No. 25-1208

In the United States Court of Appeals
For the Seventh Circuit

RAMONA MILAM, on behalf of herself and those similarly situated,

Plaintiff-Appellant,

v.

SELENE FINANCE LP

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:24-cv-00317
(Hon. Virginia M. Kendall)

PLAINTIFF-APPELLANT'S OPENING BRIEF

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Counsel for Plaintiff-Appellant

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 25-1208

Short Caption: Milam v. Selene Finance

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Ramona Milam

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Public Justice; Milberg, Coleman, Bryson, Phillips, Grossman LLC; Maginnis Howard

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Shelby Leighton Date: February 25, 2025

Attorney's Printed Name: Shelby Leighton

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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E-Mail Address: sleighton@publicjustice.net

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NA

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NA

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

NA

Attorney's Signature: /s/ Lucia Goin Date: March 13, 2025

Attorney's Printed Name: Lucia Goin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Leah M. Nicholls Date: April 23, 2025

Attorney's Printed Name: Leah M. Nicholls

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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E-Mail Address: lnicholls@publicjustice.net

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Scott C. Harris Date: April 23, 2025

Attorney's Printed Name: Scott C. Harris

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations

Other Authorities

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over this action under 28 U.S.C. § 1332(d) because it is a class action and there is complete diversity of citizenship between the named plaintiff, Ramona Milam, and the Defendant, Selene Finance LP, and the matter in controversy exceeds $5,000,000. *See* A23 ¶¶ 13, 15–16; Doc. No. 1-1 at 1.[1] The district court independently had subject-matter jurisdiction under 28 U.S.C. § 1331 because the complaint alleges violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. ("FDCPA"); *see* A39–56, and under 28 U.S.C. § 1367 because Ms. Milam's state-law claims for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505, and common-law negligent misrepresentation are so related to the FDCPA claims that they form part of the same case or controversy, *see* A39–67.

This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal seeks review of a final decision. The district court entered an order granting Defendant's motion to dismiss on January 14, 2025, *see* A1–4, and entered judgment in favor of Defendant the following day, *see* A5. Ms. Milam timely filed her notice of appeal on February 10, 2025. *See* Doc. No. 50; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that Ms. Milam's claims against her loan servicer are barred by a contractual notice-and-cure provision in her mortgage, even though the provision applies only to claims against the lender, not

[1] Unless otherwise noted, document numbers refer to electronic docket entries filed in the district court, *Milam v. Selene Finance, LP*, No. 1:24-cv-00317 (N.D. Ill.).

the loan servicer, and her claims are grounded in consumer protection statutes, not the mortgage.

2. Whether the notice-and-cure provision is an unenforceable waiver of Ms. Milam's substantive rights under the FDCPA and Illinois law because it acts as a contractual bar to effectively vindicating both Ms. Milam's own statutory rights and the rights of the class, and because it shortens the statutory limitations period.

3. Whether the district court erred by holding that Ms. Milam had not plausibly alleged that she meets the element of actual damages for her claims under Illinois law.

INTRODUCTION

After Plaintiff-Appellant Ramona Milam's mortgage went into default, she received a letter from the servicer of the loan, Defendant-Appellee Selene Finance LP, threatening to accelerate her loan and foreclose on her home if she did not cure the default by paying $3,692.58 within 35 days. Understandably panicked, she feared that her family would soon lose their home, and she began scrambling to make arrangements for a safe place for her daughter to stay and putting money she would have spent on other expenses toward the mortgage payments. But, as Ms. Milam would later learn, the letter's statements were false. Federal law—and Selene's own internal policies—prohibit it from starting the process of accelerating debts and foreclosing on debtors until their debts are more than 120 days past due.

Based on that misrepresentation, Ms. Milam sued Selene on behalf of herself and a class of similarly situated consumers, arguing that it violated the FDCPA, which prohibits making false statements in connection with the collection of debts,

and Illinois law. The district court dismissed her claims based on a notice-and-cure provision in her mortgage, which required that, before filing suit in court, Ms. Milam provide notice to the "Lender" of any claims based on the Lender's actions taken pursuant to the mortgage and wait a "reasonable period" for the Lender to "cure" its violation.

That was error. Selene is not the "Lender" as defined in the mortgage agreement and, as the loan servicer, it has been delegated only certain rights to collect payments under the mortgage, not all the rights of the Lender and not the right to enforce the notice-and-cure provision. And, even if Selene did somehow have the Lender's rights under the notice-and-cure provision, the provision applies only to claims arising from actions taken pursuant to the mortgage, not Ms. Milam's statutory claims. Moreover, enforcing the notice-and-cure provision would bar Ms. Milam and the putative class from vindicating their statutory rights under the FDCPA, thus undermining a core enforcement mechanism of that statute. For those reasons, this Court should reverse.

STATEMENT OF THE CASE

I. Factual Background

Ms. Milam owns and lives in her home in Chicago, Illinois. A23 ¶ 19. She took out a loan to buy her home from HSBC Mortgage Services, Inc., and the loan was secured by a security instrument (the "Mortgage"). A23 ¶ 20. The loan—including the

Mortgage—is currently owned by a special-purpose vehicle[2] called RCF 2 Acquisition Trust, which is a successor-in-interest of HSBC Mortgage Services. A27 ¶ 41. Because, as a special-purpose vehicle, RCF 2 merely holds a portfolio of loans, it assigned to U.S. Bank Trust National Association the full rights to act as owner of the loan. A23–24, 27 ¶¶ 22–23, 41. Ms. Milam's Mortgage is backed by Fannie Mae. *See* A27 ¶ 47.

In July 2021, Selene acquired the servicing rights for Ms. Milam's mortgage from another loan servicer, Select Portfolio Servicing. *See* A26 ¶ 35; A123. Loan servicers like Selene are typically responsible for collecting mortgage payments and distributing those payments to the lender, investors, tax authorities, and insurance companies. A24 ¶ 25. As Selene put it, servicers have "the right to collect payments from [the borrower]." A125. The rights of the servicer are limited, and they are delineated by a contract between the servicer and the owner of the loan or explicitly described in the loan documents. *See* A24–26 ¶¶ 24–25, 31, 33.

Ms. Milam's mortgage went into default. A27 ¶ 46. After Ms. Milam's loan was 45 days delinquent, Selene sent her a letter. *See* A28–29 ¶ 53–55. The letter is titled "Notice of Default" and states, in relevant part:

> Selene Finance LP ("Selene"), the servicer of your mortgage loan, and in accordance with the Security Instrument and applicable state laws, provides you with formal notice of the following:

[2] A special-purpose vehicle ("SPV") is a corporate entity that typically acquires and holds a portfolio of loans that can be transferred between investors. *See* A23–24 ¶¶ 21–23. The SPV will often assign the ownership rights to a related corporate entity or trust for the purpose of acting on its behalf because the SPV exists only to hold a portfolio of loans. *See* A23 ¶ 22.

> The mortgage loan associated with the Security Instrument is in default for failure to pay the amounts that came due on 03/01/2023 and all subsequent payments.
>
> To cure this default, you must pay all amounts due under the terms of your Note and Security Instrument, which includes any delinquent payments and regularly scheduled amounts. As of 04/17/2023, your loan is due for 03/01/2023 and the total amount necessary to cure your default is $3,692.58[.]
>
> …
>
> The total amount you must pay to cure the default stated above must be received by 05/22/2023. Failure to cure the default on or before the date specified may result in acceleration of the sums secured by the Security Instrument, sale of the property and/or foreclosure by judicial proceeding and sale of the property.
>
> If you have not cured the default within thirty-five (35) days of this notice, Selene, at its option, may require immediate payment in full of all sums secured by your Security Instrument without further demand or notice, and foreclose the Security Instrument by judicial proceeding and sale of the property and/or invoke the power of sale or any other remedies permitted by applicable law, and/or provided within your Security Instrument.

A70–71. The letter further states that partial payment does not affect the deadlines described in the letter: if less than the full amount owed is sent, "Selene can apply the amount received to your account and proceed with applicable foreclosure proceedings, without further notice to you." A71.

When Ms. Milam read the letter, she—as any consumer would—understood it to mean that if she did not pay the outstanding $3,692.58 within 35 days, Selene could begin the process of foreclosing on her home. She felt "threatened and terrified," A36 ¶ 100, and "paid money that would have gone to other sources towards her balance with Selene," A36 ¶ 102. Ms. Milam feared that she would "lose her home at

any moment," and "began making plans for her daughter, who was in high school, to have a safe place to live so that she could continue school should they be forced to leave their home." A36 ¶ 101.

As Ms. Milam would later learn, the deadline and representations in the letter were, at best, misleading, and at worst, false. By law, Selene can refer a mortgage loan to foreclosure only after it is at least 120 days past due. *See* 12 C.F.R. § 1024.41(f)(1)(i);[3] A42–43 ¶ 142. Selene knows and follows this requirement: A company representative testified in another case that Selene *never* accelerates loans that are less than 120 days delinquent and takes no action against consumers who ignore the 35-day deadline listed in the letter. *See* A20–22 ¶¶ 6–9; A29–30 ¶ 61; A77:13–78:15; A84:8–14; A85:7–17. Selene sent the same letter to other Illinois residents; indeed, "to each and every person whose loan it services in the state of Illinois when their loan becomes at least 45 days delinquent." A28–29 ¶ 55.

II. Procedural History

Federal and state law prohibit debt collectors from making false or misleading statements in connection with the collection of consumer debts. The FDCPA prohibits, in connection with the collection of debt, the use of "false, deceptive, or misleading representation[s] or means," 15 U.S.C. § 1692e; "threat[s] to take action that cannot legally be taken or that is not intended to be taken," *id.* § 1692e(5); "false

[3] This regulation is promulgated under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* ("RESPA"), which covers "federally related mortgage loans," 12 C.F.R. § 1024.5(a), including loans "intended to be sold by the originating lender to the Federal National Mortgage Association" (Fannie Mae), *id.* § 1024.2(b). "As a Fannie Mae mortgage servicer/sub-servicer, Selene is obligated to follow certain standardized procedures that comply both with the subservicing agreement and with [RESPA]." A28 ¶ 51.

representation[s] or deceptive means," *id.* § 1692e(10); and any "unfair or unconscionable means," *id.* § 1692f. The ICFA similarly prohibits "unfair or deceptive acts or practices," 815 ILCS 505/2; A57 ¶¶ 228–230, and common-law negligent misrepresentation holds liable an actor who owes a duty to another to communicate accurate information, is careless or negligent in making a false statement of fact to that party, intends to induce the other party to act in reliance on that statement, and causes damage to the party who acted in reliance on the false statement, *see, e.g.*, *Quinn v. McGraw-Hill Cos.*, 168 F.3d 331, 335 (7th Cir. 1999). Under these provisions, Ms. Milam brought an action on behalf of herself and others who received the letter from Selene in Illinois. *See generally* A19–20.

Selene moved to dismiss Ms. Milam's First Amended Complaint, Doc No. 16, arguing that Ms. Milam had failed to plausibly allege each of her claims and that her claims were barred by a provision in the Mortgage ("the notice-and-cure provision") that requires each party to provide notice and a "reasonable period" to cure any breach before filing suit:

> Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party . . . of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

Id. at 6 (quoting A98 ¶ 20).

The district court granted the motion to dismiss the First Amended Complaint, holding that Ms. Milam's claims were barred because she failed to comply with the notice-and-cure provision. A15. The court concluded that Selene was an "assign" that was entitled to enforce the notice-and-cure provision because it had been delegated certain rights to collect payments under the Mortgage. A10–11. And it rejected Ms. Milam's argument that her claims based on Selene's deceptive practices did not arise from actions taken by Selene pursuant to the Mortgage, concluding that the Mortgage authorized Selene to give Ms. Milam notice of acceleration and foreclosure, and therefore her claims based on the false statements in the letter arose from Selene's actions pursuant to the Mortgage. A12–14. Finally, it rejected Ms. Milam's argument that enforcing the notice-and-cure provision would undermine the FDCPA and prevent her from vindicating her rights, concluding that Ms. Milam's compliance with the notice-and-cure provision "does not close the courthouse doors nor cause undue delay." A14. The district also found that, in the alternative, even if the notice-and-cure provision did not apply, Ms. Milam's Illinois claims would fail because Ms. Milam had failed to plead "actual damages" under those statutes. A15–17.

In response to the district court's decision, Ms. Milam amended her complaint, adding additional detailed factual allegations to demonstrate that Selene is not an assign of the lender and that, therefore, the notice-and-cure provision does not apply to this dispute. *See* A19–105. Selene again moved to dismiss, and the district court again granted the motion, largely relying on the reasoning from its first order. *See* A3–4. It concluded that, "[i]f anything," the new factual allegations supported its

prior conclusion that Selene was an assign of the lender, and it found that Ms. Milam had not refuted its prior reasoning that these claims arise from actions Selene took pursuant to the Mortgage. *Id.* It also "reaffirm[ed] its conclusion that the notice and cure provision does not run afoul of the purposes of the FDCPA and the ICFA." A4. Finally, the court again concluded that Ms. Milam had "failed to show actual pecuniary loss in support of her IFCA and negligent misrepresentation claims." *Id.*

Ms. Milam appealed from that order dismissing her claims. *See* Doc. No. 50.

SUMMARY OF ARGUMENT

The district court's conclusion that Ms. Milam's claims were barred by the notice-and-cure provision suffers from three fundamental flaws, each of which is sufficient on its own to warrant reversal.

First, the court erred in holding that the notice-and-cure provision applies to claims against Selene. On its face, the provision applies only to the "Lender," and Selene is not the Lender; it merely services the loan. To get around that facial limitation, the district court relied on a provision of the Mortgage stating that the agreements in the mortgage bind and benefit successors and assigns of the Lender. But that provision also contains a specific carve out for loan servicers, and thus it cannot be used to apply the notice-and-cure provision to Selene as the loan servicer. And, in any event, Selene is not an assign as that term is used in the Mortgage: as Selene itself has stated in communications to Ms. Milam and in other litigation, it has been delegated limited rights to collect payments on the loan and does not have any contractual obligations to Ms. Milam under other provisions of the Mortgage.

Second, even if the notice-and-cure provision could apply to some claims against Selene, it does not apply to the claims here because they do not "arise from" Selene's "actions pursuant to" the Mortgage. The language of the provision, read in the context of the Mortgage as a whole, indicates that the notice-and-cure provision is written to apply to "breach[es]" of the Mortgage, not claims arising from consumer-protection law. Ms. Milam's claims against Selene are completely independent of the Mortgage: nothing in the Mortgage directed or required Selene to misrepresent the timeframe in which it could accelerate the loan and foreclose on Ms. Milam's home. Indeed, Selene takes the position in other cases that it has *no* contractual obligations under a mortgage to borrowers like Ms. Milam. Thus, Selene did not engage in the misrepresentations that form the basis for Ms. Milam's claims "pursuant to" the Mortgage.

Third, even if it would generally cover this dispute, the notice-and-cure provision is an unenforceable waiver of Ms. Milam's substantive rights under the FDCPA for at least three reasons. First, by imposing a futile exhaustion requirement that acts as a complete bar to statutory claims, it prevents Ms. Milam from vindicating her rights under the FDCPA and undermines the purposes of the statute. Second, it operates to shorten the one-year statute of limitations in the FDCPA by requiring consumers to engage in the process of mailing notice and waiting a "reasonable period" for a response before filing suit. The statute of limitations is a non-waivable substantive right, rendering the notice-and-cure provision unenforceable. Third, it prevents Ms. Milam and class members from effectively

vindicating their FDCPA rights because it makes it difficult or impossible to bring claims as a class action, frustrating Congress's express choice to use the class action mechanism to enforce the FDCPA.

Finally, in addition to erroneously enforcing the notice-and-cure provision, the district court also erred by concluding that Ms. Milam had not plausibly alleged actual damages for her state law claims because it ignored the value of the lost use of money that Ms. Milam paid to Selene out of fear that she would lose her home.

For those reasons, this Court should reverse the district court's order dismissing Ms. Milam's claims.

STANDARD OF REVIEW

This Court reviews *de novo* the grant of a motion to dismiss filed under Fed. R. Civ. P. 12(b)(6). *Small v. Chao*, 398 F.3d 894, 897 (7th Cir. 2005); *see also Cent. States, Se. & Sw. Areas Pension Fund v. Transervice Logistics, Inc.*, 56 F.4th 516, 524 (7th Cir. 2022) ("We review de novo a district court's grant of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, meaning that we take a fresh look at the legal issues and do not defer to the district court on close calls."). In its review, this Court "construe[s] the complaint in the light most favorable to the plaintiff," and draws "all possible inferences" in favor of Ms. Milam. *Park v. Indiana Univ. Sch. of Dentistry*, 692 F.3d 828, 830 (7th Cir. 2012) (quotation marks omitted).

ARGUMENT

I. The Notice-and-Cure Provision Does Not Bar Ms. Milam's Claims.

A. The Notice-and-Cure Provision Does Not Apply to Selene, the Loan Servicer.

1. The Plain Language of the Notice-and-Cure Provision Does Not Apply to Selene.

Selene is not a signatory to the Mortgage. And, on its face, the notice-and-cure provision applies only to the "Borrower" and the "Lender," requiring that the Borrower provide notice to the *Lender* of suits arising from the *Lender*'s actions pursuant to the Mortgage or a breach of the Mortgage by the *Lender*. A98 ¶ 20. As another court found in a similar FDCPA case against Selene, "the most natural reading" of this provision "is that it is limited to disputes between the Borrower and the Lender and therefore [does] not require Plaintiffs to provide Defendant, a loan servicer, with notice as a condition precedent to filing suit." *Cruz v. Selene Finance, LP*, 2024 WL 5374001, at *11 (S.D. Fla. Nov. 21, 2024); *see also Harrington v. Fay Servicing, LLC*, 2019 WL 4750140, at *3 n.4 (N.D. Ill. Sept. 30, 2019) (noting that "the plain language of the notice-and-cure provision limits [its] application to 'Borrower' and 'Lender'"); *Schmidt v. Wells Fargo Home Mortg.*, 2011 WL 1597658, at *3 (E.D. Va. Apr. 26, 2011) (concluding that virtually identical notice-and-cure provision "bind[s] the borrower and the lender, not the borrower and the loan servicer"), *aff'd*, 482 F. App'x 868 (4th Cir. 2012); *Johnson v. Specialized Loan Servicing, LLC*, 2017 WL 4877450, at *2 (M.D. Fla. Oct. 24, 2017) ("[T]he 'notice-and-cure' provision applies only to disputes between Plaintiff and her lender concerning acts relating to the mortgage contract. The clause imposes no such obligations

regarding disputes Plaintiff has with SLS, which services the loan secured by the mortgage."); *Patrick v. Teays Valley Trustees, LLC*, 2012 WL 5993163, at *9 (N.D.W.Va. Nov. 30, 2012) ("[T]he Notice-and-Cure Provision in the Plaintiffs' Deed of Trust expressly bind the borrower and lender—not the borrower and a loan service provider or substitute trustee.").

That the word Lender in the notice-and-cure provision does not refer to Selene is further confirmed by looking to other provisions of the Mortgage. The Mortgage defines "Lender" as the "mortgagee," HSBC Mortgage Services. A87–88 ¶ C. It then separately defines "Loan Servicer" as "the entity . . . that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note." A97 ¶ 20. And it also expressly recognizes that the Loan Servicer can change even if the Lender remains the same and, conversely, that "loan servicing obligations" can remain with the Loan Servicer if the loan is sold. A97–98 ¶ 20. In other words, the Mortgage is crystal clear that when it uses the word "Lender," it is *not* referring to the separately defined "Loan Servicer." *Id.*

Moreover, courts consistently hold that the word "Lender" in similar mortgages does not refer to the loan servicer. *See, e.g.*, *Weber v. Seterus, Inc.*, 2018 WL 1519163, at *6 (N.D. Ill. Mar. 28, 2018) (holding that provisions of mortgage did not apply to loan servicer because neither provision "refers to loan servicing or describes any obligation of the 'Loan Servicer,' which is a term separately defined in the mortgage"); *Silvester v. Selene Finance, LP*, 2021 WL 861080, at *8 (S.D.N.Y. Mar. 8, 2021) (holding that, because "the Mortgage was a contract between Plaintiffs and Lender,"

Selene, as the loan servicer, did not have contractual privity with the borrower); *Trunzo v. Citi Mortg.*, 876 F. Supp. 2d 521, 533 (W.D. Pa. 2012) (holding that servicer could not be held to obligations of "Lender" under mortgage), *aff'd in relevant part on reconsideration*, 43 F. Supp. 3d 517, 527–28 (W.D. Pa. 2014); *Chanthavong v. John Doe Corp.*, 2012 WL 6840496, at *3 (D.R.I. Nov. 19, 2012) (finding that "the mortgage agreement on its face demonstrates that [servicer] was not a party" to the mortgage because it listed another entity as the "lender"), *report and recommendation adopted*, 2013 WL 140414 (D.R.I. Jan. 11, 2013). Those cases are consistent with common statutory definitions of "lender." *See, e.g.*, 20 U.S.C. § 1019(6) (not including loan servicers in the definition of "lender").

Thus, because Selene is the loan servicer, not the "Lender," the plain language of the notice-and-cure provision does not require Milam to provide notice before filing suit based on Selene's actions. *See Cruz*, 2024 WL 5374001, at *11.

2. Selene cannot enforce the notice-and-cure provision as an "assign" of the Lender.

Despite the plain language limiting the notice-and-cure provision to only claims against the Lender, the district court concluded that the notice-and-cure provision applies to suits against Selene because "Selene Finance, as the loan servicer, is an 'assign of the lender.'" A3. That is wrong.

To begin, the court's premise that the notice-and-cure provision applies to any assignee of any of the Lender's rights is flawed. As discussed above, the notice-and-cure provision requires notice only of claims arising from the Lender's actions; it does not mention assigns. A98 ¶ 20. To conclude that the notice-and-cure provision also

applies to claims against assigns, the district court relied on section 13 of the Mortgage, which states that "[t]he covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender." A96 ¶13; *see also* A11. In doing so, the court ignored the significant "except as provided in Section 20" caveat. Section 20 is the provision that defines and discusses Loan Servicers. A97–98 ¶ 20. It also provides that the "mortgage loan servicing obligations to Borrower will remain with the Loan Servicer" and "are not be assumed by the Note purchaser unless otherwise provided by the Note purchaser." A98 ¶ 20. In other words, the statement in section 13 that the Mortgage's provisions will bind the Lender's assigns expressly does *not* apply to loan servicers, who are delegated only limited "loan servicing obligations" under the Mortgage that are not affected when the ownership rights in the loan are sold or assigned to a new entity.

The facts of this case help illustrate the meaning of section 13. The current owner of the loan, RCF 2 Acquisition Trust ("RCF 2"), is a successor-in-interest of the original Lender, HSBC Mortgage Services. A24 ¶ 23. And RCF 2 assigned its full ownership rights and obligations to U.S. Bank Trust in November 2021 so that U.S. Bank Trust could act as the owner of the loan. *Id*. Thus, for the purposes of section 13, RCF 2 is the "successor" of the Lender, and U.S. Bank Trust is the "assign" of the Lender because it took on the Lender's full rights and obligations under the Mortgage. Separately, U.S. Bank delegated to Selene the limited right to service the loan "*on behalf of* the lender." A107 (emphasis added); A27 ¶ 41. Under the terminology used

in the Mortgage, that delegation made Selene the "Loan Servicer." A98 ¶ 20. So, under section 13, the agreements in the Mortgage became binding on U.S. Bank Trust as the "assign" of the Lender but not on Selene as the "Loan Servicer" because of the express reference to section 20, which explains that the Loan Servicer continues to have the same limited "mortgage loan servicing obligations" when the loan is assigned to a new owner like U.S. Bank Trust.

Moreover, even in the absence of the explicit exception for loan servicers, the fact that a loan servicer may separately be assigned *some* rights related to servicing the loan does not make it the "assign[] of Lender" for the purposes of section 13. A96 ¶ 13. As this Court has explained, a loan servicer is at most a "partial assignee" who has rights and obligations only under "the part of the mortgage contract that has been assigned to him," not any other part. *In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638, 645 (7th Cir. 2007); *see also Weber*, 2018 WL 1519163, at *6 (applying *Ocwen* to hold that mortgage provisions that did not pertain to loan servicing did not bind loan servicer). At most, then, Selene was such a "partial assignee": it was assigned only the right to service the loan and collect payments from the borrower.[4] Indeed, Selene acknowledged as much in its notice to Ms. Milam informing her that it was taking over as loan servicer, stating that "[t]he assignment, sale, or transfer of the servicing of the mortgage loan *does not affect any term or*

[4] Selene has not produced the contract between it and U.S. Bank Trust that would set forth the scope of this alleged assignment. To the extent there is a dispute regarding the scope of the rights and obligations delegated to Selene as the loan servicer, that is a factual question that warrants discovery. At this stage, taking all the allegations in the complaint as true, Ms. Milam has plausibly alleged that Selene was delegated only limited loan servicing rights and was not assigned all the rights of the Lender under the Mortgage.

condition of the mortgage instruments, other than terms directly related to the servicing of your loan." A125 (emphasis added). Because the notice-and-cure provision is not one of those loan servicing terms, Selene cannot enforce that provision. *Weber*, 2018 WL 1519163, at *6.

Interpreting "assigns of the Lender" in section 13 to give Selene, as the loan servicer, *all* the rights and obligations of the "Lender" under every provision of the Mortgage leads to nonsensical results. Under the district court's reading, there would be two entities acting as the "Lender" under each provision of the Mortgage: U.S. Bank Trust *and* Selene. That can't be. On the other hand, defining "assign" in section 13 such that the agreements in the Mortgage bind and benefit only the entity to whom the entire loan is assigned—not entities with only loan servicing rights—avoids that result and allows U.S. Bank Trust to act as the "Lender," while delegating to Selene the rights necessary to service the loan. *See Weber*, 2018 WL 1519163, at *6 ("As a 'servicer' only receives limited rights and obligations under the mortgage contract relating to servicing, it is not a party to the original debt instruments like a 'lender' or 'note holder.'" *Id.* (quoting *Trunzo*, 876 F. Supp. 2d at 533)).

The district court's interpretation of "assign" in section 13 to include loan servicers is also contrary to the definition of an "assign" of a mortgage lender commonly used by Congress and courts. For example, under the Truth in Lending Act ("TILA"), "a servicer is not considered an assignee of a mortgage 'unless the servicer is or was the owner of the obligation.'" *Lippner v. Deutsche Bank Nat. Tr. Co.*, 544 F. Supp. 2d 695, 699 (N.D. Ill. 2008) (quoting 15 U.S.C. § 1641(f)(1)); *see Gale v.*

First Franklin Loan Servs., 701 F.3d 1240, 1245 (9th Cir. 2012) (explaining that the definition of "assignee" in TILA excludes "servicers who are merely nominal assignees" rather than "the actual owners of the loan"); *Mourad v. Homeward Residential, Inc.*, 517 F. App'x. 360, 364 (6th Cir. 2013) (holding that servicer was not "assignee" under TILA). It is also contrary to Fannie Mae's servicing guidelines, which confirm that, when Selene acts as a servicer for Fannie Mae, it "services Fannie Mae mortgage loans as an independent contractor and *not as an agent, assignee, or representative of Fannie Mae*." Fannie Mae, *Servicing Guide: Fannie Mae Single Family* 60 (Feb. 12, 2025), http://singlefamily.fanniemae.com/media/41666/display (emphasis added); A47 ¶ 169. Selene cannot explain how it is an assign when it services a loan for U.S. Bank but not when it services a loan for Fannie Mae.

Indeed, Selene itself has successfully argued in courts around the country that, as a loan servicer, it is *not* party to the mortgage and does not have contractual privity with the borrower. *See, e.g.*, *Aubee v. Selene Finance, LP*, 2019 WL 7282019, at *7 (D.R.I. Dec. 27, 2019) (agreeing with Selene's argument that as loan servicer, it was not a party to the mortgage and thus "owed no implied duties to Plaintiff arising out of the mortgage contract" (internal quotation omitted), *report and recommendation adopted by* 2020 WL 759306 (D.R.I. Feb. 14, 2020), *aff'd in relevant part*, 56 F.4th 1, 9 (1st Cir. 2022); *Silvester*, 2021 WL 861080, at *8 (dismissing breach-of-contract claim against Selene because it "was not a party to the Mortgage, and simply acting as the loan servicer is insufficient to create privity of contract between the parties"). Having argued that, as the servicer, it does not take on the Lender's contractual

relationship with borrowers, Selene cannot now argue that it has a contractual relationship with Ms. Milam that entitles it to notice of a breach.

The district court relied on *Rodriguez v. Rushmore Loan Management Services LLC*, 2019 WL 423375, at *5 (N.D. Ill. Feb. 4, 2019) to support its conclusion that the notice-and-cure provision applies to Selene. *See* A4. But, in that case, the plaintiff had conceded that the defendant was an "assign" of the lender, and the court assumed that section 13 applied without addressing its exception for loan servicers. 2019 WL 423375, at *5. Likewise, in *Giotta v. Ocwen Loan Servicing, LLC*, 706 F. App'x 421, 422 (9th Cir. 2017), the court relied on the language in section 13 to conclude that the notice-and-cure provision applied to the loan servicer without addressing the exception in section 13 for loan servicers. And there, the loan servicer had produced the contract between it and the owner of the loan, and the court concluded based on the specific language of that contract that the servicer was an "assign." *Id.* Here, there is no such contract in the record and Plaintiff has plausibly alleged that Selene is not an assign within the meaning of section 13, particularly given its loan servicer exception. At most then, the scope of the assignment is for the factfinder to assess after discovery. Thus, neither case refutes the arguments made by Ms. Milam here.

In short, because Ms. Milam plausibly alleged that Selene is not the Lender and has not been assigned the Lender's obligations under the notice-and-cure provision, the district court erred in dismissing Ms. Milam's claims.

B. Ms. Milam's statutory claims do not arise out of the Mortgage.

Even if this Court finds that the notice-and-cure provision applies to Selene as the loan servicer (which it does not), this Court should reverse on the grounds that

Ms. Milam's claims are not covered by the notice-and-cure provision because they do not "arise[] from [Selene]'s actions pursuant to" the Mortgage, or "any duty owed by reason of" the Mortgage. A98 ¶ 22. The district court incorrectly concluded that Ms. Milam's claims arise from Selene's actions pursuant to the Mortgage, finding that the Mortgage gave rise to Selene's obligation to send pre-acceleration and pre-foreclosure notice. *See* A4, A13; *see also* A99 ¶ 22 (requiring Lender to "give notice to Borrower prior to acceleration following Borrower's breach"). This conclusion, however, conflates Selene's actions taken pursuant to the mortgage agreement—providing notice of default prior to acceleration, *see* A99 ¶ 22—with its actions that violated the FDCPA and state law—misrepresenting the timeline for acceleration and foreclosure, *see, e.g.*, 15 U.S.C. § 1692e. In short, the misrepresentations in the letter were not required by the Mortgage and were therefore not an action taken "pursuant to" the Mortgage.

Nor do the misrepresentations "arise out of" the actions that Selene did take pursuant to the Mortgage. Illinois courts interpret the contractual phrase "arising out of" narrowly to require a "causal connection" that is closer than mere "'but for' causation." *Kaufmann v. Schroeder*, 946 N.E.2d 345, 349 (Ill. 2011) (citing *Brucker v. Mercola,* 886 N.E.2d 306 (Ill. 2007)). In the context of claims "arising out of" a contract, that means the claims are "limited to the specific terms of the contract or agreement containing the [] clause" in question. *Liu v. Four Seasons Hotel, Ltd.*, 138 N.E.3d 201, 207 (Ill. Ct. App. 2019); *see also Ozdeger v. Altay*, 384 N.E.2d 82, 84–85 (Ill. App. Ct. 1978) (contrasting narrow "arising in connection with" language with

"broad" "arising out of or related to" language). Applying these principles, Illinois courts are likely to conclude that the notice-and-cure provision here is narrow and does not apply to the statutory violations by Selene.

First, the notice-and-cure provision is even narrower than provisions limiting their reach to claims "arising out of" a contract; rather, it requires notice only when an action "arises from the other party's actions *pursuant to* this Security Instrument." A98 ¶ 20 (emphasis added). The language of the provision itself thus limits it to claims "causally connected" to actions authorized by the agreement. *Kaufmann*, 946 N.E.2d at 349. Here, Ms. Milam's statutory claims are based on misrepresentations by Selene that were neither authorized by the Mortgage nor caused by the actions that were authorized by the Mortgage: providing notice of default and acceleration. Selene could have sent the required notice without the misrepresentations and been in full compliance with the Mortgage. And Ms. Milam does not allege that Selene breached any "duty owed by reason of" the Mortgage, A98 ¶ 20, nor does she allege that Selene violated any particular provision of the agreement. That aligns with Selene's own position, described above, that, as the loan servicer it does not even *have* any contractual duties under the mortgage. *See, e.g.*, *Aubee*, 2019 WL 7282019, at *7. Instead, she alleges that Selene breached duties owed by virtue of federal and state laws, separate and apart from any obligations it has been delegated under the Mortgage. Whether Selene violated those statutes does not depend on interpreting the Mortgage. *See* A95–96. Indeed, even if the Mortgage were silent as to whether Selene could send notice of acceleration or foreclosure, Selene would still have an

independent obligation under those laws not to send a letter to Ms. Milam misrepresenting the steps it could take to collect her debt.

Second, reading the contract "as a whole, viewing each provision in light of the other provisions," *Thompson v. Gordon*, 948 N.E.2d 39, 47 (Ill. 2011), makes clear that the notice-and-cure provision is intended to be limited to contractual breaches. The provision requires that a party intending to initiate judicial action "notif[y] the other party . . . of such alleged *breach*." A90 ¶ 20 (emphasis added). That "circumscribe[s]" the notice-and-cure provision "to ***breaches*** of provisions, and duties owed, within the Mortgage itself." *Colon v. Nationstar Mortg., LLC*, 2015 WL 7422598, at *2 (S.D. Fla. Nov. 17, 2015) (finding that an identical notice-and-cure provision could not be read to extend to claims "concerning a consumer protection statute that is not directly connected to the performance of the duties in the Mortgage"). The district court ignored this language, focusing solely on the first clause of the notice-and-cure provision, *see* A2; A13, but reading the paragraph as a whole makes clear that the contemplated pre-suit notices apply to contractual breaches, not all possible claims arising between Ms. Milam and Selene.

Finally, the provision and the agreement together contemplate that the notice-and-cure provision will actually offer an opportunity "to take corrective action." A98 ¶ 20. But a pure statutory violation often cannot be cured, further underscoring that Ms. Milam's claims do not arise out of Selene's actions pursuant to the Mortgage within the meaning of the notice-and-cure provision. Ms. Milam's claims do not challenge "something like a misstatement or an unlawful finance charge," where the

"harm can be addressed by simply deleting the error," *Harrington*, 2019 WL 4750140, at *4. Ms. Milam alleges Selene violated the FDCPA and Illinois law when it sent her the letter falsely informing her that she could lose her home if she did not make payment within 35 days, causing her to immediately feel "threatened and terrified." A99–100. Those tactics "already happened," and "[i]t is unclear what an opportunity to cure would have accomplished in this case, aside from delaying [Ms. Milam] from suing to enforce [her] federal and state statutory rights." *Harrington*, 2019 WL 4750140, at *5. Once she knew that statement was false (and thus, that Selene had violated the FDCPA), it would be too late for Selene to do anything to cure the violation: "This gap between the supposed 'cure' and [Selene]'s conduct highlights why it is that [Selene] was not acting 'pursuant to' the mortgage agreement." *Id*.

Adopting this reasoning, federal courts in this and other circuits analyzing similar or identical notice-and-cure provisions have concluded that claims that sound in statutory consumer-protection law exist "independent of any contract between the parties," and do not fall within the scope of such provisions. *Gerber v. First Horizon Home Loans Corp.*, 2006 WL 581082, at *3 (W.D. Wash. Mar. 8, 2006); *see, e.g.*, *Harrington*, 2019 WL 4750140, at *4 (declining to enforce notice-and-cure provision as to FDCPA claim and collecting cases where courts "do not apply notice-and-cure provisions in mortgage agreements where purely statutory rights are being enforced" (emphasis omitted)); *Desimone v. Select Portfolio Servicing, Inc.*, 2024 WL 4188851, at *5 (E.D.N.Y. Sept. 13, 2024) ("[C]ourts in this and other circuits have refused to apply contractual notice-and-cure provisions to statutory claims that exist

independent of a contractual agreement between the parties, such as allegations of statutory violations or deceptive business practices, and thus have declined to dismiss such statutory claims on pre-suit notice grounds."); *Foster v. Green Tree Servicing*, 2017 WL 5151354, at *3 (M.D. Fla. Nov. 3, 2017) (concluding that a notice-and-cure provision was not applicable to plaintiff's FDCPA claims, because—although the claims were "related to the mortgage and [defendant]'s efforts to procure mortgage payments"—they arose from "alleged violations of consumer protection statutes[,]" not the mortgage); *McShannock v. JP Morgan Chase Bank N.A.*, 354 F.Supp.3d 1063, 1072 (N.D. Cal. 2018), *rev'd on other grounds*, 976 F.3d 881 (9th Cir. 2020) (concluding that a notice-and-cure provision did not apply where the debtor's claim that was based on a failure to pay escrow interest in mortgage accounts had an independent basis in state consumer protection law); *Taub v. World Fin. Network Bank*, 950 F. Supp. 2d 698, 702 (S.D.N.Y. 2013) ("Plaintiff here does not allege that Defendant has violated the credit agreement; rather, she alleges that the credit agreement violated the federal law. Courts confronted with this argument have uniformly held that the notice and cure provision does not apply."); *Richards v. NewRez LLC*, 2021 WL 1060286, at *21 (D. Md. Mar. 18, 2021) (explaining that "courts have [] held that claims that exist independent of a contractual agreement between the parties, such as allegations of deceptive trade practices, are not subject to the notice and cure provisions that might otherwise apply"); *Belcher v. Ocwen Loan Servicing, LLC*, 2016 WL 7243100, at *4 (M.D. Fla. Dec. 15, 2016) (holding that "because the causes of action arise directly from alleged deceptive business practices that are prohibited by

the FDCPA and FCCPA, rather than the mortgage itself the notice-and-cure provision is inapplicable" (cleaned up)); *Schmidt,* 2011 WL 1597658, at *3–4 (holding that notice-and-cure provision did not apply to "claims based on deceptive business practices").

In light of that authority, the cases relied on by the district court are not persuasive. *See* A4 (citing *Rodriguez*, 2019 WL 423375, at *4; *Michael v. CitiMortgage*, 2017 WL 1208487, at *3–4 (N.D. Ill. Apr. 3, 2017); *Wortman v. Rushmore Loan Management Services LLC*, 2019 WL 5208893, at *4 (N.D. Ill. Oct. 16, 2019)). Like the district court's opinion here, those cases impermissibly broaden the reach of notice-and-cure provisions by ignoring their limiting language and sweeping in any claim that arises between the parties, whether related to their contractual duties or not. But reading the notice-and-cure provision as a whole, in the context of the Mortgage, indicates that the provision is not intended to apply to violations of consumer-protection law that are wholly separate from any contractual duty and thus do not arise out of actions taken pursuant to those duties. Here, Selene "could have engaged" in the misrepresentations underlying Ms. Milam's statutory claim "even in the absence" of the Mortgage's requirement that she be notified before acceleration or default, so her claims do not "arise out of" Selene's actions pursuant to that requirement. *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1220 (11th Cir. 2011). Her claims are not an "immediate, foreseeable result of the performance of the parties' contractual duties," and are therefore "not within the scope" of the notice-and-cure clause. *Id.* at 1220.

In sum, the weight of authority supports the conclusion that Ms. Milam's claims have an independent statutory basis and do not arise from Selene's actions pursuant to the Mortgage, so pre-suit notice is not required under the notice-and-cure provision. That is an independent ground for reversal.

C. Enforcement of the notice-and-cure provision would waive Ms. Milam's statutory rights and undermine the FDCPA.

The Supreme Court has made clear that companies cannot force consumers to prospectively waive their substantive statutory rights under the guise of contractual procedures. *See, e.g.*, *14 Penn Plaza v. Pyett*, 556 U.S. 247, 267 (2009) (affirming that "federal antidiscrimination rights may not be prospectively waived"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (stating that, if contractual provisions "operated . . . as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived[.]"); *see also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) ("[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."). Here, the notice-and-cure provision operates as a prospective waiver of Ms. Milam's rights under the FDCPA for at least three reasons: (1) it completely bars Ms. Milam from suing to vindicate her rights under the FDCPA and the ICFA unless she completes a futile exhaustion process; (2) it shortens the FDCPA's one-year statute of limitations; and (3) it creates a significant barrier to Ms.

Milam and the putative class effectively vindicating their rights through the class action mechanism expressly contemplated in the FDCPA.

First, the notice-and-cure provision interferes with Ms. Milam's rights under the FDCPA and Illinois law by completely barring her otherwise meritorious claims if she does not engage in a futile notice-and-cure process. Courts in this Circuit have held that a notice-and-cure provision is unenforceable where its enforcement would prevent vindication of rights under a federal statute. *See Abercrombie v. Wells Fargo Bank, N.A.*, 417 F. Supp. 2d 1006, 1008 (N.D. Ill. 2006); *Browning v. TransUnion LLC*, 2025 WL 524206, at *4–5 (S.D. Ind. Feb. 18, 2025); *Harrington*, 2019 WL 4750140, at *5. For example, *Abercrombie* involved a lender's failure to provide notice of certain credit terms required by TILA, which prevented the borrower from comparing "the various credit terms available to him and avoid[ing] the uninformed use of credit." 417 F. Supp. 2d at 1007. The court held that the notice-and-cure provision "effectively permits the lender to contract its way around TILA's disclosure requirements" and that "[e]nforcing this provision would undermine the Congress' intent in enacting TILA." *Id.*; *see also Browning*, 2025 WL 524206, at *4–5 (applying *Abercrombie* to hold that notice and cure provision did not bar enforcement of claims under RESPA and the FCRA where enforcing notice-and-cure provision would undermine the "central" or "essential purpose" of those statutes). The court found the notice-and-cure provision posed a particular obstacle to vindication of statutory rights because, rather than being able to sue immediately when a violation is discovered, the borrower is forced to give the bank an opportunity to take corrective action.

Abercrombie, 417 F. Supp. 2d at 1007. But "any such corrective action would, by definition, come too late" to achieve the statutory purpose of the provisions at issue. *Id.*; *see also Browning*, 2025 WL 524206, at *4–5. The same is true here. By the time Ms. Milam learned that Selene had made false or misleading statements, there was nothing that Selene could do to cure the violation; the harm to Ms. Milam—and the violation of the FDCPA—had already occurred when she read and reacted to the information in the letter. Thus, as in *Abercrombie*, the only purpose served by the notice-and-cure provision would be preventing Ms. Milam from filing suit to vindicate her rights.

Second, a "shortened limitation[s] period equates to a substantive waiver." *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 831 (6th Cir. 2019); *see also Thompson v. Fresh Products, LLC*, 985 F.3d 509, 519 (6th Cir. 2021) (noting that the that statute of limitations created by Title VII "is a substantive right that may not be prospectively waived"). Here, by requiring Ms. Milam to mail Selene a letter notifying it of the violation and then wait "a reasonable period" for corrective action—which may or may not occur—before filing suit, the notice and cure provision effectively shortens the one-year statute of limitations in the FDCPA. *See* 15 U.S.C. § 1692k(d). Take, for example, a consumer who discovers, nearly a year after receiving a debt collection letter, that the letter misrepresented the loan servicer's right to collect the debt. Under the FDCPA alone, that consumer could file suit immediately, even if it had been 364 days since the violation; they simply must file within one year. But applying the notice-and-cure provision, they could not file suit. Instead, they would

first have to send the loan servicer a letter in the mail to notify them of the violation and wait "a reasonable period" for a response. A96 ¶ 15; A98 ¶ 20. In the meantime, the statute of limitations would pass. That consumer is faced with a lose-lose choice: let the statute of limitations run or file within the limitations period without meeting the notice-and-cure requirement. Either way, they are unable to vindicate their statutory rights.

Effectively then, the notice-and-cure provision shortens the statute of limitations from one year, as provided in the FDCPA, to one year minus the time it takes to provide notice and wait a reasonable period for a response. And that shortening of the limitations period is particularly problematic because it is vague – there is no way for a consumer to know what a "reasonable period" is. *See Friedmann v. Raymour Furniture Co.*, 2012 WL 4976124, at *3 (E.D.N.Y. Oct. 16, 2012) (under New York law, allowing a contractual provision shortening statute of limitations only if "clearly set forth"). That is directly contrary to Congress's decision to provide for a one-year limitations period in the FDCPA. As a result, the notice-and-cure provision is void as a waiver of Ms. Milam's substantive rights.

Third, enforcement of the notice-and-cure provision would further prevent vindication of Ms. Milam's rights under the FDCPA because the FDCPA contemplates relief through a class device, *see* 15 U.S.C § 1692k(b)(2), and the notice-and-cure provision eliminates that possibility as a practical matter by requiring that each plaintiff prove an individualized exhaustion element. The statute limits the statutory damages recovery per individual to $1,000 per violation, *see id.*

§ 1692k(a)(2)(A), which will almost always be quickly overwhelmed by the cost of hiring an attorney, paying a filing fee, and prosecuting an individual claim. Thus, class actions, which allow consumers to aggregate their claims, are essential to enforcement of the FDCPA's protections. *See Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 275 (Ill. 2006) (explaining that, where the cost of an individual claim is high, "the plaintiff's only reasonable, cost-effective means of obtaining a complete remedy is as either the representative or a member of a class"). As the Supreme Court has explained, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device." *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980); *see also Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). Congress took that into account when enacting the FDCPA, providing a different damages cap for class-wide recovery than for individual claims. 15 U.S.C. § 1692k(a). In doing so, "Congress intended that the class action mechanism was appropriate where there are many plaintiffs with small claims who would be unlikely to bring a solo suit." Philip White Jr., *Annotation, Satisfaction of Commonality Requirement for Class Actions Under Fair Debt Collection Practices Act, 15 U.S.C.A. §§ 1692 et seq.*, 54 A.L.R. Fed. 2d 479 Art. 1 § 2 (2011).

Requiring each class member to abide by a notice-and-cure provision will leave many FDCPA plaintiffs without effective redress for violations because it presents a significant obstacle to class certification by imposing an element that must be proved individually. *See* Fed. R. Civ. P. 23(b)(3). Indeed, for many class members, the first time they learn of an FDCPA violation will be when they receive notice that a class has been certified, making it impossible for the plaintiff to prove *before* the class is certified that all class members provided notice of the violation and a "reasonable period" to cure. *See* A98 ¶ 20 (requiring each party to notice-and-cure before they can "commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class)"). On the other hand, there is no benefit to enforcing the notice requirement in that circumstance, as the defendant would already be well-aware of any alleged violation from the class action complaint filed against it. The notice-and-cure provision therefore prevents Ms. Milam and the members of the class from effectively vindicating their substantive rights under the FDCPA through a class action mechanism, and it is unenforceable for that reason. *See Kinkel*, 857 N.E.2d at 274–755 (holding that a class action waiver was "unconscionable and unenforceable" under Illinois law because it would prevent the plaintiff from vindicating statutory rights).

Accordingly, in line with Congress's express aim of empowering the public to hold predatory debt collectors accountable through private suits, this Court should refuse to enforce the notice-and-cure provision.

II. Ms. Milam Plausibly Alleged Actual Damages for her ICFA and Negligent Misrepresentation Claims.

Contrary to the district court's conclusion, Ms. Milam alleged economic damages sufficient to state a claim under the ICFA and for negligent misrepresentation under Illinois law. Ms. Milam alleged that absent Selene's false statements that she faced imminent foreclosure, she would not have paid Selene so quickly. A36 ¶ 102. The fact of premature payment is itself inherently an economic loss because of the time-value of money. As the Seventh Circuit has recognized, where a person is deprived of their money for any period of time, the time-value of money means that they have suffered an economic loss, even if the money is fully restored. *See Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018).[5] Such an economic loss is calculable and satisfies the ICFA's economic-injury requirement. *See Morris v. Harvey Cycle & Camper, Inc.*, 911 N.E.2d 1049, 1053 (Ill. App. Ct. 2009) (discussing standard for "actual damages" under the ICFA). And even if Ms. Milam would have spent the money on other life expenses instead of paying Selene—perhaps making a car payment or keeping the heat on—she has suffered an economic loss in being deprived of using the prematurely paid funds.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order dismissing Ms. Milam's claims.

[5] The cases relied on by the district court do not address this theory of damages, and therefore are distinguishable from this case. *See* A4.

Dated: April 24, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Cir. Rule 32(c) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 9,103 words. This document complies with the typeface and type-style requirements of Cir. Rule 32(b) and Fed. Rs. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced type that is 12 points in the body of the brief and 11 points in footnotes, and it is set in a plain, roman style, excepting italics occasionally used for emphasis.

Dated: April 24, 2025

/s/ *Shelby Leighton*
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Counsel for Plaintiff-Appellant

STATEMENT CONCERNING THE APPENDIX

Pursuant to Cir. Rule 30(d), I certify that the material required by Circuit Rule 30(a) is appended to this brief, and additional materials considered relevant to this appeal and referenced by Circuit Rule 30(b) are included in a separately bound appendix.

Dated: April 24, 2025

/s/ *Shelby Leighton*
Shelby Leighton

Counsel for Plaintiff-Appellant

No. 25-1208

In the United States Court of Appeals
For the Seventh Circuit

RAMONA MILAM, on behalf of herself and those similarly situated,

Plaintiff-Appellant,

v.

SELENE FINANCE LP

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:24-cv-00317
(Hon. Virginia M. Kendall)

PLAINTIFF-APPELLANT'S SHORT APPENDIX

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TABLE OF CONTENTS

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAMONA MILAM, individually and on behalf of themselves and all others similarly situated,	)	
	)	No. 24 C 317
Plaintiff,	)	
v.	)	Chief Judge Virginia M. Kendall
SELENE FINANCE, LP,	)	
Defendant.	)	

ORDER

This putative class action arises from allegedly false statements made by a mortgage loan servicer in its efforts to collect residential mortgage debts. Plaintiff Ramona Milam alleges that Defendant Selene Finance, LP falsely represented the timeframe within which Selene Finance would accelerate her obligation to fully pay off the debt and initiate foreclosure proceedings, if Milam did not cure the default. Milam raises multiple causes of action, including violations of the Fair Debt Collection Practices Act (FDCPA), violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA), and a negligent misrepresentation claim under Illinois state law. The Court previously dismissed Milam's First Amended Complaint in its entirety, (Dkt. 23), and Milam subsequently filed a Second Amended Complaint. (Dkt. 28). Pending before the Court is Selene Finance's Motion to Dismiss Milam's Second Amended Complaint. (Dkt. 29). For the reasons below, the Court grants Selene Finance's Motion to Dismiss Milam's Second Amended Complaint [29].

BACKGROUND

The Court assumes familiarity with the facts of this case from its prior ruling. *Milam v. Selene Fin., LP*, 2024 WL 3455027 (N.D. Ill. July 18, 2024).

I. First Amended Complaint & Motion to Dismiss

In her First Amended Complaint, Milam brought identical claims based on Selene Finance's alleged use of unfair debt collection practices, including violations of the FDCPA, violations of the ICFA, and a negligent misrepresentation claim. *Milam*, 2024 WL 3455027 at *1. In 2005, Milam executed the mortgage at issue in favor of the lender HBSC Mortgage Services, Inc. *Id.* And in July 2021, Selene Finance acquired the servicing rights for Milam's mortgage loan, which was in default at the time. *Id.*

Milam alleged that when her residential mortgage loan became more than 45 days delinquent in April 2023, Selene Finance, the servicer of her loan, made false and coercive threats concerning the possibility that her obligation to fully pay off the loan would be accelerated if she

did not cure the default within 35 days. *Id.* at *2. Though Milam conceded that Selene Finance's statements complied with the acceleration provision of the mortgage agreement, she nonetheless asserted that Selene Finance's statements—describing the possibility of acceleration if the default is not cured within 35 days—were false representations of Selene Finance's intentions because Selene Finance maintains an internal policy of not accelerating loans that have been delinquent for less than 120 days. *Id.* According to Milam, Selene Finance's allegedly false statements created a fake sense of urgency, causing Milam to make payments faster than was necessary to avoid acceleration and suffer "emotional distress and informational harm." *Id.* (citation omitted).

In its Motion to Dismiss the First Amended Complaint, Selene Finance argued that Milam's claims were barred by her failure to comply with the mortgage agreement's notice and cure provision, which requires the borrower (Milam) to notify the lender of any injury arising from the lender's actions pursuant to the mortgage agreement and permit a reasonable period for the lender to cure the injury prior to commencing a judicial action. *Id.* at *2–3. Pursuant to another provision, the mortgage agreement—including the notice and cure provision—is enforceable not just by the lender but also successors and assigns of the lender. *Id.*

Selene Finance further argued that, as the loan's servicer, Selene Finance was an assign of the lender and entitled to enforce the notice and cure provision. *Id.* at *3. The Court rejected Milam's "pleaded legal conclusion" that Selene Finance is not an assign, reasoning that the text of the mortgage agreement, consistent with the persuasive decisions of other courts, made clear that Selene Finance—as the loan servicer—was an assign within the meaning of the mortgage agreement. *Id.* at *3–4. Specifically, the Court concluded that Selene Finance's ownership of the loan servicing rights reflects the assignment of an "identifiable interest" in the mortgage agreement to Selene Finance: the right to collect payments due under the mortgage agreement. *Id.* at *3–4 (quoting *Rodriguez v. Rushmore Loan Mgmt. Servs. LLC*, 2019 WL 423375, at *5 (N.D. Ill. Feb. 4, 2019)).

The Court also rejected Milam's contention that her claims fell outside the scope of the notice and cure provision because they turn on Selene Finance's allegedly false statements made in letters to Milam in violation of consumer protection laws, rather than a breach of the mortgage agreement. *Id.* at *4. The Court concluded that, based on the mortgage agreement's text, the notice and cure provision applied not only to breach of contract claims but any claim arising from the other party's actions "pursuant to" to the mortgage agreement. *Id.* (citation omitted). And because the mortgage agreement explicitly grants Selene Finance the right to accelerate full payment of the loan under certain conditions, Milam's claims turning on Selene Finance's statements regarding the possibility of acceleration clearly arise from Selene Finance's actions pursuant to the mortgage agreement and fall within the scope of the notice and cure provision. *Id.* at *4–5.

Alternatively, the Court further concluded that Milam's IFCA and negligent misrepresentation claims were deficient due to Milam's failure to plead actual damages. *Id.* at *5–7. Specifically, because Milam did not contend that she paid more than what she owed under the mortgage agreement, Milam did not show that she suffered any economic injury. *Id.* at *6. And as the Court explained, emotional damages alone are insufficient to support IFCA and negligent misrepresentation claims. *Id.* at *6–7. Accordingly, the Court granted Selene Finance's Motion to Dismiss the First Amended Complaint. *Id.*

II. Second Amended Complaint

The factual allegations in Milam's Second Amended Complaint are largely identical to those in the First Amended Complaint. Apart from clarifying that Selene Finance is a loan *sub*-servicer that contracts with another loan servicer to "actually perform the Loan Servicers' servicing responsibilities," Milam pleads no new facts concerning Selene Finance's role under the mortgage agreement in her Second Amended Complaint. (Dkt. 28 ¶¶ 29–30). Milam's new factual material simply confirms Selene Finance's role as the loan servicer. For example, Milam attaches the "Servicing Transfer Information" document to the Second Amended Complaint, which notified Milam of the "[a]ssignment" and "[t]ransfer" of the loan servicing rights to Selene Finance from another loan servicer. (Dkt. 28-4 at 2). Milam merely offers new legal assertions concerning loan servicers, such as the statement that "the Loan Servicer is not a successor in interest with respect to the Lender nor is the Loan Servicer assigned all rights of the Lender." (*Id.* at ¶ 31).

LEGAL STANDARD

To survive a 12(b)(6) motion to dismiss for failure to state a claim, the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Russell v. Zimmer, Inc.*, 82 F.4th 564, 570 (7th Cir. 2023) (quoting Fed. R. Civ. P. 8(a)(2)). "[A] plaintiff must allege 'enough facts to state a claim that is plausible on its face.' " *Allen v. Brown Advisory, LLC*, 41 F.4th 843, 850 (7th Cir. 2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009)). The Court accepts the complaint's well-pleaded factual allegations as true, "drawing all reasonable inferences in [the plaintiff's] favor." *Id.* (citing *W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 675 (7th Cir. 2016). The Court "also consider[s] any documents attached to and integral to the complaint as part of the [complaint's] allegations." *Gociman v. Loyola Univ. of Chi.*, 41 F.4th 873, 878 (7th Cir. 2022). To the extent an exhibit attached to or referenced by the complaint contradicts the complaint's allegations, the exhibit takes precedence. *Id.*

DISCUSSION

In its Motion to Dismiss Milam's Second Amended Complaint, Selene Finance again argues that Milam's claims are barred by her failure to comply with the mortgage agreement's notice and cure provision. (Dkt. 29 at 1). Selene Finance also argues again that Milam failed to show actual damages supporting her ICFA and negligent misrepresentation claims. (*Id.*) Milam makes substantially similar responses as she did to the first Motion to Dismiss, arguing (1) that Selene Finance is not an assign authorized to enforce the notice and cure provision, (2) that her claims don't fall within the scope of the notice and cure provision, and (3) that the notice and cure provision runs afoul of the FDCPA and would be futile. (Dkt. 33 at 3–9).

If anything, Milam's new factual allegations and materials, including the "Servicing Transfer Information" document's description of the assignment of loan servicing rights, support the Court's prior conclusion that Selene Finance, as the loan servicer, is an "assign of the lender"

because the right to collect payments is an identifiable interest in the mortgage agreement that the lender can assign to the loan servicer. *Milam*, 2024 WL 3455027 at *3–4 (citing *Rodriguez*, 2019 WL 423375 at *5, and *Giotta v. Ocwen Loan Servicing, LLC*, 706 F. App'x 421, 422 (9th Cir. 2017)). Furthermore, Milam fails to address the Court's prior reasoning regarding the scope of the notice and cure provision based on the text of the provision and its inclusion of claims arising from actions pursuant to the mortgage agreement. *Id.* at *4–5 (citing *Rodriguez*, 2019 WL 423375 at *4, *Michael v. CitiMortgage, Inc.*, 2017 WL 1208487 at *3–4 (N.D. Ill. Apr. 3, 2017), and *Wortman v. Rushmore Loan Mgmt. Servs. LLC*, 2019 WL 5208893, at *4 (N.D. Ill. Oct. 16, 2019)); (Dkt. 33 at 4–6). Here, Milam's claims regarding Selene Finance's statements regarding the possibility of acceleration under the mortgage agreement plainly arise from actions Selene Finance took pursuant to the agreement. *Id.*

The Court also reaffirms its conclusion that the notice and cure provision does not run afoul of the purposes of the FDCPA and the ICFA. *Milam*, 2024 WL 3455027 at *5 (citing *Wortman*, 2019 WL 5208893, at *3, and *Giotta*, 706 Fed. App'x at 422–23). Contrary to Milam's contention, the notice and cure provision is not a waiver of her statutory rights but instead merely functions as a precondition to bringing suit. (Dkt. 33 at 7). Furthermore, Milam provides no detailed reason why the alleged harm is incurable. (*Id.*) To the extent that Milam argues that she was misled and paid more than she was required to, the dispute seems more than susceptible to cure. As Selene Finance argues, Selene Finance could have provided additional instruction and clarification of Milam's obligations under the mortgage agreement. (Dkt. 34 at 7). Finally, because Milam's claims turn on speculation regarding the timing of past-due payments that she was indisputably obligated to pay under the mortgage agreement, the Court again concludes that Milam has failed to show actual pecuniary loss in support of her IFCA and negligent misrepresentation claims. *Milam*, 2024 WL 3455027 at *5–6 (citing *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 739 (7th Cir. 2014), and *Clark v. Receivables Mgmt. Partners*, 2022 WL 767149, at *5–6 (N.D. Ill. Mar. 14, 2022)). Accordingly, the Court grants Selene Finance's Motion to Dismiss Milam's Second Amended Complaint. (Dkt. 29).

CONCLUSION

For the reasons above, the Court grants Selene Finance's Motion to Dismiss Milam's Second Amended Complaint [29]. Milam's individual claims are dismissed with prejudice, and her class claims are dismissed without prejudice.

Virginia M. Kendall
United States District Judge

Date: January 14, 2025

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAMONA MILAM, individually and on behalf of themselves and all others similarly situated,	)	
Plaintiff,	)	No. 24 C 317
v.	)	Chief Judge Virginia M. Kendall
SELENE FINANCE, LP,	)	
Defendant.	)	

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of Plaintiff (s)

and against Defendant(s)

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment. Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of Defendant(s) SELENE FINANCE, LP

and against Plaintiff(s) RAMONA MILAM
Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge Virginia M. Kendall presiding, and the Jury has rendered a verdict.
☐ tried by Judge Virginia M. Kendall without a jury and the above decision was reached.
☒ decided by Virginia M. Kendall on a Motion to Dismiss .

Date: 1/15/2025 Thomas G. Bruton, Clerk of Court

/s/Lynn Kandziora , Deputy Clerk