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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Martha A. McNair,

10 Plaintiff,

11 v.

12 Maxwell & Morgan PC, et al.,

13 Defendants.
14

No. CV-14-00869-PHX-DGC

ORDER

15 This case involves Defendants' efforts to collect debts owed by Plaintiff Martha
16 McNair. She claims that Defendants' actions violated numerous provisions of the Fair
17 Debt Collection Practices Act ("FDCPA"). The parties have filed cross motions for
18 summary judgment (Docs. 80, 100) and the Court heard oral arguments on September 18,
19 2015 (Doc. 123). The Court will deny Plaintiff's motion and grant Defendants' motion in
20 part.¹

21 **I. Background.**

22 In August 2004, Plaintiff acquired a home in Gilbert, Arizona. Doc. 81-1 at 2.
23 The home was part of the Neely Commons Association ("Association") and was subject
24 to a declaration of covenants, conditions, and restrictions. *Id.* at 8-42. Under this

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26 ¹ Defendants move to strike Plaintiff's motion for summary judgment. Doc. 99.
27 They argue that Plaintiff violated the Court's case management order and the local rules
28 by placing their legal citations in footnotes, filing a statement of facts that is more than
ten pages long, and not double-spacing the motion text. Plaintiff apologizes for these
violations, but argues that she did double-space the text in her motion. Striking
Plaintiff's motion is too harsh a remedy for these violations, but Plaintiff's counsel is
admonished to follow the case management order and local rules in the future.

1 declaration, owners are required to pay an annual assessment to the Association. *Id.* at
2 16. The Association can require an owner to pay the assessment in monthly installments.
3 *Id.* at 16-20. If the owner fails to pay an installment, the Association can impose a late
4 charge of fifteen dollars and make a written demand for payment of the debt and
5 additional costs. *Id.* at 20. If the owner fails to pay the amount within ten days, the
6 Association can record a notice of lien on the owner's property. *Id.* at 21. The
7 Association has the right to collect the debt, along with late charges, costs, and attorneys'
8 fees, by suing the owner or bringing an action to foreclose the lien. *Id.*

9 Plaintiff became delinquent in paying her annual assessment. On November 4,
10 2009, Charles Maxwell of the firm Maxwell & Morgan P.C. sent a letter to Plaintiff
11 notifying her of the debt and stating that he may take legal action if she failed to pay. *Id.*
12 at 61. On December 21, 2009, Maxwell filed suit against Plaintiff in the Highland Justice
13 Court, alleging that she owed \$697. *Id.* at 64-65. In January 2010, Plaintiff and Maxwell
14 entered into a payment agreement, under which Plaintiff was to pay \$500 immediately
15 and \$100 a month until her debt was paid off. *Id.* at 75. Plaintiff paid the \$500 and three
16 of the monthly \$100 payments before defaulting. Doc. 81, ¶ 22. In June and September
17 of 2010, Plaintiff made additional payments totaling \$500. Doc. 81-1 at 88, 104. On
18 July 19, 2010, Maxwell revived the justice court lawsuit and sought a default judgment.
19 *Id.* at 92-93. The court entered judgment on November 22, 2010, for \$1,466.80. *Id.* at
20 96-97. Maxwell subsequently sent Plaintiff a letter demanding payment of the judgment.
21 *Id.* at 114.

22 The record is silent as to what occurred in 2011. On April 30, 2012, Maxwell
23 filed a new lawsuit in Maricopa County Superior Court. *Id.* at 121. He alleged that
24 Plaintiff's debt had grown to \$4,027.24. *Id.* at 122. William Nikolaus, who also worked
25 at Maxwell & Morgan, notified Plaintiff of the lawsuit and stated that the total amount
26 due was \$6,307.24, which included \$2,280 in attorneys' fees and costs. *Id.* at 128.
27 Plaintiff offered to enter a payment plan, which Nikolaus accepted on the condition that
28 Plaintiff sign a stipulated judgment. Doc. 101-1 at 36. On June 29, 2012, Plaintiff and

1 Maxwell signed a stipulated judgment that recognized the Association's right to collect
2 the debt by selling Plaintiff's home. Doc. 81-1 at 130-33. In the stipulated judgment, the
3 Association agreed not to execute on the judgment if Plaintiff made an initial payment of
4 \$2,500 and additional payments of \$250 a month until the debt was satisfied. *Id.* at 132.

5 Plaintiff paid the initial \$2,500 and ten monthly payments of \$250 through May of
6 2013. Doc. 81, ¶ 57. On May 5, 2013, she sent a letter to Nikolaus asking how much she
7 still owed. Doc. 81-2 at 27. On August 21, 2013, Nikolaus notified Plaintiff that she had
8 failed to make the required payments, including payments for her 2013 annual
9 assessment. *Id.* at 31. Nikolaus told her to review the stipulated judgment and warned
10 that the Association might take legal action. *Id.* On September 23, 2013, Plaintiff paid
11 \$275.74 and asked Nikolaus to inform her if she owed anything else. *Id.* at 45.

12 In November 2013, Maxwell requested, and the Superior Court granted, a writ of
13 special execution for foreclosure on Plaintiff's house. *Id.* at 49-53. The writ stated that
14 Plaintiff owed \$4,791.58. *Id.* at 53. The sheriff held a foreclosure sale on January 9,
15 2014, the property was sold for \$75,000, and Defendants received \$5,559.74. Doc. 81,
16 ¶¶ 75-76. On May 14, 2014, the Superior Court awarded the Association an additional
17 \$6,040.39 from the proceeds of the sale for attorneys' fees and costs. Doc. 81-2 at 70-71.

18 Plaintiff filed this lawsuit on April 24, 2014, naming as Defendants Maxwell &
19 Morgan, Charles Maxwell, William Nikolaus, and their spouses. Doc. 1. She claims that
20 Defendants violated the FDCPA by misrepresenting the amount and character of her
21 debt, failing to account for the payments she made, misrepresenting the amount of her
22 debt to the justice court, taking actions that Arizona law prohibits, initiating multiple
23 lawsuits over the same debt, and refusing to explain the amount she owed. Doc. 80.

24 **II. Legal Standards.**

25 Summary judgment is appropriate if the evidence, viewed in the light most
26 favorable to the nonmoving party, shows "that there is no genuine dispute as to any
27 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
28 56(a). Summary judgment is also appropriate against a party who "fails to make a

1 showing sufficient to establish the existence of an element essential to that party's case,
2 and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*,
3 477 U.S. 317, 322 (1986). Only disputes over facts that might affect the outcome of the
4 suit will preclude the entry of summary judgment, and the disputed evidence must be
5 "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v.*
6 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

7 The FDCPA was enacted to eliminate abusive debt collection practices, to ensure
8 that debt collectors who abstain from those practices are not competitively disadvantaged,
9 and to promote consistent state action to protect consumers. 15 U.S.C. § 1692(e); *Jerman*
10 *v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). The
11 FDCPA regulates interactions between consumer debtors and "debt collector[s]," defined
12 to include any person who "regularly collects . . . debts owed or due or asserted to be
13 owed or due another." 15 U.S.C. § 1692a(6). A lawyer regularly engaged in debt
14 collection activity, even litigation, is considered a debt collector. *See Heintz v. Jenkins*,
15 514 U.S. 291, 299 (1995). A debt collector "who fails to comply with any provision of
16 [the FDCPA] with respect to any person is liable to such person" for actual damages and
17 additional damages not to exceed \$1,000. 15 U.S.C. § 1692k(a).

18 The FDCPA is a strict liability statute. *Clark v. Capital Credit & Collection*
19 *Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006). It prohibits a wide array of abusive and
20 unfair practices. *See Heintz*, 514 U.S. at 292-93. In deciding whether a debt collector
21 has violated the FDCPA, courts assess the debt collector's conduct from the perspective
22 of a hypothetical "least sophisticated debtor." *See Guerrero v. RJM Acquisitions LLC*,
23 499 F.3d 926, 934 (9th Cir. 2007) (citing *Clark*, 460 F.3d at 1171; *Wade v. Reg'l Credit*
24 *Ass'n*, 87 F.3d 1098, 1099-1100 (9th Cir. 1996)). The "least sophisticated debtor"
25 standard protects the "naïve and trusting" debtor while shielding debt collectors "against
26 liability for bizarre or idiosyncratic interpretations of collection notices." *Isham v.*
27 *Gurstel, Staloch & Chargo, P.A.*, 738 F. Supp. 2d 986, 995 (D. Ariz. 2010) (quotation
28 marks and citation omitted). The FDCPA is a remedial statute and should be interpreted

1 liberally to protect debtors from abusive debt collection practices. *Evon v. Law Offices of*
2 *Sidney Mickell*, 688 F.3d 1015, 1025 (9th Cir. 2012).

3 **III. Analysis.**

4 Defendants argue that (1) the FDCPA's statute of limitations bars most of
5 Plaintiff's claims, (2) the FDCPA does not apply to those claims that arise out of
6 Defendants' foreclosure action, (3) the stipulated judgment authorized the amounts the
7 Defendants sought in the foreclosure action, and (4) res judicata and collateral estoppel
8 bar many of Plaintiff's claims. The Court will focus on these arguments and address
9 Plaintiff's motion for summary judgment only to the extent that Defendants' motion does
10 not dispose of Plaintiff's claims.²

11 **A. Statute of Limitations.**

12 Under the FDCPA, a plaintiff must bring suit "within one year from the date on
13 which the violation occurs." 15 U.S.C. § 1692k(d). Plaintiff filed her complaint on
14 April 24, 2014, but many of the alleged FDCPA violation occurred before April of 2013.
15 Plaintiff urges the Court to adopt the continuing-violation doctrine. Plaintiff also argues
16 that her claims are timely because the discovery of her injury – the foreclosure of her
17 house – occurred less than a year before she filed suit.

18 The continuing-violation doctrine has roots in the common law. Kyle Graham,
19 *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 308 (2008) (discussing early

20
21 ² During oral argument, Defendants made several arguments not found in their
22 cross motion for summary judgment. These include that Defendants are not debt
23 collectors, that the amounts they sought to recover in this case were not debts, that the
24 misstatements in their communications or filings were not material, and that they cannot
25 be lumped together as a single group of defendants. Defendants argued that Plaintiff was
26 required to come forward with evidence on each of these issues because she will bear the
27 burden of proof at trial. The Court does not agree. In describing proper summary
28 judgment procedure, the Supreme Court has explained that "a party seeking summary
judgment always bears the initial responsibility of informing the district court of the basis
for its motion." *Celotex*, 477 U.S. at 323. If a defendant asserts that a plaintiff lacks
evidence on a particular element of her claim, the plaintiff must come forward with
evidence on that element to avoid summary judgment. *Id.* at 322. But when a defendant
does not identify an alleged deficiency in the plaintiff's proof, the plaintiff is not required
to come forward with evidence to disprove the deficiency at the summary judgment
stage. True, the plaintiff will be required to prove all elements of her claim at trial, but
she need only respond at the summary judgment stage to arguments made in the motion
for summary judgment.

versions of the doctrine in trespass and nuisance suits from the 1500s). Broadly speaking, the doctrine permits a plaintiff to recover “for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period.” *Sosa v. Utah Loan Servicing, LLC*, No. 13-CV-364-W(KSC), 2014 WL 173522, at *4 (S.D. Cal., Jan. 10, 2014) (quotation marks and citation omitted). Some courts have described this as a tolling doctrine, but most treat it as a doctrine governing accrual. *Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001) (collecting cases); see also *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1332 (9th Cir. 1996) (“Under [the continuing-violation] theory, the statute of limitations does not begin to run until the last breach occurs.”). In the context of statutorily-created causes of action, the applicability of the doctrine is a question of statutory interpretation. See, e.g., *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109-10 (2002); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

The FDCPA states that “[a]n action to enforce any liability created by this subchapter may be brought . . . within one year from the date on which the violation occurs.” 15 U.S.C. § 1692k(d). By referring to “the violation,” the statute could be read as referring to a single act, but courts could also consider an ongoing violation of the FDCPA to be one violation that consisted of several parts. Some courts have adopted this view, holding that when “the conduct complained of [under the FDCPA] constitutes a continuing pattern and course of conduct as opposed to unrelated discrete acts,” then the entirety of that conduct is a single violation of the FDCPA. See *Joseph v. J.J. MacIntyre Cos., LLC*, 281 F. Supp. 2d 1156, 1161-62 (N.D. Cal. 2003) (applying the doctrine when the defendant had made hundreds of repeated, automated collection calls to Plaintiff over an 18 month period).³ Under this approach, a plaintiff’s claim regarding a continuing pattern of FDCPA violations could accrue on the date of the most recent violation and a

³ See also *Sosa*, 2014 WL 173522, at *4; *Bennett v. Portfolio Recovery Assocs., LLC*, No. CV-12-9827-DSF, 2013 WL 6320851, at *2 (C.D. Cal. Nov. 22, 2013); *Guillen v. Bank of Am. Corp.*, No. 5:10-CV-05825 EJD, 2011 WL 4071996, at *5 n.3 (N.D. Cal. Aug. 31, 2011).

1 defendant could be liable for conduct that otherwise falls outside of the limitations
2 period.

3 The Supreme Court has provided guidance on the distinction between a continuing
4 violation and a series of individual violations. *See Ledbetter v. Goodyear Tire & Rubber*
5 *Co.*, 550 U.S. 618 (2007); *Morgan*, 536 U.S. at 109-11. Title VII requires a claimant to
6 file a claim within 180 days “after the alleged unlawful employment practice occurred.”
7 42 U.S.C. § 2000e-5(e)(1). Interpreting this language, the Supreme Court found that
8 “[t]here is simply no indication that the term ‘practice’ converts related discrete acts into
9 a single unlawful practice for the purposes of timely filing.” *Morgan*, 536 U.S. at 111.
10 For that reason, “[d]iscrete acts such as termination, failure to promote, denial of transfer,
11 or refusal to hire” do not call for application of the continuing-violation doctrine, even
12 when a time-barred discriminatory act is related to more recent acts. *Id.* at 114.

13 The Supreme Court has adopted a different approach, however, for hostile work
14 environment claims under Title VII. It has explained that such claims:

15 are different in kind from discrete acts. Their very nature involves repeated
16 conduct. The ‘unlawful employment practice’ therefore cannot be said to
17 occur on any particular day. It occurs over a series of days or perhaps years
18 and, in direct contrast to discrete acts, a single act of harassment may not be
19 actionable on its own. . . . Such claims are based on the cumulative effect
20 of individual acts. . . . A hostile work environment claim is composed of a
series of separate acts that collectively constitute one ‘unlawful
employment practice.’ . . . [Thus, p]rovided that an act contributing to the
claim occurs within the filing period, the entire time period of the hostile
environment may be considered by a court for the purposes of determining
liability.

21 *Id.* at 115-17 (quotation marks and citations omitted).

22 The Court finds that “the violation” in the FDCPA is similar to “the alleged
23 unlawful employment practice” in Title VII and that the Supreme Court’s guidance is
24 relevant to this case. The Court finds that Defendants’ alleged FDCPA violations are
25 more akin to discrete acts than a continuing course of conduct. The following alleged
26 FDCPA violations are identified in the parties’ briefing:

- 27 • November 2009: Maxwell’s letter to Plaintiff misrepresented the amount of
28 Plaintiff’s debt.
- February 2010: Defendants drafted a payment agreement with Plaintiff

1 which violated the FDCPA by failing to state the amount owed, failing to
2 promise that Plaintiff's payments would be applied first to the principal of
the debt, and misrepresenting the amount of the debt.

- 3 • July 2010: Defendants misrepresented to the justice court the amount
4 Plaintiff owed and the amount Plaintiff had paid. They also sought
recovery for fees to which they were not entitled.
- 5 • November 2010: Maxwell sent a letter to Plaintiff that misrepresented the
6 amount of the debt and ignored Plaintiff's right to certain property
exemptions.
- 7 • December 2010: Defendants again misrepresented the amount of the debt in
8 paperwork they filed with the justice court.
- 9 • April 2012: Defendants misrepresented the amount of Plaintiff's debt in the
10 complaint for their foreclosure suit. The filing of the lawsuit also violated
the FDCPA because it sought recovery for amounts that had been
previously awarded in the justice court lawsuit.
- 11 • June 2012: Nikolaus's email misrepresented the amount of Plaintiff's debt.
12 Defendants also drafted a stipulated judgment that was unclear about the
number of payments Plaintiff would be required to make.
- 13 • May-September 2013: Having made several payments, Plaintiff repeatedly
14 asked Nikolaus how much she still owed. Nikolaus failed to give her a
clear answer.
- 15 • November 2013: Defendants' request for a writ of execution
16 misrepresented the amount of Plaintiff's debt. Defendants also requested
an unreasonable amount in attorneys' fees.

17 All of these alleged wrongs involved Defendants' attempts to collect the debt
18 Plaintiff owed to the Association, and almost all involved alleged misrepresentations,
19 such as inflating Plaintiff's debt, failing to account for payments, or charging fees to
20 which the Association was not entitled. These violations are interrelated, but they are not
21 sufficiently linked to be considered an ongoing violation of the FDCPA.

22 For instance, Maxwell sent a letter to Plaintiff on November 23, 2010. Doc. 81-1
23 at 114. Plaintiff claims that the letter violated the FDCPA by falsely stating she owed
24 \$1,466.80 and ignoring her right to certain property exemptions under Arizona law.
25 Doc. 80 at 10. Three years later, on November 6, 2013, Maxwell requested a writ of
26 execution for foreclosure. Doc. 81-2 at 52-53. Plaintiff claims that the request violated
27 the FDCPA by falsely stating she owed \$4,791.58, including \$1,597.50 in attorneys' fees.
28 Doc. 80 at 6. Although the 2010 letter and the 2013 request for a writ involve similar

1 facts, they represent discrete actions. One is a letter, the other a court filing; they
2 occurred three years apart; they involved different amounts; and they involved different
3 alleged violations of the FDCPA.

4 Similar distinctions could be made regarding each of Plaintiff's claims. The
5 alleged wrongs occurred over a span of four years and involved, respectively, a letter, a
6 draft agreement, a filing in justice court, another letter, paperwork filed in justice court, a
7 complaint for foreclosure in superior court, an email, a failure to respond to Plaintiff, and
8 a request for a writ of execution. Each involved different claimed amounts and many
9 included additional, unrelated alleged violations of the FDCPA.

10 Plaintiff's case is not like *Joseph*, where the defendant made hundreds of
11 automated collection calls to the plaintiff over a period of 18 months. See 281 F. Supp.
12 2d at 1161-62. Nor is it similar to a hostile work environment claim which "cannot be
13 said to occur on any particular day," "is composed of a series of separate acts that
14 collectively constitute one 'unlawful employment practice,'" and may not even rise to the
15 level of an actionable hostile work environment until the cumulative effect of the many
16 wrongs is understood. *Morgan*, 536 U.S. at 115, 117. Defendants' actions are each
17 alleged to have violated specific provisions of the FDCPA, occurred on definite days,
18 involved different conduct and different debt amounts, and extended over four years.
19 Defendants' actions are more like "[d]iscrete acts such as termination, failure to promote,
20 denial of transfer, or refusal to hire," which may be related but nevertheless do not
21 implicate the continuing-violation doctrine. *Id.* at 114.

22 The Court also finds the breaks in time between the alleged violations to be
23 significant. Plaintiff does not allege any violation in the year of 2011. Sixteen months
24 elapsed between the fifth and sixth violations recounted above, and almost a year
25 between the seventh and eighth.

26 Furthermore, the Court finds troubling the notion that every communication
27 regarding a debt starts the limitations period anew. As another court explained, "[i]f
28 plaintiff's theory were correct, . . . his cause of action could be kept alive indefinitely

1 because each new communication would start a fresh statute of limitations.” *Sierra v.*
 2 *Foster & Garbus*, 48 F. Supp. 2d 393, 395 (S.D.N.Y. 1999); *see also Nutter v. Messerli*
 3 *& Kramer, P.A.*, 500 F. Supp. 2d 1219, 1223 (D. Minn. 2007) (finding that “[n]ew
 4 communications . . . concerning an old claim . . . [do] not start a new period of
 5 limitations”) (quoting *Campos v. Brooksbank*, 120 F. Supp. 2d 1271, 1274 (D.N.M.
 6 2000)). In sum, the Court concludes that the continuing-violation doctrine does not save
 7 Plaintiff’s claims for violations that occurred before April of 2013.⁴

8 Plaintiff also seeks to apply the discovery rule, arguing that she did not discover
 9 her injury until her home was foreclosed in January of 2014. The Court is not persuaded,
 10 however, that the discovery rule should apply to this case. In *Naas v. Stolman*, 130 F.3d
 11 892, 893 (9th Cir. 1997), the Ninth Circuit held that when the alleged violation of the
 12 FDCPA is the filing of a lawsuit, “the statute of limitations beg[ins] to run on the filing of
 13 the complaint.”⁵ Plaintiff’s complaint makes clear that every alleged FDCPA violation
 14 that occurred more than one year before this case either preceded or occurred as part of a
 15 court action. These include Defendants initial filing of the justice court action in 2009
 16 (Doc. 1, ¶ 12) and their later filing of the superior court action in 2012 (*id.*, ¶ 15). The
 17 alleged violations either preceded those lawsuits, in which event the filing of the lawsuits
 18 would have triggered the limitations period, or occurred as part of the lawsuits (*id.*, ¶¶ 14,
 19 17, 19). Thus, Plaintiff’s discovery rule argument does not save her older claims from
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21
 22 ⁴ Earlier in this case, the Court denied a motion to dismiss because the continuing-
 23 violation doctrine might apply. Doc. 37. That decision does not control here. As the
 24 Court noted in its earlier decision, a motion to dismiss based on the statute of limitations
 25 may be granted only if it appears beyond doubt that the plaintiff can prove no set of facts
 26 that would establish the timeliness of the claim. *Supermail Cargo, Inc. v. United States*,
 68 F.3d 1204, 1207 (9th Cir. 1995); Doc. 37 at 6-7. Focusing solely on Plaintiff’s
 allegations, the Court could not conclude that this test had been satisfied. Doc. 37 at 7.
 This conclusion does not control a ruling on summary judgment, which focuses on
 evidence, not allegations.

27 ⁵ Later cases have recognized that this rule “only applies to cases where there is no
 28 question that the defendant was properly named and served in the underlying collection
 action.” *Huy Thanh Vo v. Nelson & Kennard*, 931 F. Supp. 2d 1080, 1086 (E.D. Cal.
 2013). Plaintiff does not claim that she was not served in the underlying cases.

1 the FDCPA's one-year statute of limitations.⁶

2 **B. Plaintiff's Timely FDCPA Claims.**

3 Plaintiff asserts two claims based on conduct occurring less than one year before
4 this case was filed: (1) in judicial proceedings in 2013 and 2014, Defendants allegedly
5 misrepresented the amount of Plaintiff's debt and sought attorneys' fees to which they
6 were not entitled; and (2) in May through September of 2013, Defendants did not respond
7 to Plaintiff's requests for a statement of the amount she owed. The Court finds that only
8 the latter claim survives Defendants' motion for summary judgment.

9 **1. The Writ's Misrepresentation of Attorneys' Fees and Debt.**

10 Plaintiff claims that Defendants violated the FDCPA by "falsely stating in the Writ
11 that the balance due was \$4,791.58 and including unadjudicated attorneys' fees of
12 \$1,597.50." Doc. 80 at 6. As for the attorneys' fees, Plaintiff emphasizes that,

13 Defendants never sought judicial approval for any of these amounts, never
14 had any court determine they were reaso[n]able, and simply decided for
15 themselves the reasonableness of the attorneys' fees and costs that they
16 incurred. . . . Defendants collected these unilaterally awarded fees even
though Arizona law does not provide for post-judgment attorneys' fees
except where expressly permitted by statute or other basis for such fees.

17 *Id.* at 12.

18 Although not clearly stated, Plaintiff appears to claim that this conduct violates 15
19 U.S.C. § 1692e, which prohibits the misrepresentation of "the character, amount, or legal
20 status of any debt." Among other points, Defendants argue that because the stipulated
21 judgment that Plaintiff signed authorized the amounts that were included in the writ of
22 execution, the Court should grant Defendants summary judgment on Plaintiff's claims
23 regarding these amounts.

24 The stipulated judgment signed on June 29, 2012, stated that the "principal sum"
25 owed was "\$4,027.24 . . . with additional assessments and charges accruing effective
26 _____

27 ⁶ The Ninth Circuit has applied the discovery rule to FDCPA claims that did not
28 involve the filing of a lawsuit, *Mangum v. Action Collection Service, Inc.*, 575 F.3d 935,
940 (9th Cir. 2009), but the Court concludes that *Naas* controls this largely litigation-
based series of alleged violations.

1 January 1, 2013 . . . plus monthly late charges.” Doc. 81-1 at 131. The judgment also
2 stated that Plaintiff owed “attorney fees herein in an amount of \$1,687.50, plus accruing
3 attorney fees incurred hereafter.” *Id.* When Defendants sought a writ of special
4 execution to foreclose on Plaintiff’s house in 2013, they stated that the total amount owed
5 was \$4,791.58, which included “attorney fees of \$1,687.50, plus accruing attorney fees of
6 \$1,597.50.” Doc. 81-2 at 52-53. The Maricopa County Superior Court approved these
7 amounts and issued the writ. *Id.* at 53.

8 Plaintiff has not explained how this conduct amounts to a misrepresentation of
9 “the character, amount, or legal status of any debt.” As Defendants note, the stipulated
10 judgment authorized the fees that were included in the writ of execution. Plaintiff argues
11 that Arizona law generally does not allow a party to collect post-judgment attorneys’
12 fees, but “[i]t is well-settled in Arizona that [c]ontracts for payment of attorneys’ fees are
13 enforced in accordance with the terms of the contract.” *Bennett Blum, M.D., Inc. v.*
14 *Cowan*, 330 P.3d 961, 963 (Ariz. Ct. App. 2014) (quotation marks and citations omitted).
15 What is more, “[w]hen the ‘broad language’ of a contractual attorneys’ fees provision
16 gives no indication of an intent to exclude fees for work done after entry of judgment,
17 those fees are generally recoverable.” *Costa v. Maxwell & Morgan PC*, No. CV-15-
18 00315-PHX-NVW, 2015 WL 3490115, at *5 (D. Ariz. June 3, 2015).

19 Plaintiff also argues that Defendants could not “unilaterally” decide whether the
20 requested attorneys’ fees were reasonable. This is true. “Arizona law is clear that even
21 when fees are awarded pursuant to an express contractual agreement, rather than statute,
22 the prevailing party is not entitled to its fees unless a court has already determined that
23 the specific amount that party seeks is reasonable.” *Id.* at *6. But Defendants in this case
24 did not unilaterally determine the amount of fees they were to receive – the Maricopa
25 County Superior Court approved the fees Defendants requested. The court signed the
26 writ of execution and *twice* rejected Plaintiff’s opposition to the requested attorneys’ fees.
27 *See* Doc. 101-2 at 43 (denying Plaintiff’s motion to cancel the sheriff’s sale, in which
28 Plaintiff had argued that the amount of owed attorneys’ fees was ambiguous (*id.* at 39));

1 *id.* at 74 (denying Plaintiff’s motion for relief from judgment, in which Plaintiff had
 2 argued that Defendants could not “award unadjudicated future assessments, attorneys’
 3 fees, and costs” (*id.* at 53)). By so ruling, the state court implicitly found that the
 4 requested attorneys’ fees were reasonable. *See, e.g., Costa*, 2015 WL 3490115, at *6.
 5 The Court cannot conclude that Defendants violated the FDCPA by seeking attorneys’
 6 fees in a filing they made with a court, particularly when it was clear that the fees would
 7 be paid only if the court found them to be reasonable.⁷

8 Plaintiff argues that Defendants misrepresented the amount of Plaintiff’s debt in
 9 the writ of execution. But again, the stipulated judgment authorized these amounts.
 10 Plaintiff has not shown that there is a genuine dispute of material fact as to whether the
 11 stipulated judgment authorized the amounts Defendants collected. The Court therefore
 12 grants Defendants’ motion for summary judgment on this claim.⁸

13 **2. Defendants’ Communications with Plaintiff in 2013.**

14 Plaintiff claims that Defendants’ failure to respond to her repeated requests for a
 15 statement of the amount she owed violated 15 U.S.C. §§ 1692e and 1692f. Specifically,
 16 Plaintiff sent a \$250 check to Defendants on May 5, 2013, and requested a statement of
 17 the amount owed. Doc. 81-2 at 27. Defendants did not respond until August 21, when
 18 Nikolaus sent Plaintiff an email stating that she had not paid off her debt and attaching a
 19 copy of the stipulated judgment. *Id.* at 31. On September 19, 2013, Plaintiff called and
 20 emailed Defendant Nikolaus requesting information about her debt. *Id.* at 30-31, 33. On
 21 September 23, Plaintiff sent Defendants a \$275.74 check and a letter explaining why she
 22 thought this settled her debt. *Id.* at 45. Nikolaus did not respond until November 6, when
 23 he informed her that she had not paid off her debt and again asked her to review the

24
 25 ⁷ *Costa* found a possible § 1692e violation when unadjudicated attorneys’ fees
 26 were demanded in a letter to the debtor. 2015 WL 3490115 at * 6. This differs from a
 request for fees in a court filing the court must approve.

27 ⁸ At oral argument, Plaintiff’s counsel argued that the writ carried forward the
 28 FDCPA wrongs from the earlier lawsuits and judgments, but those earlier wrongs are
 barred by the statute of limitations, and the Court cannot conclude that they are revived
 simply because the judgments they produced were used in securing the writ.

1 stipulated judgment. *Id.* at 30. Plaintiff claims that Defendants’ late and vague responses
 2 misrepresented the amount of Plaintiff’s debt and constituted “unfair or unconscionable
 3 means to collect” the debt. *See* 15 U.S.C. §§ 1692e, 1692f.

4 **a. Plaintiff’s Motion for Summary Judgment.**

5 Plaintiff asks the Court to grant her summary judgment on this claim, but the
 6 Court concludes that a reasonable jury could find that Defendants did not violate the
 7 FDCPA when they failed promptly to respond to Plaintiff’s requests. A jury would
 8 assess Defendants’ conduct from the perspective of a “least sophisticated debtor.”
 9 *Guerrero*, 499 F.3d at 934. While a jury could find that Defendants’ failure to respond
 10 falsely implied that Plaintiff’s debt was satisfied and that she did not need to take further
 11 action, a jury could also find that Defendants’ conduct did not imply anything and did not
 12 misrepresent the amount of Plaintiff’s debt or constitute an unconscionable means of
 13 collecting her debt. Furthermore, Defendants did eventually respond to Plaintiff’s
 14 requests, and Plaintiff had a copy of the stipulated judgment that detailed the amounts she
 15 owed. These facts could support a finding that Defendants did not violate the FDCPA.⁹

16 **b. Applicability of the FDCPA to Foreclosure Activities.**

17 Defendants seek summary judgment because the FDCPA does not apply to efforts
 18 to enforce a security interest or foreclose on a lien. “[T]he FDCPA applies only to a debt
 19 collector who engages in practices prohibited by the Act in an attempt to collect a
 20 consumer debt.” *Mansour v. Cal-W. Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1182
 21 (D. Ariz. 2009) (citation omitted). Some courts have held that foreclosure proceedings
 22 are not the collection of a debt for purposes of the FDCPA. *See Hulse v. Ocwen Fed.*

23
 24 ⁹ Defendants asserted during oral argument that an FDCPA violation cannot arise
 25 from a failure to respond. This argument, like those mentioned earlier, was not made in
 26 Defendants’ motion for summary judgment. Moreover, the Court cannot conclude that a
 27 failure to respond would never constitute an FDCPA violation. Plaintiff argues that upon
 28 reaching \$5,000 in payments she sought clarification of what more was owed, that she
 attempted to pay the amounts owed in full, that Defendants refused to tell her what more
 was owed, and that Defendants instead proceeded to initiate foreclosure proceedings on
 her house because she had not paid in full, even though she had been trying. A jury could
 find that such a course of conduct amounts to an “unfair or unconscionable means to
 collect or attempt to collect any debt.” 15 U.S.C. § 1692f.

1 *Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) (distinguishing foreclosure of
2 interest in property from efforts to collect funds from debtor); *Gray v. Four Oak Court*
3 *Ass’n, Inc.*, 580 F. Supp. 2d 883 (D. Minn. 2008) (finding that homeowners association
4 lien foreclosure proceeding to recover assessment fees was effort to enforce a security
5 interest rather than debt collection under the FDCPA). Other courts have held that
6 community housing associations and their agents are not debt collectors when they are
7 “‘actively engaged in an attempt to dispossess the [debtor] of secured property[.]’” *See,*
8 *e.g., Calvert v. Alessi & Koenig, LLC*, No. 2:11-CV-00333-LRH-PAL, 2013 WL 592906,
9 at *4 (D. Nev. Feb. 12, 2013) (quoting *Owens v. Hellmuth & Johnson, PLLC*, 550 F.
10 Supp. 2d 1060, 1066 (D. Minn. 2008)).

11 Under these holdings, Defendants’ filing of the writ did not constitute a violation
12 of the FDCPA, but the holdings do not immunize Defendants other actions during 2013.
13 When Defendants communicated (or failed to communicate) with Plaintiff regarding her
14 debt in 2013, they were not yet actively engaged in an attempt to dispossess her of her
15 home. Rather, they were still trying to collect a monetary sum. Defendants designed the
16 stipulated judgment so that Plaintiff could pay off her debt instead of losing her home.
17 Starting in May of 2013, Plaintiff contacted Defendants regarding the amount she still
18 owed under the judgment. Defendant Nikolaus responded twice, both times encouraging
19 her to review the terms of the judgment without disclosing the amount she still owed. He
20 did not threaten to foreclose on her home. As other courts have found in similar
21 situations, Defendants were not enforcing a security interest during these
22 communications. *See, e.g., Calvert*, 2013 WL 592906, at *5 (finding that “pre-notice of
23 default” letters were not efforts to enforce a security interest).

24 Defendants make a broad argument – that everything they did in 2013 related to
25 foreclosure of a lien and therefore could not have violated the FDCPA. For the reasons
26 explained above, the Court cannot agree. The Court will grant summary judgment in
27 favor of Defendants with respect to the filing of the writ and the actual foreclosure, but
28 not with respect to Defendants other communications in 2013.

c. Res Judicata and Collateral Estoppel.

Defendants argue that Plaintiff's claims regarding the communications are barred by the doctrines of res judicata and collateral estoppel. Because Defendants' argument relies on an Arizona court judgment, Arizona law governs the application of res judicata and collateral estoppel. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990). In Arizona, "[u]nder the doctrine of *res judicata*, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." *Pettit v. Pettit*, 189 P.3d 1102, 1104 (Ariz. Ct. App. 2008); *see also Hall v. Lalli*, 977 P.2d 776, 779 (Ariz. 1999). "A valid final judgment is also conclusive as to every issue decided and every issue raised by the record that could have been decided." *Heinig v. Hudman*, 865 P.2d 110, 115 (Ariz. Ct. App. 1994) (citation omitted).

Collateral estoppel, or issue preclusion, occurs when (1) the issue was actually litigated in the previous proceeding, (2) the parties had a full and fair opportunity and motive to litigate the issue, (3) the court entered a valid and final decision on the merits, (4) resolution of the issue was essential to the decision, and (5) there was common identity of the parties. *See Garcia v. Gen. Motors Corp.*, 990 P.2d 1069, 1073 (Ariz. Ct. App. 1999); *Circle K Corp. v. Indus. Comm'n of Ariz.*, 880 P.2d 642, 645 (Ariz. Ct. App. 1993).

The party asserting res judicata or collateral estoppel bears the burden of proving it. *See State Comp. Fund v. Yellow Cab Co. of Phx.*, 3 P.3d 1040, 1044 (Ariz. Ct. App. 1999). Defendants point to the following facts. After Defendants had brought suit for foreclosure, sought a writ of execution, and scheduled a sheriff's sale of Plaintiff's property, Plaintiff filed a motion to cancel the sale. Plaintiff argued that the sale should be cancelled because, among other reasons, Defendants had obscured the amount she owed by refusing to respond to her requests for an accounting of her debt. Doc. 101-2 at 39. The Maricopa County Superior Court denied the motion, noting that the court had considered her arguments. *Id.* at 43. After the sheriff's sale took place, Plaintiff filed a

1 motion for relief, arguing that the sale was improper because it was based on a stipulated
2 judgment that was ambiguous, and this ambiguity was compounded by Defendants'
3 refusal to respond to Plaintiff's requests for a statement of the amount she owed. *Id.* at
4 56-57. The state court denied the motion, again noting that it had considered her
5 arguments. *Id.* at 74. Plaintiff did not cite or discuss the FDCPA in either of these
6 motions.

7 Collateral estoppel does not bar Plaintiff's claims. "[T]he Arizona Supreme Court
8 has held that collateral estoppel requires that 'the issue sought to be relitigated must be
9 *precisely the same* as the issue in the previous litigation.'" *State v. Bartolini*, 155 P.3d
10 1085, 1087-88 (Ariz. Ct. App. 2007) (quoting *State v. Jimenez*, 634 P.2d 950, 952 (Ariz.
11 1981)) (emphasis added); *see also Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292
12 (9th Cir. 1971) ("Issues are not identical if the second action involves application of a
13 different legal standard, even though the factual setting of both suits be the same."). The
14 issues in the foreclosure suit and the present suit are not the same. In the foreclosure suit,
15 Plaintiff raised the communications as a reason to cancel the sheriff's sale or grant relief
16 from the judgment. *See* Doc. 101-2 at 39, 56-57. In this case, Plaintiff argues that the
17 communications violated the FDCPA. *Id.* These arguments are not "precisely the same"
18 and therefore cannot satisfy the Arizona requirement for collateral estoppel. *Bartolini*,
19 155 P.3d at 1087-88.

20 Nor does res judicata bar Plaintiff's claims. Setting aside the question of whether
21 Defendants were in privity with the Association (the plaintiff in the foreclosure suit), the
22 Court finds that Defendants have not shown that Plaintiff could have raised her FDCPA
23 claims in the foreclosure suit. Defendants filed that suit on behalf of the Association in
24 April of 2012 (Doc. 81-1 at 121), and the Maricopa County Superior Court approved the
25 stipulated judgment on July 12, 2012 (*id.* at 136). Because the communications at issue
26 in Plaintiff's remaining FDCPA claims occurred from May to November of 2013,
27 Plaintiff clearly could not have raised them as counterclaims in the foreclosure suit that
28 resulted in the stipulated judgment in 2012. Defendants later sought to enforce the

1 stipulated judgment and foreclose on the property in November of 2013, but Defendants
 2 have not explained how Plaintiff could have raised the FDCPA claim as some kind of
 3 affirmative defense to foreclosure. Res judicata applies only to claims that “could have
 4 been litigated” in the earlier lawsuit. *Rousselle v. Jewett*, 421 P.2d 529, 531 (Ariz. 1966).

5 Defendants argue that when Plaintiff filed her motions to cancel the sheriff’s sale
 6 and for relief from the judgment, she raised the facts underlying her FDCPA claims and
 7 thereby brought and litigated the claims. In effect, Defendants argue that Plaintiff’s
 8 FDCPA claims are the same as her defenses to the foreclosure suit. But claims “which
 9 arise out of the same transaction or occurrence are not the same for purposes of *res*
 10 *judicata* if proof of different or additional facts will be required to establish them.” *E.C.*
 11 *Garcia & Co., Inc. v. Ariz. State Dep’t of Revenue*, 875 P.2d 169, 179 (Ariz. Ct. App.
 12 1993) (citation omitted). The Court finds that some of the evidence necessary for
 13 Plaintiff’s FDCPA claims would be different from the evidence needed for her
 14 foreclosure suit arguments. Plaintiff’s FDCPA claims would require proof of whether a
 15 “least sophisticated debtor” would consider Defendants’ conduct deceptive.

16 In sum, under Arizona law, “[r]ights, claims, or demands – even though they grow
 17 out of the same subject matter – which constitute separate or distinct causes of action not
 18 appearing in the former litigation, are not barred in the latter action because of *res*
 19 *judicata*.” *Pettit*, 189 P.3d at 1105 (quoting *Rousselle*, 421 P.2d at 531). Defendants
 20 have not shown that *res judicata* or collateral estoppel bars Plaintiff’s claim.¹⁰

21 **IV. Conclusion.**

22 Defendants’ motion for summary judgment is granted with respect to all of
 23 Plaintiff’s claims except for the claim that Defendants’ failure to respond to her repeated
 24

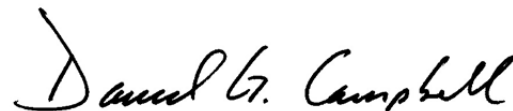
25 ¹⁰ In a footnote, Defendants argue that the *Rooker-Feldman* doctrine bars
 26 Plaintiff’s claim regarding the communications. Under this doctrine, a federal district
 27 court does not have subject matter jurisdiction to hear a direct appeal from the final
 28 judgment of a state court. *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415-16 (1923); *D.C. Ct.*
of App. v. Feldman, 460 U.S. 462, 482 (1983). As this Court found when ruling on
 Defendants’ motion to dismiss, the *Rooker-Feldman* doctrine does not bar Plaintiff’s
 claims. See Doc. 37 at 4-6; see also *Vacation Vill., Inc. v. Clark Cnty., Nev.*, 497 F.3d
 902, 907 (9th Cir. 2007).

1 requests for a statement of the amount she owed violated 15 U.S.C. §§ 1692e and 1692f.
2 Plaintiff's motion for summary judgment on this claim is denied.

3 **IT IS ORDERED:**

- 4 1. Plaintiff's motion for summary judgment (Doc. 80) is **denied**.
- 5 2. Defendants' motion to strike (Doc. 99) is **denied**.
- 6 3. Defendants' motion for summary judgment (Doc. 100) is **granted** with
7 respect to all of Plaintiff's claims except the claim that Defendants' failure
8 to respond to her repeated requests for a statement of the amount she owed
9 violated 15 U.S.C. §§ 1692e and 1692f.
- 10 4. Plaintiff's motions in limine (Docs. 82, 83) are **denied** without prejudice as
11 premature.
- 12 5. Plaintiff's motion to strike Defendants' supplemental expert report
13 (Doc. 85) is **granted** for reasons stated on the record at oral argument.
- 14 6. The Court will set a final pretrial conference by separate order.

15 Dated this 22nd day of September, 2015.

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19 _____
20 David G. Campbell
21 United States District Judge
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