UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ARCHIE J. SHOEMAKER,
on behalf of himself and others similarly situated,

Case No. 19-cv-316

Plaintiffs,

vs.

BASS & MOGLOWSKY, S.C.,

Defendant.

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO: COUNSEL OF RECORD

PLEASE TAKE NOTICE that defendant, Bass & Moglowsky, S.C., by its attorneys, von Briesen & Roper, s.c., moves that branch of the United States District Court for the Western District of Wisconsin assigned to this action for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting the moving defendant summary judgment dismissing the claims asserted against it in the pleadings on file herein on the merits, with prejudice and with costs on the grounds that:

- defendant constitutes a "debt collector" under only the limited application of the Fair Debt Collection Practices Act ("FDCPA") pursuant to 15 U.S.C. § 1692a(6) and no violations of that limited application have been or could be alleged against defendant, and

- plaintiff has not and cannot allege a "concrete injury" from the alleged violations and, therefore, lacks standing to pursue this action pursuant to the Supreme Court's Spokeo decision.

This motion is based on pleadings and papers on file herein and on the proposed statement of findings of fact and supporting brief and affidavit of Steven W. Moglowsky filed herewith.

Respectfully submitted at Milwaukee, Wisconsin this 19th day of June, 2019.

von Briesen & Roper, s.c.
Attorneys for Defendant

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ARCHIE J. SHOEMAKER,
on behalf of himself and others similarly situated,

Case No. 19-cv-316

Plaintiffs,

vs.

BASS & MOGLOWSKY, S.C.,

Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

As set forth herein, defendant Bass & Moglowsky, S.C. respectfully requests the Court grant its motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and dismiss the claims asserted against it on the merits, with prejudice and together with taxable costs and disbursements on two bases.

First, defendant constitutes a "debt collector" under only the limited application of the Fair Debt Collection Practices Act ("FDCPA") pursuant to 15 U.S.C. § 1692a(6) and no violations of that limited application have been or could be alleged against defendant. Specifically, the allegations against defendant set forth in the complaint involve alleged violations of the FDCPA by serving a validation notice with a summons and mortgage foreclosure complaint. Because defendant was engaged in the principal purpose of enforcing a security instrument and the pleadings at issue that it filed specifically waived the right to seek any deficiency judgment, defendant is subject to only limited application of the FDCPA and violations under that limited application have not and could not be alleged under the facts and circumstances of this case.

Second, plaintiff has not and cannot allege a "concrete injury" from the alleged violations and, therefore, lacks standing to pursue this action pursuant to the Supreme Court's Spokeo decision.

Accordingly, defendant respectfully requests the Court grant its motion for summary judgment and dismiss this action and the claims asserted against it on the merits and with prejudice, and together with its taxable costs and disbursements.

BACKGROUND

I. THIS ACTION.

Plaintiff Archie J. Shoemaker, on behalf of himself and others similarly situated, alleges defendant violated the FDCPA by serving a validation notice in conjunction with service of the summons and complaint in the underlying mortgage foreclosure action. (Complaint, ¶ 16; Defendant's Statement of Facts ("DSF"), ¶ 1)

On or about March 6, 2019, defendant served plaintiff with a summons and mortgage foreclosure complaint that was accompanied by a validation notice. (Complaint, ¶¶ 31-34, Exs. A, B; DSF, ¶ 2) The foreclosure complaint specifically waived the right to seek any deficiency judgment against plaintiff. (Complaint, Ex. A, ¶ 9: "Plaintiff…elects to waive judgment for any deficiency which remains due to the plaintiff after sale of the mortgaged premises in this action…"; DSF, ¶ 3) Based on the service of the summons and mortgage foreclosure complaint with the validation notice, plaintiff alleges that defendant violated two provisions of the FDCPA. (Complaint, ¶¶ 45-71; DSF, ¶ 4)

First, plaintiff alleges that defendant violated 15 U.S.C. § 1692e ("a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt") on the basis that service of the summons and mortgage foreclosure

complaint together with the validation notice contained confusing statements about when a response to the complaint was required. (Complaint, ¶¶ 45-64; DSF, ¶ 5)

Second, plaintiff alleges that defendant violated 15 U.S.C. § 1692g(a)(5) (involving information required in the initial communication with the consumer) on the basis that the validation notice did not contain proper disclosures as required by the FDCPA. (Complaint, ¶¶ 65-71; DSF, ¶ 6)

II. DEFENDANT'S LEGAL SERVICES.

One of the issues addressed in the motion for summary judgment is whether defendant constitutes a "debt collector" under the FDCPA. Steven W. Moglowsky, a shareholder of defendant, spent several hours compiling data that demonstrates defendant is a "debt collector" under the FDCPA only to the extent that it enforces security agreements. (Moglowsky Aff., ¶¶ 1, 3) Exhibit A attached to his affidavit submitted herewith is a spreadsheet he prepared which summarizes the data. (Id., ¶ 3, Ex. A) It is immediately obvious that actions filed by defendant for money judgments or foreclosure actions that actually sought deficiency judgments are quite rare, and of those that do involve a money judgment, half of them were commercial cases, not consumer cases. (Id.) Defendant has not had a significant number of money judgment actions (consumer or commercial) for at least 7 or 8 years (or more), and defendant has never had a significant number of foreclosure actions in which deficiency judgments were sought. (Id.) While the data compiled by Mr. Moglowsky covers the past 5 ½ years or so since January 1, 2014, if he had expanded his search to include additional years, the result/conclusion would be the same. (Id.)

Defendant has not received/accepted referrals for money judgment cases in many years. (Id., ¶ 4) Mr. Moglowsky ran each of defendant's attorney's bar numbers (including those who

worked for defendant at some point after January 1, 2014 but are no longer with defendant) through CCAP using an advanced search that looked for all cases that used Case Class Code "Money Judgment (30301)." (Id.) Mr. Moglowsky then parsed out those cases that were filed after January 1, 2014 and looked at the name of the defendant to determine whether the case was consumer or commercial, making the assumption that any action against an individual was consumer and that any action against a corporate entity was commercial, though it is clearly possible that even some cases against individuals were actually commercial loans. (Id.)

With respect to foreclosures, the Case Management system that defendant has been using for the past couple of years allows the user to parse data, but there is no way to filter for case filing dates. (Id., ¶ 5) That meant that for 2017 – 2019, Mr. Moglowsky actually ran bar numbers in an advanced search in CCAP looking for cases that used Case Class Code "Foreclosure of Mortgage (30404)." (Id.) None of the cases that defendant started in the new Case Management system were "with deficiency" foreclosures. (Id.) For cases started prior to the new Case Management System, Mr. Moglowsky used defendant's old "Foreclosure Tracking Spreadsheet," a spreadsheet that Mr. Moglowsky maintained for many years that tracked every firm foreclosure action. (Id.) Using that spreadsheet, Mr. Moglowsky was able to quickly parse case filing data for 2014 through 2016. (Id.)

To determine which foreclosure cases sought deficiency, Mr. Moglowsky searched through all of defendant's flat file, foreclosure database for cases for the relevant period that defendant started pursuant to Wis. Stat. § 846.103(1). (Id., ¶ 6) When Mr. Moglowsky had the list of files, he actually reviewed each file to determine whether defendant had reserved the right to deficiency. (Id.) Although Wis. Stat. § 846.103(1) permits the plaintiff to seek deficiency,

sometimes circumstances require that defendant use that statute even in cases where defendant is not actually seeking deficiency. (Id.)

For at least the past 5 ½ years, actions for money judgments or foreclosures with deficiency have never represented more than a fraction of 1% of defendant's case filings. (Id., ¶ 7; DSF, ¶ 7)

LEGAL STANDARD

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant "bears the initial responsibility of informing the district court of the basis for its motion" by identifying "those portions of [the record]…which it believes demonstrates the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

When the nonmovant is the party with the ultimate burden of proof at trial, that party retains its burden of producing evidence which would support a reasonable jury verdict. Celotex Corp., 477 U.S. at 324. To survive summary judgment, a party cannot rely on his pleadings and "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "In short, 'summary judgment is appropriate if, on the record as a whole, a rational trier of fact could not find for the non-moving party.'" Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 414 (7th Cir. 2005) (citing Turner v. J.V.D.B. & Assoc., Inc., 330 F.3d 991, 994 (7th Cir. 2003)). In addition, not only must a plaintiff adequately allege an injury for standing purposes in the complaint, but he must "submit[] adequate evidence of injury…to survive a motion for summary judgment." Diedrich v. Ocwen Loan Servicing, LLC, 839 F.3d 583, 591 (7th Cir. 2016).

When considering a motion challenging standing, this Court may look beyond the allegations and consider external facts calling standing into question, and view whatever evidence has been submitted on the issue. See, *i.e.*, Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F. 3d 440, 444 (7th Cir. 2009).

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFF'S CLAIMS BECAUSE DEFENDANT WAS NOT A "DEBT COLLECTOR" FOR PURPOSES OF THE FDCPA VIOLATIONS ALLEGED OR WHICH COULD HAVE BEEN ALLEGED IN PLAINTIFF'S COMPLAINT.

Defendant does not constitute a "debt collector" for purposes of the alleged violations of the FDCPA set forth in plaintiff's complaint. Because defendant was seeking to enforce a security instrument and the complaint it filed specifically waived the right to pursue a deficiency judgment against plaintiff in the underlying mortgage foreclosure action, defendant is subject to only the limited application of the FDCPA, which does not apply to the facts and circumstances of this case. As a result, plaintiff cannot prevail against defendant on the violations of the FDCPA alleged in the complaint and, indeed, there are no violations of the FDCPA plaintiff could allege and pursue against defendant under the facts and circumstances of this case. As a result, defendant respectfully requests the Court grant this motion and dismiss the case.

15 U.S.C. § 1692a(6) defines the term "debt collector" for purposes of the FDCPA as follows:

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

> For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests…

The United State Supreme Court recently addressed the last sentence of the definition of "debt collector" involving the enforcement of security interests -- which is the issue before the Court -- in Obduskey v. McCarthy & Holthus LLP, 139 S.Ct. 1029 (2019). There, the Court held that a business such as a law firm that is engaged in no more than the kind of security-interest enforcement involving non-judicial foreclosure proceedings is not a "debt collector" subject to the main coverage of the FDCPA. Id. at 1036-37. In Obduskey, the Supreme Court clarified that the FDCPA "exempts entities engaged in no more than the 'enforcement of security interests' from the lion's share of [the FDCPA's] prohibitions." The Obduskey court went on to abrogate several circuit court of appeals' holdings, including Kaymark v. Bank of America, N.A., 783 F.3d 168 (3rd Cir. 2015), Glazer v. Chase Home Finance LLC, 704 F.3d 453 (6th Cir. 2013), and Wilson v. Draper & Goldberg, P.L.L.C, 443 F.3d 373 (4th Cir. 2006), which generally held that enforcement of security interests was subject to all the prohibitions of the FDCPA. Obduskey, 139 S.Ct. at 1036-1038.

The Obduskey court's decision relies on its interpretation of "debt collector" in the Act, specifically 15 U.S.C. § 1692a(6). Id. at 1035-36. The Court determined that there is limited application of the FDCPA for "debt collectors" engaged in the principal purpose of enforcement of a security interest. Id. at 1036. The violations for this limited purpose involve taking or threatening to take non-judicial action to effect dispossession or disablement of property if (a) there is no present right to possession of the property; (b) there is no present intention to take possession of the property; and (c) the property is exempt by law from such dispossession or disablement. Id.; 15 U.S.C. § 1692f(6).

The Court went on to conclude that the law firm Obduskey sued was not a "debt collector" under the FDCPA in that case because it was simply enforcing a security interest in a non-judicial proceeding. Obduskey, 139 S.Ct. at 1038-40. The Court went on to point out the difference between judicial and non-judicial foreclosure proceedings, but did not rule on whether judicial foreclosure proceedings would have the same effect, referencing the 10th Circuit Court of Appeals' discussion of this issue. Id. at 1039 ("whether those who judicially enforce mortgages fall within the scope of the primary definition is a question we can leave for another day.").

The 10th Circuit pointed out that the critical difference between judicial and non-judicial proceedings is the right to seek a deficiency judgment:

> …There is an obvious and critical difference between judicial and non-judicial foreclosures—"[a] non-judicial foreclosure differs from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor." Burnett, 706 F.3d at 1239 (emphasis added) (quoting Maynard, 401 Fed.Appx. at 391–92). Colorado follows this general rule and allows a creditor to collect a deficiency only after the non-judicial foreclosure sale and through a separate action. See Colo. Rev. Stat. § 38-38-106(6) (2017); Bank of Am. v. Kosovich, 878 P.2d 65, 66 (Colo. App. 1994).
>
> While judicial mortgage foreclosures may be covered under the FDCPA because of the underlying deficiency judgment, see Maynard, 401 Fed.Appx. at 394, a non-judicial foreclosure proceeding is not covered because it only allows "the trustee to obtain proceeds from the sale of the foreclosed property, and no more." Burnett, 706 F.3d at 1239 (quoting Maynard, 401 Fed.Appx. at 391–92). Had McCarthy attempted to induce Mr. Obduskey to pay money by threatening foreclosure, the FDCPA might apply. See Burnett, 706 F.3d at 1239 ("[T]he initiation of foreclosure proceedings may be intended to pressure the debtor to pay her debt."); Rousseau v. Bank of N.Y., 2009 WL 3162153, at *9 (D. Colo. Sept. 29, 2009); see also Ho, 858 F.3d at 573 ("If entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors.").

Obduskey v. Wells Fargo, 879 F.3d 1216, 1221-22 (10th Cir. 2018).

Here, defendant was engaged in the principal purpose of enforcing a security interest by filing the underlying mortgage foreclosure complaint. In addition, the underlying foreclosure complaint specifically waived the right to seek a deficiency judgment. Thus, while application of Obduskey to this case may have been different if a deficiency judgment was sought, because any right to a deficiency judgment was specifically waived, there is no difference between the facts of this case and those in Obduskey. The critical difference identified by the 10th Circuit between judicial and non-judicial foreclosure proceedings -- the right to seek a deficiency judgment -- was not present in the underlying proceedings. Because of that, the Obduskey holding applies to this case and plaintiff's alleged violations of the FDCPA asserted against defendant fail as a matter of law.

Defendant anticipates that plaintiff may argue that defendant generally qualifies as a "debt collector" under the FDCPA and, therefore, plaintiff has alleged actionable violations of the FDCPA against defendant. Any such argument would be completely meritless.

There are a number of decisions addressing what conduct and activities is necessary for an individual or entity to constitute a "debt collector" under the FDCPA in this circuit. For example, in Mertes v. Devitt, 734 F.Supp. 872, 874 (W.D. Wis. 1990), the district court noted as follows:

> The principal purpose of defendant's business is not debt collection. Accordingly, the FDCPA is applicable to him only if his collection activities are sufficient to bring him within the definition as a person "who regularly collects or attempts to collect" debts of another. Based upon the language of the statute and its legislative history the Court concludes that the defendant is not a "debt collector" and is not subject to the FDCPA.
>
> Few courts have had the opportunity to consider the meaning of the term "regularly" in the context of this section. The only case discovered by the parties or the Court which has addressed the issue is Crossley v. Lieberman, 868 F.2d 566, 569-570 (3d Cir. 1989). In Crossley the court had little trouble

finding that the defendant's collection practice was regular because defendant testified that debt collection was a "principal part of" his practice at the time of the alleged violation. Id. at 570. Because of this testimony, Crossley is factually distinct from the present case.

Here the undisputed facts are that over the past ten years the defendant averaged less than two collection matters per year and that this comprised less than one percent of his practice. Such a limited involvement in collection matters does not satisfy the commonly understood meaning of the term regular. An interpretation which would include defendant's actions as "regular" debt collection would completely erase the limitation Congress included in the law and would be inconsistent with a common sense reading of the statute. The language of the statute leads to the conclusion that defendant is not a "debt collector."

This conclusion is supported by recent legislative history. In 1986 Congress amended the FDCPA to delete a previous provision which exempted attorneys from its coverage. House Report No. 99-405 summarized the purpose of the amendment:

> Removal of the exemption for attorneys would require any attorney who comes within the definition of "debt collector" contained in section 803(6) to comply with the provisions of the Fair Debt Collection Practices Act. Quite simply, any attorney who is in the business of collecting debts will be regarded by the Act as a debt collector.

99th Cong., 2nd Sess. (1986), U.S.Code Cong. & Admin. News 1986, 1752, 1753. The House Report evidences substantial concern with lawyers who were unfairly competing with collection firms and abusing their exemption from FDCPA coverage. It was these firms which Congress sought to affect by the amendment:

> The Act originally exempted attorneys from its provisions on the basis that attorneys were only incidentally involved in debt collection activities. In recent years a large number of law firms have gone into specialized debt collection, and many of these firms use lay persons full time to collect debts. Repeal of the exemption will require these firms to comply with the same standards of conduct as the lay debt collection firms.

Id. at 1759. These comments clearly indicate that Congress neither intended nor expected attorneys such as the defendant to be covered by the Act. Congress apparently contemplated that attorneys with only "incidental" involvement in debt collection would remain unregulated. Not surprisingly this intention is entirely consistent with the language of the statute which reaches only those who regularly collect debts.

As set forth above, defendant's principal purpose is not the collection of debts and is not regularly collecting or attempting to collect a debt. Indeed, for at least the past 5 ½ years, actions for money judgments or foreclosures with deficiency have never represented more than a fraction of 1% of defendant's case filings. (Moglowsky Aff., ¶¶ 3, 7, Ex. A; DSF, ¶ 7)

Accordingly, for the reasons set forth in Obduskey, defendant constitutes a "debt collector" under only the limited application of the FDCPA. Because no violations of that limited application have been alleged -- or could be alleged -- plaintiff's claims against defendant should be dismissed.

II. THE COURT SHOULD DISMISS PLAINTIFF'S CLAIMS BECAUSE HE HAS NOT AND CANNOT DEMONSTRATE ARTICLE III STANDING NECESSARY TO PURSUE THE CLAIMS ALLEGED IN THE COMPLAINT.

In addition to the fact that plaintiff cannot pursue the claims in the complaint because defendant constitutes a "debt collector" under only the limited application of the FDCPA, the Court should also dismiss plaintiff's claims on the basis that he lacks Article III standing.

Standing to sue is a constitutional requirement based on Article III's "limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)). To have standing to sue, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1547 (2016) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000)). To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Spokeo, 136 S.Ct. at

1548 (quoting Lujan, 504 U.S. at 560). As the party invoking federal jurisdiction, a plaintiff bears the burden of establishing the elements of Article III standing. Lujan, 504 U.S. at 561.

In Spokeo, the Supreme Court clarified what standing requires: "[p]articularization is necessary to establish an injury in fact but it is not sufficient. An injury in fact must also be 'concrete.'" Spokeo, 136 S.Ct. at 1548. The Court elaborated that "concrete" is not necessarily "tangible," but a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." Id. at 1549.

Deprivation of a procedural right without some concrete interest that is affected by the deprivation is insufficient to create Article III standing. Id. The Court in Spokeo made clear that Congress cannot expand Article III merely by passing a law. Id. at 1546-48; Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018) ("We know of no circuit court decision since Spokeo that endorses an anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III standing.")

The plaintiff in Spokeo asserted a FCRA claim based on the publication of an inaccurate consumer report on the internet. Spokeo, 136 S.Ct. at 1544, 1546. Although the plaintiff in Spokeo alleged a violation of the FCRA aimed at the heart of the statute's goal of ensuring "fair and accurate credit reporting," the violation alone did not establish standing. Id. at 1546-48 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfied the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."). The Supreme Court held that a plaintiff still had the burden to prove that he or she suffered an injury in fact that was particularized, concrete, and "fairly traceable to the challenged conduct of the defendant." Id. at 1547-48.

On remand, the Ninth Circuit held that the plaintiff had standing due to the nature of the inaccurate information published on the defendant's website and the concrete harm identified by plaintiff other than the statutorily created right to privacy. Robins v. Spokeo, Inc., 867 F.3d 1108, 1114 (9th Cir., Aug. 15, 2017). The inaccurate information disseminated for the entire world to see on defendant's website was material -- not like an immaterial zip code -- so it "present[ed] a sincere risk of harm to the real-world interest that Congress chose to protect with the FCRA." Id. at 1116. The harm from dissemination of this type of inaccurate information was akin to the type of injuries vindicated by common law invasion of privacy claims. Id. at 1115. Thus, standing existed because the plaintiff identified a real -- as opposed to purely legal -- harm. Id. at 1117.

The Supreme Court has held that "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." Lujan, 504 U.S. at 561. To satisfy the concreteness requirement, an injury "must be 'de facto'; that is, it must actually exist." Spokeo, 136 S.Ct. at 1549. As the Supreme Court made clear in Spokeo, Congress cannot abrogate the constitutional requirement of injury in fact. Id. at 1547-48 ("Injury in fact is a constitutional requirement, and it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); Diedrich, 839 F.3d at 591 (holding that although a plaintiff may have "adequately alleged an injury for purposes of standing," they must "submit[] adequate evidence of injury…to survive a motion for summary judgment.").

Here, plaintiff cannot satisfy the Article III standing clarified in Spokeo to pursue the claims in this action. While plaintiff generally alleges a general risk of harm in his complaint (Complaint, ¶¶ 63-64, 70-71) he must "submit[] adequate evidence of injury…to survive a

motion for summary judgment." Diedrich v. Ocwen Loan Servicing, LLC, 839 F.3d 583, 591 (7th Cir. 2016). Indeed, the underlying proceedings demonstrate plaintiff cannot submit adequate evidence of injury:

- The underlying action with the allegedly confusing submissions was filed on January 31, 2019;
- The alleged harm in this case was the potential for confusion as to when to answer the complaint;
- Plaintiff did not get the dates wrong because he was confused -- he never filed any answer or otherwise responded to the complaint;
- Plaintiff did not fail to answer the complaint because of confusion or that he is not sophisticated. Instead, he hired an out-of-state law firm to file this class action against defendant on April 22, 2019, even before judgment had been entered against him in the underlying action on April 29, 2019.

Because plaintiff has not and cannot establish he sustained any injury from the alleged violations of the FDCPA, he does not have Article III standing and the claims asserted in the complaint should be dismissed.

CONCLUSION

For the reasons set forth herein, defendant, Bass & Moglowsky, S.C., respectfully requests the Court grant its motion for summary judgment and dismiss the claims asserted against it on the merits, with prejudice, and with its taxable costs and disbursements

Respectfully submitted at Milwaukee, Wisconsin this 19th day of June, 2019.

von Briesen & Roper, s.c.
Attorneys for Defendant

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ARCHIE J. SHOEMAKER,
on behalf of himself and others similarly situated,

Case No. 19-cv-316

Plaintiffs,

vs.

BASS & MOGLOWSKY, S.C.,

Defendant.

AFFIDAVIT OF STEVEN W. MOGLOWSKY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Steven W. Moglowsky, being first duly sworn on oath, deposes and says:

1. I am a shareholder of the law firm of Bass & Moglowsky, S.C., a defendant in the above-referenced matter (hereinafter, the "defendant"), and make this affidavit upon personal knowledge and in support of defendant's motion for summary judgment.

2. One of the issues addressed in the motion for summary judgment is whether defendant constitutes a "debt collector" under the Fair Debt Collection Practices Act ("FDCPA").

3. I spent several hours compiling data that demonstrates defendant is a "debt collector" under the FDCPA only to the extent that it enforces security agreements. Attached hereto and marked as Exhibit A is a true and correct copy of a spreadsheet I prepared which summarizes the data. It is immediately obvious that actions filed by defendant for money

judgments or foreclosure actions that actually sought deficiency judgments are quite rare, and of those that do involve a money judgment, half of them were commercial cases, not consumer cases. Defendant has not had a significant number of money judgment actions (consumer or commercial) for at least 7 or 8 years (or more), and has never had a significant number of foreclosure actions in which deficiency judgments were sought. While the data I compiled covered the past 5 ½ years or so since January 1, 2014, had I expanded my search to include additional years, the result/conclusion would be the same.

4. Defendant has not received/accepted referrals for money judgment cases in many years. I ran each of defendant's attorney's bar numbers (including those who worked for defendant at some point after January 1, 2014 but are no longer with defendant) through CCAP using an advanced search that looked for all cases that used Case Class Code "Money Judgment (30301)." I then parsed out those cases that were filed after January 1, 2014 and looked at the name of the defendant to determine whether the case was consumer or commercial, making the assumption that any action against an individual was consumer and that any action against a corporate entity was commercial, though it is clearly possible that even some cases against individuals were actually commercial loans.

5. With respect to foreclosures, the Case Management system that defendant has been using for the past couple of years allows the user to parse data, but there is no way to filter for case filing dates. That meant that for 2017 – 2019, I actually ran bar numbers in an advanced search in CCAP looking for cases that used Case Class Code "Foreclosure of Mortgage (30404)." None of the cases that defendant started in the new Case Management system were "with deficiency" foreclosures. For cases started prior to the new Case Management System, I used the Firm's old "Foreclosure Tracking Spreadsheet," a spreadsheet that I maintained for

many years that tracked every firm foreclosure action. Using that spreadsheet, I was able to quickly parse case filing data for 2014 through 2016.

6. To determine which foreclosure cases sought deficiency, I searched through all of defendant's flat file, foreclosure database for cases for the relevant period that defendant started pursuant to Wis. Stat. § 846.103(1). When I had the list of files, I actually reviewed each file to determine whether defendant had reserved the right to deficiency. Although Wis. Stat. § 846.103(1) permits the plaintiff to seek deficiency, sometimes circumstances require that defendant use that statute even in cases where defendant was not actually seeking deficiency.

7. For at least the past 5 ½ years, actions for money judgments or foreclosures with deficiency have never represented more than a fraction of 1% of defendant's case filings.

Steven W. Moglowsky

Subscribed and sworn to before
me this 19 day of June, 2019.

Notary Public, State of Wisconsin
My commission expires 1/7/22

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JEFF RENAUD NOTARY PUBLIC STATE OF WISCONSIN

Bass & Moglowsky Case Filings 1/1/14 through 6/11/19

2019	Consumer Money Judgment	0
	Commercial Money Judgment	0
	Foreclosure w/ Deficiency	0
	Foreclosure w/out Deficiency	170 thru 6/11/19
2018	Consumer Money Judgment	0
	Commercial Money Judgment	0
	Foreclosure w/ Deficiency	0
	Foreclosure w/out Deficiency	360
2017	Consumer Money Judgment	2
	Commercial Money Judgment	1
	Foreclosure w/ Deficiency	0
	Foreclosure w/out Deficiency	453
2016	Consumer Money Judgment	1
	Commercial Money Judgment	2
	Foreclosure w/ Deficiency	0
	Foreclosure w/out Deficiency	687
2015	Consumer Money Judgment	0
	Commercial Money Judgment	3
	Foreclosure w/ Deficiency	2
	Foreclosure w/out Deficiency	878
2014	Consumer Money Judgment	2
	Commercial Money Judgment	2
	Foreclosure w/ Deficiency	4
	Foreclosure w/out Deficiency	830

NOTES 2015 w/ deficiency - both commercial
2014 w/ deficiency - 2 consumer and 2 commercial

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ARCHIE J. SHOEMAKER,
on behalf of himself and others similarly situated,

Case No. 19-cv-316

Plaintiffs,

vs.

BASS & MOGLOWSKY, S.C.,

Defendant.

DEFENDANT'S PROPOSED FINDINGS OF FACT IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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1. Plaintiff, Archie J. Shoemaker, on behalf of himself and others similarly situated ("plaintiff"), alleges defendant violated the FDCPA by serving a validation notice in conjunction with service of the summons and complaint in the underlying mortgage foreclosure action. (Complaint, ¶ 16)

2. On or about March 6, 2019, defendant served plaintiff with a summons and mortgage foreclosure complaint that was accompanied with a validation notice. (Id., ¶¶ 31-34, Exs. A, B)

3. The foreclosure complaint specifically waived the right to seek any deficiency judgment against plaintiff. (Id., Ex. A, ¶ 9: "Plaintiff…elects to waive judgment for any deficiency which remains due to the plaintiff after sale of the mortgaged premises in this action…")

4. Based on the service of the summons and mortgage foreclosure complaint with the validation notice, plaintiff alleges that defendant violated two provisions of the FDCPA. (Id., ¶¶ 45-71)

5. First, plaintiff alleges that defendant violated 15 U.S.C. § 1692e ("a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt") on the basis that service of the summons and mortgage foreclosure complaint together with the validation notice contained confusing statements about when a response to the complaint was required. (Id., ¶¶ 45-64)

6. Second, plaintiff alleges that defendant violated 15 U.S.C. § 1692g(a)(5) (involving information required in the initial communication with the consumer) on the basis that the validation notice did not contain proper disclosures as required by the FDCPA. (Id., ¶¶ 65-71)

7. For at least the past 5 ½ years, actions for money judgments or foreclosures with deficiency have never represented more than a fraction of 1% of defendant's case filings. (Moglowsky Aff., ¶¶ 1-7, Ex. A)

Dated at Milwaukee, Wisconsin, this 19th day of June, 2019.

VON BRIESEN & ROPER, S.C.
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