

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**TIMOTHY A. THEBERT**

Plaintiff,

Hon.  
Mag.  
Case No. 16-cv-

v.

PROPOSED CLASS ACTION

**POTESTIVO & ASSOCIATES, P.C. and  
BRIAN A. POTESTIVO, Individually and  
in his Official Capacity on behalf of POTESTIVO  
& ASSOCIATES, P.C.**

Defendant.

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**CLASS ACTION COMPLAINT AND JURY DEMAND**

NOW COMES Plaintiff, **TIMOTHY A. THEBERT** (hereinafter referred to as "THEBERT" or "Plaintiff") by and through counsel, The Law Offices of Brian Parker, PC, and brings this action against the above listed Defendant, **POTESTIVO & ASSOCIATES, P.C.** ("Potestivo" or "Defendant") and **BRIAN A. POTESTIVO** ("Brian Potestivo" or "Defendant") on the grounds set forth herein:

**I. PRELIMINARY STATEMENT**

1.

Plaintiff brings this action for damages and injunctive relief based upon the Defendant's violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq* and demanding a trial by jury, brings this action for the illegal practices of the Defendants who, *inter alia*, used false, deceptive, misleading, unconscionable, and other illegal practices, in connection with their attempts to collect a mortgage debt from the Plaintiff and others.

2.

Plaintiff also brings this action for ACTUAL damages and injunctive relief seeking to STOP Defendants plan and practice of acting as a collection agency while sharing office space and correspondence with an attorney's office in violation of The Regulation of Collection Practices Act (RCPA), codified at MCL 445.251 et seq. and The Michigan Occupational Code (MOC), codified at MCL 339.901 et seq.

3.

Defendants are publicizing private, mortgage debt information as an announced debt collector beyond the requirements of the Michigan Foreclosure Statute in violation of Federal regulations under the FDCPA. Every "Notice of Mortgage Foreclosure Sale" ("Foreclosure Notice") that Potestivo sends out advertising a Michigan homeowner is in default of a debt and their home is for sale, ignores the homeowners' right to privacy and also the regulations and protections against harassment and abusive debt collection under the FDCPA. **See Exhibit 1 which is the Notice Potestivo sends out to newspapers, the internet, Detroit Legal News and county buildings regarding the Plaintiff's defaulted debt and the Defendant's attempt to collect on the debt.**

4.

In *Glazer v. Chase Home Finance, LLC*, 704 F.3d 453, 464 (6th Cir. 2013), the Sixth Circuit made clear that all foreclosure action is considered debt collection under the FDCPA. The court stated that "if a purpose of an activity taken in relation to a debt is to 'obtain payment' of the debt, the activity is properly considered debt collection." Id. at 460. *Phillip Himmelein v Federal Home Loan Mortgage Corporation, Potestivo Law P.C. FKA Potestivo & Potestivo, P.C. and Roger A. Smith*, File No. 1:15-cv-00813 (December 31, 2015).

5.

Neither *Himmelein* or *Glazer* in the Sixth Circuit creates a carve out or exception for the

Notice of Mortgage Foreclosure Sale being anything but debt collection and part of the foreclosure process.

6.

In fact, on November 10, 2016, a Court in the Western District of Michigan denied a Defendant's Motion to dismiss in the same facts as here and found that "Defendant published the notice of sale for the very purpose of obtaining payment on the underlying debt through Michigan's foreclosure by advertisement statute, so it was a communication made in connection with the collection of a debt." **Please see Exhibit 2, Gray v Trott & Trott, PC, Case #16-cv-00237.**

## **II. PARTIES**

7.

The Plaintiff is a natural person and consumer and resident of Madison Heights, Oakland County, State of Michigan, and a "consumer" as defined by the FDCPA, RCPA and MOC.

8.

The Defendant Potestivo & Potestivo, P.C. aka Potestivo Law, P.C. is a foreclosure law firm organized as a Michigan Corporation in Farmington Hills, County of Oakland, State of Michigan and is a debt collector of defaulted mortgage loans engaged in the business of using the newspapers, internet, county buildings and mail to communicate the collection of consumer debts originally owed to others to sell the underlying mortgage debt. Defendant is a collection agency under the MOC and RCPA.

9.

Defendant Brian A. Potestivo holds himself out as a principal owner, director, shareholder and/or managing partner of Defendant Potestivo & Associates, PC that is in Oakland County and is a debt collector as defined by the FDCPA and a collection agency and licensee

under the MOC and RCPA.

10.

Defendant Brian A. Potestivo personally implemented, and with knowledge of such practices that were contrary to FDCPA, RCPA and MOC and *Glazer v. Chase Home Finance LLC*, 704 F. 3d 453, engaged in and oversaw, and benefitted financially from all the illegal policies and procedures used by himself and other employees of Potestivo & Associates, PC that are complained of herein. Defendant is a debt collector under *Kistner v. Law Offices of Michael P. Margelefsky, LLC.*, 518 F.3d 433, 438 (6th Cir).

### **III. STATUES AND CASE LAW**

#### **THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)**

11.

The FDCPA is a strict liability statute, which provides for actual or statutory damages upon the showing of one violation. Whether a debt collector's actions are false, deceptive, or misleading under § 1692(a)-g is based on whether the "least sophisticated consumer" would be misled by a defendant's actions. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006). This standard ensures "that the FDCPA protects all consumers, the gullible as well as the shrewd." *Kistner v. Law Offices of Michael P. Margelefsky, LLC.*, 518 F.3d 433, 438 (6th Cir).

12.

"In fact, every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (i.e, forcing a settlement) or compulsion (i.e., obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." *Glazer v. Chase Home Finance LLC*, 704 F. 3d 453. See *Goodrow v. Friedman & MacFadyen, P.A.*, 788 F. Supp.

2d 464, 471 (E.D.Va. 2011) (“[A] debt collector must comply with the FDCPA while complying with a state foreclosure law.”); *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 118 (2d Cir. 1998).

13.

“It is the provisions of the FDCPA that by and of themselves determine what debt collection activities are improper under federal law.” *Romea* at 119.

14.

Under Michigan’s Foreclosure Statute at MCL 600.3212, every notice of foreclosure by advertisement shall include all the following:

- (a) The names of the mortgagor, the original mortgagee, and the foreclosing assignee, if any.
- (b) The date of the mortgage and the date the mortgage was recorded.
- (c) The amount claimed to be due on the mortgage on the date of the notice.
- (d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.
- (e) For a mortgage executed on or after January 1, 1965, the length of the redemption period as determined under section 3240.
- (f) A statement that if the property is sold at a foreclosure sale under this chapter, under section 3278 the borrower will be held responsible to the person who buys the property at the mortgage foreclosure sale or to the mortgage holder for damaging the property during the redemption period.

15.

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq* was passed to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuse. 15 U.S.C. § 1692.

16.

The FDCPA is a strict liability statute, which provides for actual or statutory damages upon the showing of one violation. The Sixth Circuit has held that whether a debt collector's conduct violates the FDCPA should be judged from the standpoint of the "least sophisticated consumer." *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006). This standard ensures "that the FDCPA protects all consumers, the gullible as well as the shrewd." *Kistner v. Law Offices of Michael P. Margelefsky, LLC.*, 518 F.3d 433, 438 (6th Cir. 2008).

17.

The FDCPA applies to lawyers regularly engaged in consumer debt-collection litigation. *Heintz v. Jenkins*, 514 U.S. 291 (1995); *Schroyer v. Frankel*, 197 F.3d 1170, 1173-74 (6th Cir. 1999); *See also Kistner*, 518 F.3d 433 (the law firm's owner may also be individually liable).

18.

In *Heintz v. Jenkins*, the Supreme Court refused to defer to the FTC commentaries. *Heintz* addressed the FTC's purported exclusion from FDCPA coverage of attorneys engaged in "legal activities" as opposed to those engaged in "debt collection activities." Rejecting this exclusion, the Supreme Court noted that the commentaries themselves state that they are "not binding on the Commission or the public." *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995).

19.

Under the FDCPA, a "consumer" is any natural person obligated or allegedly obligated to pay any debt. 15 U.S.C. §1692a (3). Plaintiff is a consumer.

20.

Under the FDCPA, "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household

purposes. 15 U.S.C. § 1692a (5). The mortgage debt here is a “debt” under the FDCPA.

21.

Under the FDCPA, a “debt collector” is any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose for 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 to another. 15 U.S.C. § 1692a (6). The Potestivo Defendants are debt collectors under the law and by its own admission in its Foreclosure Notice of Mortgagee Sale.

22.

Under 15 U.S.C. § 1692a (2), the term “communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium.

23.

The Defendants are mortgage debt collectors of defaulted mortgage loans engaged in the business of collecting of consumer debts originally owed to others, including residential mortgage debts. See *Glazer v. Chase Home Finance LLC*, 704 F. 3d 453.

24.

Among the *per se* violations prohibited by the FDCPA is 15 U.S.C. § 1692c(b):

**(b) COMMUNICATION WITH THIRD PARTIES.** Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, *a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.*

25.

The FDCPA states at 15 U.S.C. § 1692d that:

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(4) The advertisement for sale of any debt to coerce payment of the debt.

26.

It is a violation of 15 U.S.C. § 1692d (4) for a debt collector like Potestivo to advertise the sale of any debt to coerce payment of the debt. In violation of the FDCPA and as a debt collector, Potestivo is communicating to the world and the State of Michigan, the private names and defaulted, debt information in every Notice of Mortgage Foreclosure Sale it publicizes in the Notice information not required by the Michigan Foreclosure Statute.

27.

By its express terms, § 1692d provides that "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse *any person* in connection with the collection of a debt." (Emphasis added). We have interpreted this to mean that "any person who has been harmed by a proscribed debt collection practice under § 1692d ... [may] sue for damages under § 1692k(a)(2)(A)." *Montgomery v. Huntington Bank*, 346 F.3d 693, 697 (Court of Appeals, 6th Cir. 2003).

28.

#### 15 U.S. Code § 1692e - False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, **and the failure to disclose in subsequent communications that the communication is from a debt collector**, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.



29.

Under 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.” 15 U.S.C. § 1692e. “A debt collector violates § 1692e, put simply, if the collection practice that he uses has the tendency to confuse the least sophisticated consumer.” *Gillie v. Law Office of Eric A. Jones, LLC*, 785 F.3d 1091, 1106 (6th Cir. 2015) (citing *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006)), rev’d on other grounds sub nom. *Sheriff v. Gillie*, 136 S. Ct. 1594 (2016).

30.

Under 15 U.S.C. § 1692e (6), a debt collector may not use any false, deceptive, or misleading representation making the consumer “subject to any practice prohibited by this subchapter.”

31.

When there is a conflict in the protections offered to a consumer in a Michigan Statute and the Federal Statute, the FDCPA states that the debt collector must follow the Federal Statute when it offers greater protections than the conflicting State Statute:

**§ 816. Relation to State laws [15 USC 1692n]**

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, *a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.*

32.

Article VI of the Constitution of the United States provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound

thereby, anything in the constitution or laws of any state to the contrary notwithstanding.  
U.S. Const. art. VI, cl. 2.

33.

Under 15 U.S.C. § 1692n, the FDCPA does not preempt state laws unless and only to the extent "those laws are inconsistent with any provisions of this subchapter." Importantly, a state law is not "inconsistent" with the FDCPA "if the protection such law affords any consumer is greater than the protection provided by this subchapter." Accordingly, only state laws which make it impossible to comply with both state and federal law (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)), such as where state law requires conduct prohibited by federal law, are preempted.

34.

Where there is "conflict preemption," which is "where state law `stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" embodied by the federal law, (*Gade v. National Solid Wastes*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992)), "[t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985).

35.

The FDCPA preempts state law only when those laws are "inconsistent with any provisions of this subchapter." "A State law is not inconsistent with [the FDCPA] if the protection such law affords any consumer is greater than the protection provided by this subchapter." See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987).

**REGULATION OF MICHIGAN COLLECTION PRACTICES ACT (RCPA)**

36.

The Michigan Consumer Protection Act (RCPA), MCL 445.251 et seq. is an act to regulate

the collection practices of certain persons; to provide for the powers and duties of certain state agencies; and to provide penalties and civil fines.

37.

“Claim” or “debt” means an obligation or alleged obligation for the payment of money or thing of value arising out of an expressed or implied agreement or contract for a purchase made primarily for personal, family, or household purposes. Defendants are third party debt collectors/agencies and attorneys seeking the payment of money for a creditor client based on original obligations between Plaintiff class members and the original obligors in the County of Kalamazoo and the State of Michigan.

38.

“Collection agency” means a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another person, arising out of an expressed or implied agreement. Collection agency includes a person representing himself or herself as a collection or repossession agency or a person performing the activities of a collection agency, on behalf of another, which activities are regulated by Act No. 299 of the Public Acts of 1980, as amended, being sections 339.101 to 339.2601 of the Michigan Compiled Laws. Collection agency includes a person who furnishes or attempts to furnish a form or a written demand service represented to be a collection or repossession technique, device, or system to be used to collect or repossess claims, if the form contains the name of a person other than the creditor in a manner indicating that a request or demand for payment is being made by a person other than the creditor even though the form directs the debtor to make payment directly to the creditor rather than to the other person whose name appears on the form. Collection agency includes a

person who uses a fictitious name or the name of another in the collection or repossession of claims to convey to the debtor that a third person is collecting or repossessing or has been employed to collect or repossess the claim. Defendants are operating in Kalamazoo County and throughout the State of Michigan as “collection agencies” under the RCPA.

39.

“Communicate” means the conveying of information regarding a debt directly or indirectly to a person through any medium. Defendants are communicating with Michigan consumers through letters and Public Mortgage Foreclosure Sale Notices.

40.

“Consumer” or “debtor” means a natural person obligated or allegedly obligated to pay a debt. Plaintiff is a consumer under the RCPA

41.

“Creditor” or “principal” means a person who offers or extends credit creating a debt or a person to whom a debt is owed or due or asserted to be owed or due. Creditor or principal does not include a person who receives an assignment or transfer of a debt solely for the purpose of facilitating collection of the debt for the assignor or transferor. In those instances, the assignor or transferor of the debt shall continue to be considered the creditor or the principal for purposes of this act.

42.

“Person” means an individual, sole proprietorship, partnership, association, or corporation. Defendants each represent regulated persons under § 445.251(g)(xi),

43.

The MCPA's reference to “[a]n attorney handling claims and collections on behalf of a client and in the attorney's own name,” Mich. Comp. Laws § 445.251(g)(xi), is better understood

as encompassing *both* attorneys who handle claims and collections on behalf of a client *and* attorneys who seek to collect a debt owed to themselves or their firms. *Misleh v. Timothy E. Baxter & Associates*, 786 F. Supp. 2d 1330 - Dist. Court, ED Michigan 2011.

**MICHIGAN OCCUPATIONAL CODE (MOC)**

44.

The Michigan Occupational Code (MOC), MCL 339.901 et seq. is an act to regulate the collection practices of certain persons; to provide for the powers and duties of certain state agencies; and to provide penalties and civil fines and requires that collection agencies are licensed in the State of Michigan unless their collection activities are exclusively limited to interstate activities.

45.

“Claim” or “debt” means an obligation or alleged obligation for the payment of money or thing of value arising out of an expressed or implied agreement or contract for a purchase made primarily for personal, family, or household purposes. Defendants are collecting a debt as alleged in Paragraph #11.

46.

“Collection agency” means a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another person, arising out of an expressed or implied agreement. Collection agency includes a person representing himself or herself as a collection or repossession agency or a person performing the activities of a collection agency, on behalf of another, which activities are regulated by Act No. 299 of the Public Acts of 1980, as amended,

being sections 339.101 to 339.2601 of the Michigan Compiled Laws. Collection agency includes a person who furnishes or attempts to furnish a form or a written demand service represented to be a collection or repossession technique, device, or system to be used to collect or repossess claims, if the form contains the name of a person other than the creditor in a manner indicating that a request or demand for payment is being made by a person other than the creditor even though the form directs the debtor to make payment directly to the creditor rather than to the other person whose name appears on the form. Collection agency includes a person who uses a fictitious name or the name of another in the collection or repossession of claims to convey to the debtor that a third person is collecting or repossessing or has been employed to collect or repossess the claim. Defendants are collection agencies as in Paragraph #11 and #12.

47.

“Communicate” means the conveying of information regarding a debt directly or indirectly to a person through any medium. Defendants are communicating with Michigan consumers through letters and by Public Mortgage Foreclosure Sale Notices.

48.

“Consumer” or “debtor” means a natural person obligated or allegedly obligated to pay a debt. Plaintiff is a consumer.

49.

“Creditor” or “principal” means a person who offers or extends credit creating a debt or a person to whom a debt is owed or due or asserted to be owed or due. Creditor or principal does not include a person who receives an assignment or transfer of a debt solely for the purpose of facilitating collection of the debt for the assignor or transferor. In those instances, the assignor or

transferor of the debt shall continue to be considered the creditor or the principal for purposes of this act.

50.

The MOC's reference to "[a]n attorney handling claims and collections on behalf of a client and in the attorney's own name," is better understood as encompassing *both* attorneys who handle claims and collections on behalf of a client *and* attorneys who seek to collect a debt owed to themselves or their firms. *Misleh v. Timothy E. Baxter & Associates*, 786 F. Supp. 2d 1330 - Dist. Court, ED Michigan 2011.

51.

The RCPA, like the FDCPA, prohibits debt collectors from using deceptive, coercive, threatening, abusive, and other repugnant practices for collecting a consumer debt. *McKeown v. Mary Jane M. Elliott P.C., No. 07-12016-BC, 2007 WL 4326825, at \*5 (E.D. Mich. Dec. 10, 2007* (citing *Hubbard v. Nat'l Bond and Collection Assocs., Inc.*, 126 B.R. 422, 426 (D.Del.1991)) held that "§ 445.252(e) applies to Defendant, its analysis is similar to that under § 1692e of the FDCPA, both of which bar misleading and deceptive communications... In light of the similarity between 15 U.S.C. § 1692e and these causes of action, it appears appropriate to view Plaintiff's claims under the same "least sophisticated consumer" standard.

52.

The Plaintiff, on behalf of himself and all others similarly situated, seeks ACTUAL DAMAGES, attorney fees, costs, and all other relief, equitable or legal in nature, as deemed appropriate by this Court in a Class Action context, pursuant to the MOC and the RCPA and all other common law or statutory regimes. The Plaintiff, on behalf of himself and all others similarly situated requests that he and the class members be awarded:

- a. Their Actual Damages suffered by the wrongful foreclosure and breach of privacy

- collecting and publicizing his mortgage debt using **Exhibit 1**,
- b. Injunctive Relief stopping Defendants from continuing their plan and scheme through letters such as **Exhibit 4** and Foreclosure Notices such as **Exhibit 1**,
- c. Attorney fees and costs under the MOC and RCPA.

#### **IV. JURISDICTION AND VENUE**

53.

This court has jurisdiction over this Complaint pursuant to the FDCPA, 15 U.S.C. § 1692k(d), 28 U.S.C. § 1331 and 28 U.S.C. § 1367. Supplemental jurisdiction for Plaintiff's state law claims arise under 28 U.S.C. § 1367. *Baltierra v. Orleans Associates PC*, No. 15-cv-10008 (E.D. Mich. Oct. 7, 2015).

54.

The factual basis of the RCPA claim is the same as the factual basis of the FDCPA claim and this district court has "supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. § 1367(a).

55.

Declaratory relief is available pursuant to under 28 U.S.C. §§ 2201, 2202. Venue is appropriate in this federal district pursuant to 28 U.S.C. §1391(b) because a substantial part of the events giving rise to Plaintiff's claims occurred within this federal judicial district, and because each of the Defendants are subject to personal jurisdiction in the State of Michigan at the time this action is commenced. There is nothing unique or novel about Plaintiff's state claims.

#### **V. FACTUAL ALLEGATIONS**

56.

At **Exhibit 3**, Potestivo Law's website advertises that it handles all aspects of the



foreclosure process along with Collections:

Potestivo & Associates, P.C. is recognized leader for legal solutions in the real estate finance and credit industry in the states of Michigan and Illinois. We handle thousands of foreclosure, bankruptcy, eviction, title resolution, loss mitigation, home retention, REO dispositions, and litigation matters each year.

### Collections

Potestivo & Associates, P.C. provides highly efficient and cost effective results when collecting unpaid debts.

### **COLLECTIONS**

**Please see Exhibit 3, Defendants web site.**

57.

At the *pre-publication stage*, Potestivo sends Michigan homeowners an initial communication letter outlining their intent to collect upon the debt while also providing some options to reinstate or validate the debt under Section 1692g of the 'FDCPA. **Please see Exhibit 4 as an example of the letter sent to the homeowners generally and Mr. Thebert, specifically.**

58.

Initial communication letters under the FDCPA trigger obligations under Section 1692e (11) and Section 1692g of the 'FDCPA. Section 1692e (11), the "*mini-Miranda*" provision, requires an initial communication and any subsequent communication to disclose that the debt collector is "attempting to collect a debt and that any information obtained will be used for that purpose."

37.

Defendant Potestivo sent an initial communication letter at **Exhibit 1** as a debt collector as defined by 15 U.S.C. § 1692a (6). The Letter at **Exhibit 4** was sent to Plaintiff in connection with

the collection of a “debt” as defined by 15 U.S.C. § 1692a (5).

59.

The next part of the foreclosure process after Potestivo sends out the initial dunning letters providing homeowners of their validation and dispute rights is the *publication* stage where Potestivo advertises the Notice of Mortgage Foreclosure Sale at Exhibit 1. This Notice is placed in local newspapers, the internet, county buildings and the Detroit Legal News. This communication is made after the initial communication at Exhibit 4 under Section 1692e (11) of the FDCPA.

60.

Mr. Thebert contacted Defendant Potestivo in writing after receiving Exhibit 4. Defendant promised to get back to him but they never did. Please see Exhibit 5. Defendant continues to post and publicize the Mortgage Sale Notice in its continuing collection efforts.

61.

Here, the Notice was placed in newspapers across the county, in the Detroit Legal News, county buildings and the home of Mr. Thebert starting November 22, 2016. The Notice ran in the paper, Detroit Legal News and county buildings from July 22 through August 5, 2016. Please see Exhibit 1.

62.

As required by 15 U.S. Code § 1692e (11) after the initial communication at Exhibit 1, Defendant Potestivo provided information in the Notice that it attempting to collect a debt and any information obtained would be used for that purpose by stating **BOLDLY** at Exhibit 1 that:

**THIS FIRM IS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT.  
ANY INFORMATION WE OBTAIN WILL BE USED FOR COLLECTING A  
DEBT. Exhibit 1.**

63.

There is no requirement under Michigan's Foreclosure Statute at MCLA 600.3212 that the Foreclosure Notice must contain information that the debt is being collected by a debt collector or that any information obtained will be used for debt collection.

64.

Further, the Notice at **Exhibit 2** states:

**IF THE DEBT WA DISCHARGED IN A BANKRUPTCY PROCEEDING, THIS NOTICE IS NOT AN ATTEMPT TO COLLECT THAT DEBT. If you are in the Military, please contact our office at the number below. Exhibit 1.**

65.

There is no requirement under Michigan's Foreclosure Statute at MCLA 600.3212 that the notice must contain information about bankruptcy or about calling the collection attorney if "you are in the active military."

66.

Further, the Notice at **Exhibit 1** provides information to the anyone reading it that Mr. Thebert is in Default of his mortgage obligation.

67.

There is no requirement under Michigan's Foreclosure Statute at MCLA 600.3212 that the notice must contain information about the homeowner or debtor being in default of his mortgage obligation.

68.

Further, the Notice at **Exhibit 1** provides the address of the homeowner or Mr. Thebert so that anyone reading this notice knows the address of Mr. Thebert where his mortgage is in default.

69.

There is no requirement under Michigan's Foreclosure Statute at MCLA 600.3212 that the notice must contain information regarding the actual address of the person whose home is in default on the mortgage debt.

70.

The information does not just say that Defendant Potestivo is collecting on a debt but rather, Defendant Potestivo states the fact that is it collecting a debt by using bold, capitalized fonts in writing bigger than any other information on the Notice at **Exhibit 1**.

71.

Contrary to the strict prohibitions of the FDCPA at 15 U.S.C. § 1692d, the Foreclosure Notice at **Exhibit 1** provides information to the public such as notice regarding military contact, mini Miranda notice, attorney servicer notices and notice of default of debt that are not required by Michigan Statute.

72.

Contrary to the strict prohibitions of the FDCPA at 15 U.S.C. § 1692e (6) and 15 USC 1692(a), the Foreclosure Notice at **Exhibit 1** breaches the Michigan homeowners' right to privacy and provides private information to the public in violation of 15 U.S.C. § 1692c(b), that Plaintiff is being pursued by a debt collector and that he is in default on a mortgage debt even though that is not required to be stated by Michigan Statute.

73.

There is no compelling or legal reason or Michigan Statute justification that requires Potestivo to publicize that the Thebert family is in default on a mortgage debt and that they are being pursued by an Attorney debt collector collecting upon a debt in violation of 15 U.S.C. § 1692e and 15 U.S.C. § 1692c(b).

74.

Further, the private information that Potestivo is placing in public view is false, misleading and deceptive in that Potestivo is falsely representing that it is only providing the debt information to conform with the Michigan Foreclosure Statute.

75.

When there is a conflict in the protections offered to a consumer in a Michigan Statute and the Federal Statute, the FDCPA states that the debt collector must follow the Federal Statute when it offers greater protections than the conflicting State Statute:

**§ 816. Relation to State laws [15 USC 1692n]**

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, *a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.*

76.

As the Michigan Foreclosure Statute under MCLA 600.3212 directly conflicts with the regulations of federal law, it is preempted by the protections codified under the FDCPA.

77.

Selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt is considered debt collection under *Glazer v. Chase Home Finance LLC*, 704 F.3d.45. “It is the provisions of the FDCPA that by and of themselves determine what debt collection activities are improper under federal law.” *Romea* at 119.

78.

Defendant Potestivo’s website represents that is highly specialized in handling all matters of foreclosure litigation and property recovery so it would know all aspects of Michigan Foreclosure Law and the Federal law regulating debt collection:

For over twenty-six years, Potestivo & Associates, P.C. has been providing superior legal solutions to the real estate finance and credit industry. Headquartered in downtown Rochester, Michigan, the firm also maintains full-service operations in Rochester Hills, Michigan and Chicago, Illinois, with satellite offices providing select services in Grand Rapids, Michigan and St. Louis, Missouri.

Our AV®-rated firm is supported by over 100 team members and handles all aspects of default servicing, including foreclosures, bankruptcies, landlord and tenant, title resolution, loss mitigation and home retention services, REO disposition, and litigation. To better serve our clients, litigation is organized as a separate department, and is capable of complex litigation in addition to default servicing consultation. Potestivo & Associates, P.C. represents Fannie Mae and Freddie Mac in Michigan and Illinois matters. We have also been awarded the Springboard Certification which recognizes our efforts and success in developing a solid management team. It furthermore assures that we have effective procedures and practices in place to achieve positive results for our mortgage servicing clients. Please see Exhibit 3.

79.

Under 15 U.S.C. §§ 1692e (11), The mini Miranda is only required to be placed on “*subsequent communications that the communication is from a debt collector.*” Potestivo was aware that the publicizing of the Foreclosure Notice at Exhibit 1 was debt collection as it followed 15 U.S.C. §§ 1692e (11) by placing the mini Miranda on the Foreclosure Notice:

**“THIS FIRM IS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION WE OBTAIN WILL BE USED FOR THAT PURPOSE”**

80.

Plaintiffs are informed and believe, and on that basis allege that the Defendants have a policy and practice of publicizing to the world and the public in the State of Michigan, private debt collection information of homeowners in default of their mortgage without any regard to Applicable Federal law and the homeowner’s right not to have their debts published to third parties in violation of 15 U.S.C. §§ 1692e, 15 U.S.C. §§ 1692c(b), 15 U.S.C. §§ 1692d (4), and 15 U.S.C. §§ 1692e (6).

81.

Plaintiff is informed and believes based upon the information from Exhibit 1 and Exhibit 4 that Defendants operate a collection agency and a law firm inside the same building while sharing

the same office waiting rooms and letterhead on correspondence to debtors and consumers. This is in violation of the MOC.

82.

In pursuing mortgage debts through the newspapers, Detroit legal news and posting in public places, Defendants are advertising for sale the claims and homes of homeowners in Michigan to force payment on the underlying claim in violation of the RCPA and MOC.

83.

In pursuing mortgage debts through the use of the collection agency and collection attorneys, the Defendants are listing the names of attorneys in written letters and through publications throughout the state in violation of the RCPA and MOC.

84.

The Defendants collect debts from Michigan Residents intrastate and are not exclusively debt collectors of interstate commerce. Defendants are operating in Michigan as a collection agency without a license in violation of MCL 339.904. The Defendants are “regulated persons” as the term is defined and used in the MCPA.

## **VI. CLASS ACTION ALLEGATIONS**

85.

Plaintiff realleges the above pleadings.

86.

The FDCPA Class consists of all persons with a Michigan address that have had their name and address, mortgage debt and the amount of the mortgage debt owed published inside a Foreclosure Notice of Sale (**Examples being Exhibit 1**) in violation of 15 U.S.C. §§ 1692e, 15 U.S.C. §§ 1692c(b), 15 USC 1692e (6) and 15 U.S.C. §§ 1692d (4).

87.

With the FDCPA Class, there are questions of law and fact common to each class, which common issues predominate over any issues involving only individual class members. The principal and common issue is whether Defendant's conduct in connection with the Publicizing that a homeowner owes a defaulted debt, the amount and that a debt collector is involved in a Foreclosure Notice of Mortgage Sale violates the FDCPA.

88.

There are no individual questions here. All Michigan homeowners with defaulted debt are having their mortgage debt default placed out in the open for the world to see in violation of the FDCPA.

89.

Plaintiff will fairly and adequately protect the interests of the class. Plaintiff is committed to vigorously litigating this matter. He is greatly annoyed at being the victim of Defendants' illegal practices and wishes to see that the wrong is remedied. To that end, he has retained counsel experienced in litigating the FDCPA, consumer advocacy and class claims. Neither Plaintiff nor their counsel has any interests which might cause them to not vigorously pursue this claim.

90.

Plaintiff tentatively defines two Michigan classes as all persons in the State of Michigan who, during the six years (RCPA) and (MOC) prior to the filing of this complaint, all Michigan homeowners with defaulted debt are having their mortgage debt default placed out in the open for the world to see by a debt collector law firm that shares its letterhead and its office space with a collection agency in violation of the MOC and RCPA. Plaintiff may subsequently redefine the class definition in light of discovery.

91.

The MOC Class consists of all persons with a Michigan address whose personal mortgage



debt information was publicized by a law firm and attorneys in newspapers, in county buildings, the internet and in the Detroit Legal News ( **Exhibit 1 and Exhibit 4**) to sell the underlying debt and that share letterhead and office space with a collection agency and were Operating in Michigan without a Collection License in violation of MCL 339.915(a), MCL 339.915(d), MCL 339.915(e), MCL 339.915(f)(i)(ii), MCL 339.915(q), MCL 339.915a(a), MCL 339.915a(b), MCL 339.915a(c), MCL 339.915a(d), MCL 339.915a(g)and MCL 339.915a(e) during the six year period immediately preceding the filing of this complaint and the date of class certification.

92.

The RCPA Class all persons with a Michigan address that were pursued for a mortgage debt by a collection agency and attorneys who publicize the Michigan class homeowners mortgage debt in newspapers, in county buildings, the internet and in the Detroit Legal News ( **Exhibit 1 and Exhibit 4**) to sell the underlying debt in violation of MCLA 445.252(a), MCLA 445.252(e), MCLA 445.252(f), MCLA 445.252(d), MCLA 445.252(n) and MCLA 445.252(q) during the six year period immediately preceding the filing of this complaint and the date of class certification.

93.

There are questions of law and fact common to each class, which common issues predominate over any issues involving only individual class members. The principal and common issue is whether Defendants' conduct in collection attempts publicize the mortgage debt default of Michigan homeowners in violation of the MOC and RCPA

94.

There are no individual questions, other than whether the MOC or RCPA class members received one of the offending letters ( **Exhibit 4**) or Public Mortgage Foreclosure Sale Notices letters ( **Exhibit 1**), which can be determined by a ministerial inspection of the records and collection notes of Defendants.

95.

Plaintiff will fairly and adequately protect the interests of the MOC and RCPA class. Plaintiff is committed to vigorously litigating this matter. She is greatly annoyed at being the victim of Defendants' illegal practices and wishes to see that the wrong is remedied. To that end, she has retained counsel experienced in litigating the MOC, RCPA, consumer advocacy and class claims. Neither Plaintiff nor their counsel has any interests, which might cause them to not vigorously pursue this claim.

96.

Plaintiff claims are typical of the claims of the classes, which all arise from the same operative facts and are based on the same legal theories.

97.

A class action is a superior method for the fair and efficient adjudication of this controversy. Most of the consumers who sued by Defendants undoubtedly have no knowledge that their rights are being violated by illegal collection practices. The interest of class members in individually controlling the prosecution of separate claims against Defendants is small because the maximum damages in an individual action are small but illegal percentages of fees and costs. Management of this class claim is likely to present significantly fewer difficulties than those presented in many class claims, e.g, for securities fraud.

98.

Certification of each class is appropriate because:

(a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (d) the representative parties will fairly and

adequately assert and protect the interests of the class; and (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

99.

There are questions of law and fact common to the class members, which common questions predominate over any questions that affect only individual class members. The predominant questions are:

- a. Whether Defendants had a practice of sharing a collection agency space with attorneys.
- b. Whether Defendants shared collection letters with a collection agency and attorneys.
- c. Whether Defendants publicized the private mortgage debt information of Michigan class members in newspapers, county buildings and the internet.
- d. Whether doing the above violated the MOC and RCPA.

100.

Certification of each class also is appropriate because Defendants have acted on grounds generally applicable to each class, thereby making declaratory and injunctive relief appropriate with respect to each class.

101.

Certification of each class under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure is appropriate because:

- (a) The questions of law and fact common to the members of each class predominate over any questions affecting an individual member: and

- (b) A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

102.

Certification of each class under Rule 23(b)(2) of the Federal Rules of Civil Procedure also is appropriate because Defendants have acted on grounds generally applicable to each class, thereby making declaratory and injunctive relief appropriate with respect to each class as a whole.

103.

Plaintiffs request certification of a hybrid class action, combining the elements of FRCP 23(b)(3) for monetary damages and FRCP 23(b)(2) for equitable relief.

104.

Plaintiffs seek specific damages each member suffered and Declaratory and Injunctive Relief from the Court Ordering that this practice of Defendants be stopped and that the collection practice of Defendants be Regulated such that Defendants must obtain a state license to collect debts in Michigan under the MOC.

## **VII. CLAIMS FOR RELIEF**

### **MOC CLASS ALLEGATIONS FOR ACTUAL DAMAGES AND INJUNCTIVE RELIEF**

105.

Defendant has violated the MOC and is collecting debts in Michigan without regulation and a license and has further violated the MOC, but are not necessarily limited to, the following:

- a. Defendants violated MCL 339.915(n) by using a harassing, oppressive, or abusive method to collect a debt, using (*Exhibit 1 and 4*) as mentioned above; and
- b. Defendants violated MCL 339.915(e) Making an inaccurate, misleading, untrue, or deceptive statement or claim in a communication to collect a debt or concealing or not

revealing the purpose of a communication when it is made about collecting a debt at *(Exhibit 1 and 4)*; and

- c. Defendants have violated MCL 339.915(f) Misrepresenting in a communication with a debtor 1 or more of the following:
  - (i) The legal status of a legal action being taken or threatened.
  - (ii) The legal rights of the creditor or debtor at *(Exhibit A)*; and
- d. Defendants have violated MCL 339.915(d) by using forms that may otherwise induce the belief that they have judicial or official sanction is involved such as *(Exhibit A)*; and
- e. Defendants have violated MCL 339.915(q) by failing to implement a procedure designed to prevent a violation by an employee that is not regulated by the MOC as alleged above; and
- f. Defendants have violated MCL 339.915a by communicating with a debtor in a misleading or deceptive manner such as the use of *(Exhibit A)* as alleges above in creating the plan and scheme to charge inflated and illegal interest rates and costs; and
- g. Defendants have violated MCL 339.915a(a) by listing the name of an attorney in a written or oral communication, collection letter, or publication such as *(Exhibit A)*; and
- h. Defendants have violated MCL 339.915a(b) by furnishing legal advice, or otherwise engaging in the practice of law, or representing that the person is competent to do so, or to institute a judicial proceeding on behalf of another such as *(Exhibit A)*; and
- i. Defendant have violated MCL 339.915a(c) by sharing quarters or office space, or having a common waiting room with a practicing attorney or a lender; and
- j. Defendant have violated MCL 339.915a(d) by employing or retaining an attorney to collect a claim. A licensee may exercise authority on behalf of a creditor to employ the service of an attorney if the creditor has specifically authorized the collection agency in

writing to do so and the licensee's course of conduct is at all times consistent with a true relationship of attorney and client between the attorney and the creditor. After referral to an attorney, the creditor shall be the client of the attorney, and the licensee shall not represent the client in court. The licensee may act as an agent of the creditor in dealing with the attorney only if the creditor has specifically authorized the licensee to do so in writing; and

- k. Defendants have violated MCL 339.915a(e) by demanding or obtaining a share of the compensation for service performed by an attorney in collecting a claim or demand or collecting or receiving a fee or other compensation from a consumer for collecting a claim, other than a claim owing the creditor pursuant to the provisions of the original agreement between the creditor and debtor.
- l. Defendants have violated MCL 339.915a(g) by advertising the sale of the Mortgaged Home to force payment of the underlying debt.

**Wherefore**, Plaintiff seeks judgment and INJUNCTIVE RELIEF against Defendants for:

- a. Actual damages based on the illegal interests and costs Defendants charged of each Plaintiff, pursuant to M.C.L. 339.916(1). Triple Actual damages if the Court finds Defendants' scheme and plan alleged above as willful non-compliance. M.C.L. 339.916(2); and
- b. Equitable, declaratory and injunctive relief pursuant to M.C.L. 339.916(1) to stop the plan and scheme of defendants as alleged above using (*Exhibit 1 and 4*); and
- c. Reasonable attorney's fees and court cost pursuant to M.C.L.339.916(2) with judicial sanction and Injunctive Relief.

**RCPA CLASS ALLEGATIONS FOR ACTUAL DAMAGES AND INJUNCTIVE RELIEF**

106.

Defendants have violated the RCPA. Defendant's violations of the RCPA include, but are not necessarily limited to, the following:

a. Defendants violated MCLA 445.252(a) by communicating with Plaintiff and class members in a deceptive manner using the stationery of an attorney to take the Plaintiff and class members' homes using (*Exhibit 1 and 4*) as mentioned above; and

b. Defendants violated MCLA 445.252(n) by using a harassing, oppressive, or abusive method to collect a debt, using (*Exhibit 1 and 4*) as mentioned above; and

c. Defendants violated MCLA 445.252(e) Making an inaccurate, misleading, untrue, or deceptive statement or claim in a communication to collect a debt or concealing or not revealing the purpose of a communication when it is made in connection with collecting a debt at (*Exhibit 1 and 4*); and

d. Defendant has violated MCLA 445.252(f) Misrepresenting in a communication with a debtor 1 or more of the following:

(ii) The legal status of a legal action being taken or threatened.

(ii) The legal rights of the creditor or debtor at (*Exhibit 1 and 4*); and

e. Defendant has violated MCLA 445.252(d) by using forms that may otherwise induce the belief that they have judicial or official sanction is involved such as (*Exhibit 1*); and

f. Defendant has violated MCLA 445.252(a) by communicating with a debtor in a misleading and deceptive manner with forms such as (*Exhibit 1 and 4*); and

g. Defendant has violated MCLA 445.252(q) by failing to implement a procedure designed to prevent a violation by an employee with forms and practices involving (*Exhibit 1 and 4*).

**Wherefore**, Plaintiff seeks judgment and INJUNCTIVE RELIEF against Defendants for:

a. Actual damages based on the illegal interests and costs Defendants charged of each

Plaintiff, pursuant to M.C.L. 445.257 ((1). Triple Actual damages if the Court finds Defendants' scheme and plan alleged above as willful non-compliance. M.C.L. 445.257(2); and

- b. Equitable, declaratory and injunctive relief pursuant to M.C.L. 445.257(1) to stop the plan and scheme of defendants as alleged above using (*Exhibit 1 and 4*); and
- c. Reasonable attorney's fees and court cost pursuant to M.C.L.445.257(2) with judicial sanction and Injunctive Relief.

### **FDCPA RECOVERY CLAIMS FOR RELIEF**

107.

Defendant has violated the FDCPA. Defendants' violations of the FDCPA include, but are not necessarily limited to, the following:

- a. Defendant violated 15 U.S.C. 1692e by using false, deceptive and misleading representations and means in connection with the collection or attempted collection of a mortgage debt using the communication at **Exhibit 1 and 4** above; and
- b. Defendant collected on the debt and violated 15 U.S.C. 1692d with conduct described above that harasses and abuses a homeowner in connection with collecting the mortgage debt through **Exhibit 1 and 4** in publicizing private debt information; and
- c. The Defendant communicated to third parties and the world in publishing foreclosure sale notices with the mortgage debt amount, the homeowner's name and that he is in default through **Exhibit 1** in violation 15 U.S.C. §1692c(b); and
- d. Defendant violated 15 USC 1692e (6) with the false representation or implication that the Notice of Foreclosure Sale in **Exhibit 1** allows the debt collector to violate the FDCPA; and
- e. Defendant violated 15 U.S.C. 1692d (4) by publishing that the sale of the mortgage debt to



the world and the State of Michigan using **Exhibit 1** as mentioned above.

**Wherefore**, Plaintiff seeks judgment against Defendant for:

- a. Statutory and Actual damages for Plaintiff pursuant to 15 U.S.C. 1692k(a)(2)(A) and (B);
- b. Statutory damages for the members of the FDCPA Class, *pro rata*, in the amount of the lesser of \$500,000.00 or one percent centum of the net worth of Defendants pursuant to 15 U.S.C. 1692k(a)(2)(B);
- c. Costs and reasonable attorney's fees pursuant to 15 U.S.C. 1692k(a)(3); and;
- d. Such further relief as the court deems just and proper.

### **VIII. JURY TRIAL DEMAND**

Plaintiff demands a Trial by Jury on all issues.

Respectfully submitted,

December 14, 2016

s/Brian P. Parker  
BRIAN P. PARKER (P48617)  
Attorney for Plaintiff

# EXHIBIT #1

11/29/16

**POST**

**FORECLOSURE NOTICE**

**THIS FIRM IS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION WE OBTAIN WILL BE USED FOR COLLECTING A DEBT. IF THE DEBT WAS DISCHARGED IN A BANKRUPTCY PROCEEDING, THIS NOTICE IS NOT AN ATTEMPT TO COLLECT THAT DEBT. If you are in the Military, please contact our office at the number listed below.**

**ATTN PURCHASERS: This sale may be rescinded by the foreclosing mortgagee for any reason. In that event, your damages, if any, shall be limited solely to the return of the bid amount tendered at sale, plus interest, and the purchaser shall have no further recourse against the Mortgagor, the Mortgagee, or the Mortgagee's attorney.**

**MORTGAGE SALE – Default has been made in the conditions of a certain mortgage made by:**

**Timothy A. Thebert, a Single Person**

**to**

**Standard Federal Bank, N.A., Mortgagee, dated March 10, 2003 and recorded April 7, 2003 in Liber 28703 Page 763 and renewed by affidavit dated November 10, 2016 and recorded November 14, 2016 in Liber 50060 Page 461 Oakland County Records, Michigan. Said mortgage was assigned to: Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2015-14BTI, by assignment dated December 23, 2015 and recorded January 20, 2016, in Liber 48989 Page 97 on which mortgage there is claimed to be due at the date hereof the sum of One Hundred Fifteen Thousand Two Hundred Sixty-Seven and No Cents (\$15,267.00) including interest 2.75% per annum.**

**Under the power of sale contained in said mortgage and the statute in such case made and provided, notice is hereby given that said mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, at public vendue, the Circuit Court of Oakland County at 10:00 A.M. on December 20, 2016**

**Said premises are situated in City of Madison Heights, Oakland County, Michigan, and are described as:**

**Lot 33, Spoon-Shacket Subdivision, according to the plat thereof as recorded in Liber 71, Page 20 of plats, Oakland County Records.**

**Commonly known as 29378 Spoon Ave., Madison Heights, MI 48071**

**The redemption period shall be 6 months from the date of such sale, unless determined abandoned in accordance with MCL 600.3241 or MCL 600.3241a, in which case the redemption period shall be 30 days from the date of such sale, or upon the expiration of the notice required by MCL 600.3241a(c), whichever is later; or unless MCL 600.3240(16) applies.**

**If the property is sold at foreclosure sale under Chapter 32 of the Revised Judicature Act of 1961, under MC**

600.3278, the borrower will be held responsible to the person who buys the property at the mortgage foreclosure sale or to the mortgage holder for damaging the property during the redemption period.

Dated:  
11/22/2016

Wilmington Savings Fund Society,  
FSB, doing business as Christiana  
Trust, not in its individual capacity,  
but solely as trustee for BCAT  
2015-14BITT

Assignee of Mortgagee

Attorneys: Potestivo & Associates, P.C.  
251 Diversion Street  
Rochester, MI 48307  
248-853-4400  
Our File No: 102789

NoticeId 1296846

FullNoticeText Potestivo & Associates, P.C.  
Attorneys 251 Diversion Street  
Rochester, MI 48307  
**FORECLOSURE NOTICE THIS FIRM  
IS A DEBT COLLECTOR  
ATTEMPTING TO COLLECT A DEBT.  
ANY INFORMATION WE OBTAIN  
WILL BE USED FOR COLLECTING A  
DEBT. IF THE DEBT WAS  
DISCHARGED IN A BANKRUPTCY  
PROCEEDING, THIS NOTICE IS NOT  
AN ATTEMPT TO COLLECT THAT  
DEBT. If you are in the Military,  
please contact our office at the  
number listed below. ATTN  
PURCHASERS: This sale may be  
rescinded by the foreclosing  
mortgagee for any reason. In that  
event, your damages, if any, shall  
be limited solely to the return of  
the bid amount tendered at sale,  
plus interest, and the purchaser  
shall have no further recourse  
against the Mortgagor, the  
Mortgagee, or the Mortgagee's  
attorney. MORTGAGE SALE -  
Default has been made in the  
conditions of a certain mortgage  
made by: Timothy A. Thebert, a  
Single Person to Standard Federal  
Bank, N.A., Mortgagee, dated  
March 10, 2003 and recorded April  
7, 2003 in Liber 28703 Page 763  
and renewed by affidavit dated  
November 10, 2016 and recorded  
November 14, 2016 in Liber 50060  
Page 461 Oakland County Records,  
Michigan. Said mortgage was  
assigned to: Wilmington Savings  
Fund Society, FSB, doing business  
as Christiana Trust, not in its  
individual capacity, but solely as  
trustee for BCAT 2015-148TT, by  
assignment dated December 23,  
2015 and recorded January 20,  
2016, in Liber 48989 Page 97 on  
which mortgage there is claimed to  
be due at the date hereof the sum  
of One Thousand Three Hundred  
Two Hundred Sixty Seven and No  
Cents (\$1,367.00) including  
interest 2.75% per annum. Under  
the power of sale contained in said  
mortgage and the statute in such  
case made and provided, notice is  
hereby given that said mortgage  
will be foreclosed by a sale of the  
mortgaged premises, or some part  
of them, at public vendue, the  
Circuit Court of Oakland County at  
10:00 A.M. on December 20, 2016  
Said premises are situated in City  
of Madison Heights, Oakland  
County, Michigan, and are  
described as: Lot 33, Spoon-  
Shacket Subdivision, according to  
the plat thereof as recorded in  
Liber 71, Page 20 of plats, Oakland  
County Records. Commonly known  
as 120 E. Green Ave., Madison  
Heights, MI 48071 The redemption  
period shall be 6 months from the  
date of such sale, unless  
determined abandoned in  
accordance with MCL 600.3241 or  
MCL 600.3241a, in which case the  
redemption period shall be 30 days  
from the date of such sale, or upon**

the expiration of the notice required by MCL 600.3241a(c), whichever is later; or unless MCL 600.3240(16) applies. If the property is sold at foreclosure sale under Chapter 32 of the Revised Judicature Act of 1961, under MCL 600.3278, the borrower will be held responsible to the person who buys the property at the mortgage foreclosure sale or to the mortgage holder for damaging the property during the redemption period. Dated: 11/22/2016  
Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2015-14BTT Assignee of  
Mortgagee Attorneys: Potestivo & Associates, P.C. 251 Diversion Street Rochester, MI 48307 248-853-4400 Our File No: 102789 (11-22)(12-13)

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# EXHIBIT #2

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

THOMAS GRAY,

Plaintiff,

File No. 1:16-cv-237

v.

HON. ROBERT HOLMES BELL

TROTT & TROTT, P.C.,

Defendant.

---

**MEMORANDUM OPINION AND ORDER**

Plaintiff filed a class action complaint alleging violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.* Plaintiff alleges that Defendant used illegal practices in connection with its attempt to collect debts. The matter is before the Court on Defendant’s motion for judgment on the pleadings. (ECF No. 16.)

I.

In reviewing a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), “all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment.” *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 240 (6th Cir. 2011) (quoting *Tucker v. Middleburg–Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008)). Motions for judgment on the pleadings pursuant to Rule 12(c) are analyzed under the same standard as motions to dismiss pursuant to Rule 12(b)(6). *Albrecht*



*v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010). Accordingly, the Court must construe the complaint in the light most favorable to Plaintiff, accept all well-pled factual allegations as true, and determine whether the complaint states a plausible claim for relief. *Id.* The court “need not accept as true legal conclusions or unwarranted factual inferences.” *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (quoting *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999)).

## II.

The FDCPA does not extend to every communication made by a debt collector, but only applies to communications made “in connection with the collection of a debt.” 15 U.S.C. § 1692c. The “[a]nimating purpose of the communication must be to induce payment by the debtor.” *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011). Defendant argues that, based on the plain language of the FDCPA, it did not act in connection with the collection a debt. Defendant claims that it published the notice of sale to satisfy statutory prerequisites and notice provisions governing the foreclosure of the mortgage by advertisement, not to induce Plaintiff into making payments on his defaulted mortgage. The notice of sale did not demand payment, indicate the due date of future payments, or invite a response from Plaintiff. Further, Defendant argues that the boilerplate disclaimer language stating that the notice was from a “debt collector attempting to collect debt” did not transform the notice into a debt-collection activity. Defendants also cite the Federal Trade Commission’s (“FTC”) staff commentary in support of this argument. But this commentary is not binding on the Court. *See Heintz v. Jenkins*, 514 U.S. 291, 298 (1995).

Moreover, Defendant fails to account for *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013). In *Glazer*, the Sixth Circuit held that mortgage foreclosure, whether judicial or otherwise, “is undertaken for the very purpose of obtaining payment on the underlying debt . . . . Accordingly, mortgage foreclosure is debt collection under the FDCPA.” *Id.* at 461. Defendant cites *Goodson v. Bank of America*, 600 F. App’x 422 (6th Cir. 2015) and *Gillespie v. Chase Home Fin. LLC*, No. 3:09-CV-191-TS, 2009 WL 4061428 (N.D. Ind. Nov. 20, 2009), as instructive as to the animating purpose of the notice of sale. In *Goodson*, the Sixth Circuit found that the letter was made to inform plaintiff of the status of his loan, and not to induce payment. *Goodson*, 600 F. App’x at 431-32. Similarly, in *Gillespie*, the court found that the letters were purely informational in nature. *Gillespie*, 2009 WL 4061428, at \*5. But the notice of sale is different here. The purpose was not to inform Plaintiff of the status of the loan, but rather to obtain payment on the underlying debt. Therefore, Defendant’s publication of the notice of sale to satisfy statutory requirements for a foreclosure by advertisement was a debt collection, and the FDCPA applies.

Upon review of the complaint, accepting all well-pleaded factual allegations as true, this Court is able to draw a reasonable inference that Defendant is liable for the misconduct alleged. *Iqbal*, 566 U.S. at 677. First, the notice of foreclosure states in large, bold type that Defendant is “a debt collector attempting to collect a debt, any information we obtain will be used for that purpose.” (ECF No. 11, PageID.119.) Although Defendant argues that this boilerplate language does not transform the communication into one connected to debt collection, this Court disagrees. Further, the complaint alleges that Defendant placed the

notice of mortgage foreclosure sale in newspapers, and that Defendant sold the home at auction and applied the proceeds from the sale to pay down the outstanding debt. Defendant published the notice of sale for the very purpose of obtaining payment on the underlying debt through Michigan's foreclosure by advertisement statute, so it was a communication made in connection with the collection of a debt. Therefore, Plaintiff's well-pleaded complaint states a plausible claim for relief. Accordingly,

**IT IS HEREBY ORDERED** that Defendant's motion for judgment on the pleadings (ECF No. 16) is **DENIED**.

Dated: November 10, 2016

/s/ Robert Holmes Bell  
ROBERT HOLMES BELL  
UNITED STATES DISTRICT JUDGE

# EXHIBIT #3

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OfficeCheck Out Our  
NEW ServicesBusiness Formation  
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Mortgages

MICHIGAN: (248) 853-4400

ILLINOIS: (312) 263-0003

MISSOURI: (312) 263-0003 X4103

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## About Us

For over twenty-six years, Potestivo & Associates, P.C. has been providing superior legal solutions to the real estate finance and credit industry. Headquartered in downtown Rochester, Michigan, the firm also maintains full-service operations in Rochester Hills, Michigan and Chicago, Illinois, with satellite offices providing select services in Grand Rapids, Michigan and St. Louis, Missouri.

Our AV<sup>®</sup>-rated firm is supported by over 100 team members and handles all aspects of default servicing, including foreclosures, bankruptcies, landlord and tenant, title resolution, loss mitigation and home retention services, REO disposition, and litigation. To better serve our clients, litigation is organized as a separate department, and is capable of complex litigation in addition to default servicing consultation. Potestivo & Associates, P.C. represents Fannie Mae and Freddie Mac in Michigan and Illinois matters. We have also been awarded the Springboard Certification which recognizes our efforts and success in developing a solid management team. It furthermore assures that we have effective procedures and practices in place to achieve positive results for our mortgage servicing clients.

While Potestivo & Associates, P.C. excels at achieving aggressive timeline demands, it is never at the expense of legal accuracy. Our timeline management principles focus our team members on meeting deadlines accurately and with the utmost professionalism.

Potestivo & Associates, P.C. strives to provide our clients with unparalleled customer service and legal services that exceed their expectations. This dedication assures that each client matter is handled accurately, effectively, and efficiently.

## Through Technology

In response to the rising importance of technological advancements and developments, we routinely update our case management system to allow for customization and more detailed reporting. We have staff dedicated to pulling and reviewing reports on a daily, weekly, and monthly basis. Additionally, we subscribe to Vendorscape, BKFS, Tempo, Equator, AMN, and other client specific loan tracking websites.

## Through Communication

Effective communication with our clients is a top priority for each team member. Both attorneys and support staff are always available for case monitoring and will provide an immediate response to any questions, updates, or concerns. Potestivo & Associates, P.C. provides high quality, personalized legal services to a diverse population of clients. Bilingual staff members are available to assist our French, Spanish, and Italian speaking clients.

## Licensed to Practice

Potestivo & Associates, P.C. has offices in Michigan and Illinois, and all of our attorneys are licensed to practice in their respective states. Many of our attorneys are licensed in both. If you have matters in any of these courts, please contact us today. We may be able to assist you with these cases in addition to your Michigan and Illinois files.

## Professional Affiliates

Our firm is an active member of several businesses and professional organizations. The firm strongly believes that its affiliation with these entities is critical in order to be a leader in the default servicing industry. Please click here to read about our memberships and affiliations.

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# EXHIBIT #4

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October 28, 2016

Timothy A. Thebert  
2300 S. State Ave.  
Rochester, MI 48307

Timothy A. Thebert  
2300 S. State Ave.  
Rochester, MI 48307  
Our File No. 102789  
Loan No. 0000120261

Dear Timothy A. Thebert

**THIS FIRM IS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION WE OBTAIN WILL BE USED FOR COLLECTING A DEBT. IF THE DEBT WAS DISCHARGED IN A BANKRUPTCY PROCEEDING, THIS NOTICE IS NOT AN ATTEMPT TO COLLECT THAT DEBT.**

Please be advised that this office has been retained by Fay Servicing to commence proceedings to foreclose the mortgage securing the debt. Under the terms of the mortgage, our client has elected to accelerate the total debt due and owing under the mortgage. As of the date of this letter, the total amount of the debt is: \$11,111.00. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check. The amount due must be tendered via certified funds. For further information, including an updated amount, please call 248-853-4400.

Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2015-14BTT is the creditor to whom the debt is owed. Fay Servicing is the servicer of the debt on behalf of Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2015-14BTT. The mortgage loan payments are made to the servicer.

Unless you dispute the validity of the debt, or any portion thereof, within thirty (30) days after receipt of this letter, we will assume that the debt is valid. If you notify our office in writing within the 30-day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt or a copy of a judgment against you, if applicable, and a copy of such verification or judgment will be mailed to you. Also, upon your written request within the 30-day period, we will provide you with the name and address of the original creditor, if different from the current creditor. Upon your written notice of dispute within said period, we must cease collection efforts until verification is mailed to you.

To the extent the debt has been discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this notice is for compliance and/or informational purposes only and/or is notice of the creditor's intent to enforce a lien against the property and does not constitute a demand for payment or an attempt to impose personal liability for such obligation.

If you are a service member who is, or recently was, on "active duty" or "active service," or a dependent of such a service member, you may be entitled to certain legal rights and protections, including protection from foreclosure or eviction, pursuant to the Servicemembers Civil Relief Act (50 USC App. §§501-596), as amended ("the SCRA") and possibly,

HW



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certain similar state statutes. If you believe you may be entitled to rights and protection under the SCRA, please contact our office.

If you have any questions, please do not hesitate to call 248-853-4400.

Sincerely,

Potestivo & Associates, P.C.  
Home Retention & Loss Mitigation Department

# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Lawsuit Says Potestivo & Associates Publicized Private Foreclosure Info](#)

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