NO. 22-1248

In The
United States Court of Appeals
For The Fourth Circuit

MARK ANTHONY GUTHRIE

Appellant,

v.

PHH MORTGAGE CORPORATION

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT SOUTHERN DIVISION

BRIEF OF APPELLANT

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Appellant

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1248 Caption: Mark Guthrie v. PHH Mortgage Corporation

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mark Guthrie
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 3/11/22

Counsel for: Appellant

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction of this proceeding pursuant to 28 U.S.C. §§ 1331, 1332. On March 4, 2022, the District Court granted a Motion for Summary Judgment filed by Appellant PHH MORTGAGE CORPORATION f/k/a OCWEN LOAN SERVICING, LLC d/b/a PHH MORTGAGE SERVICES ("Appellee" or "PHH"). (App. 1596 - 1620). Plaintiff Mark Anthony Guthrie ("Appellant" "Plaintiff" or "Guthrie) filed a Notice of Appeal on March 7, 2022. (App. 1622). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in finding that Plaintiff's North Carolina Debt Collection Act and other state law claims were preempted by the Bankruptcy Code?

2. Whether the District Court erred in finding that Defendant did not violate the North Carolina Debt Collection Act or the Federal Debt Collection Practices Act?

3. Whether the trial court erred in granting summary judgment to Defendant on Plaintiff's Fair Credit Reporting Act claim?

4. Whether the trial court erred in granting summary judgment to Defendant on Plaintiff's Telephone Consumer Protection Act claim?

STATEMENT OF THE CASE

This is a lawsuit filed against PHH for violations of consumer protection laws. The case focuses on PHH's attempt to collect a debt from Plaintiff after Plaintiff had surrendered the Property securing the debt in his Chapter 13 bankruptcy and after he had received his bankruptcy discharge. The lawsuit alleges that PHH and its predecessor Ocwen Loan Servicing improperly contacted Plaintiff numerous times regarding a loan that he no longer had liability on. The lawsuit further alleges that PHH failed to reasonably investigate credit reporting disputes that Plaintiff made to all three (3) credit reporting agencies.

Plaintiff seeks damages, reasonable attorneys' fees and expenses, in redress of (i) PHH's violations of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 *et seq.* (the "UDTPA"); (ii) PHH's violations of the North Carolina Debt Collection Act, N.C. Gen. Stat. § 75-50 *et seq.* (the "NCDCA") or, in the alternative, (iii) PHH's violations of the North Carolina Collection Agency Act, N.C. Gen. Stat. § 58-70-1 *et seq.* (the "NCCAA"); (iv) PHH's violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (the "FCRA"); (v) PHH's violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"); (vi) PHH's violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* (the "RESPA"); (vii) PHH's violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the "FDCPA"); (viii) PHH's

intentional infliction of emotional distress; and, in the alternative, (ix) PHH's negligent infliction of emotional distress; and (x) PHH's negligence.

The parties filed Motions for Summary Judgment and the trial court granted PHH's Motion for Summary Judgment disposing of all Plaintiff's claims. (App. 1596 - 1620).

STATEMENT OF THE FACTS

In 2009, Plaintiff and his former spouse, Tonia M. Guthrie (hereinafter referred to as "Former Spouse"), purchased a home in Jacksonville, North Carolina (the "Property"). (App. 727; Affidavit of Guthrie). In connection with the purchase of the Property, Plaintiff and his former spouse executed a Note (the "Note"). (Id.) Repayment of the Note was secured by a lien on the Property, through the filing of a Deed of Trust (the "Deed of Trust") (the Note, Deed of Trust, and related documents are referred to as the "Loan"). (Id.)

The Bankruptcy and Divorce

Plaintiff filed an individual voluntary petition for relief under chapter 13 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code") on April 21, 2011 (the "Petition Date"), in the United States Bankruptcy Court for the Eastern District of North Carolina (the "Bankruptcy Court") (hereinafter the "Bankruptcy Case"). (Id. at p. 728). Plaintiff's Petition listed his Former Spouse as having a Mississippi address, that he was going through a divorce, and that he was

currently paying his Former Spouse $1,200 in child support. (App. 1427, 1447, 1454-1456, 1461; Guthrie Petition). Prior to the Petition Date, Plaintiff and Former Spouse separated, while Plaintiff remained in the Property with their two (2) minor children. (App. 728; Aff. of Guthrie). On June 14, 2011, Plaintiff and his Former Spouse divorced, as evidenced by a Decree of Divorce. (Id). Plaintiff's Amended Schedules and Statements in the Bankruptcy Case, on June 28, 2011, indicate his marital status as unmarried. (App. 1500, 1504). Plaintiff's Amended Motion for Confirmation of Plan, filed on July 18, 2011, again shows a Mississippi address for Former Spouse. (App. 1520)

On November 30, 2011, GMAC filed a proof of claim in the Bankruptcy Case, Claim No. 13-2, (the "GMAC Proof of Claim"), in which it asserted a claim against Plaintiff, arising from the Loan. (App. 728; Aff. of Guthrie). On August 16, 2011, the Bankruptcy Court entered an Order (the "Confirmation Order") confirming Plaintiff's Chapter 13 Plan of Reorganization (the "Chapter 13 Plan") (the Chapter 13 Plan and the Confirmation Order are referred as the "Confirmed Plan"). The Confirmed Plan provided that Plaintiff would resume making the regular contractual monthly installment payments on the Loan and would cure any prepetition arrearage owed to GMAC over the life of the Chapter 13 Plan. (Id.)

Following his separation and divorce from his Former Spouse, Plaintiff and his minor children relocated to base housing on January 22, 2013. (App. 729; Aff. of

Guthrie). As a result of Plaintiff's relocation onto base housing, Plaintiff's bankruptcy counsel filed a Motion to Allow Surrender of Real Property and Modification of Chapter 13 Plan (the "Motion to Surrender") in the Bankruptcy Case, seeking an Order from the Bankruptcy Court allowing Plaintiff to surrender the Property to GMAC and modify his Confirmed Plan to exclude any further payments to GMAC on account of the Loan. (Id.)

On February 7, 2013, the Bankruptcy Court entered an Order allowing the Motion to Surrender and permitting the modification of the Confirmed Plan to exclude further payments to GMAC on the Loan (the "Surrender Order"). (Id.; App. 754; Surrender Order).

Following entry of the Surrender Order, on March 15, 2013, Appellee PHH, through its predecessor in interest Ocwen Loan Servicing, LLC ("Ocwen"), filed a Transfer of Claim other than for Security (the "Notice of Transfer of Claim") in the Bankruptcy Case. (Id.) Defendant PHH acknowledges that it has no knowledge of what action it took after receiving the Surrender Order. (App. 1081, 1086-1087, 1090: 30(b)(6) Depo of PHH: p. 32:24 to 33:6; p. 42:10 to 42:13)

Ocwen's Actions After the Order of Surrender

Beginning in approximately November 2013, Ocwen began harassing Plaintiff by placing collection telephone calls to him in connection with the Loan on a weekly basis, averaging approximately one (1) to three (3) calls to his cellular

telephone each and every week, which persisted through approximately January 2016 (collectively the "Ocwen Collection Calls"). (App. 729; Aff. of Guthrie). (App. 3). Plaintiff estimates that the total number of phone calls comprising the Ocwen Collection Calls amounts to approximately two hundred twenty-five (225) telephone calls over a period of approximately 113 weeks. (Id.) Defendant PHH lacks any records to demonstrate any calls it made to Plaintiff from February 2013 until October 2, 2014, and the Loan took approximately a year and a half to get "boarded" in Ocwen's system. (App. 1085, 1094: 30(b)(6) Depo of PHH: p. 26:12 to 26:21; p. 82:20 to 82:24).

On several occasions, from approximately March until October 2014, Plaintiff informed Ocwen that he was no longer liable on the Loan and told them to contact his ex-wife for payment. (App. 730; Aff. of Guthrie). Plaintiff repeatedly asked Ocwen to cease contacting him concerning the Loan. (Id.) Plaintiff enlisted the aid of his counsel in the Bankruptcy Case, Douglas M. Strout, Esq., who sent Ocwen at least two (2) separate warning letters informing it that the Confirmed Plan had been modified by the Surrender Order and that, consequently, Ocwen was not entitled to collect, or attempt to collect, amounts owed under the Loan from Plaintiff, even while the Bankruptcy Case remained pending. (Id.; App. 755-756; March 18, 2014 Letter). Ocwen acknowledged receipt of these letters but did nothing to fix the problem. (Id.) In fact, in a letter dated March 13, 2014 (the "March 13, 2014

Letter"), Ocwen acknowledged that it was aware that Plaintiff was represented by Mr. Strout, and further informed Plaintiff that "all communications including verbal, mail, and email will be stopped." (Id.) Notwithstanding this promise, Ocwen or PHH persisted in contacting Plaintiff directly, telephonically and in writing, between 2013 and 2020, both through the continued placement of the Calls, and through numerous pieces of written correspondence. (Id.)

Plaintiff was informed that Mr. Strout called Ocwen in 2014 and spoke with a representative who assured him that Plaintiff's records would be updated to reflect the entry of the Surrender Order, and that no further collection attempts would be made. (Id.) Notwithstanding this telephonic representation, Ocwen never "updated" its records, nor did it cease attempting to collect the Loan from Plaintiff; instead, it continued to call Plaintiff and continued to send Plaintiff written correspondence attempting to collect the Loan. (App. 731; Aff. of Guthrie).

In a letter to Plaintiff dated November 4, 2015 (the "November 4, 2015 Letter"), Ocwen appeared to acknowledge the surrender of the Property in the Bankruptcy Case and informed Plaintiff that "relief [from the automatic stay of 11 U.S.C. § 362] has not been granted on the property. Therefore, we are in the process of filing a Motion for Relief on the property." (App. 731; Aff. of Guthrie). Ocwen never filed any "motion for relief" in the Bankruptcy Case relating to the Property, nor did it take any other action that was promised in the November 4, 2015 Letter.

(Id.; App. 760-764; Discharge Order).

Plaintiff's Discharge

On May 18, 2016, and after successfully completing all of the payments required under his Chapter 13 Plan, as modified by the Surrender Order, Plaintiff received a discharge of debt pursuant to 11 U.S.C. § 1328(a) (the "Discharge"). (Id.) The Discharge relieved, and discharged, Plaintiff from any legal obligation to make any further payments on the Loan. (Id.) Both GMAC and PHH (through Ocwen, its predecessor in interest) received copies of the Discharge, on or about May 20, 2016, as evidenced in the Certificate of Notice. (Id.) On July 20, 2016, the Chapter 13 Trustee in the Bankruptcy Case filed a Final Report, and on August 22, 2016, the Bankruptcy Court entered a Final Decree, closing the Bankruptcy Case. (App. 732; Aff. of Guthrie).

Ocwen/PHH Actions after Discharge

Following entry of the Surrender Order and the Discharge in the Bankruptcy Case, Ocwen, and later PHH continued to seek payment on account of the Loan from Plaintiff through periodic monthly mortgage statements, phone calls, demand letters, and similar correspondence between June 2016 and January 2019. (Id.) Defendant PHH has provided conflicting viewpoints concerning the effect of Plaintiff's Discharge. Defendant has stated that it did not know the effect of the Discharge. (App. 1089; 30(b)(6) Depo of PHH: p.39:6 to 39:11) . Defendant has stated that

Plaintiff was no longer liable on the Loan. (App. 1245: Second 30(b)(6) Depo of PHH: p. 29:16 to 29:18). Defendant is not in possession of a single document indicating it made any change to Plaintiff's loan file to reflect the Surrender Order or the Discharge.

On June 19, 2017, Plaintiff received a document entitled "Mortgage Account Statement" which demanded payment from Plaintiff, on account of the Loan, in the amount of $68,118.79, that was purportedly due to Ocwen on or before July 1, 2017. (App. 732; Aff. of Guthrie). Plaintiff received a similar letter on July 17, 2017. (Id.) When Plaintiff alerted Ocwen of its ongoing violations of the Discharge and various applicable state and federal debt collection laws, Ocwen responded to Plaintiff, in a letter dated August 3, 2017 (the "August 3, 2017 Letter"), that while it was aware of the Bankruptcy Case, the Surrender Order, and entry of the Discharge, that pursuant to its own guidelines, "collection process will continue on loans which are out of bankruptcy." (App. 6; App. 773-774; Aug 3. 2017 Letter).

Ocwen and then PHH sent Plaintiff numerous monthly Mortgage Account Statements and Delinquency Notices stating that he owed them money. (App. 733; Aff. of Guthrie). These statements also indicated charges relating to the Property being vacant. (App. 775-979). Ocwen or PHH also sent Plaintiff payoff coupons with only Plaintiff's name on them, as opposed to Plaintiff's and Former Spouse's names. (App. 733; Aff. of Guthrie; App. 1080: Payoff Coupon). Neither Ocwen

nor PHH ever informed Plaintiff that he did not have personal liability on the Loan. In fact, PHH's counsel in this case has stated that Plaintiff was not discharged from the Loan despite the Discharge and the Surrender Order. (Id.) Ocwen further continued to report to one or more consumer reporting agencies that Plaintiff was delinquent on payments to Ocwen and that the Loan was in default and subject to substantial arrears, notwithstanding that Plaintiff's liability concerning the Loan was discharged in the Bankruptcy Case. (Id.)

The Merger of Ocwen and PHH

Plaintiff was informed that Ocwen merged with PHH on or around January 2019. (Id.) Just like with Ocwen, Plaintiff continued to receive similar collection attempts from PHH. (Id.) Between the period from February 2019 through November 2019, PHH placed, or caused to be placed, numerous collection calls to Plaintiff's cellular telephone, averaging 1 to 2 calls each and every week, for an estimated total of approximately fifty-eight (58) collection calls. (Id.) Plaintiff objected to the phone calls but did indicate sarcastically that they should keep calling so that he could collect more money against them in a lawsuit. (Id.)

Plaintiff was informed by PHH agents during one or more of the calls, that they were using an auto-dialer to call Plaintiff. (Id.) On or about June 4, 2019, a PHH agent or employee who identified herself as "Ebony" called Plaintiff's cellular telephone and demanded payment from Plaintiff in connection with the Loan. (App.

734; Aff. of Guthrie). Ebony confirmed to Plaintiff, during this telephone call, that she and PHH used an automated system to generate such phone calls. (Id.) On or about September 19, 2019, a PHH agent or employee who identified herself as "Cecilia" called Plaintiff's cellular telephone and demanded payment from Plaintiff in connection with the Loan. (Id.) During this telephone conversation, Cecilia also confirmed that she and PHH used an automated system to generate such phone calls. (Id.) Plaintiff reviewed PHH and/or Ocwen's call logs and they do not contain all of the calls between Ocwen/PHH and Plaintiff. (Id.)

At no point in time during any of this written and telephonic correspondence over the span of years did anyone at Ocwen or PHH tell Plaintiff that (i) he did not owe the Loan, or (ii) that the only reason they were calling him or sending him letters was because they were trying to collect the debt from his ex-wife or based on property related expenses. (Id.)

Credit Reporting Agencies

Plaintiff initiated disputes with various credit reporting agencies ("CRA's") regarding the Loan. In March or April of 2015 Plaintiff initiated a dispute with Equifax concerning the Loan. (App. 1044, 1048-1050: Interrogatory Responses of Plaintiff; App. 1150-1184: 2015 Equifax Dispute). The result of the dispute, after receiving feedback from Ocwen, was that the Loan was being accurately reported. In October of 2015, Plaintiff initiated a dispute with Experian concerning the loan.

(Id.; App. 1185-1212: 2015 Experian Dispute). The result of the dispute, after receiving feedback from Ocwen, was that the Loan was being accurately reported. Plaintiff initiated a dispute with Transunion in 2018 concerning the loan. (Id.; App. 1213-1224: 2018 Transunion Dispute). The result of the dispute, after receiving feedback from Ocwen, was that the Loan was being accurately reported.

Following his Discharge, PHH and/or Ocwen continued to report to CRA's that Plaintiff (i) remained liable to Ocwen and/or PHH for all or any portion of the balance of the Loan; (ii) was in default under the terms of the Loan; (iii) was more than one hundred twenty (120) days past due in remitting payments under the Loan to PHH and/or Ocwen; and (iv) was in breach of the terms of the Loan. (App. 8-9). In a consumer report, dated December 31, 2017, Transunion reported that Plaintiff (i) remained indebted to Ocwen for the Loan; (ii) was more than one hundred twenty (120) days past due in performing my obligations under the Loan; (iii) owed a past-due balance of $90,762.00 in connection with the Loan; and (iv) had been past-due for at least one hundred twenty (120) days or more for each and every month between October 2015 and December 2017 (the "2017 Transunion Report"). (App. 735; Aff. of Guthrie).

During late December 2018 or early January 2019, Plaintiff formally disputed the accuracy of the information being supplied by Transunion on his consumer reports concerning the Loan, namely that he was not liable on the Loan, and therefore

was not in default under the Loan, did not owe Ocwen and/or PHH any outstanding balance whatsoever under the Loan, and that he was not late, delinquent, or past due on any payments purportedly owed in connection with the Loan (collectively the "2019 Transunion Dispute"). (App. 735; Aff. of Guthrie). In response to the 2019 Transunion Dispute, and in a letter to Plaintiff dated January 28, 2019 (the "Transunion Dispute Response"), Transunion refused to correctly update his consumer report to display accurate information concerning the Loan. (Id.; App. 996-1003). Rather than update its records to reflect the fact that the Loan had been discharged in his Bankruptcy Case, and that he was not liable to Ocwen or PHH in any amount in connection with the Loan, Transunion instead simply updated its records concerning the Loan to reflect that it was "OK" for the months of September 2018 and October 2018, because the account, according to Transunion, was "AFFCTD BY NTRL/DCLRD DISASTR." (App. 736; Aff. of Guthrie). Nevertheless, Transunion, based on the information it received from PHH/Ocwen continued to report that Plaintiff was at least one hundred twenty (120) days delinquent in payment of the Loan for each and every month from May 2016 through August 2018. (Id.)

In late March 2019 or early April 2019, Plaintiff similarly initiated a dispute with Experian. (Id.) Experian informed Plaintiff that the information concerning the Loan had "been verified as accurate," by PHH and, as of April 10, 2019, Plaintiff,

according to Experian, was indebted to PHH in the principal amount of $239,843, of which the sum of $84,745.00 was past due as of April 2019 and was more than one hundred eighty (180) days past due. (App. 737; Aff. of Guthrie).

Similarly, during the same time period, Plaintiff initiated a dispute with Equifax. (Id.) Equifax informed Plaintiff that the information concerning the Loan was accurate, that he was in substantial arrears under the Loan, and that the Loan was past due and delinquent. (Id.)

Plaintiff's Credit Denials

In early 2019, when attempting to purchase a new vehicle, Plaintiff applied for an extension of credit with SunTrust Bank ("SunTrust") but was denied based upon information SunTrust discovered in his consumer report concerning the Loan, which was provided to SunTrust by Transunion. (Id.) In a letter to Plaintiff dated April 23, 2019 (the "SunTrust Denial Letter"), SunTrust informed Plaintiff that it had taken adverse action with respect to his application for an extension of credit "based in whole or in part on information from this consumer reporting agency," referencing a consumer report provided to SunTrust by Transunion which was dated April 18, 2019. (Id.; App. 1004-1007). Plaintiff received the denial letter well after Transunion provided him their response to his credit dispute on January 28, 2019. (App. 737; Aff. of Guthrie). Specifically, SunTrust cited, as reasons for denying his application, that he had a "Serious delinquency," that the "length of time since

account not paid as agreed" was too long, that a "Proportion of loan balances to loan amounts is too high," and that the "Amount past due on accounts" was too high. (App. 738; Aff. of Guthrie). The 2019 Transunion Report, which predates the report provided to, and acted upon by, SunTrust by approximately three (3) months, reveals that the only account reported as delinquent by Transunion was the account related to the Loan. (Id.) Every other account listed in the 2019 Transunion Report, with the exception of the account associated with the Loan, was reported as "Current; Paid or Paying as Agreed," and no other account in the 2019 Transunion Report reflects any past due balance. (Id.) Plaintiff did not fall behind on any of my obligations to creditors between January 2019 and April 2019. (Id.) Accordingly, the consumer report dated April 18, 2019 and provided to SunTrust by Transunion contained only one account which disclosed a "serious delinquency," or which disclosed a lengthy period of time in which the account was "not paid as agreed," or was otherwise past due: the account related to the Loan, which Plaintiff had previously unsuccessfully disputed, and which Transunion verified with Ocwen and/or PHH. (Id.) Plaintiff was denied credit by SunTrust because of the incorrect credit reporting. (Id.) While Plaintiff eventually did obtain a car loan it was a higher interest rate then what SunTrust would have provided had his credit reporting been accurate. (Id.)

Similarly, in late 2018 and early 2019, Plaintiff had begun applying for

mortgage financing to purchase a residence for himself and his two (2) minor children, in order to relocate from another home. (Id.) As part of his attempt to purchase a new home, he applied for, and was denied, a mortgage loan with Navy Federal Credit Union ("NFCU"). (App. 739; Aff. of Guthrie). In a letter to Plaintiff dated January 29, 2019 (the "NFCU Denial Letter"), NFCU disclosed to Plaintiff that it was denying Plaintiff's application for a mortgage loan, and that the "principal reasons" for denying my application was "Delinquent Past or Present Credit Obligations with Others." (Id.) As further detailed in the NFCU Denial Letter, NFCU based its decision to reject my application "in whole or in part on information obtained in a report from the consumer reporting agency or agencies listed below[,]" which listed the various CRA's. (Id.)

Plaintiff's Security Clearance

Plaintiff is a commissioned officer in the United States Marine Corps, a trained tiltrotor pilot who is certified to operate the MV-22 Osprey, a unique aircraft. (Id.) As part of his job duties, and by virtue of his status as a pilot, he secured and had maintained a top-secret security clearance (hereinafter the "Security Clearance"). (Id.) Additionally, as part of his duties as the XO of VMM-263, Plaintiff was required to act as the commanding officer of VMM-263, a squadron of over two hundred (200) Marines, in the event the commanding officer is deployed or otherwise unavailable. (Id.) As the XO, and when serving as the acting

commanding officer, Plaintiff is required to view, possess, analyze, and otherwise interact with classified information which requires him to maintain his Security Clearance. (App. 740; Aff. of Guthrie). Moreover, as an active pilot, Plaintiff is required to maintain a certain number of flight hours in a flight simulator, which, because of the classified nature of its design and capabilities, also requires—as a condition of use—that he maintain his Security Clearance. (Id.) In the event Plaintiff is unable to maintain his simulator hours, he faces potential grounding (*i.e.*, ineligibility to fly), removal from his current posting as a pilot, and reassignment to a non-flying billet. (Id.) In the event Plaintiff is unable to maintain his Security Clearance, he will also be ineligible to deploy overseas with his unit and may be subject to a permanent reassignment to a non-aviation duty assignment. (Id.)

As a member of the Department of Defense ("DoD") with a Security Clearance, Plaintiff is subject to oversight by the Continuous Evaluation Program ("CEP"). (Id.) The CEP is an ongoing screening process intended to ensure that individuals with a Security Clearance continue to satisfy the requirements of maintaining such a clearance. (Id.) When DoD personnel are granted a Security Clearance, they are automatically enrolled in an information technology system maintained by the DoD called "Mirador." (App. 741; Aff. of Guthrie). Mirador periodically checks available commercial, government, and public records for all individuals holding a Security Clearance, and generates an alert if it uncovers

potentially negative information concerning the holder of the Security Clearance. (Id.). Once Mirador generates an alert, a DoD analyst working as part of the CEP reviews the alert. (Id.)

On or about May 30, 2019, Mirador conducted a routine scan of Plaintiff's credit reports and discovered, in a consumer report prepared and maintained by Transunion, that Plaintiff allegedly had past due accounts with PHH and Ocwen, and that the total delinquent debt associated with these delinquent accounts was $65,000.00 (hereinafter the "CEP Alert"). (Id.) On or about November 18, 2019, and in connection with the CEP Alert, the DoD CAF submitted a letter to the SMO of Plaintiff's prior command, which was located in California, seeking additional information from the SMO regarding the CEP Alert. (App. 742; Aff. of Guthrie). Plaintiff did not become aware of the CEP Alert and the ensuing investigation until early January 2020, when the CEP Alert and letter from DoD CAF were forwarded to the SMO at Plaintiff's command. (Id.)

Since the transmission of the CEP Alert to the SMO at Plaintiff's command, which occurred on or about January 15, 2020, his job duties were grounded to a virtual halt until the investigation was resolved. (Id.) First, Plaintiff's Security Clearance was modified from current and active to an indeterminate status, which has had the practical effect of revoking, in its entirety, his Security Clearance. (Id.) For example, and from approximately mid-January 2020 until the investigation was

finalized a month or two later, Plaintiff's access to the flight simulator was suspended indefinitely because he lacked the requisite Security Clearance to use the simulator. (Id.) Further, during that time, Plaintiff was ineligible to fly, and he was in jeopardy of losing his entitlement to aviation incentive pay moving forward. (Id.) Additionally, Plaintiff was ineligible to participate in certain training drills. (App. 743; Aff. of Guthrie). He also suffered severe and ongoing professional embarrassment, as he has had to explain to numerous other Marines why he could not participate in various activities because of the status of his Security Clearance. (Id.)

Plaintiff's Health Issues

As a result of the extreme stress and rigors of his job as an active-duty Marine, Plaintiff developed gastroesophageal reflux disease ("GERD") beginning in 2006. (Id.) Following his initial diagnosis of GERD in 2006, he successfully mitigated the effect of the disease and was symptom-free and changes to diet and exercise, until approximately four (4) years ago, when, as a result of the acts of Defendants, his GERD symptoms worsened appreciably. The reason his GERD reappeared with more severe symptoms was stress. The primary cause of his stress was Ocwen and PHH efforts to attempt to collect the Loan personally from Plaintiff. (Id.) Plaintiff was forced to change prescriptions to battle with worsening symptoms of his GERD and continues to have GERD symptoms. (Id.)

Plaintiff's anxiety regarding this situation started in approximately 2018 when he began having chest pains. (App. 744; Aff. of Guthrie). Plaintiff went to the Emergency Room several times and was told he had anxiety. (Id.) Plaintiff continues to suffer from anxiety. (Id.) His anxiety has inhibited him in the following ways: caused high blood pressure; general feeling of just being on edge and jumpy; overly worrisome; elevated heart rate; lack of sleep; waking up, and gasping for air. (Id.) Plaintiff is currently seeing a psychologist, Dr. Podziewski, who has diagnosed him with general anxiety disorder. As a result of that he is currently ineligible to fly. (Id.) Plaintiff attributes the worsening of his GERD to be a result of the anxiety and stress caused by PHH/Ocwen's collection attempts. (Id.) Plaintiff has suffered the following damages from PHH and Ocwen's actions: personal embarrassment; professional embarrassment; anxiety; sense of impending doom; high blood pressure; on edge; removed from flight schedule; loss of the ability to purchase a home; denial of credit; and security clearance loss. (App. 1248, 1272-1274, 1282-1296, 1528-1570: Guthrie Depo., p. 87-88, 126-130, 178-180, 223-227, 229-237, 240-267, 275-282)

SUMMARY OF ARGUMENT

Appellant is entitled to reversal of the trial court's Order Granting Summary Judgment to Appellee in its entirety. First, Plaintiff's claims are not preempted by the Bankruptcy Code. Second, Plaintiff has presented straightforward evidence that

in the light most favorable to Plaintiff demonstrates a violation of the NCDCA and the FDCPA by Defendant. Third, Plaintiff has provided ample evidence to show that its claims for violation of the FCRA must be heard by a jury. Finally, Plaintiff has provided evidence that would support each element of a TCPA claim.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of the district court's decision on summary judgment is de novo, and all facts and reasonable inferences are to be viewed in the light most favorable to the non-movant. Sylvia Dev. Corp. v. Calvert Cnty, 48 F.3d 810, 817 (4th Cir. 1995).

II. THE DISTRICT COURT ERRED IN FINDING THAT NORTH CAROLINA'S DEBT COLLECTION ACT AND PLAINTIFF'S OTHER STATE LAW CLAIMS WERE PREEMPTED BY THE BANKRUPTCY CODE

Plaintiff's state law and FDCPA claims[1] are not preempted by the Bankruptcy Code. The Supremacy Clause of the United States Constitution states:

> 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. Federal laws, pursuant to the Supremacy Clause, may

[1] The District Court did not find that the FDCPA was preempted by the Bankruptcy Code, but Appellant will address that argument.

preempt state or local law in any of three ways:

> First, Congress may expressly preempt such laws. Second, in the absence of express preemptive language, Congress' intent to preempt state law may be implied when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." Finally, preemption will also be implied if state or local law "actually conflicts with federal law." Such a conflict occurs "when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

S. Blasting Servs., Inc. v. Wikes Cnty., 288 F.3d 584, 589 (4th Cir. 2002) (citations omitted); see Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983). "[T]he purpose of Congress is the ultimate touchstone in every preemption case," because there is a "basic assumption that Congress did not intend to displace state law." Wyeth v. Levine, 555 U.S. 555, 564 (2009).

Congress has only expressed a desire for the Bankruptcy Code to preempt a state or federal law in one section of the code, making its intent obvious. 11 U.S.C. § 544(b)(2) clearly states a case of preemption by the commencement of a bankruptcy case. Congress plainly uses the word "preempted" in the Bankruptcy Code. Congress could have stated preemption in any other part of the code and yet chose not to, even during the sweeping changes of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), effective October 17, 2005, for most sections. Since "statutes should not be read as a series of unrelated and isolated

provisions," Gonzales v. Oregon, 546 U.S. 243, 273 (2006) (citing Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (internal quotations omitted), this Court should conclude that if Congress had wanted preemption language in any other section of the code, it knew how to draft the statute accordingly. United States v. Davis, 720 F.3d 215, 220 (4th Cir. 2013).

> In its Ron Pair decision, the Supreme Court held that a statute's "plain meaning should be conclusive except in the 'rare cases [in which] the literal application of [the] statute will produce a result *demonstrably* at odds with the intentions of its drafters.'" 489 U.S. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982)) (emphasis added). Under Ron Pair, therefore, a court is obliged to apply the Plain Meaning Rule unless the party contending otherwise can demonstrate that the result would be contrary to that intended by Congress. Requiring a demonstration that the plain meaning of a statute is at odds with the intentions of its drafters is a more stringent mandate than requiring a showing that the statute's literal application is unreasonable in light of bankruptcy policy.
>
> Some bankruptcy commentators maintain that sound bankruptcy policy supports adoption of the actual test. As the Supreme Court has repeatedly emphasized, however, Congress is the policymaker - not the courts. And, put simply, the modification of a statutory provision to achieve a preferable policy outcome is a task reserved to Congress. Id.

RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.), 361 F.3d 257, 269 (4th Cir. 2004)(internal citations omitted). To say that the plain meaning should be ignored to imply a preemption is to graft a Congressional intent onto the Bankruptcy Code that is simply not there.

In the absence of explicit preemption language or provisions, federal courts have recognized two types of implied preemption—field preemption and conflict

preemption. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992). Field preemption occurs "where the scheme of federal regulations is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" Id. (citation omitted). Conflict preemption, on the other hand, applies where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (citations omitted). Courts, however, "should not lightly infer preemption." Int'l Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987).

Every analysis of preemption must begin "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); see Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541-542 (2001). As such, preemption is presumed not to apply to areas which are traditionally regulated by States. See, e.g., Wyeth v. Levine, 555 U.S. 555 (2009) (States' "historic police powers" are presumed not to be superseded by federal law, absent an express statement of Congress); Hillsborough County, Fla. v. Automated Medical Labs., Inc., 471 U.S. 707, 715-16 (1985) ("regulation of matters related to health and safety" are presumed not to be preempted).

Consumer protection laws, including the NCDCA, "have historically fallen into the purview of the states' broad police powers, to which the courts have afforded special solemnity." Pryor v. Bank of Am., N.A. (In re Pryor), 479 B.R. 694, 698 (Bankr. E.D.N.C. 2012) (citations omitted); accord Sacco v. Bank of Am., N.A., No. 5:12-CV-00006-RLV-DCK, 2012 WL 6566681, at *4 (W.D.N.C. Dec. 17, 2012); see, e.g., California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (emphasizing that unfair and/or deceptive business practices as "an area traditionally regulated by the States"); Aguanyo v. U.S. Bank, 653 F.3d 912, 917 (9th Cir. 2011).

None of the state law claims asserted by Plaintiff in the Complaint are preempted by the Bankruptcy Code because, in this case, there is no conflict—express or implied—between the traditional authority of a State to protect and provide tort remedies to their consumers and citizens, Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 248 (1984), and Congress' express Constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4.

Numerous federal courts have adopted the view that the Bankruptcy Code does not preempt, or otherwise preclude, claims for relief based upon the same allegations that would also constitute a violation of the Bankruptcy Code. See, e.g., Dougherty v. Wells Fargo Home Loans, Inc., 425 F. Supp. 2d 599, 608-09 (E.D. Pa. 2006). (holding that claims for relief under the Pennsylvania consumer protection

statute were not preempted by the Bankruptcy Code); Randolph v. IMBS, Inc., 368 F.3d 726, 730 (7th Cir. 2004); Bagwell v. Portfolio Recovery Assocs., LLC, No. 4:08-CV-03229-GTE, 2009 WL 1708227, at *1-2 (E.D. Ark. June 5, 2009); Burkhalter v. Lindquist & Trudeau, Inc., No. 4:04-CV-1803-DJS, 2005 WL 1983809, at *1-2 (E.D. Mo. Aug. 16, 2005) ("[T]he Court is not persuaded that plaintiff's FDCPA claim . . . is precluded by any exclusive remedy available under the bankruptcy code."); Kline v. Mortg. Elect. Security Sys., 659 F. Supp. 2d 940, 950-51 (S.D. Ohio 2009); Evans v. Midland Funding, LLC, 574 F. Supp. 2d 808, 817 (S.D. Ohio 2008); Drnavich v. Cavalry Portfolio Serv., LLC, No. Civ. 05-1022, 2005 WL 2406030, at *1 (D. Minn. Sept. 29, 2005); In re Marshall, 491 B.R. 217, 224-26 (Bankr. S.D. Ohio 2012) (concluding that a claim for relief under the FDCPA, based upon alleged violations of the discharge injunction under 11 U.S.C. §524, *is not preempted* by the Bankruptcy Code); Atwood v. GE Money Bank (In re Atwood), 452 B.R. 249, 253 (Bankr. D.N.M. 2011) ("Enforcement of the automatic stay provisions under the Bankruptcy Code is not Plaintiff's exclusive remedy for collection activity that could also constitute a violation of the FDCPA."); Gunter v. Columbus Check Cashiers, Inc. (In re Gunter), 334 B.R. 900, 904-05 (Bankr. S.D. Ohio 2005); see also Sears, Roebuck & Co. v. Siverly (In re Siverly), 1997 Bankr. LEXIS 2438, at *10-19 (Bankr. S.D. Iowa June 30, 1997); Garcia v. North Star Capital Acquisition, LLC (In re Garcia), 2013 Bankr.

LEXIS 404, at *15-17 (Bankr. W.D. Tex. Jan. 31, 2013); Graber v. Fuqua, 279 S.W.3d 608, 610 (Tex. 2009); Wynne v. Aurora Loan Servs., LLC (In re Wynne), 422 B.R. 763, 771-772 (Bankr. M.D. Fla. 2010); Santander Consumer, USA, Inc. v. Houlik (In re Houlik), 481 B.R. 661, 673, 674 (B.A.P. 10th Cir. 2012) (state collection laws are not preempted by § 362).

The Fourth Circuit has not ruled on this express issue. There is a split amongst the circuits as to whether state and federal consumer protection laws are preempted by the Bankruptcy Code. The Ninth Circuit has found preemption while the Seventh Circuit has not, and the Third Circuit appears to agree with the Seventh Circuit. Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002); Randolph v. IMBS, Inc, 368 F.3d 726 (7th Cir., 2004); Simon v. FIA Card Servs., N.A., 732 F.3d 259, 274 (3d Cir. 2013).

In Randolph v. IMBS, Inc, 368 F.3d 726 (7th Cir. 2004) the Second Circuit analyzed Walls:

> The district court wrote that § 362(h) "preempts" § 1692e(2)(A), but this cannot be right. One federal statute does not preempt another. See Baker v. IBP, Inc., 357 F.3d 685, 688 (7th Cir.2004). When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other--and repeal by implication is a rare bird indeed. See, e.g., Branch v. Smith, 538 U.S. 254, 273 (2003); J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc., 534 U.S. 124, 141-44 (2001) (collecting authority). It takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other. Preemption is more readily inferred, so decisions such as Cox v. Zale--which held that bankruptcy principles come from federal rather than state law--are not informative about

> which federal laws apply to what transactions. The district court did not find any clearly expressed decision that the Bankruptcy Code displaces the FDCPA, and the debt collectors do not contend that Congress made such a decision. The argument, rather, is one based on the operational differences between the statutes. These do not, however, add up to irreconcilable conflict; instead the two statutes overlap, and if the plaintiff shows a more serious transgression--the willful violation to which § 362(h) refers--then more substantial sanctions (such as punitive damages) are available. It is easy to enforce both statutes, and any debt collector can comply with both simultaneously.

Id. at 730. There is no pre-emption without conflict. The Randolph Court continues:

> The Bankruptcy Code of 1986 does not work an implied repeal of the FDCPA, any more than the latter Act implicitly repeals itself. * * * To say that only the Code applies is to eliminate all control of negligent falsehoods. Permitting remedies for negligent falsehoods would not contradict any portion of the Bankruptcy Code, which therefore cannot be deemed to have repealed or curtailed § 1692e(2)(A) by implication. To the extent that Walls holds otherwise, we do not follow it.

Id. at 732, 733. In the wake of these two circuit court cases, Congress did not alter § 362 or any other part of the Bankruptcy Code to explicitly preempt state and federal collection laws that supplement the Bankruptcy Code, even though it uses explicit preemption in § 544.

This Court should follow Randolph in finding that the Bankruptcy Code does not preempt Plaintiff's claims. Finding otherwise would prevent someone who has filed bankruptcy from ever proceeding against a creditor in his bankruptcy for violations of numerous consumer protection laws, even if that bankruptcy was closed years or decades ago. Moreover, a finding of preemption would eliminate a plaintiff's right to a jury trial and limit a plaintiff's recovery against a creditor to

whatever a bankruptcy judge decided in a Motion for Sanctions, and only after the bankruptcy court had allowed the bankruptcy case to be opened, and after the plaintiff was required to file a quarterly fee during the pendency of the Motion for Sanctions. Quite simply, after Plaintiff was discharged from his bankruptcy in 2016, he should be given the same rights as any other consumer.

The Fourth Circuit district courts tend to follow the Second Circuit's opinion in Randolph, with the exception of the Northern District of West Virginia. Gamble v. Fradkin & Weber, P.A., 846 F. Supp. 2d 377, 381-83 (D. Md. 2012) (damages were granted for post-discharge violations of the FDCPA).

> The majority of Courts have held that the Bankruptcy Code and FCRA or the FDCPA are not so irreconcilably in conflict that one displaces the other. Randolph v. IMBS, Inc., 368 F.3d 726, 730 (7th Cir. 2004). * * * The Court finds the Randolph line of cases, holding that there is not an irreconcilable conflict between the statutes, to be the better reasoned of these authorities. Accordingly, the Court finds that it has subject matter jurisdiction over the Debtor's claim.

In re Jones, 2011 Bankr. LEXIS 4083, at *2-3 (Bankr. E.D. Va. Oct. 21, 2011). Similarly, the federal courts of North Carolina have not found preemption in factual situations similar to the present case. Waggett v. Select Portfolio Servicing, Inc. (In re Waggett), No. 09-4152-8-SWH, 2015 WL 1384087 (Bankr. E.D.N.C. 2015); Winter v. Suddenlink (In re Winter), 2015 Bankr. LEXIS 2839 (Bankr. E.D.N.C. 2015); Sipe v. Conseco, 2001 Bankr. LEXIS 2199 (Bankr. W.D.N.C. 2001). The United States Bankruptcy Court for the Eastern District of Virginia, in In re P.K.R.

Convalescent Centers, Inc., observed the following:

> Congress did not place preemptive language in the Bankruptcy Code, nor did Congress intend that the Bankruptcy Code be so pervasive that it occupy the field of debtor/creditor relations. Therefore, in order for this court to conclude that the Bankruptcy Code preempts the Virginia law, the court must conclude that an actual conflict exists between a specific provision of the Bankruptcy Code and section 32.1–329 of the Virginia Code.

189 B.R. 90, 93 (Bankr. E.D. Va. 1995).

Moreover, the vast majority of district courts in other circuits have either (i) found no preemption in similar situations as the one before this Court or (ii) would appear to support the Seventh Circuit's opinion in Randolph.

First Circuit: Holland v. EMC Mortg. Corp. (In re Holland), 374 B.R. 409, 442-443 (Bankr. D. Mass. 2007); see also Rodriguez v. R & G Mortg. Corp. (In re Rodriguez), 377 B.R. 1, 7-8 (Bankr. D.P.R. 2007) (RESPA applies in bankruptcy); McGlynn v. The Credit Store, Inc., 234 B.R. 576, 584 (D.R.I. 1999) (Court lacked jurisdiction over plaintiff's FDCPA claim because such claim could have no effect on the bankruptcy estate); Goldstein v. Marine Midland Bank, N.A. (In re Goldstein), 201 B.R. 1, 5 (Bankr. D. Me. 1996).

Second Circuit: Vincent v. Money Store, 736 F.3d 88, 110-111 (2d Cir. 2013) (affirming summary judgment for Plaintiffs' claims under the FDCPA and TILA when Defendants attempted to collect on debts discharged in bankruptcy).

Third Circuit: Simon v. FIA Card Servs., N.A., 732 F.3d 259, 274 (3d Cir.

2013) (following Seventh Circuit Approach); Dougherty v. Wells Fargo Home Loans, Inc., 425 F. Supp. 2d 599, 604-06 (E.D. Pa. 2006) (post-discharge collection); Lambert v. Schwab (In re Lambert), 438 B.R. 523 (Bankr. M.D. Pa. 2010) (no bankruptcy court jurisdiction over post-petition claims under FDCPA).

Fifth Circuit: Eastman v. Baker Recovery Servs. (In re Eastman), 2009 Bankr. LEXIS 4352, 6-7 (Bankr. W.D. Tex. Apr. 17, 2009) (following Randolph); see also In re Rogers, 391 B.R. 317, 325-26 (Bankr. M.D. La. 2008).

Sixth Circuit: Evans v. Midland Funding LLC, 574 F. Supp. 2d 808, 816-817 (S.D. Ohio 2008) (following Randolph); Marshall v. PNC Bank, N.A. (In re Marshall), 491 B.R. 217, 224 (Bankr. S.D. Ohio 2012) (following Randolph); Gunter v. Columbus Check Cashiers, Inc. (In re Gunter), 334 B.R. 900, 903-05 (Bankr. S.D. Ohio 2005) (post discharge collection).

Eighth Circuit: Clark v. Brumbaugh & Quandahl, P.C., 731 F. Supp. 2d 915, 920-921 (D. Neb. 2010) (following Randolph); Donnelly-Tovar v. Select Portfolio Servicing, Inc., 945 F. Supp. 2d 1037, 1040 (D. Neb. 2013) (allowing Debtor to file a class action under the FDCPA for collection of a debt discharged in bankruptcy).

Tenth Circuit:

> Plaintiff's claims under the FDCPA, the NM-UPA, and New Mexico common law do not raise substantive rights created under bankruptcy law, can exist independently of a pending bankruptcy case, and are not otherwise defined as core proceedings under 28 U.S.C. §157(b)(2). Thus, for the Court to have jurisdiction over those claims, they must fall within the Court's non-core, "related-to" jurisdiction.

Atwood v. GE Money Bank (In re Atwood), 452 B.R. 249, 254-255 (Bankr. D.N.M. 2011); Payne v. Mortg. Elec. Registration Sys., Inc. (In re Payne), 387 B.R. 614, 634 (Bankr. D. Kan. 2008) (RESPA applies in bankruptcy); King v. 1062 LLP (In re King), 2010 Bankr. LEXIS 3415, 2010 WL 3851434 (Bankr. D. Colo. 2010); Vogt v. Dynamic Recovery Services (In re Vogt), 257 B.R. 65 (Bankr. D. Colo. 2000) (bankruptcy court did not have jurisdiction to hear or adjudicate debtor's FDCPA claim).

Eleventh Circuit: Bacelli v. MFB, Inc., 729 F. Supp. 2d 1328, 1331-1332 (M.D. Fla. 2010) (following Randolph).

> The *Randolph* court addressed the interplay between the Bankruptcy Code and the FDCPA. This Court agrees with the *Randolph* court's holding that "the Bankruptcy Code of 1986 does not work an implied repeal of the FDCPA" and that the two acts can coexist under appropriate circumstances. Id. at 732-33.

Peed v. Seterus, Inc. (In re Peed), 2012 Bankr. LEXIS 2507, 8-9 (Bankr. S.D. Ala. June 4, 2012); see also Rios v. Bakalar & Assocs., P.A., 795 F. Supp. 2d 1368, 1369-70 (S.D. Fla. 2011) (noting that "[t]he Walls decision does not explain how the Bankruptcy Code repealed the FDCPA").

The claims that Plaintiff has asserted in this case do not conflict, in any manner, with the Bankruptcy Code. If anything, they serve to supplement the Bankruptcy Code and North Carolina has several statutes which supplement the Bankruptcy Code. N.C. Gen. Stat. § 1-245 (gives notice that judgments which have

been discharged in bankruptcy no longer have the power to create a lien upon property of the discharged debtor); In re Clowney, 19 B.R. 349, 353-354 (Bankr. M.D.N.C. 1982). This clearly supplements 11 U.S.C. § 524. A quick survey of North Carolina law shows several statutes that supplement the Bankruptcy Code which will theoretically be deemed unconstitutional should the Court find that all state laws which supplement the Bankruptcy Code are preempted. Some examples include: N.C. Gen. Stat. § 25-9-102(13) (defining types of "proceeds" under U.C.C. Article 9 and specifically rejecting the definition determined by Hastie v. FDIC, 2 F.3d 1042 (10th Cir. 1993) for proceeds under 11 U.S.C. § 552(b)); N.C. Gen. Stat. § 25-9-102(21) (deriving new definition for "new value" from 11 U.S.C. § 547(a)); N.C. Gen. Stat. § 22-4 (determining the evidentiary rule regarding a promise to pay a discharged debt); N.C. Gen. Stat. § 58-70-115(1) (proscribing collection agencies from collecting debts discharged in bankruptcy); N.C. Gen. Stat. § 75-55(1) (proscribing original creditors from collecting debts discharged in bankruptcy); N.C. Gen. Stat. § 59-65(c)(2) (determining obligations of the partner of a debtor in bankruptcy); see also In re Thomas, 211 B.R. 838 (Bankr. S.C. 1997).

The allegations in the Complaint forming the basis of the claims for relief asserted therein, are identical to those in Dougherty. In Dougherty, and post-discharge, a chapter 13 debtor commenced an adversary proceeding against Wells Fargo Home Mortgage, Inc. ("Wells Fargo"). Wells Fargo moved to dismiss the

complaint, arguing that the state law claims were preempted by the Bankruptcy Code. Id. at 608. The court denied Wells Fargo's motion to dismiss, finding that:

> Plaintiff's state law claims do not presuppose violations of the Bankruptcy Code. Consequently, there is no risk of conflict between enforcement of the state laws and enforcement of the federal bankruptcy laws. Indeed, merely because a Plaintiff brings a state law claim in the context of a bankruptcy matter does not justify preemption of those claims, particularly where the underlying facts of the state law claim are not based on a violation of the Code.
>
> In addition, Defendant's alleged misconduct occurred after Plaintiff's Plan had been confirmed by the bankruptcy court and the bulk of the bankruptcy proceedings had already occurred. There is thus little risk that allowing Plaintiff's state law claims for breach of contract and unfair trade practices to go forward will disrupt the uniform application of the federal bankruptcy laws or contravene congressional purpose. This is in contrast to those cases in which the alleged misconduct occurred early on in bankruptcy proceedings.

Id. at 609 (criticizing Wells Fargo's reliance on Pertuso v. Ford Motor Credit Co., 233 F.3d 417 (6th Cir. 2000)).

Upon completion of the payments under the Confirmed Plan, as modified by the Surrender Order, Plaintiff's Discharge was entered, pursuant to 11 U.S.C. § 1328(a), relieving and absolving Plaintiff of any personal liability on the Loan. 11 U.S.C. § 1328(a); In re Sharak, 571 B.R. 13, 20 (Bankr. N.D.N.Y. 2017) ("By . . . choosing to surrender the Real Property, rather than retain it and treat the Mortgage Debt as a long-term debt subject to § 1322(b)(5), Debtor did not invoke the exception to discharge under § 1328(a)(1). As such, Deutsche Bank's Mortgage Claim is subject to discharge under § 1328(a) and Debtor is no longer personally liable for

the Mortgage Debt.")

In the instant case, Plaintiff's claims for relief are premised solely on the continuous, negligent, deceptive and unlawful debt collection activities of Defendant, all of which occurred after the Surrender Order, and almost all of which occurred after Plaintiff received his Discharge and the Bankruptcy Case was closed. Defendant, through its actions, exposed itself to liability under the Bankruptcy Code and North Carolina law for their unlawful, deceptive, unfair and/or negligent collection practices.

Similar to Dougherty, Plaintiff has received his discharge and there is no danger that allowing him to assert the aforementioned claims for relief under North Carolina law would interfere with the administration of the Bankruptcy Case nor would it stand as an obstacle to, or otherwise impede, the accomplishment and execution of the purposes and objectives of the Bankruptcy Code. 425 F. Supp. 2d at 609; accord Marshall, 491 B.R. at 225-26. Specifically, the NCDCA and the discharge injunction provisions under § 524 of the Bankruptcy Code are both aimed at inappropriate debt-collection activity; however, each theory for relief has different standards and different remedies. See Atwood, 452 B.R. at 252-53. The operational differences between general negligence principles, the NCDCA, and the Bankruptcy Code addressing violations of the discharge injunction do not present any irreconcilable conflict. As a result, both statutes can easily be enforced, and

Defendant can simultaneously comply with both the provisions of the Bankruptcy Code and applicable North Carolina law. See Drnavich, 2005 WL 2406030, at *1.

Accordingly, for the reasons stated herein, Plaintiff's state law claims for relief, all of which are based upon North Carolina law, asserted by Plaintiff in the Complaint are not preempted by the Bankruptcy Code. These claims for relief do not conflict, directly or indirectly, with the purposes or objectives of the Bankruptcy Code.

III. THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANT DID NOT VIOLATE THE NORTH CAROLINA DEBT COLLECT ACTION OR THE FEDERAL DEBT COLLECTION PRACTICES ACT

It is unclear why the Court found that there were no violations by Defendant of the NCDCA or FDCPA. It appears as if the District Court pigeonholed Plaintiff's NCDCA claim into only two issues.[2]

> To the extent it is not otherwise preempted, plaintiffs N.C. Debt Collection Act claim is premised on two alleged violations: failing to disclose in all communications from PHH that the communications were from a debt collector for the purpose of collecting a debt and communicating with plaintiff after defendant had been notified that counsel represented plaintiff.

(App. 1608, District Court Summary Judgment Order). It appears as if the District Court found that PHH could contact Plaintiff (i) in order to contact his wife or (ii) regarding the Property.

[2] Plaintiff does not dispute that if Defendant is a "debt collector" that Plaintiff's UDTPA and NCCAA claims must fail

However, none of the communications made by Defendant to Plaintiff were based on those *legally generated reasons*. Said another way, in no communication did Defendant ever inform Plaintiff that that the only reason Defendant was contacting Plaintiff was to discuss property related expenses or because Defendant intended to only collect the Loan against his wife. (App. 734, Aff. of Guthrie). The record evidence is that Defendant knew that Plaintiff was divorced, that his wife was living in Mississippi, and that the Property was vacant as it was charging fees related to the abandonment of the Property. (App. 730; Guthrie Aff.; App. 1447, 1454-1456, 1481; App. 1500; App. 775-979; Ex. 10, Mortgage Statements; App. 1100; Ex. 2, Comment Log (stating that on November 10, 2014, the Property was inspected and reported as: "Occupancy Status: Vacant"). Every communication made by Defendant was an attempt to collect the full debt from Plaintiff and that Defendant consistently represented to third parties, *i.e.*, the credit reporting agencies, that Plaintiff owed the full debt. There is no record evidence that Defendant took any action during its servicing of the Loan to indicate in its records that the only reason for contacting Plaintiff was related to the property and property related expenses. (App. 734, Aff. of Guthrie; App. 1236-1240; Second 30(b)(6) Deposition of Defendant, pp. 13:1 to 18:13). Defendant's position was legally created to serve as a defense to this lawsuit. Surely, if Defendant had been contacting Plaintiff solely related to the Property or property related expenses, they would have sent him a

statement just for what he owed or contacted him to attempt to collect property related expenses. The only evidence in this matter is that Defendant was always attempting to collect the full amount of the Loan from Plaintiff and was reporting to third parties that Plaintiff owed the full amount of the Loan.

Defendant repeatedly violated the NCDCA by

A. Repeatedly misrepresenting the character and legal status of the Loan, in violation of N.C. Gen. Stat. § 75-54(4);

B. Attempting to collect from Plaintiff amounts allegedly owed in connection with the Loan, when the same were not actually owed by Plaintiff, in violation of N.C. Gen. Stat. § 75-54(4);

C. Communicating with Plaintiff when PHH had been notified by the undersigned that the undersigned represents Plaintiff, in violation of N.C. Gen. Stat. § 75-55(3);

D. Falsely representing to Plaintiff that amounts allegedly owed in connection with the Loan would be increased by the addition of attorneys' fees, collection fees, and other fees, services, or charges, none of which PHH was legally entitled to assess against, or collect from, Plaintiff, all in violation of N.C. Gen. Stat. § 75-54(6);

If Defendant's harassing conduct over seven years does not constitute a violation of the NCDCA or the FDCPA then nothing will. If Defendant PHH had intended to remove Plaintiff from any personal liability on the Loan or acknowledge that the Discharge relieved his personal liability with respect to the Loan, they should have (i) removed his name from the correspondence seeking the collect on the Loan, (ii) not contacted him to attempt to collect on the Loan, (iii) ensured that they were

not reporting to the credit reporting agencies that he owed the Loan and that it was past due and (iv) when they received his credit reporting dispute informed the credit reporting agencies that he was not liable on the Loan. (App. 746; Aff. of Guthrie). No representative or employee of Defendant PHH or Ocwen ever informed Plaintiff that (i) they were only contacting Plaintiff to discuss the Property or (ii) they were contending he was responsible for property related expenses. In fact, on several occasions, Ocwen or PHH indicated to Plaintiff that he was liable on the Loan and needed to pay the past due amount to reinstate the Loan. (Id.) Defendant PHH has provided conflicting viewpoints concerning why it was contacting Plaintiff.

a. Defendant PHH has stated that neither it nor Ocwen took any attempts to collect any amounts they were contending were owed to them after April 21, 2011. (App. 1082: 30(b)(6) Depo of PHH: p. 19:13 to 19:16)
b. Defendant PHH has stated that it does not know what if any attempts it made to collect any amounts, they were contending were owed to them after April 21, 2011. (App. 1082-1083: 30(b)(6) Depo of PHH: p. 19:21 to 20:1)
c. Defendant has stated that it could not collect any pre-bankruptcy amounts owed by Mr. Guthrie. (App. 1239: Second 30(b)(6) Depo of PHH: p. 17:1 to 17:11)
d. Defendant acknowledges that when their agent says they are trying to collect on a debt in a conversation with Mr. Guthrie, they are trying to collect on a debt. (App. 1572: 30(b)(6) Depo of PHH: p.70:6 to 70:8)

Defendant PHH is not aware of a single communication where Mr. Guthrie was informed that PHH was only trying to collect on post-discharge property related expenses nor is there anything in PHH's records to indicate that was its position.

(App. 513-514, 516-517: Second 30(b)(6) Depo of PHH: p. 17:22 to 18:13; 20:18 to 21:18). Defendant PHH is not aware of a single communication where Mr. Guthrie was informed that PHH was only attempting to collect a debt from his Former Spouse nor is there anything in PHH's records to indicate that was its position. (App. 1246-1247-521; Second 30(b)(6) Depo of PHH: p. 31:18 to 32:5). PHH had the ability to segregate out the amounts on the Loan that were allegedly owed by Plaintiff as opposed to his Former Spouse but made no such segregation. (App. 1244-1245: Second 30(b)(6) Depo of PHH: p. 28:2 to 29:5).

It appears as if the District Court agreed with Defendant's legally flawed argument, with no supporting evidence that Plaintiff remains responsible to repay Defendant for property related expenses following entry of the Discharge. (App. 1608-1609). The District Court appears to rely on In re Rose, 512 B.R. 790 (W.D.N.C. Bankr. 2014) for the proposition that because Plaintiff remained the record owner of the Property, which was subject to the Deed of Trust, the amounts paid by PHH for insurance, taxes, or other maintenance on the Property were not affected by Plaintiff's Discharge and Plaintiff remains personally liable to PHH for such amounts. (Id.)

In Rose, the court held that "the surrender of property in bankruptcy does not serve to pass ownership of the Residence to a lender; nor does it request the lender to foreclose its mortgage." Rose, 512 B.R. at 793. In coming to that determination,

the Court discussed the potential consequences of forcing a lender to take title to a surrendered property or allowing a debtor to unilaterally convey a surrendered property to a lender. Id. at 796. The Court gave several examples which were instances in which the secured party or lender *refused to pay or otherwise incur debts to third parties*, such as governmental agencies, forgoing the opportunity to protect its interest in the collateral. Id. (citations omitted). In such instances, the debtor, as title owner to the property, would be personally liable *to the relevant the third parties for such debts*. See Canning v. Beneficial Maine, Inc. et al. (In re Canning), 442 B.R. 165, 172 (Bankr. D. Me. 2011) (discussing the consequences of the secured creditor/lender failing to foreclose and refusing to pay taxes). It is also worth noting that the holding in Rose exemplifies the predicament of debtors like Plaintiff, *e.g.*, being unable to make a lender foreclose or otherwise take title to property, while worrying if they are going to be pursued by third parties for property related expenses if the lender refuses to pay them.

Following entry of a debtor's discharge, the only remedy available to a secured lender with respect to collection of such costs is recovery from the surrendered property and any equity therein. See, e.g., Todt v. Ocwen Loan Servicing, LLC (In re Todt), 567 B.R. 667, 680 n.7-8 (Bankr. D.N.H. 2017) ("As a result of their discharge, the Debtors had no obligation to obtain hazard insurance on the Property. The Court notes that the letters Ocwen sent to the Debtors relate to

obligations that arose under the note and mortgage documents, *i.e.*, *expenses for insurance and escrow related to preserving the Property*." (internal citations omitted) (emphasis added)); Whitaker v. Bank of Am. (In re Whitaker), No. 09–50301, 2013 WL 2467932, at *10, 2013 Bankr. LEXIS 2328, at *31-32 (Bankr. E.D. Tenn. June 7, 2013). The distinction between *in personam* and *in rem* liability following discharge has been repeatedly and uniformly acknowledged by bankruptcy courts. See, e.g., Thomas v. Seterus Inc. (In re Thomas), 554 B.R. 512, 521 (Bankr. M.D. Ala. 2016) (discussing the distinction between *in personam* and *in rem* liability following discharge and collecting cases regarding the same); In re Henriquez, 536 B.R. 341, 348 (Bankr. N.D. Ga. 2015); Lemieux v. America's Servicing Co. (In re Lemieux), 520 B.R. 361, 367 n.5 (Bankr. Mass. 2014) ("To be clear, the Bankruptcy Code does not discharge the ongoing burdens of owning property. But the desirability of maintaining liability insurance for the premises does not change the fact that, as a result of their discharges, the Lemieuxs have no obligation to obtain hazard insurance on the Groton property and may choose not to do so." (internal citations and quotations omitted)); see also Navarro v. Banco Popular De Puerto Rico (In re Navarro), 563 B.R. 127 (Bankr. P.R. 2017).

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT ON PLAINTIFF'S FAIR CREDIT REPORTING ACT CLAIM

It is unclear why the District Court dismissed Plaintiff's FCRA claim. The

District Court appears to have found that Plaintiff suffered no damages. (App. 1611-1615, District Court Summary Judgment Order). In this case, the record evidence is that in 2015 Plaintiff initiated disputes with Equifax and Transunion concerning the Loan. (App. 1044-1046; App. 1150-1212). The result of the disputes, after receiving feedback from Defendant, was that the Loan was being accurately reported. Plaintiff initiated a dispute with Transunion in 2018 concerning the Loan. (App. 1044-1046; App. 1213-1224). The result of the dispute, after receiving feedback from Defendant, was that the Loan was being accurately reported.

During late December 2018 or early January 2019, and using the process provided by Transunion, Plaintiff formally disputed the accuracy of the information being supplied by Transunion on his consumer reports concerning the Loan, namely that he was not liable on the Loan, and therefore, was not in default under the Loan, did not owe Ocwen and/or PHH any outstanding balance whatsoever under the Loan, and that he was not late, delinquent, or past due on any payments purportedly owed in connection with the Loan (collectively the "2019 Transunion Dispute"). (App. 736; Aff. of Guthrie). In response to the 2019 Transunion Dispute, and in a letter to Plaintiff dated January 28, 2019 (the "Transunion Dispute Response"), Transunion refused to correctly update Plaintiff's consumer report to display accurate information concerning the Loan. (App. 736; Aff. of Guthrie; App. 270-77; Ex. 13, January 28, 2019 TransUnion Denial). Rather than update its records to reflect the

fact that the Loan had been discharged in his Bankruptcy Case, and that he was not liable to Ocwen and/or PHH in any amount in connection with the Loan, Transunion instead simply updated its records concerning the Loan to reflect that it was "OK" for the months of September 2018 and October 2018, because the account, according to Transunion, was "AFFCTD BY NTRL/DCLRD DISASTR." (App. 736; Aff. of Guthrie).

Nevertheless, Transunion, based on the information it received from PHH/Ocwen continued to report that Plaintiff was at least one hundred twenty (120) days delinquent in payment of the Loan for every month from May 2016 through August 2018. (Id.) In late March 2019 or early April 2019, Plaintiff similarly initiated a dispute with Experian in which he disputed the accuracy of Experian's credit file and consumer report with respect to the Loan. (Id.) Experian informed Plaintiff that the information concerning the Loan had "been verified as accurate," by PHH and, as of April 10, 2019, Plaintiff, according to Experian, was indebted to PHH in the principal amount of $239,843, of which the sum of $84,745.00 was past due as of April 2019 and was more than one hundred eighty (180) days past due. (App. 737; Aff. of Guthrie). Similarly, during the same time period, Plaintiff initiated a dispute with Equifax concerning the accuracy of the consumer credit file and report maintained by Equifax as it related to the Loan. (Id.) Equifax informed Plaintiff that the information concerning the Loan was accurate, that he was in

substantial arrears under the Loan, and that the Loan was past due and delinquent. (Id.)

The District Court appeared to find that all of Plaintiff's credit denials in 2019 were before Plaintiff initiated CRA disputes. The record evidence demonstrates that to be incorrect. As detailed above, Plaintiff initiated CRA disputes in 2015 and 2018. Accordingly, any credit denials after 2018 based on a violation by PHH of the FCRA would be actionable. Moreover, Plaintiff's SunTrust denial in 2019 was unquestionably due to a violation of the FCRA by Defendant. In early 2019, when attempting to purchase a new vehicle, Plaintiff applied for an extension of credit with SunTrust ("SunTrust") but was denied based upon information SunTrust discovered in his consumer report concerning the Loan, which was provided to SunTrust by Transunion. (Id.) In a letter to Plaintiff dated April 23, 2019 (the "SunTrust Denial Letter"), SunTrust informed Plaintiff that it had taken adverse action with respect to his application for an extension of credit "based in whole or in part on information from this consumer reporting agency," referencing a consumer report provided to SunTrust by Transunion which was dated April 18, 2019. (Id.; App. 1004-1007, Ex. 14, April 23, 2019 SunTrust Denial). Plaintiff received the SunTrust Denial Letter well after Transunion provided him its response to his credit dispute January 28, 2019. (Id.) Specifically, SunTrust cited, as reasons for denying his application, that Plaintiff had a "serious delinquency," that the

"length of time since account not paid as agreed" was too long, that a "proportion of loan balances to loan amounts is too high," and that the "Amount past due on accounts" was too high. (Id.) The 2019 Transunion Report, which predates the report provided to, and acted upon by, SunTrust by approximately three (3) months, reveals that the only account reported as delinquent by Transunion was the account related to the Loan. (Id.) Every other account listed in the 2019 Transunion Report, with the exception of the account associated with the Loan, was reported as "Current; Paid or Paying as Agreed," and no other account in the 2019 Transunion Report reflects any past due balance. (Id.) Plaintiff did not fall behind on any of his obligations to creditors between January 2019 and April 2019. (Id.) Accordingly, the consumer report dated April 18, 2019 and provided to SunTrust by Transunion contained only one account which disclosed a "serious delinquency," or which disclosed a lengthy period of time in which the account was "not paid as agreed," or was otherwise past due: the account related to the Loan, which Plaintiff had previously unsuccessfully disputed, and which Transunion verified with Ocwen and/or PHH. (Id.) Plaintiff was denied credit by SunTrust because of the incorrect credit reporting. (Id.) While Plaintiff eventually did obtain a car loan it was a higher interest rate then what SunTrust would have provided had my credit reporting been accurate. (Id.)

Moreover, as stated previously, Plaintiff suffered other damages to his health,

his mental state, was denied a home loan, and had his security clearance suspended. (App. 1528-1534, 1272-1274, 1281-1296; Deposition of Plaintiff, pp. 87:3 to 88:18, 126:13 to 130:2, 178:15 to 180:20; 222:9: to 237:20).

The District Court also found that Plaintiff has provided no evidence of a willful violation. (App. 1614-1615, District Court Summary Judgment Order). This Court should follow the ruling in Myrick v. Equifax Info. Servs., LLC, NO: 5:15-CV-00562-BR, 2017 WL 4798154 (E.D.N.C. Oct 23, 2017) and Daugherty v. Ocwen Loan Servicing, LLC, No. 16-2243, 2017 WL 3172422 (4th Cir. July 26, 2017), and allow the willfulness of Defendant's actions to be decided by a jury. The term "willfulness," within the meaning of the FCRA, includes acting with "reckless disregard" of one's obligations under the statute. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007). A defendant may demonstrate reckless disregard of its statutory obligations by repeatedly ignoring warning signs that it is violating the law and by failing to take corrective action to prevent future violations. See Am. Arms Int'l v. Herbert, 563 F.3d 78, 85 (4th Cir. 2009). It is clear from the recover evidence that Defendant was given several opportunities to update its records based on the Bankruptcy Discharge and did not. The District Court erred in determining as a matter of law that Defendant's FCRA related was not willful, and PHH's specific actions demonstrating "willfulness" are best left to summary judgment once all the facts have developed.

V. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT ON PLAINTIFF'S TELEPHONE CONSUMER PROTECTION ACT CLAIM

Defendant asserted at summary judgment, and the trial court agreed, that Plaintiff's TCPA claim fails because there is no evidence PHH used an "automatic telephone dialing system" as that term has been defined by the Supreme Court of the United States. (App. 1615-1616, District Court Summary Judgment Order). Dismissal of the TCPA claim is contrary to Appellant employees' representations to Plaintiff. "To qualify as an 'automatic telephone dialing system' under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator." Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1167 (2021). According to the statements of Defendant's employees or agents, Defendant did use an auto-dialer. (App. 733; Aff. of Guthrie). Accordingly, Defendant should not have been awarded summary judgment when its own employees stated that used as auto-dialer.

CONCLUSION

Appellant is entitled to reversal of the trial court's Order Granting Summary Judgment to Appellee in its entirety. First, Plaintiff's state law claims are not preempted by the Bankruptcy Code. Second, Plaintiff has presented straightforward evidence that in the light most favorable to Plaintiff demonstrate a violation of the

NCDCA and the FDCPA by Defendant. Third, Plaintiff has provided ample evidence to show that his claims for violation of the FCRA must be heard by a jury. Finally, Plaintiff has demonstrated that he has provided evidence that would support each element of a TCPA claim.

Respectfully submitted this, the 3rd day of May, 2022.

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REQUEST FOR ORAL ARGUMENT

Matthew W. Buckmiller respectfully requests that this Court hear oral argument in this case. This appeal raises issues of first impression for this Court concerning whether the Bankruptcy Code preempts state law.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains no more than 13,000 words, this brief contains 12,172 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. p. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14pt Times New Roman.

Dated May 3, 2022

/s/ Matthew W. Buckmiller
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 3rd day of May, 2022, I caused this Brief of Appellant to be filed electronically with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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