17-950

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Aaron Cohen, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

v.

Ditech Financial LLC and
Rosicki, Rosicki & Associates, P.C.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Eastern District of New York

Hon. Leonard D. Wexler

Case No. 2:15-cv-06828

Brief of Amicus Curiae Consumer Financial Protection Bureau in Support of Plaintiff-Appellant and Reversal

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QUESTION PRESENTED

The Fair Debt Collection Practices Act (FDCPA or Act) regulates the conduct of debt collectors when they take action "in connection with the collection of any debt." *See* 15 U.S.C. §§ 1692e, 1692g. The question presented is whether a debt collector that initiates a judicial foreclosure proceeding against a consumer that can lead to a deficiency judgment against the consumer has taken action "in connection with the collection of any debt" within the meaning of the FDCPA.

INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau (Bureau) is an agency of the United States and files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

Congress established the Bureau "to protect consumers from abusive financial services practices," *see* Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010), and vested it with authority to enforce the FDCPA and to prescribe rules implementing the Act, 15 U.S.C. §§ 1692*l*(b)(6), (c), (d). The Bureau therefore has a substantial interest in the interpretation and application of the FDCPA, including the question whether the FDCPA applies to debt collectors that initiate foreclosure

proceedings that can result in a deficiency judgment against consumers.

STATEMENT

A. Statutory Background

1. ***The FDCPA***. Congress enacted the FDCPA in 1977 because it concluded that existing laws and procedures were inadequate to protect consumers from serious and widespread debt collection abuses. Pub. L. No. 95-109, § 802, 91 Stat. 874, 874 (1977) (codified at 15 U.S.C. § 1692(a)-(b)). Congress intended the Act 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 abuses." 15 U.S.C. § 1692(e); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). In short, the FDCPA was "passed to protect consumers from deceptive or harassing actions taken by debt collectors." *Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2d Cir. 2002).

To effectuate its "broad, pro-debtor objectives," *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 87 (2d Cir. 2003), the Act establishes requirements and prohibitions governing debt collectors'

activities related to the collection of consumer debts, *see generally* 15 U.S.C. §§ 1692b-1692i. Two such provisions are at issue here. First, the Act prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Second, the Act requires that debt collectors send validation-of-debt notices to consumers when attempting to collect a debt. *See id*. § 1692g. The Act generally requires that debt collectors, "within five days after the initial communication with a consumer in connection with the collection of any debt," send the consumer a written notice containing certain information, including "the name of the creditor to whom the debt is owed." *Id*. § 1692g(a)(2). The Act further defines what is a communication, *id*. § 1692a(2), and specifies that an "initial communication" does not include a "communication in the form of a formal pleading in a civil action," *id*. § 1692g(d).

The FDCPA also addresses the relationship between the Act and state laws. The FDCPA preempts state law to the extent it is "inconsistent" with the FDCPA, but where a state's debt collection law is more protective of consumers, both the State's law and the FDCPA apply. *See* 15 U.S.C. § 1692n.

2. ***Judicial Foreclosure in New York***. Under New York's statutory scheme governing judicial foreclosures, a holder of a note secured by a mortgage has two remedies: (1) a suit at law to recover on the debt, or (2) an equitable proceeding to foreclose on the mortgage. *See Wells Fargo Bank, N.A. v. Goans*, 136 A.D.3d 709, 24 N.Y.S.3d 386 (2d Dep't 2016) ("Where a creditor holds both a debt instrument and a mortgage which is given to secure the debt, the creditor may elect either to sue at law to recover on the debt, or to sue in equity to foreclose on the mortgage."). New York law generally does not permit a creditor to pursue both remedies. Instead, "a creditor is required to elect between the remedies of an action for money damages on a debt or an equitable action to foreclose a mortgage that secures the debt." *Westnau Land Corp. v. U.S. Small Bus. Admin.*, 1 F.3d 112, 115 (2d Cir. 1993)) (citing New York Real Property Actions and Procedure Law (RPAPL) § 1301 and *Copp v. Sands Point Marina*, 217 N.E.2d 654, 655, 270 N.Y.S.2d 599, 600 (1966)).

Despite New York law requiring an election of remedies, a creditor that elects foreclosure does not necessarily lose its ability to recover the debt directly from the consumer. Rather, New York law provides a mechanism by which a party who forecloses on the mortgage may then

recover the balance of the debt after the sale of the property. RPAPL § 1371(1) ("If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action . . . the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property."). To obtain a deficiency judgment after a foreclosure sale, a creditor must file a motion for a deficiency judgment within 90 days of the consummation of the sale. *Id.* § 1371(2); *see also Steuben Trust Co. v. Buono*, 254 A.D.2d 803, 803, 677 N.Y.S.2d 852, 852 (4th Dep't 1998) (citing *Sanders v. Palmer*, 507 N.Y.S.2d 844, 845, 499 N.E.2d 1242, 1243 (1986)). If a timely motion is filed, the creditor may obtain a deficiency judgment against the consumer "for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action . . ., less the [the higher of] market value . . . or the sale price" of the foreclosed property. RPAPL § 1371(2).

B. Facts and Procedural History

1. ***Facts***. In August 2005, Appellant Aaron Cohen obtained a mortgage loan to help finance the purchase of his personal residence in Rockland County, New York. Appendix (App.) at A-10-11, 33.[1] Cohen defaulted on his mortgage, which was subsequently assigned to Green Tree Servicing LLC. *Id*. at A-11. In 2015, Green Tree (which later changed its name to Ditech) filed a foreclosure complaint in a New York state court against Cohen. *Id*. After the foreclosure complaint was filed, Cohen received two additional documents in connection with the state court foreclosure proceeding: a certificate of merit and a request for judicial intervention. *Id*. These documents provide the basis for Cohen's FDCPA claims in this case.

2. ***District Court Proceedings.*** Cohen filed a class-action complaint against Ditech and its foreclosure counsel, Rosicki, Rosicki & Associates, P.C., in the United States District Court for the Eastern District of New York. App. at A-9-15. Cohen claimed that Ditech and

[1]All facts are taken from Plaintiff-Appellant's complaint. *See* App. at A-9-15. Because this is an appeal from an order dismissing Cohen's complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), this brief accepts as true the allegations in his complaint. *See Carlin v. Davidson Fink LLC*, 852 F.3d 207, 210 (2d Cir. 2017).

Rosicki violated two provisions of the FDCPA, 15 U.S.C. §§ 1692e, 1692g(a)(2), by failing to identify the correct creditor—allegedly Fannie Mae (not Ditech)—in the foreclosure complaint, certificate of merit, and request for judicial intervention. *Id*. at A-12-13. Ditech and Rosicki separately moved to dismiss Cohen's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Id*. at A-213-14.

The district court granted both defendants' motions to dismiss. *Id*. at A-221. The court held that the "enforcement of a security interest through foreclosure proceedings that do not seek monetary judgments against debtors is not debt collection for purposes of the FDCPA." *Id*. at A-217-18 (internal quotation marks omitted). The district court distinguished between equitable remedies (such as a foreclosure proceeding) and remedies at law (*i.e.*, suing on the note to recover the debt). *Id*. Rejecting Cohen's argument that the availability of a deficiency judgment in a foreclosure proceeding means the foreclosure proceeding is also debt collection, the district court held that a deficiency judgment does not change the fact that a foreclosure proceeding is an equitable proceeding, which the court believed could not involve an attempt to collect a debt. *Id*. at A-218-19. Finally, the district concluded that the FDCPA would not apply here because

(1) "under the facts presented in this case . . . the purposes of the FDCPA are not furthered by continuation of this action," and (2) the "New York court system can amply protect borrowers from any allegedly unscrupulous actions taken in the foreclosure proceeding." *Id*. at A-219-20.

SUMMARY OF ARGUMENT

To state a claim under sections 1692e and 1692g(a) of the FDCPA, the challenged conduct must have been taken "in connection with the collection of a debt." A debt collector that initiates a foreclosure proceeding under New York law that can result in a deficiency judgment against a consumer has taken action in connection with the collection of any debt and is, therefore, subject to those provisions of the Act. The district court's decision to the contrary should be reversed.

While federal courts of appeals have debated whether foreclosure by itself is merely the enforcement of a security interest or also debt collection, no court of appeals has gone so far as to treat a judicial foreclosure proceeding *that can lead to a deficiency judgment* as something other than debt collection. Indeed, a majority of courts of appeals that have addressed the issue has concluded that foreclosure

itself is debt collection under the FDCPA because the purpose of foreclosure is to obtain payment on the underlying debt.

The Court, however, does not need to reach that specific question here. Because a judicial foreclosure proceeding conducted under New York law can lead to a deficiency judgment against the consumer, this case involves more than mere enforcement of a security interest. The FDCPA defines debt to include a consumer's obligation to pay money "whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5). A deficiency judgment is a judgment against a debtor for the unpaid balance of the debt. In other words, for purposes of the FDCPA, a deficiency judgment in a foreclosure proceeding is no different than a money judgment had a debt collector sued directly to recover the underlying debt—a proceeding that all recognize is debt collection.

The district court concluded otherwise by focusing on the fact that a deficiency judgment in a foreclosure proceeding does not change the judicial foreclosure from an equitable proceeding to one at law. The district court undertook the wrong inquiry. Whether the FDCPA applies does not turn on whether a proceeding is deemed equitable or at law. Rather, the relevant inquiry is whether the proceeding can

result in the collection of a debt under the FDCPA. Where, as here, a court sitting in equity may award a deficiency judgment against a consumer on a consumer debt, the Act manifestly applies.

This Court should also reject the suggestion that a foreclosure proceeding does not become debt collection until the debt collector files a motion for a deficiency judgment. Under New York law, the deficiency judgment is part of, and not separate from, the foreclosure proceeding. Moreover, arbitrarily treating that proceeding as two separate proceedings fails to serve the FDCPA purpose of protecting debtors against improper debt collection practices.

Finally, the district court erred in concluding the FDCPA would not otherwise apply because there were adequate state law protections. The FDCPA is designed to ensure that consumers have the benefits of *both* the FDCPA and those state debt collection laws that are consistent with, or even more protective than, the FDCPA. *See* 15 U.S.C. § 1692n. Therefore, even assuming state law afforded adequate protections here, consumers are still entitled to the full protections of the FDCPA.

ARGUMENT

The FDCPA Applies to Judicial Foreclosure Proceedings that Can Result in a Deficiency Judgment Against the Consumer

The FDCPA protects consumers by imposing a variety of prohibitions and requirements on debt collectors. 15 U.S.C. §§ 1692c–1692g. This case involves two such protections: The prohibition in § 1692e on false or misleading representations by debt collectors and the requirement in § 1692g that debt collectors provide consumers with validation notices that advise the consumer of, among other things, the "name of the creditor to whom the debt is owed," 15 U.S.C. § 1692g(a)(2). Both of these protections apply when a debt collector takes action "in connection with the collection of a debt." *See* 15 U.S.C. §§ 1692e, 1692g(a); *see also Boyd v. J.E. Robert Co., Inc.*, 765 F.3d 123, 125 (2d Cir. 2014) ("In order to maintain an FDCPA action, the allegedly unlawful behavior must occur in connection with collection of a 'debt'"). The district court did not reach the question whether Appellees violated the substantive protections of the Act because the court concluded that a judicial foreclosure proceeding under New York law did not involve debt collection under the FDCPA.

The district court erred. This Court has not yet addressed whether a foreclosure proceeding, *i.e.*, the enforcement of a security interest, is

inherently an attempt to collect a debt,[2] and other courts of appeals have debated that question. But *no* federal court of appeals has endorsed the district court's conclusion that a foreclosure proceeding that can result in a deficiency judgment against a consumer falls outside the scope of the FDCPA. This Court should not be the first. Under the plain language of the FDCPA and prevailing precedent, a debt collector that initiates litigation that can result in a deficiency judgment against a consumer has taken action in connection with the collection of any debt and is, therefore, subject to the FDCPA. The district court's contrary conclusion should be reversed.

A. Courts of appeals have recognized that debt collection includes the use of judicial proceedings to obtain payment on a debt

"[T]he FDCPA does not define 'debt collection,'" *Glazer v. Chase Home Finance LLC*, 704 F.3d 453, 460 (6th Cir. 2013), nor does it expressly delineate the set of activities that are "in connection with the collection of any debt." In *Heintz v. Jenkins*, 514 U.S. 291 (1995), the

[2] *See Carlin v. Davidson Fink LLC*, 852 F.3d 207, 213 n.1 (2d Cir. 2017) ("[W]e need not confront the parties' extensive arguments regarding whether the initiation of a foreclosure action is done 'in connection with the collection of any debt.'"); *Boyd*, 765 F.3d at 125 n.3 ("[W]e do not address the District Court's conclusion that the FDCPA does not apply to enforcement of security interests against property.").

Supreme Court therefore applied "ordinary English" to decide whether "lawyers engaged in litigation" could be "debt collectors" (which is a defined term) under the FDCPA. 514 U.S. at 294. Noting that the Act's definition of "debt collector" extended to certain persons "who 'regularly collec[t] or attemp[t] to collect'" consumer debts, 15 U.S.C. § 1692a(6), the Court concluded that "a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts" and, thus, is subject to the FDCPA, 514 U.S. at 294 (citing Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings")).

Consistent with *Heintz*, this Court has held that a debt collector that initiates a lawsuit to recover an unpaid consumer debt engages in debt-collection activity under the FDCPA. *See Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) (citing *Goldman v.*

Cohen, 445 F.3d 152, 155 (2d Cir. 2006)).[3] Some debt collectors have argued, however, that the FDCPA does not apply to actions (such as foreclosure proceedings) taken to enforce a security interest that secures a consumer debt. Although the circuits have reached various conclusions on that question, no court of appeals has held that a judicial proceeding that could result in a deficiency judgment against a consumer falls outside of the scope of the FDCPA simply because the proceeding also entails enforcement of a security interest.

This Court's decision in *Romea v. Heiberger & Assocs.*, 163 F.3d 111 (2d Cir. 1998), establishes the principle that debt collection activity otherwise subject to the FDCPA does not lose its character simply because it was undertaken in connection with an action against the consumer's property. *Romea* concerned a "demand notice that is required by New York law as a condition precedent to a summary

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[3] *Goldman* had held that initiation of a lawsuit was an "initial communication" triggering the requirement that the debt collector provide a validation notice under 15 U.S.C. § 1692g(a). After *Goldman*, Congress enacted 15 U.S.C. § 1692g(d), which provides that "[a] communication in the form of a formal pleading in a civil action shall not be treated as an initial communication" under § 1692g(a). *See Ellis*, 591 F.3d at 136. Nothing in § 1692g(d) overturns the accepted principle that the FDCPA applies to a debt collector's attempt to collect debts through litigation.

eviction proceeding." *Id.* at 113. This Court concluded that the demand notice involved debt collection even though it "was sent in connection with a possessory *in rem* action" under Article 7 of the RPAPL because "the letter was sent in part to induce Romea to pay the back rent she allegedly owed." *Id.* at 116. Under those circumstances, "the fact that the letter also served as a prerequisite to commencement of the Article 7 process is wholly irrelevant to the requirements and applicability of the FDCPA." *Id.*

The Fourth Circuit followed *Romea* in concluding that a debt collector's "actions surrounding [a] foreclosure proceeding were attempts to collect [a] debt." *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (citing *Romea,* 163 F.3d at 116). As the Fourth Circuit explained, the alternative conclusion "would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt." *Id.*

The Sixth Circuit followed suit in *Glazer v. Chase Home Finance LLC,* 704 F.3d 453 (6th Cir. 2013). Following *Heintz*, the Sixth Circuit explained 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 461. The court further explained that "*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)." *Id.* Any other rule, the Sixth Circuit noted, would allow a collector "to avoid liability under the FDCPA simply by choosing to proceed *in rem* rather than *in personam*," thereby "undermin[ing] the purpose of the FDCPA." *Id*. at 462 (quoting *Piper v. Portnoff Law Assocs.*, 396 F.3d 227, 234 (3d Cir. 2005)).

The Third Circuit, in *Kaymark v. Bank of America, N.A.*, 783 F.3d 168 (3d Cir. 2015), agreed with the reasoning in *Wilson* and *Glazer* and held that "foreclosure meets the broad definition of 'debt collection' under the FDCPA." 738 F.3d at 179. Specifically, the court found that misrepresentations in the *foreclosure complaint* could form

the basis for violations of 15 U.S.C. § 1692e. *Id*. at 175 (emphasis added). [4]

The Ninth Circuit has recently concluded that nonjudicial foreclosure is not debt collection where "California law does not allow for a deficiency judgment." *Ho v. ReconTrust Co., NA*, No. 10-56884, 2016 WL 9019610, at *3 (May 22, 2017).[5] In the court's view, an entity "would only be liable [under the FDCPA] if it attempted to collect money from [the consumer]"; however, "the object of a nonjudicial foreclosure is to retake and resell the security, not to collect money from the borrower." *Id*. Therefore, the court concluded that merely "giving notice of a foreclosure sale to a consumer as required by the California Civil Code does not constitute debt collection activity under the FDCPA." *Id*. at 5 (brackets removed) (quoting *Pfeifer v. Countrywide Home Loans, Inc.*, 150 Cal. Rptr. 3d 673, 684 (Cal. Ct.

[4] *See also Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1218 (11th Cir. 2012) ("A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest."); *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 386 (7th Cir. 2010) (holding that a letter threatening foreclosure while also offering to discuss "foreclosure alternatives" qualified as a communication related to debt collection activity within the meaning of § 1692e).

[5] The *Ho* opinion released on May 22, 2017, amends a prior published opinion in the case, which is available at 840 F.3d 618.

App. 2012)). Notwithstanding this holding, the Ninth Circuit recognized that "[i]f entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors." *Id.* at 4. In particular, the court explained that a foreclosure trustee "might become a 'debt collector' under [§ 1692a(6)] if he did something *in addition to* the actions required to enforce a security interest." *Id.* at 4 n.5.

B. Judicial foreclosure proceedings under New York law necessarily involve debt collection under the FDCPA because courts are authorized to award deficiency judgments to debt collectors

This Court can use this case to adopt the reasoning of *Wilson*, *Kaymark*, and *Glazer* and conclude that a foreclosure proceeding involves debt collection under the FDCPA because it necessarily "is undertaken for the very purpose of obtaining payment on the underlying debt." *Glazer*, 704 F.3d at 462; *cf. Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) (holding that "a surviving mortgage interest [after a debtor's bankruptcy] corresponds to an 'enforceable obligation' of the debtor" and is, therefore, a "claim" under the Bankruptcy Code). If the Court so concludes, then it must reverse the district court's conclusion that "'communications' . . . made in the

context of enforcing [a] security interest" do not involve an "attempt to enforce a debt . . . under the FDCPA." App. at A-218-19.

The Court, however, need not delve into that question in the context of this case. Because a judicial foreclosure proceeding conducted under New York law can lead to a deficiency judgment against the consumer, this case involves more than mere enforcement of a security interest. As with any lawsuit to recover money for an unpaid debt, initiating a foreclosure action under New York law involves an action "in connection with the collection of any debt" and is, therefore, covered by the FDCPA.

1. The FDCPA defines "debt" as "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, *whether or not* such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (emphasis added). A residential mortgage loan is a "debt" under this definition at the moment the obligation to pay is incurred, *i.e.*, when the mortgage loan is entered into. As the definition makes clear, moreover, it remains a "debt" even if a creditor successfully "reduce[s]" the obligation to "judgment."

And, as explained above, *supra* pp. 12-13, a debt collector engages in debt collection when it initiates litigation to reduce to judgment a consumer's obligation to pay.

That is precisely what New York foreclosure law allows a debt collector to do. If the consumer is made a party to the foreclosure action, then "the final judgment *may award payment* by him of the whole residue, or so much thereof as the court may determine to be just and equitable, *of the debt remaining unsatisfied*, after a sale of the mortgaged property and the application of the proceeds." RPAPL § 1371(1) (emphasis added). In purpose and effect, a judgment "award[ing] payment . . . of the debt" in a foreclosure action is no different than the type of money judgment that a court may award in any other debt-collection action. *See* Black's Law Dictionary (1oth ed. 2014) (defining "deficiency judgment" as "a *judgment against a debtor for the unpaid balance of the debt* if a foreclosure sale . . . fails to yield the full amount of the debt due") (emphasis added).

2. The district court in this case purported to "agree[] with this reasoning," stating that "the enforcement of a security interest through foreclosure proceedings *that do not seek monetary judgments* against debtors is not debt collection for purposes of the FDCPA." App. at A-

218 (emphasis added). Inexplicably, however, the district court concluded that Ditech's communications did not involve an "attempt to enforce a debt actionable under the FDCPA" because they "were made in the context of enforcing its security interest." *Id.* at A-218-19. That conclusion treats New York's judicial foreclosure scheme as if it were akin to California's nonjudicial foreclosure process, which "does not allow for a deficiency judgment." *Ho*, 2016 WL 9019610, at *3. Even if mere enforcement of a security interest did not involve debt collection under the FDCPA, *but see supra* pp. 15-18, initiating a foreclosure proceeding that can result in a deficiency judgment against a consumer is more than mere enforcement of a security interest. It is quintessentially an action made "in connection with the collection of [a] debt" within the meaning of the FDCPA.

3. The district court concluded that the availability of deficiency judgments in New York foreclosure proceedings was immaterial to its analysis because it believed that "affect[ing] the nature of the Foreclosure Action or chang[ing] it from an equitable proceeding to one at law" would "violate New York's election of remedies framework." App. at A-219. This was error for several reasons.

First, applying the FDCPA to New York foreclosure proceedings does not affect the nature of the foreclosure action. Rather, the nature of the foreclosure action is defined by New York law, and it is New York law that permits the foreclosure court to impose a deficiency judgment on a consumer. Even assuming *arguendo* that the mere enforcement of a security interest is not debt collection, New York's decision to provide additional monetary remedies as part of the foreclosure process brings foreclosure litigation within the ambit of the FDCPA.

Similarly, the FDCPA's applicability does not depend on whether the foreclosure process is an equitable proceeding (as opposed to a proceeding at law) under New York law. To the extent the district court believed that a proceeding in equity is necessarily one that is unconnected "to the collection of any debt," the court was mistaken. As explained in *Heintz*, collecting a debt broadly encompasses any activity that involves "obtain[ing] payment or liquidation of it, either

by personal solicitation or legal proceedings."[6] 514 U.S. at 294 (quoting Black's Law Dictionary 263 (6th ed. 1990)). New York's judicial foreclosure process is designed to do just that by allowing the debt collector to ask a court to force a sale of the mortgage property and, if "the debt remain[s] unsatisfied," to "award payment . . . of the whole residue" or such other amount as the court may determine. RPAPL § 1371(1).

Finally, applying the FDCPA here does not require changing the foreclosure action from an equitable proceeding to one at law, and therefore does not "violate" New York's "election of remedies framework." App. at A-219. Under the election-of-remedies principle, "[t]he holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies." *Aurora Loan Servs., LLC*

[6] The term "legal proceeding" in the dictionary definition of "collect" does not suggest that equitable proceedings are excluded from that definition. Rather, "legal proceeding" generally denotes "*[a]ny proceeding authorized by law* and instituted in a court or tribunal to acquire a right or to enforce a remedy," Black's Law Dictionary (10th ed. 2014) (emphasis added), a meaning that readily encompasses proceedings in equity. More importantly, the FDCPA itself expressly recognizes that "legal" actions include "action[s] to enforce an interest in real property"—*i.e.*, equitable proceedings. *See* 15 U.S.C. § 1692i.

v. Lopa, 88 A.D.3d 929, 930, 932 N.Y.S.2d 496 (2d Dep't 2011) (quoting *Gizzi v. Hall*, 309 A.D.2d 1140, 1141, 767 N.Y.S.2d 469, 471 (3d Dep't 2003)). This rule is designed "to discourage double litigation of such matters." *Boyd v. Jarvis*, 74 A.D.2d 937, 937, 426 N.Y.S.2d 142, 143 (1980). But a debt collector's ability to choose remedies under New York law does not give it license to avoid the requirements of the FDCPA where *both* remedies entail actions "in connection with the collection of [a] debt." In the case of New York mortgages, both proceedings at law to recover on a mortgage note and proceedings to foreclose on secured property can result in a judgment requiring a consumer to pay money to a debt collector.[7] Therefore, the

[7] Under New York law, "when a mortgage-secured creditor commences an equitable action to foreclose its mortgage, the action does not result in a 'money judgment'" within the meaning of certain statutes. *Wyoming Cty. Bank & Trust Co. v. Kiley*, 75 A.D.2d 477, 481, 430 N.Y.S.2d 900, 903 (1980) (holding that New York's homestead exemption does not prevent a mortgage foreclosure sale); *cf. Westnau Land Corp. v. U.S. Small Bus. Admin.*, 1 F.3d 112, 115 (2d Cir. 1993) (explaining that under 28 U.S.C. § 2415, "'an action for money damages[]' is not normally considered to comprehend an equitable action of foreclosure."). Whether a deficiency judgment awarded in a foreclosure action is considered a "money judgment" under New York law, however, does not affect the applicability of the FDCPA, which turns on whether the judgment actually entails collection of a debt rather than the label such a judgment has under state statutes.

election-of-remedies principle is simply irrelevant to the question whether the FDCPA applies in this case.

C. Judicial foreclosures in New York are debt collection because they can lead to a deficiency judgment, regardless of whether a motion for deficiency judgment is filed

Appellees argued below that they did not attempt to collect a debt because they had not yet made the motion for a deficiency judgment in the foreclosure proceeding, as required by New York law. *See* ECF No. 33, at 5 (citing RPAPL § 1371).[8] The district court did not reach that question because it concluded that the FDCPA was wholly inapplicable to foreclosure proceedings regardless of the availability of deficiency judgments. But in *Derisme v. Hunt Leibert Jacobson P.C.*, 880 F. Supp. 2d 311 (D. Conn. 2012), another district court considering Connecticut's foreclosure process concluded that the FDCPA can apply only "once a timely filed motion for a deficiency judgment . . . has been made." *Id.* at 326. In the *Derisme* court's view of Connecticut law, "until a timely filed motion for deficiency judgment [ ] is made a foreclosure action is solely an action in equity to enforce a security

[8] ECF No. 33 refers to Defendant-Appellee Ditech Financial LLC's Reply in Support of its Motion to Dismiss, which was not included in the Appendix.

interest." *Id.* at 322-23. But "once a timely motion for deficiency judgment has been made [ ] that will have the effect of converting the proceeding into an action at law for money damages ancillary to the initial action in equity for foreclosure to effectuate the full and complete resolution of the issues." *Id.*

This Court should not follow *Derisme*. First, *Derisme*'s conclusion that the Connecticut foreclosure process entails two types of proceedings—first, an action in equity to enforce a security interest and, then, an action at law for a deficiency judgment—is inconsistent with election-of-remedies principle under New York law that regards foreclosure proceedings as equitable and actions to recover on a note as an action at law. *See Westnau Land Corp.*, 1 F.3d at 115 ("[U]nder New York law, a creditor is required to elect between the remedies of an action for money damages on a debt or an equitable action to foreclose a mortgage that secures the debt.") (citing RPAPL § 1301); *see also* App. at A-219. While the designation of a particular foreclosure proceeding as in equity or at law does not bear on whether the FDCPA applies to it, *see supra* pp. 21-24, it does preclude a New York foreclosure proceeding from being "convert[ed]" from "an action

in equity to enforce a security interest" into "an action at law for money damages." *Derisme*, 880 F. Supp. 2d 322-23.

More generally, attempting to bifurcate a single foreclosure proceeding into two separate actions for purposes of the FDCPA—an action to enforce a security interest to which the Act presumably would not apply (*but see supra* pp. 15-18) and an action to obtain a deficiency judgment to which it would—does not serve the FDCPA's purpose of "protect[ing] consumers from deceptive or harassing actions taken by debt collectors." *Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2d Cir. 2002); *see also Avila v. Riexinger & Assocs.*, LLC, 817 F.3d 72, 75 (2d Cir. 2016) (because the FDCPA is "primarily a consumer protection statute, [this Court] must construe its terms in liberal fashion to achieve the underlying Congressional purpose.") (internal quotation marks omitted). New York law itself treats the foreclosure proceeding as a single action. *See Steuben Trust Co. v. Buono*, 254 A.D.2d 803, 804, 677 N.Y.S.2d 852, 852 (4th Dep't 1998) ("A motion for a deficiency judgment is part of, and not separate from, the foreclosure action.") (citing *Sanders v. Palmer*, 507 N.Y.S.2d 844, 845, 499 N.E.2d 1242, 1243 (1986)). Moreover, a consumer is liable for a deficiency judgment only if he is "made a defendant in the action, and

has appeared or has been personally served with the summons" in the foreclosure proceeding. RPAPL § 1371(1). And a foreclosure sale is a prerequisite to any motion for a deficiency judgment because the existence of a deficiency can only be determined after the property is sold. In these circumstances, consumers are unlikely to understand that the motion for a deficiency judgment—which occurs only at the tail end of the foreclosure process—is a new attempt to collect a debt that is (if *Derisme* were correct) separate from the foreclosure process itself. *Cf. Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993) (applying the "least sophisticated consumer" standard to determine potential violations of 15 U.S.C. § 1692e). Given how New York has chosen to structure its foreclosure process, the Court should conclude the actions taken "in connection with the collection of any debt" encompass all actions taken as part of the unitary foreclosure process.

D. The district court erred in concluding that the FDCPA's purposes would not be served by applying it to New York foreclosure proceedings

After concluding that a judicial foreclosure that can lead to a deficiency judgment against the consumer was not debt collection, the district court held that the FDCPA would not otherwise apply because (1) "under the facts presented in this case . . . the purposes of the

FDCPA are not furthered by continuation of this action," and (2) the "New York court system can amply protect borrowers from any allegedly unscrupulous actions taken in the foreclosure proceeding." App. at A-219-20. Even if true, this is not a basis for ignoring federal law. Cohen is entitled to the full protection of the FDCPA even if he may also be protected by New York's foreclosure laws.

In *Romea*, this Court was presented with a similar claim—that the FDCPA should not be applied according to its terms in light of the protections provided by New York's special landlord-tenant procedures. The Court soundly rejected this argument, explaining that "[i]f the [FDCPA] applies to [the defendant's conduct] and [the defendant's conduct] does not comply with the FDCPA's requirements, then by definition it constitutes an improper debt collection activity under federal law." *Romea*, 163 F.3d at 119. The Court further noted that it is "the provisions of the FDCPA that by and of themselves determine what debt collection activities are improper under federal law." *Id*.

Furthermore, the FDCPA is designed to ensure that consumers have the benefits of *both* the FDCPA and those state debt-collection laws that are consistent with, or even more protective than, the

FDCPA. *See* 15 U.S.C. § 1692n. And, to the extent there is any conflict, it is the FDCPA that prevails. Therefore, even if New York's debt collection and foreclosure laws are more protective than the FDCPA, Cohen is still entitled to the protections of the FDCPA.

The district court, holding otherwise, relied on *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010), where this Court held that "[d]ebtors in bankruptcy proceedings do not need protection from abusive collection methods that are covered under the FDCPA because the claims process is highly regulated and court controlled." The district court's reliance on *Simmons* is misplaced.

In *Simmons*, the Court denied a consumer the protections of the FDCPA because the consumer was already protected by another *federal* statutory scheme—the Bankruptcy Code. *Id.* ("[T]here is no need to supplement the remedies afforded by bankruptcy itself."). Here, by contrast, the district court found a *state* statutory scheme that it concluded provided adequate protections for consumers facing foreclosure. As explained above, Congress designed the FDCPA so that consumers would have the benefits of both the Act and state law.

Therefore, this Court should follow its reasoning in *Romea* and find that consumers are entitled to the protections of the FDCPA for

alleged debt collection violations related to judicial foreclosure proceedings even if New York's foreclosure laws provide adequate protection.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

June 1, 2017

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