Curtis G. Glawe, Pro Se
2240 570th Street
Aurelia, IA 51005
cglawe@live.com

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Curtis G. Glawe Plaintiff v. Carpenter, Hazelwood, Delgado,& Bolen PLC & Javier Delgado, Mark Holmgren, Mark K. Sahl, & Gregory A. Stein, Individually Defendants	Case No. CV-01282-JAS-BPV **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (Hon. James A Soto) (Oral Argument Requested)

Plaintiff , Curtis Glawe moves that the Court Deny Defendants' Motion For Summary Judgment in Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment Pursuant to Fed. R. Civ. P. 56 U.S.C. §1692 et. Seq., because Defendants have not met their burden, proving that there are no factual issues in this case that a jury should decide, and for the additional facts and reasons stated in this document.

Defendants sued Plantiff, Glawe in state court for Attorney fees of $36,264.50 and Costs of $2,782.00. (Confusing Glawe because the Resident Transaction Report showed as of November 1, 2016 $42,125.98 needed to be paid to settle the lawsuit) (Plaintiff's EX.16). The state Court issued judgment (Defendants EX. 6) on November 21, 2016 in favor of Defendant attorneys and the Association for attorney fees of $7500.00 and legal costs only of $2,364.25. At the same time the Resident Transaction Report (Plaintiff's EX.16) showed Glawe owed on November 30, 2016, $50,459.70. The Court found that Defendant Lawyers and the Association were not allowed to collect late fees, lien fees, cc&r violations, demand fees, lien prep fee, etc. because they did not timely and properly invoice for them

(Defendants EX. 5) Section 1692f prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C.§1692f. Without limiting its general application, this provision provides that the following conduct constitutes a violation:

1. the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation, unless such amount is expressly authorized by the agreement creating the debt or permitted by law.)

The Appeals court on March 8, 2018 awarded $7664.30 (Defendants EX. 9), $7500 in attorney fees, and costs of $164.30 of Defendant attorneys request for $16,164.00. The Resident Transaction Report Ledger (Plaintiff's EX.1.)showed the confusing amount of $67,791.38 owed by Glawe 5 days later on March 13, 2018.

These were not close calls on disputed issues. The State trial Court found these were invalid charges. They never should have been included in the Resident Transaction Reports because they were improper charges. Defendant lawyers were improperly using the claims of their client to leverage their claims against Glawe.

Defendant Lawyers' main arguments are Statute of Limitations and that the debt was not a "consumer" debt. Defendant lawyers argue there were only three violations within the one year statute of limitations and the Bona Fide Error Defense. Glawe has listed more than 40 violations within the one year statute and since filing the case on April 26, 2018.

Violations prior to the one year period should be included because they were part of defendant lawyers' continuing pattern of conduct using the Resident Transaction Report, (ledger). Both the older and newer violations continued the same misleading statements that would meet the FDCPA standard of misleading the least sophisticated consumer.

The underlying assessment debt was a consumer debt. The property at issue initially was purchased as a retirement residence, as is recorded in statements and affidavits (Separate Affidavits of Curtis Glawe, page 1-2 ¶'s 2-5), Affidavit of

Lorri Glawe, pages 1-3, Affidavit of Jordan Glawe pages 1-3, and Affidavit of

Austin Glawe, pages 1-2, Attached as separate documents to this Memorandum and preceding Plaintiffs Exhibits). This is significant because the deciding factor is the initial reason for the purchase, not any subsequent change in use.

The communications were misleading because Defendants sent them to the wrong address even though they knew Glawes had a different address. They knew we had a different address because they sent the initial communication (Summons and Complaint) to Glawe's address in Iowa and the Glawes informed them numerous times during and right after the 2012 litigation that led to the 2012 settlement. Even after the Defendant lawyers had the correct address they sent communications to the wrong address and for misleading amounts in their attempts to collect the debt (FDCPA violations) and as of 2018 still have never mailed plaintiff an invoice to the correct address despite Plaintiff providing them with a signed change of address form August 10, 2013 (Plaintiffs EX.8).

The Order of Hon. Bernardo P. Velasco, United States Magistrate Judge (Plaintiff's EX. 17 page 2 lines 23-25 & page 3 line 1) regarding Plaintiff's Motion for Leave to File Amended Complaint. (Doc 22.) Defendants filed a Response (Doc. 26), and Plaintiff's Reply (Doc 27), states that "Plaintiff's concern that his initial Complaint lacks specificity can be remedied in his answers to interrogatories and his response to Defendants' Motion to Dismiss-which can incorporate detail in an attached statement of facts and exhibits." Plaintiff states that there was no Motion to Dismiss in the current lawsuit, therefore Plaintiff contends the Court meant Plaintiff could incorporate the details in response to Defendants' Motion For Summary

Judgment, which Plaintiff will do. Plaintiff already used all but three of his interrogatories prior to Defendants' Motion For Summary Judgment.

Defendants' in their Motion for Summary Judgment claim "The specific communications, demands and/or violations and dates of each between 2011 and 2018 are not clearly identified in Plaintiff's Complaint". If the Court had granted Plaintiff's Motion For Leave To File Amended complaint that would have cleared up those issues as they are addressed in Plaintiff's Amended Complaint.

The Plaintiff filed his Complaint for violations of the Fair Debt Collection Practices Act against Defendants, alleging more than one hundred violations outside the statute of violations period, and more than 40 within the one year period of the Statute of Limitations as of the April 26, 2018 filing date. Plaintiff alleges at least 20 additional violations of FDCPA since April 26, 2018.

Despite Defendants' claim that "the one-year statute of limitations for claims made pursuant to the Fair Debt Collection Practices Act (FDCPA) has expired as to all but three alleged communications," Plaintiff will show that there are more than 40 violations that fall within the one-year statute of limitations and since filing the lawsuit, and how Defendants' are dishonest and misleading to Plaintiff and the Court in many claims they make in their Motion For Summary Judgment.

Defendants' claim "as to those remaining three, the underlying transaction is not a "debt" as that term is defined by 15 U.S.C.§ 1692(a)(5), and Defendants' statement that "Moreover, those three alleged communications would not confuse or mislead the least sophisticated debtor and therefore not a violation of the FDCPA.), is disputed by Plaintiff.

This Opposition to and request to deny are supported by the attached Memorandum of Points and Authorities, separately filed, Affidavits, Deposition Testimony, Plaintiff's Controverting Statement of Facts, Plaintiff's Response To Defendants Index And Summary By Date, and the entire and complete record before this Court. Fed. R. Civ. P (a- c); LRCiv 7.2, LRCiv 56 (a- d)

MEMORANDUM OF POINTS AND AUTHORITIES

I, INTRODUCTION

Every time (from 2011-2018), the Defendants sent Plaintiff a letter or e-mail communication, it was incorrect and misleading and violated the FDCPA. Plaintiff's Controverting Statement of Facts lists the violations and the dates they occurred.

Defendants sent Plaintiff communications that were improper because the State Court ruled that they did not timely and properly invoice Glawes and thus were not entitled to those charges. (Defendants' EX. 5.).

An example of misleading communications lawyers sent to Glawe is the demand letter dated July 22, 2013 (EX. 7) their letter states how any payment received from Glawe (2nd from last paragraph page 2 of **DEBT VERIFICATION**) would be applied to the various categories of charges claimed by lawyers on behalf of the HOA. The payment priority in these letters differed significantly from the payment priority in Arizona Law Statute 33-

1807 J (EX.). Lawyers July 22, 2013 **DEBT VERIFICATION** letter to Glawes stated how the payments would be applied! The letter states that costs first, then split between attorney fees and association assessments and other charges until the debt is satisfied, in direct contradiction to Arizona Revised Statutes Title 33. Property § 33-1807 J. which states "Notwithstanding any provision in the community documents or in any contract between the association and a management company, unless the member directs otherwise, all payments received on a member's account shall be applied first to any unpaid assessments, for unpaid charges for late payment of those assessments, for reasonable collection fees and for unpaid attorney fees and costs incurred with respect to those assessments, **in that order**, with any remaining amounts applied next to other unpaid fees, charges and monetary penalties or interest and late charges on any of those amounts." Lawyers' (Plaintiff's EX.7) claim that costs would be paid first, and that any payments would be split between attorneys' fees and assessments directly contradicts Arizona Revised Statutes Title 33. Property § 33-1807. The lawyers' statement was false and therefore misleading.

The conduct complained of by Plaintiff and against Defendants, constitutes a continuing pattern and course of conduct as opposed to unrelated acts and can thus use the entirety of that conduct as a single violation of the FDCPA regarding the Resident Transaction Reports (Plaintiff's EX. 16.)

They constitute the same violations over and over again and because of the unfairness and oppression, etc. of those 5 statements (EX.16) violations they could not be said to have occurred on any single day.

Defendants knowingly and willfully violated the FDCPA with malice and animus and then tried to hide behind the Association because the Association is not subject to the FDCPA. An example would be Defendants sending all communications including Resident Transaction Reports to Plaintiff and claiming that because the association produced them, Defendants are not liable for relying on them.

The context of the FDCPA allows Plaintiff to bring his case before the court even if the debt is valid and even though the validity of the debt is not relevant or an issue in the case. <u>FDCPA lawsuit and action to collect under lying debt are not compulsory counterclaims.</u> *Peterson v United Accounts, Inc.*, 638 F. 2d 1134 (8^{th} Cir. 1981).

The Plaintiff disputes Defendants assertion that Plaintiff is trying to re-litigate any issue that was adjudicated in the State Court Case. The Defendants are the ones attempting to get the Court to focus on the State & Appeals cases and not whether they violated the Federal Fair Debt Collection Practices Act during their attempt to collect the debt. The fact that the State Court with the Appeals Court affirming that the Plaintiff breached his contract with the Sundance HOA, has absolutely no bearing on whether these Defendants violated The Fair Debt Collection Practices Act in their treatment of the Plaintiff and therefore Plaintiff has a right to have his allegations heard by a jury in District Court.

Defendants claim the HOA was debt was not a "consumer" debt because Glawe rented the subject property to others. This is false and disputed. Glawe's subsequent actions after the purchase do not count. For FDCPA purposes a debt is classified as consumer if the debtors intent at the time of incurring the debt, was personal. At the time of the purchase, the Glawes intent was to use the property as a retirement home. This has been stated repeatedly by Glawes. Separate Affidavits of <u>Curtis Glawe, pages 2-3 ¶'s 2-4, Affidavit of Lorri Glawe, pages 1-3, Affidavit of Jordan Glawe, pages 1-3, and Affidavit of Austin Glawe, pages 1-2. and attached as separate affidavits to this filing.</u>

Defendants' Statement of Facts and other statements are false when they allege that the Plaintiff's accusations against the Defendants for violations of FDCPA have already been litigated. The decision in State Court on 9/24/2016 states "The Court grants the Association's Motion for Summary Judgment for breach of contract only". (Defendants EX. 5.)

Defendants' claim that "The doctrine of collateral estoppel was created, in part, to prevent re-litigation of issues actually litigated." The problem is that the Plaintiff's Complaint regarding Defendants' violations of the Fair Debt Collection Practices Act have never been litigated in any court.

Defendants claim on Page 3 lines 4-5 of their Motion for Summary Judgment "That the Glawes refused to submit a Change of Address Form for the Mohave Property", misleads this Court when in fact Glawes submitted a change of address form on August 10, 2013, (Plaintiff's EX. ~~12~~ 8.) and Plaintiff has still as of November 1, 2018 never had an invoice properly delivered to his Iowa address in violation of the State Courts Under Advisement Ruling (Defendants EX. 5.)

Defendants mislead and lie to Plaintiff and this Court about the September 14, 2016 Judgment of Former Judge Robert Oberbillig. Defendants attempt to minimize the state court ruling. Defendants claim at page 4 lines 3-4, that the Judge "found the HOA had made some errors with respect to mailing", when his actual ruling was that "The Court agrees with Glawes position that the HOA did not timely and properly invoice for any late fees or Collection fees." and "HOA is not entitled to recover those alleged damages." (Defendants EX. 5.)

This is relevant to this case because Plaintiff claims in his Complaint that the "Resident Transaction Report" ledger (Plaintiff's EX. 16.) that Defendants' have provided to Plaintiff, that continues to contain late fees, demand fees, cc&r violation fees, attorney fees and collection fees as part of what Plaintiff allegedly owes which is a part of Defendants FDCPA violations.

Plaintiff is not claiming that demand letters violated the FDCPA just because the judge awarded the HOA less than the attorneys requested in the Demand Letters. The demand letters violated the FDCPA because the improper amounts stated in the demand letters (late fees, attorney fees , lien prep fees, delinquency admin fee, etc.) were so clearly improper.

All of the letters and debt collection communications sent to Glawe also were improper for a second reason, they claimed a fixed amount was due. This stated or implied that Glawe could resolve the entire debt by paying the account. None of these stated that even if Glawe paid the sum total that would not satisfy the entire debt, because the debt was continuing to accrue charges such as late fees, cc&r violations, etc.

A debt collector has a duty to disclose to the debtor that the amount of the debt may be increasing due to accruing late fees, costs or other charges. It is misleading to state the exact balance due as of the date of the communication with the debtor even if accurate at the time, if the collector knows the stated balance is increasing, or is likely to increase, before the debtor pays it. *Avila v Riexinger & Associates, LLC,* Ex. 18 817 F. 3d 72 (2nd Cir. 2016) (EX 6 page 12 lines 10-14). Defendants did not ever provide any warning in those letters that the debt was increasing.

A classic violation of FDCPA is when the debt collector sends a demand letter including proper and improper charges they are not entitled to and uses the inflated amounts as leverage to collect money from the debtor. This is exactly what defendant lawyers did. Plaintiff's EX. 13, The (Resident Transaction Reports) Ledgers were provided to Plaintiff more than 10 times so far in the course of this 5 years of litigation as the only communication which Defendants have provided to Plaintiff since the early stages of the State Court litigation. All of those ledgers contain numerous entries claiming late fees, cc&r violations, attorney fees, etc. which also violated the FDCPA and the state court ruled that Glawes were not required to pay any of those amounts.

Defendants claim that the Courts awarded them $17, 528.55 in attorney Fees and Costs on January 9, 2018 (page 4 lines 6-23) of this Motion For Summary Judgment. Plaintiff asks this Court to reconcile that with the only document sent to the Plaintiff, the "Resident Transaction Report" Ledger (Plaintiff's EX. 16.) that Defendants' relied on showing Defendants' insisted Plaintiff owed $65,560.64 on January 9, 2018. A simple numerical comparison of these two amounts understates the discrepancy because a large part of the $17, 578.55 awarded was not included in the $65, 560.64 demand. This was an overstatement of more than 370% of this amount not included in the ledger amount defendant lawyers sent to Plaintiff.

In McNair the court found the attorney fee requests were not FDCPA violations because the fees had been approved by a court before they were billed to the Plaintiff. McNair pages 12-13, **significantly**, McNair agreed with the Plaintiff in that case that the lawyers could not unilaterally decide what fees were reasonable, Citing *Costa v Maxwell Morgan PC*, 2011 UC 3490115 (D. Ariz. June 3, 2015). At 5-6 ("Arizona Law is clear ….."). Lawyers in this case did exactly what the McNair and Costa Courts said was improper. Lawyers demanded legal fees from Glawe **Before** a court had found them to be reasonable.

In McNair the court rejected Plaintiff's continuing violation argument because the nine alleged violations , over a period of four years, consisted of discrete acts: (" A letter, a draft agreement, a filing in Justice court, another letter, paperwork filed in Justice Court, a complaint for foreclosure in Superior Court, and an e-mail, a failure to respond to Plaintiff, and a request for a writ of execution." McNair page 9. The court in McNair also found the "breaks in time" to be significant (No violations in 2011, sixteen months between violations seven and eight.).

Broadly speaking, the doctrine permits a plaintiff to recover " for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period." *Sosa v Utah Loan Servicing, LLC,* No 13-CV-364-W(KSC), 2014 WL 173522, at #4 (S.D. Cal. Jan 10, 2014. (quotation marks and citation omitted). Plaintiff Glawe alleges the Resident Transaction reports fall within in this description as Defendants have made between 100 -200 FDCPA violations in during the past 6 years that are nearly identical (EX), as well as other possible claims that could be considered continuing.

In this Case the communications are much more related, in terms of acts, violations and continuity. The acts involved multiple letters, many sending similar attachments, (various updates of the Resident Transaction Report). The violations are the same from communication to communication; repeated inclusion of prohibited charges for attorney fees, repeated inclusion of prohibited charges for late fees, repeated charges for inclusion of cc&r violations, (… and rest). The communications also are continuous in time, with numerous months having multiple communications.

Also in McNair it stated "Under the FDCPA, debt collectors "may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt" 15 U.S.C. § 1692e." In Arizona, requests for post-judgment attorney fees must be made in a motion to the court. *See* Ariz. R. Civ. P. 54(g). The record in the **current** case reflects that all of the communications Plaintiff claims were violations of the FDCPA had not yet been approved as to the accruing attorneys' fees, violating §1692e(2) by demanding attorneys' fees not yet approved by a court. In the matter before **this** Court the State Court later only approved a small percentage of the Defendants' attorneys' fees and costs as listed on the (Resident Transaction Reports) Ledgers provided to Plaintiff by Defendants.

Plaintiff's EX. 16. (Resident Transaction Report) Ledger should be warning enough to the Court that Defendants' claim that the Courts awarded the Association $17, 528.55 as opposed to the (Resident Transaction Report) ledger requiring Plaintiff to pay $69, 457.70 at the same point in time, 5/9/2018 should be enough to set off major alarm bells that something was amiss.

See Order or Amended Order Case CV-14-00869-PHX-DGC page 6 lines 1-5 of *McNair v Maxwell and Morgan P.C.*

Plaintiff also cites *Bocchino v Fountain Shadows Homeowners Association* (Plaintiff's Ex) ¶14 "The Declaration does not expressly provide that the Association may assesss against a homeowner, attorney fees incurred in a judicial proceeding that have not been awarded by a qualified tribunal. ¶15 "Even a contractual entitlement to "all" attorneys' fees incurred can be overcome by an evidentiary showing that the fees were clearly excessive.

CONCLUSION

Summary judgment should be denied.

If the Court decides continuing violation is not appropriate the court must allow the most recent FDCPA alleged allegations proceed to trial.

Defendants in this case have spent considerable effort to deny Plaintiff his rights under FDCPA to bring their prohibited violations to the jury. Defendants continue to abuse, harass, oppress, misrepresent, etc.

Plaintiff has shown that there is at the very least triable issues of fact in the key contested issues, and that a reasonable jury could return a verdict for the nonmoving party and the issues must be decided by a jury.

Glawe has listed not 3, but over 40 FDCPA violations within the one year statute of limitations period. Plaintiff, Glawe has shown there are factual issues waiting to be resolved by a jury as to whether the violations prior to April 26, 2016 are linked to the violations after and before that date, so the continuing violation doctrine applies.

The communications were misleading because they included amounts the HOA was not allowed to collect either at the time of communication or ever. The communications were also misleading because they stated or implied an exact balance, which if paid could resolve the entire debt. This was misleading because it did not disclose that fees were continuing to accrue, such as late fees, collection costs, lien prep fees, cc&r violations, demand fees, delinquency admin fees and attorneys' fees.

The debt was a "consumer" debt and, therefore, it occurred within the FDCPA, at the time of occurrence. The property was purchased for a personal reason (Retirement) not as a rental or investment.

THEREFORE, the motion should be denied.

RESPECTFULLY SUBMITTED this 17th day of November, 2018.

Curtis Glawe

Curtis Glawe Pro-Se
2240 570the Street
Aurelia, Iowa 51005
712-221-9178
cglawe@live.com

In preparing this document Plaintiff has had consultation with and received advice from Peter Goldsmith, Attorney at Law, 500 Second Street, Ida Grove, Iowa 51445. 712-364-2421.

Plaintiff, Curtis Glawe Pro-Se, gives notice that on November 17, 2018 Plaintiff served Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment on Defendants attorney by regular mail.

RESPECTFULLY SUBMITTED this 16th day of November, 2018

Curtis Glawe

Curtis Glawe Pro-Se
2240 570th Street
Aurelia, Iowa 51005
712-221-9178
cglawe@ live.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was sent on Nov. 16, 2018 via Regular Mail to the Attorney for Defendants, Donald Wilson Jr. of Broening Oberg Woods & Wilson, Post Office Box 20527, Phoenix, Arizona 85036, and the attached document by electronic mail to Clerk of Court, using the CM/ECF System for filing the transmittal of Notice of Electronic Filing to the following CM/ECF registrants:

BROENING OBERG WOODS & WILSON, P.C.
Donald Wilson Jr.
P.O. Box 20527
Phoenix, AZ 85036
Attorneys for Defendants

Copy also e-mailed to:

Hon. James A. Soto
U.S. District Court – District of Arizona
Evo A. DeConcini U.S. Courthouse
405 West Congress Street, Suite 6160
Tucson, AZ. 85701

By Curtis Glawe Pro-Se
2240 570th Street
Aurelia, Iowa 51005
Cell 712-221-9178
cglawe@live.com