To be Argued by:
SUZANNE M. BERGER
(Time Requested: 30 Minutes)

APL-2022-00061
Westchester County Clerk's Index No. 54780/14
Appellate Division–Second Department Docket No. 2018-00886

Court of Appeals

of the

State of New York

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

– against –

ANDREW KESSLER,

Defendant-Respondent,

– and –

REIKO KESSLER and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This appeal presents a question of statutory interpretation and yet Respondent says little about the critical words in the statute: "shall include." Nor does Respondent provide an alternative explanation consistent with the plain language of RPAPL § 1304(1) that the 90-day notice "shall include" the information specified in RPAPL § 1304(1) without excluding other information. Respondent does not dispute that "include" is a word of expansion; instead, he simply gives it no meaning. Read fairly and as a whole, RPAPL § 1304 on its face does not prohibit the inclusion of supplemental beneficial information on the seventh page of a notice for borrowers advising them of rights they may have if they have been in bankruptcy or military service, and the Legislature never intended such an interpretation.

Straying from the actual statutory language, Respondent's main argument is reductive. He asserts first that the "important disclosures" are not simply helpful information, but, based on a dictionary definition, constitute an additional "notice" prohibited by RPAPL § 1304(2)'s "separate envelope" requirement. Appellant disagrees that the Important Disclosures are properly characterized as "notices" within the meaning of RPAPL § 1304(2). But even if they were, they are not the type of additional "mailing or notice" that subsection (2) prohibits; they are within

itself. This is because the Important Disclosures provide information integral to the statutorily mandated content of the 90-day notice. Indeed, this information furthers the legislative intent of ensuring that borrowers facing foreclosure are informed of all options.

The issue before this Court is not "what is and what is not legally permissible to enclose in the envelope containing the RPAPL § 1304 notice," as Respondent contends. Resp. Br. at 8. The issue is not whether lenders or servicers must send "other notices or mailings" in a separate envelope from the 90-day notice. They must. Instead, the issue is what the 90-day notice itself can include.

Respondent also focuses too narrowly on the statute's requirement to provide a list of regional housing counselors though the statute does not exclude other relevant resources. Providing supplemental information to borrowers about their potential rights from other sources furthers the broader goals of RPAPL § 1304, and is likely the reason the Legislature used the "shall include" language; that way the Legislature did not have to list every last bit of important information, only the minimum that was necessary.

Importantly, although not discussed by Respondent, the Legislature did not touch RPAPL § 1304 when amending RPL§ 280-d and enacting COVID-related legislation to require further information be included with the RPAPL § 1304 notice. That silence confirms that the Legislature knew that it intended that § 1304

already permitted the inclusion, within the notice itself, important supplemental information.

Respondent miscasts Appellant's argument about the Fair Debt Collection Practices Act ("FDCPA"). Appellant argues only that, if RPAPL § 1304 were construed as the Appellate Division held to require a blanket prohibition against any information beyond that specified in RPAPL § 1304(1), the two statutes would be in conflict. The blanket prohibition would mean the debt collection warning cannot be included when required and, in those circumstances, there would be preemption. The two statutes should be construed to avoid that conflict; interpreting the plain § 1304(1) "shall include" language to permit supplemental related helpful information in the 90-day notice avoids a conflict between state and federal statutes.

Respondent argues for a "bright-line" rule in interpreting § 1304, as the Appellate Division did, but does not address why that is necessary when the reality is that no fact-intensive inquiry is required to assess the notice at issue. The only examination required is of the notice itself. For support, Respondent relies on this Court's "bright-line" rule for statute of limitations issues in *Freedom Mtge. Corp. v. Engel*, 37 N.Y.3d 1 (2021), but does not even consider the interplay with this Court's later adoption of a flexible approach to analyzing proof issues for RPAPL § 1304 notices in *CIT v. Schiffman*, 36 N.Y.3d 550 (2021).

Moreover, Respondent simply ignores Appellant's alternative argument that any "bright-line" rule should only apply prospectively. Respondent implicitly concedes that, in adopting its "bright-line" rule, the Second Department decided an issue of first appellate impression and deviated from more than a decade of customary practice and numerous trial court decisions on which lenders and servicers relied finding that 90-day notices, such as the one here, were proper. Respondent also does not dispute that retroactive application would result in extensive dismissals followed by refilings of the same lawsuits, producing a weighty and unnecessary burden on the courts, lenders, and servicers – as well as increased debt for borrowers.

Lastly, the dismissal in this case should be reversed under CPLR § 2001, which allows for *de minimis* variations in notices to be excused. Respondent does not address the many cases applying § 2001 when assessing similar language in other RPAPL § 1304 notices.

ARGUMENT

POINT I

APPELLANT COMPLIED WITH RPAPL § 1304

A. The Plain Language of RPAPL § 1304(1) Permits the Supplemental Information

Appellant's Opening Brief established that RPAPL § 1304 – which prescribes that a 90-day notice "shall include" the language set forth in § 1304(1)

– does not prohibit other information; it specifically allows for the inclusion of supplemental information pertinent to the 90-day notice. The Legislature plainly did not limit the notice's contents to the specific information required by § 1304(1).

As Respondent acknowledges, rules of statutory construction provide that unambiguous statutory language should be given its plain meaning. Resp. Br. at 9. Further, "a statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other." *Matter of Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) (citations omitted). *See also Danskammer Energy, LLC v. New York State Dep't of Envtl. Conserv.*,76 Misc. 3d 196, 247 (2022) ("it is the duty of the court to read and construe all parts of a statute as a whole and, where possible, harmonize and reconcile the provisions contained therein and endeavor to give effect to every word contained in the statute or legislative act.").

Yet, despite these rules, Respondent does not address that the statute's plain language actually states that the 90-day notice "shall include" the language set forth in § 1304(1). Respondent also does not address the ample case law set forth in Appellant's Opening Brief establishing that "include" is a word of enlargement so that its use in § 1304(1) anticipates that the 90-day notice may "include" language supplemental to the mandatory statutory requirements. *See* Opening Br.

at 18-19. Respondent does not provide meaning for the statute's "shall include" language at all, let alone in a manner that would support affirmance.

Respondent also does not quarrel with the proposition that RPAPL § 1304 is in derogation of the common law right of foreclosure, and therefore, as explained in Appellant's Opening Brief, rules of statutory construction require that it must be construed to least encroach on that right. *See* Opening Br. at 25-26.

Instead, Respondent focuses only on RPAPL § 1304(2)'s requirement that 90-day notices be sent in a "separate envelope from any other mailing or notice," arguing that this means that no language other than that explicitly prescribed by the statute can be included in the text of the notice. But this is not what the statute says; it says the 90-day notice "shall include" that language. Meaning must be given to both provisions.

B. The Supplemental Information is Not an Additional "Notice" Prohibited by RPAPL § 1304(2)

Respondent's attempt to circumvent RPAPL § 1304(1)'s "shall include" language by defining the supplemental information as "notices," relying solely on Black's Law Dictionary, is reductive and meritless. *See* Resp. Br. at 4. Respondent first converts the Important Disclosures into "notices" – falsely claiming that Appellant does not contest this characterization. *Id.* Then, in a circular fashion, Respondent argues that, as additional "notices," this information must be sent in a separate envelope under RPAPL § 1304(2). *Id.* at 4-5. No

recognition is given as to how confusing and unhelpful it would be for borrowers to receive separate envelopes, each with a paragraph about some potential right, without the context of the 90-day notice.

Appellant did and does contest that the Important Disclosures are notices under RPAPL § 1304(2). As Appellant's Opening Brief explained, "[b]ecause the Important Disclosures are germane to and included in the same document to supplement the statutory language, they are not a separate 'mailing or notice' requiring a separate envelope, but instead are directly related to – and thus part of – the RPAPL § 1304 notice as sent." Opening Br. at 20.

In any event, the substance of the language included, not a label or abstract dictionary definition, should control whether the Important Disclosures are the type of "notice" that RPAPL § 1304(2) requires be sent separately. RPAPL § 1304(2) requires that "*other* mailings or notice" be sent in a separate envelope (emphasis supplied). Thus, the question is not whether the Important Disclosures are a notice, disclosure, disclaimer, or otherwise, but whether the Important Disclosures are some *other* notice. They are not.

The Important Disclosures – which come after the statutorily required text and housing counselors list – are part of the 90-day notice, not an "other" notice. Their content is germane to the prescribed language set forth in RPAPL § 1304(1). The dissent below recognized this: "since the additional language was relevant to,

and in fact clarified, the warnings and instructions mandated by the statute, it did not constitute a separate 'mailing or notice.'" R. at 383.

C. Legislative History Supports the Inclusion of the Supplemental Information

When read in its entirety, RPAPL § 1304's legislative history supports the inclusion of the Important Disclosures to further the broad, overarching goal of avoiding unnecessary foreclosures by facilitating communications between borrowers and lenders in hopes of working out a solution during the 90-day period.

Respondent ignores this broader goal, arguing that the sole purpose of the 90-day notice is to encourage borrowers to contact housing counselors and, thus, that "the only possible meaning" of the legislative history and statute is that other notices are excluded to "prohibit language that may confuse or distract a borrower from contacting a housing counselor." Resp. Br. at 12. This is ludicrous on its face and is another example of Respondent overlooking the actual words of the statute to make a point: the required text mandates inclusion of the contact information for the lender or servicer, and does not direct readers solely to housing counselors. In making this argument, Respondent claims that § 1304 was "meant to encourage borrowers to contact a disinterested, neutral party" to assist and recognized that lenders and others were not going to protect homeowners. Resp. Br. at 17-18. Why then did they Legislature mandate including information for the borrower to contact the lender or loan servicer?

Respondent's narrow focus on housing counselors is also not supported by the legislative history. Opening Br. at 20-24. Certainly RPAPL § 1304 requires that information about housing counselors be included, but as the bills quoted by Respondent show, its broader purpose is to "bridge [the] communication gap" between lenders and borrowers prior to the commencement of foreclosure because "this lack of communication often leads to needless foreclosure proceedings." Resp. Br. at 13-14. To bridge that gap, lenders or servicers are to send relevant borrowers a notice that they are at risk of foreclosure at least 90 days pre-foreclosure because this "additional period of time in many cases would allow borrowers to work on a resolution *without fear of imminent loss of their homes*." (*Id*. at 14, *emphasis added*). The fear referenced is not of lenders and servicers – as Respondent suggests - but of loss of the borrower's home.

To that end, the notice is required to include, *inter alia*, how many days the borrower is in default, how much the borrower needs to pay to cure the default, and information about a variety of people that the borrower can contact for assistance. In addition to approved housing counseling agencies, this includes the New York Attorney General's Homeowner Protection Program hotline as well as a reminder that the borrower can contact the lender or servicer directly at a listed phone number to "ask to discuss possible options." *See* RPAPL § 1304(1). Thus, the legislative history reflects the broad goal of facilitating communication between

lenders and borrowers and of assisting borrowers with obtaining advice about their rights and options.

There is no dispute that the 90-day notice in this case was timely and included all the prescribed language and the housing counselor list. Inclusion of the Important Disclosures – which merely advise borrowers of potential additional rights and contacts they might have – furthers the goal of assisting borrowers and avoiding "needless foreclosures." *See, e.g., BCMBI Trust v. Keily*, Index No. 618396/2020, Whelan J. (Sup. Ct. Suffolk Cnty. Jan. 6 2022) (copy included with Opening Brief) (providing "additional contact options available to obtain information in connection with home retention options" satisfies the legislative purpose of RPAPL § 1304).

Without the supplemental information, impacted borrowers probably would not know they have additional rights. Requiring the Important Disclosures to be sent in a separate, disaggregated mailing does not further, and indeed undercuts, RPAPL § 1304's salutary goals. The separateness of the mailings would suggest that the demands and information in the 90-day notice are unrelated to the rights described in the Important Disclosures. This could result in increased borrower confusion as to the interplay between the servicemembers and bankruptcy disclosures and the other information in the 90-day notice. (Contrary to Respondent's assertion, Resp. Br. at 15, having to make multiple mailings would

also by its nature be more burdensome for the lender, and ultimately more costly to future borrowers).

Moreover, while Respondent speculates that the inclusion of any supplemental information in the 90-day notice would somehow distract or confuse the borrower, Respondent offers no factual support for this proposition beyond his conclusory assertion of confusion. There is no reason to believe that the inclusion of this helpful related supplemental information somehow muddles or undercuts the prescribed information in the notice or distracts from the housing counselors list. Notably, the Important Disclosures come after the housing counselor list and, to the extent borrowers have questions about them, the notice implicitly encourages borrowers to discuss the disclosures with the housing counselors, among others – furthering the purpose of § 1304.[1]

That the legislature intended to permit additional pertinent information in the RPAPL § 1304 notice beyond what is specified in § 1304(1) is further underscored by the fact that, as Respondent concedes, the Legislature has in fact twice required supplemental information to be included with the § 1304 notice, *i.e.*, the

[1] The concerns noted in the sponsor memo for CPLR § 3408, *see* Resp. Br. at 18-19, regarding how banks at times "flout" the purpose of the settlement conference by, for example, losing paperwork or providing misinformation are, therefore, inapplicable here where borrowers are instead being notified of additional rights.

amendments to RPL § 280-d to require supplemental information for reverse mortgages and the COVID moratorium legislation. Resp. Br. at 15.

Respondent argues that "[i]f the Legislature had intended to carve out the requirement for additional notices in cases other than the COVID-19 Notice or the notice required in reverse mortgages it would have done so, but it did not." Resp. Br. at 7. But Respondent's logic is flawed.

The Legislature did not amend § 1304 to allow the supplemental information required for reverse mortgages under RPL § 280-d or the hardship declaration required under the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, ch. 381, L 2020 (as amended Sept. 2, 2021) ("CEEPFPA"). This indicates that the Legislature did not believe it needed to – and its belief was correct based on then current practices, most of the then existing case law, and the plain language of the statute.

D. A "Bright-Line" Rule is Not Required

The Second Department's "bright-line" rule requiring dismissal in the event of supplemental information is neither justified nor necessary. As described in point (D) (1) below, the idea that such a rule is needed because it will avoid a fact-specific, consumer-by-consumer subjective impact analysis lacks both reality and merit, as does the related proposition that such an unneeded analysis should be

conducted under a "least sophisticated consumer" standard. As described in point (D) (2) below, this Court's precedent does not mandate such a rule.

1. The Inquiry as to Permitted Supplemental Information is Not Subjective

In arguing for a "bright-line" rule, Respondent claims that a "flexible standard is unworkable" and that "Plaintiff does not offer a workable alternative to what would be or could be an acceptable additional notice," foreseeing a future of "subjective review for cultural bias, or perhaps a literacy test or an I.Q. test for borrowers receiving the Notice." Resp. Br. at 4 n. 2 & 10. Respondent does not explain why the dense prescribed § 1304 language does not already raise this purported concern. Instead, Respondent surmises that the "Legislature and the Governor" provided for other notices to be sent in separate envelopes because they "believed and still believe the least sophisticated consumer would be or could be confused by additional notices mailed in the same envelope." Resp. Br. at 21.

But, again the issue presented is not whether "other notices or mailings" must be sent in a separate envelope, but what can be included within the 90-day notice itself. To repeat, RPAPL § 1304 does not limit the language of the notice to that set forth in RPAPL § 1304(1) – but instead simply says the notice "shall include" that language. In any event, Respondent's contention that a "bright-line" rule is required to avoid a consumer based subjective impact analysis is neither accurate nor required under this Court's precedent.

a. A Fact Intensive Analysis is Not Required

Construing RPAPL § 1304's language to permit supplemental information does not require analysis of "the subjective ability of a borrower to understand the content of the RPAPL § 1304 Notice." Resp. Br. at 26. Instead, the relevant inquiry concerns the nature of the information included in the notice. Appellant does not dispute that certain notices and other unrelated information, if included in the 90-day notice, would qualify as "another mailing or notice" that must be sent in a separate envelope. *See* Opening Br. at 20.

Here, the supplemental information advises borrowers of their additional rights if they are servicemembers (or prior servicemembers) or in bankruptcy – rights that are pertinent to the lender's right to foreclose as otherwise set forth in the notice – and thus go to the very purpose of RPAPL § 1304, which is to avoid unnecessary foreclosures. This information is by its nature beneficial and helpful to the borrower and is related to the contents of the 90-day notice because it affects whether the borrower has to cure in the manner and time specified to avoid foreclosure.

Respondent's contention that "there is nothing in the record that supports the beneficial timbre of additional notices," Resp. Br. at 26, ignores the actual information being provided. The Important Disclosures are based on federal laws providing for disclosure of certain rights to servicemembers and those in

bankruptcy. *See* Opening Br. at pp. 38-42 (describing their statutory basis). By definition, the federal government determined that the provision of information about these additional rights to the consumer is beneficial – and understandable

The bankruptcy disclosure advises borrowers that, if they are currently in bankruptcy or previously obtained a discharge, "this notice is for information only and is not an attempt to collect a debt" and they should consult with a "bankruptcy attorney or other advisor." R. 289. Similarly, the servicemember disclosure advises those in or formerly in the military, or with spouses in or formerly in the military, that the "federal Servicemembers Civil Relief Act and comparable state laws afford significant protections and benefits . . . including protections from foreclosure." *Id*.

That a particular borrower – including Respondent – may not fall into these categories does not change the fact that the Important Disclosures provide helpful or potentially helpful information. A borrower's status (or the status of their spouse) as a servicemember or party to a bankruptcy could change during the 90-day period. A Lender may be caught unaware of this change and the disclaimer provides a safe harbor to the lender or servicer and additional help to certain borrowers. Thus, the supplemental information is designed to be non-borrower specific and – out of caution – give more information about possible rights.

b. The Court Need Not Adopt a Least Sophisticated Consumer Standard

Because the inclusion of the Important Disclosures does not implicate an analysis of the "subjective impact" on the consumer, *see* Resp. Br. at 8, it is not necessary to determine whether a "least sophisticated consumer" approach should apply. In any event, the cases Respondent cites to support the application of the "least sophisticated consumer" standard arise in unrelated contexts. In addition, one is a federal case, not controlling here, and the other, from this Court, does not require evaluation of notices under a least sophisticated consumer standard.

Respondent argues that the Second Circuit would apply a "'least sophisticated consumer' standard" in reviewing a § 1304 notice "as a deceptive notice that requires it to be accompanied by a FDCPA notice," citing *Hopkins v. Collecto, Inc.*, 994 F.3d 117 (3d Cir. 2021). Resp. Br. at 21. *Hopkins* has nothing to do with RPAPL § 1304, but instead concerns whether a letter sent to a borrower "violate[d] the FDCPA's prohibition on deceptive (§ 1692e) and unfair or unconscionable (§ 1692f) means of collecting consumer debts" because of how it presented the interest and collection fees. *Id*. at 121.

As an initial matter, under Respondent's other argument that the 90-day notice cannot be an FDCPA notice, *Hopkins* would have no applicability. On the other hand, if the 90-day notice is an FDCPA notice, it should include the fair debt

collection warning. That statutory warning, provided for consumers' benefit – is clearly not deceptive information, which *Hopkins* was concerned with.

In addition, *Hopkins* is from the Third Circuit, while the Second Circuit has made clear that "even the least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." *Altman v. J.C. Christensen & Assocs., Inc.*, 786 F.3d 191, 193-94 (2d Cir. 2015). Creditors are still protected "against liability for bizarre or idiosyncratic interpretations of collection notices." *Wagner v. Chiari & Ilecki*, LLP, 973 F.3d 154, 165 (2d Cir. 2020). Thus, under federal law, even the "least sophisticated consumer" would not be confused by the mere addition of clear, helpful supplemental information in the 90-day notice such as the Important Disclosures.

Respondent's argument that a challenge to RPAPL § 1304 should use the "least sophisticated consumer" standard based "by analogy, [on] *Clemente Bros. Contracting Corp. v. Hafner-Milazzo*, 23 N.Y.3d 277, 288 (2014)," Resp. Br. at 22, also has numerous flaws.

First, as Respondent acknowledges, *Hafner-Milazzo* does not concern RPAPL § 1304 and its holding did not adopt a "least sophisticated consumer" standard. *Hafner-Milazzo* addressed whether parties can contractually alter a UCC time period for bank customers to advise a bank of incorrect payments. But

Appellant is not advocating that § 1304 requirements be altered by contract or otherwise. Instead, Appellant's position is that the statute, as enacted, already permits the inclusion (through the words "shall include") of supplemental information in the RPAPL § 1304 notice.

Second, the dissent in *Hafner-Milazzo* – on which Respondent relies – actually opined "[i]t would be better to interpret the statute in a way that obviates the need for a court to analyze whether the customer was 'financially sophisticated' or possessed other characteristics so that the same "rule would apply to every type of customer." *Id*. at 292-93. To the extent Respondent relies on *Hafner-Milazzo's* dissent for the idea that the Court should not adopt a rule requiring "evidentiary determinations concerning each borrower's subjective level of sophistication," Resp. Br. at 24, Appellant concurs. To the extent Respondent also relies on *Hafner-Milazzo* to urge this Court to "refrain from further narrowing the group of persons to which RPAPL 1304 applies," *id*., this case does not concern who is entitled to receive an RPAPL § 1304 notice.

Moreover, even assuming that all borrowers – despite being homeowners and having entered into mortgage agreements and signed notes – are the "least sophisticated customer," the inclusion of the Important Disclosures is helpful and to the borrower's benefit and is at least as clear as the statutorily required language.

Respondent points to nothing in the Important Disclosures that is allegedly deceptive or diverting – or, indeed, demanding in reader sophistication.

2. This Court Has Adopted a Flexible Approach to § 1304 Notices

This Court's precedent does not require a "bright-line" rule for the contents of a 90-day notice. To the extent Respondent relies on *Freedom Mtge. Corp. v. Engel*, 37 N.Y.3d 1 (2021), *reargument denied*, 37 N.Y.3d 926 (2021) to argue for application of a "bright-line" rule, he does not address Appellant's arguments about why a "bright-line" rule should not apply here. *See* Resp. Br. at 8, 25. These include that *Engel* concerned a limited context, *i.e.*, the statute of limitations for a foreclosure claim, and that an exploration of the lender's intent and the parties' conduct is not necessary when addressing the content of the § 1304 notice. *See* Opening Br. at 31-42. (As described above, the court's examination can be limited to the 90-day notice itself.)

Moreover, like the Appellate Division, Respondent does not mention, let alone address, that, after this Court decided *Engel*, it adopted a flexible approach in another foreclosure case to assess what a borrower must show to rebut a lender's proof of proper mailing of an RPAPL § 1304 notice. *See CIT Bank, N.A. v. Schiffman*, 36 N.Y.3d 550 (2021). Thus, this Court's precedent does not require a "bright-line" rule. Respondent also does not address the concern that adoption of a

"bright-line" rule could result in non-substantive challenges to 90-day notices – resulting in more unnecessary litigation. *See* Opening Br. at 42-44.

Appellant does not suggest that § 1304 should be construed to permit extraneous language that has nothing to do with the prescribed content of RPAPL § 1304 notices. That is not what happened here. As RPAPL § 1304 required, the 90-day notice – which included all statutorily-mandated content – was sent to Respondent and his wife to (among other things) warn them about the impending foreclosure; and the Important Disclosures provided information about assistance potentially critical to that default. This was not a deviation from the statute. As Justice Miller observed in dissent, the disclosures did not "frustrate the statute's overarching purpose or intent." R. 383.

E. A "Bright-Line" Rule Would Conflict with the FDCPA and Other Laws

That other laws require the RPAPL § 1304 notice to include supplemental information further supports Appellant's interpretation of the statute. This includes the hardship declaration required by CEEFPA and the information required by RPL § 280-d, as well as a fair debt collection warning that the FDCPA may require under certain circumstances. As explained above, Respondent's argument that the Legislature would say when it wanted supplemental information in the § 1304 notice ignores that the Legislature did not amend § 1304 to permit the CEEFPA

declaration or the required information under RPL § 280-d. This is because § 1304, properly interpreted, already permits that information.

Respondent tries to sidestep the conundrum presented by the potential conflict between the FDCPA and RPAPL § 1304 by arguing it is not properly before the Court. Resp. Br. at 6-7, 26-32. Appellant raised the potential for conflict between the two statutes to illustrate how the decision below ushers in that conflict. Statutes should be read together to avoid conflict. *See, e.g., Epic Systems Corp. v. Lewis,* ___ U.S. ___, 138 S. Ct. 1612, 1624 (2018); *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115, 118 (2014).

The U.S. District Court for the Southern District of New York has refused to follow the Second Department in this case because it was concerned that the decision did not "grapple[]" with the conflict presented by the FDCPA's requirements. *CIT Bank, N.A. v. Neris*, 2022 WL 1799497, *5, 2022 U.S. Dist. LEXIS 99040, *13 (S.D.N.Y. June 2, 2022, No. 18 CIV. 1511 (VM)). That conflict must be addressed.

The 90-day notice sent to Respondent did include an FDCPA warning (referred to by Respondent as a "mini-Miranda."). Although Respondent did not specifically challenge its inclusion below, the issue of whether it can be included should be considered because the Second Department's newly minted "bright-line" rule encompasses the "mini-Miranda" and as written strictly prohibits its inclusion

in the 90-day notice. Respondent's contention that any references to preemption by the Appellate Division are mere *dicta* is incorrect given the Court's holding, confirmed in subsequent decisions, that the statute must be strictly construed to exclude any language not specifically prescribed in § 1304(2) – which includes the FDCPA notice. *See Ocwen Loan Servicing v. Sirianna*, 202 A.D.3d 702 (2d Dep't 2022) (dismissal based on, *inter alia*, FDCPA warning); *U.S. Bank, N.A. v. Lanzetta*, 207 A.D.3d 501 (2d Dep't 2022) (same); *Citimortgage, Inc. v. Dente*, 200 A.D.3d 1025 (2d Dep't 2021) (same); *Bank of New York Mellon v. Luria*, 76 Misc. 3d 724 (Sup. Ct. 2022) (same); *U.S. Bank, N.A. v. DeJesus*, 75 Misc. 3d 1211(A) (Sup. Ct. 2022) (same); *see also U.S. Bank v. Drakakis* 205 A.D.3d 756 (2d Dep't 2022) (inclusion of document titled "Consumer Notice Pursuant to 15 USC § 1692(g)" violated § 1304).

Whether or not this Appellant was required to include the debt collector warning is not material in light of the broad brush of the Second Department's holding. Moreover, as set forth in Appellant's Opening Brief, the state of the law as to when and if a § 1304 notice must include a debt collector warning was fluid, causing lenders and servicers, in an abundance of caution, to include it in almost all communications. *See* Opening Br. at 27-29, discussing, *inter alia*, *Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 82 (2d Cir. 2018) ("communication

related to debt collection does not become unrelated to debt collection because it also relates to the enforcement of a security interest.").

Although Respondent says the "mini-Miranda" was not required in this case (though given and not challenged), he fails to reconcile *Rosicki* with his position. Moreover, the case on which he does rely, *In re Gill*, 529 B.R. 31 (Bank. W.D.N.Y. 2015), Resp. Br. at 26, only further supports the unsettled nature of the law regarding the interplay between the FDCPA and RPAPL § 1304 – and why lenders include the "mini-Miranda" to prevent arguments that the failure to include it violates the FDCPA. While the court in that case ultimately refused to find that the omission of a warning that the 90-day notice was from a debt collector was sanctionable under the Bankruptcy Code, the fact that the debtor made the claim underscores the uncertainty facing lenders.[2]

CIT Bank, N.A. v. Neris, 2022 WL 1799497 at *5, cannot be rejected, as Respondent attempts, simply because there is allegedly not an "adequate record that supports the presumed applicability of the FDCPA to the" facts of that case. Resp. Br. at 27. The record for *Neris*, available on PACER, rebuts Respondent's

[2] Respondent's professed ignorance in not "know[ing] of [any] lawsuit brought in the State of New York claiming a violation of the FDCPA premised upon a RPAPL 1304 Notice," Resp. Br. at 6, is surprising in light of his citation to *In re Gill* and, in any event, whether or not such a case exists is immaterial to whether or not § 1304's "shall include" language permits the inclusion of the "mini-Miranda."

contention; it shows that the papers before the court included evidence of who plaintiff was, and how and who sent the 90-day notice, as well as a copy of the notice itself. *See, e.g., Neris,* No. 18 CIV. 1511 (VM*).* ECF Docket Nos. 53(1) & 53(10). In any event, the mere possibility that the conflict will exist in cases where plaintiffs are debt collectors is sufficient to demonstrate the flaw in the Second Department's "bright-line" rule.

Respondent's contention, without support, that the "legislature did not intend for any borrower, much less the least sophisticated borrower, to believe that the RPAPL § 1304 Notice is an attempt to collect a debt," Resp. Br. at 32, is an argument of convenience belied by both *Rosicki* and *Neris* as well as the plain language of § 1304. Under § 1304(1), the notice must provide the number of days the borrower is in default, the amount due to cure, and a statement that if actions are not taken to resolve the matter within 90-days, legal action against the borrower may be commenced.

Finally, Respondent's argument that the "FDCPA expressly requires construction of the FDCPA to give effect to – not preemption of – state law so long as state law does not diminish the protections offered by the FDCPA," Resp. Br. at 6, in fact supports including the FDCPA warning in the 90-day notice when required. Respondent says there is no conflict between the FDCPA and RPAPL § 1304 because the § 1304 notice "adds to the protections afforded by the FDCPA

and does not detract from those protections by promoting contact with HUD approved and DHCR certified housing counselors." Resp. Br. at 6 & 32. Although the 90-day notice provides consumer protections, the Second Department's "bright-line" still detracts from the FDCPA protections by prohibiting the "mini-Miranda." RPAPL § 1304 can and should be construed to permit both protections. In this manner, there would be no preemption issue.[3]

POINT II

THE COURT SHOULD REVERSE EVEN IF A "BRIGHT-LINE" RULE IS ADOPTED

Alternatively, even if the Court should affirm the Second Department's "bright-line" rule, the rule should only apply prospectively. The "bright-line" rule represents a "dramatic shift from customary practice"; its retroactive application would "gravely prejudice parties who reasonably relied on prior 1304 jurisprudence." *See* Opening Br. at 51-52 (citations omitted). It will result in extensive case dismissals, delay resolution of foreclosures, and burden courts,

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[3] The section of the FDCPA relied on by Respondent, 15 USC § 1692, states that it does not prevent anyone subject to the FDCPA from "complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent . . . a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter." Resp. Br. at 32. Respondent's reliance on this provision is inconsistent with his position that a borrower would not believe a § 1304 notice is an attempt to collect a debt because § 1692 only applies to state laws "with respect to debt collection practices."

lenders, and servicers with countless re-filings as well as increase debt for borrowers. *See* Op. Br. at 52-53. It will also result in abandoned properties remaining vacant longer as cases require restarting (subject to any statute of limitations). *Id*.

Respondent does not address the standard for prospective application or dispute that the "bright-line" rule represents a change in precedent and practice or that there will be thousands of impacted cases. *See* Resp. Br. at 33-34. Respondent's guess that most of the cases that would be dismissed will be settled or that there would be more modification applications because borrowers will get a separate notice of access to housing counselors, *id*., is speculative and illogical. These same borrowers already received § 1304 notices advising them of their right to contact housing counselors and encouraging them to try to resolve their default.

Alternatively, the dismissal of this case should be reversed under CPLR § 2001. As set forth in Appellant's Opening Brief, *de minimis* defects in notices should be excused when there is no prejudice. Opening Br. at 45-50. Respondent does not address the standard under CPLR § 2001 or the numerous cases cited by Appellant in which § 2001 was applied to RPAPL § 1304 issues and similar notice provisions, including this Court's statement in *CIT Bank, N.A. v. Schiffman* that "[m]inor deviations of little consequence" are not sufficient to rebut the proof of mailing for 90-day notices. 36 N.Y.3d 550 (2021).

Respondent does not dispute that he received a 90-day notice or that it contained the prescribed information; Respondent also does not demonstrate how the Important Disclosures were prejudicial. Under these circumstances, Appellant submits that – even under a "bright-line" rule – the 90-day notice condition precedent is satisfied. Contrary to Respondent's argument, borrowers such as him can obtain a clear financial gain – the dismissal of foreclosure cases involving 90-day notices that satisfy the goals of RPAPL § 1304 and provide the prescribed information based solely on the inclusion of additional related beneficial information. That allows § 1304 to be used as a "sword for personal gain rather than a shield for the public good." *See Charlebois v. J.M. Weller Assoc.*, 72 N.Y.2d 587, 595 (1988) (cited by Respondent).

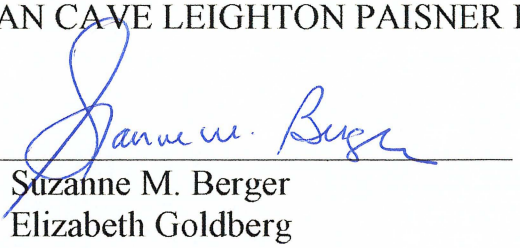
Excusing *de minimis* variations does not turn all affirmative defenses automatically into swords as Respondent posits. As CPLR § 2001 recognizes, there are times when substantial compliance accomplishes the laudable statutory goals and minimal variations do not "nullify the statute's purpose" or "lead to an absurd result." Resp. Br. at 33.

CONCLUSION

For these reasons and those set forth in Appellant's Opening Brief, this Court should reverse the Order of the Appellate Division, grant Appellant's Motion for Summary Judgment, deny Respondent's Cross-Motion, and remand to direct the entry of an order of reference.

Dated: New York, New York
November 3, 2022

BRYAN CAVE LEIGHTON PAISNER LLP

By: 

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: November 3, 2022

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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