In the Supreme Court of the State of Alaska

ALASKA TRUSTEE, LLC and
STEPHEN ROUTH,

Appellants,

v.

BRETT AMBRIDGE and
JOSEPHINE AMBRIDGE,

Appellees.

Supreme Court No. S-14915

Superior Court No. 3AN-10-06356 CI

Appeal from a Final Judgment of the Superior Court,
Third Judicial District at Anchorage,
The Honorable Mark Rindner, Presiding

Brief of Appellees Brett and Josephine Ambridge

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STATUTORY PROVISIONS

The Fair Debt Collection Practices Act (FDCPA) provides the following general definition of "debt collector": "The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The Act also provides the following additional definition: "For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Id.* The Act further provides: "For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. § 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act." *Id.* § 1692l(a).

Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful." AS 45.50.471(a). The UTPA further provides: "In interpreting AS 45.50.471 due consideration and great weight should be given the interpretations of 15 U.S.C. § 45(a)(1) (§ 5(a)(1) of the Federal Trade Commission Act)." AS 45.50.545. As recently amended, the UTPA encompasses "goods or services provided in connection with a consumer credit transaction or with a transaction involving an indebtedness secured by the borrower's residence." AS 45.50.561(a)(9).

INTRODUCTION

The Fair Debt Collection Practices Act (FDCPA) protects consumers from abuses by debt collectors. Its coverage extends to all "debt collectors," generally defined to include "any person" who "regularly collects" debts. This appeal turns on that general definition.

The defendants in this case, Alaska Trustee and Stephen Routh, are in the business of initiating and conducting foreclosures—including sending borrowers notice that they have defaulted on their mortgages and must either pay their mortgage debt or face foreclosure. The defendants do not deny that their business is debt collection. But they nevertheless contend that they are free to make false statements, harass consumers, and otherwise violate the FDCPA's basic requirements with impunity because, in their view, Congress exempted those who enforce security interests from the general definition of "debt collector."

Fortunately, that is not what Congress did. The FDCPA applies broadly to *any person* who regularly collects *any debts*, whether directly or indirectly. Foreclosure firms (like Alaska Trustee), as well as those who exercise total control over them (like Stephen Routh), are no exception: They must comply with the Act's basic requirements. Neither did so here. Because the notice of default that Alaska Trustee sent Brett and Josephine Ambridge failed to comply with the FDCPA—and because Routh has ultimate authority over the notice's standard content—both are liable for that violation. The notice likewise violated Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA), which affords consumers at least as much protection from collection abuses as federal law. The superior court's decision should accordingly be affirmed in all respects.

STATEMENT OF THE ISSUES

1. Whether Alaska Trustee Is a Debt Collector Under the FDCPA. The FDCPA's general definition of "debt collector" encompasses "any person" in "any business" whose "principal purpose" is debt collection, or who "regularly collects" debts. 15 U.S.C. § 1692a(6). For the purposes of one provision, "debt collector" "also includes" those whose principal purpose is the "enforcement of security interests." *Id.* Does this additional definition carve out an exception from the general definition for those who enforce security interests? If not, is Alaska Trustee—which conducts non-judicial foreclosures, sends homeowners notices of default on their mortgages, and provides loan-reinstatement information upon request—a debt collector under the general definition?

2. Whether Alaska Trustee Violated the UPTA. Alaska's UTPA prohibits "unfair or deceptive acts or practices," AS 45.50.471, and requires courts to give "great weight" to parallel interpretations of the Federal Trade Commission Act (FTC Act). AS 45.50.545. As a matter of federal law, violations of the FDCPA "shall be deemed an unfair or deceptive act or practice in violation of [the FTC Act]." 15 U.S.C § 1692*l*(a). Assuming Alaska Trustee violated the FDCPA, did it also violate the UTPA?

3. Whether Routh Is Personally Liable Under the FDPCA. Stephen Routh is the sole owner and managing member of Alaska Trustee. He has ultimate authority over the content of the standard-form notice of default that Alaska Trustee sends a homeowner whenever it initiates the foreclosure process. Is Routh personally liable under the FDCPA—as a "person" in a business engaged in debt collection, 15 U.S.C. § 1692a(6)—if the content of that notice violated the Act?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Alaska Trustee

Stephen Routh is the "sole owner" and "managing member" of Alaska Trustee. [Exc. 254 (Routh Dep. 28:2-3; 28:18)]. He created the company in 2005 to provide services "related to the non-judicial foreclosure process," including giving the borrower "notice of the foreclosure" and "responding to requests from the borrower" for loan-reinstatement information. [Exc. 40-41 (Santiago Aff. ¶¶8-9); Exc. 253 (Routh Dep. 24:19-21)]. These services had previously been performed by the law firm of Routh Crabtree (now known as RCO Legal, P.S.)—of which Stephen Routh is the founding partner and "principal shareholder"—and were "separated . . . out from the law firm" when Routh formed Alaska Trustee. [Exc. 200 (Routh Aff. ¶5); Exc. 253 (Routh Dep. 25:1-10); Exc. 40-41 (Santiago Aff. ¶¶8-9)].

But the two entities remain closely linked: They share the same office suite, where Routh maintains his personal office.[1] They market themselves as offering "a coordinated foreclosure solution for both judicial and non-judicial processes." RCO website, *available at* http://www.rcolegal.com. Routh Crabtree has sent letters on Alaska Trustee stationery. [Exc. 255-56, 276-77 (Routh Dep. 32:12-35:3 & Ex. 3)]. And at least one Alaska Trustee employee was originally hired by Routh Crabtree. [Exc. 102 (Santiago Aff. ¶2)].

[1] *Compare* Exc. 70 (listing Alaska Trustee's mailing address as 3000 A Street, Suite 200, Anchorage, AK 99503), *with* Appellants' Br. Cover Page and Exc. 73 (listing RCO's mailing address as the same); Exc. 73 (Answer ¶6).

Routh's Control of Alaska Trustee. Because Stephen Routh owns "100" percent of Alaska Trustee and is its "only member," he is fully in charge of its operations and has sole access to its financial information. [Exc. 256, 259 & 261 (Routh Dep. 34:5-8; 49:10-12; 55:1-2)]; State of Alaska, Department of Commerce, Community, and Economic Development website, *available at* http://www.commerce.state.ak.us/CBP/Main/CorporationDetail.aspx?id=93052. In other words, he has ultimate authority over everything the company does. While retaining that authority, Routh has chosen to structure the business so that the bulk of the daily work—drafting and sending "typical foreclosure documents"—is done by others. [Exc. 256 (Routh Dep. 34:25-35:3)]. But "issues that go beyond just the mere formalities," "that are important," or that might call for the advice of a lawyer "get elevated very quickly." [Exc. 256 (Routh Dep. 34:15-20); Exc. 260 (Routh Dep. 52:8-10)]. That is when Routh will "get involved." [Exc. 260 (Routh Dep. 52:8-10)].

One example is "[t]he creation of forms." [Exc. 256 (Routh Dep. 34:25-35:3)]. When Alaska Trustee recently changed its standard-form notice of default—the form it uses to notify homeowners that their mortgage is in default and that a foreclosure sale has been scheduled—Routh was not only "aware of" the change; he "approved it." [Exc. 257-58 (Routh Dep. 41:13-15; 42:3-9)]. And, by the same token, a proposal that would change the form in a way that he did *not* like—for instance, adding the line "Have a nice day"—"would get [his] disapproval." [Exc. 260 (Routh Dep. 52:11-14)].

Another example of Routh's involvement is Alaska Trustee's website. Routh hired a web-design company to create the website, provided the content for it, and oversaw the process. [Exc. 261 (Routh Dep. 56:24-57:13)]. Until recently, the website included a sentence

stating that "Routh Crabtree, a PC, is our parent company." [Exc. 261 (Routh Dep. 56:1-9)]. Although Routh contends that this sentence is "not accurate" and he "didn't know either way" what was on the website, he admits that he is the only person at Alaska Trustee who had any role in designing the site. [Exc. 261-62 (Routh Dep. 56:1-58:9)]. He claims that the web-design company "took it upon themselves to write" the sentence and that, "[w]hen he became aware of it, [the website] was taken down immediately," for he believed "[i]t was a magnet for litigators" and he "[d]ecided not to provide the magnet any more." [Exc. 261-62 (Routh Dep. 56:18-58:9); Exc. 260 (Routh Dep. 50:18-51:1)]. He took down Routh Crabtree's website for the "[s]ame reason"—because it was a magnet for litigators. [Exc. 260 (Routh Dep. 51:10-17)].

Alaska Trustee's Management. Aside from Routh, "two people [are] involved in the management" of Alaska Trustee: Athena Vaughn and Rose Santiago. [Exc. 255 (Routh Dep. 30:13-18)]. Vaughn "handles the day-to-day operations, staff issues, process work flows, [and] so forth." [Exc. 254 (Routh Dep. 28:21-25)]. Her role is "more human resources"—interacting with clients and "keeping the wheels greased in the business." [Exc. 255 (Routh Dep. 30:19-24)]. She is supervised directly by Routh, who maintains "[f]requent contact" with her, "both [over the] phone and in person." [Exc. 254, 255, & 256 (Routh Dep. 29:14-15; 30:1-4; 34:15-20)]. Santiago's role is "more back office"—"getting work out, taking calls, [and] interfacing with borrowers." [Exc. 255 (Routh Dep. 30:23-24)]. She reports directly to Vaughn, forming a "dotted line" to Routh. [Exc. 255 (Routh Dep. 31:14-16)].

B. The Ambridges

In 2006, Brett and Josephine Ambridge bought their first home. [Exc. 179 (Josephine Ambridge Dep. 6:15-22)]. They had been married for nearly 20 years, had four children together, and worked steady jobs—Brett as a logistics clerk at PenAir, and Josephine as a medical clerk in the emergency room at Alaska Native Medical Center—so they "thought it was time to get into [their] own home and stop paying rent." [Exc. 166 (Brett Ambridge Dep. 7:03-06); Exc. 179 (Josephine Ambridge Dep. 6:6-11; 8:17)].

The Ambridges' Mortgage. The Ambridges financed their purchase with a mortgage from Alaska Housing Finance Corporation. [Exc. 2 (Complaint ¶10); Exc. 166 (Brett Ambridge Dep. 7:15-17)]. They made monthly payments to Wells Fargo, the loan's servicer. [Exc. 166 (Brett Ambridge Dep. 7:18-19)].

For a while, the Ambridges made their payments on time. But in late 2007 they received a letter from Alaska Trustee notifying them that they were in default on their loan—the principal balance of which was then "$201,848.42, plus interest, late charges, attorney fees and costs and other advances"—and that a foreclosure sale would take place in January 2008. [Exc. 197 (Notice of Default)]. Not wanting to lose his family's home, Brett "took a loan against his 401(k)" and paid Wells Fargo what was necessary to cure the default and "stop the foreclosure." [Exc. 181 (Josephine Ambridge Dep. 15:1-12); Exc. 167 (Brett Ambridge Dep. 11:20-12:5)].

Over the next year and a half the Ambridges had a string of bad luck. Their car's "transmission went out," a number of "close family members" died, and Brett was involved in a car accident that "caused [him] to lose time at work." [Exc. 166 (Brett Ambridge Dep.

8:1-9); Exc. 179 (Josephine Ambridge Dep. 8:9-9:16)]. They again got behind on their payments. In April 2009, the Ambridges received a letter from Wells Fargo notifying them that their loan was in default and that "failure to pay [the] delinquency" of $3,223.75—in addition to their regular $1,449.30 monthly payment—would "result in the acceleration of [their] Mortgage Note," which could lead to "a foreclosure action." [Exc. 193 (Letter)]. The letter also informed the Ambridges that they would "have the right to reinstate [their] Note" even "after acceleration," as they had done before. *Id.*

The Ambridges again did all that they could to save their home. They mailed Wells Fargo a letter requesting modification of the loan, but "never heard back." [Exc. 180 (Josephine Ambridge Dep. 11:12-21)]. They also began sending Brett's entire "first-of-the-month paycheck" to cover "the main cost of the mortgage," plus "about half of [his] second paycheck to try to catch up." [Exc. 166 (Brett Ambridge Dep. 9:7-20); Exc. 179 (Josephine Ambridge Dep. 8:12-17)]. But with "utilities, four kids," and other financial obligations, they never gained any ground. [Exc. 179 (Josephine Ambridge Dep. 8:12-17)]. They "just got further behind." [Exc. 180 (Josephine Ambridge Dep. 11:17-21)].

Alaska Trustee's Letters to the Ambridges. In August 2009, the Ambridges received another letter about their loan, this time from Alaska Trustee. It was a standard notice of default (like the one they had received in 2007), and it informed them that a foreclosure sale of their home had been scheduled for November 2009. [Exc. 70] Alaska Trustee would "apply the proceeds to the indebtedness." *Id.*

In a box at the top of the letter read the following: "The purpose of this letter is to collect a debt. Any information obtained will be used for that purpose." *Id.* The letter also

contained a "Fair Debt Collection Practices Act Statement," which among other things stated that "[t]he principal balance of the debt is $196,712.28, plus interest, late charges, attorney fees and costs and other advances," and that "[t]he creditor to whom the debt is owed is Alaska Housing Finance Corporation." *Id.* The letter did not specify the amount of the interest, late charges, and additional fees and costs. *Id.*

Alaska Trustee sent the Ambridge an amended notice-of-default letter three weeks later, moving the sale date to December 2009. [Exc. 195-96]. This letter stated the same amount owed, using the same language as the last one. *Id.* It too did not provide the full amount of the debt. And, at the end, the letter reiterated: "THE PURPOSE OF THIS COMMUNICATION IS TO COLLECT THE DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE." *Id.*

Routh contends that he "did not draft, review, approve or sign" either of the two letters Alaska Trustee sent the Ambridges in 2009. [Exc. 200 (Routh Aff. ¶4)]. Indeed, despite his complete control over the company—and the centrality of the notice-of-default form to Alaska Trustee's business—Routh claims that the "actual template form" used here did not have to be approved by him. [Exc. 260 (Routh Dep. 52:1-5)].

The Foreclosure Sale. After receiving the letters, the Ambridges reached out to Wells Fargo and again requested to modify the loan, again to no avail. [Exc. 185 (Josephine Ambridge Dep. 30:5-15)]. The Ambridges lost their home in December 2009, when Alaska Housing Finance Corporation purchased the property by offset bid. [Exc. 40 (Santiago Aff. ¶7)].

II. STATUTORY BACKGROUND

A. The Fair Debt Collection Practices Act

Congress passed the Fair Debt Collection Practices Act (FDCPA) in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors"—practices Congress determined "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). The FDCPA seeks to remedy these problems by establishing basic consumer protections against overreaching by debt collectors.

The FDCPA prohibits debt collectors from "making false or misleading representations and from engaging in various abusive and unfair practices." *Heintz v. Jenkins*, 514 U.S. 291, 292 (1995). It guarantees consumers an opportunity to dispute their debts and requires debt collectors to "send the consumer a written notice containing," among other things, the full "amount of the debt" within five days of "the initial communication with a consumer in connection with the collection of any debt." 15 U.S.C. § 1692g(a)-(b). Further, the FDCPA provides that any violation of the Act "shall be deemed an unfair or deceptive act or practice in violation of [the Federal Trade Commission Act]." *Id.* § 1692*l*(a).

In designing this regulatory scheme, Congress recognized that independent debt collectors have a uniquely powerful incentive to engage in abusive practices because they "are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them"—making ordinary market forces insufficient to curb abuse. S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Consequently, the FDCPA imposes strict liability on debt collectors for any violation, while providing a

complete defense to those who can show "that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(a) & (c).

The FDPCA defines "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6). Under an additional definition applicable only to § 1692f(6), the term "also includes" any entity whose "principal purpose . . . is the enforcement of security interests." *Id.* Section 1692f(6) forbids those subject to the additional definition—such as repossession agents—from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if" they are not legally entitled to it.

B. Alaska's Unfair Trade Practices and Consumer Protection Act

Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) prohibits "unfair or deceptive acts or practices in the conduct of trade or commerce." AS 45.50.471. Specifically, the Act applies to the provision of "goods or services"—a definition amended in 2004 to include those "provided in connection with a consumer credit transaction or with a transaction involving an indebtedness secured by the borrower's residence." AS 45.50.561(a)(9); *see* H.B. 15, 23d Leg., 2d Sess. (Alaska 2004).

In interpreting what constitutes an unfair or deceptive act or practice, the UTPA expressly states that "due consideration and great weight should be given" to the interpretation of those terms under "the Federal Trade Commission Act," AS 45.50.545,

which similarly bans "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a).

C. Alaska's Non-Judicial Foreclosure Process

Alaska allows foreclosures to be conducted either judicially or non-judicially. Non-judicial foreclosures are faster and cheaper than judicial foreclosures, and for that reason are more common. They are handled by a trustee under a deed of trust and are governed by AS 34.20.070. The trustee records a notice of default "[n]ot less than 30 days after the default and not less than 90 days before the sale," and mails a copy to the homeowner. AS 34.20.070(b).

At the same time, the statute recognizes the potentially devastating effects of losing one's home. It allows the homeowner to cure the default at "any point before the sale" by paying "the sum then in default," plus the "fees and costs actually incurred by the beneficiary and trustee due to the default." *Id.* Curing the default will reinstate the loan and stop the sale. *See Kuretich v. Alaska Trustee, LLC*, 287 P.3d 87, 89 (Alaska 2012); *Young v. Embley*, 143 P.3d 936, 940 (Alaska 2006).

III. PROCEDURAL BACKGROUND

The Ambridges sued Alaska Trustee and Routh in April 2010 alleging violations of the FDCPA and UTPA because the default notices sent to the Ambridges did not include the full "amount of the debt," as required by 15 U.S.C. § 1692g(a)(1). [Exc. 1 (Complaint)].

A. The Court Holds that Alaska Trustee Violated the FDCPA.

Following the defendants' unsuccessful motion to dismiss, the Ambridges moved for partial summary judgment limited to their FDCPA claim against Alaska Trustee. [Exc. 19].

First, the Ambridges argued that Alaska Trustee is a "debt collector" under the FDCPA's general definition because its principal business is conducting foreclosures, and a foreclosure is "a method of collecting a debt by acquiring and selling secured property to satisfy a debt." [Exc. 23]. *Second*, they argued that the FDCPA requires a debt collector to provide a consumer with notice of the full "amount of the debt"—including the amount of the "interest and other charges," *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC*, 214 F.3d 872, 875-76 (7th Cir. 2000)—within five days of contacting the consumer. And *third*, Alaska Trustee did not do that here.

Alaska Trustee responded by cross-moving for summary judgment on both the state and federal claims. [Exc. 28]. Alaska Trustee did not deny that the notice failed to state the full amount owed. Instead, it claimed that it is not subject to *any* of the FDCPA's requirements (except for those found in § 1692f(6)) because the "definition of 'debt collector' *excludes* a business 'the principal purpose of which is the enforcement of security interests.'" [Exc. 32]. Alaska Trustee did not analyze whether it falls within the text of the general definition of "debt collector." Nor did it dispute that "foreclosure is a method of collecting a debt." It simply argued that the additional definition carves out an exception for *all* enforcers of security interests—even those who communicate directly with consumers and "whose activities have the effect of satisfying a debt." *Id.* & n.11.

The trial court (Rindner, *J.*) disagreed. Following "decisions from the Third, Fourth, and Fifth Circuits, as well as that of the Colorado Supreme Court," the court held that if the defendants "meet the statutory definition of 'debt collector,' they can be covered by all sections of the Act, not just § 1692f(6), regardless of whether they also enforce security

interests." [Exc. 51 (Order), Exc. 57, & Exc. 60 (quotation marks omitted)]. The court further agreed with these authorities that "a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt," so "those who engage in such foreclosures are included within the definition of debt collectors" if they do so regularly. [Exc. 64 (quotation marks omitted)]. Because Alaska Trustee regularly conducts foreclosures it "is a debt collector *as well as* an entity that enforces security interests." [Exc. 65]. A contrary view, the court reasoned, "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." [Exc. 59 (quotation marks omitted)].

The court bolstered its conclusion with several additional facts. *First*, the standard notice of default that Alaska Trustee sends consumers declares that it "is an attempt to collect a debt." [Exc. 62 & Exc. 70]. *Second*, Alaska Trustee frequently sends reinstatement letters stating the amount required to cure the default, as well as instructions on where to send the check. [Exc. 62-63 & Exc. 71]. Like the notices of default, these letters also make clear (in bold and all caps) that "the purpose of this letter is to collect a debt." [Exc. 63 & Exc. 72]. They notify the consumer that "[t]here may be other options available to help you avoid foreclosure." [Exc. 71]. *Third*, Alaska law "provides the debtor with the right of redemption"—which, as previously explained, is "'the right, until the foreclosure sale, to reimburse the mortgagee and cure the default.'" [Exc. 64 (quoting *Embley*, 143 P.3d at 940)].

The court further held that the notice in this case did not comply with the FDCPA because it "fail[ed] to state the actual amount of the debt." [Exc. 67]. The court therefore granted the Ambridges' motion for partial summary judgment. In addition, the court denied

Alaska Trustee's motion for summary judgment on the UTPA claim. Relying on this Court's decision in *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980), the court determined that "a violation of the FDCPA translates into a violation of the UTPA." [Exc. 68].

B. The Court Holds that Alaska Trustee Violated the UTPA.

The Ambridges next moved for injunctive relief on their UTPA claim against Alaska Trustee, requesting that the company conform its future notices to the requirements of the FDCPA and UTPA. The superior court granted the motion. [Exc. 115 (Order)]. In doing so, the court reiterated its earlier conclusion that "a violation of the FDCPA translates into a violation of the UTPA," and rejected Alaska Trustee's two contrary arguments. *First*, the court held that the UTPA clearly applies to those who provide "goods or services" to consumers, not just "goods" as Alaska Trustee had argued. [Exc. 129-131]. Any other interpretation, the court explained, would lead to "absurd result[s]" and thwart "the legislature's intent" in enacting the statute. [Exc. 131]. *Second*, the court rejected Alaska Trustee's argument that "real estate transactions are not within the purview of the UTPA." [Exc. 125-35]. That argument is foreclosed by the plain meaning of the UTPA's text, which was amended in 2004 to cover "goods or services provided in connection with a consumer credit transaction or with a transaction involving an indebtedness secured by the borrower's residence." [Exc. 126 (quoting AS 45.50.561(a)(9))]. Having concluded that the UTPA applies to Alaska Trustee's services, the court had little trouble finding that the requirements for an injunction were met. [Exc. 136-39]. Indeed, Alaska Trustee had not even argued that it had complied with the UTPA if subject to its requirements. [Exc. 92-99].

C. The Court Holds that Routh Is Personally Liable Under the FDCPA.

Finally, the defendants sought summary judgment on the remaining claims. The court granted the motion as to the claims for damages under the UTPA and against Routh for injunctive relief. [Exc. 212 (Order)]. But the court denied summary judgment as to the FDCPA claim against Routh, concluding that he had "failed to demonstrate that he is not liable as a 'debt collect[or]' . . . as a matter of law." [Exc. 228].

First, the court found that the approach of the majority of courts—that a corporate director, officer, or shareholder "may be liable for violating the FDCPA if she independently satisfies" the definition of debt collector—was the most persuasive in light of the Act's broad language, which applies to "any person" who meets certain criteria. [Exc. 220-24]. *Second*, the court found that Routh satisfied the definition of debt collector. The court noted that "[o]ther courts have found individuals personally liable as debt collectors when they (1) materially participated in collecting a debt, (2) exercised control over the affairs of a debt collection business, or (3) were regularly engaged, directly and indirectly in the collection of debts." [Exc. 224-25 (brackets, ellipsis, and quotation marks omitted)]. The court then applied that framework to the following facts:

- "Routh is Alaska Trustee's sole owner and ultimate manager."
- He "generally reviews any changes in Alaska Trustee's document templates."
- He supervises and "is responsible for hiring and firing Vaughn and Santiago."
- He "stays in 'frequent contact' with Vaughn even when not in the office."
- Although he delegates day-to-day authority to Vaughn and Santiago, "'[i]ssues that are important get elevated [to Routh's attention] very quickly.'"

- He "retains ultimate authority over the processing of non-judicial foreclosures at Alaska Trustee."
- He "states that he is involved in approving, and sometimes creating, form documents."
- He "handles problems that arise in Alaska Trustee's daily business."

[Exc. 225-26]. Based on these facts, the court concluded that Routh was not "entitled to judgment as a matter of law." [Exc. 226]. Even though he maintained "that he 'did not draft, review, approve or sign the Notice' sent to the Ambridges," and that he was not "involved in creating the Notice sent to the Ambridges," those facts showed, at best, that he "was not materially involved in the collection of *this* debt." [Exc. 225-26]. They did not undermine the court's conclusion that Routh "exercised control over the management of a debt collection business"—including control over the content of its standard-form notice—"and that he was regularly engaged, directly or indirectly, in the collection of debts." [Exc. 227].

Routh then moved for reconsideration, arguing "that there did not appear to be any genuine issues of material fact" and the court could enter judgment in favor of the Ambridges even though they did not submit a cross-motion for summary judgment. [Exc. 240]. Routh "specifically recognize[d] that moving for reconsideration may result in a judgment against him and in favor of the Ambridges." [Exc. 240-41]. And that is what happened: The court granted summary judgment in the Ambridges' favor, holding that "Routh is a debt collector" because he "exercised control over a debt collection business" and "was regularly engaged, directly and indirectly, in the collection of debts." [Exc. 242-44].

STANDARD OF REVIEW

This Court "review[s] a grant of summary judgment *de novo*," and will affirm "if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law." *McLeod v. Parnell*, 286 P.3d 509, 512 (Alaska 2012). In statutory cases, the Court applies its "independent judgment" and "interpret[s] the statute in question by looking to the meaning of the statute's language, its legislative history, and its purpose." *Id.*

SUMMARY OF ARGUMENT

I.A. The FDCPA generally defines "debt collector" as "any person" in "any business" whose principal purpose is debt collection, or who "regularly collects" debts directly or indirectly. 15 U.S.C. § 1692a(6). The Act further provides that, for § 1692f(6), the term "debt collector" "also includes" enforcers of security interests. *Id.* This additional definition does not *restrict* the general definition—it *expands* it for one provision. Enforcers of security interests who regularly collect debts are debt collectors under the entire Act. The reasons that Alaska Trustee offers show why its contrary contention is wrong.

Reason one: The general definition of debt collector, according to Alaska Trustee, cannot include enforcers of security interests because otherwise the additional definition would add nothing. Not so. The additional definition sweeps in those who enforce security interests without contacting consumers—repossession agents, for example. It does not suggest that debt collection and the enforcement of security interests are mutually exclusive. If it did, then § 1692i(a)(1)—which applies to "a debt collector bringing an action to enforce a security interest in real property"—would have no effect. *Kaltenbach v. Richards*, 464 F.3d 524, 528 (5th Cir. 2006).

Reason two: The "great majority of federal courts to consider the issue" supposedly agree with Alaska Trustee. Alaska Trustee Br. 15. To the contrary, not a single federal circuit has adopted its view, and five have rejected it. So too has the Colorado Supreme Court, the only state supreme court to confront the issue before this Court.

Reason three: Homeowners who have defaulted on their mortgage payments do not need protection because they "have the ability to surrender the collateral." Alaska Trustee Br. 16. Congress, however, said nothing of the sort. It was concerned about protecting consumers who could not pay their debts from unnecessary suffering and anguish. That concern applies with equal (if not more) force to homeowners. Congress did not remove them from the FDCPA's scope simply because their debts are secured.

B. Alaska Trustee meets the general definition of debt collector. It "directly or indirectly" collects the debt owed on a mortgage by conducting foreclosures. The notice it sends homeowners might lead to a payment by the homeowner; or it might lead to a foreclosure sale. But either way, one thing is certain: Alaska Trustee's communication with the consumer concerning the debt has "the effect of obtaining payment of [the] debt in whole or in part.'" Alaska Trustee Br. 14. Alaska Trustee does not argue otherwise. Rather, it contends that its *method* of collecting debts is not covered because it seeks "only the recovery of collateral and not the payment of money." Alaska Trustee Br. 15. But Congress did not distinguish between collection methods in defining the term debt collector, and "[t]here can be no serious doubt that the ultimate purpose of foreclosure is the payment of money." *Glazer v. Chase Home Fin. LLC,* 704 F.3d 453, 463 (6th Cir. 2013).

II. The UTPA prohibits "unfair or deceptive acts or practices." AS 45.50.471. It directs courts to give "due consideration and great weight" to what constitutes an unfair or deceptive act or practice under federal law. AS 45.50.545. Alaska Trustee's FDCPA violation in this case is, by definition, "an unfair or deceptive act or practice in violation of [federal law]." 15 U.S.C. § 1692*l*(a). This Court has *never* interpreted the UTPA to provide less protection than the FDCPA, and it should not do so now. Nor should it excuse the violation because it occurred in the context of a foreclosure. The UTPA applies to "services provided in connection with . . . a transaction involving an indebtedness secured by the borrower's residence." AS 45.50.561(a)(9). It also applies to debt collectors. Like the FDCPA, the UTPA should not be interpreted to allow the defendants to escape liability simply because they collect debt through the foreclosure process.

III.A. There is a split of authority on whether a corporation's director, officer, or shareholder may be held personally liable for violating the FDCPA. One side requires piercing the corporate veil; the other does not. But the divide is not close: The majority of courts and the FTC agree that veil-piercing is not required. They recognize that the Act applies to "any person," and properly give those words their full effect. The minority view, by contrast, rests on a flawed analogy to Title VII—a statute that does not apply to "any person," but rather expressly limits liability to business entities or employers.

B. Routh is personally liable here because he satisfies the general definition of debt collector and bears responsibility for the violation in this case. His authority over Alaska Trustee is absolute. He is its sole owner and managing member. He is made aware of any issues that are important or that might require the expertise of a lawyer. He controls the

company's website. He has final authority over the company's form letters, and recently approved a change to its standard-form notice of default. In fact, as the trial court found, he "generally reviews *any* changes in Alaska Trustee's document templates." [Exc. 225 (emphasis added)]. These facts make him a debt collector under the FDCPA, personally liable for the violations he oversees.

ARGUMENT

I. ALASKA TRUSTEE IS A "DEBT COLLECTOR" UNDER THE FDCPA.

A. The FDCPA's General Definition Of "Debt Collector" Does Not Exclude Those Who Enforce Security Interests.

The FDCPA "is an extraordinarily broad statute." *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 362 (6th Cir. 2012) (quotation marks omitted). It defines the term "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The Act expands on this general definition for the purpose of a single provision—§ 1692f(6), which prohibits an additional category of persons (such as auto repossession agents, who do not frequently interact with consumers) from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if" they are not legally entitled to it. For that provision only, the term debt collector "also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Id.* § 1692a(6).

These two definitions (the general and the additional) are followed by a list of six categories of people who are excluded from the definition of debt collector. *See id.* § 1692a(6)(A)-(F). Those who enforce security interests are not mentioned. *See id.* Thus, an enforcer of security interests is a debt collector for purposes of the entire FDCPA if it satisfies the general definition, and is a debt collector only for purposes of § 1692f(6) if it does not. That is the straightforward reading of the statute.

Yet Alaska Trustee urges this Court to reject that reading. As Alaska Trustee reads the statute, the additional definition of "debt collector" in fact *restricts* the general definition, "exclud[ing] for all but one purpose 'any business the principal purpose of which is the enforcement of security interests.'" Alaska Trustee Br. 14. But, as the vast majority of courts have recognized, the additional definition "is cast in terms of *inclusion*." *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005). It explains that for a particular section the general definition "also includes" enforcers of security interests. That language does not somehow create "an exception to the definition of debt collector." *Wilson v. Draper & Goldberg, P.L.L.C.,* 443 F.3d 373, 378 (4th Cir. 2006); *see also Glazer,* 704 F.3d at 463 ("[The additional definition] operates to *include* certain persons under the Act (though for a limited purpose); it does not *exclude* from the Act's coverage a method commonly used to collect a debt."); *Shapiro & Meinhold v. Zartman,* 823 P.2d 120, 124 (Colo. 1992) ("[The additional definition] does not limit the definition of debt collectors, but rather enlarges the category of debt collectors for the purpose of section 1692f(6).").

If Alaska Trustee were right, and "Congress had intended to exempt from the FDCPA one whose principal business is the enforcement of security interests," then

Congress "would have provided an exception in plain language." *Id.* It did not. Enforcers of security interests are "not among the six listed *exceptions* to the general definition." *Piper*, 396 F.3d at 236. Consequently, "a party who satisfies § 1692a(6)'s general definition of a 'debt collector' is a debt collector for the purposes of the entire FDCPA even when enforcing security interests." *Kaltenbach*, 464 F.3d at 529.

In arguing otherwise, Alaska Trustee makes three main points: (1) it invokes a canon of statutory construction known as the surplusage canon, (2) it claims that it has the weight of the case law on its side, and (3) it makes an appeal to congressional intent. Not only is Alaska Trustee wrong on all three fronts, but each actually *undermines* its position.

1. ***The Surplusage Canon.*** Alaska Trustee first argues (at 14-15) that the general definition of debt collector cannot include enforcers of security interests because, if it did, the additional definition would have no meaning—violating the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant" or meaningless. *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality op.). If the general definition included enforcers of security interests, Alaska Trustee asks, why would Congress feel the need to say that the general definition "also includes" them for a particular provision of the Act?

The problem with this argument is its premise: The general definition does not include *every* enforcer of a security interest. Specifically, it does not include most repossession agents (those known colloquially as "repo men"), "who typically 'enforce' a security interest—*i.e.*, repossess or disable property—when the debtor is not present, in order to keep the peace." *Glazer*, 704 F.3d at 464. An agent who does nothing more than repossess

cars in which creditors hold security interests—without ever contacting consumers—is not one whose business "primarily involve[s] communicating with debtors in an effort to secure payment of debts." *Piper*, 396 F.3d at 236. "Just such a person was involved in *Jordan v. Kent Recovery Services*, 731 F. Supp. 652 (D. Del. 1990)," which Alaska Trustee cites, "where an automobile repossession business was held to be subject to § 1692f(6) but not the remaining provisions of the FDCPA." *Piper*, 396 F.3d at 236; *see also Montgomery v. Huntington Bank*, 346 F.3d 693, 700-01 (6th Cir. 2003) (holding that a repossession agency did not meet general definition, and plaintiff did not allege that it did). "Indeed," the Sixth Circuit recently observed, "all of the cases we found where § 1692f(6) and [the additional definition] were held applicable involved *repossessors*," suggesting that the additional definition in practice "applies only to repossessors"—the very opposite of surplusage. *Glazer*, 704 F.3d at 464.

But the surplusage canon, it turns out, *does* play a role here—just not in the way Alaska Trustee says it does. Section 1692f(6) is not "the only section of the FDCPA that regulates the enforcement of security interests." *Kaltenbach*, 464 F.3d at 528. As the Fifth Circuit has pointed out, § 1692i(a)(1)—a provision Alaska Trustee never cites—"requires that a debt collector bringing an action to enforce a security interest in real property do so only in the venue in which the property is located." *Id* at 528. If enforcers of security interests were subject only to § 1692f(6)—that is, if they couldn't qualify for the general definition of "debt collector"—"then § 1692i(a)(1) would be without effect." *Id.*; *see also Glazer*, 704 F.3d at 462. Alaska Trustee, like the smattering of district court cases on which it relies, is unable to "reconcile the fact that § 1692i(a)(1) is directed at persons enforcing

security interests" with its view "that only § 1692f was intended to regulate the enforcement of security interests." *Kaltenbach*, 464 F.3d at 528.

2. ***The Weight of Authority.*** Alaska Trustee next claims that "the great majority of federal courts to consider the issue" agree that a person who primarily enforces security interests cannot meet the general definition of "debt collector." Alaska Trustee Br. 15. That view, however, is not the law in a single federal circuit (much less a "great majority" of them) and five have expressly rejected it in precedential decisions. *See Piper*, 396 F.3d at 235-36 (3d Cir. 2005); *Wilson*, 443 F.3d at 378-79 (4th Cir. 2006); *Kaltenbach*, 464 F.3d at 527-29 (5th Cir. 2006); *Glazer*, 704 F.3d at 463-64 (6th Cir. 2013); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216-18 (11th Cir. 2012). So has the only state supreme court to confront the question. *See Shapiro*, 823 P.2d at 123-25 (Colo. 1992). We are not aware of any appellate case that agrees with Alaska Trustee's contrary view.

Undeterred, Alaska Trustee quotes a recent district court decision for the assertion "that two Circuit Courts of Appeal and the Federal Trade Commission [have] concluded that 'the purposeful inclusion of enforcers of security interests for one section of the FDCPA implies that the term debt collector does not include an enforcer of security interests for any other sections of the FDCPA.'" Alaska Trustee Br. 16 & n.83 (quoting *Derisme v. Hunt Leibert Jacobsen P.C.*, 880 F. Supp. 2d 311, 325-26 (D. Conn. 2012)). But, again, the two circuits mentioned—the Sixth and Eleventh—have actually come out the other way. *See Glazer*, 704 F.3d at 459-64; *Reese*, 678 F.3d at 1216-18. And the FTC Staff Commentary, far from concluding that enforcers of security interests are not included within the general definition, states: "Because the FDCPA's definition of 'debt collection' includes parties whose principal

business is enforcing security interests only for [§ 1692f(6)] purposes, such parties (*if they do not otherwise fall within the definition*) are subject only to this provision and not to the rest of the FDCPA." *Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50097, 50108 (Dec. 13, 1988) (emphasis added). Indeed, this sentence led the Fifth Circuit to hold that "the entire FDCPA can apply to a party whose principal business is enforcing security interests but who nevertheless" meets the "general definition of a debt collector." *Kaltenbach*, 464 F.3d at 528.

Moreover, the newly created Consumer Financial Protection Bureau (CFPB)—which now has the *exclusive* authority to issue advisory opinions and regulations interpreting the FDCPA (and concurrent enforcement authority along with the FTC)—has taken a position that even more squarely conflicts with Alaska Trustee's.[2] In a recent amicus brief, the CFPB explained that "an entity that meets the FDCPA's general definition of 'debt collector' qualifies as a 'debt collector' for purposes of the entire act, even if its principal purpose is enforcing security interests and even if it was enforcing a security interest in the particular case." CFPB Br. 14, *Birster v. Am. Home Mortg. Servicing, Inc.*, No. 11-13574 (11th Cir.). The agency filed the brief because "courts have unduly restricted the FDCPA's protections by rejecting challenges to harmful practices occurring in the context of foreclosure proceedings." CFPB Annual Report on the FDCPA, at 27-28 (2013), *available at* http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf. As the agency with exclusive interpretive authority, the CFPB's position is entitled to deference.

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1002(12)(H), 1022(b)(1), 1061(b)(5), 1089 (2010) (codified at 12 U.S.C. §§ 5481(12)(H), 5512(b)(1), 5581(b)(5), 15 U.S.C. § 1692 *et seq.*).

Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880-83 (2011) (deferring to agency interpretation of federal consumer law set forth in an amicus brief).

3. *Congressional Intent.* Alaska Trustee's last argument is that homeowners who have fallen behind on their mortgage payments do not need the FDCPA's protections and therefore do not fall within the group of consumers Congress intended to protect. Here is Alaska Trustee's reasoning: In most debt-collection cases, "the debtor typically does not have the money with which to pay the debt, so that nonpayment is involuntary and should not subject the debtor to harassing debt collection attempts." Alaska Trustee Br. 16. The "enforcement of the security interest does not implicate the same considerations," however, because in that context "the debtor does have the ability to surrender the collateral for the debt." *Id.* (citing *Jordan*, 731 F. Supp. at 658).

As the CFPB has pointed out, this argument is "pure conjecture." CFPB *Birster* Br. 29 n.10. Neither the Senate Report cited in *Jordan* nor any other evidence suggests that Congress thought families facing foreclosure were less likely to experience "suffering and anguish" if subjected to abusive debt-collection practices. S. Rep. No. 95-382, at 2.

If anything, a family on the verge of losing its home is *more* likely to experience the "suffering and aguish" that concerned Congress than someone who owes $20 on their cable-television bill. The family home, far more than any other consumer purchase, engenders deep emotional attachment because it is where the family lives, raises children, and finds a sense of belonging and community. *See Rosado v. Taylor*, 324 F. Supp. 2d 917, 925 (N.D. Ind. 2004) (noting that the explanation given in *Jordan*, even assuming it were right, "may wane in the context of real property" because "turning over one's house is unlikely to ever be easy").

Moreover, "due to the size and duration of the financial obligation imposed by a mortgage, it may be more likely that a mortgagor will be incapable of meeting his financial obligation due to unforeseeable circumstances." Eric M. Marshall, Note, *The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve from Abusive Foreclosures*, 94 Minn. L. Rev. 1269, 1285 (2010). And when that happens, "[t]he detrimental effect of losing one's home makes mortgagors particularly susceptible to coercive settlement practices" and other abusive collection practices. *Id.* at 1287 (footnote omitted). Homeowners "typically rely on what the lender or its representative says is owed, including fees assessed during the process," which are often questionable. Gretchen Morgenson, *Panel to Look at Foreclosure Practices*, N.Y. Times, Apr. 29, 2008, at C3. To suggest that Congress singled out these consumers as undeserving of the protections of the FDCPA—the primary federal law protecting consumers from abusive debt-collection practices—defies common sense.[3]

Yet that is precisely where Alaska Trustee's argument leads. It would create a gaping hole in the FDCPA's coverage, releasing debt collectors from compliance as long as the debt they are collecting is secured, for in those situations the debtor would always have "the ability to surrender the collateral." Alaska Trustee Br. 16. As the Eleventh Circuit recently explained: "The practical result [of that rule] would be that the Act would apply only to efforts to collect unsecured debts. So long as a debt was secured, a lender (or its law firm) could harass or mislead a debtor without violating the FDCPA. That can't be right. It isn't."

[3] It also conflicts with the legislative history, which makes clear that mortgages and other secured debts are covered by the Act. *See, e.g.*, S. Rep. No. 95-382, at 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 (referring to the "collection of debts, *such as mortgages* and student loans") (emphasis added).

Reese, 678 F.3d at 1218. Congress did not erect an extensive set of protections in the FDCPA only to declare open season on consumers whose debts are secured.

B. Alaska Trustee Meets The FDCPA's General Definition of "Debt Collector."

As discussed above, the FDCPA's broad general definition of "debt collector" covers "any person . . . in *any* business the principal purpose of which is the collection of *any* debts," or who "regularly collects or attempts to collect, directly or indirectly, debts . . . owed or due another." 15 U.S.C. § 1692a(6). "Debt," in turn, means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." *Id.* § 1692a(5). And "[t]o collect a debt . . . is to obtain payment or liquidation of it." *Heintz*, 514 U.S. at 294 (quoting *Black's Law Dictionary* 263 (6th ed. 1990)). A residential mortgage is unquestionably a "debt" under the FDCPA, even though it is secured by real property. *Piper*, 396 F.3d at 234 ("[That a debt is secured] does not change its character as a debt."). "A debt is still a 'debt' even if it is secured." *Reese*, 678 F.3d at 1218. The question, then, is whether Alaska Trustee "directly or indirectly" "collects or attempts to collect" the debt owed on a mortgage. 15 U.S.C. § 1692a(6).

It does. Alaska Trustee initiates foreclosures. It communicates with homeowners who have defaulted on their mortgage debt, notifying them of the default and informing them that a foreclosure sale has been scheduled. At that point, several things can happen: The homeowner can reach out to the loan's servicer and work out a repayment plan to avoid foreclosure. Or she can request a reinstatement letter, providing the payment amount needed to reinstate the loan and cancel the sale. This letter, sent by Alaska Trustee, gives instructions

on exactly how, when, where, and to whom the homeowner should send the payment, and explains that "[t]here may be other options available to help you avoid foreclosure." [Exc. 62-63 & Exc. 71]. If she is able, the homeowner can follow these instructions and make a payment. Or, if she is unable to scrape enough money together to cure the default, Alaska Trustee can arrange for the sale of her house—the proceeds of which will go toward satisfying her debt. Under any of these scenarios, the end result is the same: The debt is satisfied as a consequence of Alaska Trustee's communications with the debtor.

This case is emblematic. When the Ambridges first defaulted, in 2007, they received a notice of default from Alaska Trustee. Brett immediately "took a loan against his 401(k)" and paid Wells Fargo what was necessary to cure the default. [Exc. 181 (Josephine Ambridge Dep. 15:1-12)]. Two years later, the Ambridges again defaulted on their loan, and again received a notice from Alaska Trustee. This time they could not cure the default, so Alaska Trustee held a sale and "appl[ied] the proceeds to the indebtedness." [Exc. 70]. These facts illustrate that the superior court was right to conclude that "'a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.'" [Exc. 64 (quoting *Shapiro*, 823 P.2d at 124)].

Alaska Trustee does not contend otherwise. It acknowledges that it "engage[s] in activities that lead to the satisfaction of debts." Alaska Trustee Br. 18. And it concedes that those whose activities "have the effect of obtaining payment of a debt in whole or in part . . . engage in 'debt collection.'" *Id.* at 14. Nevertheless, Alaska Trustee insists that it is not a "'debt collector' within the meaning of the FDCPA" because it does not engage in certain types of debt collection (like sending demand letters or processing judicial

foreclosures) but rather "strictly limit[s]" its activities "to those related to the processing of the non-judicial foreclosure." *Id.* at 17, 18.

That argument draws a distinction between different *methods* of collection. The FDCPA does not. Its coverage "depends upon the character of the underlying debt, not the collection method used to enforce the debt." Marshall, *The Protective Scope of the Fair Debt Collection Practices Act*, 94 Minn. L. Rev at 1295-96. One who takes actions for the purpose of satisfying a debt, whether "directly or indirectly," is a "debt collector." Just as litigation is "simply one way of collecting a debt," *Heintz*, 514 U.S. at 297, so too is foreclosure.[4]

Alaska Trustee, however, argues that the "'[p]ayment of funds is not the object of the foreclosure action.'" Alaska Trustee Br. 15 (quoting *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)). From that proposition, it argues that the "enforcement of security interests is not 'debt collection' because it [seeks] only the recovery of collateral and not the payment of money," which is "the fundamental aspect of a 'debt' as defined by the FDCPA." *Id.* at 15-16. But "[t]here can be no serious doubt that the ultimate purpose of foreclosure is the payment of money." *Glazer*, 704 F.3d at 463. "In fact, *every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds

[4] Just because a "notice required by [law] is a statutory condition precedent" to a foreclosure does not mean that it is not sent "in connection with the collection of any debt." *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998). "To read Congress, instead, as having carved out a wholesale exemption for anyone who prepares [such] a communication—no matter how violative of the safeguards that the FDCPA affords debtors"—"would not only stretch the statutory language; it would also significantly impede the statute from remedying the 'mischief' to which it was addressed." *Id.* at 117.

from the sale to pay down the outstanding debt)." *Id.* at 461; *see also* Marshall, *The Protective Scope of the Fair Debt Collection Practices Act*, 94 Minn. L. Rev at 1295 ("[W]hen foreclosure can be avoided by paying the arrearage, the collector's actions necessarily become debt collection" because then it "is demanding, albeit as one of two alternatives, the payment of money.").[5]

Simply put, there is "no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods" of debt collection. *Wilson*, 443 F.3d at 376; *cf. Piper*, 396 F.3d at 234-36 (applying FDCPA to *in rem* proceeding). "[A]ctions surrounding the foreclosure proceeding [are] attempts to collect [a] debt." *Wilson*, 443 F.3d at 376. And those who regularly or primarily conduct "foreclosure proceedings, regardless of whether the proceedings are judicial or non-judicial in nature," are debt collectors under the FDCPA. *Glazer*, 704 F.3d at 464. Because Alaska Trustee fits that description, the trial court properly concluded that it is a debt collector.

II. ALASKA TRUSTEE VIOLATED THE UTPA.

The next question is whether Alaska Trustee's FDCPA violation also constitutes a violation of Alaska's UTPA. The state law—which bans "[u]nfair or deceptive acts or practices in the conduct of trade or commerce," AS 45.50.471—is designed to parallel federal law. Indeed, it requires courts to give "due consideration and great weight" to what constitutes an unfair or deceptive act or practice under the Federal Trade Commission Act

[5] To claim, as Alaska Trustee does, that the notice was not made in connection with collection efforts because it did not demand payment is to read the FDCPA's "language too narrowly"—especially since "the only relationship [Alaska Trustee] had with the plaintiffs arose out of [their] defaulted debt." *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 382, 385 (7th Cir. 2010) (brackets, ellipsis, and quotation marks omitted).

(FTC Act), AS 45.50.545, with the goal of "'conforming [the UPTA] to the language'" of federal law and achieving "uniformity in unfair trade laws," *ASRC Energy Servs. Power & Commc'ns LLC v. Golden Valley Elec. Ass'n, Inc.*, 267 P.3d 1151, 1153, 1158 (Alaska 2011) (quoting legislative history). In the debt-collection context, ensuring this uniformity is straightforward because Congress made clear that an FDCPA violation "shall be deemed an unfair or deceptive act or practice in violation of [the FTC Act]." 15 U.S.C. § 1692*l*(a). Alaska Trustee does not deny that it violated the FDCPA if subject to its coverage. Thus, the only way that its FDCPA violation would not also constitute a UTPA violation would be if the UTPA were to exempt practices that federal law declares to be unfair or deceptive.

This Court has already answered that question. "For over 30 years," this Court has "consistently defined 'unfair or deceptive acts or practices' in line with *O'Neill Investigations*," the "seminal 1980 decision" holding that a debt collector violated the UTPA. *ASRC*, 267 P.3d at 1153. *O'Neill* explained that the term "unfair or deceptive acts or practices" under the UTPA "has a 'fixed meaning' derived from 'agency and judicial interpretation of the identical words of the federal statute.'" *Id.* (quoting *O'Neill*, 609 P.2d at 532). Drawing on the FDCPA and earlier FTC precedent, *O'Neill* "then adopted the contemporaneous agency and federal court standards" for the term's meaning under the UTPA. *Id.*; *see O'Neill*, 609 P.2d at 523 n.1 (adopting FDCPA's definition of "debt collector"); *id.* at 523 nn.2-6 (citing FDCPA's history).

More recently, this Court again rejected an interpretation of the UTPA that would provide less protection than the FDCPA. *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1025 (Alaska 2009). In *Pepper*, Routh Crabtree urged this Court to curtail the UTPA's scope by

excluding debt collection carried out through litigation, even though the FDCPA applies to that activity. *See Heintz*, 514 U.S. at 297. This Court declined to create "a special exemption from UTPA coverage" and instead read the UTPA's coverage as coextensive with its "federal counterpart." *Pepper*, 219 P.3d at 1025. It should do the same here.[6]

Only once has this Court deviated from federal law in interpreting the UTPA, and that was because federal law in that case had been amended "to *restrict* the scope of unfair or deceptive conduct that is actionable under the FTC Act." *ASRC*, 267 P.3d at 1161 (emphasis added). This Court refused to "incorporat[e] these restrictions into the Alaska UTPA" (and in doing so overturn its own precedent) because that "would result in *less* protection for Alaska consumers and business people," and the UTPA "provide[s] broad protection." *Id.* (emphasis added). Here, by contrast, the goals of consumer protection and uniformity point in the same direction: giving the UTPA the full reach of the FDCPA.

Alaska Trustee makes two contrary arguments. The first (at 36) is that "there was nothing either unfair or deceptive" about its FDCPA violation. But, as just explained, its FDCPA violation *by definition* constitutes an unfair or deceptive act. *See* 15 U.S.C. § 1692*l*(a). Alaska Trustee never once confronts that fact. Its argument, moreover, would eliminate the ability of Alaska's Attorney General to pursue injunctive relief for certain FDCPA violations, *see* AS 45.50.501(a), require courts to examine each provision of the FDCPA (or FTC Act) to

[6] This is consistent with other courts' interpretations of analogous state laws. A debt collector in Georgia, for example, was held to have "necessarily violated" Georgia's version of the UTPA "when it violated the FDCPA"—a conclusion that flowed from the fact that Georgia's law (like the UTPA) "is to be interpreted in accordance with the [FTC] Act" and is a remedial statute to be liberally construed. *Gilmore v. Account Mgmt., Inc.*, 357 F. App'x 218, 220 (11th Cir. 2009).

determine whether it is important enough to warrant concurrent coverage, and would thereby create uncertainty and inconsistency in the law.

Alaska Trustee's second argument (at 39)—that "the UTPA does not apply to non-judicial foreclosures"—is foreclosed by the statute's text. The UTPA was amended in 2004 to encompass "goods or services provided in connection with a consumer credit transaction or with a transaction involving an indebtedness secured by the borrower's residence." AS 45.50.561(a)(9). That amendment was a direct response to this Court's decision holding that a mortgage-servicing company that had initiated non-judicial foreclosure proceedings did not violate the UTPA because a mortgage is neither a "good" nor a "service" under the UTPA. *Barber v. Nat'l Bank of Alaska*, 815 P.2d 857, 860-61 (Alaska 1991); *see also Roberson v. Southwood Manor Assocs., LLC*, 249 P.3d 1059, 1061-63 (Alaska 2011). The amended definition closes that loophole, and makes clear that the UTPA covers non-judicial foreclosure proceedings because they are "transaction[s] involving an indebtedness secured by the borrower's residence." AS 45.50.561(a)(9). Alaska Trustee's only textual response is that the amendment "easily lends itself to the interpretation that the 'goods and services' referenced are those provided in connection with the transaction that gave rise to the security interest in the borrower's residence." Alaska Trustee Br. 42-43. But that is not what the statute says. It covers goods or services provided in connection with a consumer credit transaction *as well as* those provided in connection with a transaction involving an indebtedness secured by the borrower's residence.

Nor should this Court strain to adopt a different reading for policy reasons. This Court long ago made clear that the UTPA "stands as a sentinel against unethical and

unscrupulous conduct on the part of independent debt collection businesses operating in this state." *O'Neill*, 609 P.2d at 523. If an independent debt collector violates the FDCPA in attempting to collect a debt, then the collector should be found to have violated the UTPA as well—regardless of the method used to collect. Were it otherwise, a debt collector could engage in the exact same conduct this Court found unlawful in *O'Neill*—conduct that Alaska Trustee admits was "clearly . . . unfair or deceptive under the Alaska UTPA"—just so long as the collector did so in the context of a foreclosure. Alaska Trustee Br. 35. That argument is a mirror image of Alaska Trustee's argument for why it should be exempt from the requirements of the FDCPA, and should be rejected for the same reasons.

III. ROUTH IS PERSONALLY LIABLE UNDER THE FDCPA.

A. The FDCPA Is Broadly Worded to Apply to "Any Person," Including Corporate Directors, Officers, and Shareholders.

The final issue on appeal is whether Routh is personally liable under the FDCPA. As discussed at length above, the FDCPA's definition of "debt collector" is expansive. It covers "*any person* . . . in any business" regularly engaged in independent debt collection. 15 U.S.C. § 1692a(6) (emphasis added). This language plainly includes individuals. But when the individual is a shareholder, officer, or director of a limited liability corporation, there is a threshold question: Does the corporate form insulate the individual?

That question has generated a split of authority, albeit a lopsided one. On one side, "the Seventh Circuit has held that, regardless of an individual's personal involvement with the corporation's debt collecting activities, a shareholder or officer of a debt collecting corporation cannot be personally liable unless the plaintiff pierces the corporate veil." *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1071 (E.D. Cal. 2008) (citing *White v. Goodman*,

200 F.3d 1016, 1019 (7th Cir. 2000), and *Pettit v. Retrieval Masters Credit Bureau, Inc.*, 211 F.3d 1057, 1059 (7th Cir. 2000)). On the other side, the Sixth Circuit and a clear majority of district courts "have held that the corporate structure does not insulate shareholders, officers, and directors from personal liability." *Id.* at 1070-71 (citing *Kistner v. Law Offices of Michael P. Margelefsky, L.L.C.*, 518 F.3d 433, 437-38 (6th Cir. 2008), and numerous district court cases). This is also the position taken by the FTC, which interprets the FDCPA as extending to "[e]mployees of a debt collection business, including [those of] a corporation, partnership, or other entity whose business is the collection of debts owed another." 53 Fed. Reg. at 50102. The agency has enforced the statute in line with this interpretation, having "sought to increase deterrence through holding liable both debt collection companies and the individuals responsible for the companies' practices." FTC Report, *Collecting Consumer Debts: The Challenges of Change*, at 69 (Feb. 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.[7]

This Court should follow the view of the FTC and the majority of federal courts because it is more consistent with the FDCPA's text and purpose. "Where Congress has chosen to use broad language, that language should be given its full effect." *Brumbelow v. Law Offices of Bennett & Deloney P.C.*, 372 F. Supp. 2d 615, 621 (D. Utah 2005) (adopting majority view). Congress could have adopted a narrower definition of "debt collector." Or it could

[7] The report cites these cases as examples: *United States v. Acad. Collection Serv., Inc.*, No. 2:08-cv-1576 (D. Nev. Nov. 14, 2008) (corporate and individual defendant jointly liable for $2.25 million civil penalty); *United States v. LTD Fin. Servs.*, No. H-07-3741 (S.D. Tex. Nov. 5, 2007) (corporate and individual defendants enjoined from violating FDCPA); *FTC v. Whitewing Fin. Group, Inc.*, No. H-06-2102 (S.D. Tex. June 22, 2006) (corporate and individual defendants jointly liable for $150,000 civil penalty); *FTC v. Check Investors, Inc.*, No. 03-2115 (JWB) (D.N.J. July 18, 2005) (corporate and individual defendants jointly liable for $10.2 million to redress consumers).

have created an exception for corporate shareholders, officers, and directors, as it did for the "officer[s] . . . of a creditor." 15 U.S.C. § 1692a(6)(A). But instead Congress did neither.

That was no accident. Given the nature of the debt-collection industry and the FDCPA's remedial purpose, "it is highly unlikely that Congress wished to restrict liability to the often small corporate vehicle used for collection." *Pikes v. Riddle*, 38 F. Supp. 2d 639, 640 (N.D. Ill. 1998); *cf. Versteeg v. Bennett, Deloney & Noyes, P.C.*, 775 F. Supp. 2d 1316, 1320-21 (D. Wyo. 2011) (finding individual liability under both the FDCPA and the Telephone Consumer Protection Act—which also applies to "any person"—because otherwise an individual could "simply dissolve [his corporation], set up a new shell corporation, and repeat [his] conduct"). Indeed, Congress was keenly aware of the prevalence of small corporate debt collectors. *See* S. Rep. No. 95-382, at 2 ("There are more than 5,000 collection agencies across the country, each averaging 8 employees."). And it chose to write the FDCPA so that "any person" who otherwise fit the definition of debt collector could be held personally liable for violating the Act. That choice means something.

The key flaw in the minority view is that it essentially disregards the FDCPA's text, and rests instead on an analogy to a different statute: "Just as in the Title VII context," the Seventh Circuit has held, "the debt collection company answers for its employees violations of the statute." *Pettit*, 211 F.3d at 1059. But "Title VII applies only to a 'covered entity,' which it defines as 'an employer, employment agency, labor organization, or joint-labor management committee.'" *Schwarm*, 552 F. Supp. 2d at 1071 (quoting 42 U.S.C. § 12111(2)). That is a much more restrictive definition than the FDCPA's. Congress's decision to use different language in different statutes "strengthens the conclusion that Congress intended

that 'any person' could be liable under the FDCPA regardless of the protections state corporate law affords." *Schwarm*, 552 F. Supp. 2d at 1071-72. A better analogy is to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which imposes liability for paying cleanup costs on "*any person* who at the time of disposal of any hazardous substance owned or operated any facility." 42 U.S.C. § 9607(a)(2) (emphasis added). Consistent with how the FTC and the majority of courts have interpreted the FDCPA, "every circuit that has addressed the issue has held that CERCLA imposes personal liability on shareholders, officers, and directors without requiring a plaintiff to pierce the corporate veil." *Schwarm*, 552 F. Supp. 2d at 1072 (citing cases). The Supreme Court has held similarly, concluding that "a corporate parent that actively participated in, and exercised control over, the operations of a [polluting] facility itself may be held directly liable in its own right as an operator of the facility"—notwithstanding "the existence of the parent-subsidiary relationship under state corporate law," which "is simply irrelevant to the issue of direct liability." *United States v. Bestfoods*, 524 U.S. 51, 55, 65 (1998).

That same reasoning should apply here. Corporate law does not shield an individual from direct liability for violating the FDCPA because Congress enacted a broad remedial statute applicable to "any person" who otherwise satisfies its definition of debt collector.

B. Routh is a "Debt Collector" Under the FDCPA and is Responsible for the FDCPA Violation in this Case.

This leaves the last two questions: Does Routh satisfy the FDCPA's definition of debt collector? And if so, does he bear responsibility for the violation in this case? The answer to both questions is yes.

As to the first question: Routh is the "sole owner" and "managing member" of Alaska Trustee, a business regularly engaged in independent debt collection. 15 U.S.C. § 1692a(6); [Exc. 254 (Routh Dep. 28:2-3; 28:18)]. He created the company himself and has absolute control over it. [Exc. 253, 256, 259, & 261 (Routh Dep. 24:19-21; 34:5-8; 49:10-12; 55:1-2)]. He supervises the only "two people involved in the management" of the company aside from himself. [Exc. 254-56 (Routh Dep. 29:14-15; 30:1-4; 30:13-18; 34:15-20)]. He maintains "[f]requent contact" with them and "get[s] involved" in any "issues that go beyond just the mere formalities," "that are important," or that might call for the advice of a lawyer. *Id.* To take just two examples, he had the website created (and then taken down), and "approved" the recent change to the notice-of-default form. [Exc. 261-62 (Routh Dep.56:14-58:9); Exc. 257-58 (Routh Dep. 41:13-15; 42:3-9); Exc. 260 (Routh Dep. 52:8-10)]. These uncontested facts make him a "debt collector."

As to the second question: Routh's answer is that the "employee who mailed the Notice of Default" is responsible for the violation here—not him. Alaska Trustee Br. 28. He claims that he bears no responsibility because he "took no part in the sending of the Notice of Default," and "the FDCPA does not provide for liability for the owners and officers of the debt collecting entity who did not themselves participate in the violation." *Id.* 27 & 32.

Under different circumstances, he might have a point. If, for instance, his control over Alaska Trustee were less absolute and he had no involvement in its affairs, then he might have an argument that he should not be liable here. Or if the violation were different—if, unbeknownst to him, a rogue employee had taken it upon herself to threaten and harass the Ambridges regarding their debt—then he might have a good case for why

liability should not be pinned on him personally. But those are not the facts. The violation here involves the content of Alaska Trustee's standard notice-of-default form, which it sends homeowners in every foreclosure that it begins. The content of that form is no "mere formalit[y]." [Exc. 260 (Routh Dep. 52:8-10)]. It is of central importance to the company's business, and Routh has complete control over what it says.

Although Routh claims that he does not always exercise this control, he admits that he will "get involved" when an issue is important or should be reviewed by counsel—a description that includes "[t]he creation of forms." [Exc. 256 (Routh Dep. 34:15-35:3); Exc. 260 (Routh Dep. 52:8-10)]. Indeed, as just mentioned, when Alaska Trustee recently changed its notice-of-default form, Routh "approved" it. [Exc. 257-58 (Routh Dep. 41:13-15; 42:3-9)]. Conversely, he has explained that a change to the form that he did not like—*e.g.*, adding "Have a nice day"—"would get [his] disapproval." [Exc. 260 (Routh Dep. 52:11-14)]. As the trial court found, Routh "generally reviews any changes in Alaska Trustee's document templates." [Exc. 225]. That he denies doing so for the letter used in this case is beside the point. *Schwarm*, 552 F. Supp. 2d at 1073. What matters is that he "had final authority over [Alaska Trustee's] collection procedures, which relied on the form letters." *Id.* He should consequently be held liable when the content of those letters violates the FDCPA.

This conclusion is consistent with how the FTC and most courts have addressed the issue. Courts have found liability under a variety of circumstances, including where the individual (1) "exercise[d] control over the affairs of [a] business" that violated the Act, *Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681, 689-90 (E.D. Pa. 2003), *aff'd* 396 F.3d 227 (3d Cir. 2005); (2) "supervised [the] collection activities" of a business that violated the Act,

Versteeg, 775 F. Supp. 2d at 1321; (3) "was 'regularly engaged, directly or indirectly, in the collection of debts'" that violated the Act, *Kistner*, 518 F.3d at 438; (4) "materially participated in the debt collection activities" that violated the Act, *del Campo v. Kennedy*, 491 F. Supp. 2d 891, 903 (N.D. Cal. 2006); or (5) "was personally involved in at least one violation of the Act," *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 1000 (9th Cir. 2012). And the FTC has brought a successful action against a debt-collection agency, its owner, and two other corporate officers who had "formulated, directed, participated in, controlled, or had the authority to control" a number of illegal acts under the statute. FTC Annual Report on the FDCPA (2009), at 11, *available at* http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf. In each of these cases, the individual debt collector was the one ultimately responsible for the violation committed. Same here. This Court should reject Routh's attempt to shift blame to his subordinates, and instead hold him personally liable for having violated the FDCPA.

CONCLUSION

This Court should affirm the grant of summary judgment to the Ambridges on their FDCPA claims against Alaska Trustee and Routh and their UTPA injunctive-relief claim against Alaska Trustee. The Court should hold that Alaska Trustee is a "debt collector" under the FDCPA, that its FDCPA violation is also a UTPA violation, and that Routh is personally liable for the FDCPA violation.

Respectfully submitted,

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APPELLATE RULE 513.5(c)(2) CERTIFICATE OF FONT

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