Nos. 15-2044, 15-2082 and 15-2109

In the United States Court of Appeals for the Seventh Circuit

ALPHONSE D. OWENS,
Plaintiff-Appellant,

v.

LVNV FUNDING, LLC,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Indiana in No. 1:14-cv-02083-JMS-TAB, Hon. Jane E. Magnus-Stinson, District Judge

TIA ROBINSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

ECAST SETTLEMENT CORPORATION, A DELAWARE CORPORATION, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois in No. 1:14-cv-08277, Hon. Manish S. Shah, District Judge

JOSHUA BIRTCHMAN,
Plaintiff-Appellant,

v.

LVNV FUNDING, LLC, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Indiana in No. 1:14-cv-00713-JMS-TAB, Hon. Jane E. Magnus-Stinson, District Judge

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INTRODUCTION

As previously established, Defendants are engaged in a flagrant misuse of the bankruptcy process. They have no legitimate basis for their time-barred claims. They admit these claims should be rejected 100% of the time if the system functioned as Congress intended. Defendants' sole motivation is the knowledge that the process routinely breaks down and their time-barred claims will be accidentally allowed. If the process never malfunctioned, Defendants' abusive scheme would not exist.

Defendants' response is most telling for what it does *not* say. Defendants do not contest that they flood bankruptcy courts with frivolous claims in the hope of collecting unenforceable debts. They do not contend that they have *any* good-faith basis for these filings or *any* legitimate response once anyone objects. They do not deny that their claims are subject to an iron-clad dispositive defense (and would give rise to sanctions and FDCPA liability if filed in district court). Make no mistake: Defendants are perfectly aware that they will only collect if the process breaks down and fails. Yet they defend their abusive scheme because their claims leave sufficient hints for *others* to spot their mis-

conduct (after wasting others' time and resources), and because, they posit, the Bankruptcy Code (for undiscernible reasons) *encourages* debt collectors to file meritless claims.

Defendants are mistaken. There is no absolute "right" (in *any* functioning legal system) to file frivolous claims. Defendants' position is directly at odds with the Code's plain text, clear structure, and statutory purpose. Their abusive conduct burdens the bankruptcy process and harms innocent parties; it has no societal value or public benefit. The FDCPA forbids precisely this kind of misconduct, and the district courts erred in holding otherwise. Their judgments should be reversed.

ARGUMENT

I. CONTRARY TO DEFENDANTS' CONTENTION, THE "UNSOPHISTICATED CONSUMER" STANDARD APPLIES—BUT PLAINTIFFS PREVAIL UNDER ANY STANDARD

Defendants assert that their time-barred claims should be assessed from the perspective of "competent lawyers," not "unsophisticated consumers." According to Defendants, most debtors are represented by counsel, and all debtors are protected by trustees, who are statutorily required to object to baseless claims. With no apparent irony, Defendants insist that their claims are so *clearly* baseless that any compe-

tent professional could easily ferret them out, leaving no one misled or deceived. Defendants are mistaken.

A. Defendants' communications are not directly aimed at lawyers. These are court filings in a busy process that *may or may not* be reviewed by attorneys. This common fact is an essential component of Defendants' scheme: If these communications *always* reached competent professionals, Defendants' claims would be rejected 100% of the time, and Defendants would stop misusing the claims-process.[1] Defendants' business model critically relies on claims slipping through the process without any educated review. Given that Defendants only collect when lawyers and trustees do *nothing*, it is a bit much for Defendants to insist that those groups always review these claims.

[1] The only exception: There are instances where competent professionals do review Defendants' meritless claims but simply acquiesce to avoid the cost of an objection. Those claims may not mislead or deceive anyone, but that hardly excuses Defendants' misconduct: it is highly abusive to file frivolous claims knowing that the nuisance value will result in an illegitimate payout. Even if Defendants somehow escape liability under Section 1692e (due to the sheer obviousness of the defects in their filings), their misuse of the claims-process is still grossly unfair and unconscionable under Section 1692f.

Under this Court's precedent, the appropriate standard is calibrated to the communication's intended target. *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 776 (7th Cir. 2007); see also Answering Br. 14 (conceding this as the correct standard). Because Defendants' communications ultimately target consumers, the standard is appropriately calibrated from a consumer's perspective. See *Evory*, 505 F.3d at 774.[2]

B. 1. Nor is it factually true that lawyers or trustees always review claims. Defendants' contrary contention is certainly false on a systemic level. As previously explained, trustees and lawyers do not (and cannot) review every claim filed in the thousands of Chapter 13 bankruptcies nationwide. Opening Br. 41-43. And the National Association

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[2] This accordingly is unlike a situation where a debt collector sends direct communications exclusively to attorneys. Compare, *e.g.*, *Bravo* v. *Midland Credit Mgmt., Inc.*, 812 F.3d 599, 601, 603 (7th Cir. 2016) (evaluating letters mailed directly to a debtor's attorney at the attorney's business office); compare Answering Br. 13-14 (citing *Bravo* but overlooking this material distinction). Defendants' court filings can be viewed by anyone, including unrepresented debtors (as is often the case). Had Defendants somehow restricted their filings to a debtor's lawyer, they would at least have some basis for assessing liability under a heightened standard. But these filings were not *directed* at counsel; they were submitted to the court, in the hope that no one (most of all any competent lawyer) would ever review them.

of Consumer Bankruptcy Attorneys and the Legal Assistance Foundation, as amici, have explained (anecdotally and otherwise) how consumers are often the backstop for objecting to baseless proofs of claim. Amici Br. 12, 15-16.

Indeed, even Defendants' own authority (Br. 31) suggests that Chapter 13 debtors are unrepresented at least 10% of the time—leaving a significant group directly exposed to Defendants' misconduct. And there is no indication that those statistics even account for the limited scope of many Chapter 13 representations: not all lawyers are retained to review and object to individual proofs of claim, as opposed to handling core Chapter 13 filings. Defendants merely presume that bankruptcy debtors are never left without a lawyer, which is plainly false. Defendants have no support for subjecting this significant class of unsophisticated consumers to a "competent lawyer" standard.

2. Defendants assert that Plaintiffs failed to establish any facts—"empirical, anecdotal, or otherwise"—suggesting that lawyers and trustees do not always do their jobs. Br. 14.

Defendants, of course, ignore the procedural posture of these cases: each was dismissed on the pleadings, which means Plaintiffs were deprived of any opportunity to develop the facts.

In any event, the undisputed facts speak for themselves. Take a simple question: If competent lawyers and trustees always did their jobs, why would Defendants ever file these claims? Defendants effectively concede their claims are meritless and should *always* lose. Why file a frivolous claim unless one truly believes that "competent" individuals in fact will *not* review it? The obvious answer—looking to the real world—is that Defendants know the system routinely malfunctions, and they hope to exploit that system failure. See, *e.g.*, *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1259 n.5 (11th Cir. 2014) ("Here, however, it appears the trustee failed to fulfill its statutory duty to object to improper claims, specifically LVNV's stale claim."). Every time a debtor is unrepresented or a trustee fails to discharge his statutory duties, there is no "competent" professional left to review Defendants' claims. Because Defendants aim to exploit that dynamic, the "unsophisticated consumer" standard is appropriate in these cases.

C. Nor can Defendants avoid the appropriate standard ("unsophisticated consumer") because "three Plaintiffs" here happened to be "represented by counsel." Answering Br. 13.

Defendants overlook the FDCPA's private-attorney-general function. See, *e.g.*, *Tolentino* v. *Friedman*, 46 F.3d 645, 651-652 (7th Cir. 1995). The FDCPA is designed to avoid and deter abusive practices. Plaintiffs who are *not* deceived are permitted (and encouraged) to file suit in order to protect consumers who would otherwise fall victim to Defendants' misconduct. See *Crawford*, 758 F.3d at 1258 ("[t]he inquiry is not whether the *particular* plaintiff-consumer was deceived or misled") (emphasis added). It is accordingly irrelevant that these plaintiffs had attorneys. Contra Answering Br. 13-14. That is not always the case for many consumers, which is precisely why Defendants continue exploiting the system. The FDCPA serves as a safeguard for those consumers who cannot otherwise protect themselves.[3]

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[3] Defendants argue that they have provided all the information necessary (in court-approved forms) for an attorney to determine if the claim is time-barred, but that was simply not the case in *Robinson*. In Illinois, the limitations period for credit-card debt is five years unless a written contract is produced, extending the period to ten years. See Opening Br.

[Footnote continued on next page]

II. THE FDCPA PROHIBITS FILING A PROOF OF CLAIM ON TIME-BARRED DEBT IN A CHAPTER 13 BANKRUPTCY

A. Defendants Violated The FDCPA By Falsely Representing That Their Time-Barred Claims Are Valid And Enforceable When They Know Exactly The Opposite Is True

1. As previously established (Opening Br. 22-30), Defendants violate the FDCPA by misrepresenting the "character" and "legal status" of time-barred debts. *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014). The Supreme Court has repeatedly held that the claims-process is reserved for "enforceable obligation[s]" (*Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991)), and time-barred debts are *not* "enforceable." *McMahon*, 744 F.3d at 1020; see also *Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 396-399 (6th Cir. 2015); *Crawford*, 758 F.3d at 1261; *Huertas* v. *Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011). By falsely claiming a "right to payment" when *no* "right to payment" exists, Defendants violate the FDCPA. See 15 U.S.C. 1692e.

[Footnote continued from previous page]

10 n.4. If eCast had produced a contract after Robinson's objection was filed, her debt would not have been time-barred.

2. In response, Defendants argue there was nothing false or misleading about submitting a "right" to recover time-barred debt. For multiple reasons, Defendants are wrong.

a. Defendants assert that the federal courts of appeals have split over whether filing proofs of claim on time-barred debt violates the FDCPA. Br. 15-16 (citing *Simmons* v. *Roundup Funding LLC*, 622 F.3d 93 (2d Cir. 2010), and *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002)). This is incorrect. The only circuit to resolve the issue is the Eleventh Circuit, which squarely rejected Defendants' position. *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014). While *In re Gatewood*, 533 B.R. 905 (B.A.P. 8th Cir. 2015), split with *Crawford*, the issue is currently pending in the Eighth Circuit itself (*Nelson* v. *Midland Credit Mgmt., Inc.*, No. 15-2984), which of course is not bound by the BAP's decision. The only circuits to side with Defendants did so on *preclusion* grounds, embracing logic that this Court emphatically rejected in *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730-733 (7th Cir. 2004). See, *e.g.*, *Garfield* v. *Ocwen Loan Servicing, LLC*, 811 F.3d 86, 91-92 (2d Cir. 2016) (adopting *Randolph*, rejecting *Walls*, and acknowledging that *Randolph*'s logic "lead[s] to "a result that differs

from our *Simmons* decision"); *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 273-274 (3d Cir. 2013) ("follow[ing] the Seventh Circuit's approach"). Accordingly, if this Court adopts Defendants' position, it will be the first circuit to hold that it does not violate the FDCPA to deliberately file a time-barred proof of claim.

b. Defendants assert that "enforceability is not a component of a claim in bankruptcy." Br. 30 n.11. This is mystifying. The Bankruptcy Code defines "claim" as a "right to payment" (11 U.S.C. 101(5)(A)), and the Supreme Court has said *four times* that a "right to payment" is "nothing more nor less than an *enforceable* obligation." *Johnson*, 501 U.S. at 83 (emphasis added); accord *FCC* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 303 (2003); *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998); *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990). When Defendants assert *proof* of a "right to payment," they are necessarily asserting *proof* of an "enforceable obligation," despite knowing

perfectly well that their claims are unenforceable. That misrepresents the character and legal status of the debt.[4]

Defendants apparently believe the Supreme Court did not mean what it plainly said in (repeatedly) limiting Section 101(5)(A)'s "right to payment" to an "enforceable obligation." Answering Br. 9, 21-23 & n.7. While Defendants hope to distinguish these cases on their facts, they overlook that each case shares a critical common feature: all the claims at issue, unlike those here, were *legally enforceable*. See, *e.g.*, *NextWave*, 537 U.S. at 303 (discussing an *enforceable* regulatory condition); *Johnson*, 501 U.S. at 83-84 (discussing an *enforceable* mortgage interest). This commonality underscores precisely what Defendants' claims lack—and why their theory is indefensible under the Supreme Court's authoritative construction of the Code.

Defendants further misapprehend *Davenport*, insisting that "enforceability was not its point; rather, the Court rejected the idea that ei-

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[4] While it is clear that Defendants knowingly attempt to collect time-barred debts, knowledge that their conduct violates the law is not an element of an FDCPA claim; the mere filing of the claim violates the law. As this Court has held, Section 1692e creates a strict-liability rule: "[D]ebt collectors may not make false claims, period." *Randolph*, 368 F.3d at 730.

ther the reason behind the debt or the way it was enforced took it outside the statutory definition of 'claim.'" Br. 22. But "enforceability" was *exactly Davenport*'s point. The Court never said debt could be *unenforceable*, but instead that *enforceable* debts were "claims" *despite* "the reason behind the debt" or the "way it was enforced." Defendants' view flips *Davenport* on its head.

According to Defendants, *Davenport* never said debts must be enforceable in *civil proceedings*. Br. 23. This is true, *and irrelevant*. Plaintiffs' point is not that all debts must be legally enforceable everywhere; their point is that all debts must be legally enforceable *somewhere*. *Davenport* identified a legal "enforcement mechanism" that guaranteed a "right to payment," thus satisfying *Davenport*'s own standard. 495 U.S. at 559-560. Defendants' problem is not simply that they cannot enforce their claims in any court (Br. 23), though they plainly cannot. See, *e.g.*, *Phillips* v. *Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). Defendants' problem is that they cannot properly enforce their claims *anywhere*.

c. Defendants next maintain they have a "right to payment" because their debt is not extinguished under state law—only the "reme-

dies" are extinguished. Br. 9. Plaintiffs already refuted this line of argument (Opening Br. 27-28), and Defendants still have no response. Defendants' theory is exactly backwards. The lack of any "remedy" *is* the lack of a "right to payment." Once the limitations period expires, Defendants cannot *enforce* the debt against anyone. "[S]ome people might consider full debt re-payment a moral obligation even though the legal remedy for the debt has been extinguished," but the claim itself is not "legally enforceable." *McMahon*, 744 F.3d at 1020; see also *Buchanan*, 776 F.3d at 396-397 (expired debts leave "moral" obligations, not "legal" ones); *Huertas*, 641 F.3d at 32 ("Huerta's debt obligation is not extinguished by the expiration of the statute of limitations, even though the debt is ultimately unenforceable in a court of law"). Even Defendants' own authority recognizes this conventional point: "'[T]he statute of limitations controls the remedy for recovery of the debt, but the debt remains the same as before, excepting that the remedy for enforcement is gone.'" Answering Br. 24 (quoting Illinois law).

The Code does not say that a debt can be merely "valid" or "still exists"—it requires a "right to payment." Defendants insist they qualify, but they cannot identify that right by *ipse dixit*; they failed to identify a

single, non-voluntary, legal means of enforcing the time-barred debt. The most they can do is ask nicely to be repaid, but debtors can always refuse. The lack of remedy eliminates that "right to payment," and Defendants invite a square (and lopsided) circuit conflict in suggesting otherwise.

Nor are Defendants correct that this settled law somehow contradicts the rule that property rights are defined by state law, not federal law. Br. 24-25 (citing *Travelers Cas. & Surety Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 451 (2007)). Federal law defines "right to payment" as a legally "enforceable" right; state law determines whether a right is legally enforceable. That leaves the federal statute with its (unitary) federal meaning, while still letting "state law govern[] the substance of claims." *Travelers*, 549 U.S. at 450 (internal quotation marks omitted); see also *ibid.* ("Accordingly, when the Bankruptcy Code uses the word 'claim'—which the Code itself defines as a 'right to payment'—it is usually referring to a right to payment recognized under state law.") (internal citation omitted). As with virtually all other States, Illinois and Indiana say that debts are *not* legally enforceable after the limitations period expires, even if the underlying obligation still exists.

See Answering Br. 24-25. Defendants ignore the import of this common distinction. See, *e.g.*, *Buchanan*, 776 F.3d at 396-397 (recognizing the difference between the debt itself and its enforceability); *McMahon*, 744 F.3d at 1020 (same); *Huertas*, 641 F.3d at 32 (same).

d. Defendants assert that Congress intended for "claim" to be defined in the "broadest possible manner," so any definition that excludes stale claims is necessarily wrong. Br. 16-17. Yet "broadest possible" does not mean limitless or incoherent. Congress expanded the definition of "claim" in important respects, but those respects were *enumerated*: things like "liquidated," "unliquidated," "fixed," "contingent," "unmatured," and "disputed." See, *e.g.*, *In re Charter Co.*, 876 F.2d 866, 869 (11th Cir. 1989) (explaining how Congress expanded the definition by "using the following broad language"). Stale claims fall outside this statutory category. Language suggesting that "disputed" claims can be filed hardly suggests that *indisputably invalid* claims may be filed. Those claims are already resolved as a legal matter; they are not "contingent," "disputed," or "unmatured"—they are simply *unenforceable* (now and later). While the Code's definition captures "all *legal* obligations of the debtor, no matter how remote or contingent" (*ibid.*) (empha-

sis added), Congress did not capture solely "moral" obligations, which is all Defendants now pursue.

Moreover, while the Code's definition of "claim" is indeed broad, Defendants misunderstand Congress's objective: it wanted a process that could afford complete relief, so that "all *legal obligations* * * * will be able to be dealt with in the bankruptcy case." *Epstein* v. *Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1576 (11th Cir. 1995). In a world in which parties could not file contingent or unmatured claims, parties would be shut out of the bankruptcy proceeding. H.R. Rep. No. 95-595, at 180 (1977). They could not share in the bankruptcy estate, and the debtor could not obtain full relief or a fresh start. Once those unresolved claims ripen, the debtor could be thrown back into debt, threatening the viability of any Chapter 13 plan and frustrating bankruptcy's objective.

Congress eliminated those concerns by widening the scope of "claims" to capture all claims with a potential "right to payment"—*i.e.*, a

legally enforceable obligation.[5] But nowhere did Congress suggest that this new definition of "claim" was intended to sweep in knowingly *invalid* claims. The goal was to bring all legitimate interests before the bankruptcy court. A party with a knowingly stale claim does not have any *legitimate* interest. It simply hopes to divert funds from the estate without any legal "right to payment." That behavior harms debtors and creditors alike, and there is no indication that Congress intended anyone to burden the process with such meritless claims.

In any event, the Supreme Court has construed the "claim" definition after the Code's amendment, and it has held that the "right to payment" must still be an *enforceable* right. See, *e.g.*, *NextWave*, 537 U.S. at 303. Defendants' contrary view—insisting that proofs of claim include permanently "unenforceable" obligations—is irreconcilable with the Supreme Court's definitive construction.

e. Notwithstanding everything above, Defendants insist they never "implied legal enforceability" by merely filing a proof of claim. Br. 19.

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[5] A party, for example, cannot breach an enforceable contact simply because a contingency has not yet occurred. Even though the contract might not authorize immediate action, it most assuredly is an "enforceable obligation."

Yet Defendants voluntarily participated in a process reserved for *enforceable* obligations, which at least *implies* enforceability. And Defendants gladly take advantage of background presumptions that automatically deem all claims "prima facie" valid and enforceable. *Gardner* v. *New Jersey*, 329 U.S. 565, 573 (1947); Fed. R. Bankr. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."); see also Opening Br. 25-26 (citing these sources). Defendants never disavow these presumptions or correct the resulting misperception—instead, they *exploit* them. Indeed, when the process breaks down and fails—as it predictably does—Defendants willingly participate in the estate's distribution, despite having claims that all agree should be rejected.

Defendants simply refuse to grapple with these points; they do not even *cite Gardner* or Rule 3001(f) in their brief. Instead, Defendants find it sufficient that their claims are "accurate in all required detail about the underlying debt." Br. 1, 12, 18 (discussing Fed. R. Bankr. P. 3001(c)). But Defendants cannot escape liability simply because *some* representations were truthful; it was *not* truthful to asset a "right to

payment" that does not exist. "Whether a debt is legally enforceable is a central fact about the character and legal status of that debt" (*McMahon*, 744 F.3d at 1020), and Defendants' filings mispresent that central fact (*Crawford*, 758 F.3d at 1261).[6]

B. Defendants Violated The FDCPA By Exploiting The Claims-Allowance Process To Collect When The System *Malfunctions*, Not When It Operates As Congress Intended

1. As previously explained (Opening Br. 30-35), Defendants exploit the claims-allowance process to collect when the system *malfunctions*. Their claims have no legitimate basis or useful purpose; there is a sum total of *zero* circumstances in which these claims survive under proper review. The claims are invalid and will be rejected every time if the process functions as Congress intended. Yet Defendants deliberately "flood" bankruptcy proceedings with hundreds of thousands of time-barred claims, all in the hope of collecting when the process fails—and without any regard for the significant costs their scheme imposes on courts,

[6] As previously explained, Rule 3001(c) deters frivolous filings and provides information necessary to assess the timeliness of claims filed in good faith. It is not a bizarre license to submit knowingly baseless claims simply because the disclosed information may reveal the claim for what it is.

debtors, and innocent creditors. This flagrant abuse is an "unfair" and "unconscionable" means of collecting a debt, and it violates the FDCPA. 15 U.S.C. 1692f.

2. a. In response, Defendants maintain that their scheme is a fair and legitimate use of the bankruptcy process. Defendants insist they have an absolute right to file knowingly time-barred claims. Indeed, according to Defendants, their baseless claims "are not only allowed in bankruptcy; they are expected." Br. 8-9.

This is frivolous. The Code's structure and purpose confirm that debt collectors have no "right" to file time-barred claims. The entire point of the claims-process—as reflected by multiple Code provisions—is to efficiently and fairly process claims. That process is frustrated by attempts to bog down bankruptcy proceedings with knowingly invalid claims. Congress would not have tasked the trustee with a statutory duty to object to stale claims (11 U.S.C. 704(a)(5), 1302(b)(1)), only so debt collectors could engage the pointless exercise of filing a claim that the trustee immediately rejects. Nor would Congress have declared time-barred claims unenforceable (11 U.S.C. 502(b)(1), 558) if it wished parties to *knowingly* file unenforceable claims: there is sufficient work in

every bankruptcy without inviting claims that are unequivocally doomed for failure. And Congress would not have deemed claims "prima facie valid"—and presumptively enforceable—if it intended parties to file knowingly *invalid and unenforceable* claims. Compare *Gardner*, 329 U.S. at 573 ("A proof of claim is, of course, *prima facie* evidence of its validity."); Fed. R. Bankr. P. 3001(f).

The process is designed to function when all parties act in good faith; it is not designed to tolerate parties who abuse the system by filing meritless claims, all in the hope that the system breaks down and no one notices. *Young* v. *Young (In re Young)*, 789 F.3d 872, 879 (8th Cir. 2015). "[F]iling objections to time-barred claims consumes energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Crawford*, 758 F.3d at 1261. Defendants' business practice wastes limited judicial and party resources, interferes with the efficient processing of claims, and (when successful) diverts funds from parties with legitimate claims. Defendants cannot explain how their understanding of a "right" to file frivolous claims is consistent with the clear structure and purpose of the Code.

b. Defendants contend that the procedure for objecting to time-barred claims actually *confirms* that their filings are appropriate. Br. 17-18 ("the Bankruptcy Code expressly allows objections 'if such a claim is unenforceable against the debtor'"). Defendants have it exactly backwards.

Congress realized that it was necessary to create a procedure for resolving *genuinely disputed claims filed in good faith*. That has nothing to do with tolerating or permitting parties to file frivolous claims, simply because the Code has a way to strike those claims from the proceeding. Indeed, Defendants' contrary position is exactly tantamount to saying that parties have a "right" to engage in frivolous litigation, because Fed. R. Civ. P. 12(b)(6) authorizes a motion to dismiss and Fed. R. Civ. P. 11 authorizes sanctions for frivolous filings. These Rules would not exist, according to Defendants, unless parties had a "right" to pursue frivolous litigation.[7]

[7] Nor are Defendants correct (Br. 18) that Congress would not have required parties to include information about a claim's timeliness unless it contemplated time-barred claims. Defendants overlook that this information is useful in assessing both genuinely disputed claims and ferreting out frivolous claims that never should have been filed in the first

[Footnote continued on next page]

Bankruptcy courts operate under difficult circumstances, and the system is sound but imperfect. Defendants effectively concede that the only earthly scenario in which they collect is where the process affirmatively breaks down. They have no lawful grounds for collecting or good-faith belief that they have a "right" to collect on stale claims. Defendants' entire business practice turns on the predictability of system failure—and their ability to collect unenforceable debts (at the expense of debtors and innocent creditors) whenever that happens. Defendants tellingly could not offer a single reason that Congress would authorize baseless claims to divert limited funds from rightful claimants.[8]

[Footnote continued from previous page]

place. It is not "permission" to file a claim that everyone agrees is time-barred.

[8] Defendants assert that a "proof of claim" under 11 U.S.C. 501(a) must include *knowingly unenforceable claims* because 11 U.S.C. 502(b)(1) says that a "claim" can be rejected as "unenforceable." Br. 17-18. This is mere semantics: Congress did not have to write "purported" claim in Section 502(b)(1) to convey its obvious intent. Further, Section 501(a) is restricted (for the reasons discussed here and in the opening brief) to claims supported by a good-faith belief in their enforceability. Even if a "claim" did not mean what the Supreme Court has said it means, the Code's structure—including Section 502(b)(1)'s procedure for striking time-barred claims—underscores that Congress did not permit parties to abuse the claims-process by filing knowingly frivolous claims.

c. Defendants contend that frivolous claims are permitted, because the Code expects that all "claims will be reviewed for timeliness after they are filed, and not before they are filed, which no rule provides for." Br. 19. This is preposterous. Claims subject to a known iron-clad defense are "frivolous" and sanctionable. See Opening Br. 50-51 (citing circuit authority in the Fourth, Fifth, Seventh, and Tenth Circuits). For obvious reasons, the system cannot "review" a claim *before it is filed*. The point is that all claims must be filed *in good-faith*: the "bankruptcy process" is controlled by Fed. R. Bankr. P. 9011, which requires "'a reasonable inquiry into whether there is a factual and legal basis for a claim *before* filing.'" *Young*, 789 F.3d at 879 ("case law interpreting Rule 11 applies to Rule 9011 cases"); see also, *e.g.*, *In re Excello Press, Inc.*, 967 F.2d 1109, 1112-1113 (7th Cir. 1992). Congress did not have to explicitly say that baseless claims are forbidden in order to forbid baseless claims. The system *requires* good-faith for every submission, and Defendants admit they have no good-faith basis here—which is why they walk away once anyone objects.

d. Defendants say that their claims are necessary to "'gather together the assets and debts of the debtor and to effect an equitable dis-

tribution of those assets.'" Br. 34. Defendants are wrong. The "equitable distribution" on time-barred debt is *always* zero. These debts are unnecessary to a functioning Chapter 13 plan. They are submitted only to take unfair advantage of the process in the hope of collecting when the system malfunctions. That is directly at odds with the Code's purpose. See, *e.g.*, *Feggins* v. *LVNV Funding LLC (In re Feggins)*, No. 13-11319-WRS, 2015 Bankr. LEXIS 2822, at *12 (Bankr. M.D. Ala. Aug. 24, 2015).[9]

Indeed, it is telling that Defendants cannot offer a single reason that their participation actually benefits anyone—other than themselves. It does not benefit the debtor, who is already protected from enforcement (time-barred debts are only "moral" obligations, not legal ones). It does not benefit the trustee, who already has enough on her

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[9] Defendants find "irony" in that "each [Plaintiff] actively sought the protection of the bankruptcy process with respect to these debts and then sued their creditors simply for seeking to participate in the same process." Br. 35. But debtors do not seek bankruptcy protection to avoid *time-barred* debts; they seek protection from *enforceable* debts. Time-barred debts do not impose financial stress, and there is no need for legal relief from "moral obligations." The true "irony" here is Defendants' attempt to *add* a financial burden in a process designed to reduce consumer debt.

plate without wasting time and resources objecting to frivolous claims. It does not benefit legitimate creditors, whose proper share is diminished when the system wrongly permits recovery on time-barred debts. If the system operates without error, those debts will be categorically excluded. There is no universe in which the process is "frustrated" when debt collectors refrain from filing frivolous claims.[10]

C. Consistent With This Court's *Phillips* Decision, The Same Baseless Filings That Would Violate The FDCPA In State Court Also Violate The FDCPA In Bankruptcy Court

1. As previously explained (Opening Br. 36-44), the same acts that violate the FDCPA outside bankruptcy also violate the FDCPA within it. Debt collectors (unsurprisingly) do not have more freedom to pursue time-barred claims once debtors enter bankruptcy. See, *e.g.*, *Crawford*, 758 F.3d at 1260.

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[10] Defendants are likewise wrong that only the discharge injunction can protect debtors from future harassment: any debtor concerned about cutting off requests for *voluntary* repayment can always invoke 15 U.S.C. 1692c(c)—"[i]f a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer." This FDCPA provision replicates the core effect of the discharge injunction.

2. Defendants resist this conclusion, but they are mistaken.

a. According to Defendants, debtors have protection in bankruptcy that does not exist outside bankruptcy, and these safeguards eliminate the risks the FDCPA is designed to avoid. While Plaintiffs previously explained that bankruptcy's safeguards are inadequate, Defendants insist these safeguards operate effectively: "Plaintiffs offer no support for their claim that bankruptcy lawyers and trustees simply do not do their jobs * * * ." Br. 8.

Yet Defendants themselves offer no support for insisting that debtors are always protected. And Defendants still have no answer for this simple question: If bankruptcy's safeguards always functioned properly, why are Defendants' time-barred claims ever allowed? Defendants failed to cite a *single* reason that their claims would ever survive a proper objection. So why do they recover with sufficient frequency to make this a viable business model?

The answer is obvious: The safeguards are *not* adequate. Defendants are well aware of the deficiencies in the process, because their entire practice turns on exploiting those deficiencies. If the process func-

tioned as Congress intended, their claims would be rejected 100% of the time, and they would stop "flooding" the courts with frivolous claims.

There is literally no scenario where the time-barred debt is considered and allowed unless someone makes a mistake. The end result is *always* clear unless the system malfunctions. The very existence of Defendants' business model is itself adequate proof that the system regularly breaks down and fails.

b. Defendants argue that "'a debtor in bankruptcy has much less at stake in the allowance of a proof of claim than a defendant facing the prospect of an adverse judgment in a collection lawsuit.'" Br. 33. This is clearly untrue for Chapter 13 debtors with 100% plans; those debtors are paying dollar-for-dollar a debt that is patently unenforceable outside bankruptcy. And it is also untrue for debtors not repaying 100% of unsecured debt: "In light of the real risk that a plan will not be completed, leaving the debtor liable on the prepetition claims, the debtor has a legitimate interest in seeing that only valid claims (to which he or she has no defense) are paid by plan distributions." *In re Freeman*, 540 B.R. 129, 135 (Bankr. E.D. Pa. 2015).

Moreover, Defendants ignore that *any* amount paid by a Chapter 13 debtor risks a substantial hardship. These debtors are vulnerable. The fact that they may somehow have "less at stake" in bankruptcy does not mean that the stakes are not still high for an individual trying to meet basic needs for herself and her family. Defendants cannot excuse the real harm they inflict by citing the *additional* harm they could inflict outside bankruptcy.

Defendants also argue that "a debtor is indifferent to the distributions made by the trustee, and may avoid the expense of litigating claims if doing so will provide no return to the debtor." Br. 33. Even were this true, it merely highlights the unfairness and unconscionability of Defendants' scheme: they *admit* exploiting the dynamic that parties will often acquiesce and pay frivolous claims because an objection is simply not worth the cost. That affirms the propriety of FDCPA liability—it hardly refutes it.

III. DEFENDANTS CANNOT MEET THEIR HEAVY BURDEN OF ESTABLISHING THAT THE BANKRUPTCY CODE IMPLIEDLY REPEALS THESE FDCPA CLAIMS

Defendants previously asserted that the Code would preclude any viable claim under the FDCPA. This was patently incorrect: as this

Court already explained, these statutory schemes can readily co-exist, and it is "easy to enforce each one." *Randolph*, 368 F.3d at 730. The Code (unremarkably) grants no right to file indisputably invalid claims; because nothing compels (or even *permits*) an act under one scheme that violates the other, there is no conceivable "conflict." *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001).

Defendants have now apparently abandoned their preclusion argument. They do, however, argue that debtors "should not be able to simply ignore the [Code's] procedures and safeguards." Br. 36. This logic is directly at odds with *Randolph*: there is nothing wrong with enforcing "overlapping and not entirely congruent remedial systems"; "[t]hey are simply different rules, with different requirements of proof and different remedies." 368 F.3d at 731-732. Defendants cannot ignore circuit precedent by dressing up discredited theories in non-preclusion garb.

The FDCPA reflects Congress's considered judgment that professional debt collectors impose heightened risks of public harm, and it accordingly restricts that group's behavior in ways that do not affect ordinary creditors. "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress none-

theless intended one federal statute to preclude the operation of the other." *POM Wonderful LLV* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014). Defendants' contrary suggestion flouts the implied-repeal analysis.

To avoid confusion on any remand, the Court should address this issue and reaffirm that there is no preclusion under the controlling standard.

IV. A CONFIRMED CHAPTER 13 PLAN CANNOT BAR NON-CORE, NON-BANKRUPTCY FDCPA CLAIMS TARGETING INDEPENDENT CONDUCT DURING THE BANKRUPTCY CASE

As previously established (Opening Br. 55-65), the *Robinson* court's claim-preclusion analysis was mistaken in multiple respects. Defendants now repeat the same mistakes and their arguments fundamentally misunderstand claim preclusion. Plaintiffs address only the few points warranting a response; the rest of Defendants' errors speak for themselves.

1. Claim preclusion requires "identical" transactional facts (*Matrix IV, Inc.* v. *Am. Nat'l Bank & Trust Co.*, 649 F.3d 539, 547 (7th Cir. 2011)), and the operative facts here are plainly *not* identical. The FDCPA claim was premised on Defendants' misconduct in filing a time-

barred proof of claim. The act of filing the claim—in 2014—is the subject of the FDCPA claim. Doc. 41 at ¶ 10. The enforceability of the underlying debt transaction—incurred in 2007—was the subject of the bankruptcy proof of claim. *Ibid.* It is assuredly true that certain *elements* of these claims are related: they both involve unquestionably time-barred debt. But these are two separate events, and each claim arises independently based on different transactional facts. See, *e.g.*, *Whitaker* v. *Ameritech Corp.*, 129 F.3d 952, 958 (7th Cir. 1997); *Peterson* v. *United Accounts, Inc.*, 638 F.2d 1134, 1137 (8th Cir. 1981). Defendants' insistence that "both claims proceeded from the same operative facts and accompanying legal principles" (Br. 39-41) is meritless.[11]

2. Nor was there a "final judgment" *as to these FDCPA claims*. Opening Br. 58-59. Defendants say that Plaintiffs "confuse[] issue preclusion with claim preclusion" (Br. 42-43), but this misses the point. A plan confirmation adjudicates a defined set of bankruptcy issues; it does

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[11] As previously explained (Opening Br. 57-58), if claim preclusion applies here, it would also bar a sweeping variety of FDCPA claims that are traditionally asserted as freestanding lawsuits. Defendants label this as "fearmongering" (Br. 41-42), yet they could not offer any principled basis for cabining the reach of their expansive theory.

not adjudicate every conceivable dispute potentially arising between all parties in the bankruptcy. See *Baldwin* v. *Citigroup, Inc. (In re Baldwin)*, 307 B.R. 251, 261 (M.D. Ala. 2004). While the plan bars future suits challenging any matter falling within its scope—whether actually litigated or otherwise—it does *not* bind non-core, non-bankruptcy issues that just so happen to arise during the bankruptcy proceeding. See *Russo* v. *Seidler (In re Seidler)*, 44 F.3d 945, 948 (11th Cir. 1995).

Plaintiffs cited a series of cases explaining this distinction in their opening brief (at 58-59); in response, Defendants say—nothing.

3. Under this Court's existing law, the resolution of a "core" claim cannot bind non-core claims that were not explicitly resolved during the bankruptcy case. *Barnett* v. *Stern*, 909 F.2d 973, 978-982 (7th Cir. 1990). Defendants say that *Matrix IV* rejected *Barnett* (Br. 43)—before eventually admitting (in a footnote) that *Matrix IV* actually did *not* reject *Barnett* (Br. 44 n.15). Defendants were correct the second time, not the first.

And *Barnett*'s holding is ultimately sound. It avoids a serious constitutional question arising from *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011): whether, absent waiver, a bankruptcy judge can enter a confir-

mation order destroying non-core, non-bankruptcy statutory rights. Defendants have no answer for this constitutional issue. They are wrong to seek an undue expansion of claim preclusion that would directly invite a serious constitutional problem.[12]

4. Plaintiffs explained how a measured approach to claim preclusion is consistent with the doctrine's objectives. Opening Br. 61-62. Defendants disagree. They claim that FDCPA suits would invite "'collateral attacks'" on the confirmed plan, should the court have to reopen the plan once debtors "recover on [the] claims." Br. 45-46. Defendants are confused: A *modified* plan is not an attack on a confirmed plan. This procedure is directly contemplated by the Code itself. It reflects that changed circumstances warrant an adjustment in "the amount of pay-

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[12] Defendants engage the constitutional issue solely by claiming it was waived. Br. 44 n.15. This is baseless: parties waive *claims*, not arguments: "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); see also *United States* v. *Billups*, 536 F.3d 574, 578 (7th Cir. 2008). Defendants plainly preserved the *issue* by resisting claim preclusion; the so-called "new arguments" are properly before this Court. *Lawson* v. *Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015); *Bew* v. *City of Chicago*, 252 F.3d 891, 895-896 (7th Cir. 2001).

ments on claims" (11 U.S.C. 1329(a)(1)); it is not an effort to undo the actual disposition of an identical issue definitively resolved in the plan.

Defendants finally argue that a single policy objective is paramount—limiting FDCPA suits, which "are typically driven le[ss] by any plaintiff's recovery and more by the prospect of attorney fees." Br. 46. It is understandable that Defendants, as professional debt collectors, dislike Congress's determination that FDCPA suits are necessary to deter abusive misconduct, and that Defendants prefer to eliminate the fee-shifting necessary to ensure that debtors are adequately represented. But these are ultimately policy determinations for the political branches; if Defendants wish to eliminate fee awards (and undermine the FDCPA's core protections), their proper audience is Congress.

CONCLUSION

The judgments below should be reversed, and these cases should be remanded for further proceedings.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2016, an electronic copy of the foregoing Consolidated Reply Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Seventh Circuit, using the appellate CM/ECF system. I further certify that all parties in these consolidated cases are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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