Nos. 15-2131 and 15-2132

In the United States Court of Appeals for the Third Circuit

MARGARET TORRES, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

CAVALRY SPV I, LLC,
Defendant-Appellee.

MARGARET TORRES, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

ASSET ACCEPTANCE, LLC,
Defendant-Appellee.

On Appeals from the United States District Court for the
Eastern District of Pennsylvania

REPLY BRIEF FOR PLAINTIFF-APPELLANT MARGARET TORRES

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INTRODUCTION

Defendants are engaged in a flagrant misuse of the bankruptcy process. They have no legitimate basis for their time-barred claims. They effectively 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 really 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 hints for *others* to spot their misconduct (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 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 court erred in holding otherwise. The judgments should be reversed.

ARGUMENT

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

A. Defendants Violate 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, 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* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014); *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. 15 U.S.C. 1692e.

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 focus on the so-called "overwhelming majority of courts" supporting their position. Asset Br. 2. But this is not a head-counting exercise, and any scorekeeping is meaningless without an explanation of *why* those courts ruled the way they did. The answer is that those decisions rest on the same baseless logic that Defendants continue trotting out here, and they largely fail to grapple with the core arguments pressed here on appeal (dealing instead with limited presentations from busy debtors litigating on tight budgets).

Moreover, the balance is not nearly as lopsided as Defendants wish: the Eleventh Circuit has now twice roundly rejected their position (*Johnson* v. *Midland Funding, LLC*, No. 15-11240, 2016 WL 2996372 (11th Cir. May 24, 2016), and *Crawford*), and their preclusion analysis is incompatible with prevailing law in multiple circuits (including this Court's decision in *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259 (3d Cir. 2013), a decision Defendants badly misread). The Court should not follow the mere say-so of lower-court judges who failed to engage the critical arguments.

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.

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." Asset Br. 35. While Defendants hope to distinguish these cases on their facts (*id.* at 36 n.21), 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 insist that *Davenport* never required all debts to be enforceable in *civil proceedings*. Asset Br. 33. This is true, *and irrelevant*. Plaintiff's point is not that all debts must be legally enforceable everywhere (contra Cavalry Br. 14); her 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 (*e.g.*, Asset Br. 41), 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 "remedies" are extinguished. Asset Br. 27, 30-31. Plaintiff already refuted this line of argument, 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 ob-

ligation 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: "'A debt barred by the statute of limitations is still a debt, though the remedy upon it be suspended or gone.'" Cavalry Br. 18 (quoting Pennsylvania law, and admitting the "'existing obligation'" is "'only moral'").

The Code does not say that a debt can be merely "valid" or "still existing"—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. Asset Br. 27, 32. 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 Cas. & Surety Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007) (internal quotation marks omitted). As with virtually all other

States, Pennsylvania says that debts are *not* legally enforceable after the limitations period expires, even if the underlying obligation still exists. See Asset Br. 32. 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. Asset Br. 33. 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 (and indisputably) *unenforceable*. While the Code's definition captures "all *legal* obligations of the debtor, no matter how remote or contingent" (*ibid.*) (emphasis 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*.[1] But nowhere did Congress suggest that this new definition of "claim"

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[1] A party, for example, cannot breach an enforceable contact simply because a *contingency* has not yet occurred. Even though a conditional contract might not authorize immediate action, it most assuredly is an "enforceable obligation." Contra Asset Br. 35. This further explains Defendants' clear misreading of Third Circuit law (which they accuse Plaintiff of not "bothering" to read). Contrary to Defendants' view (Cavalry Br. 14-15), *In re Rodriguez*, 629 F.3d 136 (3d Cir. 2010), does not find debts "enforceable" simply because a creditor can request voluntary payment; *Rodriguez* involved an *enforceable obligation* under a contract, which is very much unlike Defendants' *unenforceable* "rights" in time-barred debt. 629

[Footnote continued on next page]

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 binding construction.

e. Defendants argue that filing a proof of claim does not imply a debt is enforceable. Asset Br. 16. Yet Defendants voluntarily participated in a process reserved for *enforceable* obligations, which at least *implies* enforceability. And Defendants gladly take advantage of the background presumption that all claims are "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 accord-

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F.3d at 142 ("the terms of the Rodriguezes' mortgage establish that the obligation to pay into the escrow account was enforceable").

ance with these rules shall constitute prima facie evidence of the validity and amount of the claim."). 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. Instead, they declare it sufficient that their claims are "accurate and complete" in all required detail about the debt. Asset Br. 4, 16 (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.[2] "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).

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[2] Contrary to Defendants' contention (Asset Br. 15 & n.13), *Sheriff* v. *Gillie*, 136 S. Ct. 1594 (2016), does not help them. In *Sheriff*, the Court held that special counsel's use of agency letterhead did not "falsely" imply an affiliation with the Attorney General—because special counsel *was in fact affiliated with the Attorney General*. 136 S. Ct. at 1601-1602. The challenged "impression" was not false or misleading because the impression was *true*. *Id.* at 1602-1603. Here, however, the same *cannot* be said of Defendants' proofs of claim. It makes no difference that those claims disclosed half-truths about the debts, because Plaintiff is not challenging those half-truths; she is challenging the core assertion that Defendants have a "right to payment" when no such "right" exists.

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

1. As previously established, 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, 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, but openly *expected*. Cavalry Br. 37-38.

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 pro-

cess claims. That process is frustrated by attempts to bog down bankruptcy proceedings with knowingly invalid claims. Congress would not have tasked trustees 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 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; 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.[3]

b. Defendants say the Code's structure supports their position, but Defendants are wrong. As their lead argument, Defendants say that Congress would not have created a process for objecting to stale claims if it wished to exclude those claims at the outset: "the fact that the Code contemplates that such claims will be filed * * * is evidence that they are not prohibited." Asset Br. 36. Indeed, according to Defendants, "the only way to make sense of a scheme which provides that claims may be filed, yet later disallowed * * * , is to conclude that the Code does not prohibit the *filing* of such claims." *Id.* at 37.

Plaintiff has already refuted this line of argument, and Defendants simply refuse to engage her position. Again, there is a far easier way to "make sense of" this process: Congress realized that it was necessary to create a procedure for resolving *genuinely disputed claims that were filed in good faith*. That has nothing to do with tolerating or permitting parties to file knowingly frivolous claims, simply because the Code has a way to strike those claims from the proceeding. Indeed, Defend-

[3] Defendants assert that it is unfair to prevent them from "'partak[ing] in a[] debtor's estate.'" Asset Br. 30. But Defendants *have no right to "partake" in the estate*. Their claims are unenforceable, and will lose 100% of the time absent a mistake. The only "right" Defendants sacrifice—assuming no system malfunction—is the "right" to file a losing claim.

ants' contrary position is exactly tantamount to saying that parties have a "right" to engage in frivolous litigation, because Fed. R. Civ. P. 11 contemplates sanctions for frivolous litigation. Rule 11 would not exist, according to Defendants, unless parties had a "right" to pursue frivolous claims.[4]

Contrary to Defendants' contention, what is truly difficult to "make sense of" is a scheme that permits parties to file frivolous claims. 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"—as that term is traditionally understood—to collect on their 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. See Br. 40 n.25. Congress, unsurprisingly, does not grant a "right" to undermine its own sys-

[4] Nor are Defendants correct 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 place. It is not "permission" to file a claim that everyone agrees is time-barred. See Fed. R. Bankr. P. 9011.

tem. 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).[5]

c. Defendants also maintain that their conduct benefits debtors (*e.g.*, Cavalry Br. 30), but that argument is wholly insubstantial. No one believes that Defendants are acting charitably in filing these claims. They are not trying to "reduc[e] the balance [on stale debts] * * * owed after bankruptcy" (Asset Br. 49), because debtors already owe *nothing* on time-barred debts. Defendants can politely ask for payment, but debtors may simply refuse. Debtors do not seek bankruptcy to discharge *stale* debt; debtors seek bankruptcy to discharge *enforceable* debt.

Defendants' contrary view blinks reality. No one truly believes that Defendants are acting in the debtor's best interest (or other creditors' best interest) by filing defective proofs of claim. If Defendants were truly concerned about debts omitted from a debtor's schedules—even though such claims no longer pose any threat to a debtor, who can simply ignore them—Defendants could politely remind

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[5] 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." Asset Br. 38. 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.

the debtor or the court to discharge the debt without wasting limited time and resources with a baseless proof of claim. At a minimum, Defendants could admit on the claim itself that the debt is time-barred and unenforceable. But Defendants instead attempt to sneak their claims through the process with the *legitimate* claims, in the hope that no one will notice. That practice is unlawful under the FDCPA, and Defendants have no right to revive it under the Code.

d. Defendants contend that, unlike ordinary legal systems, the Code tolerates defective claims, and Congress never said otherwise. Asset Br. 16. This is preposterous. Claims subject to a known iron-clad defense are "frivolous" and sanctionable. See Opening Br. 35-36 (citing circuit authority in the Fourth, Fifth, Seventh, and Tenth Circuits). 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.

Defendants resist that their claims are prohibited, but their reasons are meritless.

First, Defendants say that their practice is permitted under the Code even if it is punished under Rule 9011, because "'Rule 9011 is not part of the Code but a non-statutory adjunct to it.'" Asset Br. 42-43. This misses the point entirely. Courts are not typically in the practice of *sanctioning* parties for conduct permitted by statute. The very reason that courts invoke Rule 9011 is that a party has violated operative law. If parties had a right to file frivolous claims under the Code, then courts would have no power to sanction the practice under Rule 9011.

Second, Defendants assert that knowingly time-barred claims are not necessarily "baseless" or "frivolous." Yet it is difficult to imagine a better characterization for a claim that is indefensible in court: once anyone lodges an objection, Defendants immediately throw in the towel. They simply withdraw or abandon the stale claim, because they have no colorable basis for defending why they previously asserted a "right to payment." When a party asserts that it has a "right to payment"—when it knows it has *no* "right to payment"—it has filed (in common parlance) a *frivolous* claim. See, *e.g.*, *Feggins*, 2015 Bankr. LEXIS 2822, at *15-*16.[6]

[6] The fact that courts are not always eager to invoke Rule 9011 does not suggest that Defendants' practice is acceptable. Contra Asset Br. 41-42. It is notable, in fact, that Defendants make no effort to square their position with the uniform legal

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Nor can Defendants sidestep this conclusion by suggesting that some claims "might actually prove to be timely." Asset Br. 46. True enough for *some* claims, but not *these* claims. The pertinent question is whether a knowingly time-barred claim is permitted under the Code, not whether a (deceptively) *timely* claim is permitted under the Code. If Defendants had not in fact filed a frivolous claim, they would have nothing to worry about under the Code or the FDCPA.

Third, Defendants asserts that sanctions are inappropriate because Defendants have a "right to payment." Yet Defendants still cannot explain why this "right" is always refused except when the process malfunctions. "Rights" are not usually contingent on system failure or parties waiving iron-clad defenses. Defendants take advantage of the Code's background rules to create the false impression that their claims are enforceable when the opposite is true. *Crawford*, 758 F.3d at 1261. There is nothing in the Code that supports any "right" to engage in that misleading conduct.

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principles articulated in Plaintiff's brief: parties are not permitted to knowingly file claims subject to unavoidable dispositive defenses. Contra *id.* at 43. That principle squarely applies in this setting. If Defendants felt that sanctions were unwarranted, they could at least explain why the uniform rules from multiple circuits are somehow inapplicable. Defendants' exact logic fails under Rule 11, and Rule 9011 and Rule 11 are cut from the same cloth; there is no reason the practice survives under one but not the other.

e. Defendants say that their claims are necessary to "'gather together the assets and debts of the debtor and to effect an equitable distribution of those assets.'" Asset Br. 12. 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).[7]

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 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 op-

[7] Defendants find irony in that debtors seek the protection of the bankruptcy process and then sue creditors for seeking to participate in that same process. Asset Br. 12. 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.

erates 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.[8]

C. The Same Baseless Filings That Would Violate The FDCPA In State Court Also Violate The FDCPA In Bankruptcy

1. As previously explained, 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.

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

a. According to Defendants, debtors have protection in bankruptcy that does not exist outside bankruptcy, eliminating risks the FDCPA is designed to avoid. Defendants insist these safeguards operative effectively (Asset Br. 11-12), yet have no answer for this simple question: If bankruptcy's safeguards always functioned, why are Defendants' time-barred claims ever allowed? Defendants failed to cite a

[8] 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.

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: Bankruptcy's "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 functioned as Congress intended, their claims would be rejected 100% of the time, and they would stop "flooding" the courts with frivolous claims.

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.'" Asset Br. 13. 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 substantial hardship. Debtors are vulnerable. Having "less at stake" in bankruptcy does not mean 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.

c. Defendants' theory, if accepted, invites this Court to stand in direct conflict with the Eleventh Circuit. On indistinguishable facts, *Johnson* recently reaffirmed *Crawford*: "a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim in a Chapter 13 bankruptcy proceeding." 2016 WL 2996372, at *3. This "misbehavior" "'creates the misleading impression to the debtor that the debt collector can legally enforce the debt.'" *Id.* at *6. "[W]here the bankruptcy process is working as intended," time-barred claims are always rejected; it is only when defendants *exploit* the system that they collect, "'necessarily reduc[ing] the payments to other legitimate creditors with enforceable claims.'" *Id.* at 7, 10.

The panel found "no blanket prohibition" on filing time-barred claims (*id.* at *5), but did so in the narrowest possible sense. It found those claims allowed in the way "frivolous lawsuit[s]" are allowed, but subject to *punishment*: "[t]here is nothing to stop the filing, but afterwards the filer may face sanctions." *Id.* at *6. One might quibble whether *sanctionable* claims are truly *authorized* claims, but the im-

port is clear: the FDCPA appropriately punishes filing time-barred claims. *Id.* at 10.[9]

d. The Eighth Circuit recently reached the opposite conclusion in *Nelson* v. *Midland Credit Mgmt., Inc.*, No. 15-2984, 2016 WL 3672073 (8th Cir. July 11, 2016), but its scant analysis is unpersuasive.

Nelson may have confronted the same issues, but it hardly grappled with the same arguments. For example: Like Defendants, *Nelson* never identified any legitimate purpose in filing knowingly frivolous claims. It did not identify a single instance where Defendants' claims succeed absent system malfunction, or explain why Defendants' deliberate abuse of the claims-process is fair or appropriate under the FDCPA. It did not explain why the FDCPA (or the Code) tolerates meritless claims subject to a clear, ironclad defense, notwithstanding Rule 9011 (requiring a good-faith basis for all claims). And it did not say why baseless claims are "accu-

[9] The better view is that time-barred claims are not permitted under the Code: As *Johnson* itself recognized, "[a] 'right to payment' under the Bankruptcy Code 'is nothing more nor less than an enforceable obligation,'" and time-barred claims are not "enforce[able]." *Id.* at *3. In suggesting defendants somehow still had a "claim," *Johnson* made no attempt to square its view with those settled propositions. The panel was apparently bound by circuit precedent, which held (also without confronting those propositions) that "'creditors may file unenforceable claims in the bankruptcy court.'" *Ibid.* (citing *In re McLean*, 794 F.3d 1313, 1321 (11th Cir. 2015)).

rate and complete" despite (i) asserting a "right to payment" that does not exist; or (ii) invoking the Code's presumption of "validity" for *invalid* claims.

Nelson declared that debtors have substantial "protections" in bankruptcy (*id.* at *2), but in quantifying that protection, *Nelson* said—nothing. If those protections actually worked, Defendants' claims would be rejected 100% of the time. *Nelson* did not address the obvious pattern of system failure, or explain why Defendants continue to flood bankruptcy proceedings with baseless filings—at great cost to innocent parties and busy courts—if those "protections" functioned as Congress intended. Defendants' business model is designed to exploit predictable failures in the process; the model would collapse if bankruptcy's "protections" were sufficient. *Nelson* had no response to this obvious reality.

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

A. "'[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). Defendants concede there is not a single line of text in the Code or the FDCPA that expressly precludes the claims at issue. Defendants thus can prevail only by showing this is one of the "rare" occasions where one independent federal enactment precludes

another. *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004). It most certainly is not.

First, as established above, a debt collector "can easily satisfy both mandates" (*Dep't of Trans.* v. *Pub. Citizen*, 541 U.S. 752, 767 (2004)), because the challenged conduct is forbidden under both schemes. Any debt collector who refuses to violate the Code will automatically comply with the FDCPA. There is no "positive[] repugnan[cy]" between these laws, and thus no preclusion.

Second, even if the Code somehow tolerated Defendants' conduct, there is still no "irreconcilable conflict": The claims-process is wholly permissive; no one is compelled to file a claim. Put another way: even if the Code permits Defendants' abusive conduct, it certainly does not *require* it. Thus, it cannot effect a repeal of the FDCPA by implication. "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless 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 view reflects a fundamental misunderstanding of well-settled doctrine. See, *e.g.*, *Johnson*, 2016 WL 2996372, at *5 ("The FDCPA and the Code are not in irreconcilable conflict," as the "regimes together * * * provid[e] different tiers of sanctions for creditor misbehavior in bankruptcy.").

B. According to Defendants, however, "this Court already has acknowledged in a published decision that 'an FDCPA claim based on a proof of claim filed in a pending bankruptcy would create direct conflicts with the Bankruptcy Code.'" Asset Br. ii (quoting *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d Cir. 2013)). Defendants flatly misrepresent *Simon*'s holding. While *Simon*'s holding does in fact appear on page 274, Defendants reproduce language *from page 273*—where *Simon* described a decision from the Ninth Circuit BAP that *Simon* emphatically *rejected* three paragraphs later. See 732 F.3d at 273-274 ("The Seventh Circuit in *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, took a different approach. * * * We will follow the Seventh Circuit's approach."); see also *id.* at 271 (describing the conflict between "*B-Real, LLC* v. *Chaussee (In re Chaussee)*, 399 B.R. 225 (9th Cir. B.A.P. 2008) (finding the FDCPA claims were precluded by the Bankruptcy Code)" and "*Randolph* v. *IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004) (finding the FDCPA claims not precluded)"). There is nothing ambiguous about *Simon*'s discussion of these cases; Defendants have simply upended the holding.

Defendants err again in their reliance on *Rhodes* v. *Diamond*, 433 F. App'x 78 (3d Cir. 2011). *Rhodes* was unpublished, issued pre-*Simon*, and relied directly on *Chaussee*, which *Simon* squarely rejected. See 433 F. App'x at 80. Indeed, tellingly, the district court in *Simon* also relied on *Rhodes* and *Chaussee* (as well as *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)), while explicitly rejecting *Randolph*. See *Simon* v. *FIA Card Servs., N.A.*, No. 12-0518, 2012 WL 2891080, at *2-*3 & n.3 (D.N.J. July 16, 2012) ("The Court acknowledges that other courts have reached different conclusions with regard to the preclusive effect of the Bankruptcy Code, including the Seventh Circuit in *Randolph*[]. The Third Circuit has not, however, adopted the reasoning of those cases and, as discussed above, has cited with approval *Walls* and related cases."). This Court in *Simon* reached exactly the opposite conclusion, adopting *Randolph* and rejecting those other decisions. 732 F.3d at 271, 274 (following *Randolph* and rejecting *Simmons*, *Walls*, and *Chaussee*). Defendants invite a direct, intracircuit conflict on this issue without properly crediting contrary binding authority.

* * *

In the end, Defendants convinced the district court to dismiss actionable FDCPA claims on the ground that the FDCPA was impliedly repealed one year later by Congress in passing bankruptcy legislation. With no apparent irony, Defendants contend that their flagrant misuse of the bankruptcy process was not only sanctioned by Congress but also intended to repeal *by implication* the express prohibition of such conduct by Congress (one year earlier) in the FDCPA.

In accepting Defendants' argument, the district court unquestionably erred. An implied repeal is unnecessary to give both statutes "meaning." *Simon*, 732 F.3d

at 274. Defendants' interpretation of the Code is indefensible. But even were it *reasonable*, it could not support affirmance because it falls far short of "the overwhelming evidence needed to establish repeal by implication." *J.E.M.*, 534 U.S. at 137. Reversal is warranted.

III. PLAINTIFF PLAINLY HAS ARTICLE III STANDING

Defendants are incorrect that Plaintiff lacks Article III standing, as Plaintiff easily satisfies the traditional standing inquiry: (i) Plaintiff incurred an actual, concrete, particularized "injury in fact" in being forced to spend time and resources objecting to baseless claims; (ii) that injury is immediately "trace[able]" to the challenged conduct, which alone prompted the objection; and (iii) the injury will be directly "redressed" by the FDCPA. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016); see also *Reed* v. *LVNV Funding, LLC*, No. 14-C-8371, 2015 U.S. Dist. LEXIS 40457, at *8-*9 (N.D. Ill. Mar. 27, 2015).

This is not some "bare procedural violation" (*Spokeo*, 136 S. Ct. at 1549): as in all bankruptcies, due to the clockwork claims-allowance process, Defendants would automatically collect from the estate unless someone objects, despite filing unenforceable claims. This imposes serious risks and costs on all debtors, includ-

ing Plaintiff.[10] Any debtor with a 100% Chapter 13 plan—repaying the full amount of all unsecured debt—is necessarily injured by including time-barred debts in the plan. Every penny wrongly distributed is taken from the debtor. And even debtors not repaying 100% of unsecured debts face harm: If a stale claim had been allowed and her bankruptcy case were later dismissed (or converted to Chapter 7), she would owe more on her outstanding debts due to amounts wrongly diverted to Defendants. *Freeman*, 2015 WL 6735395, at *3. Plaintiff was compelled to vindicate her rights to guarantee only legitimate creditors would be paid from her future earnings. This presents a distinct risk of concrete harm, and immediate action was required to protect Plaintiff's rights. Defendants tried to collect the actual money coming from her actual wages that would otherwise pay down her actual debts. Contrary to Defendants' novel view, Plaintiff has standing even though Defendants' attempt to abuse the process fell short.

CONCLUSION

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

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[10] It also imposes serious costs on honest creditors, but Plaintiff has standing even without seeking to vindicate those creditors' interests. Cf. 15 U.S.C. 1692(e) (the FDCPA is partly designed so "debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged").

Respectfully submitted.

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July 22, 2016

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/s/ *Daniel L. Geyser*
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July 22, 2016

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I hereby certify that on July 22, 2016, an electronic copy of the foregoing Reply Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Third 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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