No. 16-5042

In the United States Court of Appeals for the Sixth Circuit

IN RE: PATRICIA ANN BROADRICK,
Debtor.

PATRICIA ANN BROADRICK,
Appellant,

v.

LVNV FUNDING, LLC; RESURGENT CAPITAL SERVICES, L.P.; PYOD, LLC,
Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee

REPLY BRIEF FOR APPELLANT PATRICIA ANN BROADRICK

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

<u>Rules</u>

<u>Other Authorities</u>

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 sufficient hints for *others* to spot their misconduct (after wasting others' time and resources), and because, they posit, the Bankruptcy Code (for undiscernible reasons) *entitles* debt collectors to file baseless 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 bankruptcy court erred in holding otherwise. The judgment 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. Br. 5, 31, 39-40. 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 on this 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 (an undeniable point they refuse to admit). And scores of district and bankruptcy courts have indeed rejected their position.[1] The Court should not

[1] *E.g.*, *Avalos* v. *LVNV Funding, LLC (In re Avalos)*, 531 B.R. 748 (Bankr. N.D. Ill. 2015); *Feggins* v. *LVNV Funding LLC (In re Feggins)*, No. 13-11319-WRS, 2015 Bankr. LEXIS 2822 (Bankr. M.D. Ala. Aug. 24, 2015); *Trevino* v. *HSBC Mortg. Servs., Inc. (In re Trevino)*, No. 10-70594, 2015 WL 3883180 (S.D. Tex. June 19, 2015); *Patrick* v. *PYOD*, 39 F. Supp. 3d 1032 (S.D. Ind. 2014).

follow the mere say-so of a group 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. 16-25 & n.7. 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.[2]

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." Br. 19-22 & n.7. While Defendants hope to distinguish these cases on their facts, they overlook that each case shares a critical common

[2] Defendants say the "touchstone of a 'right to payment' is the existence of the obligation itself." Br. 24. This makes nonsense of the Court's repeated insistence on an *enforceable* obligation.

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*. Br. 21-22. This is true, *and irrelevant*. Plaintiff's point is not that all debts must be legally enforceable everywhere; 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.*, Answering Br. 21), 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. Br. 18-19. 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 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: "'Under Tennessee law, a statute of limitations defeats 'simply the remedies upon a debt' but 'does not operate, in law, as a discharge of the debt itself, which remains.'" Br. 18.[3]

The Code does not say that a debt can be merely "valid" or "still in existence"—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 elimi-

[3] Contrary to Defendants' contention (Br. 19), Plaintiff has not suggested that Tennessee law is "wrong" or "exactly backwards." Defendants are confused. The point is not that traditional limitations principles (extinguishing all *remedies*) are "wrong." The point is that, under those principles, there is no *enforceable obligation* (*e.g.*, *Buchanan*, 776 F.3d at 396-397), which is dispositive under binding Supreme Court precedent (*e.g.*, *Davenport*, 495 U.S. at 559).

nates 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. Answering Br. 18. 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, Tennessee says that debts are *not* legally enforceable after the limitations period expires, even if the underlying obligation still exists. Defendants simply 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. 20-22. 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*.[4] 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 binding construction.

e. Defendants argue that filing a proof of claim does not imply a debt is enforceable. Br. 33 n.13. Yet Defendants voluntarily participated in a process reserved for *enforceable* obligations, which (at a minimum) *implies* enforceability.

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[4] A party, for example, cannot freely 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 binding on the parties and an "enforceable obligation." Contra Answering Br. 22.

And Defendants gladly take advantage of the background presumption deeming 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.").

Defendants know their claims are not "prima facie" valid. But they never disclose that to anyone or make any corrective statements. They simply lodge baseless claims in a formal process reserved for *enforceable* obligations. The fact that some will detect their claims as frivolous does not wipe clean the "misleading impression" that Defendants "can legally enforce [a] debt" that cannot be enforced. *Crawford*, 758 F.3d at 1261.

Defendants respond that their claims are "accurate and truthful" (Br. 30), but that is wrong. It makes no difference that Defendants' claims disclosed half-truths about the debt (*e.g.*, the debt's amount, the last-transaction date), 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. Defendants falsely assert "*proof*" of a "*right to payment*" to exploit the Code's presumption of validity. When the process (predictably) breaks down and fails, Defendants happily participate in the estate's distribution, despite having *unenforceable* claims that all agree should have been rejected. Defendants' half-truths hardly render these claims "accurate" or "truthful."

Defendants insist their claims disclose all details required by Fed. R. Bankr. P. 3001(c). Br. 28-30. But Rule 3001(c) operates together with Fed. R. Bankr. P. 9011, which requires a *good-faith basis* for all claims. *Young* v. *Young (In re Young)*, 789 F.3d 872, 879 (8th Cir. 2015) ("case law interpreting Rule 11 applies to Rule 9011 cases"). "Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim groundless in law and is subject to Rule 11 sanctions." *Brubaker* v. *City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991). Nor does it matter that "the statute of limitations is an affirmative defense which must be pled or waived" (*Steinle* v. *Warren*, 765 F.2d 95, 101 (7th Cir. 1985)): "Rule 11 does not permit a plaintiff to avoid sanctions merely because the opposing party or the judge might not immediately recognize that the assertion is groundless." *Brubaker*, 943 F.2d at 1385.

"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). Defendants' claims are not "accurate" or "truthful" simply because their claims are so *clearly* baseless that some parties can ferret them out.[5]

f. Defendants do not directly challenge the "least sophisticated consumer" standard, but instead say that "context" matters. Br. 35-38. And it most certainly does: the context here is a process reserved for (i) *enforceable* obligations that are (ii) *prima facie* valid. Defendants flunk both criteria. The "context" is also controlled by Rule 9011, requiring a good-faith basis for all claims. Defendants have no such basis here, as they effectively admit (Br. 25 n.10). If anyone is paying attention and objects, Defendants give up because their claims are indefensible. If "context" matters, Defendants plainly lose.

Likewise, 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

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[5] Contrary to Defendants' contention (Br. 33-35), *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; again, she is challenging the core assertion that Defendants have a "right to payment" when no such "right" exists—a fact confirmed by the frivolousness of their claims.

clearly baseless that any competent professional could easily ferret them out, leaving no one misled or deceived. Defendants are mistaken.

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.[6] 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.[7]

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[6] 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.

[7] This accordingly is unlike a situation where a debt collector sends direct communications exclusively to attorneys. Compare, *e.g.*, Answering Br. 35-36 n.14. 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

[Footnote continued on next page]

Nor is it relevant that Plaintiff herself was represented by an attorney. Contra Answering Br. 37. This overlooks 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 Plaintiff was represented. That is not always the case for many consumers, which is precisely why Defendants continue exploiting the system. The FDCPA deters Defendants from wasting everyone's time and serves as a safeguard for those consumers who cannot otherwise protect themselves.

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

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[Footnote continued from previous page]

to the court, in the hope that no one (most of all any competent lawyer) would ever review them.

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. As Defendants understand it (Br. 29), they have an *absolute right* to file indefensible, time-barred claims.

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 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*, 789 F.3d at 879. "[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 say the Code's structure supports their position, but Defendants are wrong. As a main 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. Answering Br. 22-23, 27-28 (the provisions striking time-barred claims would be "superfluous" if time-barred claims "were not permitted to be filed in the first place").

Plaintiff already refuted this line of argument, and Defendants simply refuse to engage her position. Again, there is a far easier way to explain this process: 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 knowingly 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. 11 contemplates sanctions for frivolous litigation. Rule 11 would not exist, according to Defendants, unless parties had a "right" to pursue frivolous claims.[8]

Contrary to Defendants' contention, what is truly difficult to explain 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 under-

[8] 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 a bizarre "permission" to file a claim that everyone agrees is time-barred. See Fed. R. Bankr. P. 9011.

stood—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. 25 n.10. Congress, unsurprisingly, does not grant a "right" to undermine its own system. See, *e.g.*, *Feggins*, 2015 Bankr. LEXIS 2822, at *12.[9]

c. Defendants contend that, unlike ordinary legal systems, the Code tolerates defective claims, and Congress never said otherwise. Br. 28. This is preposterous. Claims subject to a known iron-clad defense are "frivolous" and sanctionable. See Opening Br. 39-40 (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. 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

[9] Nor are stale claims necessary for an equitable distribution of estate assets. The "equitable distribution" on time-barred debt is *always* zero. Those debts are unnecessary to any functioning Chapter 13 plan. They are submitted only to take unfair advantage of the process in the hope of collecting when the system malfunctions.

here—which is why they throw in the towel once anyone objects. The *default*—without saying anything more—is that there is no "right" to file frivolous claims. See, *e.g.*, *Feggins*, 2015 Bankr. LEXIS 2822, at *15-*16. If Defendants wish to invent such a strange "right," they must identify language far clearer than this.[10]

Moreover, 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 operates without error, those debts will be categorically excluded. There is no uni-

[10] Defendants make no effort to square their position with the uniform legal principles articulated in Plaintiff's brief: parties are not permitted to knowingly file claims subject to unavoidable dispositive defenses. Contra Answering Br. 28. 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.

verse in which the process is frustrated when debt collectors refrain from filing frivolous claims.[11]

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 (Br. 40), 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 *single*

[11] Defendants are likewise wrong (Br. 12) 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.

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 bankruptcy debtors have "'less at stake'" than "'collection defendants.'" Br. 40. This is clearly wrong for Chapter 13 debtors with 100% plans, who end up paying dollar-for-dollar a debt that is unenforceable outside bankruptcy. It is even wrong for debtors not repaying 100% of unsecured debt: If the bankruptcy case is dismissed or converted to Chapter 7, debtors would owe more on outstanding debts due to amounts wrongly diverted to stale claims. *In re Freeman*, 540 B.R. 129, 135 (Bankr. E.D. Pa. 2015).

Chapter 13 debtors are vulnerable; they have much at stake with *every* payment, as they struggle to meet basic needs for themselves and their families. 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 *allowed* claims, but the import is clear: the FDCPA properly punishes filing time-barred claims. *Id.* at 10.[12]

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[12] 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)).

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 "accurate and complete" despite (i) asserting a "right to payment" that does not exist; and (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. Congress enacted the FDCPA to fill in gaps where "existing laws" were "inadequate to protect consumers" from professional debt collectors. 15 U.S.C. 1692(b). *Nelson* may have viewed the Code's protections as sufficient, but Congress disagreed; *Nelson* had no basis for overriding Congress's considered judgment. *POM Wonderful LLV* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014); *Johnson*, 2016 WL 2996372, at *5.

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 effectively 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*, 134 S. Ct. at 2238. 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. Defendants' contrary position is wholly insubstantial. They refuse to acknowledge that their theory has been flatly rejected by *Randolph*, *Johnson*, *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 239, 273-274 (3d Cir. 2013), and *Garfield* v. *Ocwen Loan Servicing, LLC*, 811 F.3d 86, 91-92 (2d Cir. 2016), all of which adopted *Randolph* while repudiating *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d

502 (9th Cir. 2002). They repeat effectively a *preemption* analysis, which is irrelevant to a *preclusion* analysis. *POM Wonderful*, 134 S. Ct. at 2236; *Simon*, 732 F.3d at 275; *Randolph*, 368 F.3d at 730.[13]

Defendants may think that the Code's existing "protections" and "remedies" render the FDCPA unnecessary in this context. Answering Br. 44 (relying on *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010)). But Congress made a contrary determination in the FDCPA. It decided that heightened remedies were necessary to counteract the abusive practices of professional debt collectors; the Code's remedies for ordinary creditors were inadequate. The Code and the FDCPA can thus readily co-exist, and it is "easy to enforce each one." *Randolph*, 368 F.3d at 730; accord *Simon*, 732 F.3d at 274. It is not up to Defendants, or the courts, to "pick and choose among congressional enactments." *Morton*, 417 U.S. at 551.

* * *

In the end, Defendants suggest dismissing actionable FDCPA claims on the ground that the FDCPA was impliedly repealed one year later by Congress in pass-

[13] Defendants further rely on *Kokoszka* v. *Belford*, 417 U.S. 642 (1974), a case definitively rejected as irrelevant by other circuits. As those circuits explained, the Supreme Court's statements were "at minimum dicta," and at most a "gloss" on a separate issue entirely. *Simon*, 732 F.3d at 278 (describing the "garnishment provisions" in *Kokoszka*). Under the FDCPA, the question is "how debt collectors interact with debtors," not "what assets are made available" in bankruptcy. *Randolph*, 368 F.3d at 731 (likewise distinguishing *Kokoszka*). The concerns animating the FDCPA apply with full force in this context.

ing 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.

Defendants are unquestionably mistaken. 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. DEFENDANTS ARE PLAINLY ENGAGED IN DEBT-COLLECTION ACTIVITY WHEN SEEKING TO COLLECT DEBTS IN BANKRUPTCY

As a throwaway argument, Defendants maintain that "filing a proof of claim in bankruptcy is not an attempt to collect a debt from a natural person." Br. 46-47. That is absurd. The entire point of filing a proof of claim *is to collect on an alleged debt owed by a natural person*. The *estate* did not incur any liability to Defendants (or their predecessors) a decade before the bankruptcy petition was filed. Defendants are trying to collect actual money from Plaintiff's actual wages that would otherwise pay down her actual debts. It is nothing short of desperation to pretend that this is somehow not a debt-collection activity simply because Plaintiff's assets have been pooled into a bankruptcy estate.

It is accordingly unsurprising that this argument has been roundly rejected, including by Defendants' own authority. See, *e.g.*, *Gatewood* v. *CP Med., LLC*, 533 B.R. 905, 907 (B.A.P. 8th Cir. 2015) ("the filing of a proof of claim in bankruptcy is an act in connection with the collection of a debt"; "[w]e believe it is abundantly clear that the filing of a proof of claim in a bankruptcy case is intended to result in some recovery for the creditor on the debt set out in the proof of claim"); *LaGrone* v. *LVNV Funding LLC (In re LaGrone)*, 525 B.R. 419, 424-425 (N.D. Ill. 2015) (squarely rejecting Defendants' argument); see also *Crawford*, 758 F.3d at 1261 ("disagree[ing] with the contention that LVNV's proof of claim was not a 'collection activity' aimed at Crawford," and explaining the clear textual errors in Defendants' position); *Robinson* v. *JH Portfolio Debt Equities, LLC (In re Robinson)*, No. 16-03004, 2016 WL 4069395, at *7 (W.D. La. July 28, 2016) ("By filing a proof of claim, a creditor plainly seeks to recover on a debt.").

CONCLUSION

The judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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I hereby certify that on August 11, 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 Sixth 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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