No. 11-

IN THE

Supreme Court of the United States

LAW OFFICES OF MITCHELL N. KAY, P.C.,

Petitioner,

v.

DARWIN LESHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO the UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a debt collection letter sent by a law firm that (a) accurately identifies the firm as required by the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.*; (b) truthfully discloses that "no attorney with this firm has personally reviewed the particular circumstances of . . . [the debtor's] account;" and (c) would be fully compliant with the FDCPA if sent by any debt collector other than a law firm, nevertheless violates the FDCPA because the firm's use of law firm letterhead:

1. Falsely implies that an attorney has personally reviewed the debtor's file in violation 15 U.S.C. § 1692e(3);

2. Falsely "threaten[s] to take any action that cannot legally be taken or that is not intended to be taken" in violation of 15 U.S.C. § 1692e(5); or

3. Otherwise constitutes a "false, deceptive, or misleading representation" in violation of 15 U.S.C. § 1692e.

CORPORATE DISCLOSURE STATEMENT

The Law Offices of Mitchell N. Kay, P.C. is a professional corporation organized under the laws of New York. There is no parent or publicly held company that owns 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Law Offices of Mitchell N. Kay, P.C. ("Kay Law Firm") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 650 F.3d 993 (3d Cir. 2011). App. 1a. The order denying the Kay Law Firm's petition for rehearing is unreported. App. 47a. The decision of the United States District Court for the Middle District of Pennsylvania is reported at 724 F. Supp. 2d 503 (M.D. Pa. 2010). App. 31a.

JURISDICTION

The United States Court of Appeals for the Third Circuit issued its decision on June 21, 2011, App. 1a, and denied a timely petition for rehearing on July 20, 2011, App. 47a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The Fair Debt Collection Practices Act ("FDCPA" or the "Act") provides in relevant part:

15 U.S.C. § 1692(e):

> It is the purpose of [the FDCPA] . . . to eliminate abusive debt collection practices by debt

collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692e:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

* * *

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

* * *

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.[1]

1. 15 U.S.C. §§ 1692 and 1692e are reproduced in full at App. 49a-53a.

PRELIMINARY STATEMENT

This case presents an issue of critical importance to the uniform construction of the FDCPA, which regulates debt collection practices nationwide. The Third Circuit's split panel decision below contributes to the widespread confusion generated by a series of conflicting circuit and district court decisions interpreting the Act.

The Third Circuit majority held that the mere use of law firm letterhead to send routine, non-threatening debt collection letters constitutes a false, implied representation that an attorney has reviewed the debtor's file, notwithstanding that the letters say exactly the opposite, and falsely implies a threat of legal action, notwithstanding that the letters contain no threats whatsoever. In fact, the letters contain little more than an offer to settle a debt for a substantially reduced amount and disclosures that are required by the FDCPA. The Third Circuit's holding that the letters violated the FDCPA extends a circuit split between the Second and Fifth Circuits, and calls into question whether law firms may participate in routine debt collection at all and, if so, how.

Petitioner respectfully urges the Court to clarify now the proper application of the FDCPA to debt collection letters sent by law firms.[2] The FDCPA authorizes the

2. The Court is well aware of the importance of persistent issues relating to the consistent application of the FDCPA. On October 3, 2011, it called for the views of the Solicitor General on the petition filed in *Fein, Kahn & Shepard, P.C. v. Allen*, No. 10-1417 (U.S. filed May 12, 2011), *available at* http://www.supremecourt.gov/Search.aspx?FileName=docketfiles/10-1417.htm. The *Allen* petition seeks review of a Third Circuit decision addressing the application of the Act to communications from a law firm acting as a debt collector to a debtor's attorney.

imposition of stiff statutory penalties and attorney's fee awards against debt collectors for sending non-compliant collection letters, including by way of class action lawsuits when allegedly non-compliant letters are sent to thousands of debtors nationwide. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1609 (2010). Law firms across the country are subject to enormous potential liability that they cannot predictably avoid because of the uncertainty generated by conflicting lower court decisions regarding law firm participation in debt collection communications. The need for clarification is particularly acute following this Court's recent decision in *Jerman*, which held that the bona fide error defense to FDCPA liability does not extend to errors of law. As a result of that decision, and in the face of directly conflicting lower court decisions, attorneys can no longer shield themselves from liability by relying in good faith upon a reasonable interpretation of the Act.

Review is further warranted because the conditions imposed on law firms by the Third Circuit's decision interfere with the attorney-client relationship. Indeed, those conditions lead inexorably to the conclusion that law firms may not participate in pre-suit debt collection communications at all, unless an attorney has reviewed the file (an undertaking that involves decisions by client and lawyer, is regulated by the rules of professional conduct, and necessitates consideration of many factors, including the economics of debt recovery) and the attorney discloses privileged client communications to the debtor. This result is irreconcilable with the FDCPA and contradicts the Act's goal of "insur[ing] that . . . debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e).

The decision below is also inconsistent with this Court's admonition in *Jerman* that the Act's "conduct regulating provisions . . . should not be assumed to compel absurd results." 130 S. Ct. at 1622.

Petitioner also urges the Court to grant review for the independent reason that this case raises another circuit split – necessarily subsumed within the Question Presented – regarding the important, threshold issue whether application of the FDCPA to a written communication from any debt collector, not just a law firm, presents a question of law or fact. The Second, Third and Ninth Circuits have treated Section 1692e claims that a written communication is "false, deceptive, or misleading" as presenting pure questions of law; the Fifth, Sixth, and Eleventh Circuits allow a jury to determine liability in some cases; and the Seventh Circuit has taken a hybrid position requiring the debtor to produce survey evidence before a case can go to a jury. This additional circuit split likewise has created widespread confusion and unacceptable uncertainty for all debt collectors.

In sum, the Court should grant the petition because the Third Circuit's ruling exacerbates a sharp circuit conflict that is frustrating the orderly resolution of routine collection matters and threatens to turn the FDCPA into a vehicle for abusive lawsuits in circumstances in which no reasonable consumer could possibly have been misled. This case provides an appropriate vehicle for the Court to address a second circuit split that also urgently needs resolution.

STATEMENT OF THE CASE

1. Debt collection is an enormous business of central importance to the national economy, involving by some estimates collections in excess of $50 billion annually. *See, e.g.*, PricewaterhouseCoopers LLP, *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis* at 2 (June 12, 2008), *available at* http://www.acainternational.org/files.aspx?p=/images/12546/pwc2007-final.pdf.

2. This case arises out of a dispute over two routine, plainly worded debt collection letters that the Kay Law Firm sent on firm letterhead to respondent Darwin Lesher on behalf of a creditor, Washington Mutual Home Equity Loan. The letters offered to settle Lesher's account upon payment of a substantially discounted percentage of the balance due.

On January 11, 2009, the Kay Law Firm sent Lesher an unsigned one-page, two-sided letter on firm letterhead that stated in part:

> **[Front Side of Letter]**
>
> Please be advised that your account, as referenced above, is being handled by this office.
>
> We have been authorized to offer you the opportunity to settle this account with a lump sum payment equal to 75% of the balance due – which is $9,080.52!

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. [†][3]

If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt or any portion thereof, this office will: Obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. [†]

If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor. [†]

You are invited to visit our website www.lawofmnk.com to resolve this debt privately, or to write to us or to update your personal information.

* * *

Notice: Please see reverse side for important information.

3. The paragraphs in the January 11 letter marked "†" here reflect affirmative disclosures that are expressly required by the FDCPA in "the initial communication with a consumer in connection with the collection of any debt." *See* 15 U.S.C. §§ 1692e(11) & 1692g(a) (enumerating requirements for written notice to debtor).

* * *

[Reverse Side of Letter]

This communication is from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose. [†]

If you are entitled to the protections of the United States Bankruptcy Code (11 U.S.C. §§ 362; 524) regarding the subject matter of this communication, the following applies to you: **THIS COMMUNICATION IS NOT AN ATTEMPT TO COLLECT, ASSESS OR RECOVER A CLAIM IN VIOLATION OF THE BANKRUPTCY CODE AND IS FOR INFORMATIONAL PURPOSES ONLY**.

At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.

* * *

App. 56a-57a.[4]

On February 15, 2009, the Kay Law Firm sent Lesher a second unsigned, one-page, two-sided letter on firm

4. Facsimiles of the original one-page, two-sided Kay Law Firm letters are reproduced at App. 56a-59a.

letterhead discounting the January 11 settlement offer further and inviting Lesher to settle the Washington Mutual debt with a "monthly repayment plan" or a "lump sum payment for 65% of the . . . balance due." App. 58a-59a. Like the January 11 letter, the front side of the February 15 letter repeated in boxed, bold-face type:

Notice: Please see reverse side for important information.

On the reverse side, the letter repeated several disclaimers also set forth in the first letter, including the statement: "At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." *Id.*

3. Neither of the letters refers to legal action or a threat of legal action to collect the debt. The express disclaimers accurately informing Lesher that "no attorney with this firm has personally reviewed the particular circumstances of your account" addressed the concern, set forth in prior decisions interpreting the FDCPA, that "the use of law firm letterhead, *standing alone*, . . . represent[s] a[n] [implied] level of attorney involvement to the debtor receiving the letter" within the meaning of 15 U.S.C. § 1692e(3). *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 364 (2d Cir. 2005) (Calabresi, J.) (emphasis in original). In *Greco*, the Second Circuit approved a disclaimer identical to the one at issue here, reasoning that "an attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process" because the "disclaimer of attorney involvement" would lead "the least sophisticated consumer . . . to understand that no attorney had yet evaluated his or

her case, or made recommendations regarding the validity of the creditor's claims." *Id.* at 364-65.

4. Following receipt of the Kay Law Firm letters, Lesher brought suit against the Firm in the Middle District of Pennsylvania, invoking the district court's jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331, and alleging that the letters were false, deceptive, or misleading in violation of the FDCPA.

While Lesher's suit was proceeding, a circuit split emerged between the Second Circuit's 2005 decision in *Greco* and the Fifth Circuit's 2009 decision in *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009) (Prado, J.), *cert. denied*, 130 S. Ct. 1505 (2010). In *Gonzalez*, a divided panel of the Fifth Circuit held that a Kay Law Firm debt collection letter using the same disclaimer approved in *Greco* and at issue here "may not have been effective" for purposes of the FDCPA because the letter fell "in that middle ground in which the letter is neither deceptive as a matter of law nor not deceptive as a matter of law." *Id.* at 607.

According to the *Gonzalez* majority, in contrast to the *Greco* letter, in which

> the disclaimer . . . was part of the body of the letter on the front page[,] . . . . the "least sophisticated consumer" reading the letter from the Kay Law Firm would not learn that the letter was from a debt collector unless the consumer turned the letter over to read the "legalese" on the back . . . [which] completely contradicted the message on the front of the letter – that the creditor had retained the Kay Law Firm and its lawyers to collect the debt.

Id. at 606-07. Holding that the application of the FDCPA to the Kay Law Firm letter created a jury question, the *Gonzalez* majority remanded the case. *Id.* at 607. Judge Jolly dissented, asserting that "this collection letter conforms in every respect to the standards for legality recognized by the Second Circuit" in *Greco*, and that "the majority creates a different but amorphous standard for the Fifth Circuit, effectively creating a circuit split." *Id.*

5. Lesher and the Kay Law Firm filed cross-motions for summary judgment addressing Lesher's claims that the letters violated Sections 1692e(3) and 1692e(5).[5] The district court summarized Lesher's claims in pertinent part as follows:

> The plaintiff claims that the defendant's use of law firm letterhead to collect consumer debts when there has not been attorney involvement or attorney review before collection letters are sent to consumers . . . violat[es] . . . 15 U.S.C. § 1692e(3) and (5), even though the communication contains a statement that there has not been attorney review of the particular circumstances of the debtor's account.

App. 37a-38a.

The district court started from the proposition that whether a communication is false, deceptive, or misleading under the FDCPA presents a question of law that is evaluated objectively from the "perspective . . . of the 'least sophisticated debtor.'" App. 37a. Although the district

5. The parties stipulated to the dismissal of Lesher's claims under 15 U.S.C. §§ 1692d, 1692f, 1692g, 1692j, and 1692n. App. 5a.

court did not consider the placement of the disclaimers on the reverse side of the one-page letters "a factor of prominent importance," App. 41a, it substantially adopted the Fifth Circuit's analysis in *Gonzalez* and rejected the Second Circuit's decision in *Greco*. Reasoning that the disclaimers were insufficient to "dispel the representation or impression that an attorney is pursuing the case and that a legal action is down the road," App. 42a, because the use of law firm letterhead creates an "[un]avoidable [implication] that a threat of litigation is being presented to the debtor," App. 41a, the district court granted Lesher's summary judgment motion "as to the claim of two violations of the Act." App. 44a.

6. On appeal, a divided panel of the Third Circuit affirmed the district court's decision that the letters violated the FDCPA as a matter of law. The majority opinion (Cowen, J.) concluded that "the least sophisticated debtor, upon receiving these letters, may reasonably believe that an attorney has reviewed his file and has determined that he is a candidate for legal action." App. 21a. Accordingly, the majority rejected the Kay Law Firm's reliance on the disclaimers, reasoning that the statement that "'no attorney with this firm has personally reviewed the particular circumstances of your account' does little to clarify the Kay Law Firm's role in collecting the debt because it completely contradicts the message on the front of the letters – that the creditor retained a law firm to collect the debt." App. 22a.

Without referring to the mandatory disclosure requirement in Section 1692e(14), the majority added that "it was misleading and deceptive for the Kay Law Firm to raise the specter of potential legal action by using its law

firm title to collect a debt when the firm was not acting in its legal capacity when it sent the letters." App. 23a. The majority did not elaborate on how the "specter of potential legal action" might be disclaimed effectively in the future. Furthermore, although both Lesher's claims and the substance of the majority's analysis squarely implicated "the question[s] of whether the Kay Law Firm's letters . . . violate sections 1692e(3) and (5)," the court asserted that it was not necessary to "reach th[os]e question[s]" because, in the majority's view, the letters "violate section 1692e's general prohibition against 'false, deceptive, or misleading' communications." App. 21a. Writing in dissent, Judge Jordan adopted the arguments advanced by Judge Jolly in the *Gonzalez* dissent. He added that, in light of the majority's rejection of the express disclaimer approved in *Greco*, "[l]aw firms take an extraordinary risk in sending a collection letter, no matter how conciliatory or how plain their prose." App. 30a (citations omitted).

REASONS FOR GRANTING THE PETITION

There is an urgent need for this Court to clarify the proper interpretation and application of the FDCPA to debt collection letters sent by law firms for several reasons. *First*, the decisions of the Third Circuit below and the Fifth Circuit in *Gonzalez* are not only in tension with one another, but also squarely conflict with the decision of the Second Circuit in *Greco* and district court decisions in the Seventh, Eighth, Ninth and Eleventh Circuits. These conflicting decisions have created confusion and uncertainty as to whether lawyers and law firms can participate in routine debt collection consistent with the FDCPA and, if so, how. This sharp division of authority requires this Court's attention because the

FDCPA regulates debt collection on a national basis, and collection is a critically important function in today's distressed economic climate.

The conflict below is not academic: consistent with its remedial purpose, the FDCPA protects consumers with a heavy club that permits the imposition of statutory penalties and attorney's fee awards against debt collectors, including by way of class action suits, in circumstances where allegedly non-compliant form debt collection letters are sent to thousands or hundreds of thousands of debtors across the country. *See Jerman*, 130 S. Ct. at 1609 (noting that FDCPA violations can support claims for actual damages, attorney's fees, "additional damages" up to a statutory cap of $500,000 or 1% of the net worth of the debt collector in class actions, and civil penalties of up to $16,000 per day under the Federal Trade Commission Act). Honest debt collectors, including law firms, need to know what practices are prohibited so that they can conform their conduct accordingly and represent their creditor clients effectively within the bounds of the law. As Judge Jolly noted in his dissent in *Gonzalez*, "[t]his is an area of law in where national uniformity is particularly important . . . ." 577 F.3d at 609.

Second, although the Third Circuit properly treated the FDCPA's application to a debt collection letter as a question of law, the courts of appeals are in sharp conflict on this issue. Accordingly, this case presents an opportunity for the Court to resolve a pronounced circuit split regarding the important, threshold issue whether application of the "least sophisticated consumer" standard to a written communication from any debt collector, not just a law firm, presents a question of law or fact. The Second, Third and Ninth Circuits have treated

Section 1692e claims as presenting pure questions of law; the Fifth, Sixth, and Eleventh Circuits allow a jury to determine liability in some cases; and the Seventh Circuit has taken a hybrid position requiring the debtor to produce survey evidence before a case can go to a jury. *See generally* Note, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 Fordham L. Rev. 3107, 3135-49 (2010) ("Fordham Note").

Third, the need for guidance and uniformity is heightened because this Court has held that the bona fide error defense to FDCPA liability, which permits a debt collector to avoid liability by showing "that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," 15 U.S.C. § 1692k(c), does not extend to errors of law. *Jerman*, 130 S. Ct. 1605. As matters stand now, law firms whose clients request them to initiate the debt collection process are required by Section 1692e(14) to disclose their identity accurately in any communications that they make, but many courts have held that the use of law firm letterhead, standing alone, constitutes an implied representation that an attorney has personally reviewed the debtor's file. *See, e.g., Greco*, 412 F.3d at 364. In turn, law firms that attempt to disclaim such implied attorney involvement confront a quandary: an express disclaimer of implied attorney involvement will be deemed effective in the Second Circuit, ineffective in the Third Circuit, present an issue of fact for a jury in the Fifth Circuit, and produce uncertain results in other Circuits. Under these circumstances, no matter how carefully a law firm considers the issues, and regardless of its good faith, it confronts enormous potential liability if it uses its letterhead to identify itself

accurately in a debt collection letter, as the FDCPA requires it to do, with concomitantly disruptive effects on the collection process itself.

Indeed, the rule adopted by the Third and Fifth Circuits threatens to prohibit law firms from acting as debt collectors at the pre-litigation stage, contrary to this Court's admonition in *Jerman* that the FDCPA's "conduct-regulating provisions . . . should not be assumed to compel absurd results." 130 S. Ct. at 1622. The Third Circuit majority's analysis ignores the large body of FDCPA law holding that even unsophisticated consumers are expected to read an entire collection notice. As Judge Jordan summarized:

> To say that the least sophisticated consumer would not flip the page to read the entire letter, particularly when prompted to do so by a conspicuous notice on the front of the letter, or to say that one could be confused about the level of attorney involvement despite the plain statement that no legal review had occurred, is to permit – indeed to encourage – the kind of "bizarre or idiosyncratic interpretation[] of collection notices" . . . we have previously condemned. "Rulings that ignore these rational characteristics of even the least sophisticated debtor and instead rely on unrealistic and fanciful interpretations of collection communications" frustrate the express purpose of the FDCPA to "'insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.'"

> Although the Majority claims to eschew deciding whether a law firm can ever be clear enough in a disclaimer to overcome the effect of sending out a debt collection notice on law firm letterhead, the practical effect here is clear. Law firms take an extraordinary risk in sending a collection letter, no matter how conciliatory or how plain their prose.

App. 30a (citations omitted); *see also Gonzalez*, 577 F.3d at 609 (Jolly, J., dissenting).

Fourth, the Third Circuit decision improperly intrudes on the attorney-client relationship because, following the majority's holding to its logical conclusion, a law firm *cannot* send a routine debt collection letter without exposing itself to FDCPA liability unless:

- An attorney has reviewed the file (because attorney involvement is implicit in the use of law firm letterhead and cannot be effectively disclaimed); and, at a minimum,

- The debtor has been targeted for legal action (because that is what the use of firm letterhead implies); or

- The letter accurately, affirmatively and effectively disclaims any current intention to bring suit without further misleading the debtor.

There is no basis in the FDCPA for regulating the level of scrutiny that law firms (or other debt collectors) apply to a debtor's file before sending an initial collection

letter. As long as the communication accurately discloses the identify of the sender and otherwise complies with the disclosure requirements in the Act, *see* 15 U.S.C. § 1692g (reproduced at App. 53a-55a), the inquiry should be at an end. Furthermore, a requirement that a law firm affirmatively disclose its creditor client's intent *not to bring suit* is found nowhere in the FDCPA, contradicts the Act's goal of "insur[ing] that . . . debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged," 15 U.S.C. § 1692(e), improperly compels the disclosure of client confidences while arguably rendering the letter ineffectual by signifying to the debtor that no suit will ever be filed, and invites groundless and costly FDCPA claims for misrepresentation by sowing additional confusion.

The Third Circuit's construction of the FDCPA neither protects consumers from abusive debt collection practices nor promulgates a coherent standard by which law firms can evaluate their debt collection communications in the future. Instead, it frustrates the orderly resolution of routine collection matters and threatens to turn the FDCPA into a vehicle for abusive and obstructionist lawsuits that seek legal fees and penalties under circumstances in which no reasonable consumer, no matter how unsophisticated, could have been misled.

The Court should grant the petition because the decision of the Third Circuit: (1) conflicts with the decision of another United States court of appeals on the same important matter (Sup. Ct. R. 10(a)), creating substantial confusion and uncertainty and interfering with routine debt collection efforts nationwide; and (2) decides an important question of federal law that has not been, but should be, settled by this Court (Sup. Ct. R. 10(c)).

I. The Third Circuit's Erroneous Construction Of Section 1692e Exacerbates A Growing Conflict Among The Circuits That Exposes Law Firms Nationwide To FDCPA Liability.

A. The Courts Of Appeals Are Divided On Whether A Law Firm May Issue A Debt Collection Letter That Effectively Disclaims Attorney Involvement Consistent With Sections 1692e And 1692e(3).

Although the Third and Fifth Circuits did not apply entirely consistent standards to conclude that the Kay Law Firm letters violated or potentially violated the FDCPA, they both rejected the Second Circuit's analysis in *Greco* by concluding that the plain language of the disclaimer used by the Firm was ineffective to avoid FDCPA liability. This division of authority extends further because district courts in the Eighth, Ninth and Eleventh Circuits have also taken opposing sides in the controversy. *Compare, e.g., Murphy v. Bronson, Cawley, & Bergmann, LLP*, No. 3:10 cv 01929, 2011 U.S. Dist. LEXIS 64600, at *18-25 (S.D. Cal. June 13, 2011) (following *Greco*; collecting authorities) and *Peak v. S. & Allen*, No. 4:09 cv 00753, 2010 U.S. Dist. LEXIS 41101, at *5 (E.D. Ark. Apr. 27, 2010) (following *Greco* and approving attorney disclaimer that read, "I have not, nor will I, review the details of your account status and/or file, unless you so request.") *with Brazier v. Law Offices of Mitchell N. Kay, P.C.*, No. 8:08-cv-156, 2009 WL 764161, at *3 (M.D. Fla. Mar. 19, 2009) (placement of Kay Law Firm disclaimer created a jury question whether the letter was deceptive under the FDCPA). Furthermore, because routine debt collection letters frequently cross state lines, the absence of clear rules in circuits that have *not* definitively addressed the

proper interpretation of Sections 1692e and 1692e(3) creates profound uncertainty for attorneys involved in debt collection nationwide.

B. The Third Circuit Decision Joins The Fifth Circuit In Conflict With Numerous Decisions Holding That The Use Of Law Firm Letterhead, Without More, Does Not Express Or Imply A Threat Of Legal Action In Violation Of Sections 1692e and 1692e(5).

The Third Circuit determined that the use of law firm letterhead on a debt collection letter, without more, constitutes an express or implied threat of *legal action*. This conflicts with the Second Circuit's decision in *Greco*, 412 F.3d at 364-65 (holding that law firm letterhead connotes only attorney involvement, which can be disclaimed) and numerous district court decisions in other circuits. *See, e.g., Turner v. I.C. (In re Hasson Turner)*, No. 07-11450, 2009 Bankr. LEXIS 746, at *9 (Bankr. M.D. Ala. May 20, 2009) ("[T]he mere reference to an attorney does not create an implicit threat of suit. The implicit threat theory has been rejected by a number of courts."); *Dupuy v. Weltman, Weinberg & Reis Co.*, 442 F. Supp. 2d 822, 826 (N.D. Cal. 2006) ("[t]he use of a law firm letterhead has been found insufficient by itself to imply a threat of litigation"); *Abels v. JBC Legal Group, P.C.*, 428 F. Supp. 2d 1023, 1028 (N.D. Cal. 2005) ("Absent an actual threat of litigation in the content of the collection attempt, the mere fact that the Letters are from an attorney is insufficient to be a threat of litigation even to the least sophisticated debtor."); *Veillard v. Mednick*, 24 F. Supp. 2d 863, 867 (N.D. Ill. 1998) ("[t]here is nothing in the letter that refers to legal action and the mere inference that legal action could be taken because the letter is on law firm letterhead is not enough for Section 1692e(5) purposes").

As one court cogently summarized:

> [P]laintiff contends that every collection letter from an attorney carries an implied threat of legal action which may not have been intended to be pursued by the debt collecting attorney. This argument is . . . frivolous. If this statement were true, every collection letter from an attorney would be subject to a FDCPA action in order to determine whether the attorney actually intended to take legal action at the time the initial validation notice was sent. Clearly this was not the intent of Congress when it enacted the FDCPA. While the FDCPA was intended to protect consumers from unscrupulous debt collection practices, it was also intended to avoid imposing unnecessary restrictions on ethical debt collectors.

Sturdevant v. Thomas E. Jolas, P.C., 942 F. Supp. 426, 430 (W.D. Wis. 1996).

C. The Courts Of Appeals Are Divided On The Threshold Question Whether Application Of The Objective "Least Sophisticated Consumer" Standard To A Written Communication Under The FDCPA Presents A Question Of Law For The Court.

Analysis of the Question Presented will necessarily require consideration of the threshold standards applicable to judicial review of a written communication under the FDCPA.[6] In contrast to the Fifth Circuit, which

6. *See generally* Fordham Note at 3135-49.

held that a Kay Law Firm letter presented a "close case" requiring further fact-finding by a jury, the Third Circuit treated the legality of the letters as a question of law. The divergent approaches of the Third and Fifth Circuit reflect broader disagreement in the courts of appeals as to whether application of the "false, deceptive, or misleading" standard to a written communication presents a judge or jury question. Specifically, the Second, Third and Ninth Circuits have treated Section 1692e claims as presenting pure questions of law;[7] the Fifth, Sixth, and Eleventh Circuits allow a jury to determine liability in some cases;[8] and the Seventh Circuit has taken a hybrid approach, requiring in many cases that the claimant demonstrate actual debtor confusion using survey evidence to survive summary judgment.[9] Any approach that does not treat the issue as one of law will inevitably result in inconsistent decisions under the FDCPA when different juries render conflicting verdicts regarding the legality of identical written communications sent to similarly situated consumers.[10]

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7. *See, e.g., Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996); *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir. 2000); *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997).

8. *See, e.g.*, *Gonzalez*, 577 F.3d at 607; *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1177-78 (11th Cir. 1985).

9. *See, e.g., Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1060 (7th Cir. 1999); *DeKoven v. Plaza Assocs.*, 599 F.3d 578, 580 (7th Cir. 2010).

10. For the reasons identified in Judge Jolly's *Gonzalez* dissent, the better view is that Section 1692e disputes should be resolved by the court. 577 F.3d at 609-11.

II. The Confusion Sown By The Disagreements Among Lower Federal Courts Requires Prompt Resolution Because This Court Held In *Jerman* That Law Firms Cannot Rely On A Mistake Of Law To Invoke The Bona Fide Error Defense In Section 1692k(c) Of The FDCPA.

Section 1692k(c) provides that "[a] debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." In *Jerman*, this Court held that the bona fide error defense does not apply to mistaken interpretations of the FDCPA itself, reasoning in part "'that ignorance of the law will not excuse any person, either civilly or criminally.'" 130 S. Ct. at 1606 (citation omitted).

After *Jerman*, therefore, law firms cannot avail themselves of a defense based on a bona fide mistake of law. Yet, the disagreements between and among trial and appellate courts in the Second, Third, Fifth, Eighth, Ninth and Eleventh Circuits render unknown – and, in much of the country, unknowable – what limitations the FDCPA imposes on law firms participating in routine debt collection. Accordingly, law firms are currently practicing in an unacceptable atmosphere of uncertainty, particularly as the Third Circuit decision suggests that, absent "meaningful" attorney review and/or affirmative disclosure of client confidences, App. 17a, 21a-23a, firms cannot transmit routine debt collection letters at all. *See Jerman*, 130 S. Ct. at 1631 (Kennedy, J., dissenting) (highlighting adverse consequences that flow from

"leav[ing] attorneys and their [creditor] clients vulnerable to civil liability for adopting good-faith legal positions later determined to be mistaken"). This uncertainty has enormous practical consequences for debt collection, because recent trends show that the number of new claims involving alleged FDCPA violations is increasing rapidly.[11]

Underscoring the significance of this concern, the Court recently called for the views of the Solicitor General on the petition filed in *Fein, Such, Kahn & Shepard, P.C. v. Allen*, No. 10-1417. *See supra* note 2. Because this petition and the pending *Allen* petition both involve sharply defined circuit splits involving the regulation of law firms under the FDCPA, granting certiorari in both cases and consolidating them for consideration would permit the Court to address the regulation of law firms under the Act in a comprehensive manner. Regardless of how the Court resolves the *Allen* petition, however, the instant petition warrants review because the conflicting decisions of the

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11. *See, e.g.,* Collections Recon, *Sept. FDCPA/TCPA Statistics* (Oct. 10, 2011), *available at* http://www.collectionsrecon.com/collection_news/september-fdcpatcpa-statistics-2/ (through Sept. 2011, 8,574 FDCPA/Telephone Consumer Protection Act cases have been filed in federal district courts representing over 9,300 plaintiffs, trending toward a total of 12,000 cases for the calendar year); Federal Trade Commission Annual Report 2011: Fair Debt Collection Practices Act, at 5, *available at* http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf ("The FTC received 108,997 FDCPA complaints in 2010, representing 21% of all complaints it received directly from consumers. By comparison, in 2009, the FTC received 88,326 FDCPA complaints, representing 16.8% of the complaints it received directly from consumers."); Fordham Note at 3110-11 (observing in part that 3,813 FDCPA cases were filed nationwide in 2007, 5,188 cases were filed in 2008 (a 36% increase), and 8,287 cases were filed in 2009 (a 60% increase)).

Second, Third and Fifth Circuits have raised fundamental, threshold questions regarding whether law firms may participate in routine debt collection *at all* and, if so, how.

III. The Court Should Grant Certiorari To Clarify That Section 1692e Of The FDCPA Does Not Prohibit Law Firms From Issuing Routine Debt Collection Letters Accurately Identifying Themselves And Disclosing That A Debtor's File Has Not Been Reviewed By An Attorney.

A. Contrary To The Third Circuit's Holding, The Kay Law Firm Letters Fully Comply With The FDCPA.

The Third Circuit majority's assertions that the letters imply the exact opposite of what they say and that "it was misleading and deceptive for the Kay Law Firm to . . . us[e] its law firm title to collect a debt," App. 22a-23a, impale the Firm on the horns of a statutory dilemma. In effect, the majority held that when a law firm accurately discloses its identity in a debt collection letter as required by the FDCPA, the firm has committed a *per se* violation of Sections 1692e(3) and e(5) absent individualized attorney review of the debtor's file, because the use of law firm letterhead falsely implies that an attorney has reviewed the file and falsely threatens legal action.[12] Compounding

12. The decision below purports to hold that the letters violated only the general prohibition against "false, deceptive, or misleading" communications in Section 1692e of the FDCPA, and expressly states that it does "not reach the question of whether the . . . letters to Lesher violate sections 1692e(3) and (5)." App. 21a. The majority's assertion that it did not reach the latter questions is mystifying, however, because Lesher specifically

this conundrum, both the Third and Fifth Circuit decisions suggest that the threatening character of a law firm's letter is enhanced by incorporation of the numerous, legalistic disclosures that the FDCPA *requires all debt collectors to make* to unsophisticated laypersons. *See* 15 U.S.C. §§ 1692e(11) & 1692g(a); App. 21a-22a; *Gonzalez*, 577 F.3d at 607 (criticizing use of "legalese").[13]

As the FDCPA requires, the letters accurately disclose the "true name of the debt collector's business, company, or organization." 15 U.S.C. § 1692e(14). The letters do not "false[ly] represent[] or impl[y] that any individual is an attorney or that any communication is from an attorney," *id.* § 1692e(3), because the letters were, in fact, sent from the Kay Law Firm and truthfully disclosed that "no attorney with th[e] firm" had "personally reviewed" Lesher's Washington Mutual account. Furthermore, the letters are completely silent on the subject of legal action or threatened legal action. The Third Circuit's decision

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alleged violations of Sections 1692e(3) and e(5), those Sections directly address the conduct that the court purported to find objectionable, and the majority's analysis plainly is based on the substance of those provisions while eschewing reliance upon them. *See, e.g.*, App. 21a, 23a.

13. Of course, regardless of who the sender is, *any* letter seeking to collect on an overdue debt may be considered "threatening" by the recipient, because the whole point of the communication is to secure payment. The disclosures mandated by the FDCPA mitigate this dynamic, however, because they require the debt collector to invite the debtor to "dispute[] the validity of the debt" within 30 days "after receipt of the notice," 15 U.S.C. § 1692g(a)(3), and further require the collector to "cease collection of the debt" and obtain further verification if a dispute is raised. *Id.* § 1692g(b).

distorts the language of the letters and the purpose of the FDCPA beyond recognition.

B. The Third Circuit Improperly Invoked The "Least Sophisticated Consumer" Standard To Trump Express, Written Disclosures With Speculative And Unreasonable Inferences.

The Third Circuit's application of the "least sophisticated consumer standard"[14] to hold that the Kay Law Firm letters violate Section 1692e cannot be reconciled with other decisions applying that standard, particularly as the majority's analysis effectively ignores the blocked and bolded legend directing the reader's attention to the "**reverse side**" for "**important information**" and rejects the Firm's reasonable reliance on plainly worded, express disclaimers. As the Second Circuit summarized in *Greco*:

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14. In addition to the Second and Third Circuits, the Fourth, Sixth, Ninth and Eleventh Circuits also apply the "least sophisticated consumer" standard. *See, e.g., United States v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 135-36 (4th Cir. 1996); *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 611-12 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1688 (2010); *Swanson v. S. Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1989); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193-94 (11th Cir. 2010). The Seventh and Eighth Circuits have adopted "an unsophisticated consumer" standard that is substantively indistinguishable and also imposes an objective standard of reasonableness. *See, e.g., Gammon v. GC Servs., L.P.*, 27 F.3d 1254, 1257 (7th Cir. 1994); *Duffy v. Landberg*, 215 F.3d 871, 873 (8th Cir. 2000). The Fifth Circuit has not committed to either standard, noting that any difference between the two is "de minimis at most." *Peter v. GC Servs., L.P.*, 310 F.3d 344, 349 n.1 (5th Cir. 2002).

> To . . . protect the most vulnerable population of debtors from abusive and misleading practices, we have construed FDCPA to require that debt collection letters be viewed from the perspective of the "least sophisticated consumer." . . . We have observed, however, that "in crafting a norm that protects the naïve and credulous the courts have carefully preserved the concept of reasonableness, *id.*, and that some courts have held that "even the least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care. . . . In this way, our Circuit's "least sophisticated consumer" standard is an objective analysis that seeks to protect "the naïve" from abusive practices . . . while simultaneously shielding debt collectors from liability for "bizarre or idiosyncratic interpretations" of debt collection letters. . . .

412 F.3d at 363 (citations omitted).

The Third Circuit majority's reliance on the fact that the disclaimer appears on the reverse side of a one-page letter, App. 22a, conflicts with numerous decisions holding that the debtor is charged with reading the entire letter, and improperly elevates form over substance: "'when a prominent instruction in the body of the letter warns that there is important information on the reverse side, a reasonable reader, even if unsophisticated, would turn the paper over and read the back.'" *Gonzalez*, 577 F.3d at 609 (Jolly, J., dissenting) (quoting *McStay v. I.C. Sys., Inc.*, 308 F.3d 188, 191 (2d Cir. 2002)); *accord Miller*

v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 310 (2d Cir. 2003) (Sotomayor, J.) (letter that contained clear direction to "read[] the important notice on the reverse" did not violate Section 1692e; "'courts have consistently applied the least-sophisticated-consumer standard in a manner that protects debt collectors against liability for unreasonable misinterpretations of collection notices.'" (citation omitted)); *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 299 (3d Cir. 2008) ("Although established to ease the lot of the naïve, the [least sophisticated consumer] standard does not go so far as to provide solace to the willfully blind or non-observant. Even the least sophisticated debtor is bound to read collection notices in their entirety."); *Sims v. GC Servs. L.P.*, 445 F.3d 959, 964 (7th Cir. 2006) (after reading "bright, bold, red notice on the front of the letter" advising debtors to see the reverse side, even "unsophisticated consumers would turn the letter over to see the information on the back"); *Vitullo v. Mancini*, 684 F. Supp. 2d 747, 756 (E.D. Va. 2010) (following *Campuzano-Burgos*); *Weber v. Computer Credit, Inc.*, No. 09-CV-187, 2009 WL 1883046, at *6 (E.D.N.Y. June 30, 2009) ("Consumers are expected to read a debt collection letter in its entirety; no violation exists solely because the validation notice is placed on the back side of the letter."); *Gaetano v. Payco of Wis., Inc.*, 774 F. Supp. 1404, 1411 (D. Conn. 1990) (approving collection notice disclosures where language on the front of the letter directed consumers to read the reverse).[15]

15. Notwithstanding that the front page of the letters directed Lesher's attention to the "**reverse side**" for "**important information**," the Third Circuit majority joined the *Gonzalez* majority in identifying the placement of the disclaimer as a point of factual distinction with *Greco*. This factual distinction, however, neither explains nor mitigates the circuit split. The Third

Perhaps even more important, the Third Circuit's analytical approach invites chaos, because a legal standard that ignores the plain words and meaning of a disputed text is not objective but entirely subjective. If courts are free to reject clear, plainly written disclaimers on the ground that a hypothetical, unsophisticated consumer might not take time to read or comprehend them, there is no reliable method by which a debt collector can convey its message with any assurance that the message is compliant with the FDCPA. *See* 15 U.S.C. § 1692(e) (purposes of the FDCPA include "promot[ing] *consistent . . . action* to protect consumers" (emphasis added)).

C. Contrary To The Third Circuit's Holding, The Accurate Use Of Law Firm Letterhead, Standing Alone, Does Not Falsely Express Or Imply A Threat Of Legal Action In Violation Of Section 1692e.

Amplifying the general prohibition on "false, deceptive, or misleading" communications in Section

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Circuit's analysis unequivocally turned on the language used in the disclaimer. *See* App. 22a (asserting that the substance of the "statement" in the disclaimer "does little to clarify the Kay Law Firm's role in collecting the debt" and does not "make clear to the least sophisticated debtor that the Kay Law Firm is acting solely as a debt collector"). There is no suggestion in either the Third or the Fifth Circuit decision that the rationale or result would have been different if the disclaimers were placed elsewhere. Furthermore, the placement of the disclaimers *could not* be the basis for reaching a different result without creating a conflict with the uniform body of FDCPA law cited above – including decisions from the Third Circuit itself – establishing that even the least sophisticated consumer is charged with carefully reading a debt collection letter in its entirety.

1692e, Section 1692e(5) of the FDCPA makes it a violation of the Act to "threat[en] to take any action that cannot legally be taken or that is not intended to be taken." Significantly, in contrast to numerous other subparts of Section 1692e, Section 1692e(5) does not apply to "implied" threats of legal action – it only prohibits express threats of action that meet the statutory criteria. *Compare* 15 U.S.C. §§ 1692e(1), (3), (4), (7), (12), (13), (15) & (16) (prohibiting "false representation[s] or implication[s]") (App. 50a-53a). Thus, even if a collection letter plausibly implies a threat of legal action, there is no basis in the text of Section 1692e for concluding that an implied threat triggers FDCPA scrutiny at all. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Even assuming an implied threat of legal action were cognizable under Section 1692e and 1692e(5), however, the Kay Law Firm letters are bereft of any such threat. As the dissents below and in *Gonzalez* point out, in contrast to the letter approved in *Greco*, the Kay Law Firm letters "do[] not mention 'clients,' 'representation,' 'matters,' 'remedies,' or any other jargon suggesting lawyer involvement" and "[t]he body of the letter[s] contains little more than the statutorily required disclosures" set forth in 15 U.S.C. § 1692g(a) and an offer to settle the debt for a reduced amount. *Gonzalez*, 577 F.3d at 608 (Jolly, J., dissenting); *see also* App. 24a, 29a (Jordan, J. dissenting). In addition, it is circular to conclude that the letters impliedly threatened legal action that only an attorney could initiate and direct when the letters expressly disclosed that no attorney

had personally reviewed Lesher's file; the identity of the sender connotes nothing when it is divorced from the content of a letter itself. If the drafters of the FDCPA intended to equate all law firm debt collection letters with a threat of legal action, they easily could have done so, but the Act says nothing of the kind.[16]

IV. The Third Circuit's Decision Improperly Intrudes On The Attorney-Client Relationship And Threatens To Exclude Law Firms From Non-Deceptive, Routine Debt Collection Activities In Contravention Of The FDCPA.

Although the Third Circuit does not relegate the Kay Law Firm letters to the Fifth Circuit's "middle" ground where "contradictory messages . . . present close[] calls" and raise disputed issues for jury trial, *Gonzalez*, 577 F.3d at 606, the decision below is equally vexing for several reasons. *First*, the conclusion that using law firm letterhead on a debt collection letter (as Section 1692e(14) requires) creates a "false, deceptive, or misleading" implication of attorney involvement and review that cannot be effectively disclaimed means that law firms will be precluded from participating at the inception of the debt collection process whenever the client does not request individualized attorney review of the debtor's file.[17]

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16. Indeed, attorneys were entirely exempted from the FDCPA until 1986. *Heintz v. Jenkins*, 514 U.S. 291, 294-95 (1995).

17. Numerous cases have held that the use of law firm letterhead on a debt collection letter – without more – implies that there has been "meaningful" attorney review of or involvement with the debtor's file, *see, e.g.*, *Greco*, 412 F.3d at 363-65, but it is far from clear what constitutes "meaningful" review or involvement sufficient to vitiate potential liability under the FDCPA. This is

Accordingly, the Third Circuit's analysis effectively bars law firms from participating in the critically important entry phase of the process even though nothing in the FDCPA requires that result.

Second, the decision below runs roughshod over the attorney-client privilege. Under the majority's analysis, a law firm whose client has no current intention to sue has an obligation under the FDCPA to dispel the "specter of potential legal action" inherent in any communication that the firm sends to a debtor by affirmatively informing the debtor that no legal action is threatened at all. App. 23a. If, like the letters at issue here, the body of the letter cannot reasonably be read to contain any express or implied threat of legal action implicating Sections 1692e and 1692e(5), requiring a law firm nevertheless to expressly disclose that the creditor client has no current intention of taking legal action against the debtor would inhibit the law firm's ability to represent the client zealously and effectively[18] and compel the law firm to disclose the client's confidences and strategic considerations in violation of professional ethics rules. *See, e.g.*, ABA Model Rules of Professional Conduct (2010), Rule 1.6(a) ("[a] lawyer shall not reveal information relating to the representation of a client"); ABA Model Code of Professional Responsibility,

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so because, in any given case, (a) the concept of attorney review or involvement; and (b) the false, deceptive, or misleading implication that attorney review or involvement is supposed to cure are both fraught with ambiguity.

18. *Jerman*, 130 S. Ct. at 1635 (Kennedy, J., dissenting) ("If the law firm can be punished [under the FDCPA] . . . , then to be safe an attorney must always stick to the most debtor-friendly interpretation of the statute, lest automatic liability follow . . . .").

DR 4-101 (1980) (a lawyer is prohibited from revealing secrets or confidences of client; *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) ("the canons of ethics make the attorney's common law obligation to maintain the secrecy of his communications with his client a professional mandate").

Third, the Third Circuit's decision cannot be reconciled with the admonition in Section 1692(e) that the FDCPA is not intended to "competitively disadvantage[]" debt collectors "who refrain from using abusive debt collection practices." Ordinary debt collectors are under no obligation to make similar disclosures of their client's confidences or include confusing and potentially meaningless disclaimers of a current intent to sue. Moreover, nothing in the FDCPA suggests that a creditor *cannot* retain a lawyer to perform routine debt collection activities unless the lawyer personally performs a substantive review of each and every file that she handles. Creditors, like other clients, are entitled to consult privately with counsel to determine the best manner in which to pursue the client's lawful objectives. Attempting to collect debts is a lawful objective, and a client may reasonably conclude that the most efficient way to handle a large volume of delinquent accounts is to direct counsel to send an initial collection letter to each debtor and invite a response before incurring the cost of formal, individualized attorney review to determine whether any collection actions should be pursued.[19]

19. Although the constitutionality of the Third Circuit's construction was not raised below, a judicial decision that improperly and unreasonably treats literally true commercial speech as impliedly false raises substantial First Amendment concerns, particularly where, as here, the decision regulates

Fourth, the disclosure contemplated by the Third Circuit decision will provide fertile ground for more FDCPA litigation, because as soon as a creditor client changes its mind and begins to contemplate legal action, the debtor will argue that the law firm's initial communication was "false, deceptive, or misleading" and insist on discovery to probe the intentions of the law firm and the creditor. *See, e.g., Jerman*, 130 S. Ct. at 1629 (Kennedy, J., dissenting) (FDCPA should not be construed to allow certain actors in the debt collection system to manipulate the law for their own benefit); *Sturdevant*, 942 F. Supp. at 430 (refusing to adopt construction that would subject "every collection letter from an attorney . . . to a FDCPA action in order to determine whether the attorney actually intended to take legal action at the time the initial validation notice was sent").

CONCLUSION

The Third Circuit's decision in this case and the Fifth Circuit's decision in *Gonzalez*, both of which drew strong dissents, directly conflict with the decision of the Second Circuit in *Greco* and numerous district court decisions. The decision below casts substantial doubt on the ability of law firms to participate in routine debt collection activity, exposes law firm debt collectors to enormous potential liability no matter how diligently they attempt to conform

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the conduct of a particular class of speakers. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (2011) (holding that government cannot burden truthful, non-misleading commercial speech merely because the speech is persuasive or the messenger is disfavored); *Jerman*, 130 S. Ct. at 1635 (Kennedy, J., dissenting) (government action that unlawfully suppresses attorney speech "creates serious concerns . . . for First Amendment rights").

their conduct to the law, and improperly interferes with the attorney-client relationship. The Third Circuit decision also presents a split that crosses decisions in at least six circuits regarding whether application of the FDCPA to a written communication presents a question of law or may sometimes present a question of fact suitable for jury determination. Because the resulting uncertainty in the law is creating substantial disruption in the orderly conduct of debt collection nationwide, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 17, 2011

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 21, 2011

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10-3194

DARWIN LESHER

v.

LAW OFFICES OF MITCHELL N. KAY, PC;
MITCHELL N. KAY Law Offices of
Mitchell N. Kay, PC,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 1-09-cv-00578)
District Judge: Hon. J. Andrew Smyser

Argued April 13, 2011

BEFORE: FISHER, JORDAN, and COWEN,
Circuit Judges

(Filed: June 21, 2011)

Appendix A

OPINION

COWEN, *Circuit Judge.*

Darwin Lesher filed a complaint in the United States District Court for the Middle District of Pennsylvania alleging that debt-collection letters he received from the Law Offices of Mitchell N. Kay (the "Kay Law Firm") were deceptive under the Fair Debt Collection Practices Act (the "FDCPA" or the "Act"). The District Court agreed and granted Lesher's motion for summary judgment. The Kay Law Firm now appeals from the District Court's order. For the reasons that follow, we will affirm.

I. Background

The Kay Law Firm is a law firm that acts as a debt collector. On January 11, 2009, the Kay Law Firm sent a letter to Lesher seeking to recover a debt he owed to Washington Mutual on a home equity loan. The letter was presented on the Kay Law Firm's letterhead, which displays the words "Law Offices of Mitchell N. Kay, P.C." in large characters at the top of the page. (A040.) The letter, after referencing Lesher's account with Washington Mutual, states as follows:

> Please be advised that your account, as referenced above, is being handled by this office.
>
> We have been authorized to offer you the opportunity to settle this account with a lump

> sum payment, equal to 75% of the balance due—which is $9,080.52!
>
> Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid.
>
> If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt or any portion thereof, this office will: Obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification.
>
> If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.
>
> You are invited to visit our website **www.lawofmnk.com** to resolve this debt privately, or to write to us or to update your personal information.

(*Id.*)[1] After a large blank space, the letter directs Lesher to "PLEASE ADDRESS ALL PAYMENTS TO" the "Law Offices of Mitchell N. Kay, P.C." at their New York

1. Paragraphs 3, 4, and 5 of the letter are the disclosures required by 15 U.S.C. § 1692g(a)(3), (4), and (5).

address. (*Id.*) Immediately below the address, the letter states: "Notice: Please see reverse side for important information." (*Id.*) A box surrounds this notice, below which is a detachable payment stub.

> On the back, the letter sets forth four "notices," including the following two:
>
> This communication is from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose.
>
> At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.

(A041.)[2]

On February 15, 2009, the Kay Law Firm sent a second letter to Lesher. This letter was not printed on the same letterhead, but instead stated in smaller characters at the top that it was from the "Law Offices of Mitchell N. Kay, P.C." (A042.) The letter offers the choice of a six-month repayment plan or a settlement, and again instructs the reader to "see reverse side for important information." (*Id.*) The back of the letter sets forth the same disclaimers as the first letter. (A043.)

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2. The other two notices inform the recipient that: (1) if he is entitled to protection under the United States Bankruptcy Code, the letter is not an attempt to collect, assess, or recover a claim in violation of the Bankruptcy Code; and (2) if the debtor sends a check with the payment coupon, the Kay Law Firm will complete the payment by electronic debit and destroy the check. (A041.)

In March 2009, shortly after receiving these letters, Lesher filed a complaint in the District Court against the Kay Law Firm. In the complaint, Lesher alleged that the letters violated, *inter alia*, section 1692e of the FDCPA, 15 U.S.C. § 1692e (1996), by misleading him to believe that an attorney was involved in collecting his debt, and that the attorney could, and would, take legal action against him.[3]

Following discovery, the parties filed cross-motions for summary judgment. Upon review, the District Court found that the January 11 and February 15, 2009 letters plainly implied that an attorney was involved in the collection, and implicitly threatened legal action, in violation of § 1692e.[4] Viewing the letters from the perspective of the "least sophisticated debtor," the District Court rejected the Kay Law Firm's contention that the disclaimers on the back of the letters mitigated the impression of potential legal action. The District Court awarded Lesher $1,000 in damages. *See* 15 U.S.C. § 1692k(a)(2)(A).

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3. The complaint, which was twice amended, included additional claims arising under 15 U.S.C. §§ 1692d, 1692f, 1692g, 1692j, and 1692n. However, Lesher moved for summary judgment as to his claims under §§ 1692e and g only. The District Court granted summary judgment with respect to his § 1692e claim, but denied summary judgment with respect to his § 1692g claim. Lesher decided not to pursue his remaining claims. The only issue presently before this Court is whether the District Court erred in granting summary judgment in Lesher's favor on his § 1692e claim.

4. The District Court did not specify whether it was finding a violation of § 1692e generally, or violations of subsections (3) or (5), or both.

The Kay Law Firm now appeals from the District Court's order.[5]

II. Jurisdiction and Standard of Review

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review a District Court's order granting summary judgment de novo. *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 262 (3d Cir. 2010).[6]

III. Discussion

A. FDCPA Background

Congress enacted the FDCPA in 1977 in response to the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). At that time, Congress was concerned that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to material instability, to the loss of jobs, and to invasions

5. The National Association of Retail Collection Attorneys (the "NARCA") and the Association of Credit and Collection Professionals (the "ACA") have submitted amici briefs in support of the Kay Law Firm's appeal.

6. The District Court assumed that whether a communication is false and misleading under the FDCPA is a question of law, and neither party challenges this aspect of the District Court's decision on appeal.

of individual privacy." *Id.* Congress explained that the purpose of the Act was not only to eliminate abusive debt collection practices, but also to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Id.* § 1692(e). After determining that the existing consumer protection laws were inadequate, *id.* § 1692(b), Congress gave consumers a private cause of action against debt collectors who fail to comply with the Act. *Id.* § 1692k.

Because the FDCPA is a remedial statute, we construe its language broadly so as to effect its purpose. *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir. 2006) (citations omitted). Accordingly, we analyze communications from lenders to debtors from the perspective of the "least sophisticated debtor." *Id.* at 454. "The basic purpose of the least-sophisticated [debtor] standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that courts have traditionally applied in consumer-protection law." *Id.* at 453 (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)). "'Laws are made to protect the trusting as well as the suspicious.'" *Brown*, 464 F.3d at 453 (quoting *Federal Trade Comm'n v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937)).

Bearing this in mind, we note that although the "least sophisticated debtor" standard is a low standard, it "prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Wilson*

v. Quadramed Corp., 225 F.3d 350, 354-55 (3d Cir. 2000) (internal quotation marks and citation omitted). "Even the least sophisticated debtor is bound to read collection notices in their entirety." *Campuzano-Burgos v. Midland Credit Mgmt.*, 550 F.3d 294, 299 (3d Cir. 2008)

B. Section 1692e of the FDCPA

Lesher claims that the January 11 and February 15, 2009 letters that he received from the Kay Law Firm violate section 1692e of the FDCPA, which prohibits the use of "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The sixteen subsections of section 1692e set forth a non-exhaustive list of practices that fall within this ban. These subsections include:

> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
>
> . . .
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

15 U.S.C. § 1692e. Because the list of the sixteen subsections is non-exhaustive, a debt collection practice can be a "false, deceptive, or misleading" practice in violation of section 1692e even if it does not fall within any of the subsections. *See Clomon*, 988 F.2d at 1318.

C. Section 1692e Case Law

To determine whether the District Court properly construed section 1692e of the FDCPA, we look to both our own prior opinions, and to opinions from our sister circuits, discussing section 1692e of the FDCPA.

Although we have not had occasion to consider whether the precise type of debt-collection letters at issue in this case violates section 1692e,[7] we have considered whether other debt-collection letters comply with this subsection of the Act. For example, in *Brown v. Card Service Center*, 464 F.3d 450 (3d Cir. 2006), we considered whether a letter from a debt collection agency that warned the debtor of potential legal action violated section 1692e. In that case, Card Service Center ("CSC") sent the plaintiff a letter informing her that, unless she made arrangements to pay her debt within five days, the matter "could" result in referral of the account to CSC's attorney, and "could" result in "a legal suit being filed." *Id.* at 451-52. The plaintiff sued, claiming that because CSC had no intention of referring her account to an attorney, and no intention of filing a law suit, the letter violated section 1692e's ban on false, misleading, or deceptive communications. *Id.* at

7. The Kay Law Firm emphasizes that its January 11 and February 15, 2009 letters were "settlement letters," not "dunning letters." While we recognize the distinction between letters that provide an opportunity for settlement in a conciliatory manner and those that contain more hostile demands for payment, we note that both types of communications must comply with 15 U.S.C. § 1692e. *See Campuzano-Burgos*, 550 F.3d at 299-300. Therefore, we fail to see the significance in the distinction here.

452. Specifically, Brown claimed that the letter violated subsection (5), which prohibits collection letters from "threat[ening] to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5). The district court dismissed the complaint, determining that because "[t]he letter neither states nor implies that legal action is imminent, only that it is possible," the plaintiff had failed to state a section 1692e(5) violation. *Id.* at 454.

Upon review, we disagreed, and held that the facts alleged, if proven, could show that the CSC letter was "deceptive" or "misleading" under section 1692e because, in our view, it would be deceptive under the FDCPA for CSC "to assert that it *could* take an action that it had no intention of taking and has never or very rarely taken before." *Id.* at 454-55 (emphasis in original).

More recently, this Court considered whether a collection letter falsely implied that it was from a lawyer in violation of section 1692e(3) because it was signed by the "Legal Department" of a collection agency even though none of the employees in that department were lawyers. In that case, *Rosenau v. Unifund Corp.*, 539 F.3d 218 (3d Cir. 2008), Unifund sent a collection letter to the plaintiff demanding payment on a debt he owed to a third party. *Id.* at 219. The letter stated as follows:

> If we are unable to resolve this issue within 35 days we may refer this matter to an attorney in your area for legal consideration. If suit is filed and if judgment is rendered against you, we will

> collect payment utilizing all methods legally available to us, subject to your rights below . . . This communication is from a debt collector. This is an attempt to collect a debt . . . .

Id. at 220. The letter was signed by the "Unifund Legal Department," which, despite its name, was comprised of solely non-lawyer employees. *Id.* Viewing the letter from the perspective of the least sophisticated debtor, we concluded that a debtor receiving the letter might reasonably infer that it was from an attorney even though it was not. *Id.* at 223. We rejected the idea that the statement that the letter was "from a debt collector" nullified the implication that the letter was from an attorney because, in our view, the categories of "debt collector" and "attorney" are not mutually exclusive. *Id.* We also disagreed with the district court's conclusion that the letter could not reasonably be interpreted to be *from* an attorney because it stated that Unifund might *refer* the matter to an attorney; we noted that lawyers often refer cases to one another and that this aspect of the letter would not necessarily dispel the impression that the letter was sent by a lawyer employed in Unifund's legal department. *Id.*[8]

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8. This Court's most recent opinion concerning section 1692e is *Campuzano-Burgos v. Midland Credit Mgmt.*, 550 F.3d 294 (3d Cir. 2008), in which we considered whether a collection agency violated section 1692e by sending out letters that were signed by the agency's executives even though none of those executives was personally involved in sending the letters. *Id.* at 297. We held that the letters, as a whole, were not deceptive under section 1692e because they did not objectively appear to be letters from

Several of our sister circuit courts have also analyzed the application of section 1692e to debt-collection letters from attorneys. The leading case on whether mass-produced debt-collection mailings by an attorney violate the proscriptions of the FDCPA is *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993). In *Clomon*, a debt collection agency mailed several form collection letters to the plaintiff that were printed on the attorney letterhead of the agency's general counsel, and bore the mechanically reproduced facsimile of his signature. *Id.* at 1316. Although the attorney approved the form of the letters, and the procedures according to which those letters were sent, the attorney had no direct personal involvement in the mailing of the letters. *Id.* at 1317. The letters contained a variety of threatening statements designed to induce the plaintiff to pay the amount she owed, such as the following: "After [this collection agency] reviews your collection file and previous correspondence sent you, I am suggesting we take the appropriate measures provided under the law to further implement the collection of your seriously past due account." *Id.*

The Second Circuit held that the use of the attorney's letterhead and his signature on the collection letters was sufficient to give the debtor the false impression that the letters were communications from an attorney in violation of § 1692e(3). *Id.* at 1320. The Court held that the letters were false and misleading because they were not "from"

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a corporate executive to an individual; in our view, even the least sophisticated debtor, "possessing some common sense and a willingness to read the entire document with care, would not have believed that he had received a personal communication" from an executive. *Id.* at 301.

the attorney in any meaningful sense of the word. *Id.* In reaching this conclusion, the Court found significant the fact that the attorney did not review each debtor's file, did not determine when particular letters should be sent, did not approve the sending of particular letters based upon the recommendations of others, did not see particular letters before they were sent, and did not know the identities of the persons to whom the letters were issued. *Id.*; *see also Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 301 (2d Cir. 2003) (explaining that "[a]lthough there is no dispute that [the defendant law firms] are law firms, or that the letters sent by those firms were 'from' attorneys in the literal sense of that word, some degree of attorney involvement is required before a letter will be considered 'from an attorney' within the meaning of the FDCPA").

The Seventh Circuit reached the same conclusion about a similar letter in *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996). There, as in *Clomon*, the plaintiff had received a series of mass-produced collection letters printed on the letterhead of a law office and including the mechanically reproduced signature of an attorney. *Id.* at 225. Several of the letters informed the plaintiff that, "[i]f payment is not received, a civil suit may be initiated against you by your creditor." *Id.* Although the named attorney had approved the general form letter, he did not personally prepare, sign, or review any of the letters sent to the plaintiff; instead, a "legal assistant collector" actually produced the letter using training materials developed by the attorney. *Id.* The plaintiff claimed that these letters violated § 1692e(3) because the letters were not really "from an attorney." *Id.* at 229.

The Seventh Circuit agreed and held that an attorney sending a collection letter must be directly and personally involved in the mailing of the letters in order to comply with the strictures of the FDCPA. *Id.* The Court explained as follows:

> An unsophisticated consumer, getting a letter from an "attorney," knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign escalates from the collection agency, which might not strike fear in the heart of the consumer, to the attorney, who is better positioned to get the debtor's knees knocking.
>
> A letter from an attorney implies that a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process through which the letter was sent. That's the essence of the connotation that accompanies the title of "attorney." A debt collection letter on an attorney's letterhead conveys authority. Consumers are inclined to more quickly react to an attorney's threat than to one coming from a debt collection agency. It is reasonable to believe that a dunning letter from an attorney threatening legal action will be more effective in collecting a debt than a letter from a collection agency. The attorney letter implies that the attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for

> legal action. And the letter also implies that the attorney has some personal involvement in the decision to send the letter. Thus, if a debt collector (attorney or otherwise) wants to take advantage of the special connotation of the word "attorney" in the minds of delinquent consumer debtors to better effect collection of the debt, the debt collector should at least ensure that an attorney has become professionally involved in the debtor's file. Any other result would sanction the wholesale licensing of an attorney's name for commercial purposes, in derogation of professional standards[.]

Id. at 229; *see also Nielsen v. Dickerson*, 307 F.3d 623, 635-38 (7th Cir 2002) (relying on *Avila* to conclude that collection letters from defendant attorney violated § 1692e(3) and (10) because the attorney was not meaningfully involved in the decision to send the letters).

The Second Circuit later clarified its holding in *Clomon* to explain that an attorney, acting as a debt collector, could avoid liability by including a clear and prominent disclaimer in the collection letter. The collection letter at issue in that case, *Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 360 (2d Cir. 2005), was printed on the letterhead of "Trauner, Cohen & Thomas, LLP," and stated in pertinent part as follows:

> The firm of Trauner, Cohen & Thomas is a law partnership representing financial institutions in the area of creditors rights. In this regard,

> this office represents the above named BANK OF AMERICA who has placed this matter, in reference to an original account with [sic] for collection and such action as necessary to protect our client.
>
> At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due.
>
> . . .
>
> Very truly yours,
> Trauner, Cohen & Thomas, LLP

Id. at 361. The plaintiff, relying on *Clomon*, claimed that Trauner, Cohen & Thomas had violated the FDCPA by sending a debt collection letter, signed by the law firm and on law firm stationary, thereby implying that the firm had analyzed the debtor's case and rendered legal advice to the creditor when it had not. *Id.* at 363.

The Second Circuit held that the letter did not violate the FDCPA because, unlike the letter at issue in *Clomon*, it included a clear disclaimer explaining the limited extent of the law firm's involvement in the collection action. *Id.* at 364-65. The Court elaborated on its previous holding as follows:

> One cannot, consistent with the FDCPA, *mislead* the debtor regarding meaningful

> "attorney" involvement in the debt collection process. But it does not follow that attorneys may participate in this process only by providing actual legal services. In fact, attorneys can participate in debt collection in any number of ways, without contravening the FDCPA so long as their status as attorneys is *not misleading*. Put another way, our prior precedents demonstrate that an attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process, so long as that letter includes *disclaimers* that should make clear even to the "least sophisticated consumer" that the law firm or attorney sending the letter is not, at the time of the letter's transmission, acting as an attorney.

Id. at 364 (emphasis in original). Because the letter at issue in *Greco* included a disclaimer that, "[a]t this time, no attorney with this firm has personally reviewed the particular circumstances of your account," the Court concluded that the defendant law firm had not made a "false representation or implication that any individual is an attorney or that any communication is from an attorney with meaningful involvement as an attorney in the debtor's case." *Id.* at 365 (internal quotation marks and citation omitted).

Notably, the Fifth Circuit recently considered the legality of a debt collection letter from the Kay Law Firm that appears to be the exact same form letter that was sent to Lesher on January 11, 2009. In *Gonzalez v. Kay*,

577 F.3d 600 (5th Cir. 2009), the Kay Law Firm sent a collection letter to the plaintiff demanding payment of $448.97 on a consumer debt. *Id.* at 601. The letter, like the January 11, 2009 letter at issue here, was printed on the Kay Law Firm's letterhead. *Id.* at 602. The letter also contained the same language regarding the debtor's right to contest the debt, and included, on the back, the disclaimer that, "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." *Id.* The plaintiff brought suit under § 1692e, claiming that the letter was deceptive in that the Kay Law Firm "pretended to be a law firm with a lawyer handling collection of the Account when in fact no lawyer was handling the Account or actively handling the file." *Id.* According to the plaintiff, the Kay Law Firm is not actually a law firm at all, but a debt collection agency that uses the imprimatur of a law firm to intimidate debtors into paying their debts. *Id.* at 602-03.

Although the district court dismissed the complaint for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), the Fifth Circuit held that dismissal was premature because the "least sophisticated debtor" might be deceived into thinking that a lawyer was involved in the debt collection despite the disclaimer. After reviewing the reasoning in (among other cases) *Clomon*, *Rosenau*, and *Greco*, the Court explained that, in its view, "the main difference between the cases is whether the letter included a clear, prominent, and conspicuous disclaimer that no lawyer was involved in the debt collection at that time." *Id.* at 606. According to the Court:

> There are some letters that, as a matter of law, are not deceptive based on the language and placement of a disclaimer. At the other end of the spectrum, there are letters that are so deceptive and misleading as to violate the FDCPA as a matter of law, especially when they do not contain any disclaimer regarding the attorney's involvement. In the middle, there are letters that include contradictory messages and therefore present closer calls.

Id. The Fifth Circuit concluded that this letter fell within the middle ground because, unlike the letter in *Greco* in which the disclaimer was part of the body of the text on the front page, the disclaimer here was on the back. *Id.* Thus, according to the Fifth Circuit, the least sophisticated debtor would not learn that the letter was from a debt collector unless he turned the letter over to read the "legalese" on the back. *Id.* at 607. Accordingly, the Court remanded the matter to the district court for further development of the record. *Id.* In so doing, the Court added the following precautions to attorney-debt-collectors:

> We caution lawyers who send debt collection letters to state clearly, prominently, and conspicuously that although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity when sending the letter. The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector

> at that time. Debt collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the "price of poker has gone up."

Id.

D. Applying the Least Sophisticated Debtor Standard to the Kay Law Firm's Letters

The District Court in this case relied on *Brown*, *Rosenau*, *Greco*, and *Gonzalez* to conclude that the Kay Law Firm's January 11 and February 15, 2009 letters were misleading under section 1692e of the FDCPA. The District Court found that the least sophisticated debtor, upon receiving these letters, would believe that they had been sent by an attorney who might pursue legal action if he did not pay the debt.[9] The District Court acknowledged

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9. According to the District Court:

> A consumer is reasonably expected to believe that a law firm is comprised of attorneys and that it does legal work. In the context of a consumer debt, a reasonable perception of consumers is that if a consumer debt is being handled on behalf of the lender by a law firm and if the amount of money that the law firm is seeking (or some lesser settlement amount) is not paid, then the lawyer(s) will use the legal process with which they are familiar and for the use of which they are specifically trained to obtain a mandatory order of payment, which order will be enforceable by penalties within the power of courts to impose. The implication that a communication to a consumer concerning a debt is

that the letters included a disclaimer notifying that an attorney had not reviewed his account, but found that the disclaimer did not mitigate the impression of potential legal action. The Kay Law Firm now challenges the District Court's decision.[10]

We agree with the District Court that the Kay Law Firm's letters violate section 1692e's general prohibition against "false, deceptive, or misleading" communications because they falsely imply that an attorney, acting as an attorney, is involved in collecting Lesher's debt. In our view, the least sophisticated debtor, upon receiving these letters, may reasonably believe that an attorney has reviewed his file and has determined that he is a candidate for legal action. We do not believe that such a reading would be "bizarre or idiosyncratic." *Wilson*, 225 F.3d at 354-55 (internal quotation marks and citation omitted).

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from an attorney has a particular and well-known and well-understood effect. That is explicitly recognized in and incorporated into § 1692e.

Lesher v. Law Office of Mitchell N. Kay, P.C., 724 F. Supp. 2d 503, 509 (M.D. Pa. 2010).

10. Specifically, the Kay Law Firm argues that, contrary to the District Court's conclusion, the letters: (a) complied with section 1692e(3) because they were indeed from an attorney; (b) complied with section 1692e(5) because they did not threaten legal action; and (c) were not otherwise "false, deceptive, or misleading." We need not reach the question of whether the Kay Law Firm's letters to Lesher violate sections 1692e(3) and (5) because we conclude that they violate section 1692e's general prohibition against "false, deceptive, or misleading" communications.

Nor do we believe that the disclaimers included in the letters, which are printed on the backs, make clear to the least sophisticated debtor that the Kay Law Firm is acting solely as a debt collector and not in any legal capacity in sending the letters. First, in our view, the statement that "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account" does little to clarify the Kay Law Firm's role in collecting the debt because it completely contradicts the message sent on the front of the letters—that the creditor retained a law firm to collect the debt.[11] Moreover, as we noted in *Rosenau*, the statement that the letters were "from a debt collector" is a statutorily required notification that "should not be viewed as nullifying any implication that the letter is from an attorney." *See* 539 F.3d at 223 (explaining that "[b]oth common sense and case law confirm . . . that the categories of 'debt collector' and 'attorney' are not mutually exclusive").

As the Seventh Circuit observed in *Avila*, "[a]n unsophisticated consumer, getting a letter from an 'attorney,' knows the price of poker has just gone up."

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11. We recognize that the Second Circuit held in *Greco* that the language in this disclaimer sufficiently explained the limited role that the attorneys played in collecting the plaintiff's debt. *See* 412 F.3d at 366. In viewing the Kay Law Firm letters at issue here, however, we are not convinced that this disclaimer, which—unlike in *Greco*—was printed on the back of the letters, effectively mitigated the impression of attorney involvement. *See Gonzalez*, 577 F.3d at 607 (distinguishing the letter in *Greco* from the Kay Law Firm's letter based on the position and context of the disclaimer).

84 F.3d at 229. For this reason, we believe that it was misleading and deceptive for the Kay Law Firm to raise the specter of potential legal action by using its law firm title to collect a debt when the firm was not acting in its legal capacity when it sent the letters. We need not decide whether an attorney debt-collector who sends out a collection letter on attorney letterhead might, under appropriate circumstances, comply with the strictures of the Act by including language that makes clear that the attorney was not, at the time of the letter's transmission, acting in any legal capacity. The only question before us today is whether the Kay Law Firm's January 11 and February 15, 2009 letters to Lesher comply with the Act. For the reasons set forth above, we hold that they do not.

IV. Conclusion

We will affirm the District Court's order granting summary judgment in Lesher's favor with respect to his 15 U.S.C. § 1692e claim.

Appendix A

Lesher v. Law Offices of Mitchell N. Kay, P.C., et al.,
No. 10-3194
JORDAN, Circuit Judge, dissenting:

The sole question for us to answer in this appeal is whether the least sophisticated consumer, after reading the debt collection letters at issue, would believe that an attorney, acting as such, was involved in the collection process. Because I disagree with the Majority's conclusion and would hold that even the least sophisticated consumer would not be misled as the plaintiff and the Majority contend, I respectfully dissent.[1]

The least-sophisticated-consumer standard is meant to comport with the purpose of the Fair Debt Collection Practices Act ("FDCPA") to protect all consumers, "the gullible as well as the shrewd." *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). While the standard surely protects naïve consumers, it is also supposed to protect debt collectors by "prevent[ing] liability for bizarre or idiosyncratic interpretations of collection notices by

1. The case of *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009), raised the same question with respect to a debt collection letter substantively indistinguishable from the letter at issue here. The Honorable E. Grady Jolly dissented in that case, opining that the debt collection letter did not violate 15 U.S.C. § 1692e. *Id.* at 607-12 (Jolly, J. dissenting). Consistent with the reasoning in *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005), Judge Jolly observed that the letter was best seen as sufficiently clear to tell the least sophisticated consumer that an attorney, acting in the role of an attorney, had not been involved in the collection effort. *Gonzalez*, 577 F.3d at 607-09 (Jolly, J. dissenting). I am persuaded by Judge Jolly's thoughtful analysis and endeavor to echo it here.

preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354-55 (3d Cir. 2000) (internal quotation marks and citation omitted). My colleagues in the Majority give this important aspect of the standard only a nod.

Under our precedents, attorneys are permitted to participate in debt collection, including the sending of debt collection letters, without running afoul of the FDCPA. *See Crossley v. Lieberman*, 868 F.2d 566, 569-70 (3d Cir. 1989) (acknowledging attorney participation in debt collecting and discussing the FDCPA strictures on, not prohibition of, that participation); *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991) (holding that an attorney acting as a debt collector violated the FDCPA by misstating the debtor's legal rights in the collection letter, not, implicitly, by merely sending the letter). They must, however, tread carefully. "Abuses by attorney debt collectors are more egregious than those of lay collectors because a consumer reacts with far more duress to an attorney's improper threat of legal action than to a debt collection agency committing the same practice." *Crossley*, 868 F.2d at 570. Indeed, because "[a] debt collection letter on an attorney's letterhead conveys authority and credibility," there is inherent intimidation in correspondence of that kind. *Id.*

Consistent with that concern, the United States Court of Appeals for the Second Circuit has explained that a debt collection letter signed by a law firm or appearing on the firm's letterhead "implies – *at least in the absence of language to the contrary* – that the attorney signing

the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent," *Clomon*, 988 F.2d at 1321 (emphasis added), and thus, unless the attorney actually had formed a legal opinion, would violate the FDCPA's prohibition against "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt," 15 U.S.C. § 1692e (10).[2] However, the Second Circuit has also held in *Greco v. Trauner, Cohen, & Thomas, L.L.P.*, that that implicit message of attorney involvement may be clarified by the use of proper disclaimers "connot[ing] far less actual attorney involvement [and thus] satisfying the FDCPA's requirements." 412 F.3d 360, 364 (2d Cir. 2005).

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2. Section 1692e provides a non-exclusive list of conduct that violates that section. Appellee argues that three of the examples of violative conduct listed in § 1692e are implicated here:

> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
>
> ***
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
>
> ***
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. § 1692e.

For example, in *Greco*, the debtor claimed that a collection letter he received from a law firm left him with the false impression that an attorney had reviewed his account and formed an opinion regarding the debt. *Id.* at 362. This letter was printed on law firm stationary, and the firm's name was used as a signature. *Id.* at 361. The letter further implied the involvement of attorneys, referring to the creditor as "our client," stating that the firm "represent[ed]" the creditor in "this matter," and warning of "additional remedies." *Id.* But the letter also contained the following disclaimer: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account." *Id.*

The *Greco* Court acknowledged the letter's implication that an attorney, acting as an attorney, had been involved, but the Court noted that "the implied level of attorney involvement is just that – implied." *Id.* at 364. The implication could be overcome, the Court explained, by a clear disclaimer. *Id.* The Court concluded that the disclaimer at issue was clear enough for the least sophisticated consumer to understand that no one involved in the debt collection to that point had had "meaningful involvement as an attorney." *Id.* at 365. In summary, the Second Circuit held:

> [A]n attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process, so long as that letter includes *disclaimers* that should make clear even to the "least sophisticated consumer" that the law firm or

> attorney sending the letter is not, at the time of the letter's transmission, acting as an attorney.

Id. at 364.

In *Gonzalez v. Kay*, the United States Court of Appeals for the Fifth Circuit faced essentially the same question faced by the Second Circuit in *Greco*. The collection letter's content, including its disclaimer regarding attorney involvement, tracked that of the *Greco* letter.[3] *Gonzalez*, 557 F.3d at 602. However, the panel majority in *Gonzalez* concluded that the letter was misleading because, unlike the letter in *Greco*, which had the disclaimer on the front, the disclaimer was on the back of the letter. *Id.* at 606. The *Gonzalez* majority further opined that the disclaimer was "legalese" and inconsistent with the implicit message communicated by the law firm's letterhead on the front of the page. *Id.* at 607.

The dissent in *Gonzalez*, however, pointed out that the disclaimer "[did] not contain a single legal term" and that a "reasonable unsophisticated consumer, whom we assume can read, could not possibly have trouble understanding it." *Id.* at 608 (Jolly, J., dissenting). The dissent further noted that the majority's concern over the placement of the disclaimer could only provide a meaningful basis for reaching a different result than in *Greco* if one assumes "that an unsophisticated consumer would not turn the letter over," *id.* at 608-609, which was an untenable

3. The disclaimer read: "At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." *Gonzalez*, 577 F.3d at 602.

assumption given the large notice on the letter's front page stating: "Notice: Please see reverse side for important information," *id.* at 609. As rightly put by the dissent, "[W]hen a prominent instruction in the body of the letter warns that there is important information on the reverse side, a reasonable reader, even if unsophisticated, would turn the paper over and read the back." *Id.* at 609 (internal quotation marks omitted). Thus, read in its entirety, the letter could not confuse the least sophisticated consumer regarding an attorney's involvement. *Id.*

The *Gonzalez* dissent is exactly correct, and I regret that I too am required to dissent rather than be part of a majority opinion recognizing that the words "least sophisticated" do not mean "illiterate" or "completely irresponsible." The correspondence at issue here features basically the same plain language disclaimer as was at issue in both *Greco* and *Gonzalez*: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account." (App. at 41, 43.) Without legal mumbo jumbo, that disclaimer tells any reasonable reader, including the least sophisticated, that, "while this was a letter from a law firm, no attorney had specifically examined the recipient's account information, and hence no attorney had yet recommended filing a lawsuit against the creditor." *Greco*, 412 F.3d at 362-63. Moreover, like the letter in *Gonzalez*, the letter here does not mention "clients," "representation," or "other jargon suggesting lawyer involvement." *Gonzalez*, 577 F.3d at 608 (Jolly, J., dissenting). Thus, it is "significantly less suggestive of attorney involvement" than the *Greco* letter. *Id.*

Once upon a time, we held that, "[a]lthough established to ease the lot of the naïve, the [least sophisticated consumer] standard does not go so far as to provide solace to the willfully blind or non-observant. Even the least sophisticated debtor is bound to read collection notices in their entirety." *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 299 (3d Cir. 2008). We have strayed far from that ruling today. To say that the least sophisticated consumer would not flip the page to read the entire letter, particularly when prompted to do so by a conspicuous notice on the front of the letter, or to say that one could be confused about the level of attorney involvement despite the plain statement that no legal review had occurred, is to permit – indeed to encourage – the kind of "bizarre or idiosyncratic interpretation[] of collection notices," *id.* (internal quotation marks omitted), we have previously condemned. "Rulings that ignore these rational characteristics of even the least sophisticated debtor and instead rely on unrealistic and fanciful interpretations of collection communications" frustrate the express purpose of the FDCPA to "'insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.'" *Id.* (quoting 15 U.S.C. § 1692(e)).

Although the Majority claims to eschew deciding whether a law firm can ever be clear enough in a disclaimer to overcome the effect of sending out a debt collection notice on law firm letterhead, the practical effect here is clear. Law firms take an extraordinary risk in sending a collection letter, no matter how conciliatory or how plain their prose.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED JUNE 14, 2010

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

CIVIL NO. 1:09-CV-0578

(Magistrate Judge Smyser)

DARWIN LESHER,

Plaintiff

v.

LAW OFFICE OF MITCHELL N. KAY, P.C.,

Defendant

MEMORANDUM AND ORDER

I. ***Background and Procedural History.***

The plaintiff filed a second amended complaint in this case on August 3, 2009. (Doc. 24).

The second amended complaint alleges that the plaintiff Darwin Lesher borrowed a sum from a lender, Washington Mutual, in the form of a home equity loan and that he fell behind on his payments. He disputes the

alleged debt and how the debt was calculated. Washington Mutual placed the account for collection with defendant Law Offices of Mitchell N. Kay, P.C. The defendant sent letters to the plaintiff on January 11, 2009 and on February 15, 2009 relating to the debt. The defendant was acting to collect the debt. The letters from the defendant to the plaintiff stated that the plaintiff's account was being handled by the defendant's office, that the defendant had been authorized to offer the plaintiff an opportunity to settle the account with a lump sum payment, that the plaintiff was invited to visit the web site of the defendant to "resolve this debt privately" and that: "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account."

The second amended complaint alleges that the plaintiff believed that an attorney was involved in the collection of the alleged debt and that an attorney could and would take legal action against him. The second amended complaint alleges that the defendant failed to make it clear to the plaintiff that the defendant had no authority to take legal action in Pennsylvania.

The second amended complaint alleges that the defendant acted through its agents with malicious, intentional, willful, reckless, negligent and wanton disregard for the plaintiff's rights with the purpose of coercing the plaintiff into paying the alleged debt and that the defendant thereby caused harm to the plaintiff. It is alleged that the defendant as a matter of policy and practice does not advise consumers that it can take no legal action against them, that it uses its title and status as an

attorney to make false, deceptive or confusing statements to consumers, and that it uses the authority and credibility of its letterhead to threaten litigation and to create a heightened sense of urgency without a meaningful review of the consumer's account.

The second amended complaint asserts violations of 15 U.S.C. § 1692d and §§ 1692e(3), (5) and (10), § 1692f, § 1692j, § 1692g and § 1692n. The complaint seeks statutory, actual, general and punitive damages, fees and costs as well as declaratory and injunctive relief.

A motion to dismiss the second amended complaint was denied on October 22, 2009. (Doc. 29). The discovery deadline has expired. The pretrial conference is scheduled for July 15, 2010 and trial is scheduled for August 2, 2010.

On April 16, 2010, the plaintiff filed a motion for summary judgment. (Doc. 51). A brief in support was filed on April 18, 2010. (Doc. 52). No LR 56.1 statement was filed. On May 7, 2010, the defendant filed a cross motion for summary judgment. (Doc. 57). No LR 56.1 statement was filed. A brief in support of the defendant's motion and in opposition to the plaintiff's motion was filed. (Doc. 58). On May 20, 2010, the plaintiff filed a brief in opposition to the cross motion of the defendant for summary judgment and in reply to the defendant's brief in opposition to the plaintiff's motion for summary judgment. (Doc. 63). On June 3, 2010, the defendant filed a reply brief in support of the defendant's cross motion for summary judgment. (Doc. 65).

Appendix B

Both parties have filed documents in support of and in opposition to the respective pending motions for summary judgment. There are no LR 56.1 statements and neither party asserts that there is a dispute as to a material factual issue.

II. ***Summary Judgment Standards.***

Summary judgment is appropriate if the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). With respect to an issue on which the nonmoving party bears the burden of proof, the moving party may discharge that burden by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its burden, the nonmoving party may not rest upon the mere allegations or denials of its pleading; rather, the nonmoving party must "set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2).

A material factual dispute is a dispute as to a factual issue the determination of which will affect the outcome of the trial under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes

over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

Summary judgment is not appropriate when there is a genuine dispute about a material fact. *Id.* at 248. A dispute as to an issue of fact is "'genuine' only if a reasonable jury, considering the evidence presented, could find for the non- moving party." *Childers v. Joseph*, 842 F.2d 689, 693-94 (3d Cir. 1988). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Anderson*, *supra*, 477 U.S. at 249-50. In determining whether a genuine issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir. 1988).

At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. *Anderson*, *supra*, 477 U.S. at 249. The proper inquiry of the court in connection with a motion for summary judgement "is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

III. *Discussion.*

The Fair Debt Collection Practices Act ("FDCPA") requires a debt collector not to use any false, deceptive or misleading representation or means in connection with the collection of any debt. 15 U.S.C. § 1692e. 15 U.S.C. § 1692e sets forth sixteen specific kinds of prohibited false representations, including "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney", § 1692e(3), and "[t]he threat to take any action . . . that is not intended to be taken." § 1692e(5). § 1692e(10) prohibits in relevant part the use of any false representations or deceptive means to collect a debt. § 1692g affirmatively requires a debt collector to send certain information to the consumer within five days after sending an initial communication to the consumer.[1]

---

1. § 1692g(a) provides:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity

Appendix B

Whether a communication is false and misleading under the Fair Debt Collection Practices Act is a question of law. *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir. 2000). The perspective to be taken in considering whether a representation is false, misleading or deceptive is that of the "least sophisticated debtor." *Id.* at 354. Since the issue whether a communication is false and misleading is an issue of law, and since neither party has presented to the court an argument that there is a genuinely disputed issue of material fact, it follows that the issues under 15 U.S.C. §§ 1692e are properly resolved under Fed.R.Civ.P. 56.

The plaintiff claims that the defendant's use of law firm letterhead to collect consumer debts when there has not been attorney involvement or attorney review before collection letters are sent to consumers is in violation of 15

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of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

U.S.C. § 1692e(3) and (5), even though the communication contains a statement that there has not been attorney review of the particular circumstances of the debtor's account.

The plaintiff's § 1692e(10) claim is that the defendant's collection letter is misleading in its content because the letter gives the impression that Washington Mutual, the creditor, had hired the defendant to collect the alleged debt when in fact the defendant was hired by Plaza Associates, another collection agency.

The plaintiff's § 1692g claim is that the collection letter of the defendant in form and in content has the effect of causing the consumer not to take advantage of his rights under the FDCPA, that it created a false sense of heightened urgency and intimidation, and that there had not been a meaningful review of the plaintiff's account.

The pending motions for summary judgment address the § 1692e(3), (5) and 10 and the § 1692g causes of action, but not other causes of action that may be stated in the second amended complaint.

The two letters that are the subject of the case are the letter dated January 11, 2009 from Law Offices of Mitchell N. Kay to Darwin E. Lesher and the letter of February 15, 2009 from Law Offices of Mitchell N. Kay to Darwin E. Lesher. *See* Doc. 9, Exhs. A and B.

Each of these letters plainly gives rise to the implication that an attorney is involved in the collection

of a debt. Each letter also does implicitly threaten legal action.

In *Brown v. Card Service Center*, 464 F.3d 450 (3d Cir. 2006), the Court found it to be a deceptive practice for a collection agency to mention in a letter that an account could be forwarded to an attorney when the agency had never or very rarely done so before. In the present case, the communications at issue were from a law firm. There was not a signature line, nor a specific attorney sender named. There was no explicit statement made of a plan of action. The present case is not, as was *Brown*, a situation involving an announcement of a contingent future course of action when in practice no such course of action had ever been taken in like circumstances by the debt collector. In this case, the communication is from a law firm, yet the letter contains a statement that there has not been attorney review. The letter also contains a statement that the communication is from a debt collector.

In *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 361 (2d Cir. 2005), the letters to debtors written under attorneys' letterheads contained the same language as the language contained in the letters in this case: "[a]t this time, no attorney with this firm has personally reviewed the particular circumstances of your account." In that decision, that language was found to be adequate to dispel a possible inference of the debtor that a particularized analysis had caused the attorney to have decided to pursue a collection process through litigation. *Id.* at 365. The *Greco* decision holds that there is not an actionable misrepresentation by the debt collector and

no actionable FDCPA claim, despite the use of attorney letterhead, when this "at this time, no attorney . . ." phrase is used. *Id.* Whether this court should follow that holding is a prominent issue here.

In *Rosenau v. Unifund Corp.*, 539 F.3d 218, 220 (3d Cir. 2008), the Third Circuit applied the least sophisticated debtor standard where a debt collection letter had expressly stated "[t]his communication is from a debt collector. This is an attempt to collect a debt. . . ," and where the letter closed with, in place of a signature, "Unifund Legal Department." The Court, quoting from *Brown*, *supra*, stated that a debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate. *Id.* at 222. The Court found that the letter could falsely imply to the least sophisticated debtor that it was from an attorney. *Id.* at 224. The letters here state explicitly that the letter is from a debt collector. The letters are from a law firm. The letters state that there has not been a review by an attorney.

The plaintiff's claim here is in part that the letterhead of the two letters falsely implies that the letter is from an attorney and that this implication causes an unwarranted impression and apprehension for the debtor. The plaintiff argues that such an apprehension is the intent of the use of attorney letterhead and that it is a misrepresentation. Plaintiff also notes that the letters do not point out to the debtor that the law firm's attorneys are not licensed to practice in Pennsylvania. An unsophisticated debtor would not be likely to doubt that the defendant law firm

could follow through with legal action if and when it were to decide to do so.

In *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009), the Fifth Circuit Court of Appeals considered a debt collection letter very similar to the letter in this case. The Court found that the least sophisticated consumer might be deceived into thinking that the letter was from an attorney. *Id.* at 607. The Court considered *Greco*, *supra*, and the disclaimer language held there to constitute an adequate explanation of the limited extent of any attorney involvement in collecting debts. *Id.* at 605-606. The Court found it to be significant that, as in this case, the language "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account" was on the back of the letter rather than on the front of the letter. *Id.* at 607. In our view, the location of that language within the letter is not a factor of prominent importance. In our view, that language does not mitigate the impression of potential legal action.

Although an attorney may be acting solely in the capacity of a debt collector and may not be communicating any explicit representation of a future course of action, when the attorney acting as a debt collector uses law firm letterhead the attorney acting as a debt collector plainly is communicating to the debtor in his or her capacity as an attorney. Therefore, since it is an attorney's communication, the implication is not avoidable that a threat of litigation is being presented to the debtor. The defendant correctly asserts that it is customary and ordinary for attorneys to send out letters noting

the existence of a debt and asking for payment. The unavoidable corollary to this is that it is customary and ordinary for the recipient of a law firm's letter to feel that a law suit could be the next step. The defendant does not deny that its identification of itself to the debtor as a law office is intended to make an impression, nor does it describe the impression that is intended beyond saying that this (i.e., debt collection) is something that attorneys do. The defendant asserts that its statement in the letter that "no attorney with this firm has personally reviewed the particular circumstances of your account" is enough to dispel the natural inference that the least sophisticated debtor would otherwise draw from the receipt of a letter from a law firm that a legal action against the debtor will be initiated if the debtor does not "settle this account" or "dispute the validity of this debt."

If the language that the debtor's account has not been analyzed in particular by an attorney can in some contexts dispel the representation or impression that an attorney is pursuing the case and that a legal action is down the road, it nevertheless does not of itself dispel that representation and impression in all contexts. The least sophisticated consumer would be likely to believe that the law firm is acting as an attorney for the lender in communicating with the consumer concerning the loan. The least sophisticated consumer would be likely to believe upon receiving a communication from an attorney for the lender that the debt collection process has entered into a phase where the lender through its attorney will begin to use procedures established by law and known to attorneys to collect the debt. The least sophisticated consumer would be likely to believe that his property and interests are

in some potential jeopardy. We agree with plaintiff that "[i]t is a reasonable expectation for the least sophisticated consumer to believe that Washington Mutual hired an attorney in order to take legal action." (Doc. 52, p. 11). We agree with the plaintiff that the least sophisticated consumer, absent any language clearly identifying the attorney's intent, will believe that a law firm was hired to take legal action if the debt is not collected and that when an attorney becomes involved, the matter is escalated and there is a serious and meaningful threat of litigation. *Id.* at 11-12. A law firm's letter does bear an implied threat of litigation, and does connote that it is a communication from an attorney.

A consumer is reasonably expected to believe that a law firm is comprised of attorneys and that it does legal work. In the context of a consumer debt, a reasonable perception of consumers is that if a consumer debt is being handled on behalf of the lender by a law firm and if the amount of money that the law firm is seeking (or some lesser settlement amount) is not paid, then the lawyer(s) will use the legal process with which they are familiar and for the use of which they are specifically trained to obtain a mandatory order of payment, which order will be enforceable by penalties within the power of courts to impose. The implication that a communication to a consumer concerning a debt is from an attorney has a particular well-known and well-understood effect. That is explicitly recognized in and incorporated into § 1692e.

The time of attorneys is expensive. Attorneys generally must ascertain the validity of their claims and demands before they make them. A consumer reasonably

does not expect to receive a communication containing a demand or a claim from an attorney. That in part explains that when such a communication is received, the consumer will certainly take notice, will experience some apprehension and will want to resolve the matter as soon as possible. A claim from an attorney on behalf of a client is a threat of litigation in the recipient's mind.

There is certainly nothing wrong with an attorney acting on behalf of a creditor client writing to a debtor, demanding payment and announcing or implying that a court claim will be brought if payment is not made, unless the implication of a court claim is a false implication.

For the foregoing reasons, we conclude that each of the two letters constitutes a violation of 15 U.S.C. § 1692e.

The plaintiff has not demonstrated that he is entitled to summary judgment under 15 U.S.C. § 16952g. His argument, at Doc. 52, pages 14-15, does not in our view adequately address the specific provisions of that section. The defendant has not shown that it is entitled to summary judgment as to the § 1692g claim of the plaintiff.

IV. *Conclusion and Order.*

We conclude that the letters of January 11, 2009 and February 15, 2009 from Law Offices of Mitchell N. Kay, P.C., to Darwin E. Lesher, are in violation of the FDCPA, 15 U.S.C. § 1692e. The plaintiff's motion for summary judgment is granted as to the claim of two violations of the Act. The defendant's cross motion for summary judgment

is denied as to violations of these two subsections in the sending of the letters. The motions for summary judgment will be denied as to the § 1692g claim.

Although issues under 15 U.S.C. § 1692e and § 1692g are properly reached under Rule 56, the claims under 15 U.S.C. §§ 1692d, 1692f, 1692j and 1692n are not the subject of either summary judgment motion. These claims remain to be tried. We will order the plaintiff to inform the court within fourteen (14) days of the entry of this Order whether he intends to pursue his remaining claims under 15 U.S.C. §§ 1692d, 1692f, 1692g, 1692j and 1692n. The issue of entitlement to statutory and compensatory damages remain to be tried. The plaintiff is not entitled to punitive damages. We agree with and will follow *Whiteman v. Burton Neil & Associates, P.C.*, 3:07-cv-2289, 2008 WL 4372842 at *3 in (M.D.Pa. Sept. 19, 2008) (holding that the FDCPA does not give rise to a claim for punitive damages). The attorneys' fee issues shall be presented by motion at the appropriate time pursuant to Fed.R.Civ.P. 54.

IT IS ORDERED that the plaintiff's motion for summary judgment (Doc. 51) is **GRANTED in part and DENIED in part**. The plaintiff's motion for summary judgment is granted as to the merits of his two claims of violations under 15 U.S.C. § 1692e. His motion for summary judgment is denied as to his two claims of violations under 15 U.S.C. § 1692g. The Clerk shall not enter judgment until the final disposition of all claims in this case. The defendant's motion for summary judgment (Doc. 57) is **DENIED**. The claim of the plaintiff for punitive damages

is **DISMISSED**. The plaintiff shall inform the court within fourteen (14) days of the entry of this Order whether he intends to pursue his remaining claims under 15 U.S.C. §§ 1692d, 1692f, 1692g, 1692j and 1692n.

/s/
J. Andrew Smyser
Magistrate Judge

Dated: June 14, 2010.

APPENDIX C — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 20, 2011

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-3194

DARWIN LESHER

v.

LAW OFFICES OF MITCHELL N. KAY, PC;
MITCHELL N. KAY

Law Offices of Mitchell N. Kay, PC,

Appellant

SUR PETITION FOR REHEARING

Present: MCKEE, *Chief Judge*,
SLOVITER, SCIRICA, RENDELL, AMBRO,
FUENTES, SMITH, FISHER, CHAGARES,
JORDAN, HARDIMAN, GREENAWAY, VANASKIE
and COWEN*, *Circuit Judges*

The petition for rehearing filed by Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all

* Limited to Panel Rehearing Only

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Jordan would have granted the Petition for Rehearing En Banc.

BY THE COURT,

/s/ Robert E. Cowen
Circuit Judge

Dated: July 20, 2011

trg/cc: Cary L. Flitter, Esq.
Theodore E. Lorenz, Esq.
Andrew M. Milz, Esq.
Lawrence J. Rosen, Esq.
Deanna L. Saraco, Esq.
Joann Needleman, Esq.
Tomio B. Narita, Esq.
Richard J. Perr, Esq.

APPENDIX D — RELEVANT STATUTES: 15 U.S.C. §§ 1692, 1692e and 1692g

15 U.S.C. § 1692. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) **Interstate commerce**

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of --

> **(A)** the character, amount, or legal status of any debt; or
>
> **(B)** any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

> **(A)** lose any claim or defense to payment of the debt; or
>
> **(B)** become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which

creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of

such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section.

(e) Notice provisions

The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, chapter 94 of this title, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

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(888) 647-0742

Office Hours:
Mon.-Thurs. 8:00 am to 9:00 pm EST
Friday 8:00 am to 6:00 pm EST
Saturday 8:00 am to 12:00 Noon EST

January 11, 2009

Reference Number ▶ 75357864-10

Account Number ▶ 616769840	RE ▶ DARWIN LESHER
Balance ▶ $12,107.36	
Creditor ▶ WASHINGTON MUTUAL HOME EQUITY LOAN	

Please be advised that your account, as referenced above, is being handled by this office.

We have been authorized to offer you the opportunity to settle this account with a lump sum payment, equal to 75% of the balance due – which is $9,080.52!

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid.

If you notify this office in writing within 30 days from receiving this notice that you dispute the validity of this debt or any portion thereof, this office will: Obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification.

If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

You are invited to visit our website **www.lawofmnk.com** to resolve this debt privately, or to write to us or to update your personal information.

PLEASE ADDRESS ALL PAYMENTS TO:
Law Offices of Mitchell N. Kay, P.C.
7 Penn Plaza, New York, NY 10001-3995

Notice: Please see reverse side for important information.

7-ICSMNKP02MS1

Please Detach Lower Portion and Return with Payment

WASHINGTON MUTUAL HOME EQUITY LOAN

Law Offices of Mitchell N. Kay, P.C.
PO Box 9006
Smithtown, NY 11787-9006

RETURN SERVICE REQUESTED
75357864M101111090.000000WMMS1

Reference #: 75357864-10
Balance: $12,107.36
Amount Enclosed: $_____

Check here if new address information listed on back

January 11, 2009

7535786410-MS1 000000001

PERSONAL AND CONFIDENTIAL
DARWIN E LESHER
1201 N Front St Apt 305
Harrisburg PA 17102-2818

SEE REVERSE SIDE FOR REMITTANCE ADDRESS

APPENDIX E — LETTER FROM THE LAW OFFICES OF MITCHELL N. KAY, P.C. TO DARWIN E. LESHER, DATED JANUARY 11, 2009

This communication is from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose.

If you are entitled to the protections of the United States Bankruptcy Code (11 U. S. C. 362, 524) regarding the subject matter of this communication, the following applies to you: THIS COMMUNICATION IS NOT AN ATTEMPT TO COLLECT, ASSESS OR RECOVER A CLAIM IN VIOLATION OF THE BANKRUPTCY CODE AND IS FOR INFORMATIONAL PURPOSES ONLY.

At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.

Notice About Electronic Check Conversion: Sending an eligible check with this payment coupon authorizes us to complete the payment by electronic debit. If we do, the checking account will be debited in the amount shown on the check – as soon as the same day we receive the check – and the check will be destroyed.

Name		
Street		
City	State	Zip
Home Phone ( )	Work Phone ( )	

Law Offices of Mitchell N. Kay, P.C.
7 Penn Plaza
New York NY 10001-3995

Law Offices of Mitchell N. Kay, P.C.
PO Box 9006
Smithtown, NY 11787-9006
75357864M1D215090-3L9000MMMLS

Call Toll Fr
1-888-647-07--2

**** N.Y. Office ****
7 Penn Plaza
New York, NY 10001
**** admitted in New York & Washington D.C.*

PERSONAL AND CONFIDENTIAL

February 15, 2009

DARWIN E LESHER
1201 N FRONT ST APT 305
HARRISBURG PA 17102-2818

Office Hours: *Mon-Thurs 8:00am - 9:00pm EST*
Friday 8:00am - 6:00pm EST
Saturday 8:00am - 12:00 Noon EST

Reference Number ▸ 75357864-10

Account Number ▸ 616769840-A	RE ▸ DARWIN LESHER
Balance ▸ $12,107.36	
Creditor ▸ WASHINGTON MUTUAL HOME EQUITY LOAN	

Difficult economic times exist today. We would therefore like to offer you the opportunity to repay this obligation on a monthly repayment plan. The repayment schedule being offered to you, on the balance due, is as follows:

REPAYMENT PLAN: 6 MONTHLY PAYMENTS OF $275.00

After receipt of your 6th payment, we will contact you to discuss payment of the remaining balance due.

All you need to do to get started is to send us your initial monthly payment, as indicated above, together with the tear-off payment coupon on the bottom of this letter. Upon receipt of your initial payment, we will mail you a "payment receipt letter" which will act as confirmation of this arrangement. This letter will also provide you with the next payment due date and a tear off payment coupon that should be sent with the next payment to insure proper handling.

"OR: A SETTLEMENT OFFER"

Alternatively, we have been authorized to offer you an opportunity to settle this account, as referenced above, with a lump sum payment for 65% of the above balance due, which is equal to $7,869.78.

Upon receipt and clearance of the above payment, this account will be considered settled.

If you have any questions regarding this offer or this account, please contact this office at the number(s) provided above. Please remember to include the payment stub with your payment.

You are invited to visit our website www.lawofmnk.com to resolve this debt privately, or to write to us or to update your personal information.

PLEASE ADDRESS ALL PAYMENTS TO:
Law Offices of Mitchell N. Kay, P.C.
7 Penn Plaza, New York, NY 10001-3995

Notice: Please see reverse side for important information.

▾ Detach Here ▾ Please return bottom portion with payment. ▾ Detach Here ▾

Name
Street
City State Zip
Home Phone ( ) Work Phone ( )

Please check here if your address has Changed. Make Changes in section above.

WASHINGTON MUTUAL HOME EQUITY LOAN

Reference Number	75357864-10
Balance	$12,107.36
Settlement Amount	$7,869.78
Amount Enclosed	

Law Offices of Mitchell N. Kay, P.C.
7 Penn Plaza
New York, NY 10001-3995

2/15/09

APPENDIX F — LETTER FROM THE LAW OFFICES OF MITCHELL N. KAY, P.C. TO DARWIN E. LESHER, DATED FEBRUARY 15, 2009

This communication is from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose.

Notice About Electronic Check Conversion: Sending an eligible check with this payment coupon authorizes us to complete the payment by electronic debit. If we do, the checking account will be debited in the amount shown on the check - as soon as the same day we receive the check - and the check will be destroyed.

At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.

If you are entitled to the protections of the United States Bankruptcy Code (11 U. S. C. 362; 524) regarding the subject matter of this communication, the following applies to you: **THIS COMMUNICATION IS NOT AN ATTEMPT TO COLLECT, ASSESS OR RECOVER A CLAIM IN VIOLATION OF THE BANKRUPTCY CODE AND IS FOR INFORMATIONAL PURPOSES ONLY.**

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