No. 11-492

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

MOTION TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE ACA INTERNATIONAL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF ACA INTERNATIONAL FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2(b), ACA International (ACA), by and through its undersigned counsel, respectfully moves this Court to grant it leave to file the attached brief as amicus curiae in support of the Petition for a Writ of Certiorari in the above-referenced case. Petitioner Law Offices of Mitchell N. Kay, P.C., through its counsel, Richard Simpson, has consented to the filing of this brief. A letter attesting to its consent has been submitted to this Court. Respondent Darwin Lesher through his counsel, Sanford Alan Krevsky and Deanna Lynn Saracco, has refused consent, necessitating this motion.

As explained in the statement of interest in the attached amicus curiae brief, ACA is an association of credit, collection and debt purchasing professionals, including attorneys, who provide a wide variety of accounts receivable management services. ACA is a national non-profit organization that represents more than 5,000 third-party collection agencies, asset buyers, attorneys, credit grantors and vendor affiliates. ACA members include over 900 in-house, compliance, defense or collection attorneys. ACA is a leading national advocate for debt collectors throughout the United States.

The Court will benefit from ACA's amicus brief because it explores the circuit split resulting from

decisions by the United States Courts of Appeals for the Third and Fifth Circuits rejecting the use of an attorney disclaimer, which was approved by the United States Court of Appeals for the Second Circuit, in a debt collection letter printed on law firm letterhead to dispel the implication of attorney involvement. The circuit split creates confusion and chaos in the debt collection industry regarding whether attorney debt collectors can participate in routine debt collection. The brief also discusses how the decisions by the United States Courts of Appeals for the Third and Fifth Circuits rejecting an attorney disclaimer because it was located on the back of the collection letter create confusion in the industry regarding what, if anything, can appear on the back of collection letters. The industry fears that the routine practice of providing required notices and information on the back of collection letters will be under attack, which greatly affects interstate commerce.

ACA's amicus brief also discusses how the decision by the United States Court of Appeals for the Third Circuit adopted an uncodified "meaningful involvement doctrine," which creates a separate standard under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p ("FDCPA"), for attorney debt collectors acting in a non-litigation capacity. If the Court refuses to grant Petitioner's Writ of Certiorari, attorney debt collectors may be governed by heightened requirements not contained within the FDCPA. Such requirements would unfairly encumber an attorney's ability to engage in debt collection practices, putting

attorney debt collectors at a competitive disadvantage and negatively impacting the effectiveness of law firms acting as debt collectors.

Finally, ACA's brief discusses how the courts of appeals apply two different standards in evaluating debt collection letters, which causes confusion in the debt collection industry and leads to inconsistent court decisions. The brief explains why the Court needs to review the standards and determine the level of competency to be imposed on the consumer receiving debt collection letters.

For these reasons, ACA respectfully requests that its motion for leave to file the attached brief as amicus curiae be granted.

Respectfully submitted,

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MISCELLANEOUS

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ACA International (ACA) respectfully submits this amicus curiae brief in support of Petitioner.[1] ACA has concurrently filed a motion for leave to file this brief pursuant to 37.2(b) of the Rules of the Supreme Court.

INTEREST OF AMICUS CURIAE ACA INTERNATIONAL

ACA agrees with Petitioner's arguments in its Petition for a Writ of Certiorari and offers the following additional reasons why it is important for the Court to hear this case. ACA's members nationwide are affected by the decisions of the United States Courts of Appeals for the Third and Fifth Circuits rejecting the validity of attorney disclaimers located on the back of collection letters, which create confusion in the industry regarding what, if anything, can appear on the back of collection letters. ACA believes it is necessary for the Court to grant certiorari in order to reaffirm the industry's practice of providing

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. ACA has obtained Petitioner's, but not Respondent's, consent to file this brief.

required notices and information on the back of collection letters. Further, the Court needs to grant certiorari to reject the adoption of the "meaningful involvement doctrine" by some of the courts of appeals. Finally, the Court needs to evaluate the two standards being applied by the courts of appeals in cases involving the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p ("FDCPA"), in order to adopt a uniform standard to be applied consistently nationwide.

Founded in 1939, ACA, the Association of Credit and Collection Professionals, is a national non-profit organization comprised of credit, collection and debt purchasing professionals who provide a wide variety of accounts receivable management services. *See* About ACA International, http://www.acainternational.org/about.aspx (last visited Nov. 14, 2011). ACA is a leading national advocate for debt collectors throughout the United States. ACA represents more than 5,000 third-party collection agencies, asset buyers, attorneys, credit grantors and vendor affiliates. ACA members include over 900 in-house, compliance, defense or collection attorneys. Together, ACA members employ close to 150,000 collectors. These members include the very smallest of businesses that operate within a limited geographic range of a single state, and the very largest of multinational corporations that operate in most every state as well as in non-U.S. jurisdictions. Approximately half of the company members of ACA maintain fewer than ten employees.

ACA contributes to the success of its members and the positive reputation of the credit and collection

industry through education, advocacy and services. The association establishes ethical standards; produces a wide variety of products, services and publications; and articulates the value of the credit and collection industry to businesses, policymakers and consumers.

ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education and service. As part of the process of attempting to recover outstanding accounts and balances, ACA members act as an extension of every community's businesses. They represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. Each year, the combined effort of ACA members results in the recovery of billions of dollars that are returned to businesses and then reinvested in local communities. Without an effective collection process, the economic viability of these businesses, and by extension, the United States economy in general, are threatened. At the very least, citizens would be forced to pay higher prices to compensate for uncollected debts. ACA members also assist governmental bodies in recovering unpaid obligations, a function that is increasingly important as many of our government clients face record budget deficits.

ACA has an interest in this case to provide the Court a national perspective on the importance of consistent interpretation of the FDCPA and the

application of a uniform standard in evaluating debt collection letters across the nation. ACA also has an interest in the broader law and policy that will govern future FDCPA cases. ACA wants to advise the Court of the effect of a circuit split on its members and the debt collection industry in general. ACA and its members are particularly concerned about the existence of an uncodified "meaningful involvement doctrine" affecting attorneys acting as debt collectors. Further, ACA has an interest in making sure that all of its members have an opportunity to compete on equal footing in the debt collection industry and that attorney debt collectors are not unfairly overburdened with additional regulation. ACA also has an interest in ensuring that there is uniformity in the regulation of its members' collection activities.

SUMMARY OF ARGUMENT

The Court should grant the Petition for a Writ of Certiorari to reaffirm the debt collection industry's practice of providing required information on the back of collection letters; to evaluate the uncodified "meaningful involvement doctrine" adopted by the United States Courts of Appeals for the Second, Third, Fifth and Seventh Circuits; to establish a uniform standard to determine whether a debt collection letter complies with the FDCPA; and to evaluate the application of that standard to determine whether the use of law firm letterhead accompanied by a disclaimer clearly stating that an attorney has not reviewed the consumer's file violates the FDCPA.

The Court should grant certiorari to settle a conflict that exists among the courts of appeals regarding the effectiveness of an attorney disclaimer on a debt collection letter. The decisions by the United States Courts of Appeals for the Third and Fifth Circuits rejecting the use of an attorney disclaimer because it appeared on the back of a collection letter create confusion in the debt collection industry regarding what, if anything, can appear on the back of collection letters. The Court needs to grant certiorari to reaffirm the debt collection industry's routine practice of providing required notices and information on the back of collection letters.

The United States Courts of Appeals for the Second, Third, Fifth and Seventh Circuits apply a bright-line rule that collection letters sent on attorney letterhead are false, misleading, deceptive and not "from" an attorney where an attorney was not "meaningfully involved" in a review of the consumer's file before distribution of the collection letter. The Court needs to grant certiorari to reject the adoption of an uncodified "meaningful involvement doctrine," which is not contained within the FDCPA and far exceeds the scope of the Act. Each collection letter must be reviewed on its own *in toto* in order to determine whether, as a whole, the collection letter is false, misleading or deceptive. Moreover, a disclaimer explaining that no attorney has personally reviewed the consumer's file should be given appropriate weight in that evaluation.

The United States Court of Appeals for the Second Circuit in *Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 360, 364-65 (2d Cir. 2005), expressly recognized that an implication by a consumer that an attorney formed an opinion about how to manage the case of the consumer to whom the collection notice was sent can be properly dispelled by utilizing language to the contrary. Collection letters should not be deemed to be in violation of the FDCPA simply because they are sent by an attorney or law firm. Instead, such letters should be found to comply with the FDCPA, so long as the letters do not contain false, misleading or deceptive language, or, in the absence of an appropriate disclaimer, do not overtly purport to come "from" an attorney when no attorney directly controlled or supervised the process through which the letter was sent.

The Court should also grant certiorari to create a uniform standard to apply in evaluating debt collection letters because the courts of appeals apply different standards, resulting in inconsistent decisions. The Court should apply that standard in determining whether the mere use of law firm letterhead accompanied by a disclaimer clearly stating that an attorney has not reviewed the consumer's file violates § 1692e of the FDCPA or any of its subsections.

Accordingly, ACA respectfully requests that the Court grant the Petition for a Writ of Certiorari.

LEGAL ARGUMENT

I. A Conflict Exists Among The Courts Of Appeals Regarding The Effectiveness Of An Attorney Disclaimer, Which Has Created Confusion In The Debt Collection Industry.

A. A Disparity Exists Among The United States Courts Of Appeals For The Second, Third And Fifth Circuits Regarding The Validity Of An Attorney Disclaimer On A Collection Letter.

The United States Court of Appeals for the Second Circuit has concluded that an express attorney disclaimer located on the front page of a collection letter overcomes any implied attorney involvement inferred by the consumer from the use of law firm letterhead. *See Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 360, 364-65 (2d Cir. 2005). The United States Courts of Appeals for the Third and Fifth Circuits have rejected the validity of the exact same attorney disclaimer when it appears on the back of a collection letter. *See Lesher v. Law Offices of Mitchell N. Kay, P.C.*, 650 F.3d 993, 1003 (3d Cir. 2011); (App. 21a-22a); *Gonzalez v. Kay*, 577 F.3d 600, 606-07 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1505 (2010). As a result of these decisions, a clear conflict exists among the courts of appeals regarding the effectiveness of an attorney disclaimer, especially where the disclaimer appears on the back of a collection letter. The conflict in authority requires the Court's attention because the Fair Debt Collection Practices Act, 15 U.S.C.

§§ 1692-1692p ("FDCPA" or the "Act"), regulates debt collection on a national basis and debt collectors regularly collect debt nationwide. The confusion created by the inconsistent circuit decisions leaves attorney debt collectors unsure about whether they can participate in routine debt collection without contravening the FDCPA.

In *Greco*, the United States Court of Appeals for the Second Circuit held that the "implication" of legal action invoked by the use of law firm letterhead is dispelled by an express disclaimer to the contrary. *Greco*, 412 F.3d at 364-65. The court provided the following guidance with respect to attorney participation in the debt collection process:

> [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.

Greco, 412 F.3d at 364. The court acknowledged that while a collection letter sent on law firm letterhead without any disclaimer implies to the consumer a certain level of attorney involvement, a clear disclaimer that explains the limited extent of the attorney's involvement in the collection of the consumer's debt can rectify a false implication of attorney involvement in the consumer's account. *Id.* at 364-65.

The attorney debt collector in *Greco* sent the consumer a collection letter on law firm letterhead. *Greco*, 412 F.3d at 361. The collection letter was not signed by an attorney, but the law firm's name was printed as a signature block at the bottom of the letter. *Id.* at 362. The collection letter included a disclaimer within the body of the letter that contained the following language: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account." *Id.* at 361.

The United States Court of Appeals for the Second Circuit found that in light of the disclaimer, "the least sophisticated consumer, upon reading this letter, must be taken to understand that no attorney had yet evaluated his or her case, or made recommendations regarding the validity of the creditor's claims." *Greco*, 412 F.3d at 365. Accordingly, the court held, as a matter of law, that the defendant law firm had not used any "false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, including the "false representation or implication that any individual is an attorney or that any communication is from an attorney," 15 U.S.C. § 1692e(3). *Id.*

The United States Courts of Appeals for the Third and Fifth Circuits held that the same disclaimer used in *Greco* did not effectively dispel the implication of attorney involvement when the disclaimer was located on the back of a collection letter printed on law firm

letterhead.[2] *See Lesher*, 650 F.3d at 1003; (App. 21a-22a); *Gonzalez*, 577 F.3d at 606-07. In *Gonzalez*, the United States Court of Appeals for the Fifth Circuit attempted to distinguish *Greco* based solely on the fact that the disclaimer was on the back of the letter. *Gonzalez*, 577 F.3d at 606-07. The court explained that the consumer reading the *Gonzalez* letter "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." *Id.* at 607. The court found that the location of the disclaimer on the back of the letter contradicted the message on the front of the letter, and therefore, the disclaimer was not effective. *Id.* Further, the court warned attorney debt collectors to state "clearly, prominently, and conspicuously" in their collection letters that "although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity." *Id.* at 607. The court's warning suggests that the court would have rejected the disclaimer even if it had appeared on the front of the collection letter.

In *Lesher*, the United States Court of Appeals for the Third Circuit reviewed the same form letter at issue in *Gonzalez*. *Lesher*, 650 F.3d at 1001; (App. 17a). The court held that the letters falsely imply that an attorney, acting as an attorney, was involved in

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[2] The disclaimer provides: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account." *Lesher*, 650 F.3d at 995; (App. 4a); *Gonzalez*, 577 F.3d at 602.

the collection of the consumer's debt. *Id.* at 1003; (App. 21a). The court stated that the disclaimers in the letters do not make it clear to the least sophisticated consumer that the law firm is acting solely as a debt collector and not in any legal capacity in sending the letters. *Id.*; (App. 22a). The court explained that, in its view, the disclaimer used in *Greco* "does little to clarify the [law firm]'s role in collecting the debt because it completely contradicts the message on the front of the letters[,]" namely, that the law firm was retained to collect the debt. *Id.* The court refused to address whether an attorney debt collector who sends a collection letter on attorney letterhead could ever comply with the FDCPA by including an appropriate disclaimer. *Id.*; (App. 23a).

While the United States Court of Appeals for the Second Circuit has approved the use of an attorney disclaimer, the effect of the decisions by the United States Courts of Appeals for the Third and Fifth Circuits is that the use of any attorney disclaimer, regardless of its location on the collection letter, will not dispel the implication of attorney involvement that arises from the use of law firm or attorney letterhead. Due to the clear conflict that exists among the United States Courts of Appeals for the Second, Third and Fifth Circuits regarding the validity of attorney disclaimers, the Court should grant certiorari to clarify the application of the FDCPA to collection letters sent by law firms and attorneys.

As recognized by the dissent in *Lesher*, the practical effect of the majority decision is that law firms

and attorneys take "an extraordinary risk" in sending a collection letter regardless of the content of the letter. *Lesher*, 650 F.3d at 1007 (Jordan, J. dissenting); (App. 30a). The Court should grant certiorari to determine whether disclaimers, similar to the one used in *Greco*, can be utilized by the attorney debt collector to dispel the implication of attorney involvement where no attorney had yet evaluated the consumer's case or made recommendations regarding the validity of the creditor's claims. Although the disclaimer must be evaluated within the scope of the entire collection letter, its use should be favored where appropriate. Until the Court clarifies the proper interpretation and application of the FDCPA to debt collection letters sent by law firms and attorneys, confusion and uncertainty will exist regarding the extent to which attorneys and law firms can legally participate in routine debt collection.

B. Decisions By The United States Courts Of Appeals For The Third And Fifth Circuits Declaring That An Attorney Disclaimer Cannot Appear On The Back Of A Collection Letter Creates Confusion In The Industry Regarding What, If Anything, Can Appear On The Back Of Collection Letters, Which Greatly Affects Interstate Commerce.

The United States Courts of Appeals for the Third and Fifth Circuits' rejection of the same attorney disclaimer language approved by the United States

Court of Appeals for the Second Circuit because, in part, it was located on the back of the collection letter, is of great concern to the debt collection industry. Debt collectors routinely provide required notices and information on the back of collection letters. The decisions in *Gonzalez* and *Lesher* threaten the industry's practice of providing other required notices and information on the back of collection letters.

The United States Courts of Appeals for the Second, Seventh, and Tenth Circuits have approved the industry's practice of providing required notices and information on the back of the collection letter so long as the front of the letter contains a conspicuous notice that important information is on the back. The United States Court of Appeals for the Second Circuit has held that the FDCPA does not require the validation notice required by § 1692g to be printed on the front of a collection letter. *See McStay v. I.C. System, Inc.*, 308 F.3d 188, 191 (2d Cir. 2002). The court explained "that 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." *Id.* at 191. Similarly, the United States Court of Appeals for the Seventh Circuit has concluded that the validation notice may be printed on the back of a collection letter. *See Sims v. GC Servs. L.P.*, 445 F.3d 959, 964-65 (7th Cir. 2006) ("prominent, red, bold, capital lettering that important consumer information was listed on the back" is adequate notice that the consumer should turn over the page). The United States

Court of Appeals for the Tenth Circuit has held that a debt collector does not violate the FDCPA where the validation notice is provided as an attachment to foreclosure pleadings. *See Ferree v. Marianos*, No. 97-6061, 1997 U.S. App. LEXIS 30361, at *7 (10th Cir. Nov. 3, 1997) ("Even the least sophisticated consumer receiving two communications in the same envelope, the first concerning a pending mortgage foreclosure action, would sufficiently examine the entire contents of the envelope, and uncover the enclosed validation notice.").

District courts have approved the industry's practice of providing required information on the back of collection letters so long as the front of the letter notifies the consumer that information is on the back. *See, e.g., Osborne v. RJM Acquisitions Funding, LLC*, 754 F. Supp. 2d 1309, 1311 (W.D. Okla. 2010) ("bold-face and conspicuous notice on front of the letter, which unmistakably directed debtor to view the validation language on the back of the letter, met statutory requirements and satisfied the least-sophisticated-consumer standard."); *Weber v. Computer Credit, Inc.*, 259 F.R.D. 33, 39 (E.D.N.Y. 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."); *Powell v. Computer Credit, Inc.*, 975 F. Supp. 1034, 1041-42 (S.D. Ohio 1997), *aff'd*, No. 97-3979, 1998 U.S. App. LEXIS 26797 (6th Cir. Oct. 15, 1998) (finding that notices on the back of a debt collection letter, if properly disclaimed on the front, are acceptable); *O'Connor v.*

Check Rite, Ltd., 973 F. Supp. 1010, 1015 (D. Colo. 1997) (holding collection letter did not violate the FDCPA where the "mini-Miranda" appeared on the back of the letter and the front of letter conspicuously referred consumers to back of letter for important information); *Higgins v. Capitol Credit Servs., Inc.*, 762 F.Supp. 1128, 1131-35 (D. Del. 1991) (ruling that a validation notice on the back of a collection letter does not violate the FDCPA where the front side provides "**See Reverse**").

Furthermore, courts have approved the use of content on the back of documents in contexts outside the FDCPA. *See, e.g.*, *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878-79 (8th Cir. 2009); *see also Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 176-77, 182 (3d Cir. 1999) (upholding arbitration clause that appeared "in small print on the back and near the bottom of the one page form contract"); *Frets v. Capitol Fed. Sav. & Loan Ass'n*, 712 P.2d 1270, 1277 (Kan. 1986) (ruling that a "due-on-sale clause" in a mortgage contract was not "buried in a mass of fine print" where it was contained "in the middle of 13 inches of fine print" and holding that it is "of little significance" that the text appeared on the back page). In *Fallo*, the court upheld an arbitration provision that appeared in fine print on the back of an enrollment agreement. *Fallo*, 559 F.3d at 879. The court explained that the agreement consisted of a single sheet of paper printed on both sides that set out basic terms, and the arbitration provision "was not hidden in unreadable fine print among these other terms." *Id.*

In light of the decisions in *Gonzalez* and *Lesher* rejecting the use of an attorney disclaimer, in part, because it was located on the back of the collection letter and the resulting confusion in the industry, the Court should grant certiorari to reaffirm the industry's practice of providing required notices and information on the back of collection letters, including attorney disclaimers.

II. The "Meaningful Involvement Doctrine," Adopted By The United States Courts Of Appeals For The Second, Third, Fifth And Seventh Circuits, Is A Legal Fiction And Is Not Contained Within The FDCPA.

The FDCPA provides that "a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The sixteen subsections of § 1692e provide a nonexhaustive list of practices that fall within the statute's ban. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). Specifically, the FDCPA prohibits the "false representation or implication that any individual is an attorney or that any communication is from an attorney." 15 U.S.C. § 1692e(3). The United States Courts of Appeals for the Second, Third, Fifth, and Seventh Circuits have interpreted § 1692e(3) to mean that an attorney who sends a collection letter must be directly and personally involved in the consumer's file or at least supervise the process through which the letter is sent in order to comply with the FDCPA. *See Lesher*, 650 F.3d

at 1003; (App. 21a-23a); *Gonzalez*, 577 F.3d at 602; *Greco*, 412 F.3d at 364-65; *Miller v. Wolfpoff & Abramsom, LLP*, 321 F.3d 292, 301 (2d Cir. 2003) ("some degree of attorney involvement is required before a letter will be considered 'from an attorney' within the meaning of the FDCPA"); *Nielsen v. Dickerson*, 307 F.3d 623, 635-38 (7th Cir. 2002); *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996). In effect, some of the courts of appeals have adopted an uncodified "meaningful involvement doctrine," which requires attorney debt collectors to personally review each consumer's file and each collection letter prior to its mailing. According to the doctrine, a collection letter sent on attorney or law firm letterhead is false, misleading, deceptive and not "from" an attorney where an attorney was not "meaningfully involved" in a review of the consumer's file before distribution of the letter.

The origin of the "meaningful involvement doctrine" can be traced back to the decision of the United States Court of Appeals for the Second Circuit in *Clomon v. Jackson*, 988 F.2d 1314. In *Clomon*, the court addressed whether mass-produced debt collection letters by an attorney violate the FDCPA. *Id.* at 1320-21. However, *Clomon* stands for nothing more than the proposition that attorneys may not send collection letters that are false, misleading or deceptive, and cannot give the impression that the letter is "from" an attorney where no attorney was involved in reviewing the consumer's file. In *Clomon*, the attorney debt collector sent collection letters that identified a specific individual attorney in three respects:

(1) the letters had letterhead which listed an attorney by name, "P.D. Jackson, G.C. Offices of General Counsel, Attorney-at-Law"; (2) the collection letters contained a signature line on the bottom of the letter in block letters, "P.D. JACKSON, ATTORNEY AT LAW, GENERAL COUNSEL, NCB COLLECTION SERVICES"; and (3) the collection letters contained a mechanically reproduced facsimile signature of the attorney above the block letters on the bottom of the letters. *Id.* at 1316-17.

After considering the collection letters in their entirety, the United States Court of Appeals for the Second Circuit held that the use of a specifically identified, individual attorney on the letterhead and on a signature line along with the attorney's signature implies that the collection letters are "from" the attorney who signed it and that the attorney "directly controlled or supervised the process through which the letter was sent." *Clomon*, 988 F.2d at 1316-17, 1320-21. As a result, the collection letters would give the least sophisticated consumer the impression that the letter was a communication from an individual attorney who was admitted to the bar and licensed to practice law. *See id.* at 1320. The court found that the use of an attorney's signature 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 consumer's case. *Id.* at 1320-21.

The United States Court of Appeals for the Second Circuit established the "meaningful involvement doctrine" in *Miller*, 321 F.3d at 301, and *Greco*, 412

F.3d at 364. In *Miller*, the court held that "some degree of attorney involvement is required before a letter will be considered 'from an attorney' within the meaning of the FDCPA." *Miller*, 321 F.3d at 301. In *Greco*, the court stated, "One cannot, consistent with FDCPA, mislead the debtor regarding meaningful 'attorney' involvement in the debt collection process." *Greco*, 412 F.3d at 364. The court explained:

> [A] letter sent on law firm letterhead, standing alone, does represent a level of attorney involvement to the debtor receiving the letter. And if the attorney or firm had not, in fact, engaged in that implied level of involvement, the letter is, therefore, misleading within the meaning of the FDCPA.

Id.

The United States Court of Appeals for the Seventh Circuit adopted the "meaningful involvement doctrine" in *Avila*, 84 F.3d at 229, and *Nielsen*, 307 F.3d at 635-38. In *Avila*, the court, relying on *Clomon*, held that collection letters printed on law firm letterhead and "signed" by an individual attorney implied that "an attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action" and that the attorney had some personal involvement in the decision to send the letter. *Avila*, 84 F.3d at 229. The court concluded that if a debt collector (attorney or otherwise) wants to take advantage of "the special connotation of the word 'attorney'" in collection letters, the debt collector should at least ensure that "an attorney has

become professionally involved in the debtor's file." *Id.* In *Nielsen*, the United States Court of Appeals for the Seventh Circuit held that an attorney must have some professional involvement with the consumer's file if a collection letter sent under his name is not to be considered false or misleading in violation of §§ 1692e(3) and (10). *Nielsen*, 307 F.3d at 635-38.

The United States Court of Appeals for the Fifth Circuit adopted the "meaningful involvement doctrine" in *Gonzalez*, 577 F.3d at 602. The court explained that "[a] letter from a lawyer implies that the lawyer has become involved in the debt collection process, and the fear of a lawsuit is likely to intimidate most consumers." *Id.* at 605. *Gonzalez* extended the holdings of *Clomon* and *Avila* to collection letters printed on law firm letterhead even where the letter does not contain an attorney signature.

Most recently, the United States Court of Appeals for the Third Circuit adopted the "meaningful involvement doctrine" in *Lesher*, 650 F.3d at 1003; (App. 21a-23a). The court held that the mere use of law firm letterhead to send a collection letter falsely implied that an attorney had reviewed the consumer's file and would potentially take legal action against him, when no attorney had actually reviewed the consumer's account. *Id.* at 995, 1003; (App. 2a, 21a-23a).

The "meaningful involvement doctrine" adopted by the United States Courts of Appeals for the Second, Third, Fifth and Seventh Circuits is not contained within the FDCPA. Instead, the doctrine exceeds the

scope of the Act. The Act's plain language does not require a particular level of involvement by an attorney before sending a collection letter. The creation and adoption of this doctrine despite the Act's clear wording warrant review by this Court. In order to comply with the FDCPA, attorneys must be cognizant of the manner in which they convey information and be accurate in their depiction of the level of their involvement in a consumer's account. Therefore, attorney debt collectors should only be required to take caution with respect to the content and format of their collection letters and the process through which the letters are sent. In effect, there is no such thing as a "meaningful involvement doctrine" separate and apart from the individual obligations of the FDCPA. Accordingly, the Court should grant certiorari to reject the "meaningful involvement doctrine."

III. The Court Should Grant Certiorari To Create A Uniform Standard To Apply In Evaluating Debt Collection Letters Because The Courts Of Appeals Apply Different Standards Resulting In Inconsistent Decisions.

The courts of appeals apply two different standards in FDCPA cases to determine whether a collection letter complies with the Act: the "least sophisticated consumer" and the "unsophisticated consumer." The United States Courts of Appeals for

the Second, Third, Sixth, Ninth, and Eleventh Circuits use the "least sophisticated consumer."[3] *See, e.g.*, *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 952 (9th Cir. 2011); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193-94 (11th Cir. 2010); *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 454 (3d Cir. 2006); *Clomon*, 988 F.2d at 1318-19; *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025, 1028 (6th Cir. 1992). The basic purpose of the least sophisticated consumer standard is to "ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." *Clomon*, 988 F.2d at 1318. It is a low standard that "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 quotations and citation omitted). Further, the least sophisticated consumer standard does not go so far as to protect "the willfully blind or non-observant." *Campuzano-Burgos v. Midland Credit Management, Inc.*, 550 F.3d 294, 299 (3d Cir. 2008). "Even the least sophisticated debtor is bound to read collection notices in their entirety." *Id.*

The United States Courts of Appeals for the Seventh and Eighth Circuits have expressly rejected the "least sophisticated consumer" standard. *See, e.g.*,

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[3] Courts also refer to this standard as the "least sophisticated debtor" standard.

Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057, 1060 (7th Cir. 2000) ("we have rejected the 'least sophisticated debtor' standard used by some other circuits because we don't believe that the unsophisticated debtor standard should be tied to 'the very last rung on the sophistication ladder.'"). Instead, the Seventh and Eighth Circuits use the "unsophisticated consumer" standard.[4] *Chuway v. Nat'l Action Fin. Servs.*, 362 F.3d 944, 948 (7th Cir. 2004); *Wilhelm v. Credico, Inc.*, 519 F.3d 416, 420 (8th Cir. 2008). The United States Court of Appeals for the Seventh Circuit has explained that the understanding of the unsophisticated consumer is "a more precise benchmark." *Chuway*, 362 F.3d at 949. The standard "assumes that the debtor is uninformed, naive, or trusting." *Id.* (internal quotations omitted). The standard is "designed to protect consumers of below average sophistication or intelligence." *Strand v. Diversified Collection Serv. Inc.*, 380 F.3d 316, 317 (8th Cir. 2004). The unsophisticated consumer is "not as learned in commercial matters as are federal judges, but neither is he completely ignorant." *Pettit*, 211 F.3d at 1060 (internal citation omitted). According to the unsophisticated consumer standard, "a statement will not be confusing or misleading unless a significant fraction of the population would be similarly misled." *Id.* (citing *Gammon v. GC Servs., Ltd. Partnership*, 27 F.3d 1254, 1260 (7th Cir. 1994) (Easterbrook, J., concurring)).

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[4] Courts also refer to this standard as the "unsophisticated debtor" standard.

Further, the unsophisticated consumer "possesses rudimentary knowledge about the financial world, is wise enough to read collection notices with added care, possesses 'reasonable intelligence,' and is capable of making basic logical deductions and inferences." *Pettit*, 211 F.3d at 1060.

Due to the existence of two standards applied by the courts of appeals in FDCPA cases, it is necessary for the Court to review these standards and adopt a uniform standard to be consistently applied nationwide. The use of two standards by the courts of appeals is confusing to the industry because of the inconsistent application of the FDCPA to collection letters. Debt collectors frequently conduct collection activities and send collection letters across state lines. The lack of a uniform standard to evaluate whether a collection letter complies with the FDCPA has created chaos for the industry. The Court should review the standards and determine the level of competency to be imposed on the consumer receiving debt collection letters.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in Petitioner's Petition for a Writ of Certiorari, ACA respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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