No. 13-12450

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

XILENA M. CACERES, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

McCALLA RAYMER, LLC,

Defendant-Appellee.

On Appeal from a Final Order of the
United States District Court for the Southern District of Florida
No. 1:13-cv-20035-JLK, Hon. James L. King, U.S.D.J.

BRIEF FOR APPELLANT

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September 10, 2013

No. 13-12450, *Caceres v. McCalla Raymer LLC*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Pursuant to Eleventh Circuit Rule 26-1, appellant provides the following list of persons who may have an interest in the outcome of this appeal:

Caceres, Xilena M.

Davidson, Barry R.

Hunton & Williams, LLP

Isani, Jamie Z.

King, James Lawrence (Sr. U.S.D.J.)

McCalla Raymer, LLC

Nelson, Scott L.

Owens, Scott D. (Scott D. Owens, P.A.)

Public Citizen Foundation, Inc. (Public Citizen Litigation Group)

Public Citizen, Inc.

2. Appellant is not a corporation, and so no corporate disclosure is required by FRAP or the Rules of this Court.

s/Scott L. Nelson
Scott L. Nelson

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument. This appeal involves two important questions under the Fair Debt Collection Practices Act (FDCPA). The first is whether a letter seeking to collect a debt and containing a debt validation notice that does not comply with the requirements of the FDCPA, 15 U.S.C. § 1692g, constitutes an "initial communication" triggering the debt validation notice requirements of the Act, or whether, as the district court held, the notice's alleged noncompliance is excused because the letter was related in part to a possible foreclosure action. The second question is whether it violates the FDCPA for a debt validation notice to say the "creditor" will assume the debt to be valid if it is not contested instead of saying, as the statute requires, that the "debt collector" will consider it valid. The district court's rulings on both these issues conflict with governing principles of FDCPA jurisprudence established by previous decisions of this and other federal appellate courts and with recent decisions of other district courts in this Circuit. This Court has not previously ruled on these precise questions, however, and oral argument would be helpful to the Court in resolving them.

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JURISDICTION

This action was filed by plaintiff-appellant Xilena Caceres in the United States District Court for the Southern District of Florida, asserting claims under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 *et. seq*. The district court had jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). On May 2, 2013, the district court entered a final order dismissing the complaint with prejudice for failure to state a claim on which relief may be granted. App. Tab 18.[1] On May 30, 2013, Ms. Caceres filed a timely notice of appeal from that final order in the form prescribed by Federal Rule of Appellate Procedure 4(a)(1). Doc. 19. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

(1) Does a letter from a debt collector seeking to collect a claimed debt and purporting to provide the debt validation notice required by the FDCPA, 15 U.S.C. § 1692g, constitute an "initial communication" from the debt collector and trigger § 1692g's requirement that the communication include a proper validation notice?

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[1] In this brief, "App." refers to the Appendix, and materials in the Appendix are cited by tab number and page or paragraph number within the item cited. "Doc." refers to docket entries listed in the district court docket found at App. Tab A.

(2) Does a debt validation notice that states that a debt, if not contested within 30 days, will be assumed valid by the *creditor*, instead of stating, as required by 15 U.S.C. § 1692g(a)(3), that it will be assumed valid by the *debt collector*, violate the FDCPA?

STATEMENT OF THE CASE

Course of the Proceedings and Disposition Below

In this action, plaintiff-appellant Xilena Caceres asserts claims under the FDCPA's private right of action, 15 U.S.C. § 1692k, for violations of the FDCPA's debt validation provision, 15 U.S.C. § 1692g. On January 6, 2013, Ms. Caceres filed her complaint (App. Tab 1) against defendant-appellee McCalla Raymer, LLC ("McCalla Raymer"), a law firm that engages in debt collection. Ms. Caceres alleged that McCalla Raymer was a debt collector that had made an "initial communication" to her within the meaning of the FDCPA concerning a debt that it was attempting to collect, but had failed to provide a validation notice satisfying the requirements of § 1692g. Specifically, Ms. Caceres claimed that McCalla Raymer's notice had violated the statutory requirement that it inform her that if she did not dispute the debt within 30 days, the *debt collector* would assume the debt was valid. 15 U.S.C. § 1692g(a)(3). The letter sent

to Ms. Caceres stated instead that the *creditor*—the party to whom the debt was allegedly owed—would assume the debt's validity if she failed to dispute it in that time. Ms. Caceres alleged that McCalla Raymer had likewise violated the FDCPA in its notices to other claimed debtors, and she sought to represent a class of other similarly situated persons who had received improper notices from McCalla Raymer.

On February 26, 2013, McCalla Raymer filed a motion to dismiss the complaint. Doc. 9. Ms. Caceres filed an amended complaint on March 15, 2013 (App. Tab 10), and on March 19, 2013, District Judge King filed an order denying the motion to dismiss as moot. Doc. 11. On April 1, 2013, McCalla Raymer again moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief may be granted. Doc. 12.

Following full briefing by the parties, Judge King granted the motion to dismiss by order entered on May 2, 2013. App. Tab 18. Judge King ruled that the complaint failed to state a claim on which relief could be granted because (1) in his view there had been no "initial communication" from McCalla Raymer that triggered the validation notice requirement under § 1692g, and (2) the validation notice was in any event not

unlawful because, in Judge King's view, the difference between saying the debt would be assumed valid by the debt collector and saying it would be assumed valid by the creditor was immaterial. Judge King's order dismissed the complaint with prejudice. On May 30, 2013, Ms. Caceres noticed this timely appeal. Doc. 19.

Statement of the Facts

1. Statutory Background and the FDCPA's Debt Validation Notice Requirement.

The Fair Debt Collection Practices Act was enacted in 1977 on the basis of Congress's determination that there was "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Congress found that these practices harmed the public in a variety of ways, *id.*, that "[e]xisting laws and procedures for redressing these injuries [were] inadequate to protect consumers," *id.* § 1692(b), and that abusive debt collection practices were carried out through and substantially affected interstate commerce. *Id.* § 1692(d). Accordingly, Congress enacted 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." *Id*. § 1692(e).

Congress sought to achieve these ends by imposing a number of restrictions and requirements on the activities of "debt collectors"—that is, those in the business of collecting debts owed to others. The FDCPA broadly defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).

In contradistinction to the statutory definition of debt collectors as persons whose business is to collect debts *owed to others*, the statute defines the term "creditor" to describe those to whom debts are actually owed: "The term 'creditor' means any person who offers or extends credit creating a debt or to whom a debt is owed …." *Id*. § 1692a(4). The separation between *creditors* to whom debts are owed and *debt collectors* who collect debts on their behalf is emphasized by the statutory proviso that only creditors who "use[] any name other than [their] own which would indicate that a third person is collecting or attempting to collect

such debts" are treated as debt collectors under the FDCPA. *Id*. § 1692a(6).[2]

One of the ways the FDCPA seeks to achieve its purpose of preventing abusive debt collection practices is to prescribe information that a debt collector must provide to a consumer along with, or closely following, the "initial communication" from a debt collector to a consumer aimed at collecting a claimed debt. *See* 15 U.S.C. § 1692g(a). The statute broadly defines the term "communication" to mean "the conveying of information regarding a debt directly or indirectly to any person through any medium." *Id*. § 1692a(2). The FDCPA does not separately define "initial" or "initial communication," but the term "initial" has only one relevant meaning: first. The statutory notice requirements thus are triggered by the first communication between the debt collector and the consumer that is related to collection of a debt.

The purpose of the FDCPA's notice requirement is not only to provide the consumer with information about the debt that the collector

[2] The distinction between creditors and debt collectors is also underscored by the exclusion from the definition of "creditor" of any person to whom a debt is owed only "because of an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4).

claims is owed, *see id*. § 1692g(a)(1)–(2) & (5), but also to enable the consumer to dispute the validity of the debt. *See id*. §§ 1692g(a)(4), (b). If the consumer does so, the debt collector must suspend efforts to collect the debt until it has obtained either verification of the debt from the creditor or a copy of any relevant judgment and has mailed it to the consumer. *See id.* § 1692g(b).

Section 1692g(a) defines with precision both *when* notice must be provided (in the initial communication or within 5 days after it) and *what* that notice must contain:

> 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.

Id. § 1692g(a).

The FDCPA provides a private right of action for consumers who have been subjected to violations of its terms by debt collectors, including violations of the notice requirements of § 1692g. *See* 15 U.S.C. § 1692k. In such an action, a person with respect to whom a debt collector failed to comply with the FDCPA's requirements may recover any actual damages sustained, statutory damages of up to $1,000 per violation, and reasonable attorneys' fees. *Id*. §§ 1692k(a)(1)–(3). In class actions, statutory damages are subject to a cap of $500,000 or 1% of the debt collector's net worth. *Id*. § 1692k(a)(2)(B).

2. McCalla Raymer's Initial Communication with Xilena Caceres.

The defendant-appellant, McCalla Raymer, LLC, is a law firm organized as a Georgia Limited Liability company, with offices in Alabama, Georgia and Florida. App. Tab 10 at ¶ 4.. McCalla Raymer is engaged in the business of collecting consumer debts on behalf of creditors. *Id.* at ¶¶ 4–6. Its website boasts that it is "[a] national leader in the residential

mortgage default industry which specializes in: Bankruptcies, Foreclosures, Litigation, REO & Eviction Services." *Id*. at ¶ 7. McCalla Raymer is a debt collector within the meaning of the FDCPA. *Id.* at ¶¶ 6, 8.

Xilena Caceres is a citizen of the State of Florida residing in Miami-Dade County. *Id.* at ¶ 3. On October 19, 2012, McCalla Raymer sent Ms. Caceres a demand letter seeking to collect an alleged debt. *Id*. at ¶ 10; App. Tab 10-1. The letter stated that Ms. Caceres was in arrears on her residential mortgage and owed the creditor, identified as Reverse Mortgage Solutions, Inc., a total of $269,786.81. App. Tab 10-1 at 1. The letter provided Ms. Caceres with a phone number to call to make payment arrangements, and it informed her that if she provided the $269.786.81 in "certified funds," an adjustment might be necessary because of "interest, late charges, and other charges that may vary from day to day." *Id*. at 2. In that event, the letter stated, "we will inform you before depositing the check for collection." *Id*. The letter stated that McCalla Raymer was engaged in "[c]ollection efforts," and it stated unequivocally that "[t]his communication is for the purpose of collecting a debt." *Id*. The letter was McCalla Raymer's first communication with Ms. Caceres concerning collection of the claimed debt. App. Tab. 10 at ¶ 18.

The letter set forth some of the information required in or within five days of an initial communication under the FDCPA. It stated the amount of the claimed debt and the name of the creditor, as required by 15 U.S.C. §§ 1692g(a)(1)–(2). App. Tab 10-1 at 1. And it purported to summarize the consumer's right to dispute the debt and to receive information from the debt collector if she did so, as required by §§ 1692g(a)(3)–(5). App. Tab 10-1 at 1–2. In an important respect, however, it altered the required disclosure. Although the FDCPA provides that the required disclosures must inform the consumer that if she fails to dispute the debt within 30 days, "the debt will be assumed to be valid by the debt collector," 15 U.S.C. § 1692g(a)(3), the letter McCalla Raymer sent Ms. Caceres stated instead that if she did not dispute the debt within 30 days, "the debt will be assumed valid by the *creditor*." App. Tab 10-1 at 1 (emphasis added). In other words, instead of merely stating that the debt collector would proceed on the assumption that the debt was valid absent notice within 30 days, the letter informed Ms. Caceres that the company to whom she allegedly owed the money would be deaf to any effort to dispute the debt if it were not made within 30 days.

McCalla Raymer's demand letter was not accompanied by service of any papers initiating a lawsuit. Although the letter's subject-line included the words "Reverse Mortgage Solutions, INC. vs. XILENA CACERES," it did not identify the docket number or provide other identifying information concerning any lawsuit bearing that caption. App. Tab 10-1 at 1. The public records of the Probate Court of Miami-Dade County, in which a foreclosure action was later filed against Ms. Caceres by the creditor, show that the case was not filed until October 22, 2012 (three days after the dunning letter from McCalla Raymer), and that the complaint was not served until October 24.[3] The demand letter does not even state that a lawsuit will be filed, although it confusingly refers to the creditor at one point as the "plaintiff" and says in its final paragraph that Ms. Caceres's "validation rights" do not expire for 30 days even though she is "required to file a response to the lawsuit" before that time. App. Tab 10-1 at 2.

[3] The public docket information concerning that action, of which this Court can take judicial notice, can be accessed at the website https://www2.miami-dadeclerk.com/civil/Search.aspx, by conducting a search by "local docket number" and entering 2012-41494-CA-01.

3. The District Court's Opinion.

In its decision dismissing Ms. Caceres's complaint alleging that McCalla Raymer's demand letter violated the FDCPA and seeking to represent a class of others subject to similar violations, the district court relied on two alternative grounds of decision. First, the court held that the FDCPA's notice requirements were not triggered by the McCalla Raymer demand letter. Relying on the principle that the service of a "legal action or pleading" is not an initial communication under the FDCPA, *Vega v. McKay*, 351 F.3d 1334, 1337 (11th Cir. 2003), and on a nonprecedential decision of this Court extending that principle to communications "from a foreclosing party or its counsel regarding the foreclosure," *Clark v. Shapiro & Pickett, LLP*, 452 F. Appx. 890, 895 (11th Cir. 2012), the court held that the demand letter, although filed in advance of any lawsuit and on its face representing an attempt to collect the debt outside of litigation, was not an initial communication under the FDCPA. App. Tab 18 at 4–5. Thus, even though the inclusion of a flawed version of the FDCPA's validation notice reflected the sender's own belief that the letter was an initial communication subject to the notice requirements, the court held that those requirements were never triggered.

Second, the court held that even if the notice requirements applied, the letter did not violate those requirements when it stated that the creditor, rather than the debt collector, would consider the debt valid if not contested within 30 days. The court acknowledged that under the FDCPA, a statutory notice is improper if it would "mislead the least sophisticated consumer regarding the nature of their rights in contesting the debt." App. Tab 18, at 5. But because the debt collector here was an attorney and hence an agent of the creditor, and an attorney's acts are generally attributed to his client, the court found that the letter "could not be reasonably … interpreted as confusing to the least sophisticated consumer." *Id.* at 6.

Standard of Review

The correctness of a district court's dismissal of a complaint for failure to state a claim on which relief may be granted is a question of law that this Court reviews *de novo*. *Miyahira v. Vitacost.com, Inc.*, 715 F.3d 1257, 1265 (11th Cir. 2013). In conducting such review, this Court construes the complaint in the light most favorable to the plaintiff and "accept[s] all well-pleaded facts that are alleged therein to be true." *Id*. The district court's dismissal of the complaint must be reversed if the

complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007))). Questions of statutory construction that bear on whether the complaint states a claim for relief are purely legal matters subject to *de novo* review. *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009).

SUMMARY OF ARGUMENT

Both of the district court's alternative holdings were erroneous. The court's conclusion that the validation notice requirements of 15 U.S.C. § 1692g(a) were never triggered because the complaint alleged no "initial communication" failed to recognize that the McCalla Raymer letter itself was an "initial communication." The letter was a communication under the statute because it conveyed information concerning a debt, stated on its face that its purpose was to collect a debt, and was the first such communication from a debt collector, McCalla Raymer, to a consumer, Ms. Caceres. Moroever, the letter fell well outside the Act's provision excluding "formal legal pleadings" from the category of "initial

communications" that trigger the notice requirement. *See* 15 U.S.C. § 1692g(d).

This Court's decision in *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012), confirms that such a communication from a debt collector to a consumer is subject to the FDCPA. *Reese* holds that a debt collector's communication falls under the FDCPA as long as it is *in part* related to the collection of a debt—a standard more than satisfied here. The district court's erred in basing its contrary conclusion on this Court's opinion in *Vega*, 351 F.3d 1334, and its nonprecedential decision in *Clark*, 452 F. Appx. 890. *Vega* held that pleadings that formally initiate a lawsuit are not initial communications (a holding subsequently incorporated in the narrow statutory exclusion for formal pleadings). *Clark* ruled that a letter that merely informed the occupant of a dwelling about the consequences of a foreclosure proceeding was not related to the collection of a debt. Neither ruling is applicable to a letter that on its face was aimed at collecting a debt and that had no connection to any pending lawsuit or foreclosure action.

The district court's alternative holding that the complaint failed to allege an actionable violation of § 1692g(a)'s notice requirements was

equally erroneous. Instead of telling Ms. Caceres that a failure to dispute the debt within 30 days would entitle the *debt collector* to assume the debt's validity, as the statute requires, the letter stated that the *creditor* would assume the debt's validity if Ms. Caceres did not dispute it. Creditors and debt collectors are distinct under the FDCPA, and this Court held in *Bourff v. Rubin Lublin, LLC*, 674 F.3d 1238, 1241 (11th Cir. 2012), that confusing the two in a validation notice is "a serious matter." The phrasing of the McCalla Raymer letter would likely confuse an unsophisticated consumer—or even a sophisticated one—into thinking not just that the debt collector would assume the debt's validity for purposes of carrying out its activities, but that the creditor itself would not be open to discussing the debt's validity after the 30-day period. As another district court in this Circuit recently concluded in a well-reasoned analysis of the issue, the substitution of the term "creditor" for "debt collector" in this part of a validation notice "could mislead the least-sophisticated consumer" and is therefore actionable under the FDCPA. *Iyamu v. Clarfield, Okon, Salomone, & Pincus, P.L.*, __ F. Supp. 2d __, 2013 WL 3192038 at *3 (S.D. Fla. June 24, 2013).

ARGUMENT

I. The Letter from McCalla Raymer to Ms. Caceres Was an "Initial Communication" Triggering the FDCPA's Validation Notice Requirements.

A. The Plain Language of the FDCPA Demonstrates That the Letter Was an "Initial Communication."

The district court's holding that no "initial communication" triggered the FDCPA's validation notice requirements in this case is incorrect as a matter of law. McCalla Raymer's letter to Ms. Caceres, aimed at informing her that she owed a debt and attempting to collect that debt, falls squarely within the statute's definition of a "communication," and Ms. Caceres properly alleged that it was the first communication about the debt she received from McCalla Raymer. Because the letter was an initial communication, the statute required that it either contain or be followed within five days by the required disclosures.

In cases under the FDCPA, as in all other cases involving statutory construction, a court's analysis "begins where all such inquiries must begin: with the language of the statute itself." *Reese*, 678 F.3d at 1216 (quoting *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989)). As noted above, a "communication" under the FDCPA is "the conveying of information regarding a debt directly or in-

directly to any person through any medium." 15 U.S.C. § 1692a(2). The letter at issue on its face conveyed information regarding a debt: It told Ms. Caceres that she owed a debt, to whom she was said to owe it, how much she owed, and how to arrange for payment. The letter thus fell squarely within the statute's broad definition of a "communication."

The statute's clear terms make it equally evident that this communication was an "initial communication" from a "debt collector" to a "consumer" "in connection with the collection of [a] debt" within the meaning of the FDCPA's debt validation notice provision, 15 U.S.C. § 1692g(a). The district court did not suggest that the complaint did not adequately allege that McCalla Raymer is a debt collector—a term that encompasses any person who "regularly collects or attempts to collect debt," *id*. § 1692a(6), and that includes lawyers and law firms that regularly seek to collect debts, including through litigation. *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995); *Reese*, 678 F.3d at 1218. Moreover, Ms. Caceres is clearly a "consumer"— "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3).

The communication was also "in connection with the collection of [a] debt," *id*. § 1692g(a), as it not only conveyed information about the

debt but, as it expressly said, did so "for the purpose of collecting a debt." App. Tab 10-1 at 2. To that end, it provided information to Ms. Caceres about whom to contact to determine the exact amount due at any given time to allow her to make payment in certified funds. As in *Reese*, "[i]n light of all that language stating that the law firm is attempting to collect a debt, the complaint sufficiently alleges that the notice is a communication related to 'the collection of [a] debt' …." *Reese*, 678 F.3d at 1217; *see also Bourff v. Rubin Lublin LLC*, 674 F.3d at 1241 (holding that FDCPA requirements applied to a law firm's letter stating that it was "an attempt to collect a debt").

Moreover, although the FDCPA does not define "initial," the term has an unambiguous meaning in this context: "1: of or relating to the beginning **:** INCIPIENT <his *initial* reaction> 2: placed at the beginning **:** FIRST <the *initial* word of the verse>." *Merriam Webster Online Dictionary*, www.merriam-webster.com/home-aol.htm. The "initial communication" from a debt collector to a consumer thus refers unambiguously to the first communication providing information about the debt, and there is no dispute that the complaint properly alleges that McCalla

Raymer's letter to Ms. Caceres was its first communication about the claimed debt.

The FDCPA's validation notice provision excludes only two types of "communications" from the category of "initial communications" that trigger the validation notice requirements of 15 U.S.C. § 1692g(a): legal pleadings, and notices regarding privacy rights and data security breaches that are required by law and not provided in connection with debt collection efforts. *See id*. §§ 1692g(d) & (e). As to the former, the exclusion is narrowly limited to formal civil 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)." *Id*. § 1692g(d). The letter from McCalla Raymer to Ms. Caceres was not a legal pleading of any kind, nor could it conceivably qualify for the exclusion of privacy or data security notices.

Importantly, nothing in the FDCPA suggests that a letter that purports to set out the required validation notice cannot also be the "initial communication" that triggers the notice requirements. Indeed, the Act explicitly provides that the "initial communication" and the required notice may be one and the same communication. Specifically, it requires a

separate notice within five days "*unless the [required] information is contained in the initial communication*." *Id*. § 1692g(a) (emphasis added). Thus, if the debt collector and a consumer have had no prior communication, a letter, like the one in this case, that provides *some* of the information required by § 1692g(a) and that relates to collection of the debt triggers the requirement that *all* the information be correctly provided, because such a letter meets the statutory definition of a "communication"—that is, it conveys information about the debt—and it is the first such communication.

The plain terms of the statute thus contradict the district court's conclusion that the letter in this case was not an "initial communication" triggering the statutory notice requirements. Decisions of this Court, as well as other federal appellate decisions, confirm the plain import of the statutory language. As this Court has recognized, the FDCPA is "extraordinarily broad." *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1191 (11th Cir. 2010) (quoting *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 611 (6th Cir. 2009)). Other circuits have likewise emphasized that "[t]he FDCPA is a remedial statute, and we construe its language broadly so as to effect its purposes." *Allen ex rel. Martin v. LaSalle Bank,*

N.A., 629 F.3d 364, 367 (3d Cir. 2011). As the Sixth Circuit has put it, "Our actions are guided by the hand of Congress, and thus we apply the Act broadly according to its terms." *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355, 362 (6th Cir. 2012).

In particular, courts have recognized that the Act "defines a 'communication' expansively," and that definition should be construed in accordance with its breadth. *Allen,* 629 F.3d at 368; *see also Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232 (4th Cir. 2007). The requirement in § 1692g(a) that the communication be "in connection with the collection of [a] debt" similarly requires a "commonsense inquiry" into whether the communication reflects an "attempt to collect a debt." *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 385 (7th Cir. 2010). Thus, as the Second Circuit held in *Romea v. Heiberger & Associates*, 163 F.3d 111 (1998), if a communication "convey[s] 'information regarding a debt'" and its "aim" is "at least in part to induce [the debtor] to pay," it falls within the scope of the FDCPA regardless of whether it may have had other purposes as well. *Id*. at 116.

This Court adopted the reasoning of *Romea* in *Reese*, holding that a communication that is even partly aimed at collecting a debt is "in con-

nection with the collection of [a] debt" under the FDCPA, even if it also arguably has other purposes, such as giving notice of an attempt to enforce a security interest. *Reese*, 678 F.3d at 1218, 1219. The letter at issue here falls squarely within the holding of *Reese*.

B. The District Court's Reliance on *Vega* and *Clark* Was Misplaced: The FDCPA Does Not Exempt All Communications That Refer to the Possibility of Legal Action or Foreclosure.

The district court's conclusion that the McCalla Raymer letter fell outside the scope of the FDCPA's notice requirement rested not on the terms of the statute itself, but instead on two decisions of this Court, one precedential and one not, that are completely inapposite: *Vega v. McKay*, 351 F.3d 1334, and *Clark v. Shapiro & Pickett, LLP*, 452 F. Appx. 890. Neither decision supports exempting a communication from the FDCPA's requirements just because it relates in part to a possible lawsuit or foreclosure proceeding.

1. *Vega* Excludes Only Formal Legal Pleadings from the Notice Requirement.

In *Vega*, this Court held that the filing and service of formal pleadings commencing a legal action against a debtor "did not constitute an 'initial communication' within the meaning of the FDCPA." 351 F.3d at

1337. After a conflict among the circuits arose over the point, *see Goldman v. Cohen*, 445 F.3d 152 (2d Cir. 2006) (holding that pleadings initiating a lawsuit were an "initial communication"); *Thomas v. Law Firm of Simpson & Cybak,* 392 F.3d 914 (7th Cir. 2004) (same), Congress resolved the issue consistently with the holding in *Vega* by amending the FDCPA to add subsection (d) of § 1692g, providing that "[a] communication in the form of a *formal legal pleading* shall not be treated as an initial communication for purposes of subsection (a)" (emphasis added).

Neither *Vega* nor the statutory language incorporating its holding supports the district court's ruling. The letter here, which, by its own terms, was for the purpose of collecting a debt and instructed Ms. Caceres how to satisfy the claimed debt *outside* the litigation process, was not a legal pleading and was not accompanied by any legal pleadings. Indeed, although the letter referred obliquely to litigation, neither the creditor nor the debt collector had filed any proceeding in any court against Ms. Caceres at the time McCalla Raymer sent it. At most, the letter conveyed a threat or warning that a legal proceeding of some kind was imminent. Inclusion of a warning about imminent legal proceedings in a communication that attempts to collect a debt, however, does not trans-

form that communication "into something other than an effort to collect that debt." *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005), *cited with approval in Reese*, 678 F.3d at 1218.

Neither *Vega* nor the statute supports the view that a dunning letter that merely mentions possible or imminent litigation cannot be an "initial communication." *Vega* held that actually *initiating* a legal action is outside the scope of § 1692g(a)—and nothing else. Congress, in codifying that result, limited the exception it created to communications "in the form of a formal legal pleading." 15 U.S.C. § 1692g(d). By carefully specifying that only *formal legal pleadings* are outside the coverage of § 1692g(a), Congress excluded any possibility that other communications that are not formal legal pleadings but merely refer in some way to possible litigation are similarly outside § 1692g(a).

As this Court has recognized, "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference ... is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Jian le Lin v. U.S. Atty. Gen.*, 681 F.3d 1236, 1240 (11th Cir. 2012). By creating an exception to § 1692g(a)'s requirements for litigation-related commu-

nications that is limited by its terms to *formal pleadings*, the statute forecloses the creation of ad hoc exceptions for other communications that relate in some way to litigation. Construing *Vega* to imply some broader exemption for communications that are in some way arguably related to possible litigation not only would render the precise language of section 1692g(d) superfluous, but would also effectively negate the Supreme Court's holding in *Heintz* that debt-collection activities of attorneys, including litigating attorneys, are subject to the FDCPA. *See Hartman*, 569 F.3d at 615–16.

Moreover, other provisions of the Act make clear that communications that give notice of the possibility of legal action against the consumer if a debt is not paid are communications "in connection with the collection of [a] debt" within the meaning of § 1692g(a). Section 1692c, which imposes other restrictions on communications in connection with the collection of a debt and prohibits such communications outright if the consumer requests that the debt collector cease communications, contains an exception to that prohibition for communications "to notify the consumer that the debt collector or creditor may invoke specified remedies" or "intends to invoke a specified remedy." 15 U.S.C.

§ 1692c(c). By providing a limited exception for such communications, § 1692c(c) makes clear that they otherwise fall within the scope of communications in connection with debt collection within the meaning of the FDCPA.

Section 1692g, unlike § 1692c(c), contains no exception for such communications. That omission provides a strong indication that Congress intended § 1692g to cover initial communications that warn of impending legal action if the debtor does not pay, because "[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." *Tovar v. U.S. Atty. Gen.*, 646 F.3d 1300, 1306 (11th Cir. 2011) (quoting *Russello v. United States,* 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983)). Reading *Vega* broadly to cover not only communications that formally initiate legal action but also those that mention the imminence of legal action would be contrary to that congressional intention.

2. The Outcome Here Is Controlled Not by the Nonprecedential Decision in *Clark*, but by the Precedential Opinion in *Reese*.

The district court's reliance on this Court's nonprecedential opinion in *Clark* was even further off the mark. *Clark* held that a notice addressed to the "occupant" of a dwelling concerning the effect of a foreclosure proceeding on occupancy rights was not a communication from a debt collector to a consumer in connection with the collection of a debt. As described in the Court's opinion, the letter was not in any way aimed at *collecting* the debt that gave rise to the foreclosure proceeding, but merely described consequences the proceeding had for anyone occupying the property (whether that person was the consumer/debtor or not): "Nothing in the letter suggested that it was an 'initial communication with a consumer in connection with the collection of any debt.'" *Clark*, 452 F. Appx. at 895. Rather, the court concluded, "the letter was a communication from the counsel of a foreclosing party regarding a foreclosure," and, because it was limited to that subject and was not for the

purpose of collecting a debt, it was not an "initial communication" under § 1692g(a). *Id.*[4]

Clark does not support a holding that the letter in this case was not an "initial communication" under § 1692g(a). The letter McCalla Raymer sent Ms. Caceres did not say anything about a foreclosure proceeding and used the term "foreclosure" only with reference to the "department" at McCalla Raymer with whom she should communicate about the claimed debt. And, as the district court recognized, it is undisputed that no foreclosure proceeding was pending at the time of the letter. App. Tab 18, at 2. As one district court in this circuit has recently recognized, the argument that communications regarding foreclosure proceedings are outside the scope of the FDCPA has no force in the absence of any pending foreclosure proceedings that a communication could concern. *See Ingram v.*

[4] In *Clark*, the alleged noncompliance with § 1692g(a) was that a validation letter was not sent within the required 5-day period if measured from the letter to the "occupant." A validation letter had, however, been sent later. The court in *Clark* appeared to recognize that the validation letter itself was an initial communication, but noted that there was no violation because the letter contained all the information required by § 1692g(a). *See* 453 F. Appx. at 895. In that respect, *Clark* supports the view that the letter in this case, which provided some of the § 1692g(a) information, was an initial communication.

Wells Fargo Bank, N.A., 2012 WL 252886, at *3 (M.D. Fla. Jan. 26, 2012).

More importantly, even if the letter, by virtue of its references to the possibility of the creditor's eventually obtaining an "in rem" judgment against Ms. Caceres and to McCalla Raymer's "foreclosure department," could be construed as related in part to an impending foreclosure proceeding—and even if *Clark* applied to communications about *impending* as opposed to actually *pending* foreclosure proceedings—the letter would still qualify as an "initial communication." As in this Court's precedential opinion in *Reese*, the letter did not *exclusively* concern an effort to enforce a security interest through foreclosure, but, on its face, also sought to collect a debt from the consumer. *See Reese*, 678 F.3d at 1217–18. And just as in *Reese*, the letter referred not to a *security interest*, but to Ms. Caceres's alleged *personal liability on a promissory note*, which is without doubt a debt under the FDCPA. *See id.* at 1216–17.

The letter also told her that (unless she was bankrupt) she could eventually be subject to a personal judgment, as well as the foreclosure of a security interest, if she did not pay the debt. It described the amount of the debt, said that efforts to collect it were under way and would contin-

ue, told Ms. Caceres how to arrange payment of the underlying debt in certified funds, and acknowledged that the communication was "for the purpose of collecting a debt." App. Tab 10-1 at 2. In short, the letter had all the hallmarks of a debt-collection communication that the Court found lacking in *Clark* but that were present in *Reese*. Under *Reese*, the letter must be regarded as a communication "in connection with the collection of [a] debt" under the FDCPA regardless of whether it also was related to a potential foreclosure on a security interest: "The fact that the letter and documents [may] relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of [the FDCPA]." *Reese*, 678 F.3d at 1217.

As this Court observed in *Reese*, a contrary holding, which would exempt from the FDCPA's requirements "any communication that attempts to enforce a security interest regardless of whether it also attempts to collect the underlying debt," "would create a loophole in the FDCPA. A big one." *Id*. at 1217–18. *Reese* flatly refused to create such a loophole:

> The practical result [of such a loophole] would be that the Act would apply only to efforts to collect unsecured debts. So long as a debt was secured, a lender (or its law firm) could harass or mislead a debtor without violating the FDCPA. That can't be

> right. It isn't. A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest. A debt is still a "debt" even if it is secured.

Id. at 1218 (citing cases). *Reese* forecloses reliance on *Clark*'s limited (and nonprecedential) holding to place the letter in this case outside the reach of the FDCPA.[5]

II. The McCalla Raymer Letter Violated Section 1692g(a)'s Notice Requirements.

The district court's alternative holding that Ms. Caceres's complaint failed to allege a violation of § 1692g(a)'s notice requirements is also erroneous as a matter of law. This Court's precedents establish that an initial communication that deviates from the disclosure requirements

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[5] Because the letter here was at least in part an effort to collect a debt through means other than the enforcement of a security interest, this Court need not in this case (as it did not have to in *Reese*) decide whether communications that *exclusively* concern enforcement of security interest are outside the reach of the FDCPA. *See Reese*, 678 F.3d at 1218 n.3. Although certain of this Court's nonprecedential decisions might be read to suggest that such communications are beyond the scope of the FDCPA, *see Warren v. Countrywide Home Loans, Inc.*, 342 F. Appx. 458 (11th Cir. 2009); *Acosta v. Campbell*, 309 F. Appx. 315 (11th Cir. 2009), the adoption of that position in a precedential opinion would be at odds with the FDCPA's broad scope and place this Court in conflict with other circuits. *See Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 459–65 (6th Cir. 2013) (holding, in agreement with the Fourth and Third Circuits, that mortgage foreclosure is debt collection for purposes of the FDCPA). As *Reese* makes clear, this Court has not decided that issue.

set forth in § 1692g(a) is an actionable violation of the FDCPA if the variance is such that it would tend to mislead the "least-sophisticated consumer." *LeBlanc v. Unifund CCR Partners,* 601 F.3d at 1194; *Jeter v. Credit Bur., Inc.,* 760 F.2d 1168, 1172–75 (11th Cir. 1985). That standard reflects the fundamental principle that the "law was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous.'" *LeBlanc*, 601 F.3d at 1194 (citations omitted). As the Second Circuit, which applies the same standard, has explained, the "critical question is … whether the notice fails to convey the required information 'clearly and effectively and thereby makes the least sophisticated consumer uncertain' as to the meaning of the message." *DeSantis v. Computer Credit, Inc.*, 269 F.3d 159, 161 (2d Cir. 2001) (citation omitted).

Here, the McCalla Raymer letter purported to inform Ms. Caceres that if she failed to dispute the validity of the claimed debt within 30 days, the *creditor* would thereafter assume the validity of the debt. The Act, however, requires that such a letter inform the consumer that the *debt collector* may assume the debt's validity. *See* 15 U.S.C. § 1692g(a)(3). The letter violated the FDCPA because an unsophisticated consumer—

indeed, even a sophisticated one—could misunderstand the consequences of not disputing the debt as a result of McCalla Raymer's substitution of the term "creditor" for the very different term "debt collector."

In treating the letter's error as inconsequential, the district court ignored the fundamental distinction the Act draws between "creditors" and "debt collectors." Indeed, the two categories are "mutually exclusive." *Bridge v. Ocwen Fed. Bank*, 681 F.3d at 359; *FTC v. Check Investors, Inc.,* 502 F.3d 159, 173 (3d Cir. 2007); *Schlosser v. Fairbanks Capital Corp.,* 323 F.3d 534, 536 (7th Cir. 2003). The distinction is critical because it determines the applicability of the legal requirements imposed by the FDCPA, which apply to debt collectors, not to creditors. *See id*. The distinction is also a matter of great practical significance to consumers, as the creditor is generally the party whose demands a consumer must ultimately satisfy if he or she in fact owes a debt, while the debt collector generally does not own the debt. *See* 15 U.S.C. §§ 1692a(4) & (6) (definitions of "creditor" and "debt collector").[6]

[6] An owner of a debt can be a debt collector only if the debt has been nominally assigned to it solely for purposes of facilitating collection on behalf of someone else, or if it collects its own debts under an assumed name that indicates a third person is collecting the debt. *See id*.

Recognizing the significance of this distinction, this Court held in *Bourff* that a complaint alleging that a § 1692g(a) notice misidentified the creditor (in violation of § 1692g(a)(2)'s requirement that the notice provide "the name of the creditor") stated a claim for violation of the Act. *See* 674 F.3d at 1241. The Court stressed that under the FDCPA, "[t]he identify of the 'creditor' in these notices is a serious matter." *Id*.

Exactly who—debt collector, creditor, or someone else—will assume the validity of a debt if it the consumer does not dispute it within 30 days is likewise a "serious matter," and a notice that contains a misstatement on that subject would tend to mislead the consumer to whom it is directed. As another district judge in the Southern District of Florida has recently explained, "the phrase 'debt collector' serves an important and meaningful purpose in a debt collection notice by conveying the specific entity that is entitled to assume a debtor's debt is valid for purpose of collection." *Iyamu*, __ F. Supp. 2d at __, 2013 WL 3192038 at *3. Misstating the identity of the entity that may assume the debt's validity for purposes of collecting it risks confusing a consumer about the consequences of failing to dispute the debt.

In particular, stating that the creditor, rather than the debt collector, will assume that the debt is valid significantly alters the message sent by the disclosure. As another district court in this Circuit has recently observed, there is an evident reason for the statutory language requiring disclosure that the debt collector will assume the validity of the debt:

> [T]the statute intended the consumer to receive the message that the debt would be assumed valid by only the debt collector and only for collection purposes. The statutorily required validation notice is intended to convey to the consumer that failure to dispute the debt permits the debt collector to proceed for collection purposes on the temporary fiction that the debt is valid, that failure to dispute a debt has no legal effect on a debtor's rights and that in any subsequent collection action, the burden would remain on the debt collector to prove the validity of the debt.

Orr v. Westport Recovery Corp., 2013 WL 1729578, at *5–6 (N.D. Ga. Apr. 16, 2013).

Thus, the statement in the validation notice serves to inform the consumer that "unless the debt is disputed the *debt collector* will proceed under the temporary fiction that the debt is correct as stated in the validation notice." *Smith v. Hecker,* 2005 WL 894812, at *4 (E.D. Pa. Apr. 18, 2005) (emphasis added). Indeed, any suggestion that failure to dispute the debt could have any broader consequences would run counter to

section 1692g's express provision that "[t]he 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." 15 U.S.C. § 1692g(e). In short, the statute "provides only that the *debt collector* may assume the debt to be valid." *McCabe v. Crawford & Co.*, 272 F. Supp. 2d 736, 745 (N.D. Ill. 2003).

For this reason, many courts have held that a notice that simply says that the debt will be assumed to be valid, but without saying by whom, is potentially misleading and hence may violate the Act. *See, e.g., Orr,* 2013 WL 1729578, at *5–6; *Koch v. Atkinson, Diner, Stone, Mankuta, & Ploucha, P.A.*, 2011 WL 4499100, at *3 (S.D. Fla. Sept. 27, 2011); *Guerrero v. Absolute Collection Serv., Inc.,* 2011 WL 8183860, at *4 (N.D. Ga. Oct. 6, 2011); *Philip v. Sardo & Batista, P.C.,* 2011 WL 5513201, at *4–5 (D.N.J. Nov. 10, 2011); *Harlan v. NRA Grp., LLC,* 2011 WL 500024, at *3 (E.D. Pa. Feb. 9, 2011); *Pierce v. Carrington Recovery Servs., LLC,* 2009 WL 2525465, at *1–3 (W.D. Pa. Aug. 17, 2009); *Galuska v. Collectors Training Inst. of Ill., Inc.,* 2008 WL 2050809, at *3–6 (M.D. Pa. May 13, 2008); *Nelson v. Select Fin. Servs., Inc.,* 430 F. Supp. 2d 455, 457–58 (E.D. Pa. 2006); *Smith,* 2005 WL 894812, at *6. As the district court in

Smith explained, "the least sophisticated debtor may be led to believe that unless she disputes the validity of the debt asserted by the debt collector, her debt will be determined to be valid by a court, credit reporting agency, or other entity of authority." *Id*.

McCalla Raymer's letter creates a similar possibility of confusion. Instead of telling the consumer that the debt collector, for the limited purpose of carrying out its own activities, is entitled to and will assume the debt's validity, the notice informs her that the *creditor*—the entity to whom the debt is actually owed—will not consider any challenges to its validity once the thirty days have passed. That consequence is far different, and far more serious, than the one contemplated by the statutory notice requirement. Thus, the district court in the *Iyamu* case recently concluded that plaintiff states a claim of a violation of section 1692g(a) by alleging that a debt collector substituted the term "creditor" for "debt collector" in the portion of the validation notice that says who will assume the debt to be valid if not contested within 30 days:

> [R]eplacing the phrase "debt collector" with the word "creditor" could mislead the least-sophisticated consumer. Without the phrase "debt collector," it is possible that the consumer would not know that the debt collector is the only entity entitled to assume the validity of the debt, or that collection is based on a temporary fiction that the debt is valid. Indeed, the consumer

> could believe that, if he does not respond, the creditor, as opposed to the debt collector, would presume the debt to be valid. … Accordingly, … changing the term "debt collector" to "creditor" may be deceptive to the consumer, and Plaintiff has sufficiently alleged an FDCPA violation.

Iyamu, __ F. Supp. 2d at __, 2013 WL 3192038 at *3.

The district court here was wrong to conclude that substituting the term "creditor" for "debt collector" in the required disclosure is inconsequential because the debt collector is the agent of the creditor. That difference in roles is precisely why the alteration risks consumer confusion and violates the statutory requirement. It is one thing to be told that an agent, in the course of performing his defined task of collecting a debt as instructed by his principal, may proceed on the assumption that the debt is valid if not contested. It is another to be told that the principal—the entity that actually has the authority to determine whether or not to proceed with collection of the alleged debt—will assume its validity if it is not contested within 30 days and, thereafter, may be deaf to any efforts to persuade it that the debt is not valid. The difference could readily lead to confusion, as even a well-informed consumer would attach a different meaning to the disclosure received by Ms. Caceres than to the one required by the statute. Thus, the district court erred in its alternative

holding that Ms. Caceres failed to state a claim that the McCalla Raymer disclosure violated § 1692g.

The district court's reliance on the Second Circuit's decision in *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005), was also misplaced. In that case, the validation notice stated, as the statute requires, that the debt collector would assume the validity of the debt. *Id*. at 365. The issue was whether an additional reference to the creditor overshadowed the required disclosure or rendered it misleading, *id*. at 365–66—a different issue from whether a letter can omit altogether the required disclosure that the debt collector will assume the debt's validity, as did the letter here.

The allegation in this case—that McCalla Raymer completely omitted the required disclosure and substituted a phrase with a significantly different meaning—states a claim under the FDCPA.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the district court and remand for reinstatement of the complaint and further proceedings on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Century Schoolbook BT. As calculated by my word processing software (Word 2010), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 8,692 words.

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I hereby certify that, on September 10, 2013, this Brief for Appellant was served through the court's ECF system on:

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