No. 06-15503

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT REICHERT,

Plaintiff-Appellee,

v.

NATIONAL CREDIT SYSTEMS, INC., a foreign corporation doing business in Arizona, JIM NORTH and FAYE MILES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEE ROBERT REICHERT

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STATEMENT OF RELATED CASES

Appellee is aware of one related case: *Beuter v. Canyon State Professional Services, Inc.*, No. 05-16840, on appeal from the U.S. District Court for the District of Arizona.

Beuter has been fully briefed in this Court since April 2006 and will likely control the outcome of this appeal. Both appeals arise from lawsuits filed by Arizona consumers against debt collectors who attempted to collect amounts allegedly owed to the consumers' former landlords under residential lease agreements. The plaintiffs in both lawsuits alleged that the debt collectors violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq.*, by attempting to collect amounts—specifically, attorney's fees—that were not authorized by the lease agreements or permitted by law. The debt collectors, represented by the same counsel, pressed the same argument in their motions for summary judgment: that even if the amounts were unauthorized, the defendants had not violated the FDCPA because they sought to collect precisely the amounts they were instructed to collect by their creditor-clients, the landlords. In both cases, the Arizona district court rejected the debt collectors' argument and denied their motions for summary judgment.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. The notice of appeal from the final order and judgment entered on February 2, 2006 was filed on February 24, 2006. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether a debt collector may avoid liability under the Fair Debt Collection Practices Act (FDPCA) solely on the grounds that it relied on its creditor-client.

2. Whether the defendants in this case qualify for the FDCPA's bona fide error defense, which shields debt collectors from liability for unintentional errors that occur despite the maintenance of procedures reasonably adapted to avoid such errors.

STATEMENT OF THE CASE

A. Factual Background

The facts are undisputed. Robert Reichert and his wife, Venisa Reichert, signed a fourteen-month lease for an apartment at the La Privada Apartments in Scottsdale, Arizona in October 2001. [ER G at 2; ER A at 13].[1] The total monthly

[1] Appellants' Excerpts of Record are not consecutively paginated, as required by Circuit Rule 30-1.5. Citations to the Excerpts of Records (ER) in this brief include the exhibit letter designating the document followed by a reference to the relevant exhibit, page, or paragraph within that document.

rent under the lease, including taxes, was $934.91. [ER A at 13]. The agreement provided that "[i]n the event of legal action to enforce compliance with this Rental Agreement, the prevailing party may recover reasonable attorneys' fees[.]" [ER A at 14]. The Reicherts moved out before the end of the lease term, alleging that La Privada had breached the lease agreement. [ER A at 60; ER G at 1].

One year later, in October 2002, the apartment complex assigned the Reichert account to National Credit Systems, Inc., a private debt collector, for collection. [ER G at 2]. An NCS employee named Faye Miles sent the Reicherts a collection notice on October 10, 2002, demanding a balance of $1,899.20. [ER A at 20; ER G at 2]. In response, on November 10, 2002, Mr. Reichert sent a detailed, four-page letter explaining his position that La Privada had breached the lease agreement, disputing the charges, and requesting verification of the debt pursuant to the FDCPA. [ER A at 60; ER G at 2]. Jim North, another NCS employee, sent Mr. Reichert a response on November 20, 2002. [ER A at 30; ER G at 2]. The response included a document entitled "Deposit Disposition" in which the previous balance of $1,899.20 was crossed out by hand, with a handwritten notation reflecting a balance of $2,124.20. [ER A at 30]. The document did not explain why the balance had increased, but it included an itemized list of charges with another handwritten notation, "Atty Fee, Letter," and a corresponding charge of $225. [ER A at 30; ER G at 2].

B. Decision Below

On September 5, 2003, Mr. Reichert sued NCS, North, and Miles in the U.S. District Court for the District of Arizona, alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*. [ER A]. The complaint included an allegation that the $255 charge for attorney's fees violated 15 U.S.C. § 1692f(1), which forbids "[t]he collection of any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law." [ER A at 7]. The parties filed cross-motions for summary judgment, which the district court granted in part and denied in part on March 31, 2005. [ER G]. The defendants (collectively referred to here as "NCS") presented the same argument that they now press on appeal: that even if the $225 in attorney's fees they sought to collect from the Reicherts was not an amount authorized by the lease agreement or permitted by law, they are nevertheless immune from liability under the FDCPA because they "sought to collect precisely the amount they were instructed to collect by the creditor." [ER-G at 4].

The district court rejected NCS's argument as contrary to the statute and concluded that the attempt to collect the $225, where there had been no judicial proceedings and hence no court award of attorney's fees, violated 15 U.S.C. § 1692f(1). [ER-G at 3-5].

The court also held that NCS did not qualify for the FDCPA's "bona fide error defense," which applies only "if the debt collector shows by a preponderance of the evidence that the violation is not intentional, and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Under this provision, the court explained, the defendants "have the burden to show that they had procedures in place that were reasonably adapted to avoid such error." [ER-G at 5]. But "[t]he only evidence offered of any procedure undertaken by the Defendants to avoid the error in the present case is the declaration" of NCS's General Manager, Ronald Sapp, which stated only that NCS has "extensive procedures," including "reviewing all debts which are disputed and advising this debt in writing." [ER-G at 5]. This conclusory showing was insufficient because (1) "reviewing a debt and verifying the debt in writing is no more than what is minimally required by the FDCPA," 15 U.S.C. 1692g; (2) the defendants were required to show that they "maintained adequate safeguards designed to help eliminate the type of error presented in this case," and (3) "the bona fide error defense applies only to unintentional clerical errors." [ER-G at 5-6].

The defendants filed a motion to reconsider the March 31 order, arguing again that they were not liable under the FDCPA because they "sought to collect the fees solely because they had been instructed to do so by the creditor." [ER I at

2]. The district court rejected this argument for the same reasons given in the March 31 order. [ER I at 2].

Although the March 31 order was not final—because it left some of Mr. Reichert's claims unresolved and did not dispose of the case—NCS appealed the decision to this Court. That appeal, No. 05-15976, was dismissed for lack of appellate jurisdiction on December 13, 2005. On remand, the district court issued a final order on January 31, 2006, approving the parties' stipulation that Mr. Reichert be awarded the maximum allowable statutory damages of $1,000. [ER J]. Final judgment was entered on Feburary 2, 2006 [ER I], and this appeal followed.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*, and may be affirmed on any ground supported by the record. *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1096-97 (9th Cir. 2003).

SUMMARY OF ARGUMENT

NCS does not challenge the district court's determination that the amount it attempted to collect from Mr. Reichert in attorney's fees was unauthorized. Instead, it invites this Court to become the first appellate court in the nation to recognize an extra-statutory defense to FDCPA liability for debt collectors who rely blindly on information supplied by their clients.

NCS's position runs headlong into the text, structure, and purpose of the FDCPA. The FDCPA is a strict liability statute. For purposes of establishing liability, it does not matter whether NCS intended to collect unauthorized amounts and make false statements or whether NCS relied entirely on the creditor. The relevant provisions of the FDCPA do not contain any knowledge or intent requirements. That some provisions of the statute *do* refer to intent—most notably, an affirmative defense for unintentional "bona fide errors" by debt collectors who maintain adequate preventive procedures—underscores the conclusion that the statute does not require a showing of knowledge or intent to establish liability in the first place.

NCS's theory rests on a fundamental misunderstanding of the statute's strict-liability regime. Its arguments proceed from a correct premise: The statute does not impose an affirmative obligation on the debt collector to verify the amount it attempts to collect (at least not before the consumer explicitly requests verification). But it does not follow from that fact that debt collectors who blindly rely on their clients can evade liability. On the contrary, liability under the FDCPA turns on the debt collector's actions and the consequences of those actions; it is the debt collector's responsibility to determine what precautions are necessary to avoid errors. To be sure, the statute provides an affirmative defense allowing debt collectors who institute adequate preventive procedures to avoid

liability, but the burden to demonstrate such procedures is on the debt collector. And the debt collector here, NCS, has not met its burden of demonstrating that it had any such procedures in place.

The Court should reject NCS's position because it would circumvent the statute's bona fide error defense and upset the system of rewards and incentives created by Congress. By rewarding debt collectors who maintain good procedures and punishing those who do not, the FDCPA creates a powerful incentive to implement scrupulous collection practices. NCS's position would scrap Congress's carrot-and-stick approach, encouraging debt collectors to maintain an empty head and putting scrupulous debt collectors at a competitive disadvantage.

ARGUMENT

I. A DEBT COLLECTOR'S BLIND RELIANCE ON A CREDITOR PROVIDES NO BASIS FOR IMMUNITY FROM FDCPA LIABILITY.

"The Fair Debt Collection Practices Act is an extraordinarily broad statute. Congress addressed itself to what it considered to be a widespread problem, and to remedy that problem it crafted a broad statute." *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992). NCS would have the Court "ignore this fact and read an exception into the statute that is nowhere to be found in its text." *Id.* Even if the proposed exception were "eminently sensible"—which, as explained below, it is not—it is not up to the federal courts to legislate. *Id.* The Court "must enforce this

statute as Congress has written it." *Id.; see Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not improve upon it.").

A. The FDCA Is A Strict Liability Statute.

NCS's brief fails to come to grips with a basic feature of the FDCPA: It is a strict liability statute. Congress responded to "abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a), by enacting a comprehensive, detailed remedial scheme that imposes civil liability on debt collectors who engage in a range of prohibited conduct, *without* regard to their knowledge or intent. *See Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages."). Thus, for purposes of establishing liability under the FDCPA, it does not matter whether NCS knew that the amount it sought to collect was unauthorized and intended to make a false representation, or whether it relied blindly on its client.

1. *The Text of the Statute*. The core liability provisions of the FDCPA contain no knowledge or intent requirements. They prohibit debt collectors from engaging in "any" harassing, oppressive, or abusive conduct, 15 U.S.C. § 1692d; making "any false, deceptive, or misleading representation," *id.* § 1692e; and using

"unfair or unconscionable means" to collect "any debt," *id.* § 1692f. In subsections following the general prohibitions, "[e]ach of these provisions includes a non-exhaustive list of examples of proscribed conduct." *Fox v. Citicorp Credit Servs.*, 15 F.3d 1507, 1516 (9th Cir. 1994). Subject to affirmative defenses, a debt collector who violates any of these provisions is liable for actual damages, plus costs and reasonable attorney's fees, as well as statutory damages of up to $1,000. 15 U.S.C. § 1692k(a).

Among the subsections providing examples of proscribed conduct is the provision that the district court concluded NCS had violated in this case—15 U.S.C. § 1692f(1). Section 1692f(1) prohibits "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." There is no ambiguity here; the provision contains no knowledge or intent requirement.

As the Seventh Circuit has explained, "[w]hether the collection of a debt violates 1692f(1) depends solely on two factors: (1) whether the debt agreement explicitly authorizes the charge; or (2) whether the charge is permitted by law. The provision is silent as to the debt collector's intent, yet it is clear that a collector who collected a charge unauthorized by the debt agreement or by law, even by accident, would violate § 1692f(1)." *Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d

991, 996 (7th Cir. 2003); *accord Johnson v. Statewide Collections, Inc.*, 778 P.2d 93, 101 (Wyo. 1989). A contrary conclusion cannot be reconciled with this Court's consistent interpretation of this very provision under an *objective* test, which does not consider whether the debt collector actually intended to deceive the consumer concerning the character, amount, or legal status of the debt. *Dunlap v. Credit Protection Ass'n., L.P.*, 419 F.3d 1011, 1012 (9th Cir. 2005); *Wade v. Regional Credit Assoc.*, 87 F.3d 1098, 1100 (9th Cir. 1996). "The weight of authority," including this Court's decision in *Wade*, 87 F.3d at 1100, "applies an objective test to determine liability under 1692f. The test does not hinge on the defendants' knowledge, but rather upon how a consumer would perceive a demand letter." *Turner*, 330 F.3d at 996.[2]

Despite the unambiguous statutory text, NCS asserts for the first time in its brief to this Court (at 18-22) that section 1692f(1) requires a showing of knowledge or intent. By failing to raise this argument below, NCS has waived it. *Taniguchi v. Schultz*, 303 F.3d 950, 959 (9th Cir. 2002). But even assuming the

[2] The same is true of 15 U.S.C.§ 1692e(2)(A)—a provision raised by Mr. Reichert below but not addressed by the district court—which prohibits "[t]he false representation of—the character, amount, or legal status of any debt." *See Randolph v. IMBS, Inc.*, 368 F.3d 726, 733 (7th Cir. 2004) ("[E]verything we have said about § 1692e(2)(A) applies equally to § 1692f."). By its plain terms, section "1692e(2)(A) creates a strict-liability rule. Debt collectors may not make false claims, period." *Id.* at 730. "[I]gnorance is no excuse." *Turner*, 330 F.3d at 995; *see Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000) (Section "1692e applies even when a false representation was unintentional.").

argument is properly presented, it should be rejected because it has no basis in the text of the statute.[3]

The conclusion that the FDCPA is, in general, a strict-liability statute is underscored by the fact that a few of its provisions do expressly refer to the debt collector's knowledge or intent. For example, "the extent to which the debt collector's noncompliance was intentional" is listed among the factors to be considered by the court in setting the amount of statutory damages. 15 U.S.C. § 1692k(b); s*ee Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2nd Cir. 1993) ("The FDCPA is a strict liability statute, and the degree of a defendant's culpability may only be considered in computing damages.").[4]

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[3] NCS points to nothing in the text of section 1692f(1) suggesting an intent requirement. Instead, NCS rests on a single district court decision asserting, without analysis, that Section 1692f(1) requires proof of a knowing violation. That case, *Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459 (M.D. La. 1996), focuses on section 1692e(2)(A) and contains virtually no analysis concerning section 1692f(1). *Id.* at 462-63. Appellee is aware of one other district court case, not cited by NCS, that also appears to hold that section 1692f(1) contains an intent requirement, also without analysis. *Simmons v. Miller*, 970 F. Supp. 661, 664 (S.D. Ind. 1997). Both *Ducrest* and *Simmons* have been discredited. *See Turner*, 330 F.3d at 996 & n.1 (identifying both *Ducrest* and *Simmons* as contrary to the "weight of authority"); *Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp.2d 582 (D. Md. 1999) ("*Simmons* . . . is an outlier."). Indeed, the judge who authored *Simmons* has since recognized that the decision was wrong. *See Frye v. Bowman, Heintz, Boscia, Vician, P.C.*, 193 F. Supp.2d 1070 (S.D. Ind. 2002).

[4] In this case, NCS waived its right to argue that damages should be reduced based on the degree to which its conduct was intentional by stipulating to the maximum amount of statutory damages. [ER-J].

Several subsections of the statute, moreover, contain express intent requirements. *See*, *e.g.*, 15 U.S.C. § 1692d(5) ("Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously *with intent to* annoy, abuse, or harass any person at the called number."); *id.* § 1692e(5) ("The threat to take any action that cannot legally be taken or that is not *intended* to be taken.") (emphasis added). This Court has recognized that "section 1692e(5) delineates two types of prohibited threats: a threat to take any action that cannot legally be taken *or* that is not intended to be taken," and that an objective test—one that does not consider the debt collector's intent—applies to the former but not the latter. *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1227 (9th Cir. 1988) (emphasis in original).

The most important reference to the debt collector's intent in the FDCPA is section 1692k(c) —the bona fide error defense—which permits debt collectors to escape liability for an unintentional violation provided that they have in place adequate procedures designed to prevent the type of violation that occurred. *See Picht v. John R. Hawks, Ltd.*, 236 F.3d 446 (8th Cir. 2001) ("The bona fide error defense exists as an exception to the strict liability imposed upon debt collectors by the FDCPA."); *Randolph*, 368 F.3d at 729 ("[T]he FDCPA uses a strict-liability approach (with a due care defense)."). The defense applies to all violations under

the statute and places the burden to demonstrate adequate procedures squarely on the debt collector:

> **Intent**—A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. 1692k(c). This intent requirement necessarily excludes intent as a general requirement of liability under the FDCPA; to read the statute otherwise would render the bona fide error defense superfluous. *See Turner*, 330 F.3d at 99; *Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000); *see also Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 877 (1991) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."); *Dep't of Revenue of Oregon v. ACF Indus.*, 510 U.S. 332, 340-41 (1994) (discussing "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Taken together, the FDCPA's references to intent show that Congress took care to expressly require knowledge or intent only where it deemed such requirements necessary. *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078, 1081 (9th Cir. 2005) (explaining that the FDCPA "need not contain parallel language in all of its subsections in order to be internally consistent."). To paraphrase *Camacho*, "[i]f Congress had intended to impose [an intent]

requirement in [§§ 1692f(1)], it could have done so in the subsection itself, as it did in the later subsections of [section 1692f]." *Id.* *Camacho's* observation is simply a variant on the basic principle that "[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." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citation omitted).

2. *Legislative Purposes and the Strict Liability Rationale.* There are significant differences, to be sure, between the strict liability of modern consumer protection statutes and common law strict liability for those who, say, keep dangerous wild animals or use explosives. But the basic rationale is the same: Those who engage in activities with a serious risk of harming consumers are generally in the best position to take precautions to minimize the harmful consequences of their conduct and absorb the costs of those precautions. *See* William L. Prosser, *Law of Torts* § 75 (4th ed. 1971).

In enacting the FDCPA, Congress relied on extensive evidence showing that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy," 15 U.S.C. § 1692(a), and that "the suffering and anguish" that "unscrupulous debt collectors . . . regularly inflict is substantial." S. Rep. 95-382,

at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (describing Congressional findings). "Independent debt collectors," Congress concluded, were "the prime source of egregious collection practices." *Id.* Congress was particularly sensitive to the fact that, absent federal regulation, these independent collectors would continue to have a strong incentive to profit from unscrupulous collection practices. The invisible hand of the market was an insufficient check, because the behavior of independent debt collectors, unlike that of other businesses, is not "restrained by the desire to protect their good will" or "the consumer's opinion of them." *Id.* Moreover, "[c]ollection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means." *Id.*

In response to this state of affairs, Congress created a remedial scheme that did not require intent to establish liability, but gave debt collectors an escape hatch for "unintentional" violations that "occurred despite procedures designed to avoid such violations." *Id.* at 5, 1977 U.S.C.C.A.N. at 1700. Indeed, Congress rejected an alternative version of the Act (S. 1130), sponsored by Senator Jake Garn of Utah, that would have required a showing of fault to establish liability, and, in the final markup session before the full Senate Banking Committee, again rejected an amendment that would have required that violations be knowingly made. *See* 123 Cong. Rec. 9111 (March 25, 1977) (proposing civil liability only for debt collectors who "willfully fail[] to comply" or are "negligent in failing to comply"

with statute's requirements); *see also* Robert J. Hobbs, *Fair Debt Collection* § 3.2.2 (5th ed. 2004) (describing legislative history in detail). The FDCPA's strict-liability approach was patterned after that of the Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. § 45, *et seq.*, and "courts have incorporated the jurisprudence of the FTC Act into their interpretations of the FDCPA." *Clomon v. Jackson*, 988 F.2d 1314, 1318-19 (2d Cir. 1993) ("[u]nder the FTC Act, there is no requirement of intent or negligence."); *Baker v. C.G. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) (drawing upon TILA to interpret FDCPA).

Congress's choice of a strict-liability regime is particularly apt in the context of debt collection. *See* Richard A. Posner, *The Economics of Justice* 199 (1983) (explaining that "[t]he economic literature has identified four factors bearing on the choice between a strict and a fault approach to liability"). *First*, "[s]trict liability shifts the accident-avoidance responsibility wholly from potential victims to potential injurers," and is therefore appropriate where the "injury could not have been avoided by the victim at a lower cost than to the injurer." *Id.* at 200. Debt collectors—not debtors—have the power to institute preventive procedures, so the FDCPA encourages them to adopt procedures that are "reasonably adapted" to avoid error and holds them liable if they don't.

Second, "[s]trict liability makes the injurer the insurer of the injured," and is therefore appropriate where the relative cost of insurance is lower for the defendant. *Id.* Debt collectors—not debtors—are in a position to absorb the costs of preventive procedures because they, and they alone, can pass such costs onto their creditor-clients, take out liability insurance, and/or enter into indemnification agreements with creditors. *See Russell*, 74 F.3d at 35 (FDCPA reflects Congress's judgment that debt collectors' "shall take the risk" that their conduct will harm consumers). This is especially so given the wide range of debt collectors' compensation arrangements—all of which are based on a calculation of the risk and likelihood of collection involved—from flat fees, to the 50-percent contingent fee norm, to arrangements in which the creditor receives only pennies on the dollar. *See* Hobbs, *Fair Debt Collection* § 1.4.3.2.

Third, strict liability is appropriate because intent would be extremely difficult to prove—i.e. "the cost of adjudicating fault issues are likely to be high." Posner, *Economics of Justice* at 200 (discussing "information costs"). The *fourth* and final factor is the "ratio of avoidable to unavoidable errors. If this ratio is very low, a rule of strict liability will be unattractive because it will require a lot of costly legal activity having no allocative effect." *Id.* By creating a safe harbor—the bona fide error defense—for unavoidable errors, Congress took this factor off the table.

B. NCS's Theory Rests On A Misunderstanding of the FDCPA's Strict-Liability Regime

1. NCS (at 7-18) makes several interrelated arguments in support of its novel reliance-on-the-creditor defense, all of which fail for the same reason: They rest on a misunderstanding of the strict-liability nature of the FDCPA.

NCS's arguments proceed from a single premise, a statement not about what the FDCPA actually provides but about what it does *not* provide. NCS correctly observes (at 9-10) that the statute does not affirmatively require a debt collector to verify the amounts it attempts to collect (at least not before the consumer explicitly requests verification). From that proposition, NCS—parsing the language of a trio of unpublished district court orders rather than the language of the statute—leaps to the following conclusions:

- Because the FDCPA does not affirmatively require the debt collector to interpret the agreement creating the debt or analyze state law, a court interpreting section 1692f(1) need not interpret the agreement or analyze state law to determine whether the amount charged is actually authorized by the agreement or permitted by law. (Br. at 9-10).

- Because the FDCPA does not impose an affirmative obligation on the debt collector to verify the amount of the debt in the first place, it would be "incongruous" to impose liability on the debt collector for collecting the same amount that the creditor asks it to collect. (Br. at 15).

The premise is correct, but the conclusions don't follow. These arguments all assume that a defendant cannot be held liable for the result of its failure to

undertake some action that it was not affirmatively obligated to take in the first place. But that assumption misunderstands the nature of strict liability. Strict liability is concerned with the defendant's actions and the consequences of those actions, regardless of intent; it does not depend on whether the defendant failed to undertake some particular set of affirmative steps to prevent those consequences. "[I]n cases of strict liability, the defendant acts 'at his peril' and is an insurer against the consequences of his conduct." Prosser, *Law of Torts* § 75 at 517. As the Second Circuit has explained, the FDCPA embodies a legislative judgment that a debt collector "shall take the risk that he may cross the line" between prohibited and permissible conduct. *Russell*, 74 F.3d at 35. The FDCPA's strict-liability regime is tempered by the availability of the bona fide error defense, which rewards debt collectors who maintain preventive procedures. But the burden is on the *debt collector* to demonstrate that it has instituted adequate preventive procedures, not on the *consumer* to identify statutorily-required procedures. NCS's view of the statute would turn Congress's design on its head.

An alternative premise on which NCS also appears to rely is an assumption that the conduct at issue was not really the debt collector's, but the creditor's. *See* Br. at 10, 12-13. "A distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditors' activities at all." *Randolph*, 368 F.3d 729. So if the conduct at issue here really *was* the creditor's,

then there should be no liability under the FDCPA. NCS, however, fails to explain how it is creditor's conduct that is at issue. The district court found FDCPA liability based on *NCS's* attempt to collect an amount that was not "expressly authorized by the agreement . . . or permitted by law." 15 U.S.C. § 1692f(1). It was not the apartment complex that sent the collection letter to Mr. Reichert. That NCS apparently relied blindly on its client suggests only that NCS's actions may have been unintentional, but they were still indisputably NCS's actions.

Along the same lines, NCS appears to suggest that the district court's decision was based on vicarious liability (Br. at 16). Vicarious liability imputes *another*'s actions—usually an agent's—to the defendant. The suggestion makes no sense here, however, because the apartment complex owed Mr. Reichert no duties under the FDCPA. And again, the conduct complained of here was the defendant's, not anyone else's.

2. Because NCS's theory is based on a misunderstanding of strict liability, the majority of the case law cited in its brief is inapposite. Its brief (at 13-14, 18) relies heavily on passages from *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir. 1999), but these passages interpret only section 1692g(b), the provision of the FDCPA that requires debt collectors, upon a consumer's request, to cease collection activity until a debt has been verified. The same goes for *Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197 (9th Cir. 1999), *Bleich v. The*

Revenue Maximization Group, Inc., 233 F. Supp. 2d 496 (E.D.N.Y. 2002), and *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995). Section 1692g(b) is not at issue in this appeal.

NCS also cites decisions holding that debt collectors can escape liability for their unintentional actions, but downplays the fact that, in those cases, the debt collectors successfully invoked section 1692k(c)'s bona fide error defense because they had preventive procedures in place. *See*, *e.g.*, *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025 (6th Cir. 1992); *Jenkins v. Heintz,*124 F.3d 824 (7th Cir. 1997). As discussed in Part II below, NCS cannot successfully invoke that defense here.

C. NCS's Position Would Circumvent the FDCPA's Defenses and Reverse the Incentives They Create.

The Court should also reject NCS's request to create a new reliance-on-the-creditor defense because doing so would undermine the defenses that Congress actually included when it enacted the statute: a defense for reliance in "good faith" on Federal Trade Commission advisory opinions and, most importantly, a defense for unintentional bona fide errors that occur despite the maintenance of adequate preventive procedures. 15 U.S.C. §§ 1692k(c), (e); *see* S. Rep. 95-382, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1702 ("Two defenses are provided: good faith reliance on an F.T.C. advisory opinion; and bona fide error notwithstanding procedures to avoid the error."); Therese G. Franzen and Robert S. Carlson, *Defense Strategies in Fair Debt Collection Practices Act Litigation*, 53

Consumer Fin. L. Q. Rep. 34, 36 (1999) ("[T]he only defenses available against FDCPA claims are provided by the Act. Any purported defense not expressly provided by the FDCPA is not available to defeat a FDCPA claim."). Congress could easily have added a third good-faith defense, based on "good faith reliance on the representations of a creditor," but it did not do so. Adding such a defense would radically transform the statute.

1. To take advantage of the bona fide error defense, a debt collector must show by a preponderance of the evidence that it maintains "procedures reasonably adapted to avoid" the error. 15 U.S.C. 1692k(c). This Court has described the debt collector's burden to demonstrate the existence of preventative procedures as "an essential element" of the defense. *Fox*, 15 F.3d at 1514. Courts generally conclude that, to qualify for the defense, "the defendant must not only demonstrate that there are procedures in place designed to ensure compliance with the Act, but also that there is in place a system of checks and reviews to guard against errors that can result in a violation. An empty-headed approach to collection efforts will not serve as a basis for asserting inadvertence or a good faith effort to comply with the Act." Franzen and Carlson, *Defense Strategies*, 53 Consumer Fin. L. Q. Rep. at 37.

For instance, in *Jenkins*, 124 F.3d at 827, *on remand from Heintz v. Jenkins*, 514 U.S. 291 (1995)—a case on which NCS inexplicably relies (Br. at 22)—the

defendants, as here, "moved for summary judgment contending that they did not know the nature of the unauthorized [charges] . . . and simply collected amounts which the bank claimed were due." The "defendants did not contend that" the charges were "validly imposed under [the] contract. Rather, they argued that even if some of the . . . charges were unauthorized, they [were] not liable." *Id.* at 828. So the Seventh Circuit assumed, without deciding, that the charges were unauthorized. *Id.* Unlike here, however, the defendants in *Jenkins* were entitled to the bona fide error defense because their errors were unintentional *and* they maintained "extensive systems" and "elaborate procedures . . . to avoid collecting unauthorized charges" and even went so "far as to insist that their client[s] verify under oath that each of the charges was true and correct." *Id.* at 834 (describing procedures including "an in-house fair debt compliance manual, updated regularly and supplied to each firm employee; training seminars for firm employees collecting consumer debts; and an eight-step, highly detailed pre-litigation review process to ensure accuracy and to review the work of firm employees to avoid violating the Act."). Under NCS's theory, the Seventh Circuit's examination of these procedures was entirely unnecessary; the case should have come out the same way even if the debt collectors had implemented *no* procedures designed to avoid collecting unauthorized charges.

But, in fact, lower courts regularly reject the suggestion that blind reliance on the creditor is sufficient to meet the requirements of section 1692k(c). *See*, *e.g.*, *Turner v. J.V.D.B. & Assocs., Inc.*, 318 F. Supp. 2d 681, 684-86 (N.D. Ill. 2004) (where debt collector's "principal alleged procedure" was to "rely on its creditor clients to provide it with all relevant, current and accurate information on a debtor's account," that, "respectfully, is not even a procedure," but "merely an unfounded assumption."); *Foster v. Sherman Acquisition, LP*, 2005 WL 588995, at *3 (N.D. Ill. 2005) (holding that debt collector's "naked assertion that it relied on information provided by [its client]" was insufficient); *Green v. Hocking*, 792 F. Supp. 1064, 1066 n.5 (E.D. Mich. 1992), *aff'd on other grounds*, 9 F.3d 18 (6th Cir. 1993) (affidavit stating that "the error occurred because [the debt collector] relied blindly on the [creditor's] representation [of the amount owed]" is inadequate). In *Turner*, this conclusion was reinforced by the fact that, as here, the debt collector had "even gone so far as to admit that it 'did not affirmatively ask'" the creditor about the status of the debt. 318 F. Supp. at 684. Again, if NCS's view were correct, the debt collectors in cases like *Turner, Foster*, and *Green* could simply have circumvented the requirements of the bona fide error defense and avoided liability by relying on their clients.

2. The bona fide error defense creates a powerful incentive for debt collectors to maintain proper procedures. If they maintain such procedures, they

can avoid liability for unintentional violations that result from bona fide errors. If they don't—if, for example, they take no precautions to ensure that consumers from whom they seek to collect debts are not in bankruptcy, or that the amounts they seek to collect are not inflated or incorrect, or that their telephone calls will not reach consumers in the middle of the night—they risk liability even for minor unintentional clerical errors. This carrot-and-stick approach creates incentives to ensure accuracy. "Adherence to the strict-liability approach is important to maintain some modicum of accuracy in the information conveyed from creditor to debt collector. Debt collectors who are responsible for the accuracy of the creditor's information will take steps to assure accuracy." Hobbs, *Fair Debt Collection* § 5.2.2 at 120.

By contrast, "those who are not held responsible for their ignorance will devise methods to maintain an empty head." *Id*. If the FDCPA were rewritten to conform to NCS's position, debt collectors would rely blindly on the information provided by their clients, without regard for the impact that their activities would have on consumers, and the purposes of the statute would be severely undermined. And the new defense would also create an incentive for creditors to contract with overly aggressive and unscrupulous debt collectors, without fear that the costs of liability would be passed on to them as a cost of doing business.

The undercurrent of defendants' arguments is that it is inequitable to saddle debt collectors with liability for errors that are really the fault of the creditor. NCS has it backwards. In fact, it is NCS's proposal that would create inequity, not only for consumers—who would be forced to bear the harmful consequences of decreased care on the part of debt collectors—but also for those scrupulous debt collectors who incur the costs necessary to implement good collection practices. One of the purposes of the FDCPA is "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Under NCS's proposed rule, however, debt collectors who do the right thing would have a higher cost of doing business, but would face no less risk of liability. These collectors would be forced to choose between abandoning their preventive procedures or risk being put out of business.

In enacting the FDCPA, Congress carefully balanced the equities and structured the incentives of debt collectors, creditors, and consumers in a way that advances the statute's purposes. This Court has appropriately rejected the suggestion that it should "impose equitable considerations" on a strict liability consumer protection statute, because "the statute already contains these considerations as defenses." *Semar v. Platte Valley Federal Sav. & Loan Ass'n*, 791 F.2d 699, 705 (9th Cir. 1986) (interpreting TILA); *see also Baker v. C.G. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) (describing FDCPA's and TILA's

bona fide error defenses as "nearly identical"). Like the defendant in *Semar*, NCS "overstates the potential harshness of requiring strict compliance" by disregarding the importance of the statute's "good-faith defense." *Semar*, 791 F.2d at 705. And here, as in *Semar*, "the district court correctly rejected" the defendants' "suggestion of carving a wide exception" to the statute's "detailed provisions." *Id.*

II. THE BONA FIDE ERROR DEFENSE DOES NOT APPLY IN THIS CASE.

In a last-ditch effort to salvage its appeal, NCS argues in the alternative that it is entitled to the bona fide error defense, 15 U.S.C. § 1692k(c). Br. 23-24.[5] But NCS's argument is nothing more than an attempt to wrap its meritless reliance-on-the-creditor defense in a different package. NCS once again argues that "[t]he FDCPA does not require a debt collector to investigate the charges for which recovery is sought," that "the error here was attempting to collect precisely the amount assigned" and that any preventive procedure would "entail an independent investigation of the amount of the debt," which the statute does not affirmatively require. Br. 24. These arguments fail for the same reasons discussed above.

[5] Notably, NCS did not even mention the bona fide error defense in its motion for summary judgment (Doc. # 18), and expressly repudiated any reliance on the defense in its reply brief below. *See* Defs' Reply (Doc. # 42) at 4 ("[D]efendants' position is not that there was a violation of the FDCPA, but that the violation is excused by the bona fide error defense. Quite to the contrary, defendants' position is that there was no violation.").

As the district court observed [ER G at 5], "[t]he only evidence" NCS offers in support of the bona fide error defense is a single barebones paragraph in the declaration of the company's general manager, Ronald Sapp, asserting that it has "extensive procedures" and that "[t]hese procedures include reviewing all debts which are disputed and advising this debt in writing, within 30 days of the dispute if the debt has been verified." [ER C ¶ 8, ER F ¶ 8]. The district court also correctly recognized that the procedures for verifying disputed debts are no more than what is minimally required by the FDCPA and, in any event, have nothing to do with preventing the violation at issue here: the attempt to collect an unauthorized amount in the first place. [ER-G at 5]. This Court has made clear that "the bona fide error exception is an affirmative defense, for which [the defendant] has the burden of proof at trial." *Fox*, 15 F.3d at 1516. Because NCS offered "no indication of any procedure to ensure that" the specific error at issue here did not occur, the defense is inapplicable. *Id.*[6]

[6] Although it does not say so explicitly, NCS suggests (Br. at 24) that it could not have adopted procedures reasonably adapted to prevent the error in this case. Not so. NCS could, for example, have adopted a checklist for its employees to use in reviewing files before collection letters are sent out and/or retained an independent auditing agency or lawyer to review collection files. The case law is replete with examples of such procedures. *See, e.g., Howe v. Reader's Digest Ass'n, Inc.*, 686 F. Supp. 461, 463, 467 (S.D.N.Y. 1988) (extensive systems and procedures, including an independent auditing agency to ensure compliance with FDCPA requirements, deemed adequate); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 389 (D. Del. 1991) (procedures adequate where collector held periodic seminars and provided training on FDCPA requirements, gave employees various

Tacitly acknowledging that its argument fails under current precedent, NCS also takes issue with the Ninth Circuit's interpretation of the scope of the bona fide error defense, contending that the statute's combination of strict liability and a defense for unintentional clerical errors is "draconian." Br. 25-27. NCS's complaint about the FDCPA's structure is more appropriately directed to Congress, not to this Court. Moreover, although a small minority of courts have adopted a more expansive construction of the bona fide error defense than this circuit, *see* *Johnson v. Riddle*, 305 F.3d 1107, 1121 n.14 (10th Cir. 2002), this case does not in any way implicate that split in authority because NCS's assertion of the bona fide error defense would fail in *any* circuit.[7]

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editions of FDCPA manuals, issued memorandum delineating FDCPA policy, and posted cards on phones citing language required by statute); *Transworld Sys.*, 953 F.2d 1031 (employees' procedural manual showed that the error was at most a clerical error); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 401-02 (6th Cir. 1998) (procedure manual and computer system deemed adequate).

[7] Even in the Tenth Circuit—which has the most expansive interpretation—the debt collector must still show that it maintains procedures designed to avoid the specific violation. Where a non-clerical error is involved, the inquiry focuses on the "the debt collector's due diligence practices." *Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006). But even under that approach, "[t]he procedures component of the bona fide error defense involves a two-step inquiry: first, whether the debt collector 'maintained'—i.e., actually employed or implemented—procedures to avoid errors; and, second, whether the procedures were 'reasonably adapted' to avoid the specific error at issue." *Id.* The assertions in NCS's affidavit do not come close to satisfying either of those two steps.

CONCLUSION

Because the district court properly rejected defendants' argument that a debt collector's blind reliance on a creditor provides an absolute defense to FDCPA liability and because the statute's bona fide error defense is inapplicable, this Court should affirm the decision below.

Respectfully submitted,

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APPENDIX OF RELEVANT STATUTORY PROVISIONS

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*., provides in relevant part:

§ 1692. Congressional findings and declaration of purpose

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

* * * *

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

* * * *

§ 1692e. False or misleading representations

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

> **(1)** The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
>
> **(2)** The false representation of—
>
> > **(A)** the character, amount, or legal status of any debt; or
> >
> > **(B)** any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * * *

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

> **(1)** The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

* * * *

§ 1692k. Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of–

> **(1)** any actual damage sustained by such person as a result of such failure;
> **(2)(A)** in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> * * * *
>
> **(3)** in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors–

> **(1)** in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or
>
> * * * *

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

* * * *

(e) Advisory opinions of Commission

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 7,333 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

August 9, 2006 Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing two copies of this brief to be served by first-class mail, postage pre-paid, on the following counsel:

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