16-2165-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FRANKLIN ARIAS,

Plaintiff-Appellant,

v.

GUTMAN, MINTZ, BAKER & SONNENFELDT P.C.; 1700 DEVELOPMENT CO. (1500), INC.

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

In 2006, Defendant debt collection law firm Gutman, Mintz, Baker & Sonnenfeldt, P.C. ("GMBS") sued Plaintiff Franklin Arias and obtained a default judgment against him. In late 2014, GMBS ordered Bank of America ("BofA") to restrain Arias's bank account, which contained only Social Security retirement funds. Pursuant to federal regulations and New York State law, BofA left $2,625 available to Arias, but restrained the remaining balance.

During the next few weeks, GMBS made false statements to Arias about the documentation needed to release his exempt funds and deliberately flouted federal and state protections by repeatedly refusing to release the restraint, even after Arias twice provided GMBS with documentation—the second time attached to a formal exemption claim—that the restrained funds were exempt.

The first time, GMBS responded by telling Arias that it would release his funds only if he made a payment. The second time, in response to Arias's exemption claim, GMBS filed a baseless objection containing multiple false statements, including that Arias had failed to provide sufficient documentation in support of his exemption claim. Only upon Arias's third showing of the same documentation to GMBS, at a court hearing, did GMBS finally agree to release his exempt funds.

In refusing to release the restraint on Arias's exempt funds, GMBS ignored well-established federal and state protections for exempt funds. Federal law has long exempted certain types of income, including Social Security retirement benefits, from debt collection. Nevertheless, widespread problems around debt collectors' restraint and seizure of statutorily exempt income from New Yorkers' bank accounts led the New York State legislature to enact a remedial consumer protection statute, the Exempt Income Protection Act (EIPA), in 2008. The EIPA provides an expedited procedure for seeking the release of restrained exempt funds and imposes substantive and procedural requirements on the debt collector restraining the funds. In 2011, the U.S. Department of the Treasury adopted similar remedial regulations for federal benefit payments, but provided that state laws may further protect exempt funds from restraint.

Arias sued GMBS in 2015 for violations of the Fair Debt Collection Practices Act (FDCPA) and state law. Although he plausibly alleged all of the above in his Complaint, and the district court was bound to take those allegations as true and construe them in the light most favorable to Arias, the district court misapplied the FDCPA and dismissed his claims on the pleadings. First, the district court misapplied the least sophisticated consumer standard, which led it to conclude, incorrectly, that GMBS's false statements were not material misrepresentations and thus did not violate § 1692e of the FDCPA. Second, the

district court wholly failed to address Arias's claim that GMBS had violated the FDCPA by filing a formulaic "robo-objection" without meaningful attorney involvement in order to mislead him, extend the restraint, deter him from pursuing his exemption claim, and ultimately to coerce payment from his exempt funds. Finally, overlooking Arias's allegations that GMBS failed to comply with the EIPA, the district court wrongly held that GMBS was not liable under § 1692f of the FDCPA because it had followed state procedures. This Court should vacate the district court's judgment.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Plaintiff's federal claims under 28 U.S.C. § 1331 and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k, and supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367.

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1294. Plaintiff appeals from a final order of the district court dated June 8, 2016, granting Defendants' Fed. R. Civ. P. 12(c) motion with respect to the FDCPA cause of action against Defendant GMBS, declining to exercise supplemental jurisdiction over Plaintiff's state law claims, and therefore dismissing those causes of action without prejudice. Plaintiff filed a timely Notice of Appeal on June 24, 2016. *See* Fed. R. Civ. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that GMBS did not make any material misrepresentations in violation of § 1692e of the FDCPA, given that Arias sent GMBS an exemption claim accompanied by bank documentation demonstrating that all the money in his account was exempt Social Security funds, to which GMBS responded by falsely stating in legal documents that the exemption claim failed because Arias did not provide "bank records starting from a zero balance" and "documentation that he never commingled the account with nonexempt funds."

2. Whether the district court erred in dismissing Arias's plausible claim that GMBS violated the FDCPA when it responded to Arias's exemption claim by filing a formulaic "robo-objection" without meaningful attorney involvement.

3. Whether the district court erred in holding that GMBS was immunized from liability under § 1692f of the FDCPA because it had complied with procedures under state law, given GMBS's obligation to comply with *both* the FDCPA *and* state law, and given Arias's allegations that GMBS did not even follow state law.

STATEMENT OF THE CASE

Plaintiff Franklin Arias sued debt collection law firm GMBS under the FDCPA, 15 U.S.C. § 1692 *et seq.*, New York State General Business Law § 349, New York State Judiciary Law § 487, and for conversion. JA 8. Arias alleged that GMBS had repeatedly refused to release a restraint on his Social Security retirement benefits, even after he had twice provided GMBS with documentation demonstrating that his account contained only exempt funds. JA 14–15, ¶¶ 49–60.

Specifically, Arias alleged that the first time he provided GMBS with documentation demonstrating that his funds were exempt, GMBS told him that it would remove the restraint only if he made a payment, JA 15, ¶ 51; and that the second time, GMBS—without having a factual basis or exercising professional judgment, as required by state law and the FDCPA—simply filed a formulaic "robo-objection" designed to mislead Arias, extend the restraint, deter him from pursuing his exemption claim, and ultimately to coerce payment from exempt funds. JA 16–18, ¶ 60–61, 63–65, 67–69, 71–75. Arias also alleged that GMBS has a pattern and practice of violating the law in this manner. JA 16, ¶¶ 62–63.

GMBS moved for judgment on the pleadings. JA 66–68. At oral argument, the district court (Daniels, J.) recognized that Arias's allegations gave rise to significant factual questions about whether GMBS could have reasonably believed that Arias's account contained non-exempt funds, and about whether GMBS's

representations—including those concerning the degree and nature of the evidence needed to prove that Arias's funds were exempt—would have been misleading to the least sophisticated consumer. JA 161–63, 167, 173, 175, 177, 179–85, 189, 192–95, 198–200. The district court granted GMBS's motion with respect to the FDCPA cause of action, holding that GMBS's misrepresentations relating to Arias's exemption claim were not material. JA 269. The district court also wholly failed to address whether Arias's allegations that GMBS had filed a "robo-objection" to Arias's exemption claim, without engaging in meaningful attorney review, gave rise to FDCPA liability. JA 267–73. The district court further held that GMBS's actions did not violate the FDCPA because GMBS was acting in accordance with state law, JA 271, though Arias alleged that in fact GMBS did not comply with state law. JA 16, ¶¶ 61, 63, JA 18, ¶ 73, JA 38.

The district court also declined to exercise supplemental jurisdiction over Arias's remaining state law claims and dismissed those causes of action without prejudice. JA 274.

STATEMENT OF FACTS

I. PROTECTIONS FOR EXEMPT FUNDS FROM RESTRAINT

a. Federal and State Statutory and Regulatory Protections

The federal Social Security Act has long provided that no money paid or payable under the Act "shall be subject to execution, levy, attachment,

garnishment, or other legal process." 42 U.S.C. § 407(a). In 2008, New York State enacted the Exempt Income Protection Act (EIPA) to combat widespread problems around the restraint of bank accounts containing exempt funds, including Social Security benefits. MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. 197-A08527 (2008). In May 2011, the U.S. Department of the Treasury adopted similar remedial federal regulations ("federal regulations") concerning restraints of bank accounts containing statutorily exempt federal funds. 31 C.F.R. § 212.6. The federal regulations do not preempt state laws governing garnishment practices, allowing states to enact enhanced protection from restraints or garnishments for federal benefit payments. 31 C.F.R. § 212.9(b).[1] In adopting the federal regulations, the Treasury recognized that:

> Although state laws provide account owners with an opportunity to assert any rights, exemptions, and challenges to the garnishment order, including the exemptions under applicable Federal benefits laws, the freezing of funds during the time it takes to file and adjudicate such a claim can cause significant hardship for account owners . . . If their accounts are frozen, these individuals may find themselves without access to the funds in their account unless and until they contest the

[1] The federal regulations were adopted by the U.S. Department of the Treasury and other federal agencies in the form of an interim final rule in May 2011, and as a final rule in May 2013. Garnishment of Accounts Containing Federal Benefits Payments, 78 Fed. Reg. 32099 (May 29, 2013) (to be codified at 38 C.F.R. pt. 1), *available at* https://www.federalregister.gov/documents/2013/05/29/2013-12567/garnishment-of-accounts-containing-federal-benefit-payments#p-47.

> garnishment order in court, a process that can be confusing, protracted and expensive. [Citation omitted.] It was the significant hardship posed by this after-the-fact due process procedure that the rule is designed to eliminate.

Garnishment of Accounts Containing Federal Benefits Payments, 78 Fed. Reg. 32099 (May 29, 2013) (to be codified at 38 C.F.R. pt. 1).[2]

Under the EIPA, where an account had statutorily exempt funds directly deposited in the 45 days prior to a restraint, the first $2,625 of the account is automatically protected and cannot be restrained. N.Y. C.P.L.R. 5222(h), 5205(l)(3).[3] The EIPA also provides the judgment debtor with an expedited, standardized process to seek the release of any remaining exempt funds—those in excess of the first $2,625—that may end up restrained. C.P.L.R. 5222-a.[4] This process imposes both substantive and procedural obligations on the judgment creditor. However, the judgment creditor may, "[a]t any time during the procedure

[2] *Available at* https://www.federalregister.gov/d/2013-12567/p-47, https://www.federalregister.gov/d/2013-12567/p-48.

[3] C.P.L.R. 5205(l)(3) provides for a cost-of-living-adjustment increase at three-year intervals to the original stated amount of $2,500. At the time of the alleged facts, the amount was $2,625. (The current amount is $2,750.)

[4] Similarly, the federal regulations also mandate that a bank restrain "any funds in an account in excess of the protected amount," which is at least $2,625 pursuant to the EIPA. 31 C.F.R. § 212.6(d).

specified…direct the banking institution to release the funds in question to the other party….” C.P.L.R. 5222-a(f).

b. Claiming an Exemption for Restrained Funds under the EIPA

A judgment debtor whose bank account is restrained may claim that the funds therein are exempt by completing an Exemption Claim Form. C.P.L.R. 5222-a(c). The judgment creditor must have provided an Exemption Notice and two copies of an Exemption Claim Form to the bank along with any restraining notice. C.P.L.R. 5222-a(b)(1). The bank must mail the Exemption Notice and the two copies of the Exemption Claim Form to the judgment debtor within two days of receiving the restraining notice from the judgment creditor. C.P.L.R. 5222-a(b)(3). The Exemption Notice states:

> You may be able to get your account released faster if you send to the creditor or its attorney written proof that your money is exempt. Proof can include…bank records showing the last two months of account activity….If you send the creditor’s attorney proof that the money in your account is exempt, the attorney must release that money within seven days.

C.P.L.R. 5222-a(b)(4)(a). Similarly, the Exemption Claim Form states, “If you have any documents, such as…bank records showing the last two months of account activity, include copies of the documents with this form. Your account may be released more quickly.” C.P.L.R. 5222-a(b)(4)(b).

If the judgment creditor does not object to an exemption claim, the bank must release all funds in the judgment debtor's account eight days after the date postmarked on the envelope containing the executed Exemption Claim Form. C.P.L.R. 5222-a(c)(3).

c. Responding to an Exemption Claim under the EIPA

i. Releasing Funds Demonstrated to Be Exempt

Where a judgment debtor sends a judgment creditor an Exemption Claim Form accompanied by "information demonstrating that all funds in the account are exempt," the judgment creditor must, within seven days of the postmark on the envelope containing the Exemption Claim Form, instruct the bank to release the account. C.P.L.R. 5222-a(c)(4), JA 12, ¶ 33. "Information demonstrating that funds are exempt includes, but is not limited to…bank records showing the last two months of account activity." C.P.L.R. 5222-a(c)(4).

State law also provides that "[w]here an account contains some funds from exempt sources, and other funds from unknown sources, the judgment creditor shall apply the lowest intermediate balance principle of accounting and, within seven days of the postmark on the envelope containing the exemption claim form and accompanying information, shall instruct the banking institution to release the

exempt money in the account." C.P.L.R. 5222-a(c)(4).[5] The EIPA thus set out to protect exempt funds even when they may be commingled with unknown, possibly non-exempt funds. JA 13, ¶ 35. Nor does a judgment debtor lose any federal or state exemption protections by commingling funds in an account. JA 13, ¶ 36. In any event, all the money in Arias's account was Social Security funds. *Id.*

Where the executed Exemption Claim Form demonstrates that all the funds in the account are exempt, but the judgment creditor fails to instruct the bank to release the account in the time period prescribed, "the judgment creditor shall be deemed to have acted in bad faith and the judgment debtor may seek a court award of the damages, costs, fees and penalties" as provided. C.P.L.R. 5222-a(c)(4), 5222-a(g). Nothing in the EIPA, however, "in any way restrict[s] the rights and remedies otherwise available to a judgment debtor, including but not limited to, rights to property exemptions under federal and state law." C.P.L.R. 5222-a(h). In other words, state law expressly contemplates that the FDCPA may apply.

ii. Objecting to an Exemption Claim

A judgment creditor may object to an exemption claim by moving for a court order, but must fulfill various substantive and procedural requirements. Among the substantive requirements, "[t]he affirmation or affidavit in support of

[5] See *infra* Part II for detailed discussion of the lowest intermediate balance principle.

the motion shall demonstrate a reasonable belief that [the] judgment debtor's account contains funds that are not exempt from execution and the amount of such nonexempt funds." C.P.L.R. 5222-a(d). Furthermore, "[t]he affirmation or affidavit shall not be conclusory, but is required to show the factual basis upon which the reasonable belief is based." *Id.*

Among the procedural requirements, "[t]he judgment creditor must serve the bank and the judgment debtor with its motion papers within eight days after the date postmarked on the envelope containing the executed exemption claim form…" and "[t]he hearing to decide the motion shall be noticed for seven days after service of the moving papers." C.P.L.R. 5222-a(d). At the hearing, "[t]he burden of proof shall be upon the judgment creditor to establish the amount of funds that are not exempt." C.P.L.R. 5222-a(d).

Arias's Complaint alleged multiple violations of the statutory scheme set forth above.

II. GMBS REPEATEDLY REFUSED TO RELEASE FUNDS THAT IT HAD REASON TO KNOW WERE EXEMPT, INCLUDING BY "ROBO-OBJECTING" TO ARIAS'S EXEMPTION CLAIM.

On or about December 5, 2014, BofA received a notice from GMBS ordering a restraint on Arias's account. JA 14, ¶¶ 44–46; JA 28. Arias's account received only direct deposits of Social Security retirement income (at the time $785/month), but the balance at the time exceeded $2,625. JA 10, ¶ 17; JA 14, ¶

42; JA 30. Pursuant to federal regulations and the EIPA, BofA left $2,625 available to Arias but restrained the remaining balance of nearly $1,300. JA 30. On or about December 15, 2014, Arias received notice from BofA that his funds had been restrained. JA 14, ¶ 47.

That same day, Arias asked BofA to inform GMBS that the only funds in his account were Social Security retirement funds. JA 14, ¶ 48. BofA faxed documentation to GMBS showing that the account contained only Social Security retirement funds. JA 14, ¶ 49. That same day, Arias called GMBS and confirmed that BofA had faxed GMBS documentation showing that his account contained only exempt Social Security funds. JA 14, ¶ 50. GMBS nevertheless told Arias that he owed the debt and that it would remove the restraint only if Arias made a payment. JA 14–15, ¶ 51. When Arias said, on this same phone call, that he could not afford to make a payment, GMBS responded that he would have to go to court to remove the restraint. JA 15, ¶¶ 52–53.

On December 19, 2014, Arias mailed GMBS an Exemption Claim Form in which he stated under penalty of perjury that his BofA account contained Social Security funds. JA 15, ¶ 59; JA 34. He attached a copy of a two-page BofA transaction history showing only Social Security deposits, for the 11-month period from February through December 2014. JA 35-36. (The transaction history bore the BofA name and logo and indicated that it had been printed on December 15,

2014, at 9:53 am EST. JA 35.) The deposits totaled more than $8,000. JA 35-36. As this total far exceeded the account balance at the time of the restraint, it demonstrated that all the remaining funds in the account could only be Social Security funds. JA 12, ¶ 34; JA 17, ¶ 70.

On this basis, state law required GMBS to instruct BofA to release Arias's restrained funds. C.P.L.R. 5222-a(c)(4). Instead, not only did GMBS again refuse to release Arias's restrained funds, GMBS also immediately objected to his exemption claim, by filing a motion for an order deeming the funds in Arias's account non-exempt or, in the alternative, scheduling a hearing on GMBS's objection to Arias's exemption claim. JA 15, ¶ 60; JA 38. GMBS's motion was dated Monday, December 22, 2014. *Id.*

GMBS's objection consisted almost exclusively of boilerplate language that—adjusting only for the type of exempt funds and the bank's name—could be used to object to any exemption claim, without regard for the claimant's particular facts. JA 16, ¶ 63. For example, GMBS stated:

> The Defendant does not provide the proper documentation in support of his Exemption Claim Form. *The Defendant failed to provide any bank records starting from a zero balance* for the Plaintiff to review to determine if the Defendant's account contains solely social security….Even if the restrained account contains social security, *the Defendant failed to provide any documentation that he never commingled the account with non-exempt funds.*

JA 44 (emphasis added). This language could be used to object to any exemption claim where the claimant did not attach account statements covering the entire lifespan of his or her bank account.

GMBS also used the following boilerplate language that—by just changing the bank's name—could be used to object to any exemption claim:

> Moreover, the Plaintiff's Information and Restraint Subpoena is clear that accounts containing solely exempt funds should not be restrained. If the Defendant's account contained exempt funds, then Bank of America should not have restrained the same.

JA 44.

Arias alleged that it is GMBS's practice to file objections to exemption claims as a matter of course, regardless of whether there is a good-faith basis for doing so, in order to abuse and intimidate people into settlements and/or defaults. JA 15, ¶ 62. Nearly three weeks after Arias had mailed GMBS his exemption claim accompanied by the BofA transaction history, Arias again showed GMBS the same BofA transaction history, this time at the January 6, 2015 court hearing on GMBS's objection. Immediately after looking at his papers, GMBS withdrew its motion and agreed to release his Social Security funds. JA 19, ¶ 82.

GMBS made numerous misrepresentations in objecting to Arias's exemption claim. JA 16, ¶ 65. For example, GMBS claimed that Arias had not provided the

proper documentation in support of his exemption claim, including "bank records starting from a zero balance" and "documentation that he never commingled the account with non-exempt funds." JA 16, ¶ 64; JA 44. The two-page transaction history that BofA provided Arias conclusively showed that all the funds in his account were Social Security funds, and therefore exempt. JA 11, ¶¶ 20–21; JA 17 ¶ 70. GMBS nevertheless falsely claimed that Arias had to provide additional documentation.

GMBS also claimed that BofA's restraint of Arias's account by itself provided a reasonable basis to believe that the account contained non-exempt funds, because it had instructed BofA not to restrain funds that are exempt, JA 44, despite the fact, as stated above, that federal regulations and the EIPA require a bank to restrain an account that contains solely exempt funds if the balance exceeds $2,625. 31 C.F.R. § 212.6(d); C.P.L.R. 5222(h), 5205(l)(3).[6]

III. GMBS DID NOT FOLLOW STATE LAW.

GMBS failed to follow state law when it did not, upon receiving Arias's exemption claim with attached documentation demonstrating that all funds in the account were exempt, instruct BofA, within seven days of the postmark on the

[6] GMBS also made other misrepresentations of the law, including that "funds exempt from execution under C.P.L.R. 5222 will lose their exempt status if commingled with personal funds", JA 43, ¶ 12. This is legally incorrect. See *infra* Part II.

envelope, to release the account. JA 15, ¶ 58, C.P.L.R. 5222-a(c)(4). Instead, GMBS waited until January 6, 2015—nearly three weeks after Arias mailed GMBS his Exemption Claim Form—to instruct BofA to release Arias's account.

GMBS's affirmation in support of its motion also failed to "demonstrate a reasonable belief" that the restrained account contained funds that were not exempt from execution and the amount of such nonexempt funds, and failed to "show the factual basis" for said reasonable belief, as required by C.P.L.R. 5222-a(d). JA 13, ¶¶ 38–39; JA 18, ¶¶ 73–75. Indeed, GMBS's objection contained no factual basis for a belief that Arias's account contained any non-exempt funds. JA 18, ¶ 73.

In addition, though GMBS purports to have believed that Arias's account contained both exempt and non-exempt funds, it failed to apply the LIBP as required by C.P.L.R. 5222-a(c)(4). The LIBP assumes that the first money out is from non-exempt funds. Although Arias's BofA transaction history demonstrated that his account contained only Social Security funds, applying the LIBP would have also made this clear. JA 17, ¶ 70; JA 216–17.

SUMMARY OF ARGUMENT

1. The district court erred by holding that Arias did not state a claim for relief under § 1692e of the FDCPA because GMBS's statements about the documentation needed to release his exempt funds, though false, were not material. In its objection to Arias's exemption claim, GMBS falsely stated that Arias's

exemption claim was insufficient because Arias "failed to provide . . . bank records starting from a zero balance" and "failed to provide any documentation that he never commingled the account with non-exempt funds." JA 16, ¶ 64. These statements were false and deceptive because Arias was not required to provide bank records starting from a zero balance and any alleged "commingling" would not alter the exempt status of his Social Security benefits.

As this Court recognized in *Easterling v. Collecto, Inc.*, 692 F.3d 229, 235 (2d Cir. 2012), a debt collector's false statement concerning a debtor's legal rights and options is "fundamentally misleading" because it has the "capacity to discourage debtors from fully availing themselves of their legal rights." The false statements easily meet the standard for materiality set forth in *Gabriele v. Am. Home Mortgage Servicing, Inc.*, No. 11-3209, 503 F. App'x 89, 94 (2d Cir. 2012) (summary order).

The district court conceded that GMBS's statements constituted misrepresentations, but held that they were not material because "Arias alleged that he never commingled non-exempt and exempt funds." JA 270. The district court failed to apply the objective "least sophisticated consumer" standard as directed by *Easterling*, and thus committed reversible error.

2. The district court wholly failed to rule on Arias's plausible claim that GMBS violated § 1692e of the FDCPA by "robo-objecting" to his exemption

claim: in other words, by filing a form objection without meaningful attorney involvement.

This Court has long held that sending a collection letter on attorney letterhead is false and misleading in violation of § 1692e if the attorney has not conducted a meaningful review of the file and determined based on the facts of the individual case that a letter should be sent. *Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993). The filing of legal pleadings without meaningful attorney review likewise violates § 1692e.

Filing legal pleadings without meaningful review has serious, negative consequences and is materially misleading to the least sophisticated consumer. The least sophisticated consumer is likely to believe, when served with legal papers, that an attorney has reviewed his file and determined in the exercise of professional judgment that the creditor has a viable claim. The deception could lead the least sophisticated consumer to abandon valid defenses and pay invalid claims.

Arias plausibly alleged that GMBS, without conducting a meaningful attorney review, submitted a form objection to try to deter him from pursuing his meritorious exemption claim. This claim is highly fact-specific. The district court erred by failing to address this issue in its opinion and by dismissing this fact-bound claim on the pleadings alone.

3. The district court failed to recognize that GMBS's conduct was unfair and unconscionable in violation of § 1692f. The court failed to address Arias's contention that GMBS violated § 1692f by filing an objection without the reasonable basis required by state law. By filing the objection, GMBS unduly prolonged the restraint on Arias's exempt funds beyond the time allowed by law, all in an effort to cause Arias to give up his exemption claim or make payment from his exempt funds. And as in *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529 (6th Cir. 2014), GMBS unfairly took advantage of state judgment enforcement mechanisms to maintain an invalid lien on Arias's exempt property.

The district court erred by holding that GMBS did not violate § 1692f because it followed state procedures. First, as Arias clearly alleged in his complaint, GMBS did not follow state procedures. Second, as this Court held in *Romea v. Heiberger and Assocs.*, 163 F.3d 111, 119 (2d Cir. 1998), compliance with state procedures does not excuse violating the FDCPA. A debt collector must comply with *both* the FDCPA *and* state law.

Finally, the availability of a state law cause of action does not affect liability under the FDCPA.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the granting of a motion for judgment on the pleadings, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the non-moving party. *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009). To survive a Rule 12(c) motion, the complaint must contain sufficient facts, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 44. "The plausibility standard is not akin to a probability requirement. A well pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (citations, internal quotation marks, brackets, and footnote omitted); *see also Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003) ("A case should not be dismissed unless the court is satisfied that the complaint cannot state any set of facts that would entitle the plaintiff to relief.").

Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) (referencing the Act's "broadly worded prohibitions on debt collector misconduct"). To that end, the FDCPA broadly forbids debt collectors from using "any false, deceptive, or misleading

representation or means in connection with the collection of any debt," § 1692e, or any "unfair or unconscionable means to collect or attempt to collect any debt," § 1692f. When examining misrepresentations arising under § 1692e of the FDCPA, the Court adopts an objective "least sophisticated consumer" standard. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). The purpose of this standard is to protect "the naïve and the credulous" who are "especially vulnerable to fraudulent schemes." *Id.* at 19.

II. THE DISTRICT COURT ERRED IN HOLDING THAT GMBS'S MISREPRESENTATIONS WERE NOT MATERIAL

The district court erred when it held that Arias did not state a plausible claim for relief under § 1692e of the FDCPA because GMBS's statements about the documentation needed to release his exempt funds, though false, were not material. GMBS falsely stated that Arias's exemption claim was insufficient because Arias "failed to provide . . . bank records starting from a zero balance" and "failed to provide any documentation that he never commingled the account with non-exempt funds." JA 16, ¶ 64. Arias alleged that these statements were false and deceptive because he was not required to provide bank records starting from a zero balance and any alleged "commingling" would not alter the exempt status of his Social Security benefits. JA 16, ¶ 75. "Debt collectors may not make false claims, period." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (citing *Russell*

v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996)).

GMBS's statements were mere pretexts to restrain federally exempt funds. First, under the EIPA, the accountholder need not provide records going back to a zero balance in order to establish that an account contains exempt funds. Rather, the accountholder is free to provide a range of materials that would demonstrate that the restrained funds come from an exempt source. C.P.L.R. 5222-a(c)(4). When reviewing the consumer's bank records, the judgment creditor "shall apply the lowest intermediate balance principle of accounting." *Id.* This accounting principle presumes that non-exempt funds are spent before exempt funds. *In re Foster*, 275 F.3d 924, 927 n.1 (10th Cir. 2001) (explaining LIBP). If the total amount of exempt deposits exceeds the balance in the account, as in Arias's case, all the money in the account is exempt. There is simply no need or reason to go back to a zero balance.

Second, as a matter of federal law, Social Security benefits retain their exempt status even if commingled with other funds. *Granger v. Harris*, No. CV-05-3607, 2007 U.S. Dist. LEXIS 30076, at *18–20 (E.D.N.Y. Apr. 17, 2007) (citing cases); *see also Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973) (Social Security Act "imposes a broad bar against the use of *any* legal process to reach *all* social security benefits") (emphasis added). As a matter of state law, a judgment creditor confronted with commingled funds must use lowest

intermediate balance accounting to separate exempt from non-exempt funds, and must release the exempt funds within seven days. C.P.L.R. 5222-a(c)(4). The accountholder need not establish that he "never commingled the account" in order to prove an exemption.

The district court conceded that Arias "may be correct" that these statements constituted misrepresentations, but held that they did not violate the FDCPA because they were not material. In so holding, the district court fundamentally misunderstood the concept of materiality as set forth by the Second Circuit and other appellate courts.

Although the Second Circuit has not explicitly adopted a materiality requirement, the misconduct by GMBS easily meets the standard set forth in the unpublished summary order in *Gabriele v. Am. Home Mortgage Servicing, Inc.* and leading appellate decisions from other circuits. *Gabriele* offered five examples of material violations of the FDCPA under existing Second Circuit case law,[7] including the factor most relevant here: "communications and practices" that "could impede a consumer's ability to respond to or dispute collection." *Gabriele v. Am. Home Mortgage Servicing, Inc.*, 503 F. App'x 89, 94 (2d Cir. 2012) (summary order). Notably, nothing in *Gabriele* suggests that the court intended the

[7] As discussed *infra* in Part III, *Gabriele* specifically held that misrepresenting the debt collector's involvement in the debt collection process, as in *Clomon*, constitutes a material misrepresentation and violates the FDCPA.

examples to constitute a complete list of conduct that could materially violate the FDCPA. Indeed, *Gabriele* cited to appellate case law from other jurisdictions that define material false statements broadly as "genuinely misleading statements that may frustrate a consumer's ability to intelligently choose his or her response" as opposed to "mere technical falsehoods that mislead no one." *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1034 (9th Cir. 2010); *see also Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 374 (4th Cir. 2012); *Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757–58 (7th Cir. 2009) ("The statute is designed to provide information that helps consumers to choose intelligently, and by definition immaterial information neither contributes to that objective (if the statement is correct) nor undermines it (if the statement is incorrect).").

The district court failed to analyze the effect of the misrepresentations on the least sophisticated consumer. *See Powell v. Palisades Acquisition XVI, LLC*, 782 F.3d 119, 126 (4th Cir. 2014) ("Thus, only misstatements that are important in the sense that they could objectively affect the least sophisticated consumer's decisionmaking are actionable.") Instead, the court held that the misrepresentations were immaterial because "Arias alleged that he never commingled non-exempt and exempt funds." JA 270. In so doing, the district court failed to follow this Court's holding in *Easterling v. Collecto, Inc.*, which states very clearly that "[t]he least sophisticated consumer test is an objective inquiry directed toward 'ensur[ing] that

the FDCPA protects all consumers, the gullible as well as the shrewd.'" 692 F.3d 229, 234 (2d Cir. 2012) (quoting *Clomon*, 988 F.2d at 1318); *see also DeSantis v. Computer Credit, Inc.*, 269 F.3d 159, 161 (2d Cir. 2001) (least sophisticated consumer standard is "an objective standard"); *Russell*, 74 F.3d at 34 (same). The district court wrongly relied on the unpublished decision in *DiMatteo v. Sweeney, Gallo, Reich & Bolz, L.L.P.*, 619 Fed. App'x 7 (2d Cir. 2015), for the proposition that "background facts relating to the ongoing dispute . . . may be considered when applying the least sophisticated consumer test." *DiMatteo* held that the debt collector's statements were not misleading under any standard, and the court's musings concerning the outer reaches of the least sophisticated consumer standard were dicta. *Id.* at 10. In *Easterling*, the debtor had not actually sought to discharge her student loan in bankruptcy, just as in this case Arias was not actually prevented from pursuing his exemption claim. "By its very nature, however, the least sophisticated consumer test pays no attention to the circumstances of the particular debtor in question, and it was error for the district court to rely on such circumstances here." *Easterling*, 692 F.3d at 234.

The misrepresentations concerning the zero balance and commingling could impede the least sophisticated consumer's ability to respond to or dispute collection because they imply that the documents provided by the consumer are insufficient, when in fact the consumer has already provided all the proof that is

needed. The least sophisticated consumer, confronted by these misrepresentations from a law firm, may well believe that any attempt to challenge the objection would be futile and he should therefore allow the debt collector to take his exempt funds. In other words, the misrepresentations could easily frustrate the least sophisticated consumer's ability to choose an intelligent response to the debt collector's restraint of his exempt funds.

This case is very similar to *Easterling*. There, a debt collector sent a letter stating that the plaintiff's student loan was "ineligible for bankruptcy," when in fact the loan could have been discharged under certain (albeit unlikely) conditions. This Court termed the misrepresentation in *Easterling* "literally false" and "fundamentally misleading" because it had the "capacity to discourage debtors from fully availing themselves of their legal rights." *Id.* at 235; *see also Samms v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 112 F. Supp. 3d 160, 164 (S.D.N.Y. 2015) (collector's false claim of entitlement to attorney's fees in state court complaint "could subtly coerce the consumer" to give up his defense and "pay the debt out of the fear of incurring even greater liability"); *Abramov v. I.C. Sys., Inc.*, 54 F. Supp. 3d 270, 278 (E.D.N.Y. 2014) (collector's statement that disputes must be "in writing" was materially misleading because it could impede the least sophisticated consumer's ability to respond); *Fritz v. Resurgent Capital Servs.*, 955 F. Supp. 2d 163, 171 (E.D.N.Y. 2013) (false

representation that collector held valid debt collection license was materially misleading because it "could easily have led an unsophisticated consumer to forgo a valid defense"). The misrepresentations in this case are strikingly similar in their effect on the least sophisticated consumer.

III. THE DISTRICT COURT FAILED TO ADDRESS ARIAS'S CLAIM THAT GMBS VIOLATED § 1692e BY "ROBO-OBJECTING" TO HIS EXEMPTION CLAIM.

The district court failed to address Arias's allegations that GMBS violated § 1692e by "robo-objecting" to his exemption claim: in other words, by filing a form objection without meaningful attorney involvement. *See* JA 15–16, ¶¶ 59–63, 71–73; JA 132–33. This is reason alone to reverse the district court, because robo-signing of legal pleadings violates the FDCPA.

a. Arias plausibly alleged that GMBS "robo-objected" to his exemption claim.

Arias alleged that:

- Under New York law, upon receiving information demonstrating that all funds in a restrained account are exempt, a judgment creditor is required to release the account (JA 11, ¶ 33);
- On December 19, 2014, Arias mailed an Exemption Claim Form to GMBS accompanied by a bank statement demonstrating that all the money in his account was exempt Social Security funds (JA 15, ¶ 59; JA 30-37);
- On December 22, 2014, GMBS filed an objection and requested a hearing (JA 15, ¶ 60; JA 38-39);

- Under New York law, a judgment creditor is not permitted to object to an exemption claim unless it has "a reasonable belief" that the account contains non-exempt funds (JA 13, ¶ 38);

- Further, the objection must state "the factual basis upon which the reasonable belief is based" (JA 13, ¶ 39);

- GMBS's objection was a boilerplate motion that did not contain any facts specific to Arias's exemption claim (JA 16-17, ¶¶ 63, 73; JA 38-39);

- In fact, the objections cited in GMBS's motion were so generic that they could apply to any exemption claim filed by a consumer (JA 16, ¶ 63);

- Two weeks later, at the court hearing, Arias showed GMBS the same documents that were attached to his exemption claim, and immediately upon reviewing the documents, GMBS agreed to release the account (JA 18, ¶¶ 76-81);

- GMBS made a baseless robo-objection to Arias's exemption claim in order to pressure him to use his exempt funds to pay the default judgment, or in hopes that he would default at the hearing on the objection (JA 16, ¶ 61; JA 19, ¶ 86); and

- GMBS has a pattern and practice of objecting to exemption claims regardless of whether it has a good-faith basis to do so for the purpose of abusing and intimidating consumers into abandoning their exemption claims (JA 16, ¶¶ 61-63).

These allegations are more than sufficient to meet the plausibility standard required to survive a motion for judgment on the pleadings.

b. The district court failed to find that GMBS violated § 1692e, e(3) and e(10) by filing a form objection without meaningful attorney involvement.

Section 1692e of the FDCPA bars debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This includes, without limitation, the "false representation or implication . . . that any communication is from an attorney," § 1692e(3), and the "use of any false representation or deceptive means to collect or attempt to collect any debt." § 1692e(10). The prohibition "applies to the litigation activities of lawyers" collecting debts in state court. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995). "Communications" includes legal pleadings. *Goldman v. Cohen*, 445 F.3d 152, 155 (2d Cir. 2006).[8]

This Court has long held that sending a collection letter on attorney letterhead or under attorney signature is "false and misleading" if the attorney has not conducted a meaningful review of the file and determined based on the facts of the individual case that a letter should be sent. *Clomon*, 988 F.2d at 1320. Such

[8] *Cohen* held that the initiation of a lawsuit in state court was an "initial communication" under of the FDCPA. *Id.* Congress subsequently amended the FDCPA to provide that formal legal pleadings "shall not be treated as an initial communication." 16 U.S.C. § 1692g(d). The amendment, however, did not disturb the *Cohen* court's rationale. Moreover, by exempting legal pleadings only from the narrow category of "initial" communications, Congress indicated that legal pleadings *are* generally communications for FDCPA purposes. *See Fritz*, 955 F. Supp. 2d at 169-70; *cf. Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007).

practices violate § 1692e, e(3), and e(10). *Id.* "[S]ome degree of attorney involvement is required before a letter will be considered 'from an attorney' within the meaning of the FDCPA." *Miller*, 321 F.3d at 301. This is because the use of the attorney's signature represents to the least sophisticated consumer "that the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent." *Id.* (quoting *Clomon*, 988 F.2d at 1321); *see also Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996) (attorney letter implies that attorney "has reached a considered, professional judgment"). Such representations are false if the attorney has not actually engaged in a meaningful analysis and made a considered decision. Since *Clomon*, every appellate court that has considered this question has come to the same conclusion: an attorney who sends a letter without conducting a meaningful review of the file falsely represents that his communication is "from an attorney" within the meaning of § 1692e(3). *See, e.g.*, *Lesher v. Law Offices of Mitchell N. Kay, P.C.*, 650 F.3d 993, 1003 (3d Cir. 2011); *Gonzalez v. Kay*, 577 F.3d 600, 604-07 (5th Cir. 2009); *Kistner v. Law Office of Michael P. Margelefsky, LLC*, 518 F.3d 433, 440 (6th Cir. 2008); *Avila*, 84 F.3d at 228-29.

Likewise, though no appellate court has yet considered the question, district courts have held that the filing of legal papers without meaningful attorney review violates the FDCPA. *See Bock v. Pressler and Pressler, LLP*, 30 F. Supp. 3d 283,

297 (D. N.J. 2016), *remanded on other grounds*, No. 15-1056, 2016 U.S. App. LEXIS 13681 (3d Cir. 2016) (rationales of appellate cases discussing collection letters apply equally to pleadings filed in state court collection actions); *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Associates, P.C.*, 114 F. Supp. 3d 1342, 1365 (N.D. Ga. 2015) (meaningful attorney review doctrine applies to "communications," and "communications" include legal pleadings); *see also Mohr v. Sec. Credit Servs., LLC*, 141 F. Supp. 3d. 179, 186 (N.D.N.Y. 2015) (allowing discovery of attorney time records in connection with claim of lack of meaningful attorney review); *Diaz v. Portfolio Recovery Assocs., LLC*, No. 10 CV 3920 MKB CLP, 2012 U.S. Dist. LEXIS 72724, at *5 (E.D.N.Y. May 24, 2012) (claims that attorneys filed lawsuits without meaningful review survived motion to dismiss); *Miller v. Upton*, 687 F. Supp. 2d 86, 96 (E.D.N.Y. 2009) (applying same standard to collection letters and legal pleadings); *and see Tourgeman v. Collins Fin. Servs.*, No. 08-CV-1392, 2011 U.S. Dist. LEXIS 81070, *29 (S.D. Cal. Jul. 26, 2011) (applying meaningful attorney review doctrine to legal pleadings); *Berg v. Blatt, Hasenmiller, Leibsker & Moore LLC*, No. 07-C-4887, 2009 U.S. Dist. LEXIS 26808 (N.D. Ill. Mar, 31, 2009) (same).

Furthermore, the FDCPA requires that the debt collection attorney do what is necessary to satisfy himself that the legal claims are reasonably supported by fact and law. *Miller*, 321 F.3d at 305. A mere ministerial review, such as

comparing data that appears on a computer screen with data that appears in a legal pleading, is insufficient. *Nielsen v. Dickerson*, 307 F.3d 623, 636 (7th Cir. 2002) (ministerial review and knowledge of client's general debt collection procedures did not constitute "professional judgment as to the delinquency and validity of any individual cardholder's debt"); *see also Bock*, 30 F. Supp. 3d at 304–305. Here, state law mandates particular steps to take in reviewing an exemption claim, thereby providing a guide as to what might constitute a meaningful attorney review. *Gallego v. Northland Group, Inc.*, 814 F.3d 123, 128 (2d Cir. 2016) (state law can "fill the interstices of federal legislation") (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727–28 (1979).

Filing legal pleadings without meaningful attorney review has serious, negative consequences and is materially misleading to the least sophisticated consumer. *Gabriele*, 503 F. App'x at 95 (citing *Clomon* to hold that communications are materially misleading if they are deceptive as to the involvement of the debt collector). "The least sophisticated consumer is likely to believe when served with a debt collection complaint that a lawyer has reviewed his account and determined that the creditor has a valid claim." *Hanna*, 114 F. Supp. 3d at 1366. The least sophisticated consumer—who generally lacks legal counsel—may decide not to raise a defense, wrongly assuming that "a real lawyer, acting like a lawyer usually acts" has apparently "made a considered, professional

judgment that the debtor . . . is a candidate for legal action." *Avila*, 84 F.3d at 229. The deception could lead the least sophisticated consumer to abandon valid defenses and pay invalid claims.[9]

Filing a baseless robo-objection, as in this case, is similar to suing or threatening to sue on a time-barred debt, a practice that all courts agree violates the FDCPA. *See, e.g., Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32–22 (3d Cir. 2011) (per curiam); *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324, 332–33 (6th Cir. 2006). In both instances, the debt collector advances a legal claim—a lawsuit or an objection—that represents to the least sophisticated consumer an entitlement to relief not legally available. The least sophisticated consumer, who also typically lacks legal representation, is simply not in a position to know that the debt collector has an unwinnable claim. *See Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) ("Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against

[9] This view is supported by the Federal Trade Commission and the Consumer Financial Protection Bureau, the federal agencies charged with enforcing the FDCPA. *See* Brief of *Amici Curiae* Consumer Financial Protection Bureau and Federal Trade Commission in Support of Appellee and Affirmance, *Bock v. Pressler & Pressler, LLP*, No. 15-1056 (3d Cir. Aug. 13, 2015), *available at* http://files.consumerfinance.gov/f/201508_cfpb_bock-v-pressler-and-pressler-amicus-brief.pdf. This Court must give "great weight" to the opinions of these agencies, which are often in a better position than the Court to judge whether a practice is deceptive. *FTC v. Colgate-Palmolive*, 380 U.S. 374, 384–385 (1965).

lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits."); *see also Cameron v. LR Credit 22, LLC*, 998 F. Supp. 2d 293, 300 (S.D.N.Y. 2014) ("the threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate") (citation omitted); *Diaz*, 2012 U.S. Dist. LEXIS 72724 at *5; *Goins v. JBC & Associates, P.C.*, 352 F. Supp. 2d 262, 272 (D. Conn. 2005). "To allow a debt collector to threaten a consumer with legal action, even though the statute of limitations would provide the consumer with the ultimate defense, would be to encourage manipulation and misuse of the legal system." *Baptist v. Global Holding & Inv. Co., L.L.C.*, No. 04-CV-2365 (DGT), 2007 U.S. Dist. LEXIS 49476 at * 5 (E.D.N.Y. July 9, 2007). Allowing debt collectors to raise frivolous objections to unmistakably valid exemption claims encourages similar manipulation and misuse, leading the least sophisticated consumers to assume that they have no valid exemption claim and no choice but to surrender their exempt funds.

Here, the district court erred by wholly failing to consider Arias's plausible claim that GMBS, without conducting a meaningful attorney review and in violation of § 1692e, simply submitted a form objection in order to try to deter Arias from pursuing his meritorious exemption claim. Furthermore, Arias's claims based on lack of attorney review are inherently fact-specific. The district court

should have afforded him the opportunity to develop the claims through discovery, including through depositions of the GMBS staff members involved in creating and submitting the robo-objection, and should have addressed Arias's robo-objection arguments in its opinion. The district court's failure to do so, and its dismissal of these plausible claims on the pleadings alone, constitutes reversible error.

IV. THE DISTRICT COURT FAILED TO RECOGNIZE THAT GMBS'S CONDUCT WAS UNFAIR AND UNCONSCIONABLE IN VIOLATION OF § 1692f

a. The district court wrongly rejected Arias's argument that GMBS violated § 1692f by taking an affirmative step to extend its restraint on funds it had reason to know were exempt.

The district court likewise erred in rejecting Arias's claim that GMBS's robo-objection violated § 1692f of the FDCPA, which forbids the use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. The same practices can be both "misleading" under § 1692e and "unfair" under § 1692f. *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 536 (6th Cir. 2014) (describing § 1692e and § 1692f as "broad, potentially overlapping" and "not mutually exclusive"); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185 (11th Cir. 2012) (unlicensed debt collector violated § 1692e and § 1692f by threatening lawsuit when debt collection license was required in order to sue); *Sykes v. Mel Harris & Assocs.*, LLC, 780 F.3d 70, 82 (2d Cir. 2015) (scheme to obtain default

judgments on the basis of false affidavits raised claims under § 1692e and § 1692f).

Courts interpret "unfair" and "unconscionable" according to their plain meaning, *Gallego v. Northland Group, Inc.*, 814 F.3d 123, 127 (2d Cir. 2016) (quotations omitted), and from the perspective of the least sophisticated consumer. *Currier*, 762 F.3d at 533. "Unfair" means "marked by injustice, partiality, or deception." *LeBlanc*, 601 F.3d at 1200. "Unconscionable" means "affronting the sense of justice, decency, or reasonableness" or "shockingly unjust or unfair." *Gallego*, 814 F.3d at 128.

Viable claims under § 1692f include "the unauthorized taking of money or property," such as "collecting amounts not authorized by law" or "unlawfully garnishing money or property." *Sutton v. Fin. Recovery Servs.*, 121 F. Supp. 3d 309 (E.D.N.Y. 2015). Such claims include maintaining an invalid lien against a person's home, *Currier*, 762 F.2d at 534; seeking a writ of garnishment against a person who was current in her payments, *Fox v. Citicorp. Credit Servs., Inc.*, 15 F.3d 1507, 1517 (9th Cir. 1994); failing to comply with a court order mandating the return of garnished funds, *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 522 (S.D.N.Y. 2013) (adopting *Fox*, *Bray*, *Hogue*, *Todd*, and *Lovelace*), and *Polanco v. NCO Portfolio Mgmt.*, 930 F. Supp. 2d 547 (S.D.N.Y. 2013); taking unauthorized withdrawals from a bank account, *Lovelace v. Stephens & Michaels*

Associates, Inc., No. 07-10956, 2007 U.S. Dist. LEXIS 83281 at *4-5 (E.D. Mich. Nov. 9, 2007); and—most relevant here—garnishing a bank account with knowledge that it contains exempt funds. *Bray v. Cadle Co.*, No. 4:09-cv-663, 2010 U.S. Dist. LEXIS 109470 at *15 (S.D. Tex. Oct. 12, 2010); *Hogue v. Palisades Collection, LLC*, 494 F. Supp. 2d 1043, 1051 (S.D. Iowa 2007); *Todd v. Weltman, Weinberg & Reis, Co., L.P.A.*, 348 F. Supp. 2d 903, 915 (S.D. Ohio 2004), *aff'd* 434 F.3d 432 (6th Cir. 2006).

Moreover, New York law requires that a debt collector may not object to an exemption claim unless it has "a reasonable belief" that the account contains non-exempt funds. C.P.L.R. 5222-a(d). The district court failed to address Arias's contention that filing an objection without the reasonable basis required by state law violates § 1692f. *Compare Todd*, 348 F.Supp.2d at 915 (finding § 1692f violation where debt collector had no reasonable belief) *with Lee v. Javitch, Block & Rathbone LLP*, 601 F.3d 654 (6th Cir. 2010) (finding no violation where debt collector had reasonable belief). GMBS could not possibly have had a reasonable belief that Arias's account contained non-exempt funds. By the time GMBS filed his objection, Arias had twice sent GMBS documentation demonstrating that his account contained only Social Security funds.

Had GMBS conducted a meaningful attorney review of the documents that Arias submitted with his exemption claim, and exercised professional judgment as

required by the FDCPA and state law, GMBS would have seen that Arias's account contained only exempt Social Security funds, would not have filed the objection, and instead would have released Arias's exempt funds within seven days as required by C.P.L.R. 5222-a(c)(4). By filing a robo-objection in response to Arias's exemption claim, GMBS doubled down on its refusal to release Arias's exempt funds, taking an affirmative step to maintain the restraint for an additional 21 days. C.P.L.R. 5222-a(e). GMBS did this in order to pressure Arias to give up his exemption claim or make payment from his exempt funds.

The district court's characterization of this contention as "unsupported and implausible," JA 272, is contradicted by the court's own statements at oral argument describing how GMBS's unfair acts *could* plausibly have affected Arias. *See, e.g.*, JA 164:11 ("[Y]ou forced the plaintiff to have to show up at court and you took your shot at trying to force him to give up his Social Security funds or to pay the debt so he wouldn't have to come to court.); JA 185:1, 9; JA 192:16-17 ("I don't know if the lawyer did this to just squeeze cash out of" Arias); JA 193:1-11 ("Or what could have happened is they got the records and they said, yeah, we really shouldn't be seizing these funds, but you know what, let's tell them it's ours anyway and see if they will just give us the money because he doesn't want to be dragged into court"); JA 200:2-7 ("Or the reason could be we were trying to squeeze money out of the plaintiff to make him pay stuff that we didn't have any

right to take and we're just going to see whether he is going to give us the money or if he shows up to court and defends, then we know we are going to lose, so we might as well abandon.").

The district court erred by failing to recognize these debt collection means as "marked by injustice, partiality, or deception," "affronting the sense of justice, decency, or reasonableness," or "shockingly unjust or unfair."

b. The district court wrongly rejected Arias's argument that GMBS violated § 1692f by maintaining a restraint on funds it had reason to know were exempt.

Section 1692f also has broader application as a "catchall provision," covering unfair or unconscionable collection acts that fall outside the specific acts and practices prohibited by other subsections of the FDCPA. *Rogers v. Capital One Servs.*, 447 Fed. Appx. 246, 249 (2d Cir. 2011). The district court failed to address Arias's argument that GMBS acted unfairly and unconscionably by restraining funds it had reason to know were exempt.

Arias's allegations, taken as true and in the light most favorable to him, state a claim under § 1692f that GMBS refused to release and unlawfully maintained a restraint on funds that it knew or should have known were exempt. Arias alleged that on or about December 15, 2014, he, through his bank, faxed to GMBS documentation that his account contained only exempt Social Security funds. JA 14-15, ¶¶ 48-50, 56. Even after confirming that it had received such proof, GMBS

told Arias that it would remove the restraint *only if* Arias made a payment. JA 14-15, ¶ 51.

Social Security funds are exempt from debt collection, and the EIPA explicitly does nothing to change that. 42 U.S.C. § 407(a); C.P.L.R. 5222(i). For this reason, the district court's surprising assertion that "GMBS was under no obligation to release the restraint" is wholly incorrect. JA 272. Federal law obligated GMBS to release the account as soon as it knew or should have known that the account contained only Social Security benefits, even if Arias never submitted an exemption claim, and under the EIPA a judgment creditor need not be bound by the procedure thereunder, but may instead go ahead and release an account "at any time during the procedure specified." C.P.L.R. 5222-a(f). Therefore, from the moment that GMBS knew or should have known that Arias's restrained funds were exempt under law from debt collection, GMBS acted unfairly by continuing to maintain the restraint. When Arias made his formal exemption claim, GMBS doubled down on its refusal to release the exempt funds by preparing, filing, and sending to Arias a robo-objection that violated state law and contained material misrepresentations.

GMBS's behavior was strikingly similar to that of the creditor in *Currier*. There, the debt collector filed an invalid lien against the plaintiff's home, and then maintained the invalid lien for several weeks after being advised that it had done

so. 762 F.3d at 534. The lien "placed an improper legal burden on Currier's home, restricting her rights in her own property." *Id.* Similarly, the restraint on Arias's Social Security benefits improperly restricted his rights to his exempt property. The *Currier* court held that such practices were unfair because "[t]he very point of a lien is that it coerces the property holder to settle a debt in order to maintain rights in the property." *Id.* at 535. Similarly, a lien on a bank account coerces the accountholder into making a payment so as to recover control of the account. Indeed, Arias's complaint alleged that GMBS attempted just that: When Arias's bank faxed GMBS documentation showing that the account contained only exempt Social Security benefits, GMBS responded by telling Arias that he owed a debt and GMBS would release the restraint *only if* he made a payment. JA 14-15, ¶ 51.

As the *Currier* court explained, "the least sophisticated consumer, indeed most consumers, would regard filing a lien on the debtor's home using a state procedure that does not authorize such action as an 'unfair or unconscionable means to collect or attempt to collect' the debt." *Id.* (quoting § 1692f). Similarly, GMBS maintained a restraint on Arias's bank account for several weeks, purporting to use a state procedure that did not authorize such action, and which in fact mandated GMBS to release Arias's account within one week. C.P.L.R. 5222-a(c)(4). Nor did GMBS even comply with the requirements of the state procedure.

Surely, the least sophisticated consumer would find GMBS's practices "unfair" and "unconscionable."

Where appellate courts have not found an FDCPA violation in connection with the restraint of exempt funds, the debt collector acted far differently than here. In two instances, the debt collector did have a reasonable basis to believe that the restrained account contained non-exempt funds. *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1307 (11th Cir. 2015); *Lee*, 601 F.3d at 659. In another, the debt collector had no way of knowing prior to restraint that the account contained exempt funds, but when so advised, it released the account. *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 472 (7th Cir. 2007). In all three cases, the debt collector refrained from making false statements or misrepresentations and actually did comply with state procedures (though this is not a defense to violating the FDCPA, *see infra*). Here, GMBS made material false statements concerning the documentation needed to establish an exemption claim, *see supra*. The documentation Arias sent to GMBS—which it ignored—established definitively that his account contained only exempt Social Security funds. And GMBS violated state law when it prepared and filed its robo-objection.

V. THE DISTRICT COURT ERRED BY HOLDING THAT GMBS WAS IMMUNIZED FROM LIABILITY UNDER THE FDCPA BECAUSE IT FOLLOWED STATE PROCEDURES

The District Court incorrectly reasoned that a debt collector does not engage in unfair or unconscionable conduct rendering it liable under § 1692f if it has objectively complied with a state's "legislatively prescribed process." JA 271. The district court was wrong on both counts. First, GMBS did not even follow state law. Second, alleged compliance with state court procedures does not excuse violating the FDCPA.

a. GMBS did not even follow state law.

Contrary to the district court's finding, GMBS violated state law in numerous respects, including as follows:

- Upon receiving Arias's Exemption Claim Form accompanied by information demonstrating that all funds in the account were exempt, GMBS failed to instruct the bank to release the account within seven days. C.P.L.R. 5222-a(c)(4), JA 14-15, ¶¶ 59-60.

- Though GMBS purports to have believed that Arias's account contained both exempt and non-exempt funds, GMBS failed to apply the lowest intermediate balance principle of accounting (LIBP). C.P.L.R. 5222-a(c)(4), JA 38; JA 14-15 ¶¶ 59-60.

- In its affirmation in support of its motion objecting to Arias's exemption claim, GMBS failed to "demonstrate a reasonable belief" that the restrained account contained non-exempt funds and the amount of such nonexempt funds, and failed to "show the factual basis" for said reasonable belief. C.P.L.R. 5222-a(d), JA 16, ¶¶ 61, 63-64. Indeed, GMBS's objection contained no factual basis for a belief that Arias's account contained any non-exempt funds. JA 38; JA 18, ¶ 73.

- GMBS noticed its motion for 14 days after service of the moving papers, seven days later than permitted under state law. C.P.L.R. 5222-a(d), JA 38. GMBS's overall delay unlawfully extended the time that Arias was denied access to his exempt Social Security benefits, including over Christmas and New Year's Day.

As Arias clearly alleged these violations of state law in the Complaint, the district court was bound at this stage of the proceedings to take his allegations as true and judge them in the light most favorable to him. The district court therefore had no basis to conclude that GMBS had "objectively complied" with state law.

b. Compliance with state procedures is not a defense to violating the FDCPA.

The district court wrongly held that GMBS's actions in maintaining the restraint on Arias's account and filing the baseless objection did not violate § 1692f because GMBS complied with state procedures.

In *Romea v. Heiberger and Assocs.*, 163 F.3d 111 (2d Cir. 1998), this Court examined the relationship between the FDCPA and a New York civil procedure statute and concluded that a debt collection attorney must comply with *both* the FDCPA *and* state law. This Court found it "easy to imagine a situation in which a debt collector . . . complies with New York's requirements but still contravenes the purposes of the FDCPA by using abusive or coercive techniques" to try to obtain payment. *Id.* at 118; *see also Chalik v. Westport Recovery Corp*., 677 F. Supp. 2d 1322, 1329 (S.D. Fla. 2009) (defendants' compliance with state procedure "has little relevance to Defendants' compliance with the FDCPA as a debt collector may

violate the FDCPA while simultaneously following an authorized state procedure."). For this reason, "applying the FDCPA's requirements in addition to the requirements of the [state] process may be necessary to achieve the FDPCA's goal of protecting consumers from unacceptable debt collection practices." *Romea*, 163 F.3d at 118. Furthermore, to the extent that state law conflicts with the FDCPA, the FDCPA governs. 15 U.S.C. § 1692n.

The FDCPA required that GMBS refrain from unfair and deceptive debt collection practices. GMBS, however, violated the FDCPA by: (1) refusing to release funds it knew or should have known were exempt; (2) demanding payment as a condition of releasing Arias's restrained funds, which it had reason to know were all exempt; and (3) taking advantage of state procedures to file a baseless objection containing material misrepresentations, which had the effect of prolonging the restraint on Arias's exempt funds for longer than state law allowed. In so acting, GMBS's behavior is similar to that of the attorney who files suit on a time-barred debt, *Kimber*, 668 F. Supp. at 1487–88, or takes unfair advantage of discovery devices. *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 952 (9th Cir. 2011). In these situations, the debt collection attorney employs tactics that technically may be allowed under state civil procedure rules, but are extremely unfair and deceptive as against unrepresented and unsophisticated litigants who are not equipped to counter them. The least sophisticated consumer

would not necessarily know to raise the statute of limitations as an affirmative defense. *Kimber*, 668 F. Supp. at 1488. Nor would the least sophisticated consumer understand that he must deny requests for admission within thirty days lest they be deemed admitted and used against him. *McCollough*, 637 F.3d at 952. In these and other similar cases, courts have held that the debt collection attorneys violated § 1692f of the FDCPA even though they took actions that state procedural rules arguably permitted. *See Cameron*, 998 F. Supp. 2d at 300 (time-barred debt); *Diaz*, 2012 U.S. Dist. LEXIS 72724, at *15–16 (same); *see also Louie v. Asset Capital Recovery Grp., LLC*, No. C-15-1680, 2015 U.S. Dist. LEXIS 97750 (N.D. Cal. Jul. 27, 2015) (opposing vacatur of default judgment obtained via sewer service); *Todd*, 348 F. Supp. 2d at 915 (falsely asserting reasonable basis to believe account contains non-exempt funds).

VI. THE DISTRICT COURT ERRED IN FINDING THAT AVAILABILITY OF A STATE LAW CAUSE OF ACTION RENDERS FDCPA LIABILITY UNNECESSARY

The district court erred in concluding that it is "not necessary" to impose liability under the FDCPA "when a state statutory scheme already provides substantive protection from a specific type of conduct." JA 273.

The proper question is not whether imposing liability under the FDCPA is "necessary," but whether the alleged conduct in fact gives rise to liability under the FDCPA. "It is the provisions of the FDCPA that by and of themselves determine

what debt collection activities are improper under federal law." *Romea*, 163 F.3d at 119; *Currier*, 762 F.3d at 537 ("The proper question in the context of an FDCPA claim is whether the plaintiff alleged an action that falls within the broad range of conduct prohibited by the Act."). "[C]ourts are not at liberty to excuse violations where the language of the statute clearly comprehends them." *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989). Nor may courts "disregard the plain language of the FDCPA unless the result is absurd or directly contravenes the purpose of the statute." *Romea*, 163 F.3d at 118; *Goldman*, 445 F.3d at 155 (applying the "plain language of the FDCPA").

Courts have declined to read the FDCPA as containing exemptions from liability where there are none, including for litigation activity. *Heintz v. Jenkins*, 514 U.S. 291, 295–96 (1995) (declining to "read the statute as containing an implied exemption for those debt-collecting activities of lawyers that consist of litigating"); *Sykes*, 780 F.3d at 74 (certifying FDCPA class action raising claims that a debt collection law firm filed fraudulent affidavits *en masse* in state court); *see also Miljkovic*, 791 F.3d at 1297 (declining to find an exemption in the FDCPA for a debt-collector attorney's representations in court filings); *Piper v. Portnoff Law Associates, Ltd.*, 396 F.3d 227 (3d Cir. 2005) (noting that once a communication was determined to meet the FDCPA's definition of an effort by a "debt collector" to collect a "debt" from a "consumer," it was not relevant that it

came in the context of litigation). Moreover, the remedial nature of the FDCPA requires courts to construe it liberally. *Hart v. FCI Lender Serv., Inc*., 797 F.3d 219, 225 (2d Cir. 2015).

Under the district court's flawed reasoning, any allegation giving rise to a claim under the FDCPA could be precluded by virtue of the fact that there is a state law, such as a mini-FDCPA or a UDAP statute, granting a cause of action for the same conduct. In contrast, plaintiffs commonly bring claims under *both* the FDCPA *and* state law. *E.g.*, *Sykes*, 780 F.3d at 83.[10] The FDCPA plainly does not exempt a debt collector from liability based on the fact that a state law cause of action may also be available for the same conduct, nor does it require exhaustion of state remedies. Moreover, the state law in question in this case explicitly provides that nothing therein "in any way restrict[s] the rights and remedies otherwise available to a judgment debtor, including but not limited to, rights to property exemptions under federal and state law." C.P.L.R. 5222-a(h).[11]

[10] *Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86 (2d Cir. 2016), is inapposite because it concerns the relationship between the FDCPA and the Bankruptcy Code; *Garfield* does not address state law.

[11] Moreover, C.P.L.R. 5222a(g) provides a cause of action only against the judgment creditor and does not address the full scope of GMBS's misconduct as alleged by Arias.

VII. UPON REMAND, THE DISTRICT COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S STATE LAW CLAIMS

In addition to vacating the district court's judgment and remanding Plaintiff's federal claims, this Court should order the district court to reconsider whether to exercise supplemental jurisdiction over Plaintiff's state law claims.

CONCLUSION

The district court's judgment should be vacated and this case remanded.

Dated: October 19, 2016
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 11,817 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 15 in 14-point Times New Roman typeface.

Dated: October 19, 2016

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