No. 20-1955

In the United States Court of Appeals
for the Third Circuit

RANDY HOPKINS,

Plaintiff-Appellant,

v.

COLLECTO, INC. D/B/A EOS CCA; US ASSET MANAGEMENT, INC.; AND JOHN DOES 1 TO 10,

Defendant-Appellees.

On Appeal from the
United States District Court for the District of New Jersey
Hon. William J. Martini
Case No. 2:19-cv-18661

BRIEF OF *AMICUS CURIAE* CONSUMER FINANCIAL PROTECTION BUREAU IN SUPPORT OF APPELLEES AND AFFIRMANCE

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Derick Sohn
Senior Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7873 (telephone)
(202) 435-7024 (facsimile)
derick.sohn@cfpb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

FEDERAL REGULATIONS

STATE REGULATIONS

OTHER AUTHORITIES

QUESTION PRESENTED

Does a debt collector violate the FDCPA by accurately stating that the debt it is seeking to collect includes $0.00 in interest and collection fees, including when interest and collection fees are not currently accruing?

INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau, an independent agency of the United States, files this brief pursuant to F.R.A.P. 29(a)(2).

In 2010, Congress established the Bureau "to protect consumers from abusive financial services practices," Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), and vested it with authority to enforce the Fair Debt Collection Practices Act (FDCPA or the Act), and to prescribe rules implementing the Act, 15 U.S.C. § 1692*l*(b)(6), (c), (d); 12 U.S.C. § 5512(b)(1), (4); *see also id.* § 5481(12), (14) (including the FDCPA in the list of "Federal consumer financial laws" that the Bureau administers). Pursuant to this authority, the Bureau last year issued a notice of proposed rulemaking to prescribe federal rules governing the activities of debt collectors, including rules requiring itemization of debts in certain debt collection notices. 84 Fed. Reg. 23274 (May 21, 2019); *see also* 85 Fed. Reg. 12672 (Mar. 3, 2020) (supplemental notice of proposed rulemaking). The Bureau therefore has a substantial

interest in the interpretation and application of the FDCPA to debt collection notices that itemize a consumer's debt.

STATEMENT

A. Statutory and Regulatory Framework

1. Congress enacted the FDCPA in 1977 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." Pub. L. No. 95-109, § 802(e), 91 Stat. 874 (codified at 15 U.S.C. § 1692(e)). To achieve those ends, the FDCPA imposes various requirements on debt collectors' debt-collection activity.

Plaintiff alleges violations of two sections of the FDCPA: sections 1692e and 1692f. SAppx19 (Compl.) ¶ 53. Section 1692e makes it unlawful for a debt collector to "use any false, deceptive, or misleading representation or means in connection with the collection of any debt," including by making a "false representation of … the character, amount, or legal status of any debt" or by using "any false representation or deceptive means to collect or attempt to collect any debt." 15 U.S.C. §§ 1692e, 1692e(2)(A), 1692e(10). Section 1692f similarly makes it unlawful for a debt

collector to "use unfair or unconscionable means to collect or attempt to collect any debt," including by "collect[ing] … 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." *Id.* §§ 1692f, 1692f(1).

Additionally, section 1692g generally requires a debt collector to send the consumer a written notice within five days after the collector's initial communication with the consumer about the debt. *Id.* § 1692g(a). Among other things, this notice must disclose "the amount of the debt" and alert the consumer to his right to dispute the debt. *Id.* This validation notice requirement was designed to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S. Rep. No. 95-382, at 4 (1977)*, reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

2. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Bureau and granted it authority to enforce compliance with the FDCPA. Pub. L. No. 111-203, § 1089, 124 Stat. 1376, 2092-93 (codified at 15 U.S.C. § 1692*l*(b)(6)). The Dodd-Frank Act also empowered the Bureau to "prescribe rules with respect to the collection of debts by debt collectors, as defined in the

[FDCPA]." *Id.* (codified at § 1692*l*(d)). It appears that one reason Congress gave the Bureau this authority was to address issues in the validation process. *See* S. Rep. No. 111-176, at 19 ("In addition to concerns about debt collection tactics, the Committee is concerned that consumers have little ability to dispute the validity of a debt that is being collected in error.").

Accordingly, the Bureau has issued a proposed debt collection rule that would, among many other things, establish detailed rules for the validation notices required by section 1692g.[1] *See* 84 Fed. Reg. at 23404–05. Under those proposed rules, validation notices would need to disclose the amount of the consumer's debt at two different times: the time when the validation notice is provided to the consumer and the time of a prior "itemization date." *Id.* at 23404 (proposed § 1006.34(c)(2)(viii), (x)). For credit card accounts, the charge-off date could be used as the itemization date. *Id.* (proposed § 1006.34(b)(3)(ii)). Collectors would also need to "itemize" the various amounts that might have caused the consumer's debt to change between the itemization date and the date the validation notice is

[1] The Bureau's notice of proposed rulemaking identifies potential requirements that the Bureau might or might not adopt. In response to the proposal, the Bureau received over 14,000 comments, including many regarding the proposed validation notice requirements. The Bureau is analyzing these comments as it considers final action on the notice of proposed rulemaking.

provided to the consumer. Under the proposal, validation notices would be required to include a table showing the interest, fees, payments, and credits that have been applied since the itemization date, even if none of those items had been assessed or applied to the debt. *Id.* (proposed § 1006.34(c)(2)(ix)). To show that no interest, fees, payments, or credits were assessed, the proposal would allow collectors to use "0" or "N/A" for that component, or to state that "no interest, fees, payments, or credits have been assessed or applied to the debt." *Id.* at 23415 (proposed comment 34(c)(2)(ix)-1).

The Bureau's proposed model validation notice illustrates what an itemization could look like under the Bureau's proposed rule:

As of January 2, 2017, you owed:		$	2,234.56
Between January 2, 2017 and today:			
You were charged this amount in interest:	+	$	75.00
You were charged this amount in fees:	+	$	25.00
You paid or were credited this amount toward the debt:	–	$	50.00
Total amount of the debt now:		**$**	**2,284.56**

See id. at 23409.

B. Facts and Procedural History

1. This appeal is about a letter that Collecto, Inc. d/b/a EOS CCA ("Collecto") sent to Randy Hopkins. Hopkins had allegedly incurred and

then defaulted on a consumer debt initially owed to Verizon. SAppx14 (Compl.) ¶¶ 17–19; SAppx21 (Letter) (identifying Verizon as "original creditor"). The letter, dated October 3, 2018, sought to collect this debt from Hopkins on behalf of the debt's "current creditor" US Asset Management, Inc. ("USAM"). *Id.*; *see also* SAppx15 (Compl.) ¶ 22.

The letter stated that Hopkins owed a total of $1,088.34 on the debt and offered to "resolve this debt in full" if a reduced payment of $761.84 was received from Hopkins by October 23, 2018. The letter also included a table that itemized the debt:

	PRINCIPAL	INTEREST	FEES COLL. COSTS	BALANCE
	$1,088.34	$0.00	$0.00	$1,088.34
			TOTAL DUE:	$1,088.34

SAppx21–22. Hopkins does not challenge the accuracy of these amounts in this appeal. *See* Hopkins's Br. at 11; *see also* SAppx15–16 (Compl.) ¶¶ 23–31.

2. Hopkins filed a putative class action complaint against, *inter alia*, Collecto and USAM for violating the FDCPA. Hopkins's complaint alleges that the October 3 letter was deceptive in violation of 15 U.S.C. § 1692e, and unfair or unconscionable in violation of 15 U.S.C. § 1692f. SAppx19 ¶ 53. Hopkins's complaint alleges that, because the letter itemized interest and

collection fees, he understood it to (falsely) imply that such interest and fees could begin to accrue and thereby increase the amount of his debt over time. SAppx15–16, ¶¶ 26, 29–30. In lieu of answering Hopkins's complaint, Collecto and USAM moved to dismiss it for failure to state a claim. Defs.' Mot. to Dismiss, Jan. 13, 2020, ECF No. 9.

The district court granted the defendants' motion and dismissed Hopkins's claims. The court identified the "central issue" as "whether Defendants' inclusion of language … stating that Plaintiff owed $0.00 in interest and $0.00 for fees or collection costs for a static debt violated the FDCPA." Appx6. Noting that FDCPA claims are "preclude[ed]" if based on "hypertechnical misstatements … that would not affect the actions of even the least sophisticated consumer," the court recognized that the challenged itemization did not violate the FDCPA unless it was "materially misleading." *Id.* (citation omitted). Finding no binding precedent from this Court on this precise question, the district court looked to recent decisions from the Second Circuit.

The district court found persuasive the reasoning underlying the Second Circuit's recent "determin[ation] that [the] inclusion of lines in a collection letter that reflect $0 in interest or fees and charges had accrued is not misleading." Appx7 (citing *Dow v. Frontline Asset Strategies, LLC*, 783

F. App'x 75 (2d Cir. 2019)). Accordingly, the district court held that the October 3 letter did not violate the FDCPA, finding that the challenged itemization "does not leave the least sophisticated consumer in doubt of the nature and legal status of the underlying debt" or "impede the consumer's ability to respond to or dispute collection." *Id.* Finding no ambiguity in the letter's "clear" language, the court declined to require that such itemizations be "followed by an assurance that the fact stated [i.e., the itemized amounts] will not change in the future" because such a requirement would result in the type of "complex and verbose debt collection letters … the FDCPA is meant to protect consumers against." *Id.* (quoting *Dick v. Enhanced Recovery Co., LLC*, No. 15-CV-2631, 2016 WL 5678556, at *8 (E.D.N.Y. Sept. 28, 2016)). The court further noted that requiring such assurances "might even create a perverse incentive for [debt collectors] to continue accruing interest or fees on debts when they might not otherwise do so." Appx7 (quoting *Taylor v. Fin. Recovery Servs.*, 886 F.3d 212, 214–15 (2d Cir. 2018)).

SUMMARY OF ARGUMENT

Hopkins claims that Collecto's October 3 letter violated the FDCPA because it included an accurate itemization of his debt. The district court disagreed and dismissed Hopkins's complaint. This Court should affirm.

Hopkins's theory is that the disclosure that his debt included "$0.00" in interest and collection fees was misleading because it suggested that interest and collection fees might be assessed in the future. Accordingly, Hopkins asserts that such itemization should be prohibited with respect to debts that are no longer increasing in amount, i.e., that are "static" rather than "dynamic." Hopkins's Br. at 20–29. But an itemization of a debt—just like an itemized receipt from a store—discloses what has already happened, not what will or may happen in the future. The bare statement that $0.00 in interest and collection fees says nothing one way or the other about whether such charges might be assessed in the future. *See Degroot v. Client Servs., Inc.*, No. 20-1089, --- F.3d ----, 2020 WL 5951360, at *4 (7th Cir. Oct. 8, 2020) (holding that an "itemized breakdown … which makes no comment whatsoever about the future and does not make an explicit suggestion about future outcomes[] does not violate the FDCPA"); *Dow*, 783 F. App'x at 77 (holding that itemization reflecting "$0 in interest or fees and charges had accrued" does not "suggest[]" that a "debt is dynamic" where "there is no other information relating to [such charges] in the notice"). And a plaintiff cannot state a claim under the FDCPA by merely identifying a question that a collection letter does not expressly answer.

If accepted, Hopkins's argument could create perverse incentives for debt collectors, to the potential detriment of consumers. For instance, Hopkins's proposed rule could discourage debt collectors from providing accurate itemizations that Hopkins acknowledges "can be an effective method for conveying essential information about an account's debits and credits." Hopkins's Br. at 27. Courts and state and federal regulators have recognized the substantial benefit to consumers when collectors provide more information regarding the components of a debt and the corresponding harm when collectors provide less. The Bureau, for instance, has proposed *requiring* collectors to itemize interest and fees applied to a debt; further, its proposal expressly permits collectors to use "$0.00" for charges that have not been applied, just as Collecto did in the October 3 letter. 84 Fed. Reg. at 23415 (proposed comment 34(c)(2)(ix)-1). The consequences that could flow from adopting Hopkins's view of itemization therefore further support affirming the district court's judgment and dismissing Hopkins's claims.

ARGUMENT

When a debt collector's collection letter accurately discloses that a consumer's debt includes "$0.00" in interest or collection fees, the debt collector does not violate either section 1692e or section 1692f. A contrary

holding would be inconsistent with numerous decisions interpreting the FDCPA, conflict with guidance from federal and state regulators, and risk discouraging collectors from providing consumers with accurate and useful information about their debts.

I. Accurately stating that no interest or fees have been applied to a debt does not imply that interest or fees may or will be assessed in the future.

Hopkins's complaint was properly dismissed because it did not state a "plausible claim for relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009). Hopkins needed, but failed, to plausibly allege that Collecto's October 3 letter was materially "false, deceptive, or misleading" and thereby violated section 1692e of the FDCPA.[2] 15 U.S.C. § 1692e; *Jensen v. Pressler & Pressler*, 791 F.3d 413, 421 (3d Cir. 2015) (adopting materiality requirement).

[2] Hopkins states that "[t]he district court did not address" his complaint's allegation that the October 3 letter also violated section 1692f. Hopkins's Br. at 14; *see also* SAppx19 (Compl.) ¶ 53. But he does not argue that this omission requires reversal of the decision below. He instead argues that the October 3 letter violated section 1692e and conclusorily asserts that his arguments also establish a violation of section 1692f. *See, e.g.*, Hopkins's Br. at 29 ("Having misrepresented the amount of the debt as possibly accruing interest and collection fees, Defendants violated §§ 1692e and 1692f."). He has thus waived any argument specific to the latter provision. *See Patzan v. AG of the United States*, 754 F. App'x 128, 129 (3d Cir. 2018) (citing *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994)) (explaining that "passing reference[s]" in an opening brief are insufficient to raise an issue on appeal).

Whether a collection letter violates section 1692e of the FDCPA is determined "from the perspective of the least sophisticated debtor." *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 246 (3d Cir. 2014) (quoting *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008)). This "standard is an objective one," intended to "protect the gullible as well as the shrewd." *Jensen*, 791 F.3d at 418–19 (3d Cir. 2015) (citation omitted). But it does not go so far as to impose "liability for bizarre or idiosyncratic interpretations of collection notices." *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354–55 (3d Cir. 2000) (citation omitted). Even "naïve" consumers are held to a "quotient of reasonableness" and presumed to have "a basic level of understanding and willingness to read with care." *Id.* (citation omitted).

Hopkins argues that the October 3 letter's itemization of $0.00 in interest and collection fees falsely implied to the least sophisticated consumer that such charges might be applied to his account in the future. Hopkins's Br. at 24–29. But the accurate itemization of the elements of a debt conveys no such message. That is because "the itemization of a debt is a record of what has already happened." *Degroot*, 2020 WL 5951360, at *3. Such an itemization "discloses the interest or other charges that have been assessed between a date in the past … and the date of the notice," and

therefore "cannot be construed as forward looking." *Id.*; *see also, e.g.*, 84 Fed. Reg. at 23409.

As Hopkins acknowledges, itemizations of this sort are a common feature of modern economic life. Hopkins's Br. at 27–28. From store receipts to utility bills, the unsophisticated consumer is familiar with receiving an itemized accounting of charges that have been assessed to date. So too in the consumer financial marketplace. As required by law, credit card issuers, for instance, send consumers itemized periodic statements. *See, e.g.*, 12 C.F.R. § 1026.7(b); *id.* App. G-18(A), (F), (G). As part of these periodic statements, issuers are required to disclose and itemize the interest and fees that have been imposed both during the statement period and for the calendar year to date. *Id.* § 1026.7(b)(6).

Hopkins asserts that this common experience teaches consumers that "an entry [in a billing statement] of $0.00 in any column or for any line-item … implies that the account can have those types of charges added." Hopkins's Br. at 27. He mistakenly ascribes to the unsophisticated consumer the belief that debt collectors decide whether to include particular data fields in collection letters on an individualized basis as opposed to generating letters for many different consumers from a common template. An unsophisticated consumer would understand that he has

received a letter produced from a standard template that includes certain elements that he might not find to be directly relevant to his situation. *Cf. Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 300 (3d Cir. 2008) (rejecting argument that the least sophisticated debtor would view a letter offering to settle his debt as being an individualized letter from a corporate executive based on font, formatting, and content). In this case, the generic content in the October 3 letter, which did not even address Hopkins by name, made its mass-produced origin evident. SAppx21–22; *see also* SAppx16 (Compl.) ¶ 32 (alleging the October 3 letter is a "mass-produced, computer-generated form letter[]").

And while a letter generated from a common template, like any other communication, can mislead, *see Schultz v. Midland Credit Mgmt.*, 905 F.3d 159, 165 (3d Cir. 2018) (warning that the "convenience [of form letters] does not excuse a potential violation of the FDCPA"), no circuit court has agreed with Hopkins's assertion that the itemization of charges that have not been applied materially misleads an unsophisticated consumer into believing such charges may be added to her account. The Second and Seventh Circuits, however, recently rejected it. In *Degroot*, the plaintiff made the same argument to the Seventh Circuit as Hopkins does here: that the "inclusion [in an itemization] of a zero balance for interest

and fees naturally implies [the consumer] could incur future interest or other charges." *See Degroot*, 2020 WL 5951360, at *3. The Seventh Circuit found that interpretation "bizarre" or "idiosyncratic" because "the itemization of a debt is a record of what has already happened." *Id.* In other words, such an "itemized breakdown" of consumer debt "makes no comment whatsoever about the future." *Id.* at *4. Consequently, "any inference [the *Degroot* plaintiff] made about the debt accruing interest or other charges in the future was entirely speculative." *Id.* at *3. The court further noted that it had previously held that "[a] lawyer's ability to identify a question that a dunning letter does not expressly answer ('Is it possible the balance might increase?') does not show the letter is misleading, even if a speculative guess to answer the question might be wrong." *Id.* (quoting *Koehn v. Delta Outsource Grp., Inc.*, 939 F.3d 863, 865 (7th Cir. 2019) (rejecting argument that a validation notice's disclosure of a "current balance" implied that a debt's balance might increase)). Recognizing that this logic "applies with equal force" when a collection letter merely itemizes $0 in past charges, the court held that the "mere raising of an open question about future assessment of other charges with a speculative answer does not make the [itemized] breakdown misleading." *Id.*

Similarly, in the decision relied upon by the court below, the Second Circuit affirmed the dismissal of a section 1692e claim where the collector's notice included separate line items indicating $0 in interest and charges or fees had accrued on the balance of a "static" debt. *Dow*, 783 F. App'x at 76–77. Though Hopkins finds it "difficult to understand" that decision, Hopkins's Br. at 23, its holding is clear: a collection letter does not "suggest[]" a "debt is dynamic" merely by including an itemization table reflecting $0 in interest and fees if "there is no other information relating to interest, fees, or charges in the notice." *Dow*, 783 F. App'x at 77.

As the district court discussed, the Second Circuit's holding in *Dow* "build[s] on" its prior decision in *Taylor*. Appx7. This Court recently endorsed *Taylor's* holding that "a collection notice that states a debt owed without mentioning interest or fees when no such interest or fees are accruing did not violate § 1692e." *Dotson v. Nationwide Credit*, No. 19-3695, --- F. App'x ----, 2020 WL 5757994, at *2 (3d Cir. Sept. 28, 2020) (summarizing *Taylor*, 886 F.3d at 215). The plaintiff in *Dow*, like Hopkins here, argued that *Taylor* did not control because the notice in *Dow* did mention interest and fees by "includ[ing] separate line items for the interest and charges or fees accrued on the balance." *Dow*, 783 F. App'x at 76–77. But as the Second Circuit recognized, such itemization alone does not

mislead a consumer about the nature of her debt. *Id.*; *see also Salinas v. R.A. Rogers, Inc.*, 952 F.3d 680, 685 (5th Cir. 2020) (characterizing as "absurd" the proposition that the "mere mention of 'Interest' and 'Fee[s]'—even though currently pegged at '$0.00'—could suggest the possibility that interest or fees may accrue in the future").

To be sure, as the Seventh Circuit noted in *Degroot*, 2020 WL 5951360, at *3, there has been a split among district judges about whether claims like Hopkins's should be dismissed at the pleading stage.[3] Some

[3] *Compare, e.g.*, *Knaak v. Optio Sols. LLC*, No. 19-CV-1036-JPS, 2019 WL 6895991 (E.D. Wis. Dec. 18, 2019) (denying motion to dismiss) (overruled by *Degroot*); *Virden v. Client Servs., Inc.*, No. 5:19-CV-00329, 2019 WL 4862066 (N.D. Ohio Oct. 2, 2019) (same); *Driver v. LJ Ross Assocs., Inc.*, No. 3:18-CV-00220, 2019 WL 4060098 (S.D. Ind. Aug. 28, 2019) (same) (overruled by *Degroot*); *Gaston v. Fin. Sys. of Toledo, Inc.*, No. 3:18-CV-2652, 2019 WL 2210769 (N.D. Ohio May 22, 2019) (same); *Duarte v. Client Servs.*, No. 18 C 1227, 2019 WL 1425734 (N.D. Ill. Mar. 29, 2019) (same) (overruled by *Degroot*); *Wood v. Allied Interstate, LLC*, No. 17 C 4921, 2018 WL 2967061 (N.D. Ill. June 13, 2018) (same) (overruled by *Degroot*), *with Qureshi v. Vital Recovery Servs., Inc.*, No. 18-CV-4522, 2019 WL 3842697 (E.D.N.Y. Aug. 15, 2019) (granting motion to dismiss); *Donaeva v. Client Servs., Inc.*, No. 18-CV-6595, 2019 WL 3067108 (E.D.N.Y. July 12, 2019) (same); *Hussain v. Alltran Fin., LP*, No. 17-CV-3571, 2018 WL 1640584 (E.D.N.Y. Apr. 4, 2018) (same); *Delgado v. Client Servs., Inc.*, No. 17 C 4364, 2018 WL 1193741 (N.D. Ill. Mar. 7, 2018) (same); *Jones v. Prof'l Fin. Co., Inc.*, No. 17-61435-CIV, 2017 WL 6033547 (S.D. Fla. Dec. 4, 2017) (same); *Dick v. Enhanced Recovery Co., LLC*, No. 15-CV-2631, 2016 WL 5678556 (E.D.N.Y. Sept. 28, 2016) (same). As noted, several of the district courts that denied motions to dismiss the type of claim Hopkins asserts here have now been overruled by the Seventh Circuit.

district courts have questioned why a collector would include a column for fees and costs "and insert a dollar figure ($0.00), if not to suggest that that such fees and costs might possibly accrue in the future." *Wood v. Allied Interstate, LLC*, No. 17 C 4921, 2018 WL 2967061, at *2 (N.D. Ill. June 13, 2018); *accord Driver v. LJ Ross Assocs., Inc.*, No. 3:18-CV-00220, 2019 WL 4060098, at *3 (S.D. Ind. Aug. 28, 2019); *but see Dow*, 783 F. App'x at 76–77 (affirming dismissal where notice disclosed $0 for interest and fees). But the courts that have declined to dismiss claims like Hopkins's have not identified a plausible basis to conclude that an unsophisticated consumer would understand an accurate statement that certain categories of charges had not been applied to her debt to include an implicit representation that those categories could be applied to her debt in the future.[4] *See also Degroot*, 2020 WL 5951360, at *3 (rejecting this argument as "unpersuasive"). An unsophisticated consumer cannot be expected to seek hidden meaning in the inclusion of data fields in a form letter absent a good reason, *see White v. Goodman*, 200 F.3d 1016, 1020 (7th Cir. 2000) (rejecting as "fantastic conjecture" argument that an unsophisticated

[4] It does not appear that any plaintiff has prevailed, or even survived summary judgment, on the claim that an accurate itemization of a consumer's debt violates the FDCPA. *See, e.g.*, *Edwards v. BC Servs., Inc.*, No. 18-CV-03322, 2019 WL 6726232, at *11 n.14 (D. Colo. Dec. 10, 2019) (collecting cases).

consumer would read disclosures applicable to residents of a particular state as implying that nonresidents had lesser rights). Here, there is no such reason: An unsophisticated consumer would know from experience that interest and fees are common additions to unpaid balances. *See Salinas*, 952 F.3d at 685 (observing that "unsophisticated borrowers have collectively experienced for thousands of years[] that interest and other charges tend to accrue on some debts"); 12 C.F.R. § 1026.7(b) (requiring disclosure of interest and fees).

As a result, it would be unreasonable for an unsophisticated consumer to interpret an itemization showing that no interest and fees had been assessed on her account as raising the prospect that she would be charged fees or interest in the future. Hopkins has thus failed to identify any false, misleading or deceptive representation in the October 3 letter. He has "mere[ly] rais[ed] … an open question about future assessment of charges with a speculative answer," which is insufficient to state a claim for violation of the FDCPA. *Degroot*, 2020 WL 5951360, at *3; *see also Taylor*, 886 F.3d at 215 ("[A] collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading within the meaning of Section 1692e.").

II. Holding that accurate itemization of interest and fees applied to a debt may by itself violate the FDCPA would discourage collectors from providing consumers with accurate and useful information.

Finding that a debt collector may violate the FDCPA by sending a collection letter that accurately itemizes the interest and fees incorporated into a debt would have the perverse effect of discouraging collectors from providing consumers with accurate and useful information. This Court should reject it. *See, e.g.*, *Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009) ("Classifying obligations in a way that helps customers to understand what has happened cannot be condemned as a false statement about a debt's character.").

As noted above, the Bureau has proposed requiring collectors to itemize debts in validation notices. The preamble to the Bureau's notice of proposed rulemaking explains that itemizing fees and interest could help consumers in a variety of ways. 84 Fed. Reg. at 23341–42. "[C]onsumers may be better positioned to recognize whether they owe a debt and to evaluate whether the current amount alleged due is accurate if they understand how the amount changed over time due, for example, to interest, fees, payments, and credits that have been assessed or applied to the debt." *Id.* at 23341; *see also id.* ("The Bureau's qualitative consumer testing indicates that an itemization appears to improve consumer

understanding about and recognition of the debt."). And by giving consumers sufficient information to evaluate a validation notice's claim of indebtedness, itemization may discourage unfair, deceptive, or abusive practices. *Id.* at 23342. For instance, itemization "may help a consumer identify erroneous or fabricated fees that a creditor or debt collector may have added that inflated the amount of an alleged debt." *Id.*

The Bureau is not alone in thinking that consumers may benefit from receiving itemized validation notices or collection letters. Its proposal is consistent with suggestions from the Federal Trade Commission, *see* Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change*, at v (Feb. 2009)[5] (suggesting that Congress require itemization); state requirements, *see, e.g.*, Cal. Civ. Code § 1788.52(a)(2) (requiring itemization in validation notices); N.Y. Comp. Codes R. & Regs. tit. 23, § 1.2(b)(2) (same), and judicial decisions, *see, e.g.*, *Fields v. Wilber Law Firm, P.C.*, 383 F.3d 562, 565–66 (7th Cir. 2004); *Degroot*, 2020 WL 5951360, at *4 (noting that *Fields* "appears to *compel* the inclusion of an itemized breakdown.") (emphasis added); *cf. also Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 785 (6th Cir. 2014)

[5] https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

(opining that providing "an itemized accounting detailing the transactions in an account that have led to the debt" in response to a consumer dispute "is often the best means of" enabling the consumer to sufficiently dispute a payment obligation).

If adopted, Hopkins's position would discourage debt collectors from providing this valuable information to consumers. Hopkins argues that, because Hopkins's debt was allegedly static, the FDCPA required Collecto to either (1) remove from the October 3 letter columns that do not apply to Hopkins's debt; or (2) "eliminate any ambiguity about whether the debt could increase by replacing $0.00 with 'N/A.'" Hopkins's Br. at 27–28. Hopkins erroneously suggests that the Bureau's proposed debt collection rule does not conflict with this position because, in his words, it "expressly permits debt collectors to use 'N/A' for any category which does not apply to the debt being collected." Hopkins's Br. at 28 (citation omitted).[6] But the Bureau's proposed rule does not refer to "any category which does not apply" in some general sense, *id.*; it instead refers to charges that that "have [not] been assessed or applied" in the past, 84 Fed. Reg. at 23415. Its proposal therefore would not, as Hopkins' characterization suggests,

[6] Of course, any final rule adopted by the Bureau may differ from its proposal, including with respect to the language cited by Hopkins.

require debt collectors to determine whether a given category of charge is applicable, i.e., *could* be applied. It only requires debt collectors to determine whether such a charge *has been* applied. If it has not, the Bureau's proposal would therefore permit debt collectors to indicate "0" or "N/A," or "state that no interest, fees, payments or credits *have been* assessed or applied to the debt." *Id.* (emphasis added). The Bureau's proposal, which Hopkins acknowledges "[d]raw[s] on the general familiarity with such itemization tables," Hopkins's Br. at 28, thus proceeds from the premise Hopkins rejects: consumers understand such itemizations to reflect past charges (even $0.00 in past charges) rather than to suggest future charges may accrue.

Moreover, Hopkins's position cannot be confined only to itemizations that indicate no fees or interest have been added to the debt during a certain period. Instead, his reasoning applies to the itemization of any static debt. For if disclosing that interest and collection fees have *not* been applied to a debt "impl[ies] that interest and collection fees could be added" in the future, *id.* at 27, the statement that such charges have *already* been applied implies the same, but more strongly. Indeed, at least one district court endorsing Hopkins's view of itemization has already extended his reasoning to debts where interest or fees had previously been applied but

were no longer accruing when the challenged collection letters were sent. *See Knaak*, 2019 WL 6895991, at *2 (finding that itemization of previously applied "$249.00" in fees and "$271.24" in interest could be misleading where additional fees and interests could no longer be added to the debt). This decision shows that starting with Hopkins's premise—that itemizing past charges implies future charges may be coming—ends with discouraging the itemizations that Hopkins's acknowledges "can be an effective method for conveying essential information about an account's debits and credits." Hopkins's Br. at 27; *see also Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009) ("Classifying obligations in a way that helps customers to understand what has happened cannot be condemned as a false statement about a debt's character.").[7]

Further, the impact of Hopkins's approach would not be confined to so-called "static" debts. Under his rule, a debt collector could not accurately state in an itemization that it had assessed $0 in any type of charge, unless the collector intended to assess that type of charge going forward. *Cf. Taylor*, 886 F.3d at 214–15 ("[R]equiring debt collectors to draw attention to the fact that a previously dynamic debt is now static might even create a

[7] To be clear, the Bureau does not suggest that accepting Hopkins's argument in this appeal would affect the Bureau's rulemaking authority to require that validation notices itemize consumer's debts.

perverse incentive for them to continue accruing interest or fees … when they might not otherwise do so."). But if itemizing $0 in past charges implies such charges may be assessed in the future, indicating a category of charges is "not applicable," which Hopkins would require instead, surely implies that such charges can *never* be applied. Debt collectors would therefore need to determine whether and which types of charges could ever apply to a given debt before providing a consumer with an itemization. But determining whether a debt is truly "static" may not always be straightforward. For example, even where interest or other fees are no longer accruing, a future judgment may entitle a debt collector to post-judgment interest or fees. *See, e.g.*, *Degroot v. Client Servs., Inc.*, No. 19-C-951, 2020 WL 231201, at *5 (E.D. Wisc. Jan. 15, 2020); *cf. Salinas*, 952 F.3d at 685 (explaining that determining whether a debt was static would require debt collectors "to sift through applicable statutes and loan contracts to determine with absolute certainty, for each and every account, whether interest or other charges might possibly accrue."). And a debt may be "static" in one way but not another (for instance if additional fees cannot be added but interest is still accruing). *Cf. Fields*, 383 F.3d at 563 (noting that collector's dunning letters revealed that additional interest was being added to the consumer's debt, but that attorneys' fees were not). In the

event of such uncertainty, Hopkins's proposed approach would discourage debt collectors from providing itemization at all.

CONCLUSION

The district court rightly rejected Hopkins's itemization claim because that claim's premise—that accurately itemizing $0.00 in past interest and fees implies the possibility of future interest and fees—is wrong. Hopkins has not identified any misleading or deceptive language with the October 3 letter, but only a question that the letter did not expressly answer. Incorporating Hopkins's error into the law of this Circuit would perversely incentivize debt collectors to provide less information to consumers, to those consumers' ultimate detriment. This Court should affirm the district court's judgment.

Respectfully submitted,

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/s/ Derick Sohn

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Derick Sohn (CA Bar #272758; DC Bar #1003386)
Senior Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7873 (telephone)
(202) 435-7024 (facsimile)
derick.sohn@cfpb.gov

Counsel for Amicus Curiae
Consumer Financial Protection Bureau

COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

3. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,742 words, excluding exempt material, according to the count of Microsoft Word.

4. On October 15, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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/s/ Derick Sohn
Derick Sohn
Counsel for Amicus Curiae
Consumer Financial Protection Bureau