No. 16-_____

In the Supreme Court of the United States

CHAILLE DUBOIS and KIMBERLY ADKINS,

Petitioners,

–v–

ATLAS ACQUISITIONS, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court recently granted certiorari in *Johnson v. Midland Funding, LLC*, No. 16-348, to determine questions surrounding the application of the Fair Debt Collection Practices Act to the filing of proofs of claim on time-barred debt in bankruptcy. This case presents the same issues and a parallel set of facts, with a greater focus on a question not explicitly included but predicate to a determination of *Johnson*. The questions presented are:

1. Whether the filing of a proof of claim is debt collection as defined by the Fair Debt Collection Practices Act.

2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of a proof of claim for an unextinguished time-barred debt.

3. Whether the filing of a proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act.

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PETITION FOR WRIT OF CERTIORARI

This case presents an important, recurring question of federal law currently subject to a circuit split: does the FDCPA apply to proofs of claim on time-barred debt? Because the Court has already granted review to consider that question in *Johnson v. Midland Funding, LLC*, No. 16-348, 580 U.S. ___ (Oct. 17, 2016), this petition should be held pending *Johnson*'s resolution. Moreover, because the *Johnson* case involves a question of estoppel not implicated in this case and because this case discusses in greater depth a question necessary to but not certified in *Johnson*, the Court may wish to consider granting this petition and consolidating it with *Johnson*.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Dubois v. Atlas Acquisitions LLC* (*In re Dubois*), ___ F.3d ___, 2016 WL 4474156 (4th Cir. Aug. 25, 2016) (App.1a-28a). The order of the bankruptcy court granting respondent's motion to dismiss (App.31a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Relevant provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532; the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p; and the Federal Rules of Bankruptcy Procedure are reproduced in the appendix to this petition (App.33a-41a).

STATEMENT OF THE CASE

Respondent Atlas Acquisitions, LLC ("Atlas") seeks out time-barred debt in the name of those in bankruptcy and files proofs of claim seeking payment. "Atlas plays the odds, representing itself as entitled to part of the debtors' estates. If someone notices the claims and objects, as happened here, Atlas grins sheepishly—'You caught me!'—and admits that the claim is meritless." *Dubois v. Atlas Acquisitions LLC* (*In re Dubois*), ___ F.3d ___, 2016 WL 4474156 (4th Cir. Aug. 25, 2016) (App.20a). This case represents one of the rare instances in which the bankruptcy system functioned as it should with respect to time-

barred debt. Petitioners' attorney identified and objected to the stale debt claims. More often, however, neither attorneys nor trustees tasked as gatekeepers of the bankruptcy system notice or object to the claims. Carrying the presumption of validity that attaches to all proofs of claim, these claims evade detection, and Atlas gets paid even when doing so harms the interests of the debtors, legitimate creditors, and the integrity of the system. Atlas makes money only when the bankruptcy system fails; its continued and lucrative operation provides tangible illustration of the shortfalls of the process in addressing such schemes.

Petitioners Chaille Dubois and Kimberly Adkins both had payday loan debt attributed to them. Neither petitioner scheduled the debt in their Chapter 13 bankruptcies. Ms. Dubois had forgotten about the debt; Ms. Adkins, a victim of identity theft, was unaware such debt even existed. Within days after they filed their bankruptcy petitions, however, Atlas, ever attentive to potential opportunity on bankruptcy dockets, filed proofs of claim in both cases.

Petitioners filed adversary proceedings objecting to the proofs of claim and bringing claims against Atlas for violation of the Fair Debt Collection Practices Act ("FDCPA") and the Maryland Consumer Debt Collection Act ("MCDCA") based on the theory that Atlas wrongfully, misleadingly, and unfairly sought payment on a debt that it knew was unenforceable.

Ruling on Atlas' Motions to Dismiss in a consolidated proceeding, Judge Thomas J. Catliota of the U.S. Bankruptcy Court for the District of Maryland adopted the reasoning of Judge Chasanow in *Covert*

v. LVNV Funding, Inc., No. DKC 13-0698, 2013 U.S. Dist. LEXIS 175651 (D. Md. Dec. 9, 2013), to dismiss Petitioners' FDCPA and MCDCA claims. (App.31a-32a; CA JA 88-90.) Atlas consented to Petitioners' objections.

Judge Catliota certified the case for direct appeal to the Court of Appeals for the Fourth Circuit, which heard oral argument on May 10, 2016. The Fourth Circuit issued a split decision on August 25, 2016. Judge Henry Floyd, writing for the majority, reasoned that "the filing of a proof of claim is debt collection activity regulated by the FDCPA" but determined that, notwithstanding the flaws in the system relied upon by Atlas, action within the bankruptcy process represented the more appropriate remedy. (App.7a-9a) In dissent, Judge Albert Diaz argued that the FDCPA represents the proper supplement to an exploited bankruptcy system. (App.21a-25a) He further rejected the notion that the Bankruptcy Code implicitly repeals the FDCPA. (App.25a-28a)

REASONS FOR GRANTING THE PETITION

Because this case presents the same questions on the merits as will be considered by the Court this Term in *Johnson v. Midland Funding, Inc.*, Petitioners respectfully request that the Court hold this case pending its decision in *Johnson*. Moreover, because this case does not implicate the potential estoppel issues in *Johnson* and because it more squarely addresses the proof of claim as debt collection issue necessary to a decision in *Johnson*, the Court may

wish to grant this petition, consolidate this case with *Johnson*, and order expedited briefing.

I. QUESTIONS TWO AND THREE MIRROR THOSE GRANTED IN *JOHNSON V. MIDLAND FUNDING, LLC*, WITH PARALLEL FACTS

Like *Johnson*, the instant Petition addresses the applicability of the FDCPA to proofs of claim on time-barred debt. Indeed, the facts are nearly identical: in both *Johnson* and here, Midland Funding, LLC and Atlas, respectively, filed proofs of claim on debt that was well beyond the statute of limitations. The respondent in *Johnson*, like petitioners, sought recourse under the FDCPA. In *Johnson*, the respondent filed in district court, while the petitioners here opted for an adversary proceeding in bankruptcy court.

Likewise, Questions Two and Three presented here are nearly identical to those granted in the *Johnson* petition. The only distinction is that petitioners here decline to concede the accuracy of the proofs of claim. That minor distinction, however, does not affect the applicability of the Court's decision where a proof of claim *is* accurate.

II. UNLIKE *JOHNSON*, THIS CASE HAS NO POTENTIAL ESTOPPEL ISSUE

This case raises the same issues on the merits as those presented in *Johnson*. However, the Fourth Circuit, in *Covert v. LVNV Funding,* LLC, determined *sua sponte* that "[a] finding for the Plaintiffs on [the FDCPA] would entail a holding that the Defendants' proofs of claim are invalid, which would directly contradict the bankruptcy court's plan confirmation

order approving those proofs of claim as legitimate." *Covert v. LVNV Funding, LLC,* 779 F.3d 242, 247 (4th Cir. 2015). The *Covert* court noted that "confirmation of a bankruptcy plan is a final judgment on the merits" and that "Plaintiffs were not free to raise statutory objections after the court had entered its confirmation order when those objections were known or should have been known to them during the bankruptcy proceedings." *Id.* at 246, 248.

In *Johnson*, though the debtor objected to the claim, it did so on the basis of insufficient documentation rather than on the basis of the statute of limitations. This case has no such potential estoppel issues: Petitioners objected to the proofs of claim on the basis of staleness as part of their adversary proceedings. Consolidation, therefore, would ensure that even if this Court finds that the respondent in *Johnson* is estopped, it has an appropriate vehicle to provide much-needed guidance to the lower courts on the application of the FDCPA to proof of claims.

III. THIS CASE ALSO DIRECTLY ADDRESSES A PREDICATE QUESTION IN *JOHNSON*, WHICH COULD PERMIT THIS COURT TO BETTER ILLUMINATE THE CORRECT APPLICATION OF THE FDCPA

The Court may likewise wish to grant this petition and consolidate this case with *Johnson* because the Fourth Circuit focused its opinion on questions not raised in the *Johnson* petition but predicate to a decision on the merits. In *Johnson*, the Eleventh Circuit focused on the preclusive effect of the Bankruptcy Code on the FDCPA. The questions certified in *Johnson* address only preclusion of the FDCPA by the Bankruptcy Code and application of the FDCPA to the

proofs of claim on time-barred debt. *Johnson*, No. 16-348. In order to reach the applicability of the FDCPA to proofs of claim, however, the Court must determine whether the filing of a proof of claim amounts to debt collection. The Fourth Circuit opinion discusses this question at length, and it was the primary basis for the ruling of the Bankruptcy Court. (App.7a-9a); CA JA 88-90. Consolidation would thus provide a more robust basis for determining all issues involved in the *Johnson* case.

CONCLUSION

The petition for a writ of certiorari should be either held pending the outcome of or granted and consolidated with *Johnson v. Midland Funding, LLC*, No. 16-348.

Respectfully submitted,

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NOVEMBER 23, 2016

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OPINION OF THE FOURTH CIRCUIT (AUGUST 25, 2016)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE: ERIC DUBOIS,

Debtor,

CHAILLE DUBOIS, F/K/A CHAILLE GAINES, F/K/A CANDACE DUBOIS, F/K/A CANDACE GAINES, F/K/A CANDI GAINES, F/K/A CANDI DUBOIS; KIMBERLY ADKINS,

Plaintiffs-Appellants,

v.

ATLAS ACQUISITIONS LLC,

Defendant-Appellee.

and

TIMOTHY P. BRANIGAN;
NANCY SPENCER GRISBY,

Trustees.

No. 15-1945

Appeal from the United States Bankruptcy Court
for the District of Maryland, at Greenbelt.
Thomas J. Catliota, Bankruptcy Judge.
(15-00110; 14-28589)

Before DIAZ, FLOYD, and THACKER, Circuit Judges.

FLOYD, Circuit Judge:

Appellants Kimberly Adkins and Chaille Dubois filed separate Chapter 13 bankruptcy petitions in the Bankruptcy Court for the District of Maryland. Appellee Atlas Acquisitions LLC (Atlas) filed proofs of claim in their bankruptcy cases based on debts that were barred by Maryland's statute of limitations.[1] The issue on appeal is whether Atlas violated the Fair Debt Collection Practices Act (FDCPA) by filing proofs of claim based on time-barred debts. We hold that Atlas's conduct does not violate the FDCPA, and affirm the bankruptcy court's dismissal of Appellants' FDCPA claims and related state law claim.

I.

The facts of Appellants' cases are similar. Adkins filed for Chapter 13 bankruptcy on August 29, 2014. Atlas filed two proofs of claim in her case. The first proof of claim indicated that Adkins owed Atlas $184.62 based on a loan that originated with payday lender Check N Go and that Atlas purchased from Elite Enterprise Services, LLC (Elite Enterprise) on September 15, 2014.[2] The proof of claim identified the last

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[1] "A proof of claim is a form filed by a creditor in a bankruptcy proceeding that states the amount the debtor owes to the creditor and the reason for the debt." *Covert v. LVNV Funding, LLC*, 779 F.3d 242, 244 n.1 (4th Cir. 2015).

[2] Atlas asks the Court to strike any allegation that the loans in this appeal originated with payday lenders. However, the proofs of claim attached to Appellants' complaints indicate that Atlas

transaction date on the account as May 19, 2009. Atlas's second proof of claim was for $390.00 based on a loan that originated with payday lender Impact Cash USA and that Atlas purchased from Elite Enterprise on November 18, 2014. The proof of claim identified the last transaction date on that account as September 10, 2009. It is undisputed that both debts were beyond Maryland's three-year statute of limitations when Atlas purchased and attempted to assert the debts in Adkins's bankruptcy case. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-101. Adkins neither listed the debts on her bankruptcy schedules nor sent a notice of bankruptcy to Atlas.

Dubois filed for Chapter 13 bankruptcy on December 6, 2014. Atlas filed a proof of claim for $135.00 based on a loan that originated with payday lender Iadvance and that Atlas purchased from Elite Enterprise on January 5, 2015. The proof of claim identified the last transaction date on the account as October 18, 2008. It is undisputed that this debt was also beyond Maryland's statute of limitations when Atlas purchased and attempted to assert the debt in Dubois's bankruptcy case. Dubois did not list the debt on her bankruptcy schedules nor did she send a notice of bankruptcy to Atlas.

Adkins and Dubois filed separate adversary complaints against Atlas. Both objected to Atlas's claims as being time-barred and further alleged that

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itself designated the debts "payday." *See* J.A. 55, 140. Accordingly, we find this fact sufficiently alleged. *See Goines v. Valley Cmty. Servs. Bd.*, No. 15-1589, ___F.3d___, 2016 WL 2621262, at *2 (4th Cir. May 9, 2016) (explaining that on motion to dismiss, courts may consider documents attached to complaint as exhibits).

Atlas violated the FDCPA by filing proofs of claim on stale debts. Appellants sought disallowance of Atlas's claims as well as damages, attorney's fees, and costs under the FDCPA.[3]

Atlas conceded that its claims were based on time-barred debts and stipulated to their disallowance. However, Atlas moved to dismiss Appellants' FDCPA claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. *See* Fed. R. Bankr. P. 7012(b) (incorporating Rule 12(b)(6) into adversary proceedings). After hearing consolidated oral arguments, the bankruptcy court concluded that filing a proof of claim does not constitute debt collection activity within the meaning of the FDCPA and granted Atlas's motion to dismiss. Pursuant 28 U.S.C. § 158(d)(2), we permitted Appellants to appeal the bankruptcy court's decision directly to this Court. We review the bankruptcy court's dismissal of Appellants' claims under Rule 12(b)(6) de novo. *See*, *e.g.*, *In re Mwangi*, 764 F.3d 1168, 1173 (9th Cir. 2014); *In re McKenzie*, 716 F.3d 404, 412 (6th Cir. 2013).

II.

Before addressing the substance of Appellants' claims, we provide a brief overview of the relevant statutes in this case: the Bankruptcy Code (the "Code") and the FDCPA.

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[3] Dubois additionally alleged that Atlas violated the Maryland Consumer Debt Collection Act (MCDCA). Md. Code Ann., Com. Law § 14-201, *et seq*. The parties do not analyze the MCDCA separately from the FDCPA. Accordingly, neither do we.

A.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)). Through bankruptcy, the debtor's assets are collected for equitable distribution among creditors and his remaining debts are discharged. *See Covert v. LVNV Funding, LLC*, 779 F.3d 242, 248 (4th Cir. 2015); *In re Jahrling*, 816 F.3d 921, 924 (7th Cir. 2016). A bankruptcy debtor must file with the bankruptcy court a list of creditors, a schedule of assets and liabilities, and a statement of the debtor's financial affairs. 11 U.S.C. § 521(a)(1). "[B]eing all-inclusive on the schedules is consistent with the Code's principle of honest and full disclosure." *In re Vaughn*, 536 B.R. 670, 676 (Bankr. D.S.C. 2015). Scheduling a debt notifies the creditor of the bankruptcy and of the creditor's opportunity to file a proof of claim asserting a right to payment against the debtor's estate. *See id.* at 679; 11 U.S.C. § 501(a).

The bankruptcy court may "allow" or "disallow" claims from sharing in the distribution of the bankruptcy estate. 11 U.S.C. § 502. In Chapter 13 proceedings, allowed claims are typically paid, either in whole or in part, out of the debtor's future earnings pursuant to a repayment plan proposed by the debtor and confirmed by the bankruptcy court. *See id.* § 1322(a)(1); 4-501 *Collier on Bankruptcy* ¶ 501.01 (*Collier*). Upon completion of all payments under the plan, the bankruptcy court "grant[s] the debtor a discharge of all debts provided for by the plan or disallowed." 11 U.S.C. § 1328(a). Thus, at the end of the process the

debtor receives the "fresh start" contemplated by the Bankruptcy Code.

B.

Congress enacted the FDCPA to eliminate abusive debt collection practices and to ensure that debt collectors who refrain from such practices are not competitively disadvantaged. 15 U.S.C. § 1692(a), (e). The FDCPA regulates the conduct of "debt collectors," defined to include "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6). Among other things, the FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," and from using "unfair or unconscionable means to collect or attempt to collect any debt." *Id.* §§ 1692e-1692f. The statute provides a non-exhaustive list of conduct that is deceptive or unfair (e.g., falsely implying that the debt collector is affiliated with the United States, *id.* § 1692e(1)). Debt collectors who violate the FDCPA are liable for actual damages, statutory damages of up to $1,000, and attorney's fees and costs. *See id.* § 1692k(a).

C.

Federal courts have consistently held that a debt collector violates the FDCPA by filing a lawsuit or threatening to file a lawsuit to collect a time-barred debt. *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259-60 (11th Cir. 2014) (collecting cases), *cert.*

denied, 135 S. Ct. 1844 (2015). Appellants contend that filing a proof of claim on a time-barred debt in a bankruptcy proceeding similarly violates the FDCPA. Atlas counters that filing a proof of claim is not debt collection activity and is therefore not subject to the FDCPA. Alas further argues that, even if the FDCPA applies, filing a proof of claim on a time-barred debt does not violate its provisions. These arguments are addressed in turn.

III.

Atlas does not dispute that it is a debt collector but argues that filing a proof of claim does not constitute debt collection activity regulated by the FDCPA. *See* 15 U.S.C. § 1692e (prohibiting deceptive or misleading representations "in connection with the collection of any debt"); id. § 1692f (prohibiting unfair or unconscionable means "to collect or attempt to collect any debt"). Instead, Atlas contends that a proof of claim is merely a "request to participate in the bankruptcy process." Appellee's Br. 20.

Determining whether a communication constitutes an attempt to collect a debt is a "commonsense inquiry" that evaluates the "nature of the parties' relationship," the "[objective] purpose and context of the communication[]," and whether the communication includes a demand for payment. *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 385 (7th Cir. 2010); *see also Olson v. Midland Funding, LLC*, 578 F. App'x 248, 251 (4th Cir. 2014) (citing *Gburek* factors approvingly). Here, the "only relationship between [the parties] [is] that of a debtor and debt collector." *Olson*, 578 F. App'x at 251. Moreover, the "animating purpose" in filing a proof of claim is to obtain payment by sharing

in the distribution of the debtor's bankruptcy estate. *See Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011); 4-501 Collier ¶ 501.01. This fits squarely within the Supreme Court's understanding of debt collection for purposes of the FDCPA. *See Heintz v. Jenkins*, 514 U.S. 291, 294 (1995) (explaining that in ordinary English, an attempt to "collect a debt" is an attempt "to obtain payment or liquidation of it, either by personal solicitation or legal proceedings" (quoting Black's Law Dictionary 263 (6th ed. 1990))). Precedent and common sense dictate that filing a proof of claim is an attempt to collect a debt. The absence of an explicit demand for payment does not alter that conclusion, *Gburek*, 614 F.3d at 382, nor does the fact that the bankruptcy court may ultimately disallow the claim.

Atlas argues that treating a proof of claim as an attempt to collect a debt would conflict with the Bankruptcy Code's automatic stay provision. The automatic stay provides that filing a bankruptcy petition "operates as a stay" of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6). Atlas argues that if filing a proof of claim were an act to collect debt, then such filing would violate the automatic stay, "an absurd result." Appellee's Br. 21.

Atlas's quandary is easily resolved as the automatic stay simply bars actions to collect debt outside of the bankruptcy proceeding. *See, e.g.*, *Cent. States, Se. & Sw. Areas Pension Fund v. Basic Am. Indus., Inc.*, 252 F.3d 911, 918 (7th Cir. 2001) ("'[D]emanding' payment from a debtor in bankruptcy other than in the bankruptcy proceeding itself is normally a violation of

the automatic stay"); *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 354 (5th Cir. 2008) (explaining that the automatic stay "merely suspends an action to collect the claim outside the procedural mechanisms of the Bankruptcy Code"). The automatic stay helps channel debt collection activity into the bankruptcy process. It does not strip such activity of its debt collection nature for purposes of the FDCPA.

Finally, Atlas argues that filing a proof of claim is not an attempt to collect debt because the proof of claim is directed to the bankruptcy court and trustee rather than to the debtor. However, collection activity directed toward someone other than the debtor may still be actionable under the FDCPA. *See, e.g.*, *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232-33 (4th Cir. 2007) (finding that FDCPA "plainly" applies to communications made by debt collector to debtor's counsel rather than debtor); *Horkey v. J.V.D.B. & Assocs., Inc.*, 333 F.3d 769, 774 (7th Cir. 2003) (finding that debt collector's phone call to debtor's co-worker was "in connection with the collection of a debt" where purpose of the call was to induce debtor to settle her debt). Although a proof of claim is filed with the bankruptcy court, it is done with the purpose of obtaining payment from the debtor's estate. That the claim is paid by the debtor's estate rather than the debtor personally is irrelevant for purposes of the FDCPA. *See* 15 U.S.C. §§ 1692e, 1692f (prohibiting the use of deceptive or unfair means to collect "any debt," without specifying a payor).

Accordingly, we find that filing a proof of claim is debt collection activity regulated by the FDCPA.

IV.

We next consider whether filing a proof of claim based on a debt that is beyond the applicable statute of limitations violates the FDCPA. Deciding this issue requires closer examination of the claims process in bankruptcy.

The Federal Rules of Bankruptcy Procedure specify the form, content, and filing requirements for a valid proof of claim. *See, e.g.*, Fed. R. Bankr. P. 3001. A properly filed proof of claim is prima facie evidence of the claim's validity, and the claim is "deemed allowed" unless "a party in interest" objects. 11 U.S.C. § 502. The bankruptcy trustee and debtor are parties in interest who may object.[4] Indeed, the trustee has a statutory duty to "examine proofs of claims and object to the allowance of any claim that is improper." *Id.* § 704(a)(5).

If objected to, the Code disallows claims based on time-barred debts. *See id.* § 502(b)(1) (stating that a claim shall be disallowed if it is "unenforceable against the debtor . . . under any agreement or applicable law"); *id.* § 558 (stating that the bankruptcy estate has "the benefit of any defense available to the debtor . . . including statutes of limitation"). As previously

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[4] While the parties do not address the issue, it appears that creditors are also parties in interest who may object to a claim filed by another creditor. *See, e.g.*, *Adair v. Sherman*, 230 F.3d 890, 894 n.3 (7th Cir. 2000) ("Parties in interest include not only the debtor, but anyone who has a legally protected interest that could be affected by a bankruptcy proceeding. Therefore, if one creditor files a potentially fraudulent proof of claim, other creditors have standing to object to the proof of claim." (citation omitted)); *In re Varat Enters., Inc.*, 81 F.3d 1310, 1317 n.8 (4th Cir. 1996) ("All creditors of a debtor are parties in interest.").

noted, debts that are "provided for by the plan or disallowed under section 502" may be discharged. *Id.* § 1328 (emphasis added).

Appellants contend that the FDCPA should be applied to prohibit debt collectors from filing proofs of claim on time-barred debts. Appellants argue that a time-barred debt is not a "claim" within the meaning of the Bankruptcy Code and that filing claims on time-barred debts is an abusive practice because such claims are seldom objected to and therefore receive payment from the bankruptcy estate to the detriment of the debtor and other creditors. Atlas, meanwhile, argues that a time-barred debt is a valid "claim" and that filing such a claim should not be prohibited because only debts that are treated in the bankruptcy system may be discharged.

A.

The Bankruptcy Code defines the term "claim" broadly to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). By using the "broadest possible definition," the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case," thereby providing the debtor the "broadest possible relief." H.R. Rep. No. 95–595, p. 309 (1977); S. Rep. No. 95– 989, p. 22 (1978).

"[W]hen the Bankruptcy Code uses the word claim . . . it is usually referring to a right to payment recognized under state law." *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451

(2007) (quotation omitted). Under Maryland law, the statute of limitations "does not operate to extinguish [a] debt, but to bar the remedy." *Potterton v. Ryland Grp., Inc.*, 424 A.2d 761, 764 (Md. 1981) (quotation omitted); *see also Higginbotham v. Pub. Serv. Comm'n of Md.*, 985 A.2d 1183, 1191 (Md. 2009) ("[W]e have regarded limitations as not denying the plaintiff's right of action, but only the exercise of the right." (quotation omitted)). Indeed, a stale debt may be revived if the debtor sufficiently acknowledges the debt's existence. *Potterton*, 424 A.2d at 764; *see also* FTC, *Time-Barred Debts* (July 2013), https://www.consumer.ftc.gov/articles/0117-time-barred-debts ("Although the [debt] collector may not sue you to collect [a time-barred] debt, you still owe it. The collector can continue to contact you to try to collect . . . [and] [i]n some states, if you pay any amount on a time-barred debt or even promise to pay, the debt is 'revived.'") (saved as ECF opinion attachment). Thus, under Maryland law, a time-barred debt still constitutes a "right to payment" and therefore a "claim" that the holder may file under the Bankruptcy Code.[5]

Appellants note that a debt must be enforceable to constitute a claim, citing the Supreme Court's statement that "[t]he plain meaning of a 'right to payment'

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[5] Appellants suggest that "by filing proofs of claim on time-barred debt, Atlas is trying to trick debtors into unwittingly reviving the statute [of limitations]." Appellants' Reply Br. 4. Regardless of whether this is Atlas's intent, it is difficult to see how a creditor's filing a proof of claim would constitute acknowledgement of the debt by the debtor, particularly when there is persuasive authority that a debtor does not revive a time-barred debt by listing it in his bankruptcy schedules. *See, e.g., Biggs v. Mays*, 125 F.2d 693, 697-98 (8th Cir. 1942); *In re Povill*, 105 F.2d 157, 160 (2d Cir. 1939).

is nothing more nor less than an enforceable obligation." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990). However, we do not read the Supreme Court's statement to mean that a debt must be enforceable in court to be a claim. Indeed, the Bankruptcy Code treats debts that are "contingent" or "unmatured" as claims notwithstanding that such debts are not presently enforceable in court. 11 U.S.C. § 101(5)(A). Furthermore, in *Davenport*, the Supreme Court found restitution orders to be claims even though "neither the Probation Department nor the victim can enforce restitution obligations in civil proceedings." 495 U.S. at 558. Instead, such obligations are enforced by the "substantial threat of revocation of probation and incarceration." *Id.*

It is also notable that while the Bankruptcy Code provides that time-barred debts are to be disallowed, *see*, *e.g.*, 11 U.S.C § 558, the Code nowhere suggests that such debts are not to be filed in the first place. Indeed, the Bankruptcy Rules were recently amended to facilitate the assessment of a claim's timeliness by requiring that claims such as the ones at issue in this appeal be filed with a statement setting forth the last transaction date, last payment date, and charge-off date on the account. Fed. R. Bankr. P. 3001, advisory committee notes to 2012 Amendments (discussing filing requirements for claims based on open-end or revolving consumer credit agreements). This Rule suggests the Code contemplates that untimely debts will be filed as claims but ultimately disallowed. Lastly, excluding time- barred debts from the scope of bankruptcy "claims," and thus excluding them from the bankruptcy process, would frustrate the Code's "intended effect to define the scope of the term 'claim' as broadly as

possible," 2-101 *Collier* ¶ 101.05, and thereby provide the debtor the broadest possible relief. Accordingly, we conclude that when the statute of limitations does not extinguish debts, a time-barred debt falls within the Bankruptcy Code's broad definition of a claim.

B.

Next, we consider whether filing a proof of claim on a time-barred debt violates the FDCPA notwithstanding that the Bankruptcy Code permits such filing. As noted above, the FDCPA has been interpreted to prohibit filing a lawsuit on a time-barred debt. The rationale has been explained as follows:

> As with any defendant sued on a stale claim, the passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt. Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care—that sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of

> going into court to present the defense; this is particularly true in light of the costs of attorneys today.

Kimber v. Fed. Fin. Corp., 668 F.Supp. 1480, 1487 (M.D. Ala. 1987); *see also Crawford*, 758 F.3d at 1260; *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013).[6]

We note at the outset a unique consideration in the bankruptcy context: if a bankruptcy proceeds as contemplated by the Code, a claim based on a time-barred debt will be objected to by the trustee, disallowed, and ultimately discharged, thereby stopping the creditor from engaging in any further collection activity.[7] If the debt is unscheduled and no proof of claim is filed, the debt continues to exist and the debt collector may lawfully pursue collection activity

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[6] The Eleventh Circuit in *Crawford* is the only court of appeals to hold that filing a proof of claim on a time-barred debt in a Chapter 13 proceeding violates the FDCPA. 758 F.3d at 1256-57. The Eighth Circuit has "reject[ed] extending the FDCPA to time-barred proofs of claim," *Nelson v. Midland Credit Mgmt., Inc.*, No. 15-2984, 2016 WL 3672073, at *2 (8th Cir. July 11, 2016), and the Second Circuit has broadly held that "filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA." *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 95 (2d Cir. 2010). Other circuits are presently considering the issue. *See*, *e.g.*, *Owens v. LVNV Funding, LLC*, No 14-cv-02083, 2015 WL 1826005 (S.D. Ind. Apr. 21, 2015), *appeal docketed*, No. 15–2044 (7th Cir. May 13, 2015); *Torres v. Asset Acceptance, LLC*, 96 F. Supp. 3d 541 (E.D. Pa. 2015), *appeal docketed*, No. 15–2132 (3d Cir. May 13, 2015).

[7] By contrast, raising a statute of limitations defense may defeat a lawsuit to collect a time-barred debt but would not extinguish the debt or necessarily prevent collection activity.

apart from filing a lawsuit. This is detrimental to the debtor and undermines the bankruptcy system's interest in "the collective treatment of all of a debtor's creditors at one time." 1 Norton Bankr. L. & Prac. 3d § 3:9. Clearly, then, when a time-barred debt is not scheduled the optimal scenario is for a claim to be filed and for the Bankruptcy Code to operate as written.

Appellants complain, however, that trustees often lack the time and resources to examine each proof of claim and object to those that are based on time-barred debts. *See* Appellants' Br. 17-18 (explaining that Maryland has only three Chapter 13 trustees to manage approximately 5,000 cases per year, with approximately 10 proofs of claim filed in each case). Debt collectors like Atlas purportedly take advantage of this by filing claims on stale debts in hopes that the claims will go unnoticed and receive some payment from the bankruptcy estate. When successful, these debt collectors reduce the amount of money available to legitimate creditors and may sometimes cause debtors to pay more into their Chapter 13 plans.

We appreciate the harm that can be wrought if time-barred claims go unnoticed. However the solution, in our view, is not to impose liability under the FDCPA that would categorically bar the filing of such claims, but to improve the Code's administration such that it operates as written.[8] This may be accomplished, for example, by allocating additional resources to

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[8] Indeed, if Appellants are correct that trustees are failing to fulfill their statutory duty to examine and object to improper claims, this is surely producing adverse consequences beyond the context of time-barred debts.

trustees or through action of the United States Trustee, who appoints and supervises all Chapter 13 trustees. 28 U.S.C. § 586.

Another consideration that counsels against finding FDCPA liability is that, for most Chapter 13 debtors, the amount they pay into their bankruptcy plans is unaffected by the number of unsecured claims that are filed. Chapter 13 debtors typically do not enter into 100 percent repayment plans; thus, their unsecured creditors receive only partial payment of their claims, with the remainder being discharged. *See* 8-1328 *Collier* ¶ 1328.02 ("Congress clearly contemplated chapter 13 plans paying little or nothing on unsecured debts . . . ."). As additional claims are filed, unsecured creditors receive a smaller share of available funds but the total amount paid by the debtor remains unchanged. Thus, from the perspective of most Chapter 13 debtors, it may in fact be preferable for a time-barred claim to be filed even if it is not objected to, as the debtor will likely pay the same total amount to creditors and the debt can be discharged. *See In re Gatewood*, 533 B.R. 905, 909 (8th Cir. BAP 2015) (explaining that "debtors have less at stake in claims allowance than they would when facing enforcement of an adverse judgment in a collection action" because the allowance of additional claims would not affect the total amount the debtor would pay).[9]

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[9] As noted above, the FDCPA was enacted in part to protect scrupulous debt collectors from unfair competition. However, bankruptcy creditors are sophisticated entities that may object to improper claims. Thus, we will not invoke the FDCPA solely on their behalf when, as discussed above, there are reasons not to do so on behalf of bankruptcy debtors.

Various other considerations also differentiate filing a proof of claim on a time-barred debt from filing a lawsuit to collect such debt. First, the Bankruptcy Rules require claims like the ones filed by Atlas to accurately state the last transaction and charge-off date on the account, making untimely claims easier to detect and relieving debtors from the burden of producing evidence to show that the claim is time-barred.[10] Second, a bankruptcy debtor is protected by a trustee and often by counsel who are responsible for objecting to improper claims even if, as Appellants argue, they currently do not always do so. Third, unlike a debtor who is unwillingly sued, a Chapter 13 debtor voluntarily initiates the bankruptcy case, diminishing concerns about the embarrassment the debtor may feel in objecting to a stale claim. In sum, the reasons why it is "unfair" and "misleading" to sue on a time-barred debt are considerably diminished in the bankruptcy context, where the debtor has additional protections and potentially benefits from having the debt treated in the bankruptcy process.

Lastly, Appellants concede that a debt collector would not violate the FDCPA by filing a proof of claim on a time-barred debt that the debtor had scheduled and did not designate as "disputed." Appellants explain that scheduling a debt as undisputed is an "invitation to participate" because it provides "'notice to a creditor that its debt will be paid . . . in accordance with the filed proof of claim, claims objection process, and other bankruptcy provisions.'" Appellants' Br. 28 n.14

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[10] There is no allegation that Atlas filed inaccurate proofs of claim. A debt collector who supplies false dates to obscure a claim's staleness may well violate the FDCPA. However, we have no occasion to consider that issue today.

(quoting *Vaughn*, 536 B.R. at 678). However, such notice is sent whether a scheduled debt is disputed or not. Moreover, a time-barred debt that is disputed is less likely to be inadvertently allowed. Thus, we see no reason to attach FDCPA liability to a claim filed on a time-barred debt that is scheduled as disputed. Finally, the interests in discharge and collective treatment of claims discussed above convince us that FDCPA liability should not attach where a debtor fails to schedule a time-barred debt.

We conclude that filing a proof of claim in a Chapter 13 bankruptcy based on a debt that is time-barred does not violate the FDCPA when the statute of limitations does not extinguish the debt.[11]

V.

For the foregoing reasons, we affirm the district court's dismissal of Appellants' FDCPA and MCDCA claims.

AFFIRMED

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[11] In light of this decision, we do not reach Atlas's argument that the Bankruptcy Code precludes the FDCPA and preempts the MCDCA from applying to the filing of a proof of claim.

DISSENTING OPINION OF JUSTICE DIAZ (AUGUST 25, 2016)

I join Part III of the majority opinion, which concludes that filing a proof of claim is debt-collection activity regulated by the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*

And while I agree that Atlas's time-barred claim is a "claim" under the Bankruptcy Code (as the majority concludes in Part IV.A), I cannot agree that Atlas's alleged conduct is consistent with the FDCPA (or the Maryland Consumer Debt Collection Act (MCDCA), Md. Code Ann., Com. Law § 14-201 *et seq.*).[1] Atlas buys the time-barred debt of people in bankruptcy and tries to collect by filing proofs of claim in their bankruptcy proceedings. As Atlas concedes, these claims should fail—the debt is unenforceable in court. But, absent objection, the Bankruptcy Code automatically allows all properly filed claims. 11 U.S.C. § 502. So Atlas plays the odds, representing itself as entitled to part of the debtors' estates. If someone notices the claims and objects, as happened here, Atlas grins sheepishly—"You caught me!"—and admits that the claim is meritless. But if the claim slips through, Atlas uses the bankruptcy court to garner a payoff on unenforceable debts. In my view, this sharp practice is misleading and unfair to debtors and other creditors, and it gives rise to a cause of action under the FDCPA.

Moreover, I would hold that the Bankruptcy Code does not impliedly repeal the FDCPA or

[1] I join the majority in analyzing the FDCPA and MCDCA claims together, as the parties do.

preempt the MCDCA. Accordingly, I would vacate the opinion of the district court and remand for further proceedings.

I.

The FDCPA aims to "protect[] consumers from abusive and deceptive practices by debt collectors, and . . . non-abusive debt collectors from competitive disadvantage." *United States v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 135 (4th Cir. 1996). The statute prohibits a wide variety of collection tactics, including the use of "any false, deceptive, or misleading representation or means" of debt collection, 15 U.S.C. § 1692e, and "unfair or unconscionable means to collect or attempt to collect any debt," § 1692f.

Although the FDCPA enumerates specific examples of these broad prohibitions, it does so "[w]ithout limiting [their] general application." *Id.* For example, "[t]he false representation of . . . the character, amount, or legal status of any debt" is a specific violation of the general ban on false, deceptive, or misleading representations. § 1692e(2)(A). But Congress chose not to limit the general prohibitions, to "enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed." *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 450 (6th Cir. 2014) (quoting S. Rep. No. 95-382 at 4 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1698).

One such court-imposed proscription applies to lawsuits to collect time-barred debt. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259-60 & n.6 (11th Cir. 2014) (citing cases). Such lawsuits raise

two major concerns in the consumer context. First, the "least sophisticated consumer"—from whose vantage point we view FDCPA communications, *see Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 394 (4th Cir. 2014)—may be unaware of the existence of a statute-of-limitations defense and may therefore "unwittingly acquiesce to such lawsuits," *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). Second, "the assage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that [the consumer] will no longer have personal records detailing the status of the debt." *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (quoting *Kimber*, 668 F. Supp. at 1487).

These same considerations support recognizing FDCPA liability for filing time-barred claims on unscheduled debts in bankruptcy.[2] *Crawford*, 758 F.3d at 1260-61. *But see Nelson v. Midland Credit Mgmt., Inc.*, No. 15-2984, 2016 WL 3672073, at *2 (8th Cir. July 11, 2016) (published opinion) (refusing to "extend[] the FDCPA to time-barred proofs of claim" because the Bankruptcy Code's "protections against harassment and deception satisfy the relevant concerns of the FDCPA"). Here, where the proofs of claim provide enough information to determine the debt is time barred, the first consideration is of particular importance. An unsophisticated debtor reviewing a proof of claim may be unaware of the statute-of-limitations defense

[2] As the debtors concede, their case might be different had they scheduled these debts with the bankruptcy court, an action that might be seen as an invitation to a creditor to file a claim.

and— perhaps not appreciating the legal significance of even accurately listed last-transaction and charge-off dates—may nevertheless "acquiesce" to the claims.

While some courts have found the role of the bankruptcy trustee in weeding out time-barred claims critical in distinguishing the bankruptcy context from civil lawsuits, *see*, *e.g.*, *Nelson*, 2016 WL 3672073, at *2, I am not persuaded. At best, a debt collector who files such a claim wastes the trustee's time. At worst, the debt collector catches the trustee asleep at the switch and collects on an invalid claim to the detriment of other creditors and, in many cases, the debtor. In either case, the debt collector misleadingly represents to the debtor that it is entitled to collect through bankruptcy when it is not.

Moreover, there is reason to doubt the efficacy of the trustee as a vigilant steward of the debtor's estate. *See*, *e.g.*, *In re Edwards*, 539 B.R. 360, 365 (Bankr. N.D. Ill. 2015) ("Chapter 13 trustees in this district do not object to proofs of claim based on statute of limitations defenses. This is not surprising because objecting to claims based on affirmative defenses would require trustees to examine the details of virtually every unsecured proof of claim, which is simply impracticable."). Indeed, if trustees performed their duties flawlessly, Atlas would have little incentive to engage in its scheme.

Like filing a lawsuit on time-barred debt, Atlas's alleged debt-collection activity in this case is precisely the sort of unfair and misleading practice that Congress intended the courts to recognize as a violation. After the debtors entered bankruptcy, Atlas

bought their debts, or rather, as the bill of sales said, "charged-off receivables." J.A. 58, 132, 143. All of these charged-off debts were more than five-years old, well outside Maryland's three-year statute of limitations. Nevertheless, Atlas filed proofs of claim to recover the unenforceable debts in the bankruptcy court. The relevance of the statute of limitations was not lost on Atlas, which included the following notice on two of the three proof-of-claim forms it filed: "This proof of claim is being filed pursuant to 11 USC Secs. 101(5), 501(a) and 502(b) as said claim may be outside of the statute of limitations." J.A. 55, 140. Section 502(b) explains that if a claim is objected to, the court will allow the claim "except to the extent that . . . such claim is unenforceable against the debtor and the property of the debtor, under any agreement or applicable law." § 502(b)(1). In short, Atlas knew exactly what it was doing—exploiting a weakness in the bankruptcy system and preying on potential error to collect on debts where it should not. The practice subverts a core purpose of bankruptcy by diverting estate assets from the creditors entitled to receive them.

Atlas rather stunningly argues that it is doing a public service: "[B]ut for Atlas' filing of its proofs of claim, those debts would not be subject to discharge and at the conclusion of Appellants' chapter 13 cases, Atlas could restart collection activity with respect thereto so long as it does not otherwise violate the FDCPA." Appellee's Br. at 40. Really? While the statement is literally true, the (unintended) possibility that the time-barred debts will be disallowed and discharged hardly justifies Atlas's tactics. Moreover, that the debtors did not schedule the debts is

some evidence that collection efforts have stopped. And it would not be surprising if they had; the time for enforcement has passed, and the combination of the statute of limitations and the FDCPA seriously limits what a debt collector can do to recover old debts. Ideally, debtors would remember all their old debts, realize they were time barred, schedule them as disputed, and see that they were disallowed. But the FDCPA asks what the least sophisticated consumer would do, not the ideal one. Atlas's conduct games the bankruptcy process; it does not ensure its integrity.

Accordingly, I would hold that Atlas's conduct constitutes a violation of the FDCPA. Such a holding would not impose a great burden on debt collectors. "[A] debt collector is not liable in an action brought under the [FDCPA] if [it] can show 'the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 576 (2010) (quoting 15 U.S.C. § 1692k(c)). Atlas and other debt collectors can avoid FDCPA liability by putting in place a reasonable procedure to screen unscheduled, time-barred claims—if Atlas already has such a procedure, it can prove it in the district court.

II.

Because the majority determines that the FDCPA does not reach Atlas's conduct, it does not address the question whether—if the FDCPA on its own terms would apply to the filing of time-barred claims—the Bankruptcy Code nevertheless precludes

such an action. To determine whether two federal statutes are compatible, we employ ordinary statutory interpretation principles. *See POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). Because the circuits are split on this issue and the arguments have been made extensively on both sides, I explain briefly my position that the two statutes do not conflict in this instance.

The Second and Ninth Circuits have concluded that the Bankruptcy Code precludes certain FDCPA suits. *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 95-96 (2d Cir. 2010) (rejecting an FDCPA claim brought during the pendency of bankruptcy proceedings for the filing of an inflated proof of claim); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-11 (9th Cir. 2002) (barring an FDCPA claim for post-bankruptcy debt collection in violation of the discharge order). Both rely on the comprehensive provisions and protections of the Bankruptcy Code to hold that it leaves no room for FDCPA claims. *Simmons*, 622 F.3d at 96; *Walls*, 276 F.3d at 510.

The Third, Seventh, and Eleventh Circuits have rejected the notion that FDCPA actions may not be brought in the context of bankruptcy. *Johnson v. Midland Funding LLC*, Nos. 15-11240, 15-14116, 2016 WL 2996372, at *6 (11th Cir. May 24, 2016) (published opinion) (holding that the Bankruptcy Code does not impliedly repeal FDCPA actions for filing proofs of claim on time-barred debt); *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d Cir. 2013) (permitting an FDCPA claim for the violation of the Bankruptcy Code's subpoena requirements); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730-31 (7th Cir. 2004) (comparing the FDCPA and Bankruptcy

Code and concluding they are compatible). In the view of these courts, the statutes do not expressly contradict one another, nor are they in "irreconcilable conflict" because "any debt collector can comply with both simultaneously." *Randolph*, 368 F.3d at 730; *accord Johnson*, 2016 WL 2996372, at *5-6; *Simon*, 732 F.3d at 273-74; *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) ("While a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . , 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" (third alteration in original) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981))).

I would side with the view of the Third, Seventh, and Eleventh Circuits, at least on the facts of this case. Atlas does not argue that the Bankruptcy Code expressly bars FDCPA remedies. Instead, it contends the statutes are irreconcilable: "[W]hat [the debtors] allege is prohibited by the FDCPA (the filing of a proof of claim with respect to a 'stale' debt) is expressly permitted by the Bankruptcy Code." Appellee's Br. at 34. But this argument is easily answered: Because the Bankruptcy Code does not obligate a creditor to file a proof of claim, a debt collector such as Atlas can comply with both statutes by not filing unscheduled, time-barred proofs of claim. *See Johnson*, 2016 WL 2996372, at *6; *Randolph*, 368 F.3d at 730.[3]

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[3] For similar reasons, I would hold that the Bankruptcy Code does not preempt the MCDCA.

This conclusion is buttressed by our holding, in a somewhat different posture, that an FDCPA claim may be brought during bankruptcy proceedings. *Covert v. LVNV Funding, LLC*, 779 F.3d 242, 246-48 (4th Cir. 2015). In *Covert*, debtors filed suit under the FDCPA and MCDCA after the completion of their bankruptcies, alleging that a creditor had unlawfully filed proofs of claim without a debt-collection license. *Id.* at 245. We found the claims barred by res judicata because the debtors failed to raise them during the bankruptcy. *Id.* at 247-48. Because res judicata applies to unraised claims only if they "could have been adjudicated in an earlier action," *id.* at 246, we necessarily determined that the debtors "could . . . have brought their affirmative claims for damages [under the FDCPA and MCDCA] during the bankruptcy process under Federal Rule of Bankruptcy Procedure 7001(1), which provides that 'a proceeding to recover money or property' may be brought as an adversary action," *id.* at 248. Similarly, I would hold that the Bankruptcy Code does not preclude or preempt the filing of the FDCPA and MCDCA claims in this case.

III.

Because I believe the debtors state a claim under the FDCPA (and MCDCA), I would reverse and remand for further proceedings.

JUDGMENT OF THE FOURTH CIRCUIT (AUGUST 25, 2016)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE: ERIC DUBOIS,

CHAILLE DUBOIS, F/K/A CHAILLE GAINES, F/K/A CANDACE DUBOIS, F/K/A CANDACE GAINES, F/K/A CANDI GAINES, F/K/A CANDI DUBOIS; KIMBERLY ADKINS,

Plaintiffs-Appellants,

v.

ATLAS ACQUISITIONS LLC,

Defendant-Appellee.

and

TIMOTHY P. BRANIGAN;
NANCY SPENCER GRISBY,

Trustees.

No. 15-1945
(15-00110) (14-28589)

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor
Clerk

ORDER ENTERING JUDGMENT BY CONSENT ON COUNT 1 AND DISMISSING COUNTS 2 AND 3 (JUNE 9, 2015)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT

IN RE: ERIC DUBOIS and
CHAILLE DUBOIS,

Debtors,

CHAILLE DUBOIS,

Plaintiff,

v.

ATLAS ACQUISITIONS LLC,

Defendant.

Case No. 14-28589-TJC
Chapter 13

Adversary No. 15-00110

Before the court is a motion to dismiss the complaint filed by the defendant, Atlas Acquisitions LLC. ECF No. 8. The motion is opposed by the plaintiff, Chaille DuBois. ECF No. 10. The court held a hearing on the motion on June 8, 2015. For the reasons stated on the record by the court at the

hearing, it is, by the United States Bankruptcy Court for the District of Maryland, hereby

ORDERED, that Count 1 of the complaint, the debtor's objection to Claim 10, is sustained by consent of the defendant on the record and Claim 10 is hereby disallowed; and it is further

ORDERED, that Count 2 of the complaint is hereby dismissed; and it is further

ORDERED, that Count 3 of the complaint is hereby dismissed.

cc:

Plaintiff
Plaintiff's Counsel
Defendant
Defendant's Counsel
Chapter 13 Trustee

RELEVANT STATUTORY PROVISIONS AND JUDICIAL RULES

11 U.S.C. § 101(5)(A)
Definitions

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured

11 U.S.C. § 501(a)
Filing of Proofs of Claims or Interests

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

11 U.S.C. § 502
Allowance of Claims or Interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of

the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured

11 U.S.C. § 541(a)
Property of the Estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * * *

11 U.S.C. § 558
Defenses of the Estate

The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

11 U.S.C. § 704(a)
Duties of Trustee

(a) The trustee shall—

[. . .]

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper

11 U.S.C. § 1302(b)
Trustee

(b) The trustee shall—

(1) perform the duties specified in sections 704(a)(2), 704(a)(3), 704(a)(4), 704(a)(5), 704(a)(6), 704(a)(7), and 704(a)(9) of this title

15 U.S.C. § 1692
Congressional Findings and Declaration of Purpose

(a) Abusive practices

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

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

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

15 U.S.C. § 1692e
False or Misleading Representations

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

[. . .]

(2) The false representation of—

(A) the character, amount, or legal status of any debt

[. . .]

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. 1692f
Unfair Practices

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

Fed. R. Bankr. P. 3001
Proof of Claim

(a) Form and content

A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

[. . .]

(c) Supporting information

(1) Claim based on a writing.

Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be

filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional requirements in an individual debtor case: sanctions for failure to comply.

In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c),

the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(3) Claim based on an open-end or revolving consumer credit agreement

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

[. . .]

(f) Evidentiary effect

A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Fed. R. Bankr. P. 9011(b)
Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.