No.

In the Supreme Court of the United States

DOMICK NELSON, PETITIONER

v.

MIDLAND CREDIT MANAGEMENT, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. VOYTAS, JR.
VOYTAS & COMPANY
1 North Taylor Avenue
St. Louis, MO 63108

ALEXANDER J. CORNWELL
BRODY & CORNWELL
1 North Taylor Avenue
St. Louis, MO 63108

PETER K. STRIS
BRENDAN S. MAHER
DANIEL L. GEYSER
Counsel of Record
DOUGLAS D. GEYSER
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017
(213) 995-6811
daniel.geyser@strismaher.com

QUESTIONS PRESENTED

This case directly implicates two circuit conflicts concerning the interaction of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and the Bankruptcy Code.

The questions presented are:

1. Whether filing a proof of claim on a knowingly time-barred debt violates the FDCPA.

2. Whether any such claim under the FDCPA is impliedly repealed by the Bankruptcy Code.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Domick Nelson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 828 F.3d 749. The opinion of the district court (App., *infra*, 9a-14a) is unreported but available at 2015 WL 5093437.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2016. A petition for rehearing was denied on September 15, 2016 (App., *infra*, 7a-8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, the Bankruptcy Code, and the Bankruptcy Rules are reproduced in the appendix to this petition (App., *infra*, 15a-25a).

STATEMENT

1. a. 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." 15 U.S.C. 1692(e). In enacting the FDCPA, Congress specifically determined that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. 1692(b).

Among a broad range of prohibitions, the FDCPA forbids the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. That section further enumerates a non-exhaustive list of prohibited practices, including making false representations of "the character, amount, or legal status of any debt," and "using any false or deceptive means to collect or attempt to collect any debt." 15 U.S.C. 1692e(2)(A), 1692e(10). The Act separately prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. "[A]s remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes." *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 172 (3d Cir. 2015).

Congress authorized a private right of action to enforce the FDCPA's prohibitions. 15 U.S.C. 1692k.

b. Once a debtor files for bankruptcy, a bankruptcy estate is created that consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). Creditors who wish to recover from the estate "may file a proof of claim" (11 U.S.C. 501(a))—"a written statement setting forth a creditor's claim." Fed. R. Bankr. P. 3001(a). The Code defines a "claim" as a "right to payment, whether or not such right is * * * fixed, contingent, matured, unmatured, disputed, [or] undisputed." 11 U.S.C. 101(5)(A). The filing of a proof of claim is "prima facie" evidence of its validity. Fed. R. Bankr. P. 3001(f).

A proof of claim is automatically "allowed" unless a party in interest objects and shows that "such claim is unenforceable against the debtor * * * under any agreement or applicable law." 11 U.S.C. 502(a), (b)(1). Congress specifically included "statutes of limitation" as one means of proving unenforceability (11 U.S.C. 558), and tasked bankruptcy trustees with "examin[ing] proofs of claims and object[ing] to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); 11 U.S.C. 1302(b)(1) (imposing the same duty on Chapter 13 trustees). While debtors are often represented by lawyers, not all debtors are represented, and the representation does not always extend to examining proofs of claim or filing objections. See, *e.g.*, *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726, 740 (7th Cir. 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016) (Wood, C.J., dissenting) (citing statistics).

2. "A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors—are filing proofs of claim on debts deemed unenforceable under state statutes of limitations." *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1256 (11th Cir. 2014). "Absent an objection from either the Chapter 13 debtor or the

trustee, the time-barred claim is automatically allowed against the debtor"; "[a]s a result, the debtor must then pay the debt from his future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court." *Id.* at 1259. "Such a distribution of funds to debt collectors with time-barred claims then necessarily reduces the payments to other legitimate creditors with enforceable claims." *Id.* at 1261. And even when a proper objection is lodged, those objections "consume[] energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Ibid.*

Debt buyers obtain debts at a fraction of their face value. *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1022 (7th Cir. 2014) (FTC study showing "debt buyers paid on average 3.1 cents per dollar of debt for debts that were 3 to 6 years old and 2.2 cents per dollar for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than 3 years old"); *Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 395 (6th Cir. 2015) ("LVNV buys 'uncollectable' debts at a discount—the older the debts, the greater the discount"). Due to this significant margin, debt collectors can generate a profit even if the majority of their time-barred claims are properly rejected as baseless. "[T]he phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system." *In re Hess*, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009).

3. Respondent is a substantial part of this trend: its conduct here was part of a broader scheme of submitting knowingly time-barred proofs of claim, despite lacking any basis for defending the claim once anyone objected.

After petitioner sought protection in Chapter 13 bankruptcy, respondent filed a proof of claim seeking $751.87.

App., *infra*, 2a. The claim on its face was barred by Missouri's statute of limitations: it had been obtained from Retail Lane Bryant, which recorded the last transaction on November 12, 2006, nearly a decade earlier. C.A. Addendum of Appellant (Add.) 15.

Petitioner objected to this claim, and it was disallowed. App., *infra*, 2a.; Add. 20. Petitioner then sought relief under the FDCPA, alleging that respondent's attempt to collect knowingly time-barred debts violated 15 U.S.C. 1692e and 1692f as an "unfair," "unconscionable," "false," "deceptive," and "misleading" practice. App., *infra*, 10a; Add. 5-6.

4. a. The district court dismissed petitioner's complaint (App., *infra*, 9a-14a), and the Eighth Circuit affirmed (*id.* at 2a-6a). According to the court of appeals, respondent filed an "accurate and complete" proof of claim, despite seeking relief on patently time-barred debt. *Id.* at 6a. It reasoned that the Bankruptcy Code's "protections against harassment and deception satisfy the relevant concerns of the FDCPA": "Unlike defendants facing a collection lawsuit, a bankruptcy debtor is aided by 'trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims.'" *Id.* at 5a. The court thus found "'no need to protect debtors who are already under the protection of the bankruptcy court,'" and "'no need to supplement the remedies afforded by bankruptcy itself.'" *Id.* at 5a-6a (quoting *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010)).

The court acknowledged that respondent's practice "burden[s]" debtors, but insisted the Code's claims-process was *less* "burdensome" than ordinary litigation. *Id.* at 5a. The court likewise recognized that respondent's scheme inflicts harm, but still *less* harm than collection lawsuits: "Because a proof of claim does not expand the

pool of available funds in bankruptcy, debtors have less at stake than a collection defendant." *Ibid.* The court thus refused to "follow the Eleventh Circuit," and "reject[ed] extending the FDCPA to time-barred proofs of claim." *Id.* at 4a, 6a.

b. Petitioner filed a petition for rehearing en banc, which was denied without dissent. *Id.* at 7a-8a.

REASONS FOR GRANTING THE PETITION

This case raises the same merits questions as *Midland Funding, LLC* v. *Johnson*, cert. granted, No. 16-348 (oral argument scheduled for Jan. 17, 2016). Cf. App., *infra*, 4a-5a (declining to follow the Eleventh Circuit's holdings in *Johnson* v. *Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016), and *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014)). If the Court concludes that the debt collector's conduct in *Midland* violates the FDCPA, then respondent's conduct here also violates the FDPCA, and the Eighth Circuit should be reversed. The Court should accordingly hold this petition pending its decision in *Midland* and then dispose of the petition as appropriate in light of that decision.

If the Court for any reason fails to resolve these questions in *Midland*, however, this case is an ideal vehicle for deciding the questions.[1] The material facts here are cleanly presented and undisputed; they represent the precise fact pattern that has divided courts nationwide. Petitioner's complaint directly alleges that respondent acted with knowledge that the claims were time-barred, see

[1] The pending petition in *Owens* v. *LVNV Funding, LLC*, No. 16-315 (filed Aug. 26, 2016), would also serve as a suitable vehicle. Although the *Owens* petition did not raise the implied-repeal question, that issue is factually presented, was argued and preserved below, and would be properly before the Court as an alternative ground supporting affirmance.

Add. 5 ("At the time it filed its proof of claim, Defendant also knew that the alleged debt was time-barred."), and his case was dismissed under Fed. R. Civ. P. 12(b)(6). The outcome thus turns on two pure questions of law (as does *Midland*): whether filing a knowingly time-barred proof of claim violates the FDCPA, and whether the Bankruptcy Code impliedly repeals the FDCPA in this context.[2]

This case is also a better vehicle than *Dubois* v. *Atlas Acquisitions, LLC*, petition for cert. pending, No. 16-707 (filed Nov. 23, 2016). Unlike *Midland* and this case, *Dubois* has highly unusual facts: the proofs of claim expressly disclosed that they were likely time-barred. *Dubois*, C.A. Rec. 55, 140 ("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."); see also *Dubois*, Pet. App. 24a (Diaz, J., dissenting) (noting this language). This renders that case unsuitable for deciding the common questions arising in courts nationwide (where the proofs of claim are silent on timeliness).

Moreover, as the *Dubois* petition recognizes (at 6-7), the respondent in that case asserted other "predicate" issues that could block the Court from reaching the questions presented. There are no such "predicate" questions here.

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[2] The Eighth Circuit's reasoning blended elements of each question presented—suggesting, at times, that the FDCPA was not violated at all, and suggesting, at other times, that the Code displaced the FDCPA in this setting. See, *e.g.*, App., *infra*, 4a-5a (declining to follow the Eleventh Circuit's "holding that the Bankruptcy Code does not preempt the FDCPA," and concluding that the Bankruptcy Code's "protections against harassment and deception satisfy the relevant concerns of the FDCPA"). To the extent the court of appeals did not decide the implied-repeal question, that issue was squarely argued below, and would again provide an alternative ground for affirmance.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Midland Funding, LLC* v. *Johnson*, No. 16-348, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

RICHARD A. VOYTAS, JR.
VOYTAS & COMPANY
1 North Taylor Avenue
St. Louis, MO 63108

ALEXANDER J. CORNWELL
BRODY & CORNWELL
1 North Taylor Avenue
St. Louis, MO 63108

PETER K. STRIS
BRENDAN S. MAHER
DANIEL L. GEYSER
Counsel of Record
DOUGLAS D. GEYSER
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017
(213) 995-6811
daniel.geyser@strismaher.com

DECEMBER 2016

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-2984

Domick Nelson

Plaintiff – Appellant

v.

Midland Credit Management, Inc.

Defendant – Appellee

National Association of Consumer Bankruptcy Attorneys

Amicus on Behalf of Appellant(s)

ACA International

Amicus on Behalf of Appellee(s)

Appeal from United States District Court for the Eastern District of Missouri – St. Louis

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Submitted: March 15, 2016
Filed: July 11, 2016

Before WOLLMAN, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

In November 2006, Domick R. Nelson defaulted on a consumer debt of $751.87. On February 25, 2015, she filed a Chapter 13 petition in bankruptcy court. Midland Credit Management, Inc., as agent for the creditor, filed a proof of claim in bankruptcy court for the amount of the debt. According to the proof of claim, Nelson made no payment on the debt after November 2006. Nelson objected to the proof of claim, arguing it was time-barred. *See* **§ 516.120(1) RSMo 2000;** ***Discovery Grp. LLC v. Chapel Dev., LLC***, 574 F.3d 986, 990 (8th Cir. 2009) (recognizing that Missouri statutes of limitations are procedural, not substantive, and merely suspend the remedy without extinguishing the right). The bankruptcy court agreed, disallowing Midland's claim. *See* **11 U.S.C. § 558** (including statutes of limitation as a defense for a bankruptcy estate).

Nelson then sued Midland, alleging that, by filing the proof of claim on the time-barred debt, Midland violated the Fair Debt Collection Practices Act (FDCPA). The district court[1] dismissed for failure to state a claim, holding that the FDCPA is not implicated by a debt collector filing an accurate and complete claim on a time-barred debt. Nelson appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

This court reviews de novo the Rule 12(b)(6) dismissal of Nelson's claims. ***Cox v. Mortgage Elec. Registration***

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[1] The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri.

Sys., Inc., 685 F.3d 663, 668 (8th Cir. 2012). This court assumes as true all factual allegations in the pleadings, interpreting them most favorably to Nelson, the nonmoving party. ***Bell v. Pfizer, Inc.***, 716 F.3d 1087, 1091 (8th Cir. 2013). "[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." ***Ashcroft v. Iqbal***, 556 U.S. 662, 678 (2009).

"Enacted to eliminate abusive debt collection practices, the FDCPA imposes civil liability on debt collector[s] for certain prohibited debt collection practices." ***Hemmingsen v. Messerli & Kramer, P.A.***, 674 F.3d 814, 817 (8th Cir. 2012) (alteration in original). Nelson alleges that Midland's claim violated three prohibitions in the FDCPA: "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt," **15 U.S.C. § 1692d**; "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," **§ 1692e**; and "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," **§ 1692f**. Because each of these allegations stem from the same conduct—the filing of the proof of claim—this court may consider the provisions together. *See* ***Hemmingsen***, 674 F.3d at 817.

More specifically, under the FDCPA, a debt collector may neither falsely represent "the character, amount, or legal status of any debt," **15 U.S.C. § 1692e(2)(A)**, nor threaten "to take any action that cannot legally be taken or that is not intended to be taken," ***id.* § 1692e(5)**. Nelson argues that Midland, by submitting its claim, represented that the claim was valid and enforceable. *See* **11 U.S.C. § 502(a)** ("A claim or interest . . . is deemed allowed, unless a party in interest . . . objects."). Even if—as here—the

debt collector does not make express misrepresentations, the FDCPA bars a debt collector from filing or threatening a lawsuit to collect a time-barred debt. *See* ***Freyermuth v. Credit Bureau Servs., Inc.***, 248 F.3d 767, 771 (8th Cir. 2001) ("[I]n the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid.").

Nelson urges this court to follow the Eleventh Circuit and extend to bankruptcy claims the rule against actual or threatened litigation on time-barred debts. *See* ***Crawford v. LVNV Funding, LLC***, 758 F.3d 1254 (11th Cir. 2014); *see also* ***Johnson v. Midland Funding, LLC***, 2016 WL 2996372, at *3 (11th Cir. May 24) (clarifying *Crawford* by holding that the Bankruptcy Code does not preempt the FDCPA). In *Crawford*, the Eleventh Circuit held that knowingly filing a time-barred proof of claim violated the FDCPA's prohibitions against unfair, unconscionable, deceptive, or misleading conduct. 758 F.3d at 1261. The *Crawford* court reasoned that the same concerns underlying the rule against litigating or threatening to litigate time-barred debts—the debtor's faded memory and lost records, possible ignorance of the statute of limitations, and expense to contest the stale debt—apply equally to a debt collector filing a claim on a stale debt. ***Id.***

Crawford, however, ignores the differences between a bankruptcy claim and actual or threatened litigation. In *Freyermuth*, this court held that a defendant's FDCPA liability turns on "whether an unsophisticated consumer would be harassed, misled or deceived by" the debt collector's acts. ***Freyermuth***, 248 F.3d at 771. The bankruptcy process protects against such harassment and deception. Unlike defendants facing a collection lawsuit, a

bankruptcy debtor is aided by "trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims." ***In re Gatewood***, 533 B.R. 905, 909 (8th Cir. B.A.P. 2015); *see* **11 U.S.C. §§ 704(a)(5), 1302 (b)(1)** (outlining trustees' duties, including objecting "to the allowance of any claim that is improper").

Defending a lawsuit to recover a time-barred debt is more burdensome than objecting to a time-barred proof of claim. "[T]he Bankruptcy Code provides for a claims resolution process involving an objection and a hearing to assess the amount and validity of the claim . . . [that] is generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit." ***In re Gatewood***, 533 B.R. at 909. Because a proof of claim does not expand the pool of available funds in bankruptcy, debtors have less at stake than a collection defendant. Rather, an unsecured creditor likely shares only "pro rata in the distribution of the pool of available funds and see[s] the unpaid portion of its claim discharged." ***Id.***

These protections against harassment and deception satisfy the relevant concerns of the FDCPA. "There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." ***Simmons v. Roundup Funding, LLC***, 622 F.3d 93, 96 (2d Cir. 2010) (so stating while rejecting an FDCPA suit even where the proof of claim was inaccurate and inflated).

This court rejects extending the FDCPA to time-barred proofs of claim. An accurate and complete proof of claim on a time-barred debt is not false, deceptive, misleading, unfair, or unconscionable under the FDCPA. The district court properly dismissed for failure to state a claim.

****

The judgment is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-2984

Domick Nelson

Appellant

v.

Midland Credit Management, Inc.

Appellee

National Association of Consumer Bankruptcy Attorneys

Amicus on Behalf of Appellant(s)

ACA International

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis
(4:15-cv-00816-ERW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 15, 2016

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No: 4:15-CV-00816-ERW

DOMICK NELSON,
Plaintiff,

v.

MIDLAND CREDIT MANAGEMENT, INC.,
Defendant.

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Midland Credit Management, Inc.'s Motion to Dismiss Plaintiff's Complaint [ECF No. 9].

I. BACKGROUND

On or about April 23, 2015, Plaintiff initiated this lawsuit by filing his Petition (hereafter "Complaint") in the Circuit Court of St. Louis County, Missouri [*See* ECF Nos. 1, 4]. Plaintiff alleges Defendant violated the Fair Debt Collection Practices Act ("FDCPA") by filing a proof of claim in Plaintiff's bankruptcy proceedings on an alleged debt which was time-barred by the applicable statute of limitations. According to the Complaint, Plaintiff filed an Objection to Claim against Defendant in the bankruptcy proceedings, and the bankruptcy court sustained Plaintiff's Objection, ordering Defendant's claim disallowed in its entirety.

Plaintiff alleges Defendant, through filing a proof of claim on a stale debt in Plaintiff's bankruptcy proceedings, violated various provisions of the FDCPA. Specifically, Plaintiff alleges Defendant violated: (1) 15 U.S.C. § 1692d-f, by "[t]hreatening action Defendant had no authority or intention of taking, including misrepresenting that it possessed a legal right to enforce payment on Plaintiff's alleged debt"; (2) § 1692e, by "[f]alsely representing the legal status of a debt"; (3) § 1692e-f, by "[f]iling a proof of claim on an alleged debt when the last alleged payment on the debt was older than the applicable statute of limitation"; (4) § 1692e, by "[u]sing false, deceptive [,] and misleading tactics in order to collect the debt; and (5) § 1692d-f, by "[e]ngaging in harassing, abuse, unfair, and unconscionable conduct in the collection of a debt" [ECF No. 4 at ¶ 24].

On May 21, 2015, Defendant filed its Notice of Removal with this Court, pursuant to 28 U.S.C. §§ 1441(a), 1331, and 1446(b) [ECF No. 1]. On June 18, 2015, Defendant filed the pending Motion to Dismiss, pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6).

II. STANDARD

Under FRCP 12(b)(6), a party may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The notice pleading standard of FRCP 8(a)(2) requires a plaintiff to give "a short and plain statement showing that the pleader is entitled to relief." To meet this standard and to survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to

draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A court accepts "as true all of the factual allegations contained in the complaint," and affords the non-moving party "all reasonable inferences that can be drawn from those allegations" when considering a motion to dismiss. *Jackson v. Nixon*, 747 F.3d 537, 540-41(8th Cir. 2014) (internal quotations and citation omitted). However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Carton v. Gen. Motor Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010) (internal citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (internal citation omitted). Additionally, "some factual allegations may be so indeterminate that they require further factual enhancement in order to state a claim." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009).

A well-pleaded complaint may not be dismissed even if it appears proving the claim is unlikely and if the chance of recovery is remote. *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007). However, where the allegations on the face of the complaint show "there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate." *Young v. St. John's Mercy Health Sys.*, No. 10-824, 2011 WL 9155, at *4 (E.D. Mo. Jan. 3, 2011) (internal citation omitted). Further, if a claim fails to allege one of the elements necessary to recovery on a legal theory, that claim must be dismissed for failure to state a claim upon which relief can be granted. *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 355 (8th Cir. 2011). Bare assertions constituting merely conclusory allegations failing to establish elements necessary for recovery will not suffice. *See id.* ("Plaintiffs, relying on facts not in the complaint, make bare assertions that [defendants] were not just lenders,

but owners that controlled the RICO enterprise . . . these assertions are more of the same conclusory allegation . . . "). Courts must assess the plausibility of a given claim with reference to the plaintiff's allegations as a whole, not in terms of the plausibility of each individual allegation. *Zoltek Corp. v. Structural Polymer Grp.*, 592 F.3d 893, 896 n.4 (8th Cir. 2010) (internal citation omitted). This inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

In moving for dismissal, Defendant argues Plaintiff's claims fail as a matter of law because "an FDCPA claim cannot be predicated on a creditor's filing of a proof of claim" [ECF No. 10 at 1 (internal quotations omitted)]. Thus, Defendant contends, filing a proof of claim which is "subject to a limitations defense does not violate the FDCPA," adding, "[C]reditors such as [Midland] are entitled to file proofs of claim even for stale debts" [ECF No. 10 at 1 (internal quotations omitted)]. Defendant concludes, "[B]ecause the FDCPA provides no remedy . . . for [Defendant's] allegedly wrongful proof of claim, [Plaintiff's] Complaint should be dismissed" [ECF No. 10 at 1 (internal quotations omitted)]. In support of its argument, Defendant relies on various bankruptcy district court cases within the Eighth Circuit, a case from the District of Minnesota, and district court cases from other circuits which have come to the same or similar conclusions. In his Response, Plaintiff relies on *Crawford v. LVNV Funding, LLC*, an Eleventh Circuit case which found the defendant's "filing of a time-barred proof of claim against [the plaintiff] in bankruptcy was 'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of" the FDCPA. 758 F.3d 1254, 1261 (11th Cir. 2014).

This Court recently resolved this exact same issue in evaluating a Motion to Dismiss in *Ward v. Midland Credit Management, Inc.*, 4:15CV00814 HEA, 2015 WL 4876221 (E.D.Mo. Aug. 14, 2015). In addition to presenting the same issue, the *Ward* case involved the same Defendant, the same attorneys on both sides, a nearly identical Complaint, and nearly identical briefs for the Motion to Dismiss. In that case, the Court adopted and applied the analysis from *In re Broadrick*, 532 B.R. 60 (Bankr. M.D. Tenn. 2015).[1] The *Broadrick* decision states:

> The FDCPA should not be implicated with regard to stale debts when a creditor merely (a) files an accurate proof of claim in a bankruptcy case, (b) when the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the FDCPA other than merely the applicability of a statute of limitations.

Broadrick, 532 B.R. at 75. Applying *Broadrick* to the situation in *Ward*, this Court determined the FDCPA

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[1] In choosing to "adopt and apply the *Broadrick* analysis," the Court cited the following considerations: (1) "the imbalance in the case law, with scales tipped in favor of Defendant's position"; (2) a recent holding from the United States Bankruptcy Appellate Panel for the Eighth Circuit, *In re Gatewood*, 2015 WL 4496051 (B.A.P. 8th Cir. July 10, 2015), which "found compelling" the reasoning in *Broadrick*; and (3) "the vast differences between lawsuits filed against individuals and to collect on debts versus proofs of claims filed in bankruptcy cases." *Ward*, 2015 WL 4876221, at *3.

should not be implicated, and granted Defendant's Motion, dismissing the case. Here, as in *Ward*,[2] the parties do not dispute the following: Defendant filed an accurate proof of claim in Plaintiff's bankruptcy proceedings; the proof of claim included all of the required information, including the timing of the debt; the applicable statute of limitations is one that does not extinguish the right to collect the debt, but merely limits the remedies;[3] and no legal impediment to collection or factual circumstances exist which would invoke the FDCPA other than merely the applicability of the applicable statute of limitations. *See id.*; *Ward*, 2015 WL 4876221, at *3.

Therefore, the Court finds the FDCPA should not be implicated here. Thus, the Court will grant Defendant's Motion and dismiss Plaintiff's claims.

Accordingly,

IT IS HEREBY ORDERED that Defendant Midland Credit Management, Inc.'s Motion to Dismiss Plaintiff's Complaint [ECF No. 9] is **GRANTED**.

IT IS FURTHER ORDERED that this matter is **DISMISSED**.

Dated this 28th day of August, 2015.

/s/ E. Richard Webber
E. RICHARD WEBBER
SENIOR UNITED STATES DISTRICT JUDGE

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[2] Again, the allegations, arguments, and briefs in the present case are nearly identical to those in *Ward*.

[3] In Missouri, "statutes of limitations 'merely suspend the remedy without extinguishing the right.'" *Discovery Grp. LLC v. Chapel Dev., LLC*, 574 F.3d 986, 990 (8th Cir. 2009) (quoting *Rincon v. Rincon*, 571 S.W.2d 475, 476 (Mo. Ct. App. 1978)).

APPENDIX D

1. 11 U.S.C. 101(5) provides in pertinent part:

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 * * *.

2. 11 U.S.C. 501(a) provides:

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.

3. 11 U.S.C. 502 provides in pertinent part:

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 * * * .

* * * * *

4. 11 U.S.C. 541(a) provides in pertinent part:

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.

* * * * *

5. 11 U.S.C. 558 provides:

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.

6. 11 U.S.C. 704(a) provides in pertinent part:

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 * * * .

7. 11 U.S.C. 1302(b) provides in pertinent part:

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 * * * .

8. 15 U.S.C. 1692 provides:

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.

9. 15 U.S.C. 1692e provides in pertinent part:

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.

* * * * *

10. 15 U.S.C. 1692f provides in pertinent part:

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 * * * .

* * * * *

11. Fed. R. Bankr. P. 3001 provides in pertinent part:

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.

* * * * *

12. Fed. R. Bankr. P. 9011(b) provides:

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.