No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL HILL

Petitioner,

v.

ACCOUNTS RECEIVABLE SERVICES, LLC,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents four questions:

(1) Whether the Eighth Circuit may disregard this Court's instructions in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) for construction of the Fair Debt Collection Practices Act in deciding to import a "materiality" requirement into 15 U.S.C. § 1692e based on speculation about the Act's purpose.

(2) Whether the Eighth Circuit's refusal to resolve the underlying state law question regarding the applicable interest statue violated this Court's instruction in *Commissioner v. Estate of Bosch*, 387 U.S. 456; 87 S. Ct. 1776; 18 L. Ed. 2d 886 (1967).

(3) Whether Congress specifically included a "materiality" requirement in the statutory text of the Fair Debt Collection Practice Act when it was written and enacted in 1978.

(4) Whether Minn. Stat. § 334.01 remains the applicable pre-judgment interest statute for contact-type claims under Minnesota law.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiff-Appellant below (and Petitioner here) is Paul Hill, an individual.

Defendant-Appellee below (and the Respondent here) is Accounts Receivable Services, LLC.

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JURISDICTION

On April 19, 2018, the Eighth Circuit issued its decision. On May 25, 2018, it denied petitions for rehearing en banc. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 15 United States Code, Sections 1692a, 1692e, and 1692f which are reproduced in the Appendix.

INTRODUCTION

In affirming the district court's dismissal of Petitioner's case on a motion for judgment on the pleadings, the Eighth Circuit imported a "materiality" requirement into 15 U.S.C. § 1692e by relying upon a pre-*Santander* Seventh Circuit opinion and failing to follow the rules of statutory construction for the FDCPA set forth in this Court's unanimous *Santander* decision.

Similarly, in affirming the district court's dismissal of Petition's claim under §1692f(1), the Eighth Circuit stopped short of its required analysis under *Bosch* and simply stated that the Minnesota Supreme Court had not yet decided the applicable interest statute question.

Because the Eighth Circuit failed to follow the precedent of this Court in reaching its decision, this court should grant, vacate and remand this case to the Eighth Circuit for a decision consistent with *Santander* and *Bosch*. *See* 28 U.S.C. § 2106.

In the alternative, this Court should grant *certiorari* to resolve the pre-*Santander* circuit split regarding the judicial addition of a "materiality" requirement into the language of the FDCPA as written by Congress.

Similarly, in the alternative, this Court should grant *certiorari* to resolve the Minnesota state law question regarding the applicable statutory interest question to permit resolution of Petitioner's §1692f(1) claim.

STATEMENT OF THE CASE

The Fair Debt Collection Practices Act (FDCPA) was enacted in 1978 and codified as 15 U.S.C. § 1692 et seq. The purpose of the statute is "to eliminate abusive debt collection practices" and "to insure that those debt collectors who refrain from using [such] practices are not competitively disadvantaged." *See* 15 U.S.C. § 1692e.

15 U.S.C. § 1692k(a) provides that "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person . . ." There are roughly 30 specifically enumerated violation provisions of the FDCPA. Only a few distinct provisions, however, are relevant to this dispute. 15 U.S.C. § 1692e provides as follows:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.

15 U.S.C. § 1692f states:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.

15 U.S.C. § 1692f(1) provides:

> Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

On February 1, 2016, Petitioner filed his complaint against Respondent in the United States District Court for the District of Minnesota. On

April 5, 2016, Petitioner filed an Amended Complaint.

Appellant's Amended Complaint alleged multiple distinct violations of §§ 1692e and 1692f(1) the FDCPA.

Respondent filed its Answer to the Amended Complaint on April 19, 2016 and incorporated four documents referenced in the Amended Complaint.

On May 19, 2016, Respondent moved for Judgment on the Pleadings. The district court heard Respondent's motion on July 1, 2016. The district court issued its Order on October 31, 2016 granting Respondent's motion for Judgment on the Pleadings. Judgment was entered on November 1, 2016. Notice of appeal to the Eighth Circuit was timely filed on November 29, 2016.

After the briefing on the appeal to the Eighth Circuit was complete, but prior to oral argument, this Court released its decision in *Santander*. Petitioner provided the panel with a Fed. R. App. P. 28(j) notice regarding this Court's *Santander* decision on July 27, 2017. Similarly, the Minnesota Supreme Court's opinion in *Poehler* was issued after the briefing was complete. The *Poehler* decision was provided to the Eighth Circuit pursuant to Fed. R. App. P. 28(j) on August 7, 2017.

REASONS FOR GRANTING THE PETITION

A. The Eighth Circuit ignored this Court's directive in *Santander* in deciding to import a "materiality" requirement into the FDCPA.

The words "material" or "materiality" do not appear in the text of §1692e or any other section of the FDCPA as written by Congress. The Eighth Circuit, however, relied upon a "materiality" requirement in §1692e to affirm the dismissal of Petitioner's claim.

This Court recently decided the proper method for statutory construction of the FDCPA in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017):

- "In doing so, we begin, as we must, with a careful examination of the statutory text." 137 S.Ct. at 1721.

- "And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." 137 S.Ct. at 1725.

- "Legislation is, after all, the art of compromise, the limitations expressed in

> statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose[ ] at all costs.'" 137 S.Ct. at 1725 (brackets in original).

This Court also identified methods of interpretation that are improper:

> For these reasons and more besides we will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead "that [the] legislature says . . . what it means and means . . . what it says." *Dodd v. United States*, 545 U. S. 353, 357 (2005) (internal quotation marks omitted; brackets in original).

137 S.Ct. at 1725 (ellipses in original).

The Eighth Circuit decision does not mention, much less address or discuss, *Santander*. The Eighth Circuit's decision does not begin with a "careful examination of the statutory text." The Eighth Circuit's decision does not "apply faithfully the law Congress has written."

Rather, the Eighth Circuit decision relies upon an outdated Seventh Circuit decision's speculation as to the FDCPA's "overarching goal" to rewrite the plain language of the statute.[1]

---

[1] The "overarching goal" relied upon by the Seventh Circuit in *Hahn* is not the congressional goal identified in the statute itself. *See* § 1692(e).

Therefore, this Court should grant, vacate, and remand this case to the Eighth Circuit for a determination consistent with this Court's decision in *Santander*.

B. The Eighth Circuit Refused to Decide the Applicable Minnesota Interest Statute as Required by *Bosch*.

Petitioner's § 1692f(1) claim as stated in the Amended Complaint turns on the applicable interest statute under Minnesota law. That section prohibits any attempt by a debt collector to seek to recover an amount not permitted by contract or law.

There are two prejudgment interest provisions in the Minnesota statutes – Minn. Stat. § 549.09, adopted by the Minnesota legislature in 1984, and Minn. Stat. § 334.01, which has existed since at least 1923. *See L.P. Med. Specialists, Ltd. v. St. Louis County*, 379 N.W.2d 104, 109-10 (Minn. Ct. App. 1985) ("In 1984, the Minnesota Legislature amended Minn. Stat. § 549.09, subd. 1 (1984) to provide prejudgment interest in most cases.")

Under § 549.09, Respondent is not permitted to recover statutory interest because the amount of the alleged debt at issue is below the requirement of the statute. See §549.09, subd. 1(b)(4) (limiting interest to claims in excess of the jurisdictional limit of Minn. Stat. § 491A.01). Respondent had sought to collect interest from Petitioner under the older interest statute (§ 334.01) based upon an alleged loophole in §

549.09 permitting interest "as otherwise provided by law."

The decisions by the Minnesota district court and the Minnesota Court of Appeals recognized that the question of the applicable interest statute was an "either or" question. Either Minn. Stat. § 549.09 applies or Minn. Stat. § 334.01 is still applicable. *Compare Best Buy Stores L.P. v. Developers Diversified Realty Corp*., 715 F.Supp. 2d 871 (D.Minn. 2010) (applying §549.09) and *Nelson v. Illinois Farmers Ins. Co.* 567 N.W.2d 538, (Minn. App. 1997) (same) with *Hogenson v. Hogenson*, 852 N.W.2d 266, 272-74 (Minn. Ct. App. 2014) (acknowledging the conflicting statutes, but applying Minn. Stat. § 344.01 to a conversion claim).

The Eighth Circuit declined to resolve the question of the applicable interest statute, reasoning that it need not do so because the Minnesota Supreme Court had not yet resolved the question ("Whether § 334.01 applies to Accounts Receivable's conciliation court claim is a question of Minnesota law that has not been decided by the Minnesota Supreme Court."). The Eighth Circuit affirmed the dismissal of Petitioner's claim based upon this stunted analysis.

In refusing to resolve the issue, the Eight Circuit failed to follow this Court's instructions in *Bosch Commissioner v. Estate of Bosch*, 387 U.S. 456; 87 S. Ct. 1776; 18 L. Ed. 2d 886 (1967):

> This is not a diversity case but the same principle may be applied for the same reasons, *viz.,* the

> underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. ***If there be no decision by that court then federal authorities must apply what they find to be the state law*** after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

387 U.S. at 465 (emphasis added). Thus, the Eighth Circuit "must" apply what they find to be the Minnesota state law on interest sitting as a state court.

The Eighth Circuit failed its obligation under *Bosch* to determine the applicable law on interest. The Eighth Circuit based its decision affirming the denial of Petitioner's claim on its own failure to resolve the applicable Minnesota law question.

Therefore, this Court should grant, vacate, and remand the decision to the Eighth Circuit for a decision on the applicable Minnesota state law as required by *Bosch*.

C. This Court Should Grant *Certiorari* to Resolve the Pre-*Santander* Circuit Split Regarding the Importation of a "Materiality" Requirement Into the Language of the FDCPA as Written by Congress.

The FDCPA is a strict liability statute. The violations are clearly defined and *per se*. The terms

"material" and "materiality" do not appear in the statutory text of the FDCPA as written by Congress.

This Court has previously reserved the question of a materiality requirement in the FDCPA. *See Sheriff v. Gillie*:

> Because we conclude that the letters sent by petitioners were truthful, we need not consider the parties' arguments as to whether a false or misleading statement must be material to violate the FDCPA. . .

136 S. Ct. 1594, f.n 6 (2016).

i. A Circuit Split existed Pre-*Santander* on importing a "Materiality" requirement into §1692e.

Prior to this Court's decision in *Santander* prohibiting the importation of terms and meanings not written into the FDCPA by Congress, there existed a circuit split regarding whether courts should read a "materiality" requirement in §1692e.

Prior to this case, the Eighth Circuit had not previously adopted a "materiality" requirement for the FDCPA. *See Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 698-99 (8th Cir. 2017) ("This court has not directly addressed whether materiality is required . . .")

The Eleventh Circuit in *Bourff v. Rubin Lublin, LLC*, 674 F.3d 1238 (11th Cir. 2012) rejected the application of a materiality requirement. *Id.* at 1241. ("A false representation in connection with the collection of a debt is sufficient to violate the FDCPA facially, even where no misleading or deception is claimed").

The Third Circuit in *Jensen v. Pressler & Pressler*, 791 F.3d 413 (3rd Cir. 2015) imported a "materiality" requirement into § 1692e. The *Jensen* Court admits that the materiality test does not come from the language of the statute itself. *Id.* at 418 ("Jensen correctly argues that the word "material" does not appear in the statute."). Nonetheless, the Third Circuit imported a "materiality" requirement based upon its view of supposed "congressional intent."

The Second, Fourth, Sixth and Ninth Circuits have also adopted "materiality" requirements. *See e.g.*, *Gabriele v. Am. Home Mortg. Servicing*, 503 Fed. Appx. 89 (2d Cir. 2012); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 374 (4th Cir. 2012); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027 (9th Cir. 2009).

Each of these Circuit Court decisions importing "materiality," expressly trace back to dicta in *Hahn v. Triumph P'ships LLC*. 557 F.3d 755 (7th Cir. 2009), in which the Seventh Circuit similarly imported a materiality requirement based upon its own view of "congressional intent." *Id.* at 757-758 ("The statute is designed to provide information that helps consumers to choose intelligently, and by

definition immaterial information neither contributes to that objective (if the statement is correct) nor undermines it (if the statement is incorrect).").

The speculation about "congressional intent" set forth in *Hahn*, however, contradicts Congress' explicitly stated purpose for enacting the FDCPA in §1692(e). *See* §1692(e) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors. . . .").

The Eighth Circuit's decision in this case followed the Seventh Circuit's pre-*Santander* adoption of "materiality" based upon this incorrect statement of congressional intent.

ii. **"Materiality" Should Not Be Imported into §1692e Based Upon this Court's Analysis in *Santander*.**

In writing and enacting the FDCPA, Congress chose not to impose a materiality requirement. The FDCPA enumerates approximately thirty (30) specific debt collection prohibitions, distributed among three categories. Each category of violation begins with a general prohibition, followed by a series of enumerated violations.

In drafting the FDCPA, Congress employed specific language repeatedly stating "the following conduct is a violation of this section," and it clarified that a debt collector who engages in that specific conduct is violating the statute. Congress' specific

text did not state that the violation requires proof of some additional, unrecited element. Thus, when a plaintiff proves that a debt collector published a list of purported deadbeats in the local paper, he has proven a violation of § 1692d(3). The debt collector cannot defend by arguing, "There is nothing abusive about publishing such a list," or "this particular list was not abusive, because these deadbeats deserved it." Congress made the determination when it drafted the FDCPA, and a court has no discretion to second-guess it. *Santander*, 198 L. Ed. 2d at 184.

So, too, for § 1692e. Once a consumer establishes that a debt collector's conduct matches one or more of the specific debt collection prohibitions passed by Congress, the debt collector cannot defend by arguing, "This statement may have been false, but the violation should be excused because the misimpression should not affect the recipient's behavior." Congress made the determination when it drafted the FDCPA, and the courts may not attempt to "replace the actual text with speculation as to Congress' intent." *Santander*, 137 S.Ct. at 1725.

The statutory text of the FDCPA as written by Congress does not state that the "conduct is a violation" if, and only if, it is "material." Nor did Congress choose to require that the "conduct is a violation" if, and only if, a consumer pleads and proves that it "undermines his or her ability to choose intelligently." Therefore, if this Court does not grant, vacate, and remand this case, it should in the alternative grant *certiorari* to resolve the Circuit split that exists over the importation of a "materiality" requirement.

D. This Court Should Grant *Certiorari* to Resolve the Interest Law in Minnesota Necessary to Evaluate Petition's § 1692f(1) Claim.

Petitioner's Amended Complaint alleges that Respondent violated § 1692f(1) by attempting to collect interest pursuant to Minn. Stat. § 334.01, which is not the applicable interest statute. 15 U.S.C. § 1692f(1) prohibits

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

Thus, the collection of "any interest . . . unless such amount is . . . permitted by law" is a violation of §1692f(1).

The only applicable interest statute under Minnesota law is Minn. Stat. § 549.09, which does not allow interest to be collected from Petitioner, because the amount of the alleged debt is below the minimum threshold for application of such interest. *See* Minn. Stat. § 549.09(subd. 1)(b)(4).

Respondent attempted to collect interest from Petitioner and circumvent the statutory prohibition on interest in Minn. Stat. § 549.09 by relying upon an older, inapplicable interest statue, *i.e.* Minn. Stat. § 334.01. The Eighth Circuit's decision sidesteps the issue of which statute applies:

> Whether § 334.01 applies to Accounts Receivable's conciliation court claim is a question of Minnesota law that has not been decided by the Minnesota Supreme Court.

Pet. App. 25.

In this circumstance, as previously discussed, the Court "must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. *Bosch,* 387 U.S. at 465.

The Minnesota Supreme Court in *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135 (Minn. 2017) held that Minn. Stat. §549.09 is unambiguously the applicable interest statute:

> Accordingly, we hold that Minn. Stat. § 549.09, subd. 1(b), unambiguously provides for preaward interest on all awards of pecuniary damages that are not specifically excluded by the statute, and does not restrict the recovery of preaward interest to cases or matters involving wrongdoing or a breach of contract.

899 N.W.2d at 140. Because the conflict between interest statutes (Minn. Stat. 549.09 v. Minn. Stat. 334.01) has been viewed by both the Minnesota state and Federal District Court as an "either or" issue, the Minnesota Supreme Court's decision in *Poehler* should be viewed as resolving the applicable interest statute.

Post-*Poehler* decisions from the Minnesota Court of Appeals confirm that *Poehler* eliminated the continued viability of interest under Minn. Stat. 334.01. *See Andersen v. Owners Ins. Co.,* 2018 Minn. App. Unpub. LEXIS 241, *4-5 (Minn. Ct. App. 2018) (recognizing the effect of *Poehler* on *Hogenson* and holding § 334.01 inapplicable); *K & R Landholdings, LLC v. Auto-Owners Ins.,* 2018 Minn. App. LEXIS 116 (Minn. Ct. App. 2018) (same).

Properly determining that Minn.Stat. § 549.09 is the only appropriate prejudgment interest law in Minnesota requires reversal of the Eighth Circuit and district court decisions dismissing Petitioner's claim for violation of the 15 U.S.C. § 1692f(1).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition, vacate the Eighth Circuit's decision, and remand the case to the Eighth Circuit for a decision consistent with this Court's rulings in *Santander* and *Bosch*.

In the alternative, this Court should grant the Petition and resolve the Circuit split over the "materiality" requirement and the Minnesota law on interest necessary for resolution of Petitioner's FDCPA claim.

Respectfully submitted,

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