No. 18-482

# 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*

## BRIEF IN OPPOSITION

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## RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the United States Supreme Court, Accounts Receivable Services, LLC is not a publicly held corporation and there is no ownership of ten percent or more of its stock.

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## SUMMARY OF THE ARGUMENT

The Eighth Circuit Court of Appeals affirmed the district court's dismissal of Petitioner Paul Hill's ("Hill") claims under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"). Hill now seeks review from the United States Supreme Court. Hill's Petition, however, does not warrant Supreme Court review.

First, Hill challenges the Eighth Circuit ruling by claiming it "ignored" the Supreme Court's holding in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) and claiming that the Eighth Circuit expanded an alleged "circuit split" when it applied a "materiality" requirement to Hill's FDCPA claims. Hill's contentions, however, are based on mischaracterizations of *Santander* and the status of the law. *Santander* did not address "materiality." There is no circuit split. In short, the Eighth Circuit's ruling is consistent with applicable law.

Second, Hill contends that review is warranted because Hill claims the Eighth Circuit was required to "resolve" an alleged discrepancy regarding the application of statutory interest under Minnesota law. Here again, Hill mischaracterizes Minnesota law and the Eighth Circuit's holding. As the Eighth Circuit correctly noted, "the text of [Minnesota Statute] § 334.01 does not prohibit" the interest sought (in the underlying collection action). In any event, the Eighth Circuit correctly concluded that Hill's allegations did not amount to a FDCPA claim because the mere fact "[t]hat Hill may have a valid legal defense to the application of the statute does not mean that Accounts

Receivable attempted to collect interest that is not permitted by law."

## ARGUMENT

### I. STANDARD.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons," including, in relevant part:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
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> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

*Id*.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id*.

## II. THE EIGHTH CIRCUIT CORRECTLY APPLIED A MATERIALITY STANDARD TO HILLS CLAIMS UNDER § 1692e.

### A. *Henson v. Santander* does not apply to Hill's claims.

Hill contends that review is justified because the Eighth Circuit supposedly "ignored" *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) when it applied the materiality standard. (Pet. at 5-6.) Hill contends that the materiality standard is somehow at odds with the holding in *Santander*. (*Id*.) Hill is wrong.

*Santander* is inapplicable to the analysis of materiality under the FDCPA and in no way disturbs the Eighth Circuit's adoption of the materiality standard. *Santander* addressed the issue of which entities qualify as "debt collectors" under the FDCPA, and not the standard associated with determining an actionable claim under § 1692e for alleged false representations. 137 S. Ct. at 1721 ("All that remains in dispute is how to classify individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account.").

In affirming the Fourth Circuit's decision (that entities who regularly purchase debts originated by someone else and then seek to collect those debts are not debt collectors), this Court focused on the plain meaning of the words defining "debt collector" in the statute. *Id.* at 1721-22. In analyzing the defined term "debt collector," this Court distinguished between interpreting the plain and common meaning of the

"debt collector" definition set forth in the statute, and speculating or presuming the legislative intent (in effect re-writing statutory text) to infer what the legislature might have or would have done. *Id.* at 1723, 1725. As a result, this Court distinguished between refraining from re-writing legislative text on the one hand and interpreting common law and legally relevant terms in statutes on the other hand. Such is not the case at issue in the instant appeal. Here, all courts addressing materiality under the FDCPA have all come to the same logical conclusion as to this standard.

Moreover, this Court has adopted and applied a "materiality" standard to claims involving a "false" or "misleading" statement under other federal statutes. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 1840 (1999) (holding that "materiality" applies to a federal fraud statute even though "materiality" was not explicitly set out in the statutory language, concluding that "we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes. On the contrary, we must presume that Congress intended to incorporate materiality unless the statute otherwise dictates."); *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001 (2016) (analyzing materiality under the False Claims Act); *Maslenjak v. United States*, 137 S. Ct. 1918, 1932 (2017) (holding although the Naturalization and Citizenship Act "does not expressly refer to the concept of materiality, the critical statutory language effectively requires proof of materiality in a case involving false statements."); *see also, Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (finding that where a plaintiff alleged a "bare

procedural violation" under the Fair Credit Reporting Act, the violation will not be cognizable unless it caused "harm or presented [a] material risk of harm.")

Although none of these statutes explicitly used the term "materiality" or spelled out a "materiality" requirement (in fact each was silent as to "materiality"), this Court nonetheless held that materiality was required to establish a cause of action.

In addition, Hill's contention that a materiality requirement is not included in the FDCPA unless expressly written into it by Congress is at odds with other well-settled FDCPA requirements that were never mentioned in the text of the FDCPA, but nonetheless are a regularly adopted and applied to FDCPA claims. *See, e.g.*:

- **The unsophisticated consumer standard**. *Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316, 317 (8th Cir. 2004) ("A violation of the FDCPA is reviewed utilizing the unsophisticated-consumer standard which is designed to protect consumers of below average sophistication or intelligence without having the standard tied to the very last rung on the sophistication ladder.") (quotation omitted).

- **The least sophisticated consumer standard.** *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993) ("The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd.").

- **Meaningful attorney involvement.** *Lesher v. Law Offices Of Mitchell N. Kay, PC*, 650 F.3d

993, 1001 (3d Cir. 2011) ("One cannot, consistent with the FDCPA, *mislead* the debtor regarding meaningful "attorney" involvement in the debt collection process.") (citation omitted).

- **Overshadowing.** *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984, 991 (9th Cir. 2017) ("Overshadowing or inconsistency may exist where language in the notice would "confuse a least sophisticated debtor" as to her validation rights.").

In short, the Eighth Circuit properly applied a materiality requirement when it dismissed Hill's claims.

### B. There is no "circuit split."

Next, Hill contends that there is a "circuit split regarding whether courts should read a 'materiality' requirement in § 1692e." (Pet. at 10.) Hill's premise – that a "circuit split" exists – is wrong.

While Hill argues that the "Eleventh Circuit in *Bourff v. Rubin Lublin, LLC*, 674 F.3d 1238 (11th Cir. 2012) rejected the application of a materiality requirement" (thereby supposedly creating the split with all other circuits that have adopted materiality). (Pet. at 11.) Hill's interpretation is incorrect.

The word "materiality" never appears in *Bourff*. The issue in *Bourff* was whether misidentifying the creditor on an initial notice (contrary to the requirements of § 1692g(a)) was false under the FDCPA. *Id*. at 1241. Ultimately, the Eleventh Circuit concluded that misidentifying the creditor was "facially" false under the FDCPA. *Id*. The court

further noted that the "identity of the 'creditor' in these notices is a serious matter." *Id*. Thus, to the extent the Eleventh Circuit even impliedly addressed materiality, it concluded that the alleged conduct *was* material and therefore a violation.

Likewise (as Hill concedes), the Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits have all concluded that a technically false but non-material statement is not actionable under the FDCPA. *Jensen v. Pressler & Pressler,* 791 F.3d 413, 421 (3d Cir. 2015); *Lembach v. Bierman*, 528 F. App'x 297, 303 (4th Cir. 2013); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009); *Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757-58 (7th Cir. 2009); *Hill v. Accounts Receivable Servs., LLC*, 888 F.3d 343, 346 (8th Cir. 2018); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010); *see also Gabriele v. Am. Home Mortg. Servicing*, 503 F. App'x 89, 94 (2d Cir. 2012) (while not expressly adopting, noting positively that "several other circuit courts, as well as a number of district courts in this Circuit, read a materiality requirement" in the FDCPA); *Maynard v. Cannon*, 401 Fed. App'x. 389, 397 (10th Cir. 2010) (while not specifically addressing materiality, noting that the "FDCPA does not result in liability for every statement later alleged to be inaccurate, no matter how small or ultimately harmless.").

Indeed, "[n]o Circuit Court that has addressed this [materiality] issue has disagreed with *Hahn* and held that an immaterial false statement made during the collection of a consumer debt is actionable under the FDCPA." *Jensen v. Pressler & Pressler*, 791 F.3d 413, 417-18 (3d Cir. 2015).

Simply put, there is no circuit split. The Eighth Circuit's application of materiality was consistent with the law, and all other circuits addressing this issue.

## III. THE EIGHTH CIRCUIT CORRECTLY CONCLUDED THAT INTEREST WAS NOT PROHIBITED UNDER MINN. STAT. § 334.01.

Hill next contends that review is warranted because the Eighth Circuit "refused to decide the applicable Minnesota interest statute as required by *Bosch*." (Pet. at 7.) Here again, Hill's contention mischaracterizes the law.

In *Bosch Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967), the Supreme Court reviewed two cases involving a state law question in which the eligibility of the federal estate tax marital deduction was affected. In both cases, the issue before this Court was what effect must be given to a state trial court adjudication of property rights where the United States is not made a party to the proceeding and where such adjudication affects the estate's federal estate tax liability. *Id*. at 462-63.

The Supreme Court held that when federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made by a state trial court. *Id*. at 464. Where the highest court of the state has not spoken, "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." *Id.* at 465. The Supreme Court further indicated that the federal

court's determination of state law in these kinds of cases "would avoid much of the uncertainty that would result from the 'non-adversary' approach and at the same time would be fair to the taxpayer and protect the federal revenue as well." *Id.*

The actual issue in *Bosch* involved the interplay between federal and state tax liability. Those issues do not exist here.

Here, Hill mistakenly contends that a debt collector can only seek interest under Minnesota Statute § 549.09, and goes on to claim that a debt collector is prohibited from seeking interest under Minnesota Statute § 334.01. Hill in effect claims that § 334.01 has ceased to exist despite the fact that it remains viable statutory law in Minnesota. In short, Hill argues that a debt collector who seeks interest under Minnesota Statute § 334.01 (whether or not it is collected) automatically violates the FDCPA. Simply put, Hill's contentions are based on a false premise.

The FDCPA specifically allows a collector to seek interest on a debt, so long as the interest sought is "expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1) (emphasis added).

Minnesota law does authorize interest "for any legal indebtedness." Minn. Stat. § 334.01, subd. 1 ("The interest for any legal indebtedness shall be at the rate of $ 6 upon $ 100 for a year, unless a different rate is contracted for in writing."); *see also,* Minn. Stat. § 549.09(b) ("Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport

interest on pecuniary damages shall be computed as provided[.]") (emphasis added).

Minnesota courts recognize that a "creditor is entitled to interest where damages are liquidated, or where damages are unliquidated and the amount due is readily ascertainable by computation or by reference to generally recognized objective standards of measurement." *Egge v. Healthspan Servs. Co.,* No. CIV. 00-934 ADM/AJB, 2002 WL 31426190, at *3 (D. Minn. Oct. 28, 2002) (citing *ICC Leasing Corp. v. Midwestern Mach. Corp.*, 257 N.W.2d 551, 556 (Minn. 1977); *L.P. Med. Specialists, Ltd. v. St. Louis County*, 379 N.W.2d 104, 110 (Minn. App. 1985).

The Minnesota Supreme Court refers to the ability to collect such interest on debt as an "entitlement." *Donaldson v. Mankato Policemen's Benefit Ass'n*, 278 N.W.2d 533, 538 (Minn. 1979) ("[Plaintiff] is entitled to simple interest at 6 percent per annum, Minn. Stat. § 334.01, on the payments as they become due.").

The Minnesota Court of Appeals has addressed the interplay between § 549.09 and § 334.01 in *Hogenson v. Hogenson*, 852 N.W.2d 266 (Minn. App. 2014). The *Hogenson* Court was asked to consider whether pre-verdict interest on a conversion claim was governed by § 334.01 or § 549.09. *Id*. at 273. The *Hogenson* Court held that application of § 334.01 is not limited to a narrow set of claims and that where, such as here, damages are readily ascertainable or liquidated (*i.e.,* unpaid medical bills), § 334.01 should be applied. *Id*. at 274.

In fact, when confronted with the very interplay of Minn. Stat. § 549.09 and § 334.01 challenged here, the

Minnesota Court of Appeals determined that, "[n]othing in the plain language of section 334.01 would lead us to conclude that it applies only to very specific types of claims." *Hogenson*, 852 N.W.2d at 273-74. To the contrary, the phrase in Minn. Stat. § 549.09 "'[e]xcept as otherwise . . . allowed by law' requires that preverdict interest be calculated under existing common-law principles [such as Minn. Stat. § 334.01] whenever possible." *Id.* (emphasis added).

Hill curiously contends that the Minnesota Supreme Court "eliminated the continued viability of under interest under Minn. Stat. § 334.01" in *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135 (Minn. 2017). Hill's contention is wrong.

The sole issue before the *Poehler* court was whether "an underlying breach of contract or actionable wrongdoing" was required "for the recovery of pre-award interest on an insurance appraisal award [under Minn. Stat. § 549.09]." *Id.* at 139. The focus of *Poehler*, in the court's own words was "on the permissibility of pre-award interest on an insurance appraisal award under Minn. Stat. § 549.09, subd. 1(b)." The court ultimately held that pre-award interest may be recovered even in the absence of a breach of contract or other wrongdoing by the insurer. *Id*. at 140.

There was absolutely no mention of § 334.01, or medical debts, much less a determination that § 334.01 cannot be used to recover interest on unpaid medical debts in *Poehler*. And the *Poehler* court emphasized that the plain language of § 549.09 – that § 549.09 applies to prejudgment awards "[e]xcept as otherwise provided by contract or allowed by law." *Id*. (emphasis

added). Section 334.01 is precisely the "or allowed by law" basis to seek interest. *Poehler's* holding in no way abrogated § 334.01.

In short, *Poehler* did not criticize, much less overrule, *Hogenson*.

Ultimately, the Eighth Circuit correctly concluded that the attempt to seek interest under Minn. Stat. § 334.01 was not a violation of the FDCPA:

> 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. Hogenson v. Hogenson, 852 N.W.2d 266, 272-74 (Minn. Ct. App. 2014). Furthermore, the text of § 334.01 does not prohibit Accounts Receivable from recovering such interest. That Hill may have had a valid legal defense to the application of the statute does not mean that Accounts Receivable attempted to collect interest that is not permitted by law.

*Hill*, 888 F.3d at 346–47.

## CONCLUSION

Respondent respectfully requests that the Petition for a Writ of Certiorari be denied in its entirety.

Respectfully submitted,

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