UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONSUMER FINANCIAL PROTECTION BUREAU, Plaintiff, v. WELTMAN, WEINBERG & REIS CO., L.P.A., Defendant.	Case No. 1:17 CV 817 Judge Donald C. Nugent Magistrate Judge William H. Baughman, Jr.

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTION

Plaintiff the Bureau of Consumer Financial Protection (Bureau), pursuant to this Court's Order (ECF No. 84) entered on May 8, 2018, submits the following proposed findings of fact and conclusions of law. The Bureau respectfully requests the Court adopt these proposed findings of fact and conclusions of law, find that Defendant Weltman, Weinberg & Reis Co., L.P.A. (WWR) violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e(3), (10) and §§ 1036(a)(1), 1054, and 1055 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5536(a)(1), 5564 and 5565, enter judgment in the Bureau's favor on Counts One through Three of the Bureau's complaint, and order further proceedings to determine the amount of civil money penalties to be awarded.

PROCEDURAL HISTORY

1. The Bureau filed this action on April 17, 2017, alleging that WWR engaged in unlawful collection activities by misrepresenting the level of attorney involvement in demand letters and calls to consumers, in violation of §§ 807(3), 807(10), and 814(b)(6) of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692e(3), (10), and 1692*l*(b)(6) and §§ 1036(a)(1), 1054, and 1055 of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5536(a)(1), 5564 and 5565. ECF No. 1.

2. Following the close of discovery, the Bureau and WWR moved for partial summary judgment and for summary judgment, respectively. The Court denied both motions, holding that no claim would be completely foreclosed based on statute of limitations grounds and that whether the communications were misleading was a question of fact that must be determined by a jury. ECF No. 61 at 7.

3. A trial regarding liability before an advisory jury commenced on May 1, 2018. During pre-trial proceedings that same day, the Bureau voluntarily dismissed Counts Four through Six of its complaint and withdrew its request for disgorgement. ECF No. 79. The Court also denied WWR's motion to exclude the Bureau's expert witness. Tr. 4:21-25.

4. At trial, the Bureau called three witnesses: (1) WWR's Compliance Officer, Ms. Eileen Bitterman; (2) WWR's Director of Collections, Mr. David Tommer; and (3) Dr. Ronald Goodstein, an expert in consumer marketing and consumer behavior.

5. WWR called three witnesses: (1) Ms. Bitterman; (2) Mr. Charles Pona; and (3) Mr. Scott Weltman.

6. Following the close of evidence, the Court provided instructions and interrogatories to the jury. The Court did not adopt most of the proposed jury instructions and interrogatories the Bureau submitted in its trial brief (ECF No. 69, Ex. 4), and the Bureau objected to the instructions provided to the jury. Tr. 461:6-471:21.

7. Those jury instructions provided that the jury would determine whether WWR's lawyers were "meaningfully involved in the debt collection process." Tr. 540:18-541:3. The instructions did not define "debt collection process" or "meaningful involvement." Rather, the instructions provided that "what constitutes sufficient involvement to be 'meaningfully involved' depends on the circumstances in each case" and that there is "no minimum standard." Tr. 541:12-15.

8. The jury began deliberations on May 3, 2018. The next day, it found unanimously that the Bureau "proved by a preponderance of the evidence that the initial demand letter sent by Weltman contained . . . false, deceptive, or misleading representations in connection with the collection of a debt," (Interrogatory 1) while declining to find that the Bureau "proved by a

preponderance of the evidence that Weltman's lawyers were not meaningfully involved in the debt collection process" (Interrogatory 2). ECF No. 83.

9. Consistent with the jury's first finding, the material facts set forth below establish by a preponderance of the evidence that the Bureau is entitled to judgment on Counts One through Three.

PROPOSED FINDINGS OF FACT

A. WWR is a law firm that operated an in-house debt collection agency.

10. WWR is a legal professional association organized under the laws of Ohio that operates as a law firm. Tr. 537:23-25; 44:4-5.

11. Since July 21, 2011, WWR has attempted to collect debts incurred for personal, family, or household purposes from consumers. Tr. 47:7-12; 45:15-18. These include debts from credit cards, installment loan contracts, mortgage loan deficiencies, and student loans. *See* Tr. 44:19-45:11.

12. When creditors place consumer accounts with WWR for collection, those accounts are initially assigned to a department called the "Agency Collections Unit." Tr. 304:19-25; 311:14-312:2.

13. The Agency Collections Unit operates as a collection agency and there are no attorneys staffed directly in the unit. Tr. 305:16-307:11; *see* Ex. Q (WWR "is a law firm with a fully integrated collection agency.").

14. The Agency Collections Unit attempts to collect on consumer accounts by sending firm-signed form demand letters to consumers. Tr. 50:9-15; 323:2-10.

15. The information on the demand letters comes from data WWR's clients provide. Specifically, creditors electronically transmit to WWR data about the consumers to whom it

would like WWR to send a demand letter. Tr.101:23-102:9. This data includes consumers' contact information and the balance sought. Tr. 102:5-16.

16. WWR hires outside vendors to "scrub" this data to identify consumers who have filed for bankruptcy, died, or who are on active military status, and to identify cellular phone numbers. Tr. 436:18-437:1.

17. These "scrubs" are an entirely automated process to weed out consumers who should not automatically be sent a form demand letter. Tr. 102:25-103:7; 473:19-21. This process does not involve attorneys. Tr. 103:8-13; 317:9-18; *see also* 473:22-23.

18. WWR also performs an automated "scrub" of creditors' data to identify debts that may be past the applicable statute of limitations. Tr. 437:16-25.

19. If a consumer's account is not flagged during one of these "scrubs," then WWR passes the data the creditor provided to an outside vendor, which then populates the demand letter with that data, prints, and sends a demand letter to the consumer. Tr. 103:8-104:11.

20. No WWR attorney reviews any consumer's account before initial demand letters are sent to consumers. Tr. 103:11-13; 104:9-11; *see also* 520:13-17.

21. No WWR attorney reviews the initial demand letters before they are sent to consumers. Tr. 103:11-13; 104:9-11; *see also* 520:13-17.

22. WWR has sent firm-signed form demand letters to consumers nationwide, with the exception of consumers in North Dakota, since July 21, 2011. Tr. 114:24-115:2; Ex. 41 at 3-4.

23. From July 21, 2011, through September 25, 2017, WWR had between 1,500 to 3,400 consumer debt collection clients. Tr. 88:16-22.

24. From July 21, 2011, through September 25, 2017, WWR attempted to collect between 3 million and 5 million debts on behalf of those clients. Tr. 88:23-89:1.

25. From July 21, 2011, through October 31, 2017, WWR sent 4.2 million form demand letters to consumers. *See* Tr. 91:4-10; Ex. 41 at 3-4.

B. WWR collected debts by sending demand letters on firm letterhead and told consumers that an amount was due.

26. Since July 21, 2011, WWR has used several form, model, or template demand letters to generate letters to consumers, including WWR's initial demand letter template. Tr. 55:3-86:14; Exs. 1-31; Ex. F.

27. WWR has also used variations of this initial demand letter template, *see, e.g.*, Exs. 1, 6, 7, 10, 11, 30, as well as follow-up demand letter templates. *See, e.g.*, Exs. 2-5, 8, 9, 14, 18, 21-25, 27, 29, 31.

28. WWR has typically printed these letters on its law firm letterhead. Tr. 79:14-80:5; 82:1-82:19; 85:18-86:6; Exs. 1-30. At the top of the letterhead, the firm name appears in all caps and in bold with "ATTORNEYS AT LAW" directly beneath:

WELTMAN, WEINBERG & REIS Co., LPA
ATTORNEYS AT LAW
Over 80 Years of Service.

Tr. 56:14-57:9; 85:18-86:6; *see also* Exs. 1-30.

29. WWR signs the demand letters by listing the firm name in the signature line. *See* Exs. 1-30; Tr. 85:18-86:8.

30. WWR's demand letters state a balance due. Tr. 57:10-15; 64:16-25; *see also* Exs. 1-31. At times, WWR has further stated in the body of the demand letter, "[a]s of the date of this

letter you owe the amount listed above." *See, e.g.*, Exs. 1, 7, 10-13, 15, 16, 19, 20, 26, 28, 30.

31. At times, WWR's demand letters have included additional references to WWR being a law firm and/or to potential legal action:

- "Failure to resolve this matter may result in continued collection efforts against you or possible legal action by the current creditor to reduce this claim to judgment. In the event a judgment is rendered against you, the current creditor may choose to exercise their option to proceed with any and all post judgment proceedings as allowed by law in your state to protected their rights." Exs. 2, 7; *see also* Ex. 8 (utilizing similar language).

- "This letter shall serve as notice of [] Bank's claim against you arising from your [bank] account . . . We are affording you an opportunity to resolve this claim before initiating any legal action. We must hear from you within 15 days from the date of this letter otherwise collection activity may continue." Ex. 6.

- "Your continued failure to satisfy your obligation may result in further collection action under the provisions of your credit agreement and in accordance with state and federal laws." Ex. 3.

- "Please be advised that this law firm has been retained to collect the outstanding balance due and owing on this account." *See*, *e.g.*, Exs. 20, 28; *see also* Ex. 26 (utilizing similar language).

- Identifying itself as a "law firm" attempting to collect debt for "our client." *See*, *e.g.*, Exs. 7-9, 26, 28, 29, 30.

32. WWR's demand letters did not inform consumers that no attorney had personally reviewed the particular circumstances of the consumer's account. Tr. 269:1-13; Exs. 1-30; *see also* Tr. 520:13-521:9.

C. A significant percentage of consumers seeing WWR's demand letters believe an attorney reviewed the account and sent the letters.

33. The Bureau offered testimony from Dr. Ronald Goodstein, an Associate Professor of Marketing at Georgetown University's McDonough School of Business. Tr. 339:17-19.

34. Following the scientific methodology established in his field, Dr. Goodstein conducted a survey of 643 consumers to test consumer reactions to the legal elements of WWR's

demand letters, including "Attorneys at Law" and "L.P.A." Tr. 354:1-3; 367:22-23. He testified that, in his expert opinion, the presence of those legal elements led significantly more consumers to believe a lawyer reviewed their account and that a lawyer (Tr. 341:8-12) or law firm sent the letter. Tr. 381:19-382:2.

35. Dr. Goodstein testified that almost 40%, or four out of every ten consumers, who saw WWR's demand letter thought an attorney had reviewed their file. Tr. 378:5-8. These findings are significant because they show a "large percentage of people" who reviewed WWR's demand letters thought an attorney reviewed their file, and "40 percent of millions [of letters sent]…is a significantly large part of the marketplace." Tr. 379:16-24; 394:25-395:3.

36. Dr. Goodstein tested consumer responses to WWR's initial demand letter by making slight alterations to WWR's initial demand letter template to remove its legal elements. Tr. 368:25-370:6; *see also* Ex. 1, Ex. F. Dr. Goodstein testified that consumers who viewed WWR's demand letter were 250% more likely to think that a lawyer reviewed their account, and almost 600% more likely to think that a lawyer or law firm sent them the letter, than consumers who saw the same letter but with "Attorneys at Law" and "L.P.A." removed. Tr. 379:8-10; 380:13-17.

37. Dr. Goodstein performed a number of steps, each standard in the field of survey research, to design and conduct a consumer study according to scientific standards. Among those steps, Dr. Goodstein conducted initial research, Tr. 362:16-22, and pre-tested the survey questions to confirm that respondents understood the questions consistently. Tr. 375:9-376:10. After conducting the survey, he performed several tests to validate his results and gauge their robustness; he determined that the results were at the 99.9% confidence level. Tr. 380:22-381:-7.

38. Dr. Goodstein concluded that, in his expert opinion, WWR's demand letter "leads significantly more consumers to believe both that a lawyer reviewed their file and that a lawyer or law firm had sent them the letter." Tr. 381:19-382:2.

39. Apart from Dr. Goodstein's survey and opinion, WWR employee trainings since 2013 have acknowledged that consumers often assume that, because WWR is a law firm, legal action will automatically be filed against them. Tr. 104:12-19, 105:6-106:15; 107:5-9, 13-14; 108:4-15; 117:13-22; 119:7-120:6.

40. WWR's Compliance Officer also certified that, "[u]pon receiving these letters, certain consumers may have prioritized paying the debt," stating WWR "is in a better position to file suit than a [non-law firm] collection agency." Tr. 110:23-112:10.

D. Before WWR sent demand letters to consumers, no WWR attorney reviewed the consumers' accounts, formed a professional judgment that the debt was due, or engaged in the practice of law with respect to sending the collection letters.

41. WWR attorneys do not review the consumer's account before WWR sends a demand letter to the consumer. Tr. 98:24-99:2.

42. WWR attorneys do not take any steps to verify the accuracy of the amounts demanded in the letter. Tr. 474:7-13. WWR attorneys do not review any of the consumer's account-level documents to determine that the balance stated in the letter is due and owing before WWR sends a demand letter. Tr. 99:6-10.

43. WWR does not have any policy requiring a WWR attorney to review *any* information specific to a consumer before the firm sends a demand letter. Tr. 284:1-17; *see also* 99:3-99:54.

44. WWR attorneys generally do not form a professional judgment that sending a letter to a particular consumer is appropriate. Tr. 99:11-20.

45. WWR attorneys are not engaged in the practice of law when the firm sends firm-signed form demand letters to consumers. Tr. 283:3-54.

46. WWR attorneys are licensed in Illinois, Indiana, Kentucky, Michigan, New Jersey, Ohio, and Pennsylvania, and it only files collection lawsuits in those seven states. Tr. 115:3-13. However, WWR sends demand letters to consumers nationwide (with the exception of consumers in North Dakota). Tr. 114:24-115:2.

47. As a result, WWR has sent hundreds of thousands of letters each year to consumers whom it cannot sue because its attorneys are not licensed to practice law in the consumer's state. Tr. 91:4-92:6, 115:3-116:9, Ex. 41 3-4. Tr. 91:4-92:6; 115:3-116:9; Ex. 41 3-4.

48. If creditors want to sue consumers who live outside the seven states where WWR is licensed, then WWR may forward the accounts to a different law firm, which essentially re-starts the debt collection process by sending another initial demand letter. Tr. 115:10-17; 116:21-117:9.

49. WWR attorneys' participation in the debt collection process is limited to "onboarding" new clients, securing verbal or written assurances from creditor clients about the accuracy of information provided to WWR,[1] drafting policies and procedures and template collection letters, overseeing compliance, and setting up the process for the automated "scrubs" of data. *See*, *e.g.*, Tr. 149:3-151:23; 152:16-154:4; 415:10-417:24; 418:14-419:2; 420:1-9;446:25-447:4; 197:19-222:22.

[1] Neither WWR's Compliance Officer nor its Managing Shareholder of the Consumer Collections Unit could confirm whether each contract contained such warranties. Tr. 260:9-261:6; 449:8-450:2.

50. As part of the "onboarding" process for a new client, a WWR attorney reviews examples of documents such as the terms and conditions for a credit card account, for a subset of accounts. Tr. 420:1-421:1.

51. Rather than require WWR attorneys to review account-level documents and form a professional judgment as to whether the debt sought is due and owing, WWR relies on assurances from its clients that the information the creditors provide is accurate. *See* Tr. 474:14-475:1.

52. Charles Pona, Managing Shareholder of WWR's Consumer Collections Unit, acknowledged that terms and conditions that apply to an account may change after an account is placed with WWR. Tr. 421:15-21; 450:20-451:8.

53. Once WWR contracts with a new creditor client, that client can place accounts for collection with WWR on an ongoing basis, and WWR conducts no further reviews of account-level documents. *See* Tr. 446:25-447:8. Some of these clients have placed over 100,000 accounts per year with WWR for collection. Tr. 96:13-19. Thus, WWR can attempt to collect thousands of debts over several years based on this single review, which may have happened years earlier. Tr. 446:25-447:8.

54. WWR's Chief Compliance Officer and the Managing Shareholder of the Consumer Collections Unit also testified that instead of a WWR attorney looking at the consumer's account-level documents, to ensure that the debt is valid and due and owing, WWR relies on a creditor's reputation it considered when evaluating whether to accept business from a new client. Tr. 169:24-170:15; 417:17-24.

E. Alan Weinberg's work as special counsel did not involve the letters at issue in this case.

55. The Ohio Attorney General appointed Alan Weinberg, then a WWR shareholder, to successive one-year terms as special counsel to collect the State of Ohio's debts. Tr. 234:8-17; 244:9-16; Ex. B. Pursuant to Mr. Weinberg's appointments, WWR collected debt on behalf of the State of Ohio from approximately 2003 until about 2011 or 2012, when Mr. Weinberg's appointment was not renewed. Tr. 227:2-4; 242:19-243:12.

56. The form demand letters WWR used to collect debts for the Ohio Attorney General's Office were printed on the Ohio Attorney General's letterhead, identified Mr. Weinberg as special counsel, and were worded differently from the form demand letters at issue in this action. Tr. 240:4-241:24; *compare* Ex. A *with* Exs. 1-30.

57. WWR never provided the Ohio Attorney General's Office with the demand letters at issue in this case (Exs. 1-30). Tr. 276:21-277:12; 278:15-19.

58. The application process for being appointed special counsel required Mr. Weinberg to submit a response to a Request for Qualifications (RFQ). Ex. A. That response included information about WWR, including WWR's use of technology in its debt collection process, where its attorneys were licensed to practice, the number of attorneys and support staff it employed, and the number of accounts placed with the firm for collection in the prior year. Tr. 230:15-231:1; 232:2-24; 233:2-12; 233:16-24; 235:8-12; Ex. A at A8, A12, A15, A16.

59. WWR did not disclose in its RFQ response that WWR attorneys do not review consumer accounts before sending form demand letters to collect debt from consumers. Tr. 279:2-16.

60. WWR did not include in its RFQ response for review by the Ohio Attorney General the WWR demand letters at issue in this case. Tr. 277: 7-12.

PROPOSED CONCLUSIONS OF LAW

A. This Court has jurisdiction over this action.

61. This Court has subject-matter jurisdiction over this action because it is "brought under Federal consumer financial law," 12 U.S.C. § 5565(a)(1), presents a federal question, 28 U.S.C. § 1331, and is brought by an agency of the United States, 28 U.S.C. § 1345.

62. The Bureau is an independent agency of the United States that is authorized to take enforcement action to address violations of Federal consumer financial law, 12 U.S.C. §§ 5511(c)(4), 5512(a), 5563, 5564, including the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531, 5536(a)(1).

63. The Bureau may bring civil actions against persons violating these laws to seek "all appropriate legal and equitable relief including a permanent or temporary injunction as permitted by law." 12 U.S.C. § 5564.

B. WWR is a "debt collector" under the FDCPA and a "covered person" under the CFPA.

64. Since at least July 21, 2011, WWR has regularly collected or attempted to collect, directly or indirectly, consumer debts, owed or due or asserted to be owed or due to another, including debts from credit cards, installment loan contracts, mortgage loan deficiencies, and student loans. *See* Tr. 44:19-45:11. These include debts incurred primarily for personal, family, or household purposes. *See* Tr. 45:15-18.

65. Such debts constitute "debts" within the meaning of the FDCPA, and WWR is, therefore, a "debt collector" under the FDCPA. *See* 15 U.S.C. § 1692a(5), (6).

66. WWR is also a "covered person" under the CFPA because it collects debt related to credit for use by consumers primarily for personal, family, or household purposes. 12 U.S.C. § 5481(5), (6), (15)(A)(i), (15)(A)(x).

67. WWR sent the letters at issue (Exs. 1-30) in connection with WWR's collection of or attempts to collect debts from consumers. Tr. 53:11-54:20.

C. The FDCPA prohibits false, deceptive, or misleading representations in debt collection.

68. The FDCPA "is an extraordinarily broad statute, and must be construed accordingly" to effect its remedial purpose. *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 448-49 (6th Cir. 2014), *as amended* (Dec. 11, 2014) (quotation marks and citations omitted).

69. The FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This includes using "any false representation or deceptive means to collect or attempt to collect any debt," and making "the false representation or implication that . . . any communication is from an attorney." 15 U.S.C. § 1692e(3), (10).

70. The Court evaluates whether communications are false, deceptive, or misleading from the perspective of the "least-sophisticated-consumer." *Kistner v. Law Offices of Michael P. Margalefsky LLC*, 518 F.3d 433, 438 (6th Cir. 2008).

71. Collection letters "can be deceptive if they are open to more than one reasonable interpretation, at least one of which is inaccurate." *Kistner*, 518 F.3d at 441 (citation omitted).

72. A statement can be misleading to the least sophisticated consumer even if it is actually true. *Gionis v. Javitch, Block, Rathbone, LLP*, 238 Fed. App'x 24, 28-29 (6th Cir. 2007)

(holding least sophisticated debtor would find affidavit misleading even though "[i]n a strict sense, neither § 1692e(5) nor § 1692e(10) has been violated here.").

73. A representation must be materially false or misleading to be actionable under the FDCPA. *Wallace v. Washington Mut. Bank, F.A.*, 683 F.3d 323, 326 (6th Cir. 2012) (citation omitted). A representation that a communication is from an attorney is material because, as courts have consistently recognized, an unsophisticated consumer who receives a debt collection letter from an attorney "knows the price of poker has just gone up." *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 1000 (3d Cir. 2011) (quoting *Avila v. Rubin*, 84 F.3d 222, 229 (7th. Cir. 1996)).

74. The FDCPA imposes strict liability on a debt collector, regardless of the debt collector's knowledge or intent. *Stratton*, 770 F.3d at 448-49 (citations omitted).

D. WWR violated the FDCPA by sending millions of demand letters that contained false, deceptive, or misleading representations (Count One)

75. The Bureau proved by a preponderance of the evidence that WWR violated § 1692e of the FDCPA, including §§ 1692e(10) and (3). WWR, through its collection letters, used false, deceptive, or misleading representation or means to collect and attempt to collect debts from consumers. WWR also misrepresented the level of attorney involvement by sending firm-signed demand letters on firm letterhead that stated "ATTORNEYS AT LAW" in all capitals and in bold at the top, even though no WWR attorney had reviewed the consumer's account and no WWR attorney had reached a professional judgment that sending the letter was appropriate or that the debt was due. In fact, WWR attorneys were not even practicing law when the firm sent those letters—the firm and its attorneys were acting not in any legal capacity, but solely as debt collectors.

1. WWR violated § 1692e, e(10)

76. Section 1692e of the FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The section prohibits specific conduct "without limiting the general application" of this broad prohibition. *Id*. In particular, as the Court instructed the jury, "it is a violation of § 1692e(10) if a debt collector uses any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a customer." Tr. 540:14-17; *see also* 15 U.S.C. § 1692e(10).

77. Consistent with the jury's finding on Interrogatory 1, the Bureau established by a preponderance of the evidence that WWR violated §§ 1692e and 1692e(10) because WWR's demand letters contained "false, deceptive, or misleading representations or means in connection with the collection of a debt[.]" ECF No. 83.[2]

a. WWR's letters conveyed to consumers that WWR attorneys had reviewed their account and were involved in the decision to send the letter.

78. Consistent with well-established case law, WWR's demand letters implied involvement by a WWR attorney in his or her professional capacity, and by extension, the possibility of a lawsuit. That implication is false or misleading where, as is the case here, attorneys are not acting in a legal capacity when the firm sends the letters. *See, e.g.*, *Lesher*, 650 F.3d at 1003 (holding it was "misleading and deceptive for the [law firm] to raise the specter of potential legal action by using its law firm title to collect a debt when the firm was not acting in

[2] For the reasons explained in Section D(2) below, WWR violated § 1692e(3)'s prohibition on falsely representing that a communication is from an attorney. But, even if WWR had *not* violated that provision, WWR still violated § 1692e's more broad prohibition against false and misleading representations. *See Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993) (given the "broad sweep" of § 1692e, a court could grant summary judgment under § 1692e even if the facts did not establish a violation of 1692e(3)).

its legal capacity when it sent the letters."); *Nielsen v. Dickerson*, 307 F.3d 623, 635 (7th Cir. 2002) (recognizing the implicit message in a letter from an attorney that the attorney "has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action" (quoting *Avila*, 84 F.3d at 229)); *Gonzalez v. Kay*, 577 F.3d 600, 604 (5th Cir. 2009) (explaining that an attorney letter creates a fear of a lawsuit that "is likely to intimidate most consumers" and emphasizing that letters must make clear "even [to] the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time." *Id.* at 607.).

79. That the letters here bear the signature of a law firm, rather than an individually named attorney, is a "distinction without a difference." *See Cordes v. Frederick J. Hanna & Assocs., P.C.*, 789 F. Supp. 2d 1173, 1178 n.6 (D. Minn. 2011) (rejecting argument that letter signed by a law firm instead of an individual attorney conveyed a different impression about the level of attorney involvement to the least sophisticated consumer).

80. The evidence here confirms the wisdom of these cases. Based on evidence adduced at trial, consumers receiving WWR's demand letters would reasonably believe (1) that an attorney had reviewed their file; and (2) that an attorney was involved in the decision to send the letter. Tr. 341:8-12; ¶ 38; *see also Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 364 (2d Cir. 2005) (a "letter sent on law firm letterhead, *standing alone*, does represent a level of attorney involvement to the debtor receiving the letter"); *Lesher*, 650 F.3d at 1003 (unsigned letters from a law firm violate § 1692e "because they falsely imply that an attorney, acting as an attorney, is involved in collecting [plaintiff's] debt").

81. The testimony of Dr. Goodstein, an expert in marketing and consumer behavior, supports this finding.[3]

82. Specifically, Dr. Goodstein's testimony and survey established that WWR's demand letters imply to a large percentage of consumers that attorneys reviewed consumers' accounts and were involved in the decision to send the letter. ¶¶ 38, 40; Tr. 379:16-24; 394:25-395:3; 378:5-8 (40% of consumers surveyed who viewed WWR's demand letter believed that a lawyer had reviewed the account); *cf. ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 610-11 (6th Cir. 2017) (interpreting the FTC Act and affirming deception claim where survey showed representation misled significant minority of consumers) (citations omitted).

83. At trial WWR did not present any expert testimony or other reliable evidence regarding how consumers were likely to interpret the demand letters. *Cf. FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1001 (N.D. Cal. 2010) (granting summary judgment to FTC on deceptive billing claim where FTC relied on "compelling and unrebutted" survey evidence).

84. Viewed from the perspective of the least sophisticated consumer, WWR's demand letters create the impression that an attorney reviewed the consumer's account and decided to send the letter.

b. WWR's representations were false: no WWR attorneys reviewed consumers' accounts or were involved in the decision to send the demand letter.

85. WWR's implied representations that an attorney reviewed the consumer's file and was involved in the decision to send the demand letter were false, deceptive, or misleading.

[3] The Bureau tendered Dr. Goodstein as an expert and WWR did not object. Dr. Goodstein meets the requirements of an expert witness because he possesses specialized knowledge which helped the trier of fact understand the evidence, his testimony is based on sufficient facts and data and is the product of reliable methods, and he reliably applied those methods to the facts of the case. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

WWR attorneys generally did not review consumers' accounts before the law firm sent collection letters to consumers. Nor did WWR attorneys form a professional judgment that a particular consumer owed a debt and that a letter should be sent to the consumer. In fact, WWR conceded that, whatever role its attorneys had in the debt collection process, those attorneys were not practicing law when WWR sent demand letters. Tr. 283:3-5.

86. In other words, there was no attorney, *acting as an attorney*, involved in sending the letters. *Lesher*, 650 F.3d at 1003 (collection letters on law firm letterhead or that included the phrase "law offices" and instructed the consumer to make payments to the firm conveyed the impression "that an attorney, acting as an attorney" was involved in collecting the debt).

87. Under these circumstances, WWR's letters were false, deceptive, or misleading in violation of the FDCPA. *See Kistner*, 518 F.3d at 440 (stating that if letter implied to the least sophisticated consumer that it was a communication from an attorney, that impression would be false because attorney "did not review [the consumer's] file, did not determine whether particular letters should be sent, and did not know the identities of persons to whom the letters were sent."); *Nielsen*, 307 F.3d at 636; *Clomon v. Jackson*, 988 F.2d 1314, 1317 (2d. Cir. 1993) (holding letter was deceptive where attorney approved form letter and procedures by which those letters were sent, but "never considered the particular circumstances of [the consumer's] case" and did not participate personally in the mailing by reviewing the letter).

88. Further, nothing in WWR's demand letters cured this misleading impression. *Cf. Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 107 (1st Cir. 2014) ("In evaluating whether a collection letter breeds confusion, a district court thus acts well within its proper province in noting that a debt collector could easily have included explanatory language but chose not to do so."); *see also Gonzalez*, 577 F.3d at 604; *Greco*, 412 F.3d at 364; *Michael v.*

Javitch, Block & Rathbone, LLP, 825 F. Supp. 2d 913, 922 (N.D. Ohio 2011). WWR's demand letters never informed consumers that, at the time the firm sent the letters, no attorney had actually reviewed the particular circumstances of the consumer's account. Tr. 269:1-13; 520:13-521:9; *see also* Exs. 1-30; *cf. Lesher*, 650 F.3d at 1003 (holding that demand letter on attorney letterhead was likely to deceive the least sophisticated consumer even though the back of the letter included a disclaimer that no attorney had personally reviewed the consumer's account). Nor did WWR's letters inform consumers that, though a law firm, WWR was not practicing law when it sent the collection letters—it was not acting in any legal capacity and, instead, was acting purely as a debt collector. Finally, WWR did not inform the consumers residing in the 43 states in which WWR never litigates that there was *no* circumstance under which WWR would pursue litigation against the consumer, and if a creditor decided to sue, WWR would forward the file to another law firm, which would then send its own demand letter to the consumer.

c. These representations were material.

89. The representation that a WWR attorney reviewed a consumer's account prior to the firm sending a demand letter is material to consumers. As other courts have held, "an unsophisticated consumer, getting a letter from an 'attorney,' knows the price of poker has just gone up." *Lesher*, 650 F.3d at 1000 (quoting *Avila*, 84 F.3d at 229); *Gonzalez*, 577 F.3d at 604 (same). As opposed to a letter from a non-law firm debt collector, a letter indicating that it is "from" an attorney—with the accompanying implication that the attorney has reviewed the consumer's account and exercised professional legal judgment that a letter is appropriate—is more likely "to get the debtor's knees knocking." *See id.*; *see also Tourgeman v. Collins Fin. Servs. Inc.*, 755 F.3d 1109, 1124-25 (9th Cir. 2014), *as amended on denial or reh'g and reh'g en banc* (Oct. 31, 2014) (same).

90. This should come as no surprise to WWR. Internal firm documents acknowledge that consumers may assume that legal action is imminent because WWR is a law firm. Ex. 38; *see also* Tr. 105:6-108:15, 119:7-120:6. Likewise, WWR has acknowledged that, because it is a law firm, consumers may prioritize payments to the law firm's creditors over other debts. Tr. 110:23-112:10.

91. Thus, WWR's implied misrepresentations that its attorneys reviewed the consumer's account and decided to send the letter are material because they are "capable of influencing the decision of the least sophisticated debtor." *Jensen v. Pressler & Pressler*, 791 F.3d 413, 421 (3d Cir. 2015) (citation omitted); *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 969 (N.D. Ohio 2009) (considering whether representation about debt's validity might influence a person's decision on a matter), *modified on other grounds*, No. 3:08 CV 1434, 2009 WL 3086560 (N.D. Ohio Sept. 23, 2009); *see also Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009) (requiring a misrepresentation to be material to be actionable under the FDCPA) (citations omitted).[4]

2. WWR violated § 1692e(3)

a. WWR's letters falsely implied that attorneys were "meaningfully involved."

92. Section 1692e(3) of the FDCPA prohibits debt collectors from misrepresenting or falsely implying that a communication is from an attorney. 15 U.S.C. § 1692e(3).

93. Courts have consistently applied § 1692e(3) in analyzing whether dunning letters sent by lawyers violate this provision. Under § 1692e(3), a communication that is literally from an attorney violates the FDCPA if the attorney was not meaningfully involved in drafting the

[4] The jury made no findings as to whether the false, deceptive, or misleading representations it identified in response to Interrogatory 1 were material. After answering "No" to Interrogatory 2, the jury concluded its deliberations pursuant to the Court's instructions.

communication. *See, e.g.*, *Clomon*, 988 F.2d 1314; *Avila*, 84 F.3d at 228; *Gonzalez*, 577 F.3d at 604; *Lesher*, 650 F.3d at 1003; *Dalton v. FMA Enterp., Inc.*, 953 F. Supp. 1525 (M.D. Fla. 1997).

94. Courts applying § 1692e(3) focus on "the sufficiency of the attorney's independent review of a *particular* case prior to the issuance of a debt collection letter." *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, 102 (E.D.N.Y. 2009) ("*Miller*"); *see also Bock v. Pressler & Pressler, LLP*, 30 F. Supp. 3d 283, 294 (D.N.J. 2014), *as corrected* (July 1, 2014), *as corrected* (July 7, 2014).

95. Courts have applied § 1692e(3) in this way because a letter from a law firm or an attorney implies the attorney reached a "considered, professional judgment" that the consumer is delinquent and that the attorney had some personal involvement in the decision to send the letter. *Avila*, 84 F.3d at 229.

96. As the Seventh Circuit explained in *Nielsen*, the "central requirement" of the rule "is crystal clear: an attorney must have some professional involvement with the debtor's file if a delinquency letter sent under his name is not to be considered false or misleading." 307 F.3d at 638; *see also Avila*, 84 F.3d at 228-29 (relying on *Clomon*, 988 F.2d at 1320; *Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354, 1382-83 (E.D. Cal. 1995) (entering summary judgment against defendant law firm where evidence showed it had not reviewed the plaintiff's files before collection notices had been sent).

97. The Sixth Circuit followed this approach in *Kistner*. There, the Sixth Circuit stated that a letter implying it was a communication from an attorney would be false where the attorney "did not review [the consumer's] file, did not determine whether particular letters should be sent, and did not know the identities of the persons to whom the letters were sent." *Kistner*, 518 F.3d at 440-41 (remanding to lower court to determine whether least sophisticated

consumer would believe letter was sent by an attorney given letter included law firm references but was signed by an unnamed "ACCOUNT REPRESENTATIVE" who may not have been an attorney). The Sixth Circuit reached this conclusion even though the attorney drafted the form letter, set up the firm's arrangement with a mail vendor, and oversaw compliance with collection laws. *See Kistner*, 518 F.3d at 438.

98. Applying these principles to the evidence presented at trial, WWR violated § 1692e(3) by sending these collection letters. Although WWR is a law firm and the letters it sends are literally "from" attorneys, "some degree of attorney involvement is required before a letter will be considered 'from an attorney'" to avoid liability under the FDCPA." *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 301 (2d Cir. 2003) ("*Miller I*") (citing *Clomon*, 988 F.2d at 1321). No such attorney involvement is present here.

99. WWR's attorneys did not review consumers' accounts, form a professional judgment that the particular consumer's debt was due and owing, or determine that sending a letter was appropriate before the firm sent to consumers millions of collection letters on law firm letterhead that were signed by the firm.

100. Specifically, the Bureau has proven by a preponderance of the evidence that WWR attorneys were not "meaningfully involved" because:

- WWR attorneys do not review each individual consumer account before sending demand letters to the consumer. Tr. 98:24-99:2.
- WWR attorneys do not take any steps to independently verify the accuracy of the amounts sought by WWR's clients, Tr. 474:7-13, such as reviewing individual account-level documents to determine that the balance stated in each demand letter is due and owing before sending the letter. Tr. 99:6-10. Instead, WWR relies on assurances from its clients that the information provided is accurate. *See* Tr. 474:14-475:1.
- WWR does not require clients to provide account-level documents before it sends demand letters. Tr. 451:25-452:3. As a result, WWR often may not even

have the documents that would enable its attorneys to conduct a meaningful review of each consumer's file. *See* Tr. 321:3-9.

- WWR attorneys generally do not form a professional judgment that sending a form letter to a particular consumer is appropriate. Tr. 99:16-20.

- WWR attorneys are not engaged in the practice of law when the firm sends firm-signed form demand letters to consumers. Tr. 283:3-5.

101. In sending these demand letters, neither WWR nor its attorneys were acting in any legal capacity. Tr. 283:3-5. The firm was acting solely as a debt collector, yet its letters did not inform consumers that, at the time of sending the letters, the law firm and its attorneys were not acting as attorneys. *Greco*, 412 F.3d at 364.

102. Finally, the fact that WWR sends millions of collection letters nationwide to consumers whom it will never sue because they reside in states where its attorneys are not licensed to practice law further supports finding that WWR attorneys were not meaningfully involved in deciding to send the demand letters to consumers. *See Nielsen*, 307 F. 3d at 637-38 (noting attorney never filed a lawsuit on creditor's behalf in evaluating whether attorney was sufficiently "involved" to avoid liability under § 1692e(3)).

b. WWR attorneys' role in the debt collection process does not satisfy § 1692e(3)'s "meaningful involvement" requirement.

103. At trial, WWR's Compliance Officer and Managing Shareholder of the Consumer Collections Business Unit claimed that WWR attorneys are meaningfully involved in attempting to collects debts because, according to her testimony, WWR attorneys: (1) participated in "onboarding" discussions with prospective clients and review sample documents from the portfolio of debts to be placed; (2) secured assurances from clients about the accuracy of data the creditors provided to WWR; (3) drafted policies and procedures, drafted the template collection letters, and oversaw compliance; and (4) designed the firm's automated data "scrubs." *See, e.g.*,

Tr. 149:3-151:23; 152:16-154:4; 415:10-417:24; 418:14-419:2; 420:1-9; 446:25-447:4; 197:19-222:22.

104. These activities do not constitute "meaningful attorney involvement" under § 1692e(3).[5] Even though no court has adopted a rule requiring attorneys to review specific account level documents, *see, e.g. Miller I*, 321 F.3d at 311 (reversing summary judgment for law firm and remanding for further proceedings), some involvement with a consumer's file is necessary before a demand letter is "in compliance with" § 1692e(3) and (10). *Id.* at 307 (citing *Nielsen*, 307 F.3d at 638). Thus, even in the absence of any bright line standard, none of WWR's activities represent professional involvement in the debtor's file—reviewing the consumer's particular circumstances and making a professional judgment that the debt is due and owing—that is the hallmark of meaningful attorney involvement.

105. WWR conducts "onboarding discussions" and partial reviews of a subset of account-level documents[6] only at the outset of WWR's relationship with a creditor, sometimes years prior to subsequent collection activity for the creditor. WWR sent over 4.2 million demand letters in attempting to collect between 3 million and 5 million debts. Thus, the sheer volume of debts placed with WWR, as well as the millions of collection letters WWR sent, undermines any argument by WWR that its attorneys are meaningfully and professionally involved in consumers'

[5] WWR's arguments on this point also do not alter the Court's conclusions that WWR violated §§ 1692e and 1692e(10). As discussed above, *supra* Section (D)(1)(a), the Bureau proved that WWR's letters imply that an attorney had actually reviewed the consumer's account and decided to send the letter. Both are false in violation of § 1692e and § 1692e(10). *See Lesher*, 650 F. 3d at 1003 (finding violation of 1692e's general prohibition against "false, deceptive, or misleading" communications" where letters falsely implied "that an attorney, acting as an attorney" was involved in collecting the debt).

[6] When asked on direct examination if he reads the sample terms and conditions in its entirety, the Managing Shareholder of the Consumer Collections Unit testified that WWR attorneys "won't necessarily read the entire agreement because, again, we've seen hundreds of these, thousands of these agreements" and that, as a result, they "only look for certain things" during this limited review. Tr. 423:10-20.

files by virtue of participating in onboarding discussions and document reviews that could have occurred years before the collection. *See Boyd v. Wexler*, 275 F.3d 642, 645-46 (7th Cir. 2001) (rational jury could find that the volume of mail sent by attorney's firm made it unlikely that attorney had actually reviewed consumers' files before authorizing the letters to be sent).

106. These onboarding discussions and associated review do not constitute the kind of professional involvement with the debtor's file required under 15 U.S.C. § 1692e(3). As the Seventh Circuit held in *Nielsen*, an attorney's review of a master contract, among other things, was not meaningful involvement because the attorney was not involved in the file of any debtor and played no meaningful role in the decision to send a letter. *See Nielsen*, 307 F.3d at 638-39. That is precisely the case here.

107. Moreover, WWR does not obtain file-level documents during the onboarding process that would enable WWR attorneys to engage with each consumer's file on an individual basis. Courts have held an attorney's failure to obtain and review a consumer's file provided "an adequate and independent basis" for finding an FDCPA violation. *Miller*, 687 F. Supp. 2d at 98. That is because an attorney typically cannot "exercise considered judgment without review of the debt information contained in the actual client file." *Id*. (citing *Miller I*, 321 F.3d at 304); *see also Nielsen*, 307 F.3d at 638-39; *Cordes*, 789 F. Supp. 2d at 1177-78 (citations omitted).

108. Second, WWR witnesses also testified that attorneys are meaningfully involved because they secured verbal or written warranties from clients that the data the clients provide to WWR was accurate. *See* Tr. 149:3-7; 150:16-25; 418:14-419:2.

109. However, an attorney's reliance solely on a creditor's assurances that "these are accurate and valid claims for the amounts stated" is not meaningful involvement. *Nielsen*, 307 F.3d at 636; *see also Miller I*, 321 F.3d at 304 ("merely being told by a client that a debt is

overdue" is not enough to constitute meaningful attorney involvement.) The American Bar Association has summarized an attorney's legal duties in this area as follows: "[I]t is not enough that the lawyer rely upon the client's certification of the validity of the account." Tr. 280:5-15; *see also* ABA Informal Ethics Opinion 1368, "Mass Mailing of Form Collection Letters" (July 15, 1976). Rather, the attorney "must take responsibility for the reasonable accuracy of each letter and must exercise due care that no letter misstates a fact with respect to the account of the debtor." *Id.* at 2.

110. Moreover, there is no evidence in the record from which the Court could find that WWR's reliance on its client's warranties is reasonable, such as "a party's history of past reliability, reputational quality, use of rigorous practices and procedures, etc." *Miller*, 687 F. Supp. 2d at 101. "For FDCPA purposes, an attorney claiming reasonable reliance [on a client's representations] must also show that he or she was aware of those factors at the time of his or her review and at the time the collection letters were actually sent." *Id.*

111. Third, WWR's Compliance Officer testified at length about numerous firm policies and procedures drafted by WWR attorneys. *See* Tr. 197:19-222:22; *see also* Exs. Q-SSS.

112. WWR, however, does not have any policy requiring a WWR attorney to review any documentation specific to a consumer before WWR sends a firm-signed form demand letter to that consumer. Tr. 284:13-17.

113. Nor does drafting form letters constitute meaningful attorney involvement where those letters are sent *en masse* to consumers without any individualized assessment of consumers' accounts. *See Kistner*, 518 F.3d at 438 (stating in dicta that meaningful attorney involvement would not be met even though the attorney drafted the form letter, set up the firm's arrangement with a mail vendor, and oversaw compliance with collection laws); *Nielsen*, 307

F.3d at 637; *Cordes*, 789 F. Supp. 2d at 1178 (holding that sending form letters created by an attorney pursuant to his standing instructions "does not constitute meaningful attorney involvement" where attorney neither reviewed the consumer's file nor the letter "automatically" generated before it was mailed).

114. Likewise, attorney oversight of WWR's compliance efforts is not a substitute for an attorney's review of individual consumer files. *See Kistner*, 518 F.3d at 438, 440-41 (reversing summary judgment for attorney who oversaw firm's compliance with applicable collection laws but did not review individual consumers' files); *Nielsen*, 307 F.3d at 626, 636 (holding attorney's failure to review debtors' individual files violated § 1692e(3) and (10) notwithstanding attorney's professional memberships, continuing legal education, review of industry publications, maintenance of office debt collection policies, and oversight of FDCPA trainings administered to staff).

115. Finally, WWR's witnesses testified that WWR attorneys are meaningfully involved because they designed the automated data "scrubs" that weed out certain consumers. These processes are entirely automated, are performed by outside vendors, and do not require an attorney to evaluate whether the particular consumer owes the debt or whether it is appropriate to send a demand letter. Tr. 102:25-103:3; 103: 2-3; 317:13-18; 473:19-23.

116. WWR's "scrubs" are not a replacement for the exercise of an attorney's professional judgment and do not constitute "meaningful attorney involvement." *See Nielsen*, 307 F.3d at 636 ("categorical" exclusion of consumers meeting broad criteria was not meaningful attorney involvement because it did not call for an "individualized, discretionary assessment by [the attorney]"); *Young v. Citicorp Retail Servs., Inc.*, No. CIV. 3:95CV1504 (AHN), 1997 WL 280508, at *6 (D. Conn. May 19, 1997) (rejecting argument that "criteria by

which accounts are computer-selected to receive" demand letter "is a valid substitute for [attorney's] personal review."); *Bock v. Pressler & Pressler*, LLP, 254 F. Supp. 3d 724, 727 (D.N.J. 2017) (finding insufficient law firm's "internal 'scrubs'" of electronic information received from creditor). This is because the scrubs "do not demonstrate the sort of independent analysis and professional opinion that must occur when a debt collector represents that an attorney has reviewed a debt." *See Martsolf v. JBC Legal Grp., P.C.*, No. CIV.A. 1:04-CV-1346, 2008 WL 275719, at *9 (M.D. Pa. Jan. 30, 2008).

117. In sum, the fact that WWR's attorneys do not conduct an independent review of the particular circumstances of an individual debt collection letter "doom[s]" the sufficiency of any "overarching procedures" that WWR otherwise utilizes to collect consumer debt. *Miller*, 687 F. Supp. 2d at 102 (citing *Nielsen*, 307 F.3d at 636).

c. The conclusion that WWR violated § 1692e(3) is consistent with the evidence presented at trial and the jury's factual findings.

118. Finally, though the jury found that the Bureau had not established that WWR's attorneys were not "meaningfully involved in the debt collection process," the Court can still properly hold that WWR violated 15 U.S.C. § 1692e(3).

119. Based on the jury's response to the second Interrogatory, it appears the jury found that WWR attorneys were colloquially involved in the "debt collection process" – for example, through drafting policies, having onboarding discussions with potential new clients, etc. Ultimately, the jury's finding in response to Interrogatory 2 is not instructive on whether WWR violated § 1692e(3) of the FDCPA. That is because the jury instructions and Interrogatory 2 focused on whether attorneys were involved in the "debt collection process" without further explanation. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (noting

that "[v]ague instructions … do little to aid the decision maker in its task of assigning appropriate weight to evidence").

120. The FDCPA requires more than just nebulous "involvement" in the "debt collection process." Section 1692e(3) requires WWR attorneys to review a debtor's particular circumstances and make a professional judgment regarding whether the debt is due and owing before sending a collection letter. *Avila*, 84 F.3d at 228-29; *Clomon*, 988 F.2d at 1320.

121. The jury was instructed that "what constitutes sufficient involvement to be 'meaningfully involved' depends on the circumstances in each case" and that there is "no minimum standard." Tr. 541:12-15. Citing *Miller I*, WWR has argued that no court has specified precisely what documents an attorney must review in every circumstance. *E.g.*, ECF No. 68 at 12. This mischaracterizes the holding in that case and ignores the cases discussed above. *See, supra*, Section D(2)(a). In *Miller I*, the plaintiff urged the adoption of a minimum standard requiring attorneys to review "a copy of the contract, a credit report, and a full payment history or statement of account." *Miller I*, 321 F.3d at 304. The Second Circuit declined to adopt a rule requiring review of those particular documents, explaining that there may be circumstances that "negate the need to review some if not all of the documents." *Id.* Nothing in the court's opinion suggested it was countenancing an application of § 1692e(3) under which an attorney would not make a particularized judgment that the debt was due and owing and that sending a letter was appropriate. In fact, on remand, the district court interpreted the court's opinion as suggesting that "the data contained in the complete client file, (or alternatively, some proxy for such information) is typically necessary for proper FDCPA review." *Miller*, 687 F. Supp. 2d at 98 n.9 (discussing *Miller I*, 321 F. 3d at 304).

122. While no court has adopted a rule requiring an attorney to review *specific* documents in every case, courts have been clear for years that the attorney must be professionally involved in the debtor's file, which includes reviewing the consumer's particular circumstances and making a professional judgment that the debt is due and owing. *Avila*, 84 F.3d at 228-29; *Clomon*, 988 F.2d at 1320.

123. As explained above in Section D(1)(a), the Bureau established that WWR's demand letters falsely implied an attorney (1) reviewed the consumer's account and (2) sent the letter. Consistent with the showing, the jury found that the Bureau proved that WWR's demand letter contained "false, deceptive, or misleading representations or means in connection with the collection of a debt[.]" ECF No. 83.

124. For these same reasons, the Bureau established WWR violated 15 U.S.C. § 1692e(3) by misrepresenting the level of attorney involvement in its demand letters. Any involvement by attorneys in the broader "debt collection process" does not change this result.

E. WWR's violation of the FDCPA is a separate violation of the CFPA (Count Two).

125. As set forth above, WWR violated the FDCPA, which in turn constitutes a separate violation of the CFPA. *See* 12 U.S.C. § 5536(a)(1)(A) ("It shall be unlawful for … any covered person … to … commit any act or omission in violation of a Federal consumer financial law," including the FDCPA); 12 U.S.C. § 5481(12)(H), (14).

126. Because WWR's FDCPA violations constitute separate CFPA violations, judgment for the Bureau on Count Two is also appropriate.

F. WWR engaged in deceptive acts or practices in violation of the CFPA (Count Three).

127. The evidence and the advisory jury's unanimous response to Interrogatory 1 leave no doubt that WWR's demand letters contain material misrepresentations likely to mislead

customers acting reasonably under the circumstances, and therefore violate the CFPA. *See* 12 U.S.C. §§ 5481(5), (15)(A)(x), 5531(a), 5536(a)(1)(B). Specifically, WWR's letters falsely implied that an attorney (1) reviewed the consumer's account and (2) sent the letter. Tr. 341:8-12; ¶¶ 38-40.

128. It is a violation of the CFPA for any covered person to engage in deceptive acts or practices in connection with, among other things, collecting debt relating to any consumer financial product or service, such as an extension of consumer credit. 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

129. An act or practice is deceptive if: "(1) there was a representation; (2) the representation was likely to mislead consumers acting reasonably under the circumstances; and (3) the representation was material." *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630-31 (6th Cir. 2014) (citations omitted) (analyzing deception claim under FTC Act); *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1192-93 n.7 (9th Cir. 2016) (applying FTC standard to CFPA claims), *cert. denied*, 137 S. Ct. 2291 (2017).

130. Courts consider the overall net impression that a communication makes on a "significant minority of reasonable consumers" in determining whether a communication implies a message that misleads consumers. *ECM BioFilms, Inc.*, 851 F.3d at 610-11 (citations omitted) (interpreting the FTC Act and affirming deception claim where representation misled 20-30% of consumers).

131. A representation "is material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (internal quotations and citation omitted).

132. Here, the Bureau established by a preponderance of the evidence that WWR's letters led a "significant minority" of reasonable consumers to believe an attorney (1) reviewed the consumer's account and (2) sent the letter. Tr. 341:8-12; ¶¶ 38-40. Both representations are false. Accordingly, the jury unanimously found that the Bureau established that WWR's letters contained "false, deceptive, or misleading" representations. Tr. 596:18-23; ECF No. 83.

133. This is sufficient to establish a violation of the CFPA—the Bureau need not prove any consumers were actually deceived or relied upon the representation. *Cf. ECM BioFilms, Inc.*, 851 F.3d at 610-11; *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) ("It is well established [under FTC Act] … that proof of individual reliance by each purchasing customer is not needed."); *see also FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (holding that FTC did not need to prove reliance by each consumer to prevail on deceptive act or practices claim).

134. These representations are material and are not just "false in some technical sense." *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009) (citations omitted). Consumers may believe they will be sued when they receive a firm-signed demand letter on WWR's letterhead, and therefore may change their approach to the debt WWR seeks to collect. Tr. 105:17-106:6; Ex. 38 at 34 ("Because WWR is a law firm, oftentimes a consumer may assume that legal action will automatically be filed against them…"); Tr. 110:23-111:4; 112:5-10 ("Upon receiving these letters, certain consumers may have prioritized paying the debt because the law firm is in a better position to file suit than a collection agency.")

135. Further support for holding that WWR's representations are material is found in longstanding FDCPA case law. Indeed, as discussed in Section D(1)(c), courts have long recognized that a letter from an attorney or law firm is more likely to induce a consumer to pay

or prioritize a debt than one from a non-attorney debt collector. *See, e.g.*, *Lesher*, 650 F.3d at 1000; *Nielsen*, 636 F.3d at 635; *Avila*, 84 F.3d at 229; *Gonzalez*, 577 F.3d at 604.

136. The evidence establishes that WWR's demand letters made material representations that its attorneys reviewed consumers' files and sent the letter, and that these representations were likely to mislead customers acting reasonably under the circumstances. Accordingly, judgment is entered in favor of the Bureau on Count Three.

G. WWR failed to carry its burden of establishing any affirmative defense.

1. WWR failed to show that any of the Bureau's claims are time-barred.

a. The CFPA's three year discovery-based limitations period governs all of the Bureau's claims.

137. All of the Bureau's claims are subject to the three-year discovery-based statute of limitations provided by the CFPA. *See* 12 U.S.C. § 5564(g)(1).

138. The CFPA provides that "no action may be brought under [the CFPA] more than 3 years after the date of discovery of the violation to which [the] action relates." 12 U.S.C. § 5564(g)(1). It is plain that this limitations period applies to the Bureau's CFPA claims under Counts Two and Three.

139. This Court previously found "persuasive" the reasoning of another court that, when applied here, means that the CFPA's limitations period also applies to the Bureau's FDCPA claims (Count One). *Consumer Fin. Prot. Bureau v. Weltman, Weinberg & Reis, Co., L.P.A.*, No. 1:17-cv-817, 2017 WL 4348916, at *6-7 (N.D. Ohio Sept. 29, 2017) (discussing *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1380 (N.D. Ga. 2015) and *FTC v. CompuCredit*, No. 1:08-cv-1976, 2008 WL 8762850 (N.D. Ga. Oct. 8, 2008)). No additional facts or argument have been presented that undermine that position, so the Bureau's FDCPA claims are timely if its CFPA claims are timely.

b. WWR failed to present any evidence that the Bureau "discovered" WWR's violations more than three years before filing this action.

140. For the Bureau to have "discovered" a violation triggering the running of the statute of limitations, the Bureau "would have to be in possession of sufficient facts to file suit." *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, No. 15-CV-02106-RS, 2017 WL 3948396, at *10 n.22 (N.D. Cal. Sept. 8, 2017).

141. Here, WWR apparently intended to introduce evidence that the Bureau "discovered" WWR's violations when Richard Cordray became the Director of the Bureau. ECF No. 68 at 5-6; ECF No. 68-3 at 16 (Defendant's Requested Instruction No. 14); ECF No. 71 at 6-7. In pretrial documents, WWR suggested it would call Mr. Cordray to testify regarding knowledge of WWR's debt collection practices he supposedly acquired when he was Ohio Attorney General in 2009 and 2010. ECF No. 71 at 6-7. WWR then planned to argue that any knowledge Mr. Cordray acquired should be imputed to the Bureau when he joined the Bureau in 2011. *See id.*; ECF No. 68 at 5-6; Tr. 456:4-7 (WWR counsel stating that WWR's statute of limitations defense was "an argument under the law that Mr. Cordray … said this was fine, then became the head of the [Bureau]").

142. There is no evidence that Mr. Cordray had any relevant knowledge that could be imputed to the Bureau when he joined in 2011, and no evidence to find that the statute of limitations began to run at that time. Thus, even assuming that the knowledge an individual gains in one position can be imputed to a government agency when that individual joins the agency (an issue that the Court need not decide here), WWR has not met its burden to show that Mr. Cordray in fact had knowledge of the violations at issue here.

143. At trial, WWR opted not to call Mr. Cordray and presented no evidence that, as Ohio Attorney General, he had knowledge of the letters at issue in this case, let alone that he

acquired sufficient facts for the Bureau to file suit against WWR. WWR never submitted the demand letters at issue here to the Ohio Attorney General's office (*See* Tr. 277:7-12) and there is therefore no evidence suggesting Mr. Cordray knew WWR sent those letters. Further, there is no evidence that Mr. Cordray knew WWR's attorneys did not review individual consumer files prior to sending demand letters.

144. More broadly, WWR presented no evidence suggesting the Bureau discovered WWR's violations through any other means.[7]

145. Accordingly, WWR failed to prove by a preponderance of the evidence that the Bureau discovered any of WWR's violations more than three years prior to filing this action or that any portion of the Bureau's claims was untimely.

2. Lack of objection by state officials does not inoculate WWR from CFPA or FDCPA liability.

146. As set forth in Part (G)(1)(b), WWR did not present evidence that either the Ohio Attorney General personally or his Office were aware of the letters at issue in this case or WWR's procedures with respect to sending such letters.

[7] Even if WWR had presented evidence suggesting the Bureau discovered some of WWR's violations more than three years prior to filing this action, only those violations that occurred more than three years before the Bureau filed this action would be time-barred. *See Consumer Fin. Prot. Bureau v. Howard*, No. 8:17-cv-00161-JLS-JEM, slip op. at 4 (C.D. Cal. May 3, 2018) ("any violations of [federal consumer financial law] that occur within the relevant limitations period are not time-barred"). Each collection letter is a separate violation of the FDCPA and CFPA. *See Michalak v. LVNV Funding, LLC*, 604 Fed. App'x. 492, 493 (6th Cir. 2015); 12 U.S.C. § 5561(5) (A "violation" is "any act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law."). Accordingly, assuming for the sake of argument that the Bureau "discovered" that WWR sent violative letters by 2011, the Bureau cannot have "discovered" at that time that WWR sent violative letters in 2012, 2013, or 2014, because those violations had not yet occurred. *Cf. also Badaracco v. C.I.R.*, 464 U.S. 386, 391-92 (1984) ("Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the government.") (citations omitted).

147. WWR also did not present credible evidence that either the Ohio Attorney General personally or his Office knew that WWR attorneys did not review consumers' accounts prior to WWR sending different letters on the Ohio Attorney General's letterhead.[8] ¶¶ 142-143.

148. Even assuming arguendo that the Court could plausibly infer from the facts in evidence that the Ohio Attorney General believed WWR to be in compliance with the FDCPA[9] (Tr. 239:6-8) and therefore did not terminate Mr. Weinberg's special counsel appointment, such "representations or assurances by state or local officials lack the authority to bind the federal government" to interpretations of federal law. *United States v. Ormsby*, 252 F.3d 844, 851 (6th Cir. 2001) (citation omitted).

149. The approval of a state official "is irrelevant to the operation of [a] federal regulatory scheme." *See Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1144 (9th Cir. 1978).

150. The fact that the Ohio Attorney General's office never informed WWR that its practices—that were never before the Ohio Attorney General—did not "comply with the law," Tr. 239:3-5, has no bearing on whether WWR is liable for violating the FDCPA or the CFPA.

151. It is likewise irrelevant to the Bureau's enforcement of the FDCPA and CFPA that no official in any state in which a WWR attorney is licensed has expressed concerns that WWR's demand letters are misleading, Tr. 249:11-16, or that the Ohio Supreme Court has never determined that WWR attorneys misled consumers Tr. 249:8-10.

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[8] Nor did WWR present any evidence suggesting that debt collection lawyers in the Ohio Attorney General's Office—like WWR's attorneys—did *not* review individual accounts before sending demand letters to consumers. WWR also offered no legal or factual basis to allow the Court to conclude that the Ohio Attorney General's Office is subject to the FDCPA.

[9] The CFPA did not take effect until July 21, 2011, the final year that Mr. Weinberg served as special counsel to the Ohio Attorney General.

H. *Sheriff v. Gillie* is inapposite to the Bureau's claims.

152. Throughout this litigation, including in its Trial Brief (ECF No. 68 at 8-12), WWR has invoked *Sheriff v. Gillie*, 136 S. Ct. 1594 (2016) in arguing that its demand letters are not misleading because they do no more than truthfully convey that the letters are from a law firm.

153. *Sheriff* did not discuss, let alone disturb, the longstanding application of § 1692e(3) regarding attorney involvement by numerous appellate and district courts.[10] Thus, *Sheriff* does not immunize WWR from falsely implying in its demand letters that its attorneys reviewed consumers' files and were meaningfully involved in the collection attempts.

154. The question of whether a demand letter on law firm letterhead implies meaningful attorney involvement was not before the Court in *Sheriff*. Rather, in addressing alleged violations of other parts of the FDCPA, the *Sheriff* Court addressed whether a private law firm's use of the Ohio Attorney General's letterhead to collect the latter's debt in its capacity as special counsel falsely represented to consumers that the letter was from the Ohio Attorney General. *Sheriff*, 136 S. Ct. at 1600-01.

155. The Court observed that the letterhead truthfully identified the special counsel's affiliation to the Ohio Attorney General on whose behalf it sent the letters. *Id.* at 1601. Thus, the

[10] WWR has previously cited *Moorer v. U.S. Bank NA*, No. 3:17-cv-56, 2018 WL 587319 (D. Conn. Jan. 29, 2018), and *Daniels v. Solomon & Solomon, P.C.*, No. 17-0757, 2017 WL 3675400 (E.D. Pa. Aug. 25, 2017) in arguing that *Sheriff* precludes the Bureau's claims. The *Moorer* court, in evaluating the *pro se* plaintiff's allegation that the law firm defendant "falsely represented that it was acting in an attorney's capacity, when it was, in fact, acting as a debt collector," held only that the subject law firm did not misrepresent its affiliation with the trust for which it was collecting debt or use a name other than its true name on its demand letter. 2018 WL 587319, at *19. The court did not consider whether the demand letter falsely implied attorney involvement. And, unlike WWR's form demand letters, the demand letter in *Daniels* made no reference to attorneys and did not identify the defendant as a law firm. *See Daniels*, 2017 WL 3675400, at *4.

Court held that the letters were not false or misleading in violation of § 1692e of the FDCPA, noting that the FDCPA "does not protect consumers from fearing the actual consequences of their debts." *Id.* at 1603.

156. The Court's admonition that § 1692e "does not protect consumers from fearing the actual consequences of their debts" is inapplicable here. *Id.* First, WWR has acknowledged that, because WWR represents itself as a law firm in its collection letters, consumers fear a collections lawsuit will be filed against them. When WWR sends collection letters, no attorney has reviewed the consumer's file. And, despite the fact that WWR is a law firm, consumers receiving the letter are no closer to a lawsuit than if those consumers were receiving letters from non-law firm debt collectors.

I. The Bureau's action does not violate Due Process.

157. In its Answer, WWR asserted an affirmative defense that "[t]he Bureau's interpretation of the FDCPA and CFPA violates the Due Process Clause by retroactively enforcing rules not in effect at the time WWR communicated with debtors." ECF No. 6. Although it did not mention this defense in its Trial Brief (ECF No. 68), WWR elicited testimony at trial that the Bureau has not promulgated a rule defining meaningful attorney involvement. Tr. 248:9-249:3.

158. WWR's complaint that the Bureau is retroactively enforcing a new *interpretation* of the FDCPA fails.

159. There can be no doubt that WWR could reasonably foresee that the type of conduct it was engaged in could violate these statutes, which is all that is required. *See FTC v. Wyndham Worldwide, Corp.*, 799 F.3d 236, 256 (3d Cir. 2015) (holding fair notice satisfied "as

long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute.").

160. Prior judicial interpretations of a statute can provide fair notice of the conduct a statute prohibits. *United States v. Gills*, 702 Fed. App'x 367, 377 (6th Cir. 2017) (citing *Skilling v. United States*, 561 U.S. 358, 404 (2010)), *as amended* (Nov. 6, 2017), *cert. denied sub nom. Walker v. United States*, 138 S. Ct. 1172 (2018). As set forth in Part D, the Bureau's action is consistent with judicial precedent requiring that an attorney must be meaningfully involved in the collection of a consumer's debt for a demand letter implying attorney involvement not to violate §§ 1692e(3) and (10). This standard has been consistently applied and reinforced since the Second Circuit's decision in *Clomon* 25 years ago.

161. WWR's own Compliance Officer testified that she was familiar with several such cases, including *Avila*, *Nielsen*, and *Gonzalez*. Tr. 265:23-268:21. For example, she knew that the *Gonzalez* court "caution[ed] lawyers who send debt collection letters to state clearly, prominently, and conspicuously that although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity when sending the letter." Tr. 266:7-267:8. There can be no doubt that WWR could reasonably foresee that a court could construe its conduct as falling within the meaning of the FDCPA and CFPA.

162. Accordingly, this action does not violate WWR's due process rights.

J. Under the CFPA, the Court must impose civil money penalties for WWR's FDCPA and CFPA violations.

163. The CFPA authorizes the Court to order any appropriate equitable relief, including civil money penalties. 12 U.S.C. §§ 5565(a)(1) and (2); 12 U.S.C. § 5565(c)(1). An award of civil money penalties is mandatory for any violation of Federal consumer financial law. *See* 12 U.S.C. § 5565(c)(1) ("Any person that violates, through any act or omission, any

provision of Federal consumer financial law *shall* forfeit and pay a civil penalty…") (emphasis added)).

164. First-tier civil money penalties apply to "any violation of a law, rule, or final order" and may not exceed $5,639 for each day during which such violation occurs. 12 U.S.C. § 5565(c)(2)(A); *see also* 12 C.F.R. § 1083.1 (adjusting statutory amount for inflation). First-tier civil money penalties do not require scienter.

165. Here, the Bureau has requested first-tier penalties for each day during which WWR engaged in the unlawful practices—July 21, 2011, until the conclusion of the trial, May 3, 2018—adjusted for any mitigating factors the Court finds should be taken into account. *See* 12 U.S.C. § 5565(c)(3); *see also Nationwide Biweekly Admin., Inc*., 2017 WL 3948396, at *13 (imposing first tier penalties for every day during which the conduct occurred).

166. Because WWR violated both the FDCPA and the CFPA, the Court must therefore determine the appropriate penalty.

167. The Court advised the parties at trial that WWR would be able to put forth evidence in support of mitigation of civil money penalties after a decision on liability was rendered. Tr. 455:8-21.

168. Accordingly, the Court should schedule further proceedings regarding the statutory mitigating factors set forth in 12 U.S.C. § 5565(c)(3). At that time, WWR should be permitted to present evidence on those mitigating factors and the Bureau, in turn, should be afforded the opportunity to test and/or rebut any mitigating evidence WWR presents.

CONCLUSION

For the reasons stated above, Plaintiff the Bureau of Consumer Financial Protection (Bureau) respectfully requests that the Court adopt these proposed findings of fact and

conclusions of law, find that Defendant Weltman, Weinberg & Reis Co., L.P.A., violated the Fair Debt Collection Practices Act and §§ 1036(a)(1), 1054, and 1055 of the Consumer Financial Protection Act of 2010, enter judgment in the Bureau's favor on Counts One through Three of the Bureau's complaint, and, if appropriate, order further proceedings to determine the amount of civil money penalties to be awarded.

Dated: June 15, 2018

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 15, 2018, a copy of the foregoing Plaintiff's Proposed Findings of Fact and Conclusions of Law was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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