1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DUPRES, ET AL,	:	19-CV-6691(RPK)
	:	
Plaintiff,	:	U.S. Courthouse
	:	Brooklyn, New York
	:	
-against-	:	TRANSCRIPT OF
	:	ORAL ARGUMENT
	:	
	:	
HOUSLANGER & ASSOCS.,	:	September 29, 2021
PLLC, ET AL,	:	10:05 a.m.
	:	
Defendants.	:	

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11 BEFORE:
HONORABLE RACHEL P. KOVNER, U.S.D.J.

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APPEARANCES:

13

For the Plaintiffs: NEW YORK LEGAL ASSISTANCE GROUP
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17

18 For the Defendant: KAUFMAN DOLOWICH & VOLUCK LLP
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21

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25 Proceedings recorded by mechanical stenography, transcript
produced by Computer-Assisted Transcript.

1 (The following takes place via telephone:)
2 THE COURT: Good morning, everybody. This case is
3 Dupres, et al versus Houslanger & Associates, PLLC, et al.
4 It is 19 Civil 6691.
5 Could the parties state your appearances.
6 MS. RANUCCI: Good morning, Your Honor, this is
7 Jessica Ranucci from the New York Legal Assistance Group for
8 plaintiffs, and I'm joined by my colleague, Danielle
9 Tarantolo.
10 MS. TARANTOLO: Good morning, Your Honor.
11 THE COURT: Good morning.
12 MR. SCHER: Good morning, Your Honor, Brett Scher
13 from Kaufman, Dolowich & Voluck on behalf of of the
14 defendants.
15 THE COURT: Great, good morning.
16 MR. SCHER: Good morning.
17 MR. MARSHALL: Good morning, this is Adam Marshall,
18 I'm just announcing my appearance, Kaufman, Dolowich & Voluck,
19 for the defendants.
20 THE COURT: Great.
21 MR. HOUSLANGER: I'm sorry, I'm Todd Houslanger, I
22 am one of the named defendants listening in on the arguments.
23 Thank you.
24 THE COURT: Great. Good morning, everybody.
25 So, let's see, I've read the papers but I wanted to

1 afford you all the opportunity to add anything that you wanted
2 to add orally and I do have a few questions I think for you
3 all as well. Maybe the easiest way to handle this would be to
4 start with listening to what's on my mind, so let me pull up
5 the complaint so that I'm looking at it while I'm asking you
6 about this. Give me one moment.
7 (Pause in the proceedings.)
8 Okay. So, the way the complaint is structured is
9 just a few counts, let me go down to that section, the first
10 cause of action which alleges a violation of the FDCPA against
11 all defendants; there's a second cause of action that alleges
12 a violation of New York General Business Law Section 349, and
13 then there's third cause of action under New York Judiciary
14 Law against a couple of the defendants.
15 And it seems like -- and the briefing is a little
16 bit more structured as directed to particular kind of factual
17 allegations that plaintiff is making and whether the factual
18 allegations would be sufficient to state a claim and I guess
19 it is helpful for me to think of it in a claim by claim way,
20 so maybe I can start under 1692 -- maybe I'll talk about
21 specific subsections of 1692. So, 1692e prohibits a debt
22 collector from using false or misleading representations or
23 means in connection with the collection of a debt. It covers
24 material misrepresentations.
25 Defendants, are you alleging that plaintiffs haven't

1 adequately pleaded any actionable false, deceptive or
2 misleading representations, or are you just alleging that some
3 of their allegations don't rise to that level?
4 MR. SCHER: Your Honor, what we're seeking is
5 dismissal of all claims and I know for purposes of the motion
6 we broke it down into obviously the state law claims aside but
7 what we tried to do is break it down in terms of the two
8 classes of subclasses that the plaintiffs had broken out which
9 are referred to as the opposition class and the execution
10 class because I think it kind of lumps together two sets of
11 claims, the opposition class being the various theories of
12 FDCPA liability that plaintiffs have articulated or attempted
13 to articulate with respect to how the defendants opposed
14 motions to vacate that were filed in the state court, and then
15 we have the execution class which deals with the efforts that
16 were undertaken by the defendants to execute upon judgments
17 that had been entered previous by other law firms.
18 So, in trying to narrow down what we are seeking
19 dismissal on, what we're not seeking dismissal on, what we are
20 seeking dismissal on is essentially all of the FDCPA claims
21 except for, and I believe this is laid out in a footnote in
22 our reply, the claims that deal with the assertion, because it
23 is a factual based issue which we'll address at the summary
24 judgment stage, as to whether the defendants sent the
25 plaintiffs Soto and Tolentino a debt validation notice which

1 is a claim under 15 USC 1692g(a), and that's laid out in the
2 complaint in section -- in paragraph 331(e); and then the
3 other issue which is whether the defendants were required to
4 meaningfully review Soto and Tolentino's files before
5 commencing any of the judgment efforts with the exception
6 of the argument that we did raise in the motion which deals
7 with whether the FDCPA's meaningful review standard, which is
8 part of 1692e(3), whether that requires an attorney commencing
9 any post-judgment efforts to conduct what we have called --
10 characterized plaintiffs' allegations as essentially a
11 forensic review and analysis of a judgment that had been
12 obtained and not given the presumptive validity that the
13 courts, I believe it was Judge Sullivan in the *Kong* case that
14 said a judgment like that that had not been disturbed is
15 entitled to (audio drop) and then the other issue we're
16 dealing with on the motion is whether the FDCPA's meaningful
17 review standard is even applicable in an actively litigated
18 matter and that really applies to the opposition class claims,
19 so --
20 THE COURT: Okay.
21 MR. SCHER: -- I hope that clears that up.
22 THE COURT: On that last point, the meaningful
23 attorney review issue, and I guess I saw this in your brief
24 too, I just wanted to make sure I understand it. So, I
25 understand you to be challenging the 1692e claim based on lack

1 of meaningful attorney review, but I guess the language is,
2 "only to the extent that the claim is based on defendant's
3 alleged failure to review affidavits of service prior to
4 executing on the judgments." That's at 1 in your brief.
5 So, should I take that to mean there's no dispute
6 that some of what plaintiffs have alleged about lack of
7 meaningful review is sufficient for the motion to dismiss
8 stage; there is a dispute about whether some additional things
9 that plaintiffs have alleged, in particular the alleged
10 failure to review the affidavits of service is sufficient to
11 state a claim?
12 MR. SCHER: I think that is a fair characterization,
13 Your Honor.
14 THE COURT: Okay. So, I guess the question I have
15 for you is why isn't it enough then to say some of plaintiffs'
16 allegations are sufficient to state a claim under the FDCPA?
17 I mean there's a single FDCPA cause of action that alleges a
18 bunch of stuff, a lot of facts, the FDCPA claims starts in
19 paragraph 328, a lot of stuff alleged; why isn't it enough to
20 say they've alleged some facts which are sufficient to support
21 an FDCPA claim?
22 MR. SCHER: Well, Your Honor, I think it boils down
23 to that, you know, it's plaintiffs' way of pleading it, you
24 know, this could have been pled, you know, more succinctly in
25 terms of each one of these violations being a, you know, a

1 separate cause of action, in other words, violating the FDCPA
2 by doing this and then by doing that, but what plaintiff did
3 is to say you violated the FDCPA and here's nine separate
4 grounds on how you violated the FDCPA and I don't think it is
5 fair for defendants to have to defend a class action and we
6 run into issues, you know, now with discovery and one of the
7 things before Your Honor is an appeal from a ruling from Judge
8 Bulsara with respect to the scope of discovery because, you
9 know, by plaintiffs' wholesale putting all of these
10 allegations under one heading of FDCPA violations saying you
11 can't attack this particular part of my FDCPA claim even
12 though in and of itself that one sentence is enough to have a
13 viable cause of action if it's actually pled correctly and
14 sustainable.
15 So, therefore, we're put at a tremendous
16 disadvantage. We've been spending thousands and thousands of
17 dollars defending these claims and we think we have the right
18 to say, hey, look, this cause of action, you know, you can't
19 just say, well, you violated the FDCPA based on these ten
20 separate violations and you therefore cannot attack nine out
21 of the ten of them or eight out of the ten of them because
22 we've lumped them together into one cause of action.
23 THE COURT: Okay. Let me ask you about a couple of
24 the allegations about false and deceptive or misleading
25 statements that the plaintiffs have made. I think this is

1 with respect to Mr. Soto, there's the allegation that you said
2 for his debt, the debt in question is owed with respect to a
3 particular bank account and any and all restraints of bank
4 accounts on property, or garnishment of wages, resulted from
5 the proper execution of a judgment of this court lawfully
6 obtained and issued therefrom. And I think with respect to
7 Mr. Tolentino there's a similar statement about any and all
8 restraints of bank accounts or property, or garnishment of
9 wages, resulted from the proper execution of a judgment of
10 this court lawfully obtained and issued therefrom. And
11 obviously plaintiffs are alleging there wasn't actually a
12 valid judgment that resulted from the proper execution or
13 judgment of the court. Tell me what your response is to those
14 statements, to why those statements aren't false or
15 misleading?
16 MR. SCHER: Sure. This is the case that I was
17 referring to previously which is *Kong versus Strumpf*, a case
18 out of the Southern District of New York, 2018 U.S. District
19 LEXIS.
20 THE COURT: I think Judge Sullivan -- did that
21 address statements like this where you are just flatly
22 saying -- I mean I get the idea that executing on, you know,
23 trying to enforce a judgment, maybe you're entitled to rely on
24 this presumption of validity but this seems like an
25 affirmative statement that the judgment is valid; does *Kong*

1 involve a statement like that?
2 MR. SCHER: That's exactly it and what *Kong*
3 specifically says is that any judgment is presumptively valid
4 until it is reversed or set aside and here distinguishing our
5 case from the many cases that plaintiff did cite, when that
6 statement was made the judgment was still valid, it had not
7 been set aside. The motion, you know, that was made, that
8 statement was made and contained in an attorney affirmation in
9 opposition to a motion to vacate a valid judgment.
10 The cases that are cited by plaintiff, I believe
11 *Polanco* and *Okyere* and I think *Hunter* all dealt with
12 situations where there were attempts to collect on a debt that
13 had already been -- either the default, it had already been
14 set aside or the judgment had already been vacated and the
15 attorneys had attempted to collect upon it after that.
16 So, I think the big distinction between our case and
17 these other cases is that you have a statement made by an
18 attorney saying, look, based on the fact that this is a
19 judgment that has been on the books for, I think in every one
20 of the cases over a decade had not been disturbed, it's
21 entitled to a presumptive validity, so therefore there's
22 nothing wrong, nothing is false or misleading in saying that
23 our efforts to collect on this debt were based on a valid
24 judgment because it had not been set aside.
25 THE COURT: I see. But this is a statement they are

1 making in opposition to a motion to vacate the judgment,
2 right?
3 MR. SCHER: That is correct.
4 THE COURT: So there's just a weird -- obviously at
5 that point you've got somebody coming into court and saying
6 this is actually not a valid judgment and it seems like you
7 are making -- so, notwithstanding that there was a judgment
8 obtained, they are trying to set it aside and it seems like
9 you're saying affirmatively in opposition to that, no, the any
10 and all restraints resulting from the proper execution of a
11 judgment of this court that was lawfully obtained and issued,
12 doesn't really sound like there's a presumption and you
13 haven't met your burden of setting that presumption aside. It
14 sounds like an affirmative representation that the judgment
15 was lawfully obtained.
16 MR. SCHER: You know, if you read the affidavit --
17 sorry, the affirmation that was submitted in each of those
18 cases, it goes through the history and it specifically says,
19 you know, that it's done on information and belief and I think
20 more importantly it specifically says -- you know, the
21 challenge in those motions to vacate is based on the plaintiff
22 saying I wasn't served with these papers ten, fifteen years
23 ago and, you know, I guess the argument that we have made is
24 that this is an attempt to, by shifting the burden back to the
25 creditors and the creditors' counsel. When motions to vacate

1 are filed in the state court proceedings plaintiffs and
2 plaintiffs' counsel know that, and they acknowledge it in the
3 complaint, is that it takes the New York court system up to
4 ten weeks to retrieve the file from storage to get the
5 affidavit of service to, you know, give both the plaintiff,
6 our plaintiff or in those underlying cases the
7 debtor-defendant the ability to challenge the affidavit of
8 service.
9 So, when the affirmation goes in which is, you know,
10 in response to an order to show cause which is usually on ten,
11 fifteen days notice, everybody knows that there's not going to
12 be the ability to get the affidavit of service and that's why
13 the statements that are made are based upon information and
14 belief that there is a presumption in the validity of service
15 and that the clerk would not have entered a judgment against
16 this person without having reviewed the affidavit of service
17 and the statement of facts as constituting the default and the
18 debt and therefore that we are entitled as the attorneys that
19 are now trying to collect on this and the judgment creditor is
20 entitled to rely on the fact that there is this presumption of
21 validity by the court process where these judgments are
22 entered.
23 They're not entered blindly, obviously they're
24 reviewed by the court system and one of the -- you know, to
25 get a default judgment under 3215 which is what happened a

1 decade prior ago was that there was an affidavit of service
2 that was presented to the Clerk's Office along with the
3 request for an entry of judgment and it was granted based upon
4 that.
5 So, when the attorney comes in now, Mr. Bryks in our
6 case, and makes these statements, it is based on that
7 presumption and more importantly he expressly acknowledges in
8 each one of those affirmations that they do not possess the
9 affidavit of service. So, he's not making any representation
10 about what's in the affidavit of service, he explains to both
11 the court and to the plaintiffs that at this point they don't
12 have the affidavit of service and that's because of the
13 constraints of the court system, the New York City court
14 system which places files older than three years into archives
15 which unfortunately takes over ten weeks to get back,
16 sometimes longer to get back.
17 THE COURT: I appreciate your kind of focusing me on
18 the particular statements in the affidavit. I'm looking at
19 one of the -- I guess in the affirmation, I'm looking at one
20 of those which is at 36-10, this is the Tolentino one; so, it
21 seems like there are some statements that are made just the
22 way you describe which is upon information and belief, and I
23 understand your argument about those statements, it's kind of
24 an interesting issue. I know the plaintiffs disagree with the
25 kind of view that the information and belief caveat is

1 sufficient but I understand the argument that all you are
2 saying is that you think it is true based on the information
3 you have now and that is that it is a true statement with
4 respect to what you thought then based on the information that
5 you have.
6 So, let me move on from those statements, which are
7 in paragraphs three and five. The one that I am the most
8 focused on is in paragraph eight and it doesn't have any kind
9 of caveat like that and it doesn't say presumptively based on
10 the fact that there is a valid judgment we think that this is
11 true in the way that the information and belief statements
12 might be read to say, any and all restraints of bank accounts
13 on property -- I assume that's supposed to be or, bank
14 accounts or property, or garnishment of wages, resulted from
15 the proper execution of a judgment of this court lawfully
16 obtained and issued therefrom. So, what about that?
17 MR. SCHER: I think that the statement that's
18 contained therein is valid because of, and it comes from the
19 following sentence which is: There is a presumption of
20 regularity that accompanies the filing of documents that are
21 accepted by the clerk and the clerk's review thereof and
22 issuance of a judgment.
23 So, they're saying that those two sentences, I don't
24 think you can read one without the other, you know, it is
25 explaining that the judgment -- the process that goes into

1 getting a judgment is what gives Mr. Bryks the ability to say,
2 hey, look, this is a judgment that was entered, it's been
3 entered, it's been sitting on the books for over a decade, I
4 think this one had been 13 years it had been undisturbed and I
5 think it all ties back to that presumption of validity which
6 gives him the ability to say this was the proper execution on
7 the judgment because it has sat undisturbed for all these
8 years and it was clearly -- it could not have been lawfully
9 obtained without the court's approval and blessing by
10 acknowledging that the affidavit of service was filed and
11 notice constituting whatever the debt was and the grounds for
12 the default were not entered with the court.
13 THE COURT: Okay. Let me ask you about one
14 additional set of misrepresentations or alleged
15 misrepresentations that plaintiffs maintain and maybe your
16 responses would be kind of the same but I wanted to ask you
17 about that. So, plaintiffs are alleging that before the state
18 court litigation starts you sent a restraining notice to
19 Mr. Soto's bank saying he owes a debt and you issued a notice
20 of garnishment, an income execution statement that
21 Mr. Tolentino owes a debt; are those statements that are
22 falsely representing the legal status of the debt given the
23 allegation here is actually there was not a valid debt owed or
24 why not?
25 MR. SCHER: Well, I think the same logic applies --

1 THE COURT: Okay.
2 MR. SCHER: -- to the affirmation, I think it is
3 probably the same counter-argument, Your Honor.
4 THE COURT: Okay. Let me turn to Section 1692f.
5 So, the provision prohibits using unfair or unconscionable
6 means to collect or attempt to collect a debt. My
7 understanding of the case law is that you state a claim under
8 that provision if you plead that the defendant attempted to
9 collect an amount that was not authorized by agreement or
10 permitted by law, and here I take it the plaintiffs are
11 alleging you are trying to -- you were trying to collect a
12 debt that you weren't authorized to collect because the
13 judgments weren't valid and because plaintiff had not received
14 a notice of assignment, what about that?
15 MR. SCHER: With respect to the first part of what
16 Your Honor said, I think the same argument applies to
17 attempting to collect an amount that they weren't entitled to
18 collect, I think that argument is the same as what we just
19 went through in terms of having a valid judgment on file and
20 so I don't think that there's any unfair, unconscionable
21 practice that was undertaken to do that, to collect on that.
22 With respect to the issues with respect -- I think
23 plaintiff raises actually two things, one is the attempt to
24 collect without filing a notice of assignment of the debt and
25 then the other argument is that they also -- I think they

1 claim a violation under 1692f by attempting to collect on the
2 judgments without filing and serving a consent to change
3 attorney, so I'm happy to run through both of those.
4 With respect to the filing and serving of a formal
5 assignment of the judgment, I think the courts have come down,
6 if you break it down into two components; with respect to the
7 filing aspect of it, I don't think plaintiffs' argument finds
8 any support in any of the courts, including some of the cases
9 that they rely upon. The courts have said that the
10 identifying of a notice of assignment is not a prerequisite to
11 judgment enforcement and it is not required under the FDCPA,
12 that's what we call *Musah* 1, there's two *Musah* cases, but
13 that's *Musah* 1, as well as *Strobel.* Both of those cases stand
14 for the very clear proposition that CPLR 1519(c), which
15 governs the filing of notices of assignment, is not for the
16 benefit of the debtor and, therefore, it does not give any
17 right under the FDCPA to bring a claim against the debt
18 collector for not filing the notice of assignment.
19 With respect to serving the plaintiff with the
20 notice of assignment, we acknowledge in our papers that there
21 are cases that have gone in plaintiffs' way and in terms of
22 doing that, and we think that there's a strong argument to be
23 made that the courts -- those courts that have gone that way
24 have done a 180 with the case law which I don't think flies in
25 the sense that you have --

1 (Mr. Scher drops off the line.)
2 (Pause in the proceedings.)
3 MR. MARSHALL: Your Honor, this is Adam Marshall
4 also from Kaufman, Dolowich, I will alert Mr. Scher that his
5 audio dropped out if you'll just excuse me for a moment.
6 Thank you.
7 (Pause.)
8 MR. SCHER: Hi, it's Brett Scher. Can you hear me
9 again?
10 THE COURT: Yes.
11 (Whereupon, the record is read.)
12 MR. SCHER: Okay. Picking up where I left off, you
13 have the courts finding that the FDCPA is not violated with
14 respect to a claim that requires -- that is based on filing of
15 a default -- sorry, Your Honor, someone just called me telling
16 me my audio dropped out a little late.
17 But, anyway, so, with respect to, you know, the
18 courts have held that you can't base a violation on failing to
19 file a notice of assignment of a debt. However, those courts
20 seem to find that the failure to serve the plaintiff with that
21 same document could give rise to a potential FDCPA violation
22 and we would argue that that is based on a misinterpretation
23 of the New York Court of Appeals holding in the *Tri City*
24 *Roofers* case, and the logic that was implored by the Court of
25 Appeals in *Tri City Roofers* was that what you're avoiding --

1 attempting to avoid is a double payment, you don't want to put
2 the debtor in a situation where they are paying two different
3 creditors, and that's not something that is alleged here or
4 that happened here. You don't have a situation where these
5 individuals say, hey, I already paid this debt to somebody
6 else and now you're coming after me and I am entitled to this
7 notice of assignment protection, and even if plaintiffs are
8 correct and the court goes with these, with the cases that
9 have held that notice is a requirement here, the bigger issue
10 that you run into is that, first of all, with respect to
11 Tolentino, Tolentino did receive notice, that's in Exhibit H
12 to our motion I believe, which is the income execution which
13 expressly notes on its face that the current creditor as the
14 assignee to whom this is debt is owed is Libra Equities, LLC,
15 so Tolentino has no argument.
16 THE COURT: Is that going to be a summary judgment
17 issue? That seems like it's not -- that seems like a
18 controverted question that wouldn't be a motion to dismiss
19 question.
20 MR. SCHER: I don't think it is controverted. He
21 admits that he receives it. He admits it in the complaint and
22 it's actually attached to his order to show cause that he
23 files with the court seeking to vacate. So, he did receive
24 the document, I don't think there's any dispute about whether
25 or not he received it, so I don't think it is a summary

1 judgment issue, it's in the pleadings.
2 THE COURT: And this is just a document that in the
3 course of indicating that his income is going to be garnished
4 in some way says that we're the assignee; is that really the
5 kind of notice that is contemplated under the statute, kind of
6 anything that contains a mention of being the assignee is
7 sufficient?
8 MR. SCHER: That's the reading of the case law,
9 that's from *Musah* and Baltazar, all cases relied upon by
10 plaintiff. There's no formal notice that is required under
11 the FDCPA, it just simply needs to give, quote unquote, notice
12 of who the assignee of the judgment creditor is. So,
13 leapfrogging from that part, there's also something that
14 wasn't addressed by these other courts which is materiality,
15 you know, any perceived deception or, you know, or misleading
16 about not regarding -- sorry, not receiving the notice of
17 assignment is really not material in a case like this.
18 If plaintiffs' argument is taken to its logical
19 conclusion that you have to give notice of assignment before
20 you attempt to execute it, it could be literally delivered,
21 you know, 30 seconds before or simultaneously with these
22 judgment executions. So, and the judgment executions
23 obviously have the information on them. So, to the extent
24 that there's an argument that this materially impacted the
25 debtor's ability to dispute the debt, there's just nothing

1 there because receiving it any bit earlier is not going to
2 change, you know, if it comes in a minute before, there's no
3 requirement under the FDCPA that you have to receive notice of
4 assignment, you know, 30 days before you attempt to collect on
5 it or a year before, there's nothing like that.
6 THE COURT: I guess I hope when plaintiffs' counsel
7 speaks she'll tell me if I'm misunderstanding the claim but I
8 had thought the core alleged misrepresentation is just that we
9 have a valid judgment essentially and the claim is that that's
10 false because you don't have a valid judgment because you
11 haven't fulfilled these prerequisites to enforcement, you
12 haven't completed the notice of assignment. It feels like
13 that kind of thing that has got to be material, right, just in
14 the sense of the Second Circuit has spoken about materiality
15 as being the kind of thing that would -- I'm loosely
16 paraphrasing -- that would be important or relevant to the
17 consumer, right, like whether the debt is valid or not seems
18 like it would definitely fall in that category. Why isn't
19 that the kind of misrepresentation I should be thinking about
20 or why isn't my analysis of materiality right?
21 MR. SCHER: Well, I think not to jump all the way
22 back but that all goes back to, when you talk about
23 materiality it goes back to the presumptive validity of the
24 debt itself.
25 THE COURT: I think a lot turns on the *Kong* case and

1 this presumption. Let me ask you a little bit about that. Do
2 you have any case other than *Kong* that resolves FDCPA cases
3 other than in reliance on this presumption in the way that
4 you're suggesting or is *Kong* kind of the core case for you?
5 MR. SCHER: *Kong* is the core case and I do recall,
6 I'm looking for my brief, but I know that *Kong* actually -- I
7 believe Judge Sullivan kind of did a survey of FDCPA cases
8 throughout the country for that premise but they're really not
9 addressed --
10 THE COURT: So, in *Kong*, I'm looking at it as we
11 speak and I've read it before, it seems to me like in *Kong* the
12 plaintiff's core claim is basically you lacked the legal right
13 to enforce this default judgment because it was in fact
14 invalid, and in response to that Judge Sullivan is invoking
15 this presumption of validity saying the mere sort of attempt
16 to garnish plaintiff's wages through an income execution
17 doesn't suffice, and I guess I'm looking, in my Westlaw it is
18 on page three.
19 Here plaintiffs challenge the validity of the
20 default judgment in July of 2016, it wasn't vacated until
21 later after the conduct that's at issue. Accordingly,
22 defendants issued the income execution on the basis of a
23 presumptively valid judgment that had been duly issued by the
24 civil court. Without more plaintiff cannot show that
25 defendant's attempts to collect the then valid judgment was

1 unfair or deceptive under the FDCPA.
2 The reason I'm focusing on that language, it
3 suggests to me that what Judge Sullivan was dealing with is
4 the question of whether just the income execution on a
5 judgment that nobody has challenged is deceptive or misleading
6 or actionable under the FDCPA and it feels that to me like
7 your claim goes one step further in that you are saying we
8 made a bunch of statements in our opposition papers in the
9 state court and those statements are challenged. I don't
10 think that was at issue in Judge Sullivan's case in *Kong*. So,
11 there are specific statements that are being challenged and
12 you're saying we're entitled to rely on the presumption of
13 validity, even if those statements turn out to be mistaken we
14 are entitled to the rely on the presumption of validity to
15 defend those statements.
16 What do you think about that, is that the right way
17 of understanding it, is it the wrong way of understanding it,
18 what do you think?
19 MR. SCHER: I think it kind of segues into one of
20 the other arguments that we raised in the motion which talks
21 about, and that's from the Second Circuit's opinion in *Simmons*
22 and *Gabriel* which talks -- we're straying into this area of
23 the federal courts kind of overseeing statements and arguments
24 made in a state court proceeding where there are guidelines
25 and rules in terms of relief that can be sought; for example,

1 if plaintiffs, you know, and you have -- sorry, and you have
2 the court's protection.
3 So, if a state court judge had read the statements
4 that were made by Mr. Bryks as being anything more than they
5 were, the motions could have been denied on the spot and the
6 court could have said, sorry, this isn't enough, you know, we
7 dictate how our courts run, meaning the state court system,
8 and in turn could have, you know, if plaintiffs -- in many of
9 these cases we have individuals who were represented by
10 attorneys, volunteer lawyers for the day that assisted them at
11 these hearings. If these statements were so presumptively
12 false or misleading, why wasn't this brought to the attention
13 of the presiding judge in seeking to have the motions to
14 vacate granted, why wasn't there a motion for sanctions
15 brought for making statements that were false in a pleading,
16 because they weren't, because, you know, this was -- you know,
17 the state court system is there and the court officers and the
18 court system, the judges understand what goes into entering a
19 default judgment and the presumptive validity that we keep
20 talking about and then ultimately the enforcement efforts that
21 come after it and so I think when you -- yes, we have a little
22 bit more than you have in the *Kong* case but I think here you
23 start straying into, because we're talking about ongoing court
24 proceedings, not just the executions anymore and you're
25 talking -- and plaintiffs' claims are based upon statements

1 that are made in opposition to a motion that's filed in state
2 court, I think you're straying -- you know, the plaintiffs are
3 straying, you know, far into the areas where the courts,
4 including the Second Circuit, are saying that the FDCPA is
5 really not meant to govern because you're in active litigation
6 in a state court proceeding.
7 THE COURT: Okay. You've been very helpful
8 answering my questions. If there's anything else you wanted
9 to add on any of these claims that I haven't asked you about,
10 feel free and then I'll turn the floor over to your friend on
11 the other side.
12 MR. SCHER: So, I just wanted to clarify just for
13 purposes of the record that the plaintiffs have conceded that
14 with respect to plaintiff Viruet that the FDCPA claims are
15 time-barred, so there's no argument with respect to that.
16 And then the only other thing I just wanted to
17 quickly touch on was the state law claims that go along with
18 it. In terms of the Judiciary Law 487 claim, I think we can
19 easily wipe out all of the claims that are related to what
20 they refer to as the execution class because --
21 THE COURT: One question to clarify just to make
22 sure I'm understanding correctly; has there been a class
23 certified or not?
24 MR. SCHER: There has not.
25 THE COURT: Okay.

1 MR. SCHER: It's pled in the complaint but there's
2 no class certified at this point.
3 So, with respect to the 487 claim, any of the claims
4 that are being advanced, and maybe it's better to not use the
5 word execution class but execution based claims, so any of the
6 claims that deal with any potential violation of Judiciary Law
7 487 based upon the efforts that were undertaken by the
8 defendants to execute upon these judgments, those claims kind
9 of go out the window with the New York Court of Appeals
10 holding in the *Bill Birds* case which says that Judiciary Law
11 487 only applies to pending judicial proceedings. So,
12 anything that predates the filing of those motions to vacate,
13 those cannot constitute a violation of Judiciary Law 487.
14 With respect to the opposition claims, those
15 opposition claims, and obviously at that point it is a pending
16 proceeding, but we would argue that, one, as we talked about
17 before, that there was no deceit or collusion which you need
18 or an intent to deceive but, more importantly, the Judiciary
19 Law 487 requires a heightened element of extreme or outrageous
20 and egregious conduct which is not pled here, as well as
21 actual damages. Again, there's no damages that flow from the
22 opposition to the motions to vacate, nothing happened, you
23 know, ultimately plaintiffs were not harmed by the statements
24 in those motions to vacate.
25 With respect to the General Business Law claims,

1 those again the same type of issue. With respect to -- first
2 of all, all the allegations in meaningfully attorney review
3 don't apply. The GBL is a statute that deals with false and
4 deceptive conduct, it doesn't deal with putting in opposition
5 papers in exchange -- sorry, in response to a motion.
6 Likewise, there's no requirement, you don't violate the GBL by
7 not meaningfully reviewing a document before it goes in.
8 THE COURT: Let me just make sure, so on the state
9 law claims it seemed to me like the arguments here are fairly
10 linked to the claims on the FDCPA because the statute states
11 deceptive acts or practices with certain requirements,
12 deceptive acts or practices or representations or omissions
13 likely to mislead a reasonable consumer acting reasonably
14 under the circumstances.
15 So, it feels like, and maybe your argument goes to
16 some of plaintiffs' additional allegations suffice, but it
17 seems like plaintiffs are pleading you made false or
18 misleading statements that would mislead a reasonable consumer
19 acting reasonably under the circumstances and we talked about
20 what the statements are in the context of the FDCPA; is your
21 response there the same kind of nature of the response that
22 they weren't false or misleading statements because they were
23 made in reliance on a presumption of validity or is there
24 something specific to GBL about those statements that you
25 wanted to point out?

1 MR. SCHER: Sure, above and beyond distinguishing
2 the fact that there is no meaningful attorney review or
3 meaningful attorney involvement standard under the GBL, the
4 issue -- I guess what distinguishes the GBL or our GBL
5 arguments above and beyond the there was no false or
6 misleading statements is that the GBL, unlike the FDCPA which
7 has statutory damages, the GBL does require a showing of
8 actual damages and so to the extent that there was some kind
9 of statement in the affidavit that was put in -- the
10 affirmation, I apologize, the affirmation that was put in by
11 Mr. Bryks, it did not cause any actual damages, the plaintiff
12 did not pay any money because of the statements that he put in
13 there. It was -- you know, if they had to -- any money that
14 they had previously paid was, you know, the only proximately
15 caused link would be to the attorneys that entered the
16 judgment against them ten years ago, ten plus years ago.
17 THE COURT: Well, maybe you can help me with the
18 actual damages point a little bit. I mean I take your point
19 that ultimately the judgments get vacated, the lawsuits are
20 dismissed but I think plaintiffs are pleading they suffered
21 emotional harm as a result of the misleading representations
22 and based on the stress and anxiety and then they're
23 suggesting that they had to spend time and money to defend
24 against lawsuits based on the misrepresentations, so tell me
25 about your response to those.

1 MR. SCHER: Well, so the argument is plaintiffs did
2 not suffer any proximately caused damages from these alleged
3 misstatements in the opposition papers. They had already
4 filed their motions to vacate, so I think that was what we
5 were trying to get across in our arguments that any damages
6 that flowed flowed from the entry of judgment against these
7 individuals years ago and not based on a statement that was
8 put in the opposition to a motion to vacate. And I think that
9 there's also an issue with respect to (audio drop) because,
10 again, plaintiffs have pled that there's a GBL violation from
11 every action that was undertaken, and this is what I was
12 talking about at the very beginning of the argument where
13 plaintiffs were focusing, yeah, so, basically you did this and
14 you violated the GBL, you did that, you violated the GBL, so
15 we tried to go through each one of the aspects of the claim
16 and talk about why it could not lead to a violation.
17 For example, they referred to the fact that by
18 serving notices -- failing to serve notices of the assignment
19 of the judgment they were damaged under GBL 349, and we've
20 shown that both Tolentino and Viruet acknowledged receiving
21 the notice of assignment so they couldn't have been harmed by
22 it, and then with respect to Dupres and Soto, their issue is
23 that, and we cited to, I think it is the *Wurtzburger* case
24 which says you can't have a GBL 349 claim based on being
25 deceived by something you never saw.

1 So, plaintiffs, they claim that they never received
2 the notice of assignment so they can't be -- you can't have a
3 claim of GBL by omission, a GBL violation by omission; that's
4 the *Douyon* case which we cited. So, since there was no double
5 payment, they didn't pay anything that they were not supposed
6 to pay, they don't have the actual damages. The emotional
7 distress component I think is -- it can be pled to the FDCPA.
8 I don't believe you can get GBL emotional distress damages.
9 THE COURT: Okay, great, thank you. That's very
10 helpful.
11 Let me turn the floor over to counsel for plaintiff.
12 I have a couple of questions I wanted to ask, maybe I'll ask
13 those at the outset and give you a chance to respond if that's
14 all right.
15 Do you agree, just with respect to Mr. Viruet,
16 there's no question that his claims are time-barred and so the
17 FDCPA claims, as distinct from his state law claims, should be
18 dismissed?
19 MS. RANUCCI: Correct, Your Honor.
20 THE COURT: Okay.
21 MS. RANUCCI: We agree that the FDCPA claims are
22 time-barred for the one-year statute of limitations.
23 THE COURT: Okay. And then I'm familiar with some
24 of the Judiciary Law stuff, so maybe you can help me
25 understand the basis for the claim. So, Section 487 requires

1 the attorney or counsel to be guilty of any deceit or
2 collusion or consent to any deceit or collusion with intent to
3 deceive the court or any party. So, here I think the course
4 of conduct that you are alleging is basically there were a
5 bunch of representations and conduct that stemmed from
6 basically they buy these judgments allegedly, they don't do
7 review of the underlying case file and then they go and say
8 we believe -- well, they say these are valid judgments when in
9 fact they haven't reviewed the underlying documents so they
10 don't know whether they are or not, they haven't done adequate
11 review. That's I guess what I'm reading your core theory to
12 be.
13 I'm wondering how you get from that conduct to it
14 tends to deceive the court or any party, and I know we are at
15 the motion to dismiss stage so this can be kind of statements
16 in pleadings or statements that raise an inference of intent
17 to deceive the court or a party, but give me kind of what your
18 best material is to say that you've adequately pleaded they
19 had intent to deceive the court or a party through the
20 statements that they made.
21 (Continued on next page.)
22
23
24
25

1 MS. RANUCCI: Thank you, your Honor.
2 I believe that there are a number of allegations in
3 our complaint that it draw inferences in favor of our motion
4 to dismiss. We would support the finding of that intent, and
5 a lot of these include, I would say, the factual allegations
6 around the bad quality of these judgments and the numerous
7 problems that they have.
8 So the complaint outlines, for example, that three
9 of the four named plaintiffs have their judgments obtained
10 about a prior law firm, Mel Harris, it's defunct and the
11 reason it's defunct is that it was sued in a similar service
12 class action that went up to the Circuit and eventually
13 settled for $60 million.
14 Defendants were well aware of that case. They're
15 well aware that -- they either knew that that was a law firm
16 underlying the plaintiffs' cases, or they were just so
17 purposefully blind to that fact, I think, as to show intent.
18 And that is just one example of facts here but there's a
19 number of facts in the complaint that show that defendant
20 intentionally engaged in deceit by engaging this course of
21 conduct because they knew or should have known, essentially,
22 about the widespread defects.
23 THE COURT: Okay. Thank you for that presentation.
24 Defendants, and be I'd happy to turn the floor over to you to
25 say anything you want to respond to about those claims.

1 MS. RANUCCI: Your Honor -- sorry, go ahead.
2 MR. SCHER: I'm sorry. I misspoke. Sorry.
3 MS. RANUCCI: Thank you, your Honor.
4 I think that we largely agree with your
5 characterization of the FDCPA law as you spoke to defendants
6 and I don't think there's anything that I want to clarify at
7 this time.
8 THE COURT: Okay.
9 Can I ask you one factual question? There was this
10 point about notice of assignments and whether several, I
11 guess, several of the plaintiffs here had received notices of
12 assignment and what is the state of the record on that from
13 your perspective?
14 MS. RANUCCI: Right. So there is no disagreement
15 factually or pleadings that two of the four named plaintiffs,
16 in fact, receive executions from defendants, I believe, I
17 could check my notes. Either both income executions or one
18 income execution and one bank inquiry. And I believe if I'm
19 understanding defendants correctly their argument is that
20 execution itself can suffice as a notice of assignment. And
21 our legal position is that it can't for two reasons. Both
22 as, you know, from a formal perspective collecting without
23 having sent a notice of assignment cannot itself be the
24 notice of assignment. Execution of the notice of the
25 collection it was the document collecting from the plaintiff.

1 And that also can't be the notice that predated the
2 collection and, therefore, made the collection lawful.
3 I think from a second more pragmatic reason, the
4 importance here of the notice of assignment is not just a
5 technical one. It's really important to these judgments have
6 been sitting around as defendant said for decades and
7 plaintiffs were completely unaware of them. They were
8 unaware of them because they didn't get a notice of
9 assignment because they didn't get a consistent attorney,
10 didn't get served in the first place as you know.
11 And it was that total lack of awareness with the
12 judgment that put them in such a bad position where they had
13 to -- at the time they got the wage garnishment and bank
14 interest rate, in fact, their account was frozen or the
15 employer had already been notified about the debt. And so,
16 it put them at a disadvantage where their backs were against
17 the wall. Whereas, if they had been notified at any point
18 prior, they could have diligently taken their time and
19 options potentially consult a lawyer of financial advisor and
20 try to figure out their steps when they had not had their
21 back against the wall with coercive execution.
22 THE COURT: Thank you.
23 Mr. Scher, I don't know if there is anything you
24 want to say by way of brief rebuttal on the judiciary law
25 complaint. I would be happy to give you the floor if you do.

1 MR. SCHER: Sure. Just a quick response.
2 The argument I know plaintiffs' counsel raised the
3 issue of this *Sykes* case and the fact that the plaintiffs,
4 you know, that the three out of the four were the judgments
5 were obtained by this Mel Harris Law Firm. That argument was
6 raised by the plaintiffs in the *Baltazar* case and rejected
7 that somehow there was this heightened scrutiny that needed
8 to be applied just because that the law firm that had to end
9 up paying the judgments was part of *Sykes*. And most notably,
10 is that these plaintiffs were not part of the *Sykes* case. So
11 any findings that there were, and *Sykes* was a settlement not
12 a judgment. But any finding that was in part of that *Sykes*
13 case is not applicable to the plaintiffs in this case.
14 And with respect to the earlier disclosure of the
15 notice of assignment, it goes back to what I had mentioned
16 previously that there is no requirement of the FDCPA as to
17 how much in advance plaintiffs, you know, that argument
18 really is just based on speculation that it could have been
19 sent out a year earlier, two years earlier, or two minutes
20 earlier that they would have been able to, you know, get
21 their affairs in order and talk to a financial planner. I
22 think that that case, that renders that argument kind of
23 implausible.
24 Thank you.
25 THE COURT: Okay. Thank you.

1 I appreciate your help with the issues in this
2 case. I think there are some tricky issues in this case, but
3 I intend rule on the motion to dismiss, and it seems that
4 everybody is in agreement that Mr. Viruet's claims under the
5 FDCPA are barred by the statute of limitations, and so, I
6 intend to dismiss those claims.
7 I also intend to dismiss the claims of Ms. Dupres
8 based on her relief and deny the motion to dismiss with
9 respect to the remaining claims.
10 So let me just explain a little bit.
11 Federal Rule of Civil Procedure §12(b)(6) directs
12 the Court to dismiss a complaint that fails to state a claim
13 upon which relief that can be granted. To avoid dismissal on
14 that basis, a complaint must state a claim to relief that's
15 plausible on it's face. The facial plausibility standard is
16 not akin to a probability requirement, but it requires a
17 plaintiff to allege sufficient facts to enable the Court to
18 draw the reasonable inference that the defendant is liable
19 for the misconduct alleged.
20 A well-pleaded complaint may proceed even if it
21 strikes a savvy judge that actual proof of the facts alleged
22 is improbable, and that a recovery is very remote and
23 unlikely.
24 In evaluating the motion to dismiss under Rule
25 §12(b)(6), I accept all the facts that are alleged in the

1 complain as true and I also may consider the documents that
2 are to the complaint or incorporated in it by reference or
3 integral to the complaint.
4 And in that discussion, I'm basically relying on
5 *Iqbal* and *Twombly* and a Second Circuit case that discusses
6 incorporation by reference.
7 Okay. So let me start with Ms. Dupres.
8 Defendants had moved to dismiss her complaint on
9 the ground that she signed a release of her claims. I can
10 consider the release on a motion to dismiss because it's
11 integral to Ms. Dupres' claims about documents integral to
12 the complaint where the complaint relies heavily on its terms
13 and effect.
14 Here, Dupres does not dispute that she signed a
15 release, a fact that she herself alleges in the complaint and
16 the release is integral to her ability to pursue her claims.
17 And some cases I'm relying on are: *Sira v. Morton*,
18 380 F.3d 57, 67. 2d Circuit. 2004. *Pesserillo v. National*
19 *Grid*, 78 F. Supp. 3d 551, 554. E.D.N.Y. 2015. *Westbrooke*
20 *v. Bellevue Hospital. Center.*, 2018 WL 4189514, at *3.
21 Here, I'm quoting from a case, "A valid release
22 constitutes a complete bar to an action on a claim which is
23 the subject of the release... A release may be invalidated,
24 however, for any of the traditional bases for setting aside
25 written agreements, namely, duress, illegality, fraud, or

1 mutual mistake."

2 That's from *Centro Empresarial Cempresa S.A. v. Am.*

3 *Movil, S.A.B. de C.V.*, 952 N.E.2d 995, 1000. N.Y. 2011.

4 So here Ms. Dupres doesn't argue that the release

5 is ambiguous, but instead that defendants' misconduct renders

6 it unenforceable. I don't think Ms. Dupres alleged facts

7 that would show that the release is unenforceable under any

8 theory.

9 Ms. Dupres first suggested that the release is

10 fraudulently induced because Bryks told her that she would

11 have to return to court every two weeks if she didn't sign

12 the release and Bryks failed to tell her that the process

13 server falsely swore to serving her would not be appearing at

14 a forthcoming hearing.

15 Under New York law, fraudulent inducement requires

16 a material misrepresentation of presently existing or past

17 facts among other requirements.

18 And here, Bryks's statement that Ms. Dupres would

19 have to return to court and his failure to mention that a to

20 process server would not actually appear at a forthcoming

21 hearing were not statements about presently existing or past

22 facts. They were instead predictions about future events.

23 Some cases that I looked to in drawing my

24 conclusion are *MFW Associates., LLC v. Plausteiner*, 2017

25 WestLaw 1057311, at *7. S.D.N.Y. March 16, 2017. *Wolfson v.*

1 *Wolfson*, WestLaw 224508, at *7. S.D.N.Y. Feb. 5, 2004.
2 *Coccia v. Liotti*, 70 A.D.3d 747, 756. N.Y. Appellate
3 Division 2010.
4 Dupres also suggested the release was signed under
5 economic duress.
6 Under New York law, to void a contract on that
7 ground, the complaining party has to show that this agreement
8 was procured by means of a wrongful threat that precluded the
9 exercise of the parties' free will. That's in *Interpharm,*
10 *Inc. v. Wells Fargo Bank, National Association*, 655 F.3d 136,
11 142. 2d Circuit 2011.
12 A mere demonstration of financial pressure or
13 unequal bargaining power will not, by itself, establish
14 economic duress." Same case at the same page.
15 Parties seeking to void a release agreement on
16 economic duress shoulders a heavy burden. That from an
17 S.D.N.Y. case.
18 So here, Dupres has not alleged the defendants made
19 any wrongful threats sufficient to overcome her free will.
20 Plaintiff's brief suggests that the defendants continue to
21 threaten her to force her to appear in court and retain her
22 wages. That's in her opposition brief. But the complaint
23 doesn't include allegations of that sort.
24 In addition, Dupres has not included any facts
25 giving rise to the plausible inference that defendant's

1 conduct prevented the exercise of her free will. She has
2 presented facts suggesting she had no option except to accept
3 the release, she could have continued to pursue legal
4 remedies instead.
5 Dupres also suggested that she was under duress
6 because the garnishing of her wages was unlawful. Of course,
7 this Circuit has held that alleged threats to withhold pay,
8 even if unlawful, do not rise to the level of economic duress
9 where the plaintiff would have legal recourse. And for a
10 case that collections case that you can look to *Shang Zhong*
11 *Chen v. Kyoto Sushi, Inc.*, 2017 WestLaw 4236556, at *5.
12 E.D.N.Y. September 22, 2017.
13 Dupres also suggests that the release was
14 unenforceable for lack of consideration, but under New York
15 law, A written release is valid even in the absence of
16 consideration. That's from *VKK Corp. v. National Football*
17 *League*, 244 F.3d 114, 127. 2d Circuit 2001 among other
18 cases.
19 In any event, Dupres didn't explain why defendants'
20 promise to settle of dispute short of judicial resolution
21 should constitute consideration even if Ms. Dupres was likely
22 to succeed on her motion if the case proceeded to a judicial
23 deposition.
24 Finally, Ms. Dupres suggested that the release was
25 unconscionable. But the complaint does not allege facts

1 showing an absence of meaningful choice on the part of the
2 parties together with contract terms that are unreasonably
3 favorable to the other party as required by New York law.
4 Dupres alleges that the release was procedurally
5 unconscionable because of the parties' unequal bargaining
6 power and defendants' high-pressure tactics. That's in her
7 opposition papers at 25. But she doesn't point to facts
8 supporting that contention to the extent that she relies on
9 allegations that Bryks didn't tell her that the stipulation
10 contained a release, or that Bryks did not disclose that the
11 process server was not available and that Dupres reviewed the
12 release without help of a lawyer. Courts have declined to
13 find procedural unconscionability where the party had the
14 opportunity to read the release even if that was without an
15 attorney especially where the release was short. Here, this
16 was less than two pages. And plaintiff hasn't since she had
17 no opportunity review the release.
18 I also suggest that the release was subsequently
19 unconscionable because defendants got the release for
20 nothing, she suggests, from that defendants' garnishment of
21 her wages was unlawful. But, again, even if Dupres would
22 likely succeed on motion to vacate the judgment that doesn't
23 refute that signing the release afforded her some benefit to
24 resolve the dispute over wages requiring judicial
25 involvement.

1 The cases that Dupres cites are inapposite. All
2 three of them involved an arbitration agreement signed in the
3 employment context and several more indicia of
4 unconscionability.
5 In *Brennan v. Bally Total Fitness*, for example,
6 that's 198 F. Supp. 2d 377, 384. S.D.N.Y. 2002. The Court
7 found an arbitration agreement unconscionable where, among
8 other things, the employer gave the plaintiff no more than 15
9 minutes to review a 16-page document, threatened that
10 employees who didn't sign would not be promoted. Asked aloud
11 whether each employee signed the agreement, and the contract
12 allowed the employer to unilaterally modify the contract at
13 any time, thus finding they may never have seen.
14 In *McLaughlin v. Advanced Communications, Inc.*,
15 2010 WestLaw 11626961, at *3. E.D.N.Y. March 25, 2010. The
16 Court found the arbitration agreement unconscionable where
17 the employee was not given an opportunity to review the
18 agreement prior to signing it and imposed a six-month statute
19 of limitation on any claim relating to his employment.
20 Finally, in *O'Conner v. Agilant Solutions., Inc.*,
21 444 F. Supp. 3d 593, 603. S.D.N.Y. 2020. The Court found
22 unconscionable an arbitration agreement that an employer sent
23 to employees where the employer gave the employees just two
24 days to sign it and didn't disclose to them that a putative
25 class action and that the agreement will preclude employees'

1 ability to participate.
2 As the discussion of those cases indicate, this
3 case involved some unusual facts that are not present in this
4 case.
5 I want to move on the other defendants.
6 Soto and Tolentino stated a claim under the FDCPA.
7 Defendants don't dispute that plaintiffs are consumers who
8 are alleged to owe debt and that defendants are debt
9 collectors under the FDCPA. And defendants also don't
10 dispute that plaintiffs have adequately pleaded a violation
11 of 1692g. Instead, that plaintiffs haven't adequately
12 pleaded a violation of 1692e or 1692f.
13 Let me just say one thing about my approach here.
14 There is a lot of different allegations that plaintiffs are
15 making. I think at the motion to dismiss stage, it is
16 appropriate for me to limit myself to considering whether
17 plaintiffs have stated a claim. In each of the accounts, I
18 think I could probably just limit myself to saying they
19 stated a claim under the FDCPA but I'm going to analyze the
20 respective subsections of the FDCPA. What I don't want to do
21 is go theory by theory or factual allegation by factual
22 allegation. I think it's well established that a motion to
23 dismiss is properly denied when the plaintiff has pleaded an
24 appropriate theory to support accounts even if the plaintiff
25 has also pleaded other theories that the Court isn't

1 addressing. To quote from *In re: American Express*
2 *Anti-Steering Rules Antitrust Litigation.*, that cause of
3 action is based on one set of facts but contains multiple
4 legal theories supporting relief one claim. 343 F. Supp. 3d
5 94, 100. E.D.N.Y. 201.
6 And for some other cases that say that it's
7 appropriate for a Court just to address whether a claim
8 survives without addressing each legal theory to look at *Nova*
9 *Fund Advisors v. Capitala Group, LLC,* 2021 WestLaw 3568892
10 *16. And B. Klein case from August 11, '21, where you can
11 look at look at *Scientec, Inc., v. Metro North Railroad*, 2002
12 WestLaw 18138654 *2 an S.D.N.Y. case from August 7, 2002.
13 I appreciate that from defendant's perspective
14 narrowing the case for a motion to dismiss would be helpful
15 in terms of limiting the scope of discovery and defendants
16 are free to make any argument that they want to Judge Bulsara
17 about what the scope of discovery should be because I'm not
18 addressing some of the allegations in the complaint are free
19 to argue that those allegations shouldn't derive through
20 discovery that they're not good arguments under the FDCPA. I
21 think in the motion to dismiss context, it is sufficient to
22 say that the FDCPA claims and state law claims and judiciary
23 law claims survive.
24 So let me talk first about 1692e. That's section
25 prohibits a debt collector from using any false, deceptive,

1 or misleading representation or means in connection with the
2 collection of any debt.
3 To violate Section 1692, a representation has to be
4 material, meaning, does the debt have the potential to affect
5 the decision-making process of the least sophisticated
6 consumer.
7 So here, there's no disputes, I think, that
8 plaintiffs have adequately pleaded the claim under 1692e(3)
9 by pleading that defendants failed to conduct a meaningful
10 attorney or a review of the underlying files in this case
11 before making representations to plaintiffs' banker report
12 that plaintiff owes a debt. The defendants have challenged
13 plaintiffs, meaning, for attorney review claim 1692e insofar
14 as it's based on defendants' alleged failure to review
15 affidavits of service before executing the judgment. They
16 don't dispute that plaintiffs have adequately pleaded a 1692e
17 claim based on lack of meaningful attorney review and other
18 respects.
19 The plaintiffs have adequately pleaded at the
20 motion to dismiss stage that defendants made representations
21 that were false and I focused in on the misrepresentations
22 that I think are adequately pleaded for the motion to dismiss
23 stage in colloquy with counsel.
24 (Continued on the next page.)
25

1 THE COURT: (Cont'g.) In particular, there are
2 court filings where defendant stating without any kind of
3 information and belief caveat that -- let me just pull up the
4 precise language.
5 (Pause.)
6 THE COURT: Okay. So, the opposition contained a
7 statement that "any and all restraints of bank accounts on
8 property, or garnishment of wages, resulted from the proper
9 execution of a judgment of this court, lawfully obtained and
10 issued therefrom;" there's interesting questions about
11 statements that are made with an express caveat that they're
12 on information and belief, and there are parts of these
13 attorney affirmations where the plaintiff is indicating or
14 where the affiant is indicating that certain statements are
15 made in reliance on a presumption that a judgment is valid but
16 this statement is completely uncaveated and just asserts that
17 "any and all restraints on bank accounts on property, or
18 garnishment of wages, resulted from the proper execution of a
19 judgment of this court, lawfully obtained and issued
20 therefrom."
21 In this case that statement makes this case pretty
22 different from the case like *Kong* where the assertion of the
23 plaintiff was just that the defendant was trying to enforce
24 the judgment and lacked a legal right or authority to enforce
25 the judgment because the judgment was invalid. Here there's

1 an allegation that particular statements that are made were
2 false statements or misleading statements and I think that
3 plaintiff has adequately pushed back the claim at least with
4 respect to those statements.
5 Let me turn to 1692f of the FDCPA. That section
6 prohibits a debt collector from using unfair or unconscionable
7 means to collect or attempt to collect any debts. Plaintiff
8 states a claim under Section 1692f(1) by pleading that the
9 defendants attempted to collect an amount not authorized by
10 agreement determined by law. Once the allegations are pled
11 the plaintiff does not need to plead any further allegations
12 of unfairness or unconscionability. There I'm citing
13 *Vangorden versus Second Round, Limited Partnership*,
14 897 F.3d 433, 438, a Second Circuit case from 2018.
15 Here plaintiffs have stated a claim under 1692f.
16 They've alleged that defendants attempted to collect a debt
17 even though they weren't authorized to do so because the
18 underlying judgments were invalid, and because plaintiffs
19 hadn't received a notice of their assignment.
20 Courts have held that allegations that a debt
21 collector attempted to collect based on fraudulently filed
22 default judgments, and that they supported court filings with
23 affidavits that contained misrepresentations can present an
24 actionable claim under Section 1692f.
25 Some cases to this effect are *Scott versus*

1 *Greenberg,* which is available at 2017 Westlaw 1214441, at
2 page *11, an E.D.N.Y. case from March 31st of 2017; *Mayfield*
3 *versus Asta Funding*, 95 F.Supp. 3d 685, 702, from S.D.N.Y.
4 2016.
5 Give me one moment, I have one more cite on this,
6 *Sykes versus Mel Harris*, 757 F.Supp 2d 413, 424, an S.D.N.Y.
7 case from 2010.
8 Similarly, courts have held that Section 1692f
9 prohibits debt collectors from attempting debt collection
10 where they lacked legal authority to do so because the debtor
11 had not received prior notice that the debt was assigned to a
12 third party. Some cases to that effect, *Baltazar versus*
13 *Houslanger & Associates*, at 2018 Westlaw 3941943 at page 6,
14 *6, an E.D.N.Y. case from August 14th of 2018; *Musah versus*
15 *Houslanger & Associates* at 962 F.Supp 2d 636, 640, an S.D.N.Y.
16 case from 2013; and I'm going to spell this one out,
17 *Moukengeschaie*, M O U K E N G E S C H A I E, versus
18 E L T M A N, E L T M A N and *Cooper, PC*, at 2016 Westlaw
19 1274541 at page 11, *11, E.D.N.Y., March 31st of 2016.
20 So, to conclude, Soto and Tolentino have stated a
21 claim under Section 1692f. Because I've considered these
22 under the sections for the reasons I've just described, I
23 don't address the parties' arguments about whether particular
24 additional facts or allegations that plaintiffs make would
25 suffice under those sections.

1 Turning to New York GBL 349, that section prohibits
2 deceptive acts or practices in the conduct of any business,
3 trade or commerce or in the furnishing of any service in the
4 state. The plaintiffs Soto, Tolentino and Viruet have stated
5 a claim under this provision. In order to do so, a plaintiff
6 must allege that the defendant engaged in consumer-oriented
7 conduct that was materially misleading, and the plaintiff was
8 harmed as a result; and that's from *Nick's Garage, Inc. versus*
9 *Progressive Casualty Insurance Company*, 875 F.3d 107, 124,
10 Second Circuit 2017.
11 Defendants don't dispute that the plaintiffs
12 adequately allege the first element but they argue that
13 plaintiffs didn't adequately allege that the alleged conduct
14 was materially misleading and that plaintiffs suffered actual
15 damages.
16 I disagree. Under New York law deceptive acts or
17 practices are representations or omissions likely to mislead a
18 reasonable consumer acting reasonably under the circumstances.
19 That's from *Oswego*, O S W E G O, *Laborers Local 214 Pension*
20 *Fund versus Marine Midland Bank, N.A.*, which is 647 N.E.2d
21 741, 745, N.Y. 1995.
22 Here plaintiffs have alleged, as I discussed with
23 respect to the FDCPA claims, that defendants filed oppositions
24 in Soto, Tolentino and Viruet's cases where they said, "Any
25 and all restraints of bank accounts on property, or

1 garnishment of wages, resulted from the proper execution of a
2 judgment of this court, lawfully obtained and issued
3 therefrom." Plaintiffs allege that that statement was false.
4 Plaintiffs have also alleged that defendants sent a
5 restraining notice to Soto's bank and issued notices of
6 garnishment and income execution as to Tolentino and Viruet
7 purporting to collect on valid judgments even though,
8 according to plaintiffs, the judgments against Soto, Tolentino
9 and Viruet were invalid because plaintiffs had never been
10 properly served.
11 Courts have found that plaintiffs stated a claim
12 under Section 349 based on similar allegations that a
13 defendant attempting to collect a debt without the legal
14 right to do so. Some cases that I looked to for that are
15 *Martinez versus Lvnv Funding, LLC*, which is 2016 Westlaw
16 5719718 at *3, an E.D.N.Y. case from September 30th, 2016;
17 *Hunter versus Palisades Acquisition XVI, LLC,* 2017 Westlaw
18 5513636, at *7 to *8, S.D.N.Y., November 16th of 2017; and
19 *Morales versus Kavulich*, K A V U L I C H, & *Associates, PC*,
20 294 F.Supp. 3d 193, 198, an S.D.N.Y. case from 2001.
21 As to actual damages, defendants argue that
22 plaintiffs don't adequately allege that they suffered actual
23 damages because the judgments against plaintiffs were vacated
24 and the debt collection lawsuits were ultimately dismissed and
25 because Tolentino and Viruet didn't actually have their money

1 restrained or collected.
2 To plead injury under Section 349, the plaintiff has
3 to allege actual injury but not necessarily pecuniary harm,
4 and that's from *Stutman versus Chemical Bank*, 731 N.E.2d 608,
5 612, N.Y. 2000.
6 A plaintiff adequately pleads injury under
7 Section 349 by alleging that she suffered emotional harm, such
8 as humiliation or distress or anxiety as a result of the
9 challenged conduct; for instance, you could look to *Douyon*
10 *versus New York Medical Health Care, PC*, 894 F.Supp. 2d 245,
11 264, an E.D.N.Y. case from 2012, and there are a number of
12 other cases to that effect.
13 Here plaintiffs allege that they experienced
14 emotional distress and anxiety because of misstatements they
15 challenged and those allegations suffice.
16 Courts have also suggested that a plaintiff pleads
17 injury under Section 349 by alleging "time spent and costs
18 incurred by consumers to defend against meritless collection
19 lawsuits that should never have been filed and should never
20 have been prosecuted; *Fritz versus Resurgent Capital Services,*
21 *LP*, 955 F.Supp.2d 163, 174, an E.D.N.Y. case from 2013. There
22 are a number of other cases to that effect.
23 Here plaintiffs have alleged that they lost time and
24 money defending against the attempts by defendants to collect
25 on judgments that were, according to plaintiffs, not

1 appropriately obtained and that, according to plaintiffs,
2 defendants used misrepresentations to execute it and the
3 plaintiffs allege lost wages due to missed work, photocopying
4 costs, transportation costs and child care. These allegations
5 suffice to state an injury.
6 In discussing this, counsel indicated that the
7 argument or any argument they were making is that those costs
8 are not proximately caused by defendants' conduct, they're
9 more caused by the fraudulent judgments themselves and maybe
10 if the fraudulent judgments are one cause of the injuries
11 plaintiffs are alleging but I think plaintiffs have adequately
12 pleaded for the motion to dismiss stage that defendants making
13 misrepresentations about the validity of the debt in
14 connection with the court proceedings causes them to have to
15 engage in further litigation about the debt that they wouldn't
16 have otherwise had to have engaged in. So, plaintiffs have
17 stated a claim under New York General Business Law 349.
18 Okay. Finally, I'm going to deny the motion to
19 dismiss Soto, Tolentino and Viruet's claims under New York
20 Judiciary Law 487. Under that section an attorney or
21 counselor who is guilty of -- can be (audio drop) damages if
22 that person is guilty of any deceit or collusion, or consents
23 to any deceit or collusion, with intent to deceive the court
24 or any party.
25 To state a claim under Section 487, a plaintiff must

1 plead that the defendant is guilty of deceit or collusion, or
2 consented to any deceit or collusion, that the defendants had
3 an intent to deceive the court or any party, and the plaintiff
4 suffered actual damages caused by the deceit or collusion
5 alleged.
6 Section 487 applies to any oral or written statement
7 relating to a proceeding and communicated to the court or a
8 party with the intent to deceive. There I'm citing
9 *Amalfitano*, A M A L F I T A N O, *versus Rosenberg*, 533 F.3d
10 117, 123, a Second Circuit case from 2009.
11 Liability under this statute doesn't depend on
12 whether the court or another party is actually misled but the
13 statute does not extend to negligent acts or conduct that
14 constitute only legal malpractice, evincing a lack of
15 professional competency.
16 Some courts in New York have imposed an additional
17 prerequisite that the plaintiffs must show a chronic
18 and extreme pattern of legal delinquency by the defendants,
19 and that's the *Amalfitano* case I just cited at 533 F.3d at
20 123, but that requirement isn't in the text of the statute and
21 other courts have found attorneys liable under the statute
22 with a single intentionally deceitful or collusive act, and
23 that's the same *Amalfitano* case at the same page.
24 Defendants argue that their alleged conduct isn't
25 actionable under Section 487 because some of that conduct

1 occurred before plaintiffs filed the motion to vacate, and
2 therefore occurred outside court and because defendants'
3 statements in the oppositions that plaintiffs rely on was not
4 extreme or egregious conduct. At least some of defendants'
5 statements, namely those in affidavits attached to their
6 opposition papers were communicated to a court or a party in
7 the course of a pending judicial proceeding and those
8 communications form a sufficient basis for a claim under New
9 York Judiciary Law.
10 Assuming that Section 487 requires conduct to be
11 extreme or egregious, courts have held that that standard is
12 met when a party engaged in a scheme or pattern of filing
13 false or misleading affidavits in state court to collect a
14 debt. Look, for example, to *Diaz versus Portfolio Recovery*
15 *Associates, LLC*, 2012 Westlaw 1882976 at *2 and *5, an
16 E.D.N.Y. case from May 24th of 2012, and *Sykes versus Mel*
17 *Harris Associates, LLC* at 757 F.Supp 2d 413, 429, an S.D.N.Y.
18 case from 2010.
19 Here I think plaintiffs have alleged that defendants
20 engaged in a pattern of filing boilerplate oppositions
21 representing that underlying judgments had been lawfully
22 obtained and plaintiffs alleged the defendants engaged in this
23 course of conduct willfully and knowingly and they've pleaded
24 at least some facts such that at the motion to dismiss stage
25 are adequate to support that inference.

1 Defendants point out that the statute doesn't
2 encompass the filing of a pleading or a brief indicating
3 non-meritorious legal arguments, but the alleged
4 misrepresentations here are not just legal arguments, they go
5 to factual representations about the validity of the
6 underlying judgments.
7 In discussing this claim, defendants raised an
8 argument that's similar to their arguments under the GBL about
9 actual damages. I do think that even if that's a requirement
10 that plaintiff show damages, they have adequately alleged that
11 they suffered a harm from defendants' misrepresentations that
12 we're discussing for the reasons that outlined with respect to
13 the state law claim.
14 Finally, I'm not going to the dismiss Mr. Viruet's
15 claim based on lack of subject matter jurisdiction. His FDCPA
16 claims are time-barred, but under Section 1367(a) of Title 28,
17 if a court has jurisdiction over an action, it also has
18 supplemental jurisdiction over claims that form part of the
19 same case or controversy, including claims that involve the
20 joinder or intervention of additional parties.
21 For purposes of that section, claims form part of
22 the same case or controversy if they derive from a common
23 nucleus of operative fact. In determining whether two
24 disputes arise from a common nucleus of operative fact, courts
25 have traditionally asked whether the facts underlying the

1 federal and state claims substantially overlap or if the
2 federal claim necessarily brought the facts underlying the
3 state claim before the court.
4 Where Section 1367(a) is satisfied, the discretion
5 to decline supplemental jurisdiction is available only if it
6 is founded upon an enumerated category of subsection 1367(c)
7 of Title 28, and that section provides that a district court
8 can decline to exercise supplemental jurisdiction if a claim
9 raises a novel or complex issue of state law, if the claim
10 substantially predominates over the claim or claims over which
11 the district court has original jurisdiction, if the district
12 court has dismissed all claims over which it has original
13 jurisdiction, or in exceptional circumstances if there are
14 compelling other reasons for declining jurisdiction.
15 Even where one of those factors does apply, a court
16 should exercise supplemental jurisdiction unless doing so
17 would not promote economy, convenience, fairness and comity.
18 So, applying those principles, I decline to dismiss
19 Mr. Viruet's state law claims under Section 1367(a) as the
20 claims do derive from a common nucleus of operative fact, and
21 the remaining plaintiffs' federal claims, and defendants
22 haven't identified any factor under Section 1367(c) that would
23 justify declining to exercise jurisdiction over Viruet's
24 claims.
25 Accordingly, the motion to dismiss Mr. Viruet's

1 state claims is denied.
2 I'll do a docket entry that reflects my decision on
3 this motion.
4 Anything else for us to take care of today?
5 MS. TARANTOLO: Good morning, Your Honor, this is
6 Danielle Tarantolo, a colleague of Ms. Ranucci at the New York
7 Legal Assistance Group. One question from plaintiffs, Your
8 Honor, with regard to the pending objections to Judge
9 Bulsara's discovery order in this case compelling the
10 production of certain material from defendants, those
11 objections are fully briefed before Your Honor; how would you
12 like the parties to proceed with respect to discovery and with
13 that motion in particular?
14 THE COURT: So, I haven't reviewed that motion. I
15 appreciate you supplying us with the briefs. They are in the
16 queue of motions I've got to review and I'll get to it as soon
17 as I can.
18 I take it that discovery is ongoing before Judge
19 Bulsara in the meantime, right? There's no reason why, I take
20 it, that that dispute would prevent you from engaging in any
21 other discovery that you're engaging in, right?
22 MS. TARANTOLO: Unfortunately, Your Honor, this is
23 still Ms. Tarantolo -- it will be me speaking, Ms. Court
24 Reporter, unless otherwise noted.
25 Unfortunately that's not the case because

1 production, the class-wide production that Judge Bulsara
2 ordered, that is the ruling that defendants have challenged in
3 the objections and Judge Bulsara granted their motion to stay
4 discovery pending the resolution of those objections. One of
5 the objections they raised is that this motion to dismiss
6 remains pending. Of course, that's no longer true which is
7 why we raise the topic that perhaps calculations have changed.
8   THE COURT: Got it, okay. Well, Judge Bulsara is a
9 lot more familiar with the discovery disputes in this case and
10 the status of discovery in this case than I am. So, as to
11 what's on my plate, it sounds like I've got a fully briefed
12 motion, I'll turn to it as soon as I can, just the nature of
13 our dockets these days, I've got a lot of pending motions. I
14 can't tell you exactly when this will be on the top of my
15 queue but I promise to get to it as soon as I can.
16   If part of the inquiry is kind of a suggestion that
17 Judge Bulsara's calculus about staying discovery should be
18 revisited, I suggest to the parties that they take it up with
19 Judge Bulsara who is more inclined to resolve the question of
20 whether the disposition of the motion changes the calculus,
21 unless the parties have a view as to why a different course of
22 action is appropriate.
23   MS. TARANTOLO: Thank you, Your Honor, understood.
24   THE COURT: Okay, great.
25   Anything else today?

1 MR. SCHER: Nothing further from the defendants,
2 Your Honor.
3 THE COURT: Okay. Thanks, everybody. I appreciate
4 the helpful argument.
5 MS. TARANTOLO: Thank you, Your Honor.
6 MS. RANUCCI: Thank you, Your Honor.
7 MR. SCHER: Thank you, Your Honor.
8 (Time noted: 11:40 a.m.)
9 (End of proceedings.)
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