UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JENIFER DUPRES, WILLIAM SOTO, DOMINGO TOLENTINO, and LUIS VIRUET, individually and on behalf of all persons similarly situated,

Plaintiffs,

-against-

HOUSLANGER & ASSOCIATES, PLLC, TODD HOUSLANGER, and BRYAN BRYKS,

Defendants.

No. 19 Civ. 6691 (RPK) (SJB)

Oral Argument Requested

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs Jennifer Dupres, William Soto, Domingo Tolentino, and Luis Viruet ("Plaintiffs") respectfully submit this Memorandum of Law in opposition to the September 25, 2020 Motion to Dismiss submitted by Defendants Houslanger & Associates, PLLC ("H&A"), Todd Houslanger ("Houslanger"), and Bryan Bryks ("Bryks") (together, "Defendants"). For the reasons set forth below, the motion should be denied.

Plaintiffs' Complaint describes a far-reaching scheme by which Defendants unfairly and deceptively collected money from Plaintiffs and the hundreds of New York City consumers who comprise the putative class. Defendants have carved out a niche within this market: they represent "judgment buyers" who purchase the most flawed Civil Court judgments obtained by other entities. Then, Defendants indiscriminately issue executions on those judgments and baselessly oppose challenges to the wrongful executions. To make this scheme lucrative, Defendants cut every corner—they fail to obtain or review necessary documents and fail to send required notices—and, when consumers resist the executions, they use false statements and other tactics to pressure consumers into giving up or acceding to unfavorable settlements. This is the opposite of a "lawyers'" case; Plaintiffs are among the many consumers who sought help from undersigned counsel, a nonprofit legal services organization, during their efforts to stop Defendants' wrongful executions. Indeed, far from amounting to technicalities, Defendants' widespread violations have led to an entire body of debt collection case law within this Circuit directed *specifically at them*.

Defendants' motion fails at every level: it ignores well-pleaded facts; it disregards binding Circuit precedent; and, conceptually, it misapprehends the comprehensive nature of the misconduct described in the Complaint. Defendants' motion attempts to chip away at discrete factual pieces of alleged misconduct in isolation, without recognizing that the Complaint

challenges a course of conduct in which each wrongful element builds on the last, yielding a whole that is more wrong than the sum of its parts. More to the point, Plaintiffs' Fair Debt Collection Practices Act (FDCPA) cause of action rests on multiple bases, each of which independently would sustain the claim at this stage. Since Defendants do not even challenge certain of these alternatives, Plaintiffs' FDCPA cause of action will proceed irrespective of this motion. But even if Defendants could pick off certain theories of liability, their motion has not successfully articulated any basis to do so—as explained below, each type of misconduct alleged in the Complaint *does* violate the FDCPA. The result is that Plaintiffs' FDCPA claim must proceed intact.

Defendants' motion is also flawed in its attacks on other claims and certain parties. The Complaint more than adequately states violations of the NY GBL § 349 and Judiciary Law § 487. And neither Ms. Dupres's nor Mr. Viruet's individual claims should be dismissed; the former because her defenses to enforcement of the release plainly raise fact questions inappropriate for resolution at this stage, and the latter because his claims are factually "common" with the other Plaintiffs'. The motion should be denied in full.

FACTUAL BACKGROUND

Plaintiffs Jenifer Dupres, William Soto, Domingo Tolentino, and Luis Viruet were all sued by debt collectors in New York City Civil Court between 2002 and 2007. Compl. ¶¶ 150, 207, 244, 283. But since none of the Plaintiffs was ever served, they did not know about the lawsuits, or that default judgments were entered against them. *Id.* ¶¶ 93, 149, 152, 206, 209, 243, 246, 282, 285. Such "sewer service," the practice of failing to lawfully serve a summons and complaint and then filing a fraudulent affidavit of service, was rampant at the time those judgments were entered, *id.* ¶ 32, but is particularly well-documented as to the process servers and law firms involved in obtaining the judgments against Plaintiffs. For example, the process

servers who purported to serve Ms. Dupres and Mr. Viruet were later barred from serving process in New York City due to violations. *Id*. ¶¶ 5, 32, 61-62.

Also unbeknownst to Plaintiffs, those judgments were sold, years later, to unrelated companies called "judgment buyers." *Id.* ¶¶ 29, 33, 155, 213, 250, 289. Defendants H&A, a debt collection law firm, Houslanger, the firm's managing attorney, and Bryks, an attorney at the firm, then entered the picture, when they began representing the judgment buyers for the purpose of collecting on the years-old judgments. *Id.* ¶¶ 18-22, 33, 39, 157, 215, 252, 291.

A. Defendants Executed on Unlawfully Obtained Judgments Without Reviewing the Relevant Documents

Over a decade after the judgments were entered, Defendants attempted to execute against Plaintiffs by garnishing the wages of Ms. Dupres, Mr. Tolentino, and Mr. Viruet, and restraining Mr. Soto's bank account, as attorneys acting as "as officer[s] of the court." *See id*. ¶¶ 43, 146, 200, 240, 279; N.Y. C.P.L.R. §§ 5222(a), 5230(b). These executions were the first time that each Plaintiff learned about the lawsuits and judgments. Compl. ¶ 93, 149, 206, 243, 282. Before executing, Defendants did not review any documentation relevant to the case: not affidavits of service, chain of title documents, case files, nor even the judgments themselves. *Id.* ¶¶ 43-76, 159, 218, 254, 294. Often, Defendants did not even possess these documents; they could have obtained many from the public court file, but did not, and they did not obtain them from their clients. *Id.* ¶¶ 68-70. Because they were not involved in the underlying litigation that yielded the judgments, neither Defendants nor their judgment buyer clients had any relevant documentation or independent knowledge about the actions. *Id.* ¶¶ 29, 33, 39. Defendants executed on the judgments without having sent any of the notices required by law, including an assignment of judgment, a change of attorney form, or a validation notice. *Id*. ¶¶ 77-92, 149, 206, 243, 282. Receipt of these notices would have alerted Plaintiffs to the judgments' existence and to the

identities of the entities attempting to collect on them. *Id.* ¶¶ 91, 93, 149, 206, 243, 282.

B. When Plaintiffs Contested the Executions, Defendants Opposed Through Deceptive Litigation Conduct

All four Plaintiffs challenged Defendants' executions by filing *pro se* Motions to Vacate in New York City Civil Court, stating, among other things, that they had never been served. *Id.* ¶¶ 101-02, 161, 219-220, 255, 295. In response to each Plaintiff's Motion, Defendants prepared, served, and filed an Opposition on the first court date, again, without meaningful review of critical documentation related to the case. *Id.* ¶¶ 104, 162-63, 222-23, 256-57, 296-97. The Oppositions were signed by Bryks under penalty of perjury and contained boilerplate language, including false and misleading statements that "[u]pon information and belief, the [consumer] was properly served in this matter" and that "[a]ny and all restraints of bank accounts . . . or garnishment of wages, resulted from the proper execution of a judgment of this Court, lawfully obtained and issued therefrom." *Id.* ¶¶ 105-14, 162-68, 222-26, 256-63, 296-302.[1]

At the first court date on each Plaintiff's motion, Defendants offered no proof or specific facts as to service—since they did not have any. *Id.* ¶¶ 109, 164, 224, 258, 298. This directly resulted in prolonging the legal proceedings against Plaintiffs, since the court had to schedule another court date to be held after Defendants obtained the affidavit of service. *Id.* ¶¶ 122, 174, 231, 268, 308. Defendants further prolonged the legal proceedings against Ms. Dupres and Mr. Soto by continuing to baselessly oppose their Motions even after both Plaintiffs had presented documentary evidence that the judgments were invalid because they were never served. ¶¶ 123-30, 178-85, 233-37. Defendants intentionally engaged in this conduct to induce Plaintiffs to drop their challenges to the executions or enter settlements favorable to Defendants. *Id.* ¶¶ 123, 172,

[1] The Opposition filed against Mr. Soto does not state that "[u]pon information and belief, the [consumer] was properly served in this matter." *See* ECF No. 36-8.

[2] On April 18, 2019, consumers harmed by Defendants' unlawful debt collection practices first brought these same

230, 267, 306. As a result, Ms. Dupres, Mr. Soto, and Mr. Viruet had to attend three court dates over the span of months before successfully obtaining vacatur of the judgments; Mr. Tolentino had to attend five court dates before ultimately prevailing. *Id.* ¶¶ 186, 236, 272, 311.

Defendants sought Ms. Dupres's and Mr. Tolentino's agreement to a stipulation that contained a release of potential claims in exchange for Defendants' agreement to cease execution and vacate the judgments against them. *Id.* ¶¶ 131-36. Ms. Dupres signed this stipulation on the basis of Bryks's false representations and material omissions, including that if she did not sign the paper, she would have to return to court every two weeks. *Id.* ¶ 188.

C. Defendants' Actions Harmed Plaintiffs and Hundreds of Other Consumers

Defendants' execution and litigation practices harmed Plaintiffs. Ms. Dupres and Mr. Soto lost access to hundreds of dollars of their own money for months. *See* Compl. ¶¶ 145, 175, 197-98, 204, 238. All four Plaintiffs had to miss work for each of their multiple court appearances. *Id.* ¶¶ 198, 238, 277, 312. Plaintiffs incurred additional damages, including money spent on postage, photocopying, and transportation; they also experienced emotional distress. *Id.*

The Complaint alleges that Defendants have engaged, and are engaging, in similar misconduct against hundreds of New Yorkers. Specifically, without meaningful review or sending the required notices, Defendants garnished the wages or restrained the bank accounts of those individuals pursuant to old New York City Civil Court judgments, which are almost always legally flawed and of questionable collectability, and were obtained by law firms and companies that are often now defunct. *Id.* ¶¶ 5, 28, 30-32, 38-39, 43-92. Then, when any consumers like Plaintiffs challenge the executions in court, Defendants file the same form Oppositions, with the same lack of review, as they did against Plaintiffs. *Id.* ¶¶ 93-139. Defendants' conduct is knowing and willful, and is ongoing and will continue absent court

intervention. *Id.* ¶¶ 41-42.

On November 26, 2019, Plaintiffs filed this action on behalf of themselves and a putative class. *Id.* ¶ 313.[2] On September 25, 2020, Defendants moved to dismiss some but not all of Plaintiffs' claims. Mem. of Law in Support of Defs.' Mot. to Dismiss, ECF No. 36-14 ("MTD").

ARGUMENT

I. Defendants' Motion to Dismiss Plaintiffs' FDCPA Claims Challenging Their Unfair and Deceptive Conduct Must be Denied

Defendants' fragmented attack on various bases of FDCPA liability set forth in the Complaint fundamentally fails to recognize that Plaintiffs have alleged a unitary course of conduct comprising multiple elements which, individually and together, violate the FDCPA. Defendants' discrete arguments all attempt to distract from the overwhelming unfairness of their conduct, but each argument is also flawed in isolation, as explained below. Indeed, courts routinely find that these *same* practices by these *same* Defendants state viable FDCPA claims.[3]

Moreover, many of Defendants' arguments ignore the FDCPA statutory scheme. For example, Defendants assert (wrongly) that certain facts do not state actionable misrepresentations—but the FDCPA can be violated by conduct that is deceptive *or* unfair, or both. *See Arias v. Gutman, Mintz, Baker & Sonnenfeldt LLP*, 875 F.3d 128, 136 (2d Cir. 2017);

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[2] On April 18, 2019, consumers harmed by Defendants' unlawful debt collection practices first brought these same claims, on behalf of the same putative class. *See Burkett v. Houslanger & Associates et al*., No. 19 Civ. 2285 (E.D.N.Y.); Compl. ¶ 24. Plaintiffs filed this action after the *Burkett* plaintiffs accepted Rule 68 offers of judgment.

[3] *See Baltazar v. Houslanger & Assocs., PLLC*, 2018 WL 3941943, at *10 (E.D.N.Y. Aug. 16, 2018), *R. & R. adopted*, 2018 WL 4781143 (E.D.N.Y. Sept. 30, 2018) (denying, in relevant part, motion to dismiss claim that H&A and Houslanger violated FDCPA by restraining bank account to collect on years-old default judgment obtained via sewer service); *Musah v. Houslanger & Assocs., PLLC*, 962 F. Supp. 2d 636, 641 (S.D.N.Y. 2013) (denying, in relevant part, motion to dismiss claim that H&A violated FDCPA by restraining bank account to collect on years-old default judgment without meaningful review); *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 522, 530-32 (S.D.N.Y. 2013) (denying motion to dismiss claim that H&A and Houslanger violated FDCPA by restraining bank account to collect on years-old default judgment and retaining plaintiff's money after court vacated judgment); *McCrobie v. Palisades Acquisition XVI, LLC*, 359 F. Supp. 3d 239, 256 (W.D.N.Y. 2019) (denying motion to dismiss claim that H&A violated FDCPA and G.B.L. § 349 by garnishing wages to collect on years-old default judgment without reviewing or possessing judgment).

15 U.S.C. §§ 1692e, 1692f. Defendants also repeatedly disregard the statutory admonition to look to the perspective of the "least sophisticated consumer" when determining whether conduct violates the FDCPA, erroneously basing their arguments on the subjective experiences of these Plaintiffs. *Easterling v. Collecto, Inc.*, 692 F.3d 229, 234 (2d Cir. 2012). And they do not acknowledge that the Second Circuit's command to construe the FDCPA's "terms . . . in liberal fashion" means that all close calls must go to the consumer. *Arias*, 875 F.3d at 134.

Finally, the FDCPA "impose[s] liability" for even "a single violation," *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 133 (2d Cir. 2010), and Defendants concede they do not seek to dismiss all of Plaintiffs' FDCPA claims, MTD 1 n.1, so Plaintiffs' FDCPA cause of action will proceed regardless of all arguments in Defendants' motion.

A. Defendants Identify No Deficiency in Plaintiffs' FDCPA Claims Based on Executing on Invalid Judgments

Defendants assert that it was not unlawful to execute on invalid judgments against Plaintiffs, claiming that the judgments were "presumptively valid" because at the time of execution Plaintiffs had not yet succeed in vacating them. MTD 16. This argument ignores the relevant New York law. The New York Court of Appeals has held that a default judgment obtained without proper service "is a nullity and may not be enforced." *Royal Zenith Corp. v. Cont'l Ins. Co.*, 473 N.E.2d 243, 244 (N.Y. 1984).[4] Defendants erroneously cite cases involving domestication of out-of-state judgments—plainly irrelevant here. In *All Terrain Properties, Inc. v. Hoy* (cited at MTD 16), for example, a state-court defendant was estopped from contesting service in proceedings to domesticate a New Jersey default judgment, based on New Jersey law. 265 A.D.2d 87, 94 (N.Y. App. Div. 2000). And *Boorman v. Deutsch* (cited at MTD 16) found

[4] *See also, e.g.*, *Wash. Mut. Bank v. Murphy*, 10 N.Y.S.3d 95, 101 (N.Y. App. Div. 2015) (such a judgment is "null and *void*" (emphasis added)); *Shaw v. Shaw*, 467 N.Y.S.2d 231, 233 (N.Y. App. Div. 1983) ("nullity"); *Prudence v. Wright*, 943 N.Y.S.2d 185, 187 (N.Y. App. Div. 2012) (same); *Matter of Liberty Mut. Ins. Co.*, 625 N.Y.S.2d 619, 620 (N.Y. App. Div. 1995) (same); *McMullen v. Arnone*, 437 N.Y.S.2d 373, 375 (N.Y. App. Div. 1981) (same).

that a litigant who had tried and failed to contest service in New Jersey could not do so again when judgment was domesticated in New York. 547 N.Y.S.2d 18, 22 (N.Y. App. Div. 1989).[5] Because the judgments against Plaintiffs were in fact invalid, Defendants' executions involved "unauthorized taking of money," and thus give rise to "viable claims under" the FDCPA—as courts routinely have recognized, including as to these very Defendants. *Baltazar*, 2018 WL 3941943, at *10.[6] Threatening to execute on unlawful judgments, as Defendants did when first issuing Income Executions and Restraining Notices, independently violates the FDCPA.[7]

Defendants also cite *Kong v. Strumpf*, 2018 U.S. Dist. LEXIS 164537, at *8-10 (S.D.N.Y. Sept. 21, 2018), for the proposition that a New York judgment "is presumptively valid until reversed or set aside." MTD 16. But *Kong* cannot bear the weight Defendants place on it. First, *Kong* relies on *All Terrain Properties* and *Boorman* which, as noted, do not support this conclusion. Second, in *Kong*, the *same* company and attorney that obtained a default judgment later enforced it, *id.* at *2-*3, whereas here, *neither* Defendants *nor* their clients were involved in procuring the judgment. Third, *Kong* explicitly recognized that "an attempt to enforce a fraudulently-obtained default judgment" *may* state an FDCPA claim. *Id.* at *8. Although *Kong* concerned collection on an existing judgment "[w]ithout more," *id.*, Defendants' misconduct here involves significantly "more": they execute on judgments that they had no involvement in obtaining, with no relevant documentation, and with no notice to Plaintiffs.

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[5] *Hernandez v. Am. Transit Ins. Co.*, 875 N.Y.S.2d 125 (N.Y. App. Div. 2015), cited later for this same proposition (MTD 18), is also irrelevant; it concerns the standard for recovering proceeds under New York Insurance Law .

[6] *See also Polanco v. NCO Portfolio Mgmt., Inc.*, 930 F. Supp. 2d 547, 551 (S.D.N.Y. 2013) (unlawful garnishment violates FDCPA); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1517 (9th Cir. 1994) (same); *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 522, 530-32 (S.D.N.Y. 2013) (unlawful bank restraint violates FDCPA); *Hunter v. Palisades Acquisition XVI, LLC*, No. 16 CIV. 8779, 2017 WL 5513636, at *7 (S.D.N.Y. Nov. 16, 2017) (same); *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014) (unlawful lien violates FDCPA).

[7] *See* Compl. ¶¶ 145-47, 200-04, 240-42, 279-81; 15 U.S.C. §§ 1692e(2)(A), 1692e(5); *cf. Morales v. Kavulich & Assocs., P.C.*, 294 F. Supp. 3d 193, 198 (S.D.N.Y. 2018) ("[A] reasonable consumer reading [a restraining notice] would likely be misled into believing that the judgment exists . . . ."); *Martinez v. Lvnv Funding, LLC*, No. 14CV00677, 2016 WL 5719718, at *3 (E.D.N.Y. Sept. 30, 2016) (similar).

Moreover, Defendants' argument that they *could have* relied on the judgments entered against Plaintiffs to execute is beside the point. Plaintiffs' Complaint plainly alleges that Defendants *did not*, in fact, rely on the judgments because they did not review them (or in some cases even possess them). Compl. ¶ 51; *see also id.* ¶¶ 49-50, 53-54. At most, Defendants relied on their clients' unsubstantiated representations that judgments existed, which does not suffice. *See, e.g.*, *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 304 (2d Cir. 2003) ("[M]erely being . . . told by a client that a debt is []due is not enough" for an attorney to collect.).[8]

B. Defendants Cannot Evade Claims for Executing Without Meaningful Attorney Review

Executing on invalid judgments *per se* violates the FDCPA, but even if it did not, Plaintiffs' FDCPA claims primarily challenge Defendants' executions on the ground that they were made without review of any of the relevant documents—not the judgments themselves, the affidavits of service, chain of title documents, or case files. Such conduct plainly violates the FDCPA's meaningful attorney review requirement. *See Clomon v. Jackson*, 988 F.2d 1314, 1321 (2d Cir. 1993).[9] Defendants apparently concede as much by purporting to challenge this claim *only* "to the extent [it] is based on Defendants' alleged failure to review affidavits of service" (and not on the failure to review all of the other relevant documents they did not review). MTD 1 n.1. Defendants' partial challenge is procedurally flawed, since a motion to dismiss may only attack an entire "claim" comprising the full set of facts that can support liability; it "may not simply seek adjudication of facts in a complaint that are not dispositive." *In re Am. Express Anti-*

[8] *See also Vincent v. The Money Store*, 736 F.3d 88, 97 n.6 (2d Cir. 2013); *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, 97 (E.D.N.Y. 2009) ("reviewing basic debtor information [like name and amount allegedly due] . . . without more" not sufficient for an attorney "to form a reasoned professional judgment as to the appropriateness of a collection action").

[9] *See also Miller,* 321 F.3d at 306; *Miller*, 687 F. Supp. 2d at 96 (describing review required before commencing collection lawsuit); *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 369 F. Supp. 2d 353, 361 (E.D.N.Y. 2005); *Goins v. Brandon*, 367 F. Supp. 2d 240, 245 (D. Conn. 2005).

Steering Rules Antitrust Litig., 343 F. Supp. 3d 94, 100 (E.D.N.Y. 2018).

Even if Defendants' improper challenge is considered, however, it should be rejected. Ignoring relevant case law, Defendants apparently contend that the FDCPA did not require them to do any meaningful review before execution, again asserting that they were entitled to rely on "presumptively valid" judgments in lieu of making any "independent determination" about the lawfulness of execution. *Id.* 18-19. That is not the law. When, unlike here, an attorney and client were involved in the litigation yielding the judgment, the "attorney's determination that there exists a valid judgment *may* obviate the need for further review of a case file." *Musah*, 962 F. Supp. 2d at 641 (emphasis added); *Baltazar*, 2018 WL 3941943, at *17. But where, as here, the judgment was assigned to a third party after entry, an attorney seeking to collect on it "has an independent duty" to engage in a review sufficient to determine that the judgment can lawfully be enforced. *Balhazar*, 2018 WL 3941943, at *8; *see also Musah*, 962 F. Supp. 2d at 641.

From a "practical standpoint," MTD 19, reviewing the affidavits of service would have revealed important information indicating that the judgments against Plaintiffs were invalid and thus each Plaintiff "was not obligated to pay the debt," *Miller*, 321 F.3d at 306, such as: the process servers who purported to effectuate service on Ms. Ortiz and Mr. Viruet had been banned from process serving in New York City due to widespread misconduct, Compl. ¶ 62,[10] or that the affidavit of service attested process being served in the wrong case, *see id.* ¶ 59. And Defendants' weak textual argument that the FDCPA provision permitting "verification" of a debt with a "copy of the judgment" excuses pre-execution attorney review of anything besides the

[10] Defendants likely would have recognized the names of these process servers, because Houslanger previously testified that H&A is aware of the widespread prevalence of sewer service, and maintains a list of approximately a dozen process servers whose affidavits are subject to additional scrutiny. Dep. of Houslanger & Associates, PLLC, *Stinson v. Houslanger & Associates et al.*, No. 18 Civ. 11350 (S.D.N.Y), ECF No. 121-4, at 255:9-24.

judgment, MTD 19, vastly overreads that provision.[11]

C. Defendants Cannot Dismiss Plaintiffs' Claim That Executing on Judgments Without Having Filed or Served Required Notices Violates the FDCPA.

Defendants' assertion that executing on judgments without filing mandatory notices of assignment and change of attorney forms is a mere technical "failure to comply with a state law" is both incorrect and misses the point. MTD 17-18, 20-21; Compl. ¶¶ 77-91, 331(c-d). Failing to serve *any* notices on Plaintiffs allowed Defendants to conceal the lawsuits and judgments from them until the moment of execution. Compl. ¶¶ 91, 149, 206, 243, 282. That made the subsequent enforcement deceptive, and profoundly unfair, because Plaintiffs had no opportunity to contest the invalid judgment before facing coercive collections. It also ensured that Defendants remained strangers to Plaintiffs at the time of execution—a practice that leaves even diligent consumers unable to effectively tell whether Defendants are authorized to collect.[12] This is why Defendants err in calling their violations "immaterial," or arguing that they can cure their violations by identifying themselves at the moment of collection. MTD 17-18, 20; *see Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 86 (2d Cir. 2018) (violations are material if they "impede a consumer's ability to respond to or dispute collection"). Defendants' claim that the notice requirements are designed solely to prevent "double-payment" is also flawed, MTD 17, because whether *these* Plaintiffs paid money to the original creditors erroneously ignores that the "least sophisticated consumer" standard is objective. *Easterling*, 692 F.3d at 234.

In any event, Defendants' failure to file and serve these notices also meant that they had

[11] Section 1692g is designed only to "facilitate" the early "exchange of information" between consumer and collector. *Vangorden v. Second Round, Ltd. P'ship*, 897 F.3d 433, 439 (2d Cir. 2018). Providing a judgment at that stage does not grant debt collectors "immunity" for future unlawful collections, nor does it imply that attorneys issuing executions have no further obligations. *See id.* at 439-42.

[12] As the New York Attorney General has warned, "New Yorkers must be on guard when it comes to suspicious notices regarding debt collection or pending litigation." *See, e.g.*, *A.G. Schneiderman Warns Consumers Of Fraudulent NYS Attorney General's Office Debt Collection Notices* (Feb. 4, 2015), *available at* https://ag.ny.gov/press-release/2015/ag-schneiderman-warns-consumers-fraudulent-nys-attorney-generals-office-debt.

no authority to execute on Plaintiffs; doing so thus violated the FDCPA, as courts have repeatedly admonished these very Defendants. *See Baltazar*, 2018 WL 3941943, at *8; *Musah*, 962 F. Supp. 2d at 641; *see also Moukengeschaie v. Eltman, Eltman & Cooper, P.C.*, 2016 WL 1274541, at *11 (E.D.N.Y. Mar. 31, 2016). The New York Court of Appeals has held that "[a] debtor, in order to be charged with a duty to pay a debt to an assignee, must *first* [*i.e.*., before execution] have actual notice of the assignment." *Tri City Roofers, Inc. v. Northeastern Indus. Park*, 461 N.E.2d 298, 299 (N.Y. 1984) (emphasis added). A consumer who has not received this notice "has no duty to pay an assignee, [so] the assignee does not have a legal right to enforce such payment by the debtor." *Baltazar*, 2018 WL 3941943, at *8. Likewise, until a notice of assignment is filed with the clerk, the assignee's "right to the judgment" is not "a matter of court record," and so the assignee cannot "invoke the court's process against the judgment debtor." *Law Research Serv., Inc. v. Martin Lutz Appellate Printers, Inc.*, 498 F.2d 836, 840 n.12 (2d Cir. 1974). And without filing and serving change of attorney forms, Defendants "had no authority to act" on behalf of the judgment buyers at all—especially to issue executions as "the attorney for the judgment creditor [acting as an] as officer of the court." *Splinters, Inc. v. Greenfield*, 63 A.D.3d 717, 719 (N.Y. App. Div. 2009); N.Y. C.P.L.R. §§ 5222, 321(b).

D. There is No Basis To Dismiss Plaintiffs' Claim That Opposing Consumers' Motions to Vacate Without Meaningful Attorney Review Violates the FDCPA

Contrary to Defendants' argument, debt collection attorneys do not have unfettered discretion to "determin[e] . . . whether and how to oppose a motion," nor do they satisfy the FDCPA's meaningful review requirement by merely being "involve[d]" in preparing a communication. MTD 12, 13. The requirement of "meaningful attorney review" means what it sounds like: an attorney must review, at a minimum, sufficient "underlying debtor information" to be able to "exercise . . . professional judgment" regarding the "validity of" the debt. *Miller*,

687 F. Supp. 2d at 96-97; *see also supra* § I.B. A "superficial" review is not enough, nor is it absolved by later writing something shorter than *War and Peace*. *Miller*, 687 F. Supp. 2d at 96; MTD 13. Plaintiffs' Complaint straightforwardly alleges what Defendants were "required" to review but did not: *any* of the relevant documents relating to the Oppositions (including affidavits of service, court files, or documents showing chain of title, and often not the judgments themselves). *See* MTD 13; Compl. ¶¶ 49, 108, 112, 119-21, 331(f).

Defendants assert that "a law firm can permissibly disclaim *all* meaningful attorney involvement in the collection process" to justify Bryks's allegedly deficient review here. MTD 14. But an attorney cannot disclaim meaningful involvement in a court filing, particularly not one like this, which "Bryan C. Bryks, Esq." signed under penalty of perjury, consistent with New York law. *See* 22 N.Y.C.R.R. § 130-1.1a; ECF Nos. 36-4 at 5; 36-8 at 5; 36-10 at 5; 36-13 at 4. Disclaimer of any meaningful attorney involvement is only permitted in debt collection activities by an attorney *other than* "providing actual legal services." *See Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 364 (2d Cir. 2005) (cited at MTD 14). And the stakes of a court filing are obviously *higher* than a collections letter, *see* MTD 13, making review *more* important.

E. Plaintiffs' Claim That Opposing Consumers' Motions Through False and Misleading Misrepresentations Violates the FDCPA Must Proceed

Defendants' attempts to excuse the materially false and misleading statements in the Oppositions are similarly unavailing. Defendants implicitly concede that the Oppositions' statement that "[u]pon information and belief, the [consumer] was properly served in this matter" was literally false because none of the Plaintiffs were properly served, but maintain it should not be "*deemed* false for FDCPA purposes." MTD 10 (emphasis added).[13] But courts in this Circuit

[13] Defendants likewise do not challenge the falsity of Bryks's statements that the judgment buyers represented by Defendants were the "successor[s]" to the companies that obtained the judgments. *See* MTD 12; Compl. ¶¶ 115-18, 169-70, 227-28, 264-65, 303-04. The judgment buyers were not the lawful successors for multiple reasons,

routinely find that falsely stating in court filings that consumers have been served violates the FDCPA.[14] Relying on out-of-context citations to out-of-Circuit cases, Defendants argue that Bryks's assertions that the Plaintiffs were properly served were "factual contention[s] [or] . . . legal position[s] later proven wrong." MTD 10 (quoting *Van Hoven v. Buckles & Buckles, P.L.C.*, 947 F.3d 889, 896 (6th Cir. 2020)). But Bryks's statements did not just happen to turn out to be incorrect; Bryks made these statements without *any* "reasonable basis" or *any* "investigation that could have led to a good faith belief in [their] truth." Compl. ¶ 119, 121, 171, 229, 266, 305. Bryks's "[i]gnorance" thus "is not a defense." *Van Hoven*, 947 F.3d at 895.

Nor does Defendants' purported disclaimer rescue them from liability for Bryks's false statements regarding either proper service or proper execution.[15] Defendants claim Bryks "made clear" to Plaintiffs that "the reason he 'belie[ved]'" Plaintiffs were properly served and that the judgments were lawfully obtained was that "'[t]here is a presumption of regularity that accompanies the filing of documents that are accepted by the Clerk, the Clerk's review thereof and issuance of a judgment.'" MTD 10-11. But the "presumption of regularity" quote was not connected by logic, placement, or structure with the statements Plaintiffs challenge. And Defendants also ignore the allegations that Bryks did not review judgments for some or all Plaintiffs, Compl. ¶¶ 49-54, 261.

At a minimum, even if Bryks's statements in the Oppositions were not false, they were

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including that no assignment of judgment was served on Plaintiffs, *see supra* § I.C.

[14] *See, e.g.*, *Carroll v. U.S. Equities Corp.*, No. 118 CV 667, 2019 WL 4643786, at *7 (N.D.N.Y. Sept. 24, 2019); *Scott v. Greenberg*, No. 15 CV 05527, 2017 WL 1214441, at *11 (E.D.N.Y. Mar. 31, 2017); *Polanco*, 930 F. Supp. 2d at 550; *Guzman v. Mel S. Harris & Assocs., LLC*, No. 16 CV 3499, 2018 WL 1665252, at *9 (S.D.N.Y. Mar. 22, 2018); *Mayfield v. Asta Funding, Inc.*, 95 F. Supp. 3d 685, 702 (S.D.N.Y. 2015); *see also Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015).

[15] The Complaint alleges that the statement that "[a]ny and all restraints of bank accounts . . . or garnishment of wages, resulted from the proper execution of a judgment of this Court, lawfully obtained and issued therefrom" was "false," for two reasons: the judgments against Plaintiffs were not "lawfully obtained" because Plaintiffs were never served, and the executions against Plaintiffs were not "proper" because, when they were issued, Defendants had not undertaken a meaningful review or sent the required notices. *Id.* ¶¶ 113-14, 167-68, 182-83, 225-26, 262-63, 301-02.

materially misleading, because they were "open to more than one reasonable interpretation, at least one of which is inaccurate," *Easterling*, 692 F.3d at 233, and they could have "impede[d]" the least sophisticated consumer's ability "to respond to or dispute [debt] collection," *Cohen*, 897 F.3d at 85-86 (2d Cir. 2018). Defendants fundamentally misunderstand materiality. *See* MTD 11-12. A consumer challenging an execution has three options: continue the challenge, drop it and allow the execution to continue, or settle. The least sophisticated consumer, on reading sworn statements by a licensed attorney that she was "properly served," the execution was "proper," and the judgment was "lawfully obtained," would reasonably believe that Bryks had some basis for making them; that she would thus be unlikely to win her Motion to Vacate; and that she should probably drop her challenge or accede to a disadvantageous settlement. In other words, the statements materially misled consumers by "frustrat[ing] [their] ability to intelligently choose [their] response" to the executions. *See Cohen*, 897 F.3d at 86.[16]

For the same reasons, Defendants miss the mark when arguing that there is "simply no way" the Oppositions could have convinced the Plaintiffs that they were in fact served, or that the statements were "technical[ities]" in light of Bryks's admission that the affidavit of service was not available. MTD 11. The statements were not designed to persuade consumers they were served, or advise them about the availability of the affidavit of service. They were designed to persuade consumers that their motions would fail, in order to pressure them to abandon their challenges. The Second Circuit specifically rejected a debt collector's argument that a representation is not actionable simply because "the recipient knows the true facts." *See Arias,*

[16] *See also Arias*, 875 F.3d at 138 (challenged statements material); *Winslow v. Forster & Garbus, LLP*, No. CV 15-2996, 2017 WL 6375744, at *4, *10-12 (E.D.N.Y. Dec. 13, 2017) (adopting plaintiffs' argument that false statements were "material because they might reasonably prompt a []consumer to settle rather than litigate, or to settle on less favorable terms . . . ."); *cf. Midland Funding, LLC v. Giraldo*, 39 Misc. 3d 936, 949 (N.Y. Dist. Ct. 2013) ("A consumer, unschooled in the law, could be readily deceived into believing that the plaintiff would not be bringing the lawsuit unless it either possessed evidentiary proof of the claim, or could easily obtain such proof.").

Br. for Defs-Appellees, 2017 WL 282761, at *18.[17]

F. The FDCPA Plainly Applies to Defendants' Litigation Conduct

Defendants' argument that the FDCPA is "inapplicable" to their litigation conduct because Plaintiffs were "protected by the court system," MTD 8-9, is foreclosed by binding precedent. The FDCPA does not exempt "debt-collecting activities of lawyers that consist of litigating," *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995), and, in particular, there is no FDCPA "immunity" for "court filings [that] routinely come to the consumer's attention and may affect his or her defense of a collection claim," *Arias*, 875 F.3d at 137. Defendants rely on *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010)—but the Second Circuit explained that *Simmons* is inapplicable to the state court proceedings here, which, unlike the bankruptcy proceedings in *Simmons*, do not have "special protections" for consumers like "a knowledgeable trustee." *Arias*, 875 F.3d at 137 (also noting that state court consumers are likely to be unfamiliar with garnishment law). No Civil Court "procedures [were] in place" that would distinguish Plaintiffs from *Arias*, *see* MTD 9, because *Arias* arose in exactly the same court where Defendants litigated against Mr. Soto and Mr. Tolentino.[18]

Defendants' argument that the FDCPA does not apply because Plaintiffs "had the benefit of counsel," MTD 9, is both legally and factually wrong. "The fact that [consumers] are represented by counsel does not excuse [a] debt collector from the consequences of conveying inaccurate and unlawful information." *White v. Fein, Such & Crane, LLP*, No. 15 CV 438, 2015

[17] Defendants also suggest that their statements are protected because it is "*doubtful*" that the least sophisticated consumer would be able to "parse the language in the Oppositions to this extent." MTD 12. This can be dismissed out of hand: lawyers cannot bury false statements in legalese and then defend those statements as not misleading because an unsophisticated consumer would not be able to understand them. (It is worth noting that Defendants maintain that the language in their Release—which sought a release of claims against Defendants as part of a single, 227-word sentence, with more than fifty commas, *see* ECF No. 36-6—was "[s]o clear" and "unambiguous" that it is implausible any consumer could claim not to understand it. MTD 6, 16.)

[18] *See Arias v. Gutman, Mintz, Baker & Sonnenfeldt, P.C.*, No. 15 CV 09388, 2016 WL 3443600, at *1 (S.D.N.Y. June 8, 2016) (district court decision); Compl. ¶¶ 201, 241.

WL 6455142, at *4 (W.D.N.Y. Oct. 26, 2015). Defendants erroneously rely on a non-precedential summary order, in which the court upheld dismissal of FDCPA claims based on certain misrepresentations that were directed to the consumer's counsel, not the consumer himself, and were not misleading to the least sophisticated consumer in any event. *See Gabriele v. Am. Home Mortg. Servicing, Inc.*, 503 F. App'x 89, 95 (2d Cir. 2012).[19] In published decisions, the Second Circuit has expressly declined to decide whether statements to a consumer's counsel fall within the FDCPA's scope, but such a principle would not bar Plaintiffs' claims anyway, since Plaintiffs filed their Motions to Vacate *pro se*, and Defendants' actions were directed to the *pro se* Plaintiffs. *See Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 97 n.6 (2d Cir. 2015); Compl. ¶¶ 102, 161, 219-20, 255, 295; *see also* ECF Nos. 36-4 at 5; 36-8 at 5; 36-10 at 5; 36-13 at 4 (Oppositions addressed to *pro se* Plaintiffs). The volunteer attorneys who provided limited-scope legal services for some of Plaintiffs' court appearances did not represent them and were not intermediaries for any of Defendants' misrepresentations. That Plaintiffs achieved "positive outcomes" in state court, MTD 9-10, also has no bearing on their FDCPA claims.[20]

G. Plaintiffs' Claim That Defendants Unlawfully Prolong Legal Proceedings is Well-Pleaded and Supported by Precedent

Defendants do not (and could not) challenge that when a debt collector "unduly prolongs legal proceedings," it violates section 1692f of the FDCPA, since the Second Circuit squarely held so in *Arias*. 875 F.3d at 138 (recognizing these delays cause real-world harm like unpaid leave from work and dependent care expenses). Nor do (or could) Defendants challenge that

[19] *See also Gabriele v. Law Office of Martha Croog*, No. 10 Civ. 1798, 2012 WL 460264, at *3 (D. Conn. Feb. 9, 2012) (district court decision clarifying that statements were made to plaintiff's lawyer).

[20] *See Sykes*, 780 F.3d 7 at 94–95 ("[C]laims sounding under the FDCPA . . . speak not to the propriety of the state court judgments, but to the fraudulent course of conduct that defendants pursued in obtaining such judgments."); *Easterling*, 692 F.3d at 234 ("error" to consider effect of Defendants' actions on plaintiffs, rather than how Defendants' actions would be understood by the "the least sophisticated consumer").

Plaintiffs adequately pleaded this claim by alleging that Defendants refused to vacate judgments against Ms. Dupres and Mr. Soto after being presented with multiple forms of proof showing the judgments were invalid.[21] Those claims cannot be meaningfully distinguished from *Arias*, in which the debt collector "refused to release [a bank] restraint and filed an objection in State court despite having no good-faith basis for objecting in order to abuse and intimidate [the consumer] into agreeing to send [] payments . . . [or] default at the hearing." 875 F.3d at 138.

Plaintiffs plead that, in addition, Defendants unduly prolonged legal proceedings by filing Oppositions without affidavits of service. *See* Compl. ¶¶ 107-08, 164, 224, 258, 298. In response, Defendants make the patently false assertion that this theory "has already been rejected by the Second Circuit." MTD 15. Without acknowledging *Arias*, the binding Second Circuit precedent on this issue, Defendants again cite only a non-precedential summary order that does not involve sewer service or unduly prolonged court proceedings, for its statement that untimely-filed motion papers do not violate the FDCPA. 503 F. App'x at 95.

Defendants also incorrectly argue that they did not prolong the proceedings because "the adjournments were directed by the Civil Court and for Plaintiffs' benefit." MTD 14 (emphasis omitted). Their convoluted explanation of the Civil Court's adjournment procedures, *id*. 14-15, cannot alter simple truth: by filing Oppositions without affidavits of service, Defendants made the first court date useless—since they offered no facts about service for Plaintiffs to rebut—with the inevitable and foreseeable effect of requiring Plaintiffs to return on a second day.[22] *See Arias*, 875 F.3d at 138 (forcing "appear[ance] at an unnecessary hearing" violates FDCPA).

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[21] *See* Compl. ¶¶ 123-24, 126, 128-29, 172, 178-86, 198, 230, 234-38 (alleging Defendants did so to force Plaintiffs to attend additional court dates so that Plaintiffs would drop their challenges or accede to settlement, and that Ms. Dupres and Mr. Soto did each have to attend additional court date and miss work to do so).

[22] *See* Compl. ¶¶ 162-74, 222-31, 256-68, 296-308. As Defendants noted, *after* the second court date, the court often orders additional dates, which benefit either consumers or debt collectors, depending on the context. *See* MTD 14-15. But that does not alter that it was Defendants' unilateral conduct that rendered the first appearance useless.

Defendants assert that Plaintiffs are attempting to create a rule that no New York judgment "can[] be collected upon until the affidavit of service has been retrieved from court archives." MTD 15. But New York already *has* that rule. *See* N.Y. C.P.L.R. § 3211(e) ("[P]apers in opposition to a motion based on improper service shall contain a copy of the proof of service."). Defendants just ignored it. More to the point, under the circumstances here, where neither Defendants nor their clients were involved in the underlying litigation, yet executed on judgments without reviewing relevant documents, Defendants' failure to attach an affidavit of service in contravention of New York law unlawfully required Plaintiffs "to appear at an unnecessary hearing." *Arias*, 875 F.3d at 138. This conduct was intended to—and, in the case of Ms. Dupres, did—coerce Plaintiffs into dropping their challenges or acceding to disadvantageous agreements. Defendants doubled down on this unfair conduct by deceptively offering some Plaintiffs, and countless other consumers, a Release designed to insulate them from liability—its own FDCPA violation. Compl. ¶¶ 131-35, 187-96, 274; *see infra* § IV (Release unenforceable because, *inter alia*, it was procured by fraud, economic duress).

II. There is No Basis on Which to Dismiss Plaintiffs' G.B.L. § 349 Claim.

Plaintiffs' allegations are more than sufficient to state a claim under New York General Business Law § 349, which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce." Defendants do not challenge that their conduct is consumer-oriented under the statute, instead recycling arguments that their actions were not materially misleading. MTD 21-23. Those fail here for the same reasons they fail under the FDCPA: the Complaint plainly alleges deceptive conduct by Defendants that is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Stutman v. Chemical Bank*, 95

N.Y.2d 24, 29 (N.Y. 2000).[23] Indeed, courts have routinely found that similar conduct states a claim under G.B.L. § 349, including, for example, a debt collector's execution on an eight-year-old default judgment illegally obtained through sewer service. *Guzman v. Mel S. Harris & Assocs., LLC*, No. 16 CIV. 3499, 2018 WL 1665252, at *2, *12 (S.D.N.Y. Mar. 22, 2018).[24] And claims based on lack of meaningful attorney review are not, as Defendants argue, exempt from G.B.L. liability, *see* MTD 21, 22; to the contrary, sending an attorney communication without meaningful review *misleads* a consumer into believing that such a review took place.[25]

Defendants confuse the "actual damages" requirement of G.B.L. § 349 with the concept of reliance. *See* MTD 21-23. But the G.B.L. "does not require proof of justifiable reliance"; rather, a plaintiff need only "show that the defendant engaged in a material deceptive act or practice that caused actual . . . harm." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (N.Y. 1995). Plaintiffs' pecuniary losses "in the course of defending against" Defendants' unlawful executions and continued litigation (*e.g.*, missed work resulting in lost wages, out-of-pocket expenses for copying, mail, and transportation, and, for Ms. Dupres and Mr. Soto, loss of their funds for months, *see* Compl. ¶¶ 198, 238, 277, 312) are "more than adequate" to plead a claim for damages under §349. *Giraldo*, 961 N.Y.S.2d at 755.[26] And because damages under § 349 "need not be necessarily pecuniary," the time Plaintiffs

[23] *See supra* §§ I.E (Opposition statements both false and misleading); I.A, I.B (executions on invalid judgments deceptive, regardless of how Plaintiffs learned of them, *see* MTD 23); I.C (failure to serve relevant notices deceptive).

[24] *See also, e.g.*, *Sykes*, 780 F.3d at 86 (false affidavits filed in state court debt collection action "provide[s] independent bases for" FDCPA and G.B.L. liability); *Hunter*, 2017 WL 5513636, at *8; *Morales*, 294 F. Supp. 3d at 198; *Martinez*, 2016 WL 5719718, at *3; *cf. Midland Funding, LLC v. Giraldo*, 961 N.Y.S.2d 743, 753 (N.Y. Dist. Ct. 2013) ("'[D]eceptive practices' claims [under § 349] may be brought . . . to challenge 'false and deceptive' representations by debt buyers in legal papers filed in state court proceedings." (collecting cases)).

[25] *See, e.g.*, *Miller*, 321 F.3d at 300-01; *see also Morales*, 294 F. Supp. 3d at 198 (granting summary judgment to plaintiff on § 349 claim where Defendant failed to perform a meaningful review before issuing a bank restraint).

[26] *See also, e.g.*, *Michelo*, 419 F. Supp. 3d at 709 ("Wage garnishment is a pecuniary harm that satisfies the actual injury requirement."); *Beslity v. Manhattan Honda*, 467 N.Y.S. 2d 471, 475 (N.Y. Sup. Ct. 1983) (travel expenses).

expended and their emotional distress are also cognizable. *Guzman*, 2018 WL 1665252, at *12.[27]

III. Plaintiffs' N.Y. Judiciary Law § 487 is More Than Adequately Pleaded

Defendants incorrectly argue that they did not violate New York Judiciary Law § 487, which prohibits attorneys from committing "deceit or collusion . . . with intent to deceive the court or any party," because their conduct was neither "extreme" nor "egregious." MTD 24. But "nowhere in the text of the statute" is extreme or egregious conduct required. *Amalfitano v. Rosenberg*, 533 F.3d 117, 123 (2d Cir. 2008). Although "some courts in New York" previously imposed this requirement, *id.*, the New York Court of Appeals clarified that the statute "imposes liability for the making of false statements with scienter." *Bill Birds, Inc. v. Stein Law Firm, P.C.*, 149 N.E.3d 888, 891 (N.Y. 2020). Regardless, and even if Defendants' execution conduct outside of court were not actionable, *see* MTD 24, Defendants' litigation conduct—the "making of a false statement of fact in [a court filing]"—"f[alls] squarely within the scope of the statute." *Bill Birds*, 149 N.E.3d at 891 (citing *Amalfitano v. Rosenberg*, 903 N.E.2d 265 (N.Y. 2009)); *see also Michelo v. Nat'l Collegiate Student Loan Tr. 2007-2*, 419 F. Supp. 3d 668, 711 (S.D.N.Y. 2019) ("[T]he statute plainly addresses statements made in the course of adversarial litigation." (collecting cases)). Defendants intended to deceive Plaintiffs and the state court by filing court documents falsely (and baselessly) stating that the service, judgments, and executions against Plaintiffs were proper, and then doubled down on these false statements by refusing to vacate judgments even when confronted with Plaintiffs' proof.[28]

IV. Ms. Dupres Alleged Facts That Make the Release Unenforceable

[27] *See also, e.g.*, *Fritz v. Resurgent Capital Services*, 955 F. Supp. 2d 163, 174 (E.D.N.Y. 2013); *Michelo*, 419 F. Supp. 3d at 706; *Samms v. Abrams*, 198 F. Supp. 3d 311, 315 (S.D.N.Y. 2016).

[28] Compl. ¶¶ 93-122; *see also Diaz v. Portfolio Recovery Assocs., LLC*, No. 10 CV 3920, 2012 WL 1882976, at *5 (E.D.N.Y. May 24, 2012) (allegations of a "broad pattern of deceptive filings," made without meaningful attorney review, stated § 487 claim); *Michelo*, 419 F. Supp. 3d at 711 (similar); *Sykes v. Mel Harris & Assocs., LLC*, 757 F. Supp. 2d 413, 428-29 (S.D.N.Y. 2010) (similar).

Defendants' focus on the purported clarity of the Release they offered Ms. Dupres misses the point. MTD 5-6. Although the Release was confusing and badly written, that is not Ms. Dupres's legal argument—rather, it is that Defendants' misconduct renders it unenforceable. Compl. ¶¶ 131-136, 187-196.[29] That fact-sensitive issue cannot be resolved on this motion. *See STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 81 (2d Cir. 2011).

First, the Complaint states facts sufficient to show that the Release was fraudulently induced. Specifically, Ms. Dupres alleges that, after Defendants forced her to attend multiple court dates while retaining her garnished wages, Bryks called her to presented her the Release. Compl. ¶¶ 172, 187. Bryks falsely told her that she would have to return to court every two weeks if she did not sign it, and he also failed to tell her that the process server who had falsely sworn to serving her would not appear at Ms. Dupres's scheduled evidentiary hearing, meaning that Ms. Dupres would imminently win her motion. *Id.* ¶¶ 187-191. Ms. Dupres executed the release on the basis of these misrepresentations and omissions. *Id.* ¶¶ 193-197. Unbeknownst to Ms. Dupres until much later, the Civil Court *did* grant her motion just days later (outright, without any reliance on the stipulation), vacating the judgment and ordering her funds returned with no conditions.[30] These facts would render the Release unenforceable. *See Capax Discovery, Inc. v. AEP RSD Inv'rs, LLC*, 285 F. Supp. 3d 579, 586 (W.D.N.Y. 2018) (unenforceable if material misrepresentations intended to defraud plaintiff and plaintiff reasonably relied).

Defendants argue that Bryks's false statements were not actionable because they were

[29] Defendants' reference to a similarly worded release in *Stinson v. Houslanger & Assocs., PLLC*, No. 18-CV-11350, 2020 WL 5569582, at *3 (S.D.N.Y. Sept. 17, 2020), where the plaintiff alleged only that the release's text was objectively misleading and not other misconduct, is thus irrelevant. Defendants' other cases are inapposite for the same reason. *See Koster v. Ketchum Commmc'ns*, 204 A.D.2d 280 (N.Y. App. Div. 1994) (plaintiff made mistake in interpreting release); *Olson v. Messerli & Kramer, P.A.*, No. 17-CV-4423, 2018 WL 834236, at *3-4 (D. Minn. Feb. 12, 2018) (plaintiff alleged release was ambiguous, and had also been advised by counsel).

[30] Ms. Dupres learned of the court's vacatur only after this action was filed. *See* Ranucci Decl. Ex. A. "A court may take judicial notice of . . . decisions in prior state court adjudications, on a motion pursuant to Rule 12(b)(6)." *Johnson v. Pugh*, No. 11 CV 385, 2013 WL 3013661, at *2 (E.D.N.Y. June 18, 2013).

mere legal "opinions" or something he "hoped" would happen. MTD 6-7. But stating that someone would be required to attend court every two weeks is a fact, not a legal opinion, a distinction Defendants' own cases highlight.[31] Defendants also invent *per se* rules that Bryks's material omissions are not actionable, and Ms. Dupres's reliance was unreasonable, because Bryks was her adversary. MTD 7. But the cases they cite articulate neither rule.[32] On the contrary, such questions are fact-sensitive and are inappropriate for resolution on a motion to dismiss. *See, e.g.*, *Capax,* 285 F. Supp. 3d at 592; *STMicroelectronics,* 648 F.3d at 81 (reasonable reliance "a question of fact for the jury rather than a question of law for the court"). The facts alleged here strongly support a finding of liability: Ms. Dupres was unrepresented; she lacked legal sophistication; and the parties had vastly unequal bargaining power.

Whether Ms. Dupres subsequently repudiated the Release is also fact-based and inappropriate for resolution on this motion, because it turns on whether all of her actions, taken together, demonstrated an intent to ratify the fraudulently obtained contract. *See Brown v. City of S. Burlington, Vt.*, 393 F.3d 337, 343 (2d Cir. 2004). By filing this lawsuit promptly after

[31] *See MFW Assocs., LLC v. Plausteiner*, 2017 WL 1057311, at *6-7 (S.D.N.Y. Mar. 16, 2017) (mispresenting "terms of a future agreement" not actionable); *Boone v. Codispoti & Assocs.*, *P.C.*, 2015 WL 5853843, at *2-3 (S.D.N.Y. Oct. 7, 2015) (likelihood of jury trial not actionable as "mere expression of future expectation[]").

[32] *Aglira v. Julien & Schlesinger,* for example, found that opposing counsel made no misrepresentations at all; and also opined that *legal malpractice claims* cannot be brought against opposing counsel. 214 A.D.2d 178, 183 (N.Y. App. Div. 1995); *see also Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 562 (N.Y. 2009) (deciding "under the circumstances" that counsel had no duty to disclose in misleading offering memorandum). Defendants also cite inapposite cases holding that *represented*, sophisticated parties did not reasonably rely on their adversaries. *See* MTD 5-7 (citing *Appel v. Giddens*, 89 A.D.3d 543, 544 (N.Y. App. Div. 2011) (relying party was represented); *Mooney v. Manhattan Occupational, Physical & Speech Therapies, PLLC*, 166 A.D.3d 957, 960 (N.Y. App. Div. 2018) (same); *Sheng v. Div. of Human Rights*, 93 A.D.3d 851, 852 (N.Y. App. Div. 2012) (same); *Gupta v. Headstrong, Inc.*, No. 17 CV 5286, 2019 WL 4256396, at *3 (S.D.N.Y. Sept. 9, 2019) (same); *Mann v. Rusk*, 14 A.D.3d 909, 910 (N.Y. App. Div. 2005) (same, and no reliance); *Eurycleia*, 12 N.Y.3d at 562 (same, and relying party had substantial legal and business savvy); *Stone v. Sutton View Capital,* LLC, 2017 WL 631192, at *3 (S.D.N.Y. Dec. 8, 2017) ("Defendants are a sophisticated businessman and sophisticated entities planning to advise on a complex and sophisticated financial transaction."); *Centro Empresarial Cempresa S.A. v. Am. Móvil S.A.B. de C.V.*, 17 N.Y.3d 269, 278 (N.Y. 2011) (parties were "large corporations engaged in complex transactions in which they were advised by counsel")). Defendants are also incorrect that Bryks' material omissions are not actionable because he was her adversary: the Complaint alleges that Bryks was aware Ms. Dupres would rely on his statements and omissions in executing the release, which is sufficient to find a "special relationship" between known parties giving rise to a duty to disclose. *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 584 (2d Cir. 2005).

meeting with counsel—the earliest point at which she had "full knowledge of the material facts entitling [her] to rescind"—Ms. Dupres timely indicated that she did *not* intend to ratify it. *Id*. at 344; Compl. ¶ 196. And there is no blanket rule that a party must "tender back" any sums received. MTD 8. This case illustrates precisely why an unthinking application of such a requirement would be absurd: Defendants apparently would have Ms. Dupres give *them* back *her* wages, which they took wrongfully on behalf of a third party and had no entitlement to keep—the same wages which, just days later, the Civil Court directed them to return to her with no strings attached. *See Brown*, 393 F.3d at 346-48 ("tender back of consideration" principle required "detailed analysis" of factors like timeliness, prejudice to defendants, defendants' knowledge, and party's separate entitlement to consideration).

Defendants do not even address the multiple additional theories under which the Release would be unenforceable, each of which is also inappropriate for resolution on this motion. The Complaint alleges facts showing that Ms. Dupres signed the Stipulation under economic duress, because it alleges that Defendants placed her under severe financial pressure by wrongly seizing her wages, then "compelled [her] to agree" to the Release "by means of a wrongful threat which precluded the exercise of [her] free will"—the threat of continuing to force her to appear in court and retaining her wages.[33] Compl. ¶¶ 175; 187-89, 194-96, 198. The Complaint also pleads facts sufficient to deem the Release void for lack of consideration, because Ms. Dupres received only the return of her *own* improperly garnished wages, and Defendants' promise to vacate a judgment that was about to be vacated anyway—neither is "something of value to which [she] was not otherwise entitled." *Chaput v. Unisys Corp.,* 964 F.2d 1299, 1301 (2nd Cir. 1992); *see also Brown*, 393 F.3d at 347 (2d Cir. 2004) (lack of consideration inappropriate for resolution on

[33] *Guzman v. Concavage Marine Constr. Inc.*, 176 F. Supp. 3d 330, 338 (S.D.N.Y. 2016) (plaintiff's allegations of being compelled to sign release "on the spot" due to threats by the defendants defeated motion to dismiss).

motion to dismiss). Finally, Ms. Dupres alleges facts that would make the release void as unconscionable, both procedurally—because of the parties' vastly unequal bargaining power and Defendants' high-pressure tactics—and substantively—because the terms were "unreasonably favorable" to Defendants, who got the release for nothing.[34]

V. The Court Should Retain Mr. Viruet's Claims Based on "Common" Practices

Contrary to Defendants' arguments, the Court should exercise supplemental jurisdiction over Mr. Viruet's state law claims. *See* MTD 25. Those claims plainly share a "common nucleus of operative fact" with the other Plaintiffs' allegations, since all are challenging "the *same* . . . policies and practices" of Defendants. *See Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 245, 250 (2d Cir. 2011) (emphasis added). It is immaterial that Mr. Viruet's claims arise from those practices as applied to him in particular. In *Romero v. Bestcare, Inc.*, for example, the court exercised jurisdiction over the state law claims of a plaintiff without parallel federal claims, because the claims "share[d] a common bond with [the federal claim plaintiff's] in that they derive from defendants' wage payment and reimbursement policies."[35] Keeping Mr. Viruet's claims in this action will promote "economy, convenience, fairness, and comity." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 446 (2d Cir. 1998).

[34] *McLaughlin v. Advanced Commc'ns, Inc.*, No. 09 Civ. 2311, 2010 WL 11626961, at *2-3 (E.D.N.Y. Mar. 25, 2010), *R. & R. adopted*, 2010 WL 11626962 (E.D.N.Y. Apr. 15, 2010); *see also Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 382 (S.D.N.Y. 2002); *OxConner v. Agilant Sols., Inc.*, 444 F. Supp. 3d 593, 602 (S.D.N.Y. 2020).

[35] No. 15 CV 7397, 2018 WL 1702001, at *8 (E.D.N.Y. Feb. 28, 2018), *R. & R. adopted*, 2018 WL 1701948 (E.D.N.Y. Mar. 31, 2018); *see also Xue Hui Zhang v. Ichiban Grp., LLC*, No. 17 Civ. 148, 2018 WL 3597632, at *3 (N.D.N.Y. July 26, 2018) (similar).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

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Respectfully submitted,

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