UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GERRELL MARTIN and CURTIS SAMPSON, Plaintiffs, vs. LEVYLAW, LLC and BART E. LEVY, Defendants.	CIVIL ACTION No.: 17-1139

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE EVIDENCE OF MISTAKE OF LAW AND INDUSTRY PRACTICES FOR DEFENDANTS' LIABILITY

In 2010, the Supreme Court concluded that the Fair Debt Collection Practices Act's bona fide error defense does not apply to a debt collector's claims that he made a mistake of that law. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010). Any argument that seeks to *use* mistakes of law for that defense therefore must grapple with and distinguish that precedent, as well as the Third Circuit decision that followed, *Daubert v. NRA Group, LLC*, 861 F.3d 382 (3d Cir. 2017).

Defendants make no such attempt. They do not even cite *Jerman* or *Daubert*, let alone explain away their reasoning. But those decisions, along with Congress' express purpose in enacting the FDCPA, are clear: Mistakes of any law do not qualify for the bona fide error defense. Defendants should not be able to mislead a jury otherwise.

A. The Supreme Court's Decision in *Jerman* Forecloses Debt Collectors from Using a Mistake of Law Defense

In *Jerman*, the Supreme Court considered for the first time whether a debt collector could use the bona fide error defense, 15 U.S.C § 1692k(c), for an alleged a mistake of law. The answer was unequivocal: "FDCPA violations forgivable under § 1692k(c) must result from

'clerical or factual mistakes,' not mistakes of law." *Daubert*, 861 F.3d at 394 (quoting *Jerman* 559 U.S. at 577). The bona fide error defense requires *procedures*. 15 U.S.C. 1692k(c). "Procedures, the [Supreme] Court said, are 'processes that have mechanical or other such regular orderly steps' designed to 'avoid errors like clerical or factual mistakes,' and 'legal reasoning is not a mechanical or strictly linear process' amenable to such procedures." *Daubert*, 861 F.3d at 394 (quoting *Jerman*, 559 U.S. at 587)). "In other words, a mistake of law isn't a bona fide error." *Id.*

Jerman dealt with an error of law interpreting the FDCPA itself. 559 U.S. at 580 n.4. Accordingly, whether other errors of law could still qualify for the bona fide error defense theoretically remains an open question. *See id.* The reasoning of *Jerman*, however, quickly answers the query, because at least *seven* different principles used by the Supreme Court to reach its decision make clear that any mistakes of law do not qualify:

> (1) "[T]he common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."
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> (2) "[W]hen Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than [under the FDCPA]."
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> (3) "Congress also did not confine liability under the FDCPA to "willful" violations, a term more often understood in the civil context to excuse mistakes of law."
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> (4) The statutory phrase "procedures reasonably adapted to avoid any such error" is "more naturally read to apply to processes that have mechanical or other such 'regular orderly' steps to avoid mistakes," and "legal reasoning is not a mechanical or strictly linear process."
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> (5) "[T]he uniform interpretations of three Courts of Appeals holding that the TILA defense does not extend to mistakes of law."
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> (6) "[N]onlawyer debt collectors could obtain blanket immunity for mistaken interpretations of the FDCPA simply by seeking the advice of legal counsel."

> (7) Concern over an "enforcement gap" under a contrary reading, where "consumers will have little incentive to bring enforcement actions where the law is at all unsettled, because in such circumstances a debt collector could easily claim bona fide error of law."

Verburg v. Weltman, Weignberg & Reis Co., L.P.A., 295 F. Supp. 3d 771, 774-75 (W.D. Mich. 2018) (quoting *Jerman*, 559 U.S. at 581, 83-84, 87, 91, 602-03) (internal citations omitted).

Simply put, each of *Jerman's* guideposts leads to the same endpoint. *See Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710, 713 (6th Cir. 2015) ("[T]he discussion of the affirmative defense makes clear that mistakes of state law can give rise to liability."); *Verburg*, 295 F. Supp. 3d at 774 ("[M]uch of the Court's reasoning in *Jerman II* applies in equal force to mistakes of state law as it does to mistakes of the FDCPA"); *Harden v. Autovest, L.L.C.*, No. 15-34, 2016 U.S. Dist. LEXIS 164728, at *4-5 (W.D. Mich. Nov. 30, 2016) ("The Supreme Court did not . . . distinguish errors in interpretation of the FDCPA from errors of state law. . . . Thus, the reasoning in *Jerman* is consistent with the conclusion that a mistake of state law is not a bona fide error."); *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 911 F. Supp. 2d 1, 82 (D. Mass. 2012) (holding that the "principles used to support the holding in *Jerman* lead to the conclusion that section 1692k(c) does not encompass mistakes based on state law"); *New v. Gemini Capital Grp.*, 859 F. Supp. 2d 990, 998 (S.D. Iowa 2012) ("Although the specific question before the Court in *Jerman* was whether an incorrect interpretation of the FDCPA qualifies as a bona fide error, the Court discussed mistakes of law generally, and its reasoning encompasses mistakes of state law."); *see also Daubert*, 861 F.3d at 394 (holding that "legal reasoning is not a mechanical or strictly linear process' amenable to [the] procedures" required by the bona fide error defense) (quoting *Jerman*, 559 U.S. at 587).

Rather than grappling with *Jerman*, Defendants spend three pages recapping *Kort v. Diversified Collection Services, Inc.*, 394 F.3d 530 (7th Cir. 2005). *Kort* is inapposite for any

number of reasons, but as district courts within the Seventh Circuit itself recognize, the most important one is the simplest: it predates *Jerman*. *See Oberg v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, No. 14-7369, 2015 U.S. Dist. LEXIS 172439, at *8-9 (N.D. Ill. Dec. 29, 2015) ("*Kort* predates *Jerman*, so the continued validity of its central holding is open to question."); *Rowan v. Blatt, Hasenmiller, Leibsker &, Moore LLC*, No. 14-8923, 2015 U.S. Dist. LEXIS 137739, at *14 (N.D. Ill. Oct. 8, 2015) ("[I]t is important to note that *Kort* was decided before *Jerman*, so *Kort* did not have to consider the impact of *Jerman* on its decision.").[1]

Next, Defendants rely on a case from the Eastern District of Washington, *Gray v. Suttell & Associates*, 123 F. Supp. 3d 1283, 1289 (E.D. Wash. 2015), for an alleged "trend" in case law to allow the bona fide error defense for state law errors. *Gray*, however, makes a familiar mistake: It wholly "relies on cases decided before *Jerman*, and does not address the reasons given by the Supreme Court that would apply to all mistakes of law, including mistakes of state law." *Harden*, 2016 U.S. Dist. LEXIS 164728, at *4; *see also Verburg*, 295 F. Supp. 3d at 775 (rejecting *Gray* because the cases it cites "all predate the Supreme Court's decision in *Jerman*," and because it ignores *Jerman's* reasoning).[2] Defendants have simply not met their burden to demonstrate that the reasoning of the Supreme Court should be ignored.

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[1] Even were *Kort* good law, it would have no bearing here. The Seventh Circuit has cautioned that "*Kort's* holding was limited: where a separate federal law requires debt-collection letters to include specific text, and that text is later held to be misleading, a debt collector that used the required text is covered by the 'bona fide error' provision." *Leeb v. Nationwide Credit Corp.*, 806 F.3d 895, 899 n.2 (7th Cir. 2015). But Defendants have not presented a scintilla of evidence—nor could they—that there was a law or rule that *required them to sue Plaintiffs for an unowed debt*, or which required them to state that a property was fit for occupancy and had no code violations when it was without heat and had been declared unfit for human occupancy.

[2] There is not significant law on the issue in the Eastern District of Pennsylvania. *Compare Jarzyna v. Home Props., L.P.*, 114 F. Supp. 3d 243, 267 (E.D. Pa. 2015) (allowing error of law without significant analysis of *Jerman*, but granting summary judgment to consumer because of lack of procedures) *with Walter v. Palisades Collection*, No. 06-378, 2011 U.S. Dist.

B. The Court Rule Adopted by the Board of Judges of Municipal Court was Created to Stop Debt Collectors, not to Absolve them

Defendants end their brief with one of their boldest leaps yet. They argue that a court rule adopted to stop the precise illegal evictions at issue here somehow proves Defendants were acting legally. Nothing could be further from the truth.

On January 2, 2018, the Board of Judges of the Philadelphia Municipal Court took action to confront the issues raised by this case: collection attorneys suing Philadelphia consumers for money those consumers do not owe under the law. Specifically, the Board of Judges adopted new Rule 109(c)(3) and (c)(4) of the Philadelphia Municipal Court Rules of Civil Practice, adding a requirement that a landlord-tenant complaint "shall set forth" that the "the landlord is in compliance with the requirements of those sections of the Philadelphia Code that relate to Certificates of Rental Suitability, the City of Philadelphia Partners for Good Housing Handbook and Rental Licenses." Phila. M.C.R. Civ. P. No. 109(c)(3)(j). The Rule further provides that a landlord must attach "[a] copy of the Rental License which was in force during any time that the plaintiff is seeking to collect rent and is in force at the time of filing," and "[a] copy of the Certificate of Rental Suitability that was provided to the defendant." *Id.* at 109(c)(4)(b)-(c). In other words, Philadelphia law means what it says: landlords that do not comply with Philadelphia law are "denied the right to recover possession of the premises or to collect rent during or for the period of noncompliance." Phila. Code § 9-3901(4)(e).[3]

LEXIS 47106, at *21 (E.D. Pa. May 2, 2011) (rejecting bona fide error defense under *Jerman* for question under state law as to whether "spouse is liable for the debt of another spouse").

[3] This should lay to waste once and for all Defendants' attempt to evade the clear language of Philadelphia law. But it does not, for Defendants repeat their summary judgment tactic: citing an op-ed from the Legal Intelligencer and stray dicta from a nonprecedential decision of the Superior Court, which itself admonishes parties not to even cite to it. *See* Pa. IOP Super. Ct. 65.37 ("An unpublished memorandum decision shall not be relied upon or cited by a

Forcing a court system to adopt an entire rule of procedure to stop one's illegal behavior might give some debt collectors pause. Defendants, however, are not so chagrined. They assert this attempt to stop an illegal eviction crisis that *Defendants and their brethren were causing* somehow demonstrates Defendants' actions were permissible in the first instance. They present no legal support for this bold notion.

In any case, Defendants argument is a red herring. They would be not saved by the bona fide error defense even had they filed suit in reliance on the opinions of Municipal Court Judges. *See Daubert*, 861 F.3d at 393-95 (holding that relying on decisions by district courts that conduct was permissible is an error of law not excusable under the bona fide error defense); *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 864 F.3d 492, 500 (7th Cir. 2017) (en banc) ("The fact that different sets of lawyers, including those with judicial commissions, made a legal error does not make it less a legal error."). Again, Defendants do not so much as cite this case law, let alone explain why it should be ignored.

Defendants are right about one thing: suing Philadelphians for rent they did not owe was the standard operating procedure of Levy and a certain number of his colleagues. But in making the argument that this should excuse their behavior, they come face-to-face with "Congress' express purpose" in enacting the FDCPA: "to eliminate abusive debt collection practices by debt collectors, and to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Jerman*, 559 U.S. at 602 (quoting 15 U.S.C. § 1692(e)) (internal brackets omitted). It is precisely why the law does not have an "everyone did it" defense or allow mistakes of law to be used as bona fide errors. *Id.* (holding that "immunizing

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Court or a party in any other action or proceeding . . . ."). As Plaintiffs explained previously, the statute is unambiguous, and that plain language therefore controls. *See* ECF No. 37 at 1-3.

debt collectors who adopt aggressive but mistaken interpretations of the law" is not "consistent with the statute's broadly worded prohibitions on debt collector misconduct"); *Dinaples v. MRS BPO, LLC*, No. 15-1435, 2017 U.S. Dist. LEXIS 192255, at *7 (W.D. Pa. Nov. 21, 2017) (rejecting bona fide error defense and granting summary judgment for consumer when debt collector "admits it was company – and indeed, industry – policy" to commit the violation at issue). Allowing Defendants to put on evidence to the contrary will only mislead a jury.

Date: July 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of the brief was made on July 31, 2018, and served to counsel for Defendants via the electronic filing system.

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