No. 14-1114

In the United States Court of Appeals for the Third Circuit

PATRICIA EVANKAVITCH,
Plaintiff-Appellee,

v.

GREEN TREE SERVICING, LLC,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

BRIEF FOR PLAINTIFF-APPELLEE PATRICIA EVANKAVITCH

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INTRODUCTION

The Fair Debt Collection Practices Act generally bars debt collectors from contacting a consumer's friends, neighbors, relatives, or employers. Green Tree Servicing violated the FDCPA by making multiple calls to Patricia Evankavitch's daughter and neighbors. The jury returned a verdict in Ms. Evankavitch's favor.

Green Tree asks this Court to overturn the verdict based on an objection that Green Tree never raised below, that wouldn't have changed the outcome anyway, and that is wrong as a matter of law. Its new objection turns on a defense to the rule against third-party contact: A debt collector may contact third parties "for the purpose" of seeking "location information about the consumer," but may not do so more than once "unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information." 15 U.S.C. § 1692b(3). Green Tree now says that it was the *plaintiff's* burden to disprove this defense—with evidence of Green Tree's beliefs about information in Green Tree's possession.

First, Green Tree never "[s]tat[ed] distinctly the matter objected to and the grounds for the objection," as Rule 51 requires. This Court enforces that rule "strictly," and "refuse[s] to consider newly developed arguments concerning a jury charge deficiency" absent errors "so serious and flagrant" that they implicate "the very integrity of the trial." *Fashauer v. N.J. Transit R. Operations*, 57 F.3d 1269, 1288-

89 (3d Cir. 1995). But Green Tree's own proposed instructions wouldn't have placed the burden on Ms. Evankavitch, so its complaint is one of "invited error." *2660 Woodley Rd. v. ITT Sheraton Corp.*, 369 F.3d 732, 744 (3d Cir. 2004).

Second, the jury's verdict would have been the same regardless. Ms. Evankavitch's attorney asked Green Tree's manager at trial: "Did you find any documented reasonable belief that information previously given by a third party was incomplete or inaccurate?" App. 337. He answered: "I did not." *Id.*

Third, Green Tree's theory flouts the "general rule" that the burden is on the party who "claims the benefits of an exception to the prohibition of a statute." *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967). "That longstanding convention is part of the backdrop against which the Congress writes laws," and courts "respect it" absent "compelling reasons" to the contrary. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91-92 (2008). Because the FDCPA's incomplete-information defense hinges on "facts peculiarly within the knowledge and control of the defendant," *Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980), "it is easier to prove … than to disprove," and thus "practicality favors placing the burden on the party asserting" it. *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706-711 (2001). Doing so is also appropriate in light of the FDCPA's strict-liability regime. The courts that have considered the issue have placed the burden on the debt collector. Not one has placed it on the consumer. This Court shouldn't become the first.

STATEMENT OF THE ISSUES

"Except as provided in section 1692b … a debt collector may not communicate, in connection with the collection of any debt," with most third parties. 15 U.S.C. § 1692c. Section 1692b, in turn, creates a limited-purpose safe harbor, allowing debt collectors to contact a third party "for the purpose of acquiring location information about the consumer"; they may not do so more than once "unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information." 15 U.S.C. § 1692b(3). Green Tree contends that it was the consumer's burden to disprove this incomplete-information defense.

1. Failure to Preserve Error and Invited Error. Did Green Tree fail to preserve its objection by failing to "[s]tate distinctly the matter objected to and the grounds for the objection," as required by Rule 51? And did Green Tree invite the error of which it complains by proposing jury instructions that wouldn't have placed the burden on the consumer to prove the incomplete-information defense?

2. Harmless Error. Would any error have been harmless because the allocation of the burden of proof wouldn't have changed the jury's verdict?

3. Burden of Proof. Who bears the burden to prove the FDCPA's incomplete-information defense—the debt collector or the consumer?

STATEMENT OF THE CASE AND OF THE FACTS

A. Statutory and Regulatory Background

Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," practices that Congress determined "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). The Act seeks to remedy these problems, at once "protect[ing] consumers against debt collection abuses" and "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Id.* § 1692(e).

1. The Prohibition on Third-Party Contacts. Among other things, Congress sought to ensure that "a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer" because "[s]uch contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs." S. Rep. No. 95-382 (1977). To that end, the Act provides that: "*Except as provided in section 1692b* … a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." 15 U.S.C. § 1692c (emphasis added).

2. Safe Harbor for Efforts to Obtain "Location Information."

Section 1692b, in turn, provides a safe harbor from the ban on third-party communications. It permits a debt collector to contact third parties a single time "for the purpose of acquiring location information about the consumer." 15 U.S.C. § 1692b. To qualify, the debt collector must comply with a series of safeguards designed to protect the consumer's privacy and ensure that the communication is limited to its purpose; among other things, the debt collector must "state that he is confirming or correcting location information concerning the consumer" and shall "not state that such consumer owes any debt." *Id.* The term "location information" is limited to "a consumer's place of abode and his telephone number at such place, or his place of employment." *Id.* § 1692a(7).

3. The Incomplete-Information Defense. Section 1692b also sets forth a more specific and demanding exception to the ban on third-party communications for all subsequent contacts: A debt collector communicating with a third party for the purpose of requesting location information may not contact a third party more than once "*unless* the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information." *Id.* § 1692b(3) (emphasis added). The text is silent about who bears the burden of proof on this defense.

4. The FDCPA's Strict-Liability Regime. In designing this regulatory scheme, Congress recognized that debt collectors have a uniquely powerful incentive to engage in abusive practices. "[I]ndependent debt collectors," Congress concluded, were "the prime source of egregious collection practices." S. Rep. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Unlike other businesses that interact with consumers, debt collectors are not "restrained by the desire to protect their good will" or "the consumer's opinion of them." *Id.* Moreover, "[c]ollection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means." *Id.* Consequently, the Act contains no general knowledge or intent requirement. Instead, it imposes strict liability, while providing a complete defense to those debt collectors who "show[] by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

The Act also provides a second overarching defense for conduct in "good faith conformity" with a written advisory opinion of the Consumer Financial Protection Bureau, the federal agency with interpretive and enforcement authority over the FDCPA. *Id.* § 1692k(e). Unlike the bona-fide error defense but like the incomplete-information defense, the text is silent about who bears the burden of proof to show that conduct is or is not in conformity with an advisory opinion.

B. Facts and Proceedings Below

1. The Facts. In 2005, Patricia Evankavitch took out a loan of $43,300 so she could lend money to her son, Christopher. App. 71–72 ¶¶ 4, 7. Christopher made payments to Ms. Evankavitch, who remained the only person legally responsible for the loan, and she paid the lender herself. *Id.* ¶ 8-9. Christopher, however, got into a financial bind and fell behind. *Id.* ¶ 10. In May 2011, the loan was transferred to Green Tree Servicing, a collection agency. *Id.* ¶ 11. Over the six-year period between 2005 and 2011, Ms. Evankavitch had made all monthly loan payments except four. *Id.* ¶ 12.

After failing to reach Ms. Evankavitch, Green Tree phoned her daughter, Cheryl, in January 2012, and asked her to convey a message to Ms. Evankavitch. App. 73 ¶ 20. Ms. Evankavitch later contacted Green Tree and asked it to stop calling her daughter's number. App. 73-74 ¶ 22-23. Despite this request, Green Tree repeatedly called Cheryl's phone number over a four-month period and also left several voicemails at that number. App. 74 ¶ 25.

Green Tree did not limit its calls to Ms. Evankavitch's family; the company also repeatedly called Ms. Evankavitch's next-door neighbors, Robert and Sally Heim. App. 75 ¶ 30–37. In a couple of these instances, Green Tree left voicemails; in others, they spoke directly to the Heims and asked them to tell Ms. Evankavitch to call them back.

Robert Heim said that Ms. Evankavitch "lives next door, but we're not real close neighbors." ECF No. 25-3 at 6. He believes he answered at least six calls from Green Tree, and sometimes would not answer the phone. *Id.* at 8. Green Tree asked him to "go next door and tell Patty to call Green Tree." *Id.* at 10. Heim recalled, "I thought to myself, why should I do that? She has a phone. Call them on their own phone. I'm not that close to the neighbors myself." *Id.* After a while, he "got pretty angry. I keep telling them, don't call this house again for a message to go next door. I said, I have my own problems and she has hers." *Id.* at 13.

2. The Proceedings Below. Ms. Evankavitch sued Green Tree in state court for violating the FDCPA. App. 38–40. She alleged that Green Tree violated 15 U.S.C. § 1692c(b) by contacting third parties repeatedly, failing to identify itself as a debt collector, and by repeatedly leaving messages for Cheryl and the Heims asking them to have Ms. Evankavitch return its calls. App. 39 ¶¶ 11–14. Green Tree removed the case to federal court. App. 31–34. Following discovery and an unsuccessful summary-judgment motion, the case proceeded to a jury trial in which Green Tree asserted two defenses—the bona-fide-error defense and the incomplete-information defense.

Before and during trial, the parties communicated several times regarding jury instructions. In a November pre-trial conference, the district judge asked whether the parties could agree on proposed verdict forms to expedite the trial.

App. 97:4–97:7. After Green Tree's attorney noted she hadn't yet read Ms. Evankavitch's proposed verdict forms, Ms. Evankavitch's attorney alerted her that Green Tree might not agree that "the defendant has the burden on proving the exception to the statute." App. 97:20–97:24. Green Tree's attorney responded, "I can't agree on that," and offered to "give [Ms. Evankavitch's attorney] a call" to discuss the forms later. App. 97:16–98:3. The record, however, does not show any further exchange between counsel on the topic until the parties submitted their respective trial memoranda. Green Tree's memorandum, discussing the jury instructions on the burden of proof, stated only that Ms. Evankavitch had the burden to prove Green Tree violated the Act. App. 106–108. It did not address the question now on appeal: Who has the burden of proof on the incomplete-information defense?

The parties next discussed the jury instructions in a December conference immediately before the trial began. Judge Munley, in discussing the jury instructions and recapping the November pre-trial conference, said: "the parties agree . . . that the Act is violated in the sense that they agree that the defendant contacted third parties and did so multiple times, which is generally a violation of the act. They don't agree on the Defendant's defenses; that is, [whether] the Defendant was seeking location information which is allowed under the statute[.]" App. 227:22–228:16. Green Tree's attorney began to ask a question, at which

point the judge interrupted and clarified. App. 228:20–229:4. After he completed his clarification, Judge Munley asked, "Do you have any questions?" App. 229:4. Green Tree's attorney had no further questions on that instruction. Judge Munley and both attorneys then discussed other matters for the next several minutes before ending the conference. App. 229:4–233:1

During trial, Ms. Evankavitch called several witnesses, including Thomas Krehel, a manager at Green Tree and the official that Green Tree provided to speak on behalf of the company. The following colloquy took place during his direct examination—after he had been given a day to refresh his recollection and review all relevant documents:

> Q. Did you find any documented reasonable belief that information previously given by a third party was incomplete or inaccurate?
>
> A. I did not.
>
> Q. You were also going to look through all the notes for a documented reasonable belief that a third party could now provide complete or correct information.
>
> Did you find any such document to a reasonable belief?
>
> A. I did not.

App. 337:7-337:15; *see also* App. 294:5–299:6; DN 30-3 at 3.

An attempt by Green Tree's lawyer to rehabilitate Mr. Krehel on cross-examination produced this exchange:

> A. And in your review of the notes last night, did you ascertain any reasonable belief that the third party would be able to provide correct information?
>
> Q. It is possible. I mean, she is the neighbor, so it is possible now that she has updated information, yes.

App. 345.

Following this testimony, the evidence was closed. The attorneys met with Judge Munley in chambers to discuss the jury instructions. Green Tree's proposed jury instruction number 14, regarding the burden of proof, stated that Ms. Evankavitch only bore the burden of proving Green Tree violated the Act. It read: "[T]o prevail on Plaintiff's claim that Green Tree is liable to her for a violation of the FDCPA, Plaintiff must prove by a preponderance of the evidence that Green Tree violated the FDCPA as described in these instructions." App. 162. Without addressing whether the incomplete-information exception constituted an affirmative defense either way, it stated that "with respect to any affirmative defense asserted by [] defendant, the burden of proof is upon the defendant to prove the material allegations of any affirmative defense by a preponderance of the evidence." *Id.* Similarly, the plaintiff's proposed jury instruction number 5 stated that "Green Tree has the burden of proving the elements of the defense by a preponderance of the evidence." ECF No. 58 at 5.

Judge Munley went through both parties' proposed instructions one-by-one, and when he reached Green Tree's instruction number 14, he stated "14 is

covered," *i.e.* the content of the instruction would be included in the judge's charge to the jury. App. 358:23. At that point, Ms. Evankavitch's attorney interjected, prompting Judge Munley to read aloud that section of his instructions. App. 358:24–359:3. He read: "The parties further agree that the Defendant did, in fact, contact third parties. The FDCPA, however, provides an exception to the general rule of not contacting third parties. . . . Here the Defendant argues that the location information exception applies." App. 363:3–363:25.

Green Tree's attorney then objected—not to the allocation of the burden of proof for the incomplete-information exception, but rather, to the characterization that both parties agreed that all of the calls in question were to third parties. She said, "when the call was placed by Green Tree to [Cheryl's phone number] . . . Green Tree thought it was calling the Plaintiff, not that it was calling a third party." App. 365:3–365:10. The district judge clarified his instruction, reiterating that the parties "agree that the Act is violated in the sense that they agree that the Defendant contacted third parties and did so multiple times, which is generally a violation of the Act." App. 365:11–365:16. Green Tree's attorney responded, "I would agree with that as to" the neighbor's phone number. App. 365:17–365:22. Judge Munley then asked if Green Tree had any further objections, to which Green Tree's attorney responded, "No." App. 366:2.

Finally, Judge Munley charged the jury. Using the instructions to which both parties had acquiesced, he instructed the jury that Green Tree had two defenses: "that the Defendant was seeking location information which is allowed under the statute" and "that the violation was a good faith error on the Defendant's part." App. 405. He explained to the jury that "you are going to be examining the Defendant's defenses, and the burden of proof with regard to the Defendant's defenses are on the Defendant." *Id.*

After deliberating, the jury found Green Tree liable for violating the FDCPA in its calls to Cheryl and the Heim family. The court thereafter entered judgment in favor of Ms. Evankavitch in the amount of $1,000. App. 5. Green Tree did not file any post-trial motions. This appeal followed.

SUMMARY OF ARGUMENT

I. Green Tree's threshold problem is that it didn't properly preserve below the objection that it makes here—that, in its view, the consumer should bear the burden of proving the FDCPA's incomplete-information exception. Green Tree never "[s]tat[ed] distinctly the matter objected to and the grounds for the objection," as Rule 51 requires. Indeed, Green Tree not only failed to make a proper objection below, but admits in its brief (at 18) that it "acquiesced" in the district court's instructions before the case was sent to the jury. To ensure that the important policies of Rule 51 are not undermined, this Court enforces that rule

"strictly" and "refuse[s] to consider newly developed arguments concerning a jury charge deficiency" absent errors "so serious and flagrant" that they implicate "the very integrity of the trial." *Fashauer v. N.J. Transit R. Operations*, 57 F.3d 1269, 1288-89 (3d Cir. 1995). In any event, because Green Tree actually proposed instructions of its own that did *not* clearly allocate the burden in the way it now says the district court should have, the error of which Green Tree complains, even if it exists, is "tantamount to invited error." *2660 Woodley Rd. v. ITT Sheraton Corp.*, 369 F.3d 732, 744 (3d Cir. 2004).

II. Any error, even if preserved, was also harmless error. There is no reason to believe that this case would have come out differently had the burden been reallocated. Ms. Evankavitch's attorney asked Green Tree's manager at trial: "Did you find any documented reasonable belief that information previously given by a third party was incomplete or inaccurate?" App. 337. His answer: "I did not." *Id.* The burden of proof affects only "which party loses if the evidence is closely balanced." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008). "In truth, however, very few cases will be in evidentiary equipoise." *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). Green Tree points to nothing to suggest equipoise on this record.

III. Finally, even if Green Tree's objection had been preserved, and even if it would make a practical difference in this case, the district court got it right. The FDCPA's text and structure—particularly its use of the words "except" and

"unless," and its focus on the subjective purposes and beliefs of the defendant—show that the incomplete-information defense functions as a safe-harbor exception from the prohibition on communications with third parties. "After looking at the statutory text, most lawyers would accept that characterization as a matter of course, thanks to the familiar principle that '[w]hen a proviso . . . carves an exception out of the body of a statute . . . those who set up such exception must prove it.'" *Meacham*, 554 U.S. at 91 (quoting *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910) (opinion for the Court by Holmes, J.)). "That longstanding convention is part of the backdrop against which the Congress writes laws." *Id.* at 91-92. And because the FDCPA's incomplete-information defense "is easier to prove … than to disprove," "practicality favors placing the burden on the party asserting" it. *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706-11 (2001).

STANDARDS OF REVIEW

"When reviewing the propriety of a district court's charge to the jury, the scope of [this Court's] review depends on whether the party challenging the charge properly preserved his or her objection before the trial court." *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 275-76 (3d Cir. 1998); *see* Fed. R. Civ. P. 51(d)(1). Where the objection has been waived, the Court's power to review is "discretionary" and "should be exercised sparingly'"—an approach that applies equally where, as here, the instructions concern the burden of proof. *Fashauer v. New Jersey Transit Rail*

Operations, 57 F.3d 1269, 1289 (3d Cir. 1995) (quoting *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 770 n. 31 (3d Cir. 1990)). If the Court "choose[s] to exercise that discretion, [it] may reverse only where the error is 'fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and [the Court's] failure to consider the error would result in a miscarriage of justice.'" *Id.* (quoting *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 53 (3d Cir. 1989)); *see* Fed. R. Civ. P. 51(d)(2).

Where a party's own proposed jury instructions would not have specifically allocated the burden in the way that party proposes on appeal, this is "tantamount to invited error," *2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 744 (3d Cir. 2004), and "does not warrant relief" even if the instructions were wrong. *Sands v. Wagner*, 314 F. App'x 506, 509 (3d Cir. 2009).

Even where the asserted error has been preserved, this Court will not overturn a jury's verdict for harmless error: "[T]he court must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61; *see also* 28 U.S.C. § 2111. That is, the Court will not reverse unless there is "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004); *see also Forrest v. Beloit Corp.*, 424 F.3d 344, 349 (3d Cir. 2005).

Finally, assuming the question is properly preserved and can be shown to be outcome-determinative, "[d]eterminations as to whether a party's defense is an affirmative defense which the party raising it bears the burden of proving, are legal determinations" subject to *de novo* review. *Blancha v. Raymark Indus.*, 972 F.2d 507, 512 (3d Cir. 1992).

ARGUMENT

I. Green Tree failed to raise its objection below, as required by Rule 51, and invited the alleged error by failing to propose the jury instruction it now claims should have been given at trial.

Green Tree asks this Court to overturn a jury verdict because it thinks the district judge gave the jury an incorrect instruction concerning the burden of proof on one of Green Tree's defenses—the FDCPA's incomplete-information exception to the prohibition against third-party contacts. The problem for Green Tree in this appeal, however, is that it did not properly preserve this argument in the district court. It never made a proper objection on this point, and never proposed its own jury instruction that would have clearly allocated the burden in the way it now says the court should have. To the contrary, Green Tree's brief admits (at 18) that it "acquiesced" in the district court's instructions, without objecting, before the case was sent to the jury. And because it actually proposed instructions of its own that did *not* clearly allocate the burden in the way it now says the district court should have, the error Green Tree complains of is tantamount to invited error as well.

Perhaps anticipating that we would raise these serious error-preservation problems, Green Tree relies on the notion that an error concerning the burden of proof is "fundamental" and "requires a new trial" regardless. Green Tree Br. 30 (citing *Waldorf v. Shuta*, 896 F.2d 723, 730 (3d Cir. 1990)). But "that principle assumes that the issue properly has been preserved for appeal." *Fashauer v. New Jersey Transit R. Operations, Inc.*, 57 F.3d 1269, 1288-89 (3d Cir. 1995) (distinguishing *Waldorf*). Green Tree's "invited error," too, independently forecloses consideration of the burden-of-proof issue on appeal. *See 2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 744 (3d Cir. 2004) (holding that "invited error" precluded consideration of jury instructions on burden of proof); *Sands v. Wagner*, 314 F. App'x 506, 509 (3d Cir. 2009) (same).

As this Court explained at length in *Fashauer*, Federal Rule of Civil Procedure 51 establishes a clear mandate: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." *Fashauer*, 57 F.3d at 1288 (quoting previous version of Rule 51). This Court has long stressed the important policy objectives of strict adherence to this rule: Among other things, it gives the trial courts an opportunity to correct any errors and removes unnecessary burdens on appellate courts. *Id.* To honor those objectives, this Court follows the requirement of error-preservation

"strictly" and has "refused to consider 'newly developed argument[s] concerning [a] jury charge deficiency.'" *Id.* (quoting *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 769 n.29 (3d Cir. 1990)). Thus, because Green Tree did not properly preserve its objection below, this Court reviews only for "plain error" and the "power to reverse is discretionary." *Id.* at 1289. The Court exercises that power "sparingly" in general and "even more sparingly" in civil cases. *Id.* The power is to be "invoked with extreme caution" and is appropriate only "where the error is so serious and flagrant that it goes to the very integrity of the trial." *Id.* (citations omitted).

A. Green Tree points to five locations in the record where it supposedly objected to the district court's jury instructions regarding the burden of the proof on the incomplete-information exception: (1) at the pretrial conference (2) in its trial memorandum; (3) at a second pretrial conference; (4) in its proposed jury instruction number 14; and (5) at a conference in chambers at the close of evidence. Green Tree Br. 6, 16–17. But in none of these places did Green Tree "state[] distinctly the matter objected to" or clearly articulate "the grounds for the objection," as required by Federal Rule of Civil Procedure 51(c).

In fact, Green Tree, by its own admission (at 18) "acquiesced" rather than objected to the jury instructions at the conference in chambers after the close of evidence, failed to object after the instructions were given, and did not file any

post-trial motion on this or any other subject. Green Tree thus "failed to specifically and clearly object" to the jury instructions in each of the five instances at which it claims to have done so. *See McAdam*, 896 F.2d at 759. By "fail[ing] to either cogently raise a specific objection or state the grounds of the objection," Green Tree "waive[d] related arguments on appeal." *Lesende v. Borrero*, 752 F.3d 324, 335 (3d Cir. 2014) (citing *Waldorf,* 896 F.2d at 739). We take each one in turn.

First, at the November pre-trial conference, Green Tree's attorney indicated that she *might* object, but would need to articulate the objection later after reading the materials. She never followed up. In conference, Judge Munley asked if the parties could agree on proposed verdict forms to speed up the trial. App. 97:4–97:7. After Green Tree's attorney noted she hadn't yet read Ms. Evankavitch's proposed verdict forms, Evankavitch's attorney alerted her that Green Tree might not agree "that the defendant has the burden on proving the exception to the statute." App. 97:20–97:24. Green Tree's attorney responded, "I can't agree on that," and offered to "give [Ms. Evankavitch's attorney] a call" to discuss the instructions later. App. 97:16–98:3. That was the full extent of Green Tree's "objection" during that conference. This colloquy is far from the "specific and clear" statement of the "grounds for the objection" necessary to preserve the issue for appeal.

Second, Green Tree's trial memorandum likewise "fail[ed] to . . . cogently raise a specific objection." *Lesende*, 752 F.3d at 335. Instead, it simply repeated the requirement that Ms. Evankavitch must prove that Green Tree violated the Act. App. 106–109. No one disputes that requirement, as far as it goes. But Green Tree seems to suggest that merely mentioning that general proposition somehow preserved the issue it now raises on appeal: whether the incomplete-information exception is an element of a prima facie case under the Act (which Ms. Evankavitch must prove) or an exception (which Green Tree must prove). The closest Green Tree came to such an objection was arguing that the district court should not follow a case that held that the defendant *does* bear the burden of proof on the incomplete-information exception. App. 108 (citing *Kasalo v. Monco Law Offices, S.C.*, 2009 WL 4639720 (N.D. Ill. 2009)). But Green Tree merely noted in passing that this case wasn't binding on the district court, which is of course true. Green Tree did not "clearly and specifically," *McAdam*, 896 F.2d at 759, identify its new argument: that the incomplete-information exception is an element of the offense that Ms. Evankavitch must prove as part of her prima facie case, rather than an exception that Green Tree must prove. And Green Tree certainly didn't explain the *basis* for that objection or argue in support of it.

Third, in the December pre-trial conference, Green Tree again had an opportunity to object and failed to do so. Judge Munley, in discussing the jury instructions, stated:

> the parties agree . . . that all of these elements [of an FDCPA violation] have been met. They agree that the Act is violated in the sense that they agree that the defendant contacted third parties and did so multiple times, which is generally a violation of the act. Thus, the Plaintiff does not have the burden to establish any of these elements. They don't agree on the Defendant's defenses; that is, the Defendant was seeking location information which is allowed under the statute or that the violation was a good faith error on the Defendant's part. . . . Do we understand each other?

App. 227:22–228:17. Green Tree's attorney initially questioned how Judge Munley "worded one of [his] points," noting, "you said that we're all in agreement that the Defendant has violated the act, but"—at which point the judge interrupted her and clarified. App. 228:20–229:4.

Recognizing its error-preservation problem, Green Tree tries to characterize this exchange as the judge "cut[ing Green Tree's attorney] off from making any further objections" "moments" before "the trial [was] scheduled to begin." Green Tree Br. at 18. Quite the contrary: After Judge Munley finished speaking, he asked, "Do you have any questions?" App. 229:4. Green Tree's attorney did not. Judge Munley then addressed other questions from both parties. App. 229:4–233:14. Green Tree had ample time during this conference to "state distinctly the matter objected to and the grounds for the objection," Fed. R. Civ. P. 51(c)(1), but it did

not do so and it offers no plausible explanation for its failure to do so. Under these circumstances, any suggestion that the district court did not "give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments [were] delivered," Fed. R. Civ. P. 51(b)(2), is meritless.

Fourth, Green Tree's proposed jury instruction number 14 took the same approach as its trial memorandum: It merely stated that Ms. Evankavitch had the burden of proving that Green Tree violated the FDCPA. App. 162–163. It did not identify the incomplete-information exception separately, nor did it argue that Ms. Evankavitch had to show that Green Tree was *not* within this exception.

Fifth, at the in-chambers conference after the close of evidence, Green Tree *agreed* that the Judge's jury instructions were correct. In chambers, Judge Munley read aloud his planned jury instructions on the burden of proof. App. 363:3–363:25. Green Tree's attorney then objected only on a different point, stating that when Green Tree called one of the third parties, Ms. Evankavitch's daughter, it "thought it was calling the Plaintiff." App. 365:6–365:7. The district judge then reiterated his instruction, to which Green Tree's attorney responded: "I would agree with that as to [one of the third parties]." App. 365:17–365:22. Far from "stating distinctly the matter objected to and the grounds for the objection" per Rule 51, Green Tree objected to different matter, and acquiesced in the court's

instruction that the Act was violated unless Green Tree could prove that the incomplete-information exception applied.

Finally, Green Tree failed to object after the jury was instructed. After charging the jury, Judge Munley asked: "Counsel, [are] there any additions, corrections or misstatements?" to which Green Tree's attorney responded, "No, Your Honor." App. 412:13–412:15. And after the jury verdict was entered, Green Tree filed no post-trial motions raising this objection or any other objection. App. 25–30.

B. Alternatively, Green Tree suggests that its mere submission of alternative jury instructions to the district court, in itself, preserved the objection it seeks to raise here. *See* Green Tree Br. 6. It does not. To be sure, this Court assumes that a party objects when its proposed jury instruction is rejected. *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 276 (3d Cir. 1998) ("[A] definitive ruling from the trial court rejecting a requested instruction is sufficient to preserve the issue for appeal."). But this doesn't mean that offering *any* alternative jury instruction preserves *all* claims of jury-instruction error: "Merely proposing a jury instruction that differs from the charge given is insufficient to preserve an objection." *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 339 (3d Cir. 2005). Rather, for proposed jury instructions to sufficiently preserve an issue for appeal, two requirements must be met: (1) the instructions must sufficiently "appris[e] the trial

court of possible error" and of the "the party's position" *id.*, and (2) there must be a "definitive ruling on the record rejecting" the specific instruction at issue, *Collins v. Alco Parking Corp*, 448 F.3d 652, 656 (3d Cir. 2006). Green Tree's instructions failed both requirements.

First, Green Tree's proposed instruction number 14 failed to sufficiently inform the trial court of its position because it was neither "cogent" nor "specific to the alleged error." *Lesende*, 752 F.3d at 335 (citing *Palmer v. Hoffman,* 318 U.S. 109, 119 (1943)). A party can meet this standard if it, for example, "cite[s] . . . authority" that supports the proposed instruction or holds that a contrary "instruction [is] in error," or if it "explain[s] why" a contrary "instruction might cause . . . harm." Green Tree did neither. *Collins*, 448 F.3d at 655. Green Tree's jury instruction number 14, like Green Tree's trial memorandum, did nothing more than state that Evankavitch has the burden of proving that Green Tree violated the FDCPA and that Green Tree would bear the burden on its affirmative defenses. App. 162–163.

The purpose of Rule 51's requirement of a *specific* objection, and the general rule that appeals courts only hear issues raised at trial, is to "ensure[] that the district court is made aware of and given an opportunity to correct any alleged error in the charge before the jury begins its deliberations." *Smith*, 147 F.3d at 276 (citing *Fashauer v. New Jersey Transit Rail Operations,* 57 F.3d 1269, 1289 (3d Cir. 1995)); *see also Remington Rand Corp. v. Bus. Sys., Inc.*, 830 F.2d 1260, 1267 (3d

Cir.1987) ("The requirement that we consider only those objections to jury instructions that were raised before the district court reflects the policy that an appellate court will not predicate error on an issue upon which the district court was not provided with an opportunity to rule.") (internal citations omitted). If "merely proposing" alternative jury instructions were sufficient to preserve *any* objection—without also requiring the alternative jury instruction to clearly and specifically articulate the legal argument—then a party could sneak through an entire trial without ever arguing for the legal theory that it believes the district judge got wrong.

Second, Green Tree's proposed jury instruction 14 was not *definitively rejected* on the record. *Collins*, 448 F.3d at 656. In chambers after the close of evidence, as Judge Munley went through each party's proposed jury instructions, he said, "14 is covered," *i.e.* the content of the instruction would be included in the judge's charge to the jury. App. 358:23. "[P]roposing an instruction, having a similar one adopted and used, and *not objecting to that* does not preserve the error." *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 359 (3d Cir. 2005) (emphasis added). Here, Ms. Evankavitch's attorney objected to Judge Munley "covering" this instruction. App. 358:24–359:3. Judge Munley then read aloud his instruction, App. 360:8–364:9, prompting Green Tree to object to a *different issue*—whether one of the calls in dispute was in fact a call to a third party. App. 364:13–365:2. Then, when the judge prompted if Green

Tree had any further objections, Green Tree's counsel responded "No." App. 366:2.

C. Because Green Tree failed to preserve its objection, this Court could only review the jury instructions for "plain error"—a standard that Green Tree cannot, and does not attempt to, satisfy. *Collins*, 448 F.3d at 655. Under this standard, the Court may reverse only if an error was "fundamental and highly prejudicial" such that "refusal to consider the issue would result in a miscarriage of justice," and if the proper course was "clear under current law." *Franklin Prescriptions, Inc.*, 424 F.3d at 343, 339. Because the district court judge answered a question of first impression in this circuit, his interpretation could not have been clearly wrong under current law. To the contrary, as discussed in part III.A, the courts that have considered the issue appear to have uniformly followed the same approach as the district court—an approach consistent with the "general rule" that a party who "claims the benefits of an exception to the prohibition of the statute" must "carry the burden" of proving that exception applies. *United States v. First City Nat. Bank of Houston*, 386 U.S. 361, 366 (1967). This is a far cry from a "plain error in the instructions affecting substantial rights." *Collins*, 448 F.3d at 655.

II. The result would have been the same regardless of who had the burden to prove the incomplete-information defense.

Even if Green Tree had properly preserved its objections, and even if it were right about the law, it would make no difference here. Any error would have been

harmless because Green Tree cannot show "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (quotation marks omitted); *see also Forrest v. Beloit Corp.*, 424 F.3d 344, 349 (3d Cir. 2005). Under Federal Rule of Civil Procedure 61, "the court must disregard all errors and defects that do not affect any party's substantial rights." *See also* 28 U.S.C. § 2111. Thus, even if the district court's instruction constituted a "misstatement of the burden of proof," (which it did not), that misstatement would "constitute[] harmless error" because it did "not affect the outcome[.]" *United States v. Brennan*, 326 F.3d 176, 201 (3d Cir. 2003) (holding that "the District Court's misstatement of the burden of proof constituted harmless error" in a criminal case because the prosecution's evidence would have met its burden had the burden been properly assigned).

By "burden of proof," Green Tree apparently means to raise only the "burden of persuasion," not the burden of production or pleading. Green Tree Br. 13, 33, 48. But if "the only thing at stake in this case is the gap between production and persuasion," then the burden only affects "which party loses if the evidence is closely balanced." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008). "In truth, however, very few cases will be in evidentiary equipoise." *Schaffer v. Weast*, 546 U.S. 49, 58 (2005); *see Medina v. California*, 505 U.S. 437, 449 (1992) (noting that "the allocation of the burden of proof to the defendant will affect competency

determinations only in a narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent").

There is therefore no reason to believe that this case would have been decided differently if the district court had assigned to Ms. Evankavitch the burden of proof regarding the incomplete-information exception. Green Tree does not even attempt to show that the evidence regarding the exception was in equipoise. And it would be very hard to do so given the testimony of Thomas Krehel, a Green Tree manager who admitted that Green Tree's files contained no information to indicate that Green Tree had a "reasonable belief" that the third parties gave incomplete information. App. 294:5–299:6, 337:7–337:10. Ms. Evankavitch's attorney asked Mr. Krehel: "Did you find any documented reasonable belief that information previously given by a third party was incomplete or inaccurate?" App. 337:7–337:9. Mr. Krehel answered: "I did not." App. 337:10. Given Green Tree's admission that it did not have evidence of a reasonable belief that the third-parties it repeatedly contacted had given incomplete information, it is more than just "highly probable" that the burden of proof did not affect the outcome.

Indeed, in her closing statement, Green Tree's counsel made little effort to win on the incomplete-information defense. She referred to Mr. Krehel's "somewhat dramatic" questioning on the stand and then weakly suggested that the

mere fact that the Heims were Ms. Evankavitch's neighbors, without more, indicated that Green Tree had the requisite reasonable belief. App. 391:16-392-10. In the end, Green Tree urged the jury to conclude that the calls to Ms. Evankavitch's daughter did not constitute third-party calls at all and that the calls to her neighbors were justified under the FDCPA's bona-fide error defense—grounds that did not rely on the incomplete-information defense at all. App. 392.

It's hard to envision what type of proof a consumer (let alone the unsophisticated consumer envisioned by the FDCPA) could use to prove the negative Green Tree would have the consumer prove: that a debt collector *did not* have a reasonable belief that a third party had given it incomplete information. In this case, Ms. Evankavitch was able to discover Green Tree's documents with records from each phone call and to cross-examine a Green Tree manager regarding those records, revealing that there was no information indicating that Green Tree had a "reasonable belief" that fit within the incomplete-information exception. Because this evidence shows that it was at least "highly probable" that Ms. Evankavitch would have prevailed anyway, it makes no difference who had the burden of proof. But if this evidence was *not* sufficient under Green Tree's theory, then that only demonstrates how impossible it would be for a consumer to bear such a burden—and it would be absurd to place that burden on consumers across the board.

III. The district court correctly instructed the jury that Green Tree had the burden to prove the FDCPA's incomplete-information defense.

Even assuming it were preserved below and would make a difference to the outcome here, Green Tree's new objection to the jury's verdict—that Ms. Evankavitch should have been forced to bear the burden of *disproving* Green Tree's incomplete-information defense—fails as a matter of law. Congress's formulation of the defense, as an exception from a general prohibition, marks it as a classic affirmative defense on which the defendant bears the burden of proof. That conclusion flows from the text, structure, and objectives of the FDCPA and yields a sensible result. Debt collectors, not consumers, are in a position to know about their own subjective motivations and beliefs about the completeness of information exclusively in their possession.

Green Tree, however, offers a contrary and extreme theory: Because Congress established two affirmative defenses that apply across the entire FDCPA, there can be no specific defenses under the Act on which the defendant bears the burden. And because Congress was silent as to who bears the burden on the incomplete-information defense in particular, Green Tree argues (at 41-42), that silence must be read as a tacit decision to place the burden on the consumer.

Green Tree's theory proves too much, and it lacks support in existing law. The scenario here is commonplace; a great many federal statutes have both explicit

statute-wide affirmative defenses as well as specific exceptions on which the defendant bears the burden of proof.[1] Congress and the courts both adhere to "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). "That longstanding convention is part of the backdrop against which the Congress writes laws, and we respect it unless we have compelling reasons to think that Congress meant to put the burden of persuasion on the other side." *Meacham*, 554 U.S. at 91-92; *see also First City Nat. Bank of Houston*, 386 U.S. at 366 ("That is the general rule where one claims the benefits of an exception to the prohibition of a statute"). This rule is not new; "at common law, the burden of proving affirmative defenses—indeed, 'all . . . circumstances of justification, excuse or alleviation'—rested on the defendant." *Dixon v. United States*, 548 U.S. 1, 8 (2006) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 201 (1769)). Green Tree seeks to turn that venerable convention upside down.

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[1] The Fair Labor Standards Act, for example, establishes some affirmative defenses that apply to the entire statute but other defenses scattered throughout specific sections of the statute. Like the FDCPA, the FLSA provides an affirmative defense to any violation of the Act for a defendant who acts in "good faith conformity" with a federal agency interpretation. *Compare* 15 U.S.C. § 1692k(c) *with* 29 U.S.C. § 259. But beyond this statute-wide defense, many sections of the FLSA provide their own section-specific defenses on which the defendant bears the burden. *See, e.g., Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 181 (3d Cir. 2000).

But, contrary to Green Tree's argument, the Supreme Court has made clear that the fact that a statute "is silent" on whether an issue "must be pleaded by the plaintiff or is an affirmative defense" is "strong evidence that the usual practice should be followed," *Jones v. Bock*, 549 U.S. 199, 212 (2007)—not evidence, as Green Tree would have it, that Congress chose to silently trump the default rule and place the burden on the plaintiff. Thus, in *Jones v. Bock*, the Court concluded that the exhaustion of administrative procedures is an affirmative defense under the Prison Litigation Reform Act, despite Congress's silence as to who bears the burden. *Id.* And in *NLRB v. Kentucky River Community Care, Inc.*, the Court drew the same conclusion about the National Labor Relations Act's supervisory-employee exception, despite Congress's silence as to the burden and despite the existence of statute-wide affirmative defenses. 532 U.S. 706, 711-12 (2001); *see also Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (where a statute's plain text is "silent on the allocation of the burden of persuasion," the defendant bears the burden on elements "fairly characterized as affirmative defenses or exceptions"). Green Tree's brief (at 33) reluctantly acknowledges the existence of the default rule but effectively asks this Court to disregard it.

Green Tree also tellingly makes no effort to reconcile its position with Federal Rule of Civil Procedure 8(c), which requires the defendant to "affirmatively state any avoidance *or* affirmative defense." To be sure, this appeal involves only

the burden of proof, not the burden of pleading, but in practice they often travel together. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Ordinarily, it is incumbent on the defendant to plead and prove such a defense."). And Rule 8's drafters made plain that defendants bear the burden not only on enumerated "affirmative defense[s]" but also "any other matter constituting an avoidance." *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1979) (explaining that this "residual clause" has "provided the authority for a substantial number of additional defenses" on which the burden rests with the defendant, including "statutory exemption[s]").[2]

In deciding whether the burden falls on the defendant in the pleading context, courts consider a variety of factors similar to those in the burden-of-proof context, including whether "the defendant can more easily show" that the defense has been satisfied and whether the defense would be "likely to take the opposite party by surprise." *Id.* (quoting Charles Clark, *Code Pleading* (2d ed. 1947), a treatise by the "principal author of the Federal Rules"). As this Court has explained, "many courts in addressing this issue have focused on the relationship between the defense in question and the plaintiff's primary case." *In re Sterten*, 546 F.3d 278, 284

[2] As part of a "general restyling of the Civil Rules to make them more easily understood," the residual clause has been simplified to the two-word phrase "any avoidance," but the rulemakers explained that this simplification is "intended to be stylistic only." 2007 Advisory Committee Note to Rule 8.

(3d Cir. 2008) (citing *Ingraham*, 808 F.2d at 1079). This inquiry traditionally entails "a determination (1) whether the matter at issue fairly may be said to constitute a necessary or extrinsic element in the plaintiff's cause of action; (2) which party, if either, has better access to the relevant evidence; and (3) policy considerations," including Congress's policies under the relevant statute. *Ingraham*, 808 F.2d at 1079. And this Court has emphasized the need to shift the burden to the defendant "to avoid surprise and undue prejudice." *Id.* at 285. As we now explain, all of these factors and more—beginning with the FDCPA's text and structure—show that the debt collector bears the burden to prove the incomplete-information defense.

A. The FDCPA's text, structure, and history show that the incomplete-information defense is an affirmative defense on which the debt collector bears the burden of proof.

The FDCPA's text and structure show that the incomplete-information defense functions as a safe-harbor exception from the prohibition on communications with third parties. The general rule against third-party communications is contained in one section, 15 U.S.C. § 1692c(b), under the heading "Communication with third parties." That section makes clear at the outset that it applies "*[e]xcept* as provided in section 1692b of this title." And section 1692b, in turn, spells out the contours of a safe harbor based entirely on the debt collector's subjective motives; it applies only where a debt collector contacts third parties "*for the purpose* of acquiring location information." More specifically, a debt

collector that seeks to justify multiple contacts to third parties, as Green Tree sought to do here, must establish not only this subjective "purpose" but also a "reasonable belief" that it had received bad information from a previous contact with the third party and was likely to receive better information the next time. 15 U.S.C. § 1692b(3). That this is an exception for the benefit of the debt collector is revealed not only by the word "except" in section 1692c(b) but also by the word "unless" in section 1692b(3): Multiple contacts may not be made "*unless* the debt collector reasonably believes" it can update bad information.

This is classic affirmative-defense language. *See United States v. Franchi-Forlando*, 838 F.2d 585, 591 (1st Cir. 1988) (Breyer, J.) (where "the statutes introduce those portions with the words 'unless' and 'except,'" "defendants may have to treat them as affirmative defenses"). And "there is no hint in the text that Congress meant [section 1692b(3)] to march out of step with [the] default rules placing the burden of proving on an exemption on the party claiming it." *Meacham*, 554 U.S. at 92-93.

"Given how the statute reads, with exemptions laid out apart from the prohibitions," "it is no surprise," *id.* at 91, that the district court here (and other courts to consider the issue) regard the incomplete-information defense as an affirmative defense on which the debt collector bears the burden of proof. "After looking at the statutory text, most lawyers would accept that characterization as a

matter of course, thanks to the familiar principle that '[w]hen a proviso ... carves an exception out of the body of a statute . . . those who set up such exception must prove it.'" *Id.* (quoting *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910) (opinion for the Court by Holmes, J.)).

That common-sense reading is borne out by a survey of district courts across the country, which appear to uniformly treat the safe harbor as an exception to the general prohibition on third-party communications and place the burden on the debt collector to prove up the defense.[3] Green Tree (at 35) dismisses one of these

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[3] *See*, *e.g.*, *Kasalo v. Monco Law Offices, S.C.*, 2009 WL 4639720 (N.D. Ill. 2009) ("[W]e treat the exception in Section 1692b(3) on which defendant relies as an affirmative defense, which defendant has the burden of proving."); *Kempa v. Cadlerock Joint Ventures, L.P.,* 2011 WL 761500 (E.D. Mich. 2011) ("Although it does not deny contacting Greg and Maura Kempa, CadleRock argues that its actions fall within two exceptions to § 1692c(b). The first exception to § 1692c(b) is the 'location information' exception, pursuant to 15 U.S.C. § 1692b(3). … CadleRock has not provided any evidence to show that, in any of her messages or communications to Kempa's parents, Hunt stated that she was confirming or correcting Kempa's location information."); *Russell v. Goldman Roth Acquisitions, LLC*, 847 F. Supp. 2d 994, 1001-02 (W.D. Mich. 2012) ("Defendant argues in the alternative that his third-party communications did not violate § 1692c because they fell under the section–1692b safe harbor[.]… Mr. Vaiden undisputedly called Plaintiff Hall at least twice, and he makes no allegations that would excuse this second call. For all of these reasons, Defendant has not shown any disputed fact that would entitle him to the protection of the section–1692b safe harbor."); *Regan v. Law Offices of Edwin A. Abrahamsen & Assocs., P.C.*, 2009 WL 4396299 (E.D. Pa. 2009) ("Defendants have not presented any evidence suggesting that the calls to plaintiff's parents were, in fact, placed in an effort to obtain location information about plaintiff."); *see also DeGeorge v. LTD Fin. Servs., L.P.*, 2008 WL 905913 (W.D.N.Y. 2008) (suggesting that defendant bears the burden on the question whether contacts "were attempts to confirm or correct Plaintiff's location

(continued . . .)

decisions out of hand as an "unpublished district opinion" distinguishable on its facts. True enough. But more notable is Green Tree's failure to point to any case anywhere that even suggests that the burden lies with the consumer to *disprove* the incomplete-information defense by *proving* a negative—*i.e.* that is, that the debt collector could not have possibly had the requisite belief about erroneous or incomplete information in its possession. This alone shows that Green Tree's position cannot be "clear under current law," *Franklin Prescriptions*, 424 F.3d at 343—its task given the failure to preserve an objection under Rule 51.

The courts' treatment of other FDCPA defenses—for example, exemptions for government officials or for charges expressly authorized by contract—further undermines Green Tree's theory that the Act can have only two defenses on which the defendant bears the burden.[4] *Cf. Blasland, Bouck & Lee, Inc. v. City of N. Miami*,

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information, which is a permissible third-party contact under 15 U.S.C. § 1692b(1)"); *Sanchez v. Client Servs., Inc.*, 520 F. Supp. 2d 1149, 1157 (N.D. Cal. 2007) ("Defendants' argument, however, that the repeated telephone calls made to plaintiff Irma Sanchez's workplace was based on incomplete location information creates a triable fact issue as to whether theirs was a 'reasonable belief.'").

[4] *See, e.g.*, *Irwin v. Mascott*, 96 F. Supp. 2d 968, 980 (N.D. Cal. 1999) ("In this action defendants seek the benefit of the statutory exception to 15 U.S.C. § 1692f(1), which allows excess charges on a debt where expressly authorized by the agreement creating the debt. Therefore, defendants must prove by a preponderance of the evidence that they had a lawful agreement with each check writer to pay the additional charge.") (citing *Morton Salt*); *Passa v. City of Columbus*, 2007 WL 3125130 (S.D. Ohio 2007) ("As the party claiming exemption to a remedial statute, the City bears the burden of proof [as to a blanket FDCPA exemption for government 'officers' and 'employees' under § 1692a(6)(C)].")

283 F.3d 1286, 1303 (11th Cir. 2002) (the "existence of additional enumerated …. defenses elsewhere in the statute" belies the suggestion that certain defenses are exclusive). Indeed, even the two defenses Green Tree acknowledges (bona-fide error and good-faith-conformity) don't conform to Green Tree's own theory. True, the language of the bona-fide-error defense specifically indicates that the debt collector must "show[] by a preponderance of the evidence" that the defense is satisfied. 15 U.S.C. § 1692k(c). But, even on Green Tree's account, the debt collector also bears the burden of proof on a separate defense for actions done "in good faith in conformity" with a federal agency advisory opinion, 15 U.S.C. § 1692k(e)—even though that section contains no burden-of-proof language at all. Green Tree does not explain the discrepancy. And we could go on. The Act contains a blanket exemption, for example, for certain private entities whose check-collection programs are operated through contracts with prosecutors, 15 U.S.C. § 1692p; it would be absurd to contend that the plaintiff bears the burden to show that a debt collector does *not* fall within this detailed exemption—but that appears to be Green Tree's position.

Green Tree's treatment of the legislative history fares no better. At best, the history is a wash—as it so often is. And whatever else it may reveal, it cannot trump the plain text of the statute. To the extent the history says anything relevant, it is that Congress described the ban on third-party communications as a general rule

to which the location-information safe harbor is an exception: "[I]t prohibits disclosing the consumer's personal affairs to third persons. *Other than to obtain location information*, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer." S. Rep. 95-382, 7 (1977) (emphasis added).

B. The logical relationship between the consumer's prima facie case and the debt collector's defense supports placing the burden on the debt collector.

That the incomplete-information defense functions as an affirmative defense is also shown by the logical "relationship between the defense in question and the plaintiff's primary case." *In re Sterten*, 546 F.3d at 284. As this Court has explained, a "focus on whether a defense raises factual or legal issues other than those put in play by the plaintiff's cause of action nicely tracks the distinction between a general denial and an affirmative defense." *Id.* Viewed in this way, the incomplete-information defense is an affirmative defense because it is not "adequately asserted merely by denying the allegations made in the complaint," *id.*—more is required, namely, a defendant's indication about the *purpose* of its contacts and the subjective *beliefs* upon which the debt collector acted.

There is no reason to think that the original state-court complaint in this case was atypical. It had a straightforward allegation that Green Tree "caused at least one telephone call to be placed to Plaintiff's neighbor" concerning Ms.

Evankavitch's debt and that Green Tree thus "violated the Act, 15 U.S.C. 1692c(b), which restricts communications with third parties." App. 39 ¶ 12. If that allegation were correct, Ms. Evankavitch would prevail without regard to Green Tree's subjective purpose or beliefs—an appropriate result given the FDCPA's strict-liability framework. The incomplete-information defense thus "notes issues not raised, even by implication, in the complaint." *Sterten*, 546 F.3d at 284; *see also Kentucky River Cmty Care*, 532 U.S. at 1866 ("Supervisors would fall within the class of employees, were they not expressly excepted from it. The burden of proving the applicability of the supervisory exception, under *Morton Salt*, should thus fall on the party asserting it."). Put another way, the defense "refers to an excuse or justification for behavior that, standing alone, violates the statute's prohibition." *Meacham,* 554 U.S. at 95*; see Jakobsen v. Massaschusetts Port Auth.*, 520 F.2d 810, 813 (1st Cir. 1975) (a defense that is a "bar to the right of recovery even if the general complaint were more or less admitted to" functions as an affirmative defense).

Consideration of the logical relationship between the exception and the *prima facie* case also takes into account the likelihood that the exception, if not treated as an affirmative defense, will result in "surprise and undue prejudice" to the plaintiff. *In re Sterten*, 546 F.3d at 285 (quoting *Robinson v. Johnson*, 313 F.3d 128, 134-35 (3d Cir. 2002)). That is certainly so here because the "defense depends on facts outside

the debtor's primary case," *id.* at 286—namely, the debt collector's purpose and its beliefs about information it has already obtained and may seek to obtain.

C. The debt collector is best positioned to produce evidence of its own subjective beliefs about information in its possession.

It is also "both practical and fair" to place the burden on the debt collector to establish the incomplete-information defense because the defense depends on information likely to be in the debt collector's possession. *Smith v. United States*, 133 S. Ct. 714, 720 (2013). "Where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof." *Id.* (quotation marks omitted). It is "entirely sensible to burden the party more likely to have information relevant to [the matter] with the obligation to demonstrate [those] facts." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993).

Here, "the informational asymmetry heavily favors the defendant." *Smith*, 133 S. Ct. at 720. "The defendant knows what steps, if any, [it] took" to attempt to locate a consumer's whereabouts, whether it really had that purpose with respect to any particular contact, what information it received, whether that information was incomplete or erroneous, and whether (and if so why) it believed that further contacts would be warranted to update or fix its information. *Id.* On the other hand, it would be "nearly impossible" for the consumer "to prove the negative"

that the debt collector lacked the requisite reasonable belief. *Id.; see In re Sterten*, 546 F.3d at 286 (burden should fall on the defendant where the defense "turns on the motives" of the defendant).

It is no answer to say, as Green Tree suggests (at 40) that the defense here ultimately turns on the objective reasonableness of a debt collector's beliefs. That may be so, but the debt collector must first establish that it actually had—as a subjective matter—the requisite "purpose" in making the contacts and the requisite beliefs about the likelihood of updating its information.

Rather than require consumers to hypothesize and debunk every conceivable motive or belief a debt collector may have about the completeness of its location information, based on information in the debt collector's sole possession, Congress sensibly chose to establish the incomplete-information exception as an affirmative defense and to place the burden on the defendant. *See* Richard A. Posner, *Economic Analysis of the Law* 647 (7th ed. 2007) ("It would be particularly inefficient to require the plaintiff to anticipate and produce evidence contravening the indefinite number of defenses that a defendant might plead in a given case.); Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. Legal Stud. 413, 419 (1997) ("One party may have easier access to evidence than his opponent, meaning he can assemble the appropriate evidence at lower cost than his opponent. Other things being equal, the lower one

party's relative costs, the stronger the argument for giving him the burden of proof."). In short, because the incomplete-information defense hinges on "facts peculiarly within the knowledge and control of the defendant," *Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980), "it is easier to prove . . . than to disprove," and so "practicality favors placing the burden on the party asserting" it. *Kentucky River Cmty. Care*, 532 U.S. at 706-11.

D. Placing the burden on the debt collector is especially appropriate under the FDCPA's strict-liability regime.

Finally, the placement of the burden on the debt collector to establish its incomplete-information defense is especially sensible in light of Congress's strict-liability policy towards collection abuse: As this Court has recognized, the FDCPA is a strict-liability statute. *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 n.7 (3d Cir. 2011). One of the purposes of a strict-liability regime is to shift the costs of avoiding rulebreaking to the "potential injurer" rather than to the "potential victim," and this includes the transactional costs of proof. *See* Richard A. Posner, *The Economics of Justice* 200-01, 293 (1981). In the FDCPA, Congress made the judgment that "it does not seem unfair to require that one who deliberately goes perilously close to an area of proscribed conduct"—through aggressive debt-collection tactics—"shall take the risk that he may cross the line." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171-72 (9th Cir. 2006).

It is therefore not surprising that courts have found it appropriate to place the burden on defendants to prove a wide range of exceptions and defenses under federal strict-liability statutes. *See, e.g., Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) (where Telephone Consumer Protection Act prohibits auto-dialed calls to cell phones "*other than* a call made … with the prior express consent of the called party," the defendant bears the burden of proof to show consent); *United States v. E.I. Dupont De Nemours & Co., Inc.*, 432 F.3d 161, 178 (3d Cir. 2005) (where CERCLA requires cleanup of spills by those who transport hazardous materials by paying costs "not inconsistent with the national contingency plan," the defendant bears the burden of proving the exception).

Green Tree's freestanding policy arguments, claiming that it would be both "unfair" and "unworkable" to place the burden on debt collectors (at 45-50), largely attack a straw man. Nobody is saying that the burden must fall on the defendant "whenever" a statute "uses words like 'unless,' 'except,' or 'without.'" Green Tree Br. 45. Rather, the Supreme Court's cases and common sense suggest that the inquiry must be done on a case-by-case basis, taking into account the text and structure of the relevant statute and the nature of the specific defense at issue. It therefore makes no sense to suggest that a limited affirmance of the decision below will somehow "overly burden defendants and essentially relieve plaintiffs of any meaningful burden of proof." *Id.* at 47. Nor is there any serious cause to worry

that the approach now followed by district courts "if used during a jury trial, will be so impossibly confused and complex as [Green Tree] imagines. Juries long have decided cases in which defendants raised affirmative defenses." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (1989) (internal cross-reference omitted). "[A]t the end of the day," Green Tree's policy arguments "have to be directed to Congress, which set the balance where it is, by both creating the [incomplete-information exception] and writing it in the orthodox format of an affirmative defense." *Meacham*, 554 U.S. at 102.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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