

No. 13-1151

**In the United States Court of Appeals
for the Fourth Circuit**

DANA CLARK AND DAVID CLARK,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

ABSOLUTE COLLECTION SERVICE INCORPORATED,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina

JOINT APPENDIX

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Jennifer D. Maldonado
William Thomas Kesler, Jr.
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**U.S. District Court
EASTERN DISTRICT OF NORTH CAROLINA (Western Division)
CIVIL DOCKET FOR CASE #: 5:12-cv-00400-BO**

Clark et al v. Absolute Collection Service, Incorporated
Assigned to: District Judge Terrence W. Boyle
Case in other court: 4th Circuit Court of Appeals, 12-01151
Cause: 15:1692 Fair Debt Collection Act

Date Filed: 06/29/2012
Date Terminated: 01/10/2013
Jury Demand: Both
Nature of Suit: 890 Other Statutory
Actions
Jurisdiction: Federal Question

Plaintiff

Dana Clark
*on behalf of herself and all others
similarly situated*

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*on behalf of himself and all others
similarly situated*

represented by **Craig M. Shapiro**
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Joseph A. Bledsoe , III
(See above for address)
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V.

Defendant

**Absolute Collection Service,
Incorporated**

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Date Filed	#	Docket Text
06/29/2012	<u>1</u>	COMPLAINT against Absolute Collection Service, Incorporated (Filing fee \$ 350 receipt number 0417-2125423.), filed by Dana Clark, David Clark. (Attachments: # <u>1</u> Exhibit A – Letter from Collection Agency to Dana Clark # <u>2</u> Exhibit B – Letter from collection Agency to David Clark # <u>3</u> Civil Cover Sheet, # <u>4</u> Proposed Summons) (Bledsoe, Joseph) (Entered: 06/29/2012)
06/29/2012	<u>2</u>	NOTICE of Appearance by Joseph A. Bledsoe, III on behalf of Dana Clark, David Clark (Bledsoe, Joseph) (Entered: 06/29/2012)
06/29/2012	<u>3</u>	FINANCIAL DISCLOSURE STATEMENT by Dana Clark. (Bledsoe, Joseph) (Entered: 06/29/2012)
06/29/2012	<u>4</u>	FINANCIAL DISCLOSURE STATEMENT by David Clark. (Bledsoe, Joseph) (Entered: 06/29/2012)
07/02/2012		NOTICE OF DEFICIENCY regarding: Exhibits A and B attached to <u>1</u> Complaint. Exhibits not identified as required pursuant to Section L(2)(b) of the Court's Electronic Policy and Procedure Manual. Clerk's Office identified the exhibits for this filing, but directs counsel to Section L(2)(b) for future reference. No division listed in case caption. Counsel should reflect the "Division" in which the case has been assigned on all future documents. (Heath, D.) (Entered: 07/02/2012)
07/03/2012	<u>5</u>	SUMMONS ISSUED as to Absolute Collection Service, Incorporated. Counsel should print summons and effect service. (Sawyer, D.) (Entered: 07/03/2012)
07/10/2012	<u>6</u>	AFFIDAVIT of Service for Summons and Complaint served on FKAACS, Incorporated, f/k/a Absolute Collection Service, Inc. on 7/8/12, filed by Dana Clark, David Clark. (Bledsoe, Joseph) (Entered: 07/10/2012)
07/24/2012	<u>7</u>	NOTICE of Appearance for non-district by Craig M. Shapiro on behalf of Dana Clark, David Clark (Shapiro, Craig) (Entered: 07/24/2012)
08/08/2012	<u>8</u>	NOTICE DIRECTING PLAINTIFF TO PROCEED AFTER FAILURE TO ANSWER. (Talbert, S.) (Entered: 08/08/2012)
08/08/2012	<u>9</u>	Consent MOTION for Extension of Time to File Answer by Absolute Collection Service, Incorporated. (Attachments: # <u>1</u> Text of Proposed Order) (Kesler, William) (Entered: 08/08/2012)
08/08/2012	<u>10</u>	NOTICE of Appearance by William Thomas Kesler, Jr. on behalf of Absolute Collection Service, Incorporated. (Kesler, William) (Entered: 08/08/2012)
08/08/2012	<u>11</u>	NOTICE of Appearance by Sean T. Partrick on behalf of Absolute Collection Service, Incorporated. (Partrick, Sean) (Entered: 08/08/2012)
08/09/2012		MOTION REFERRED to Julie A. Richards, Clerk of Court: <u>9</u> Consent MOTION for Extension of Time to File Answer. (Talbert, S.) (Entered: 08/09/2012)
08/10/2012		TEXT ORDER granting <u>9</u> Defendant's Motion for Extension of Time. Defendant's answer or response to plaintiffs' complaint is due August 23, 2012. Signed by Julie A. Richards, Clerk of Court, on 8/10/2012. (Richards, J.) (Entered: 08/10/2012)

08/23/2012	<u>12</u>	NOTICE of Appearance by Jennifer D. Maldonado on behalf of Absolute Collection Service, Incorporated (Maldonado, Jennifer) (Entered: 08/23/2012)
08/23/2012	<u>13</u>	ANSWER to <u>1</u> Complaint, with Jury Demand by Absolute Collection Service, Incorporated. (Partrick, Sean) (Entered: 08/23/2012)
08/23/2012	<u>14</u>	FINANCIAL DISCLOSURE STATEMENT by Absolute Collection Service, Incorporated. (Partrick, Sean) (Entered: 08/23/2012)
08/24/2012	<u>15</u>	ORDER FOR DISCOVERY PLAN sent to all parties. Signed by Julie A. Richards, Clerk of Court on 8/24/12. (Talbert, S.) (Entered: 08/24/2012)
08/30/2012	<u>16</u>	NOTICE by Dana Clark, David Clark regarding <u>5</u> Summons Issued <i>Alias & Pluries Summons</i> (Bledsoe, Joseph) (Entered: 08/30/2012)
08/31/2012		NOTICE OF DEFICIENCY regarding: <u>16</u> Alias and Pluries Summons – The Federal Court does not recognize or "have" Alias and Pluries Summons. If you need to have this summons reissued, either remove the Alias and Pluries from the Summons or type REISSUED and re-file the correct version for issuance. (Talbert, S.) (Entered: 08/31/2012)
09/04/2012	<u>17</u>	NOTICE by Dana Clark, David Clark regarding <u>5</u> Summons Issued (<i>New Summons</i>) (Bledsoe, Joseph) (Entered: 09/04/2012)
09/04/2012	<u>18</u>	Summons Reissued as to Absolute Collection Service, Incorporated. Counsel should print the summons and effect service. (Talbert, S.) (Entered: 09/04/2012)
09/13/2012	<u>19</u>	AMENDED ANSWER to <u>1</u> Complaint, <i>and Motion to Dismiss</i> by Absolute Collection Service, Incorporated. (Kesler, William) (Entered: 09/13/2012)
09/13/2012	<u>20</u>	Memorandum in Support regarding <u>21</u> Corrected Motion to Dismiss filed by Absolute Collection Service, Incorporated. (Attachments: # <u>1</u> Exhibit A – Unpublished Case – Alisha Turner v. Shenandoah Legal Group, 2006 WL 1685698, # <u>2</u> Exhibit B – Catherine Davis v. R & R Professional Recovery, 2009 WL 400627, # <u>3</u> Exhibit C – Unpublished Case – James Glen v. Law Office of W.C. French, 2012 WL 181496) (Partrick, Sean) Modified on 9/18/2012 to correctly link it to the proper document. (Talbert, S.) (Entered: 09/13/2012)
09/14/2012		NOTICE TO COUNSEL regarding <u>19</u> Amended Answer. Division omitted in case caption. Counsel should reflect on all future filings the "Division" in which the case has been assigned (Western). (Heath, D.) (Entered: 09/14/2012)
09/17/2012		REMINDER TO COUNSEL as to Absolute Collection Service, Incorporated – Pursuant to Judge Boyle's Practice and Procedures located on the court's website, http://www.nced.uscourts.gov/html/chambersTWB.htm , counsel shall provide a courtesy copy of all documents over 20 pages, by mailing or delivering to the clerk's office in Raleigh. If your recently filed document(s) is less than 20 pages or if you have already mailed the courtesy copy(ies), disregard this notice. (Talbert, S.) (Entered: 09/17/2012)
09/17/2012		NOTICE OF DEFICIENCY regarding: <u>19</u> Amended Answer and Motion to Dismiss – Counsel filed an Answer and a Motion in the same document. Answers and Motions can not be filed in the same document and, therefore, Counsel is directed to separate this filing and file the corrected and individual documents separately on the docket. (Talbert, S.) (Entered: 09/17/2012)
09/18/2012	<u>21</u>	Corrected MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Absolute Collection Service, Incorporated. (Partrick, Sean) (Entered: 09/18/2012)
09/18/2012	<u>22</u>	AMENDED ANSWER to <u>1</u> Complaint, <i>corrected</i> by Absolute Collection Service, Incorporated. (Partrick, Sean) (Entered: 09/18/2012)
09/24/2012	<u>23</u>	Rule 26(f) Report (joint) by Dana Clark, David Clark. (Shapiro, Craig) (Entered: 09/24/2012)
09/25/2012		Remark – Parties' Joint Rule 26(f) Report referred to US Magistrate Judge James E. Gates for issuance of a scheduling order. (Talbert, S.) (Entered: 09/25/2012)

09/28/2012	<u>24</u>	SCHEDULING ORDER: Discovery due by 3/15/2013. Motions due by 4/30/2013. Counsel should review the Order in its entirety for critical deadlines and information. Signed by US Magistrate Judge James E. Gates on 9/27/12. (Talbert, S.) (Entered: 09/28/2012)
10/02/2012	<u>25</u>	Consent MOTION for Extension of Time by Absolute Collection Service, Incorporated. (Attachments: # <u>1</u> Text of Proposed Order) (Partrick, Sean) (Entered: 10/02/2012)
10/02/2012		MOTION REFERRED to US Magistrate Judge James E. Gates: <u>25</u> Consent MOTION for Extension of Time. (Talbert, S.) (Entered: 10/02/2012)
10/04/2012	<u>26</u>	ORDER granting <u>25</u> Motion for Extension of Time to Respond to Discovery. Signed by US Magistrate Judge James E. Gates on 10/4/12. (Talbert, S.) (Entered: 10/04/2012)
10/04/2012	<u>27</u>	Consent MOTION for Extension of Time to File Response/Reply as to <u>21</u> Corrected MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Dana Clark, David Clark. (Attachments: # <u>1</u> Text of Proposed Order Granting Motion for Extension) (Shapiro, Craig) (Entered: 10/04/2012)
10/05/2012		MOTION REFERRED to Julie A. Richards, Clerk of Court: <u>27</u> Consent MOTION for Extension of Time to File Response to <u>21</u> Corrected MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM. (Talbert, S.) (Entered: 10/05/2012)
10/05/2012		TEXT ORDER granting the <u>27</u> motion for extension of time. Plaintiffs have through and including October 18, 2012 to respond to defendant's <u>21</u> corrected motion to dismiss. Signed by Jolie Skinner for Julie A. Richards, Clerk of Court on 10/05/2012. (Skinner, J.) (Entered: 10/05/2012)
10/18/2012	<u>28</u>	Memorandum in Opposition regarding <u>21</u> Corrected MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Dana Clark, David Clark. (Shapiro, Craig) (Entered: 10/18/2012)
10/19/2012		REMINDER TO COUNSEL as to Dana Clark, David Clark – Pursuant to Judge Boyle's Practice and Procedures located on the court's website, http://www.nced.uscourts.gov/html/chambersTWB.htm , counsel shall provide a courtesy copy of all documents over 20 pages, by mailing or delivering to the clerk's office in Raleigh. If your recently filed document(s) is less than 20 pages or if you have already mailed the courtesy copy(ies), disregard this notice. (Talbert, S.) (Entered: 10/19/2012)
11/05/2012	<u>29</u>	REPLY to Response to Motion regarding <u>21</u> Corrected MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Absolute Collection Service, Incorporated. (Partrick, Sean) (Entered: 11/05/2012)
11/21/2012		Motion Submitted to US District Judge Terrence W. Boyle: <u>21</u> Corrected MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM. (Talbert, S.) (Entered: 11/21/2012)
01/10/2013	<u>30</u>	ORDER granting <u>21</u> Motion to Dismiss for Failure to State a Claim. Signed by US District Judge Terrence W. Boyle on 1/9/13. (Talbert, S.) (Entered: 01/10/2013)
01/10/2013	<u>31</u>	JUDGMENT – IT IS ORDERED, ADJUDGED AND DECREED that the Defendants Motion to Dismiss is GRANTED and this matter is DISMISSED in its entirety. Signed by Julie A. Richards, Clerk of Court on 1/10/13. (Talbert, S.) (Entered: 01/10/2013)
02/05/2013	<u>32</u>	NOTICE OF APPEAL as to <u>31</u> Judgment, <u>30</u> Order on Motion to Dismiss for Failure to State a Claim by Dana Clark, David Clark. Filing fee \$ 455, receipt number 0417-2385108. (Shapiro, Craig) (Entered: 02/05/2013)
02/05/2013	<u>33</u>	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals regarding <u>32</u> Notice of Appeal by Dana Clark, et al. (Fogle, L.) (Entered: 02/05/2013)
02/06/2013	<u>34</u>	US Court of Appeals Case Number 12-1151, Amy L. Carlheim, Case Manager for <u>32</u> Notice of Appeal filed by Dana Clark, David Clark. (Fogle, L.) (Entered: 02/07/2013)

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

DANA CLARK and DAVID CLARK,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

ABSOLUTE COLLECTION SERVICE
INCORPORATED,

Defendant.

CLASS ACTION COMPLAINT

Civil Action No.

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

I. INTRODUCTION

1. This action is brought by Plaintiffs Dana Clark and David Clark, on behalf of themselves and all others similarly situated, for statutory damages against Defendant Absolute Collection Service, Inc. for violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§1692 *et seq.* (hereinafter referred to as "FDCPA"), which prohibits debt collectors from engaging in abusive, deceptive, and unfair practices.

II. JURISDICTION

2. Jurisdiction of this court arises under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.
3. Venue is proper in this district as all relevant events took place here.

III. PARTIES

4. Plaintiffs Dana and David Clark are individuals who previously resided in Raleigh, North Carolina, but currently reside in Hixson, Tennessee, and are "consumers" as defined by the FDCPA, 15 U.S.C. § 1692a(3).

5. Defendant Absolute Collection Service, Inc. is a corporation and collection agency located in Raleigh, North Carolina.

6. Defendant is engaged in the collection of debts from North Carolina consumers using the mail and telephone.

7. Defendant regularly attempts to collect consumer debts alleged to be due to another.

8. Defendant was and is a "debt collector" as defined by the FDCPA, 15 U.S.C. §1692a(6).

IV. FACTUAL ALLEGATIONS

9. Ms. Clark had medical services preformed by WakeMed.

10. Ms. Clark was unable to pay her account with WakeMed.

11. Mr. Clark's daughter Shannon Clark had medical services preformed by WakeMed, for which Mr. Clark was allegedly responsible.

12. Mr. Clark was unable to pay his account with WakeMed.

13. Mr. and Mrs. Clark's unpaid accounts referenced above are referred to as "the Debts."

14. The Debts were incurred for personal, family, or household purposes, *i.e.*, family medical treatment.

15. Defendant obtained the Debts after they entered default.

16. By correspondence dated July 1, 2011, Defendant arranged for the preparation and transmittal of a letter to Ms. Clark at her residence in an attempt to collect her WakeMed account. Defendant's July 1, 2011, letter to Ms. Clark is attached hereto as Exhibit A.

17. By correspondence dated August 16, 2011, Defendant arranged for the preparation and transmittal of a letter to Mr. Clark at his residence in an attempt to collect his WakeMed account. Defendant's August 16, 2011, letter to Mr. Clark is attached hereto as Exhibit B.

18. Both Exhibit A and Exhibit B contain on the front side of the letters:

This is an attempt to collect a debt. Any information obtained will be used for that purpose only.

WakeMed turned your account over to our office for collection.

All portions of this claim shall be assumed valid unless disputed in writing within thirty (30) days; in which case, verification of the debt or a copy of the judgment will be provided to you. If the original creditor is different from the above named creditor, the name of the original creditor will be provided upon request.

19. Exhibit A was the initial communication from Defendant to Ms. Clark regarding her alleged debt to WakeMed.

20. Exhibit B was the initial communication from Defendant to Mr. Clark regarding his alleged debt to WakeMed.

21. Exhibit A and Exhibit B state that the consumers' dispute of the debt's validity must be made "in writing" in order to prevent it from being assumed valid.

V. DEFENDANT'S POLICIES AND PRACTICES

22. Exhibit A and Exhibit B are form letters that Defendant uses as its initial written communication and regularly sends to consumers to solicit payment.

23. It is the standard policy and practice of Defendant to use false, deceptive, or misleading representations or means in connection with the collection of any debt.

24. It is the standard policy and practice of Defendant to state that a consumer's dispute of the alleged debt must be "in writing" in order to prevent the assumption of validity.

25. To prevent the debt collector from assuming the debt valid, the FDCPA only requires the consumer to dispute the debt - orally or in writing. 15 U.S.C. § 1692g(a)(3).

However, Defendant's use of its form letter, represented here by Exhibits A and B, eliminates the consumer's statutory right to dispute the debt orally by unilaterally imposing a written dispute requirement to prevent the assumption of validity. *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005).

VI. CLASS ALLEGATIONS

26. This action is brought as a class action. Plaintiffs define the class as (i) all persons with addresses within the state of North Carolina (ii) who were sent a letter from Defendant in the form of Exhibit A and Exhibit B (iii) to recover a debt allegedly owed to

WakeMed (iv) incurred for personal, household purposes (v) which were not returned undelivered by the United States Postal Service (vi) during the period of time one-year prior to the filing of this Complaint through 21 days after the filing of this Class Action Complaint.

27. The class is so numerous that joinder of all members is impractical.

28. There are questions of law and fact common to the class, which predominate over any questions affecting only individual class members. The principal issue is whether Defendant violated the FDCPA by:

- A) falsely representing that a consumer's dispute of the alleged debt must be "in writing" to avoid the assumption of validity in violation of 15 U.S.C. § 1692g(a)(3);
- B) using any false, deceptive, or misleading representation or means in connection with the collection of any debt in violation of 15 U.S.C. §§ 1692e and e(10).

29. There are no individual questions, other than whether a class member was sent a letter in the form of Exhibit A and Exhibit B, which can be determined by ministerial inspection of Defendant's records.

30. Plaintiffs will fairly and adequately protect the interests of the class.

31. Plaintiffs have retained counsel experienced in handling class claims and claims involving unlawful collection practices.

32. The questions of law and fact common to the class predominate over any issues involving only individual class members. The principal issue is whether Defendant's letter in the form of Exhibit A and Exhibit B violates the FDCPA, 15 U.S.C. § 1692 *et seq.*

33. Plaintiffs' claims are typical of the claims of the class, which all arise from the same operative facts and are based on the same legal theories.

34. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendant to comply with Federal law. The interest of class members in individually controlling the prosecution of separate claims against Defendant is small because the maximum statutory damages in an individual FDCPA

action are \$1,000.00. Management of these class claims are likely to present significantly fewer difficulties than those presented in many class actions, e.g., for securities fraud.

VII. COUNT ONE – FAIR DEBT COLLECTION PRACTICES ACT

35. Plaintiffs repeat, reallege, and incorporate by reference the foregoing paragraphs.
36. Defendant’s violations of the FDCPA include, but are not limited to:
 - A) falsely representing that a consumer’s dispute of the alleged debt must be “in writing” to avoid the assumption of validity in violation of 15 U.S.C. § 1692g(a)(3);
 - B) using any false, deceptive, or misleading representation or means in connection with the collection of any debt in violation of 15 U.S.C. §§ 1692e and e(10).

37. As a result of Defendant’s violations of the FDCPA, Plaintiffs and the class members are entitled to an award of statutory damages, costs and reasonable attorney fees.

VIII. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs Dana Clark and David Clark request that judgment be entered in their favor and in favor of the class against Defendant Absolute Collection Service, Inc. for:

- A. Certification of this matter as a class action;
 - B. Statutory damages pursuant to 15 U.S.C. § 1692k(a)(2);
 - C. Costs and reasonable attorney fees pursuant to 15 U.S.C. § 1692k(a)(3);
- and
- D. For such other relief as the Court may find to be just and proper.

/s/ Joseph A. Bledsoe, III
Joseph A. Bledsoe, III
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Fax: (312) 726-1093
LR 83.1 Counsel (by Special Appearance)

421 Fayetteville Street, Ste. 600
Raleigh, NC 27601



Statement Date	Account Number	Amount Due	Amount Paid
7/1/2011	1724	\$150.00	\$
PLEASE CHARGE MY: <input type="checkbox"/>  <input type="checkbox"/> 			
CARD NUMBER		AMOUNT	
EXPIRE DATE		EXP DATE	

EXHIBIT A

Make Checks Payable To:

*****AUTO**5-DIGIT 27616
DANA CLARK
3504 RIBCOWSKI CT
RALEIGH NC 27616-8952

Absolute Collection Service
Suite 600
421 Fayetteville St
Raleigh, NC 27601-1792

#03077



073011A27081724000150005

PLEASE DETACH AND RETURN THE TOP PORTION WITH YOUR PAYMENT.

Pay Your Bill Online!
www.absolutecollection.com/payments
Online PIN: 9325



DEBTOR # 1724
PATIENT DANA CLARK
WAKEMED # 9009

Dear Dana Clark:

This is an attempt to collect a debt. Any information obtained will be used for that purpose only.

WakeMed turned your account over to our office for collection.

Our records indicate that your account balance is \$150.00 for services rendered to you on 1/27/11.

If this is your first notification concerning this account and you need additional information before payment is submitted, please call our office.

ALL PORTIONS OF THIS CLAIM SHALL BE ASSUMED VALID UNLESS DISPUTED IN WRITING WITHIN THIRTY (30) DAYS; IN WHICH CASE, VERIFICATION OF THE DEBT OR A COPY OF THE JUDGMENT WILL BE PROVIDED TO YOU. IF THE ORIGINAL CREDITOR IS DIFFERENT FROM THE ABOVE NAMED CREDITOR, THE NAME OF THE ORIGINAL CREDITOR WILL BE PROVIDED UPON REQUEST.

If you like, you may call our office at 919-755-3900 to charge your balance to either your check card, MasterCard or Visa account.

Sincerely,

Charlton Clarkson
Account Representative
800-752-4172

N.C. Department of Insurance Permit #988

421 Fayetteville Street, Ste. 600
Raleigh, NC 27601

Statement Date	Account Number	Amount Due	Amount Paid
8/16/2011	656	\$150.00	\$
PLEASE CHARGE MY:			
<input type="checkbox"/> VISA <input type="checkbox"/> MasterCard			
CARD NUMBER		AMOUNT	
SIGNATURE			EXP DATE

EXHIBIT B

Make Checks Payable To:

*****3-DIGIT 276
 DAVID CLARK
 3504 RIBOWSKI CT
 RALEIGH NC 27616

Absolute Collection Service
 Suite 600
 421 Fayetteville St
 Raleigh, NC 27601-1792

091511A27296564000150007

PLEASE DETACH AND RETURN THE TOP PORTION WITH YOUR PAYMENT.

Pay Your Bill Online!
www.absolutecollection.com/payments
 Online PIN: 7605



DEBTOR # 6564
 PATIENT SHANNON CLARK
 WAKEMED # 9503

Dear David Clark:

This is an attempt to collect a debt. Any information obtained will be used for that purpose only.

WakeMed turned your account over to our office for collection.

Our records indicate that your account balance is \$150.00 for services rendered to you on 3/26/11.

If this is your first notification concerning this account and you need additional information before payment is submitted, please call our office.

ALL PORTIONS OF THIS CLAIM SHALL BE ASSUMED VALID UNLESS DISPUTED IN WRITING WITHIN THIRTY (30) DAYS; IN WHICH CASE, VERIFICATION OF THE DEBT OR A COPY OF THE JUDGMENT WILL BE PROVIDED TO YOU. IF THE ORIGINAL CREDITOR IS DIFFERENT FROM THE ABOVE NAMED CREDITOR, THE NAME OF THE ORIGINAL CREDITOR WILL BE PROVIDED UPON REQUEST.

If you like, you may call our office at 919-755-3900 to charge your balance to either your check card, MasterCard or Visa account.

Sincerely,

Charlton Clarkson
 Account Representative
 800-752-4172

N.C. Department of Insurance Permit #988

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO.: 5:12-cv-00400-BO

DANA CLARK and DAVID CLARK, on behalf)
of themselves and all others similarly situated,)
)
Plaintiff,)
vs.)
)
ABSOLUTE COLLECTION SERVICE, INC., a)
North Carolina Corporation,)
)
Defendant.)
_____)

MOTION TO DISMISS

Defendant FKAACS hereby moves to dismiss Plaintiff's Complaint pursuant to Federal Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The allegations of the Complaint fail to allege a violation of the Fair Debt Collection Act ("The Act"), specifically 15 U.S.C. § 1692(a)(3). There is an inherent requirement that the § 1692(a)(3) dispute be in writing. Therefore, it is not a violation of the Act to include such a requirement in an initial written communication to a debtor. Having failed to allege a violation of the Act, Plaintiff's Complaint has failed to state a claim upon which relief can be granted and must be dismissed.

This the 13th day of September, 2012.

YATES, MCLAMB & WEYHER, LLP

/s/ SEAN T. PARTRICK

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO.: 5:12-cv-00400-BO

DANA CLARK and DAVID CLARK, on behalf)
of themselves and all others similarly situated,)
)
Plaintiff,)
vs.)
)
ABSOLUTE COLLECTION SERVICE, INC., a)
North Carolina Corporation,)
)
Defendant.)
_____)

**AMENDED ANSWER
TO COMPLAINT**

The Defendant denominated in the Complaint as Absolute Collection Service, Inc., which underwent a corporate name change that was adopted as of June 29, 2012 and is now named FKAACS, Incorporated (hereinafter referred to as “Defendant” or “FKAACS”), by and through undersigned counsel answers the individually numbered allegations of Plaintiff’s Complaint as follows:

FIRST DEFENSE

FKAACS hereby responds to the numbered paragraphs of the Plaintiff’s Complaint as follows:

I. INTRODUCTION

1. The allegations in Paragraph No. 1 are denied to the extent they allege facts or claims against FKAACS.

II. JURISDICTION

2. Admitted, upon information and belief.

3. FKAACS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph No. 3.

III. PARTIES

4. The allegations in Paragraph No. 4 refer to legal conclusions to which no response is required. To the extent a response is required, FKAACS admits that Plaintiffs had a Raleigh mailing address in 2011. Except as stated, FKAACS lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph No. 4.

5. It is admitted that “Absolute Collection Service, Incorporated” is the former legal name of North Carolina corporation FKAACS, Incorporated, whose principal place of business is in Raleigh, North Carolina. Except as admitted, denied.

6. It is admitted that FKAACS has been engaged in the collection of certain debts related to certain medical services to certain North Carolina individuals. Except as admitted, denied.

7. It is admitted that FKAACS has been engaged in the collection of certain debts related to certain medical services to certain North Carolina individuals. Except as admitted, denied.

8. The allegations in Paragraph No. 8 refer to legal conclusions to which no response is required. To the extent a response is required, it is admitted that FKAACS has been a debt collector as defined under 15 U.S.C. §1692a(6). Except as admitted, denied.

IV. FACTUAL ALLEGATIONS

9. With regard to the allegations in Paragraph No. 9, it is admitted that a person named Dana Clark received certain services from WakeMed. Except as admitted, FKAACS lacks knowledge or information sufficient to form a belief about the truth of the allegations

contained in Paragraph No. 9.

10. FKAACS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph No. 10.

11. With regard to the allegations in Paragraph No. 11, it is admitted that a person named Shannon Clark received certain services from WakeMed. Except as admitted, FKAACS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph No. 11.

12. FKAACS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph No. 12.

13. The allegations in Paragraph No. 13 do not allege any action or inaction of FKAACS and no answer is required. To the extent an answer is required, FKAACS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph No. 13.

14. It is admitted upon information and belief that the services performed by WakeMed described in the Complaint for the Clark's were for medial services. Except as admitted, FKAACS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph No. 14.

15. It is admitted that WakeMed provided certain information on medical services provided by WakeMed and that WakeMed sought assistance from FKAACS regarding recovery of payment for such services. Except as admitted, denied.

16. The allegations of Paragraph No. 16 refer to a written document which speaks for itself. To the extent that the allegations of Paragraph No. 16 are inconsistent with this document, they are denied. Except as stated, denied.

17. The allegations of Paragraph No. 17 refer to a written document which speaks for itself. To the extent that the allegations of Paragraph No. 17 are inconsistent with this document, they are denied. Except as stated, denied.

18. The allegations of Paragraph No. 18 refer to written documents which speak for themselves. To the extent that the allegations of Paragraph No. 18 are inconsistent with these documents, they are denied. Except as admitted, denied.

19. It is admitted that the letter attached as Exhibit A to the Complaint was likely the first contact between ACS and the addressee regarding the medical services described in the complaint. Except as admitted, FKAACS is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph No. 19.

20. It is admitted that the letter attached as Exhibit B to the Complaint was likely the first contact between ACS and the addressee regarding the medical services described in the complaint. Except as admitted, FKAACS is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph No. 20.

21. With regard to the allegations in Paragraph No. 21, it is admitted that Exhibit A and Exhibit B state in part “All portions of this claim shall be assumed valid unless disputed in writing within thirty (30) days; in which case, verification of the debt or a copy of the judgment will be provided to you”. Except as admitted, denied.

V. DEFENDANT’S POLICIES AND PRACTICES

With regard to the allegations in Paragraph No. 22, it is admitted that letters substantially similar are sent to certain persons who received medical services from a particular health care provider regarding notification of debt collection with an option to allow the recipient of the service(s) to pay. Except as admitted, FKAACS is without knowledge or information sufficient to form a

belief as to the truth of the allegations in Paragraph No. 22.

22. Denied.

23. With regard to the allegations in Paragraph No. 24, it is admitted that the specific correspondence attached as Exhibits A and B to the Complaint state in part “All portions of this claim shall be assumed valid unless disputed in writing within thirty (30) days; in which case, verification of the debt or a copy of the judgment will be provided to you”. Except as admitted, denied.

24. Denied.

VI. CLASS ALLEGATIONS

26-34. At the present time FKAACS is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 26 through 34 of the Complaint and the same are, therefore, denied. It is expressly denied that FKAACS made any false misrepresentations or false, deceptive, or misleading representations as alleged in the Complaint.

VII. COUNT ONE – FAIR DEBT COLLECTION PRACTICES ACT

35. FKAACS hereby incorporates its responses to the allegations contained in Paragraphs No. 1 through 34 herein by reference.

36. Denied, including subpart (A) and (B).

37. Denied.

SECOND DEFENSE

As a Third Defense and Answer, Plaintiff and other purported class members may have failed to take reasonable steps to alleviate or mitigate damages.

THIRD DEFENSE

As a Fourth Defense and Answer, FKAACS alleges that there is not a recognizable class under Rule 23 of the Federal Rules of Civil Procedure and joinder of individual purported class members is impractical and should not be permitted. Moreover, Plaintiff's claims are inappropriate for handling as a class action for failure to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure.

FOURTH DEFENSE

As a Fifth Defense and Answer, FKAACS alleges that Plaintiff's claims are inappropriate for handling as a class action since the common questions of law and fact do not predominate over the individual claims of the class members as required under Rule 23 of the Federal Rules of Civil Procedure. The potential claims of the purported class members reflect variability.

FIFTH DEFENSE

As a Sixth Defense and Answer, FKAACS alleges that Plaintiffs' claims are inappropriate for handling as a class action since claims of the named Plaintiffs' claims are not typical of the claims of the class as required under Rule 23 of the Federal Rules of Civil Procedure.

SIXTH DEFENSE

As an Seventh Defense and Answer, some or all of the claims of the purported class members may be barred from recovery to the extent the claims were not filed within the applicable statute of limitations.

WHEREFORE, Defendant respectfully requests as follows:

1. That Plaintiffs recover nothing from this Defendant;
2. That Plaintiffs' request for certification of this matter as a class action be denied;
3. That Plaintiffs' request for relief be denied in its entirety;

4. For a trial by jury on all claims triable;
5. That the costs of this action be taxed against Plaintiffs;
6. That Defendant be awarded attorney's fees reasonable in relation to the work expended; and,
7. For such other and further relief as the Court deems just and proper.

This the 13th day of September, 2012.

YATES, MCLAMB & WEYHER, LLP

/s/ SEAN T. PARTRICK

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL ACTION NO.: 5:12-cv-00400-BO

DANA CLARK and DAVID CLARK, on behalf)
of themselves and all others similarly situated,)
)
Plaintiff,)
vs.)
)
ABSOLUTE COLLECTION SERVICE, INC., a)
North Carolina Corporation,)
)
Defendant.)
_____)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Joseph A. Bledsoe, III (jbledsoe@attorneybledsoe.com) and Craig M. Sharpiro (cshapiro@keoghlaw.com) and I hereby certify that I have mailed the document to the following non CM/ECF Participants:
None.

This the 13th day of September, 2012.

YATES, MCLAMB & WEYHER, LLP

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UNITED STATES DISTRICT COURT
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DANA CLARK and DAVID CLARK, on behalf)
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None.

This the 13th day of September, 2012.

YATES, MCLAMB & WEYHER, LLP

/s/ SEAN T. PARTRICK

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:12-CV-400-BO

DANA CLARK and DAVID CLARK, on)
behalf of themselves and others similarly)
situated,)
Plaintiffs,)
v.)
ABSOLUTE COLLECTION SERVICE,)
INC., a North Carolina Corporation,)
Defendant.)

ORDER

This cause comes before the Court on defendant's motion to dismiss. Plaintiffs have responded, defendant has replied, and for the reasons discussed below, defendant's motion is granted.

BACKGROUND

This matter arises out of defendant's debt collection efforts related to plaintiffs' overdue accounts at WakeMed. Plaintiffs filed this action alleging that, in attempting to collect such debt, defendant violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.* The FDCPA was enacted in part in order to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). Plaintiffs contend that defendant violated the FDCPA when it sent an initial written communication to both plaintiffs that stated:

All portions of this claim shall be assumed valid unless disputed in writing within thirty (30) days; in which case, verification of the debt or a copy of the judgment will be provided to you. If the original creditor is different from the above named creditor, the name of the original creditor will be provided upon request.

[DE 1-1; 1-2]. Plaintiffs allege that this language is regularly used in defendant's initial written communication sent to consumers to solicit payment, and thus plaintiffs filed this putative class action on behalf of themselves and all others similarly situated. Defendant has moved to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

DISCUSSION

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. *Papasan v. Attain*, 478 U.S. 265, 283 (1986). When acting on a motion to dismiss under Rule 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff," *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993), and a complaint must allege enough facts to state a claim for relief that is facially plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In order to prevail on a FDCPA claim, a plaintiff must demonstrate (1) that he has been the object of collection activity arising from consumer debt, (2) that the defendant is a debt collector as that term is defined by the FDCPA, and (3) that the defendant has engaged in an act or omission that is prohibited by the FDCPA. *Dikun v. Streich*, 369 F. Supp.2d 781, 784-85 (E.D.Va. 2005) (citation omitted). Defendant does not contest that plaintiffs have sufficiently alleged the first two requirements, but contends that plaintiffs have failed to allege any action or omission by defendant that violated the FDCPA.

Section 1692g of the FDCPA provides that a written notice by a debt collector must contain, *inter alia*, "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed valid by

the debt collector.” 15 U.S.C. § 1692g(a)(3). Plaintiffs contend that by requiring plaintiffs to dispute the validity of the debt or a portion thereof *in writing*, defendant has violated the plain meaning of § 1692g and imposed an additional burden on them in violation of the FDCPA.

As noted by the parties, there is an absence of binding precedent in this circuit as to whether § 1692g(a)(3) contains an inherent writing requirement. *See e.g. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, n. 3 (2010) (declining to express a view “about whether inclusion of an ‘in writing’ requirement in a notice to a consumer violates § 1692g”). Defendant urges the Court to follow the Third Circuit to read an inherent writing requirement into § 1692g(a)(3), *Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991), while plaintiffs urge the Court to follow the Ninth Circuit, which held that § 1692g(a)(3) permits oral disputes of the validity of a debt and thus that imposing a writing requirement violates the FDCPA. *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078 (9th Cir. 2005).

Having considered the arguments of the parties and the analyses of courts who have weighed in on this issue, the Court is persuaded that the proper reading of § 1692g(a)(3) includes an inherent writing requirement. *See Graziano*, 950 F.2d at 112 (holding that though *Graziano* had argued and other courts had reasoned that “the absence of [a writing] requirement in subsection (a)(3) is strong evidence . . . that Congress advertently omitted an analogous requirement in subsection (a)(3) . . . given the entire structure of section 1692g, subsection (a)(3) must be read to require that a dispute, to be effective, must be in writing.”). *Graziano*’s reading of § 1692g(a)(3) does not impose an additional burden on consumers, but rather furthers the FDCPA’s purpose to protect consumers by ensuring that once the validity of a debt is contested under subsection (a)(3), additional protections also may triggered, including that all collection

activities must cease unless and until the debt collector obtains some verification of the debt. 15 U.S.C. §§ 1692g(a)(4),(5); 1692g(b). Indeed, to permit an oral dispute of a debt leaves the consumer with fewer protections and in a potentially far more confusing station than if a writing is required as they navigate the interplay between the provisions of § 1692g.

This holding is also consistent with several cases from the District of Maryland, in which that court has held that “not requiring a debtor’s dispute under § 1692g(a)(3) to be in writing would make the statutory scheme incoherent” and “might induce the debtor to waive her rights under § 1692g(a)(4) and (5) which require a writing to invoke the rights conferred by those sections.” *Wallace v. Capital One Bank*, 168 F. Supp. 2d 526, 529 (D. Md. 2001); *see also Davis v. R & R Prof'l Recovery, Inc.*, CIVA RDB-07-2772, 2009 WL 400627 (D. Md. Feb. 17, 2009); *Glen v. Law Office of W.C. French*, CIV. ELH-11-927, 2012 WL 181496 (D. Md. Jan. 19, 2012) *report and recommendation adopted*, CIV.A. ELH-11-00927, 2012 WL 425870 (D. Md. Feb. 8, 2012); *but see Turner v. Shenandoah Legal Group, P.C.*, 3:06CV045, 2006 WL 1685698 (E.D. Va. June 12, 2006). Accordingly, as the only action by defendant that plaintiffs have identified as violative of the FDCPA is the requirement that a dispute as to the validity of plaintiffs’ debts be in writing, plaintiffs have failed to state a claim upon which relief can be granted under the FDCPA.

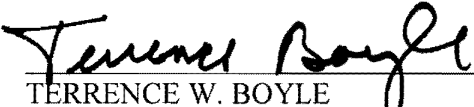
CONCLUSION

In light of the foregoing, the motion to dismiss filed by defendant¹ [DE 21] is GRANTED. This matter is hereby DISMISSED in its entirety and the Clerk is DIRECTED to

¹Defendant in its amended answer states that having undergone a corporate name change adopted as of June 29, 2012, the same day of the filing of the instant action, it is now named FKAACS, Incorporated [DE 22].

enter judgment accordingly.

SO ORDERED, this 9 day of January, 2013.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing this joint appendix to be filed electronically via this Court's CM/ECF system, which will automatically serve the following counsel of record:

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Jennifer D. Maldonado
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/s/ Deepak Gupta

Deepak Gupta

April 17, 2013