CASE NO. 19-35825

In the United States Court of Appeals For the Ninth Circuit

JOSEPH and RENNY FANGSRUD VON ESCH,

Plaintiffs-Appellants,

vs.

ASSET SYSTEMS, INC., an Oregon Corporation d/b/a in Washington as ASSET SYSTEMS, pursuant to Washington UBI No. 601474356,

Defendant-Appellee,

and

LEGACY SALMON CREEK HOSPITAL, a Washington company,

Defendant.

On Appeal from United States District Court for the Western District of Washington
No. 3:16-CV-05842-RBL

BRIEF ON BEHALF OF ACA INTERNATIONAL (ACA) AS AMICUS CURIAE IN SUPPORT OF DEFENDANT/APPELLEE AND AFFIRMANCE

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DISCLOSURE STATEMENT UNDER RULE 26.1

In accordance with the Rules of this Court, amicus curiae ACA International, the Association of Credit and Collection Professionals (collectively, "ACA"), states that it is a Minnesota not-for-profit corporation. It is not a subsidiary or affiliate of any other corporation. No publicly held corporation owns ten percent or more of its stock.

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To the Honorable Court of Appeals for the Ninth Circuit:

ACA files this Brief as *amicus curiae* in support of Defendant-Appellee Asset Systems, Inc., an Oregon Corporation d/b/a in Washington as Asset Systems, pursuant to Washington UBI No. 601474356 ("Asset").

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY[1]

ACA is the leading trade association for credit and collection professionals. Founded eighty years ago, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 2,500 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multi-national corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses—about three-quarters of ACA's company members have less than $15 million in annual revenue and fewer than twenty-five employees.[2] The ACA-member workforce is also incredibly

[1] All parties consent to the filing of this brief. No counsel of any party to this proceeding authored any part of this amicus brief. No party or party's counsel, or person other than amicus and its members, contributed money to the preparation or submission of this brief. Asset is an ACA member, and ACA has authorized the filing of this amicus brief.

[2] Josh Adams, *Small Businesses in the Collection Industry in 2018* (May 2018) (ACA International White Paper) *available at* https://www.acainternational.org/assets/research-statistics/aca-wp-smallbusiness-5-18.pdf at 2. As of 2018, thirty-two percent of responding ACA members indicated that they were woman-owned businesses, while six percent reported that they were minority-owned businesses; an additional five percent indicated that they were both woman- and minority-owned. *Id.* at 5. The overwhelming majority of these organizations also qualify as small businesses. *Id.*

diverse, with racial and ethnic minorities accounting for some forty percent and women making up seventy percent of employees.[3]

ACA regularly files briefs as an amicus curiae in cases of interest to its membership like this one. The question presented in this case relates to the construction and application of the Fair Debt Collection Act ("FDCPA") and, in particular, the statutory "bona fide error" affirmative defense from liability. This issue is of great importance to ACA members. A reversal of the district court's decision would upset the statutory balance of rights, liabilities, and defenses contained in the FDCPA. ACA members thus have a direct interest in this litigation, and ACA has authorized the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The bona fide error defense plays an important role in FDCPA jurisprudence. Debt collectors, like Asset, are held strictly liable for any violation of the Act, but for a sole defense to liability that they acted in good faith when they (or more likely the creditors they rely upon) make clerical or factual errors. Any violation based on accounting errors, such as those made by the original creditor in this case, must be excused where, as here the debt collector reasonably relies on the accuracy of creditor records, took steps to ascertain the accuracy of those records, and ceased

[3] Josh Adams, *Diversity in the Collections Industry: An Overview of the Collections Workforce* at 4 (Jan. 2016) (ACA International White Paper) *available at* j.mp/CollectionRole2016.

collection efforts once it received notice of an error. The Court should not extend its prior holdings to create an obligation to sift through creditor records in a hunt for inexplicable and baffling errors.

This Court should affirm the district court's decision to direct a verdict in favor of Asset. A reversal would allow a one-off accounting error by a creditor's employee to transform the FDCPA into a rule requiring each debt collector to also be auditor, accountant, and fact-checker. To hold otherwise would turn every debt collector into an accounting firm and run contrary to the established case law and the language of the Act. Affirmance of the district court's dismissal will clarify the duties of a debt collector and allow those attempting compliance to remain viable businesses.

ARGUMENT

I. AFFIRMANCE WOULD CLARIFY THE DUTY OF A DEBT COLLECTOR PRIOR TO A CONSUMER DISPUTE AND REQUEST FOR VERIFICATION AND NOT ADD ADDITIONAL BURDEN NOT CONTEMPLATED BY THE STATUTE.

Congress enacted the FDCPA to halt "abusive debt collection practices," including harassing phone calls and threats of violence. 15 U.S.C. § 1692(e); *id.* § 1692d ("A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."). However, Congress recognized that only a minority of debt-collection professionals engaged in these troubling practices. *See* S. Rep. No. 95-382, at 2

(1977) *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699 (emphasizing that "unscrupulous debt collectors comprise only a small segment of the industry"). By providing for strict liability and statutory remedies for improper debt collection, as well as a "bona fide error" defense for unintentional violations by debt collectors, Congress protected ***both*** consumers ***and*** "those debt collectors who refrain from using abusive debt collection practices". 15 U.S.C. § 1692(e); 15 U.S.C. § 1692k(c) ("A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows 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.").

On the one hand, to achieve the balance between consumer rights and the need for ethical debt collectors to remain competitive, the FDCPA provides consumers with tools to respond to problematic-collection efforts, including dispute and debt verification. *See* 15 U.S.C. §§ 1692b-j; 15 U.S.C. § 1692c(c). These processes are designed to remedy the problems of attempted collection of debts already paid or dunning the wrong consumer. *See id*. On the other hand, the FDCPA protects debt collectors, too. It expressly provides that a debt collector is not liable for a violation that "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). It is this process—of dispute and verification—expressly written into

the statute, where a duty to *verify* the debt with the original creditor arises. Indeed, the procedures outlined in the Act "wisely anticipates that not all debts can or will be verified." *Jang v A.M. Miller & Assoc*., 122 F.3d 480, 483 (7th Cir. 1997). And instead, the procedure anticipates that "in the real world, creditors and debt collectors make mistakes, and sometimes initiate collection activities against persons who do not owe a debt." *Id*. In those instances where a debt collector makes such a mistake, "the statute allows the debt collector to cease all collection activities at that point without incurring any liability for the mistake." *Id*.

A. THE PROCESS FOR DISPUTE AND VALIDATION PROVIDES FOR A MINIMUM VERIFICATION STANDARD TO ENSURE THAT CONSUMERS ARE PROTECTED.

Specifically because the FDCPA was enacted in part to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid," it gives the consumer the right to dispute a debt claimed by a debt collector, and to seek verification of the validity of the debt." S. Rep. No. 95-382, at 4 (1977) The validation requirement ("Validation Notice") found in section 1692g of the Act provides that when independent debt collector solicits payment it must provide the consumer with a detailed validation notice. 15 U.S.C. § 1692g(b). If the consumer notifies the debt collector in writing, within the thirty-day period afforded by the Act, that she disputes the debt or any portion of the debt, the debt collector must cease collection.

Id. at §§ 1692g(a) (4), 1692g(b); *Clark v. Capital Credit & Collection Servs., Inc*., 460 F.3d 1162, 1173 n.9 (9th Cir. 2006). This provision ensures that debt collectors give consumers adequate information concerning their legal rights. *See* 15 U.S.C. § 1692g. The sufficiency of any notice sent to a consumer is judged under the least sophisticated debtor standard i.e., if the least sophisticated debtor would likely be misled, the notice violates the Act. *See Swanson v. S. Or. Credit Serv., Inc*., 869 F.2d 1222 (9th Cir. 1988); *McStay v. I.C. System, Inc*., 308 F.3d 188 (2d Cir. 2002); *Jeter v. Credit Bureau, Inc*., 760 F.2d 1168, 1174 (11th Cir. 1985); *Higgins v. Capitol Credit Servs., Inc*., 762 F. Supp. 1128, 1133 (D. Del. 1991) (subsequent notices likewise should not mislead unsophisticated consumers concerning their legal rights).[4] In fact, even before validation occurs, the FDCPA authorizes consumers to demand that a collector refrain from contacting them, contact them at a particular time and place, or provide details necessary for the consumer to verify a debt's validity. *See* 15 U.S.C. § 1692c; 15 U.S.C. § 1692g. And, if a violation does occur, consumers can sue to recover actual damages and statutory damages. *See id*. § 1692k.[5]

[4] "If a consumer notifies a debt collector in writing ... that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt...." 15 U.S.C. § 1692c(c).

[5] Consistent with legislative intent as to the purpose and function of the Validation Notice, the failure to communicate clearly the validation procedure forms the basis of many FDCPA lawsuits. See *Clark*, 460 F.3d at 1173; *Mahon v. Credit Bureau of Placer Cnty. Inc.*, 171 F.3d 1197, 1203 (9th Cir. 1999).

The Validation Notice serves an important purpose in the collections process and the relationship between a consumer and a debt collector because it provides a means by which the debt collector and consumer can exchange information concerning a debt, particularly a disputed debt. *Hubbard v. Nat'l Bond and Collection Assoc., Inc*., 126 B.R. 422, 428 (D. Del. 1991) *aff'd*, 947 F.2d 935 (3d Cir. 1991) (table) ("[T]his exchange of information [under § 1692g's validation procedure] provides debt collectors with 'actual knowledge' of the facts relevant to their collection efforts. This is significant because only a knowing violation of § 1692e is actionable.").

In contrast, the Act does not include any obligation on the debt collector to dispute the debt with the original creditor, to perform the verification process prior to a consumer dispute, or to investigate the original creditor's processes. *See* 15 U.S.C. § 1692g. In fact, to require a debt collector to verify a debt in this way presupposes a process already required by the Act. A reversal of the district court's decision would add an (as yet undefined) additional requirement to verify debt prior to dispute and would void the statute's clear language.

B. REVERSAL OF THE TRIAL COURT DECISION WOULD CHARGE DEBT COLLECTORS WITH RESPONSIBILITY FOR DETERMINING THE ACCURACY OR LAWFULNESS OF THE REPORTED DEBT.

The validation process informs a debt collector "whether the debt is contested and the reasons, if any, for the debtor's refusal to pay." *Hubbard*, 126 B.R. at 426.

This exchange of information between a debtor and a debt collector serves the legislative intent in preventing the collection of invalid debts without requiring debt collectors bear the entire burden of collecting information:

> The statutory scheme of the FDCPA thus allows debt collectors to avoid the costs of investigating a debtor's background and ensures a cost effective means by which a debtor and debt collector can exchange information. This is an important part of the FDCPA's statutory scheme.

Id. at 428 (citing S. Rep. No. 382, 95th Cong., 1st Sess. 2 *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (the FDCPA should function "without imposing unnecessary restrictions on ethical debt collectors.") and 1699; 15 U.S.C. § 1692(e)).

For these reasons, a debt collector is ***not*** charged with investigating a debt. This Court, as well as other courts of appeal, have opined that at the minimum, "verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed." *Clark*, 460 F.3d at 1173–74; *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999); *Azar v. Hayter*, 874 F. Supp. 1314, 1317 (N.D. Fla. 1995), *aff'd* (unpublished), 66 F.3d 342 (11th Cir. 1995); *Walton v. EOS CCA*, 885 F.3d 1025, 1027–28 (7th Cir. 2018). It follows that the requirement to include notice of dispute procedures in its initial communication with consumers, acknowledges that debt collectors can and do make mistakes concerning a consumer's obligation to pay. This is because creditors are not regulated by the FDCPA (15 U.S.C. § 1692a), and they may assign a debt to a debt collector.

C. ANY INTERPRETATION OF THE BONA FIDE ERROR DEFENSE MUST NOT REQUIRE DEBT COLLECTORS TO BE INDEPENDENT AUDITORS.

The bona fide error defense plays a crucial role in FDCPA regulation. The balance struck between protecting consumers and allowing debt collectors to sustain a competitive business relies on the Court's interpretation of the defense to include good-faith errors, like the one here. To require more would place too great a burden on the debt collection industry and the businesses it works with to collect amounts owed for services and goods already consumed.

Where a debt collector confirms with their client the amount being claimed, and enforces reasonable policies to ensure accuracy of records, the FDCPA does not impose upon them any duty to investigate independently the claims presented by a creditor. *Clark*, 460 F.3d at 1174. Because of the express purpose and design of § 1692g and the principles discussed above, this Circuit, as well as others, have concluded that the FDCPA does not impose a duty upon a debt collector to independently verify a debt prior to attempting to collect it. *See Clark*, 460 F.3d at 1173-74 ("At a minimum, 'verification of a debt involves nothing more than the debt collector confirming in writing that amount being demanded is what the creditor is claiming is owed.'" Nor does it impose on the debt collector "a duty to investigate independently the claims presented by [the original creditor]."); *Chaudhry*, 174 F.3d at 406 (holding that debt collectors do not have to "vouch for the validity of the underlying debts"); *Wittenberg v. Wells Fargo Bank, N.A.*, 852 F. Supp. 2d 731, 753

(N.D. W.Va. 2012), *aff'd sub nom. Wittenberg v. First Indep. Mortg. Co*., 599 F. App'x 463 (4th Cir. 2013) ("[T]he FDCPA does not require a debt collector to engage in an independent investigation of the debt referred for collection."); *Smith v. Transworld Sys., Inc*., 953 F.2d 1025, 1032 (6th Cir. 1992) (holding that the district court correctly determined that the FDCPA does not require an independent investigation of a debt); *see also*, *McStay v. I.C. Sys., Inc*., 174 F. Supp. 2d 42, 47 (S.D.N.Y. 2001) *aff'd McStay v. I.C. Sys*., 308 F.3d 188 (2d Cir. 2002) ("The FDCPA does not require debt collectors to conduct independent investigations of the information provided by clients when collecting a debt.").

This Court must adopt a construction of the FDCPA that recognizes that "there is room within the [FDCPA] for ethical debt collectors to make occasional unavoidable errors." *Clark*, 460 F.3d at 1174 *citing Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 392 (D. Del. 1991) ("Generally, a debt collector may reasonably rely upon information provided by a creditor who has provided accurate information in the past."). "Courts do not impute to debt collectors other information that may be in creditors' files—for example, that debt has been paid or was bogus to start with." *Randolph v. IMBS, Inc*., 368 F.3d 726, 729 (7th Cir. 2004). As the Seventh Circuit was apt to point out, "[t]his is why debt collectors send out notices informing debtors of their entitlement to require verification and to contest claims." *Id*.

Instead, creditors may reasonably rely on the reported debt, where there was reliance on the basis of procedures maintained to avoid mistakes. *See Reichert v. Nat'l Credit Sys., Inc.,* 531 F.3d 1002, 1007 (9th Cir. 2008) (noting that debt collectors may not "sit back and wait until a creditor makes a mistake and then institute procedures to prevent a recurrence."); *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948–49 (9th Cir. 2011) (citing *Hyman v. Tate*, 362 F.3d 965, 967–68 (7th Cir. 2004) and *Transworld Sys.*, 953 F.2d at 1032 for the proposition that the FDCPA does not require an independent investigation of the debt referred for collection where, for example, there was either an "understanding" or an agreement that the debts referred for collection would be legally due); *Urbina v. Nat'l Bus. Factors, Inc. of Nev.*, Civil. No. 3:17-cv-385, 2019 WL 1767890, at * 14 (D. Nev. Apr. 22, 2019) (finding evidence of reasonable reliance on creditor information where there was an agreement to provide only reliable information); *see also Hayter*, 874 F. Supp. at 1317 ("No provision of the FDCPA has been found which would require a debt collector independently to investigate the merit of the debt, except to obtain verification, or to investigate the accounting principles of the creditor, or to keep detailed files."); *Sanchez v. United Collection Bureau, Inc.*, 649 F. Supp. 2d 1374, 1381 (N.D. Ga. 2009) ("When a consumer requests validation of a debt pursuant to the FDCPA, the debt collector is required to cease collection of

the debt until it provides verification of the debt to the consumer. *See also* 15 U.S.C. § 1692e.

The obligation to maintain procedures is "designed to avoid discoverable errors, including, but not limited to, errors in calculation and itemization." *Reichert*, 531 F.3d at 1007. The Court should not extend this obligation to somehow force development of additional procedures in an attempt to uncover errors like the bewildering accounting error presented below. Some courts have broadly held that "a debt collector is not required to prove that it had procedures in place to guard against the unknown or potential errors of others—instead, the debt collector has to take prompt steps to correct any errors once it received notice." *Alston v. Central Credit Servs., Inc.*, Civil No. DKC 12-2711, 2013 WL 4543364, at * 4–5 (D. Md. Aug. 26, 2013); *see also In re Creditrust Corp*., 283 B.R. 826, 832 (Bankr. D. Md. 2002).

The bona fide error defenses should therefore protect collection professionals, like Asset, that can show compliance with the FDCPA. This Court should find that a debt collector's actions are protected by the bona fide error defense where the debt collector: (1) reasonably relies on the accuracy of creditor records; (2) took steps to ascertain the accuracy of the records by collecting from the creditor an itemized accounting, including what (if any) interest is appropriate; and (3) had no notice, prior to the first notice, of any errors in the creditor's records. The Court should not

extend its prior holdings to create an obligation to sift through creditor records in a hunt for inexplicable and baffling errors.

> When the law is used to punish good-faith mistakes; when adopting reasonable safeguards is not enough to avoid liability; when the costs of discovery and litigation are used to force settlement even absent fault or injury; when class-action suits transform technical legal violations into windfalls for plaintiffs or their attorneys, the Court, by failing to adopt a reasonable interpretation to counter these excesses, risks compromising its own institutional responsibility to ensure a workable and just litigation system.

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 612 (2010) (J. Kennedy, dissenting).

A reversal of the district court's decision by this Court would entrench, not eliminate, some of the most troubling aspects of modern FDCPA litigation. It would rewrite the FDCPA to (to paraphrase Justice Kennedy) extending it to punish good-faith mistakes; hamstring the efficacy of adopting reasonable safeguards to avoid liability; expand when the costs of discovery and litigation are used to force settlement even absent fault or injury; when class-action suits transform technical legal violations into windfalls for plaintiffs or their attorneys,

II. THE ABILITY TO EFFECTIVELY AND EFFICIENTLY COLLECT CONSUMER DEBT IS A CRUCIAL UNDERPINNING OF THE AMERICAN ECONOMY.

The U.S. economy depends on collected debt and debt collectors play a critical role in that process. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 LOYOLA CONSUMER L. REV. 167, 168 (2016). As the

Consumer Financial Protection Bureau has explained, "[c]onsumer debt collection is critical to the functioning of the consumer credit market."[6] By collecting delinquent debt, debt collectors help make credit more affordable to consumers, enabling them "to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase."[7]

In 2011, Ernst & Young conducted a study to measure the various impacts of third-party debt collection on the national and state economies. Ernst & Young, *The Impact of Third-Party Debt Collection on the National and State Economies*, (February 2012), *available at* https://bit.ly/2N1Skz5 ("Ernst & Young Report"). The study revealed that debt collection returned $67.6 billion of funds in 2016 to U.S. businesses—an average savings of $579 for every American household. *Id*. An academic study about the impact of debt collection confirms the basic economic reality that losses from uncollected debts are paid for by the consumers who meet their credit obligations:

> In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient. Again, as noted, collection activity influences on both the supply and the demand of consumer credit. Although lax collection efforts will increase the demand for credit by consumers, the higher losses associated with lax collection efforts will increase the

[6] CFPB ANNUAL REPORT 2012, FAIR DEBT COLLECTION PRACTICES ACT at 4 (2012), *available at https://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf*.

[7] *Id*.

> costs of lending and thus raise the price and reduce the supply of lending to all consumers, especially higher-risk borrowers.

Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 167, 213-14, GEORGE MASON UNIVERSITY, MARCATUS CENTER (2016) (working paper).

The debt collection market is also extremely varied in the types of debts being collected and the nature and size of the accounts receivable management industry encompasses a broad scope. Small businesses in particular rely on the debt-collection industry, often lacking the resources to collect outstanding debts themselves. William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 556–57 (2010). They therefore rely on third-party debt collectors - providing cash flow that is critical for the sustainability of those businesses and for the workers they employ. Consumers, too, benefit—not just from more available and affordable credit, but also from lower prices. *Id*. Of course, if "collection agencies are forced to charge businesses more in order to offset the risk of an FDCPA lawsuit" – those costs will ultimately pass on to consumers. *Id*. at 562. *Cf*. Ernst & Young Report at p.i. ("Unpaid debt can affect consumer prices, borrowing costs, and business performance[.]"). Because collecting unpaid debts requires time and expertise, many creditors rely on professional debt collectors. Small businesses, which often lack "the resources or manpower to collect . . . debts on their own," depend especially

heavily on these professionals. Hoffman, *supra* at 557. The Act should not be read to incentivize consumers to shirk legal and valid debts at the expense of honest businesses and other consumers seeking affordable credit. If the Court makes collection efforts less certain and more hazardous, small and medium-sized business owners and their employees will be less willing to provide goods and services in advance of payment, or will increase prices to make up for increased collection costs and unpaid but valid debt. *Id*. at 556.

III. AMBIGUITY IN APPLICATION OF THE BONA FIDE ERROR DEFENSE ENCOURAGES MERITLESS FDCPA LAWSUITS, ACCRUING HIGH COSTS FOR SMALL BUSINESSES AND CONSUMERS.

Claims like those asserted by Appellants have morphed the FDCPA from a shield to a sword for consumers. As the Seventh Circuit observed, plaintiffs' attorneys are particularly adept at using "the class action as a device for forcing the settlement of meritless claims," a practice the court described as the "mirror image of the abusive tactics of debt collectors at which the statute is aimed." *White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000). There is widespread abuse of the FDCPA, which caused it to become a *debt relief statute* rather than a shield for consumers as it was initially intended to be. There is no shortage of FDCPA actions, and a reversal of the district court's decision would encourage even more frivolous claims. Here, where the creditor's error was not discoverable despite reasonable policies, to add an additional burden would simply cripple businesses.

A. REVERSAL WOULD INVITE SUBSTANTIAL INCREASE IN MERITLESS LITIGATION.

As numerous authorities have recognized, law-abiding debt collectors are currently bombarded by FDCPA suits. *See Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (noting the "proliferation of litigation" under the Act) (internal quotation marks omitted); *Jacobson v. Healthcare Fin. Servs., Inc*., 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006), *aff'd in part, rev'd in part and vacated*, 516 F.3d 85, 961 (2008) ("The interaction of the least sophisticated consumer standard with the presumption that the FDCPA imposes strict liability has led to a proliferation of litigation in this District … the cottage industry that has emerged does not bring suits to remedy the widespread and serious national problem of abuse that the Senate observed in adopting the legislation.... Rather, the inescapable inferences that the judicially developed standards have enabled a class of professional plaintiffs.").[8] Although many of those lawsuits are entirely devoid of

[8] For similar statements from the "trenches", i.e., the District Courts that must deal with the multitudes of such cases, describing the tidal wave of FDCPA litigation *see Cohen v. Am. Credit Bureau, Inc*., No. 10-5112, 2012 WL 847429, at * 2 (D. N.J. March 13, 2012) ("The FDCPA was not passed in order to sprout a cottage industry for lawyers who self-interestedly battle over attorney's fees in federal court."); *Pappenfuss v. Receivable Mgmt. Servs. Corp*., No. 13-CV-175, 2013 WL 5427891, at *1 (E.D. Wis. 2013) ("The prospect of attorneys' fees and the volume of alleged violations of the FDCPA has resulted in the development of a cottage industry for both plaintiffs and defense attorneys specializing in these sorts of actions and a proliferation of FDCPA litigation in courts."); *Allen v. LaSalle Bank, N.A*., Civ. No. 08-2240, 2012 WL 1898612, at * 6 (D. N.J. May 23, 2012) ("The FDCPA was not passed in order to sprout a cottage industry for lawyers who self-interestedly battle over attorneys in federal court.") (internal quotations omitted); *Kraus v. Prof'l Collections Bureau of Md., Inc*., 281 F. Supp. 3d 312, 324 (E.D.N.Y. 2017) With the FDCPA, Congress intended to 'arm[ ] consumers with a shield against the overly zealous debt collector.' The Court worries that, by carrying the least-sophisticated-consumer standard and strict

merit, plaintiffs' attorneys can often extract settlements from law-abiding debt collectors who face greater expense from litigating such nuisance suits than from settling them, and like the case before the Court, no actual damages to the plaintiff.

The sheer number of FDCPA suits brought each year is staggering—in 2017 alone, plaintiffs filed more than 9,000 FDCPA cases in the district courts.[9] And filed cases are only the beginning—"attorneys often threaten to sue if they are not paid a quick settlement, knowing the cost of defending an FDCPA claim can easily reach $10,000 or more." William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. Rev. 549, 562 (2010). In the context of the FDCPA "even successful suits may produce recoveries that are small in relation to the defendants' costs". Indeed, in recent years a "cottage industry" of high-volume FDCPA lawyers has taken root. *Murphy v. Equifax Check Servs., Inc*., 35 F. Supp. 2d 200, 204 (D. Conn. 1999).

Nevertheless, meritless cases are often nonetheless "successful"—in that, the endgame is almost always a quick settlement, not a verdict. Reversal of the district court would encourage lawsuits claiming "technical violations". It is not surprising

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liability to an illogical extreme, this circuit has fashioned that shield into a sword."); *Campagna v. Client Servs., Inc*., No. 18-cv-3039 (SJF) (ARL), 2019 WL 6498171, at * 6 & n.6 (E.D.N.Y. Dec. 3, 2019) (citing *Kraus*, 281 F. Supp. 3d at 322 & n.8).

[9] WebRecon, LLC, WEBRECON STATS FOR DEC 2017 & YEAR IN REVIEW *available at* https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/; *See also* WebRecon, LLC, WEBRECON JAN 2020: YEAR STARTS WITH COMPLAINTS UP ACROSS THE BOARD *available at* https://webrecon.com/webrecon-stats-for-jan-2020.

that plaintiffs' attorneys are often successful at coercing law-abiding debt collectors to settle. As noted above, the cost of successfully defending a nuisance lawsuit far exceeds the cost of settlement. Therefore, there is often a strong economic incentive to settle even meritless claims. *See Berther v. TSYS Total Debt Mgmt.,* Inc., No. 06-C-293, 2007 WL 1795472, at *4 (E.D. Wis. Jun 19, 2007) ("[I]t is the avoidance of attorney[']s fees that undoubtedly serves as the primary motivating factor in pushing defendants into settlements."); *Hoffman*, 29 ST. LOUIS U. PUB. L. REV. at 562 ("for a collection agency, it is more cost effective to pay a settlement"); Lynn A.S. Araki, *Rx For Abusive Debt Collection Practices: Amend The FDCPA*, 17 U. HAWAII L. REV. 69, 105–06 (1995) ("Attorneys who are familiar with the FDCPA provisions try to extract more money in the settlement process than they could reasonably expect to recover for a non-aggrieved client in court.").

Courts have repeatedly recognized, moreover, that even those cases that do end with an immediate settlement serve primarily to benefit plaintiffs' lawyers—not consumers. *See Zagorski v. Midwest Billing Servs., Inc*., 128 F.3d 1164, 1166 (7th Cir. 1997) (per curiam); *Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir. 1995). Not surprisingly, then, "FDCPA litigation is a breeding ground for class actions." Lawrence Young & Jeffrey Coulter, *Class Action Strategies in FDCPA Litigation*, 52 CONSUMER FIN. L.Q. REP. 61, 70 (1998). "[I]t is these attorneys' fees which are a significant inducement for FDCPA class action lawsuits." *Sanders v. Jackson*, 209

F.3d 998, 1003 (7th Cir. 2000) (citing *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) (In many class action cases the plaintiffs "are mere 'figureheads' and the real reason for bringing such actions is 'the quest for attorney's fees.'")); *see* Araki, 17 U. HAWAII L. REV. 69, 105–06 (noting that "it often is cost free for their clients to try a case for a nominal verdict" while "it costs the defendant his own attorney's fees"). The history of FDCPA litigation shows that cases have resulted in limited recoveries for plaintiffs and hefty fees for their attorney. *See e.g.*, *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 880 (7th Cir. 2000) (where a negotiated settlement provided $2,000 to the class representative, $78,000 to the plaintiff's attorneys, and nothing for the rest of the class). Cases like *Crawford* illustrate "the all-too-common abuse of the class action as a device for forcing the settlement of meritless claims and is thus a mirror image of the abusive tactics of debt collectors at which the statute is aimed." *White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000).

B. AN INCREASE IN MERITLESS LITIGATION WILL RESULT IN HARM TO CONSUMERS AND SMALL BUSINESSES.

While the benefits of increased regulation of the debt-collection industry to consumers are often illusory, the harm to law-abiding debt collectors, small businesses, and their customers is all too real. The misleading caricature debt collectors as "unethical" overlooks the critical role responsible debt collectors play in our economy—and the wider costs of meritless FDCPA lawsuits.

The American economy depends on the collectability of consumer debts. As part of the process of attempting to recover outstanding payments, credit and collections professionals, like ACA's members, are an extension of every community's businesses. ACA members work with businesses, both large and small, to obtain payment for the goods and services already received by consumers. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls. Moreover, absent effective and legal collections remedies, consumers would be forced to pay more for their purchases to compensate sellers for the uncollected debts of others. Debt-collection businesses directly provide 150,000 American jobs - and indirectly provide another 150,000. Although ACA International's 5,000 member agencies range in size from small businesses to large corporations, forty-four percent of ACA member organizations (831 companies) have fewer than nine employees. Additionally, eighty-five percent of members (1,624 companies) have forty-nine or fewer employees and ninety-three percent of members (1,784 companies) have ninety-nine or fewer employees. Josh Adams, *The Role of Third-Party Debt Collection in the U.S. Economy*, 1, 2 (Jan. 2016) (ACA International White Paper), *available at*

j.mp/CollectionRole2016. The cost of defending just one or two meritless lawsuits can therefore have a severe impact on such a small businesses.

CONCLUSION

Congress intended the FDCPA to eliminate abusive debt collection practices by debt collectors, and to aid those debt collectors who refrain from using abusive debt collection practices do not competitively disadvantaged. Lawsuits such as this run counter to this stated purpose. Asset, named as a defendant in the underlying lawsuit, engaged in compliant collection efforts regarding a just and owing debt. Yet is it being sued notwithstanding its compliant collection effort, thereby putting it at a competitive disadvantage. This scenario is not the intended purpose of the FDCPA or the bona fide error defense provided for therein. Therefore, amicus curiae supports affirmance of the district court's opinion below.

Dated: April 6, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 5,654 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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Dated: April 6, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System, which will send a notice of electronic filing to all registered parties.

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