

ORIGINAL

IN THE SUPREME COURT OF OHIO

SANDRA J. TAYLOR JARVIS,	:	CASE NO. 13-0118
	:	
Plaintiff-Appellee	:	
	:	
vs.	:	
	:	
FIRST RESOLUTION	:	On Appeal from the Summit
INVESTMENT CORP., et al.,	:	County Court of Appeals,
	:	Ninth Appellate District
Defendants-Appellants	:	Case No. CA26042

BRIEF AMICUS CURIAE OF AARP
IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly concerned about abusive practices being used to collect stale and invalid debt. Older people are especially vulnerable to debt collection abuses.

Debt collection lawsuits have multiplied across the county, corresponding to the evolution of the debt buying industry and rapidly increasing debt loads, exorbitant interest and fees, and the economic downturn. Out of necessity, people have used high cost credit to pay for basic needs such as groceries, medical care, prescription drugs, house payments, and urgent house repairs. A variety of unfair practices by lenders have increased outstanding balances by millions of dollars. Lenders have sold to debt buyers large portfolios of debt, including time-barred debt, disputed debt, settled debt, or otherwise invalid debt, and the contracts of sale disclaim all warranties as to the accuracy of the information. Such debt has become the subject of often questionable and abusive debt collections.

Many older people are harmed by abusive collection practices which threaten their financial security and well-being. AARP has an interest in protecting older people from such abuses and has participated as amicus curiae in cases involving challenges to abusive debt collections in federal and state courts. AARP's participation in this case will assist this Court in understanding the issues raised on appeal.

SUMMARY OF ARGUMENT

The debt collection industry consistently garners more complaints by consumers to governmental agencies than any other industry. Even with efforts by legislatures, state attorneys general, and the Federal Trade Commission (hereinafter "FTC") to protect consumers, collection abuses continue to cause significant suffering and anguish.

The evolution of the debt buying industry, particularly involving credit card debt, presents significant challenges for consumers and courts. Debt collectors aggressively pursue judicial collection of debt considered to be essentially worthless. Such debt is sold by creditors with explicit disclaimers as to its accuracy because it may be invalid or disputed, have resulted from identity theft, have been discharged in bankruptcy, or even be fully paid. Industry wide, debt buyers refuse to purchase the data necessary to ensure and verify the accuracy or validity of such debts, and the scant summaries they do purchase are often

inaccurate. The collection of stale debt based on inadequate information leads to collection of the wrong amount or collection from the wrong person, in violation of the Fair Debt Collection Practices Act (“FDCPA”) and state fair debt collection laws.

Judicial collection of time-barred and/or unverifiable debt plagues court dockets across the country. Debt collectors frequently file lawsuits that are time-barred, for claims they have made no attempt to verify, and for which they are not prepared to litigate, with the expectation that a large number of defendants will not defend themselves and the claims will not be scrutinized by the courts. Abuses including attempts to obtain judgments on time-barred debts are among the predictable and foreseeable consequences of the debt buyer business model.

Debt collectors take unfair advantage of the (usually) unsophisticated, unrepresented debtors when they sue without regard for the accuracy of the information underlying the claims. To discourage judicial collection abuses, courts should require debt collectors to have a reasonable basis to assert the claims they allege and to adhere to court procedures designed to ensure a fair judicial process. Failure to insist on stringent adherence to court procedures rewards collection mills for filing volumes of lawsuits based on legally inadequate and unverifiable information. Older consumers are especially vulnerable to collections abuses. They often live in social isolation, lack knowledge of their legal rights, and live on

fixed incomes, all factors which make them susceptible to abusive collection actions and create enhanced fear of a court judgment.

ARGUMENT

I. The Debt Buying Industry Aggressively Pursues Judicial Collection of Stale and Time-Barred Debt Through an Inherently Abusive Business Model

Virtually worthless debt is being bought by debt collectors who then aggressively pursue judicial collection of those worthless debts. The evolution of the debt buying industry, involving the sale and resale of scant, unsupported, and explicitly inaccurate summaries of information about charged-off credit card debt, presents significant challenges for consumers and courts. The debt buyer business model has inherent flaws that have increased debt collection abuses exponentially. Debt buyers routinely use the courts to collect on debts which are inadequately documented, infringing on the integrity of the judicial system. A predictable result of debt buyers filing countless lawsuits based on inadequate and unverifiable information is that lawsuits are regularly filed after the right to collect the debts has expired.

A. The Debt Buyers' Collection Model Predictably Results in Abuses Requiring Stronger Enforcement Efforts from State and Federal Authorities

Consumers need protection from the abuses inherent in the debt buyer business model, which manipulates court process to obtain judgments on often

invalid debts. Despite legal protection from debt collection abuses, consumer complaints about abusive debt collection practices to state attorneys general and the Federal Trade Commission (“FTC”) have consistently exceeded those for any other specific industry. See FTC, *The Structure and Practices of the Debt Buying Industry*, i (Jan. 3, 2013) (hereinafter “FTC Debt Buying Report”);¹ FTC, *Consumer Sentinel Network Databook for January - December 2012*, 81 (Feb. 2013) (reporting complaints about significant abuses by third party debt collectors in 2012 totaled 178,009);² Nat’l Assoc. of Att’y Gen., *Top 10 List of Consumer Complaints for 2008*, NAAG News (Oct. 2, 2008).³

Many of the people sued by debt collectors have already paid, settled, or discharged their debts, are the victims of identity theft, are being sued on debt after the expiration of the statute of limitations, or are being sued for the wrong amount or on debt owed by a decedent. See *FTC Debt Buying Report* at iv (“[E]ach year, buyers sought to collect about one million debts consumers did not owe,” and this may understate the problem); Rich Jurgens & Robert J. Hobbs, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts*, Nat’l

¹ Available at <http://ftc.gov/os/2013/01/debtbuyingreport.pdf>.

² Available at <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf>.

³ Available at <http://naag.org/top-10-list-of-consumer-complaints-of-2008-resource-list.php>.

Consumer Law Ctr., 11 (2010) (hereinafter “*NCLC Debt Machine*”).⁴ Though victims of identity theft and fraud are not legally liable for unauthorized charges, they may nevertheless be hounded by collectors. Debt that has been discharged in bankruptcy or that was owed by a decedent is also regularly pursued by collectors. *Id.*; see also Jessica Silver-Greenberg, *Debts Go Bad, Then It Gets Worse*, Wall St. J. (Dec. 23, 2011) (describing “court-appointed auditor’s conclu[sion] that Capital One pursued 15,500 ‘erroneous claims’ seeking money previously erased by a bankruptcy-court judge”).⁵

The Consumer Financial Protection Bureau (“CFPB”) in its first report regarding debt collection practices repeated the conclusion that has been widely acknowledged: a “major consumer protection concern[] is the quantity and quality of information that debt collectors have, use, or convey to others in their collection activities.” CFPB, *Annual Report 2012: Fair Debt Collection Practices Act*, App’x A at 3 (2012).⁶ Widespread complaints by consumers harmed by abusive practices arising from the debt buyers’ process of collecting debts based upon inadequate information prompted the CFPB to assert supervisory authority over

⁴ Available at <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf>.

⁵ Available at <http://online.wsj.com/article/SB10001424052970203686204577114530815313376.html>.

⁶ Available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf.

debt collectors. The CFPB now spends over \$10 million per year to guard against the perpetration of these abusive practices. CFPB, *Defining Larger Participants of the Consumer Debt Collection Market, Final Rule*, 77 FR 65775 (Oct. 31, 2012); CFPB, *Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation*, CFPB Bulletin (June 25, 2013).⁷

The Office of the Comptroller of the Currency (“OCC”) has also begun scrutinizing debt buyers. Subcomm. on Financial Institutions and Consumer Protection, Sen. Comm. on Banking, Housing, and Urban Affairs, “Shining a Light on the Consumer Debt Industry” (July 17, 2013) (Statement of Tim Curry, Office of the Comptroller of the Currency) (discussing bank sale of debt without adequate controls).⁸ See also Jeff Horwitz and Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, Am. Banker (Jul. 2, 2013).⁹ J.P. Morgan Chase, for example, has faced increasing scrutiny. See Jeff Horwitz, *JPM Chase Quietly Halts Suits Over Consumer Debts*, Am. Banker (Jan 10, 2012).¹⁰ The California attorney

⁷ Available at http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.

⁸ Available at <http://www.occ.treas.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf>.

⁹ Available at http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html.

¹⁰ Available at http://www.americanbanker.com/issues/177_7/jpmorgan-chase-consumer-debt-collection-1045606-1.html.

general recently sued in state court “to hold Chase accountable for systematically using illegal tactics to flood California’s courts with specious lawsuits against consumers.” Press Release, CA Att’y Gen., *Attorney General Kamala D. Harris Announces Suit Against JPMorgan Chase for Fraudulent and Unlawful Debt-Collection Practices* (May 9, 2013) (“Chase employed unlawful practices as shortcuts to obtain judgments against California consumers with speed and ease that could not have been possible if Chase had adhered to the minimum substantive and procedural protections required by law.”).¹¹ In the face of the increasing OCC scrutiny of debt collection practices, Wells Fargo has also halted its credit card collections. See Maria Aspan, *Wells Fargo Halts Card Debt Sales as Scrutiny Mounts*, Am. Banker (Jul. 29, 2013).¹²

Concerted efforts against abusive collections by the OCC, the CFPB, and the FTC all point to a fundamental underlying issue with the abusive collection mills: banks sell debt portfolios without regard to the quality of the accounts sold or the practices of the collectors to whom debt portfolios are sold.

¹¹ Available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase>.

¹² Available at http://www.americanbanker.com/issues/178_144/wells-fargo-halts-card-debt-sales-as-scrutiny-mounts-1060922-1.html.

B. Debt Buyers Purchase Inherently Flawed Data

The quality of debt account data purchased in the debt buying industry is deeply flawed. The data purchased is not warrantied and does not incorporate adequate safeguards against abusive collections. These flaws underlie the increase in debt collection abuse complaints. See Jeff Horwitz, *State AGs Probing Sales of Credit Card Debt*, Am. Banker (Sept. 17, 2012) (hereinafter “*Horwitz Sept. 2012*”).¹³ Technological advances and huge growth in levels of unaffordable consumer credit card debt, especially between 2004 – 2006, spawned the birth and exponential growth of the multi-billion dollar debt buying industry. *FTC Debt Buying Report* at 14. Debt buyers purchase, for pennies on the dollar, large portfolios of delinquent (usually credit card) debt with little or no documentation. The debt is sold in contracts which typically disclaim “any representations, warranties, promises, covenants, agreements, or guaranties of any kind or character whatsoever’ about the accuracy or completeness of the debts’ records,” and reveal that “some of the claims it sold might already have been extinguished in bankruptcy court...’ some balances are ‘approximate’... or [some] consumers have already paid back in full.” Jeff Horwitz, *Bank of America Sold Card Debts to*

¹³ Available at http://www.americanbanker.com/issues/177_180/state-attorneys-general-probing-sales-of-credit-card-debt-1052724-1.html.

Collectors Despite Faulty Records, Am. Banker (Mar. 29, 2012) (hereinafter “*Horwitz Mar. 2012*”).¹⁴

Debt buyers also purchase only mere segments of data which typically do not amount to more than an electronic spreadsheet summarizing minimal information about an account. *See Id.* at 30; Jeff Horwitz, *Banks Face Official Backlash Against Card Debt Collection Practices*, Am. Banker (Jan. 16, 2013) (hereinafter “*Horwitz Jan. 2013*”) (reporting “bank contracts warn that records no longer exist. Even when account documents are available and debt buyers request them, banks often require additional payments to supply them. Such demands can prove prohibitively expensive or encourage debt collectors to gather detailed evidence only in sporadic cases.”).¹⁵ Incredibly, the entire debt buying industry is currently structured to ensure that in most cases, a debt buyer will never have access to the information necessary to avoid collection abuses, including the collection of time-barred debt. *See FTC Debt Buying Report* at ii-iv (finding debt buyers rarely receive any documents related to the debts, such as account statements or the terms and conditions of credit, and their ability to obtain same, if such documents even existed, was limited); *See also Horwitz Mar. 2012* (noting

¹⁴ Available at http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html.

¹⁵ Available at http://www.americanbanker.com/issues/178_12/banks-face-official-backlash-against-card-debt-collection-practices-1055929-1.html.

loan sale contracts “warned that [banks] would initially provide no records to support the amounts it said are owed and might be unable to produce them.”).

The cost to debt buyers to purchase defaulted debt is so low because it is deemed to be nearly worthless by creditors, as reflected in the average price paid by debt buyers of four cents on the dollar. *See FTC Debt Buying Report* at 23-24. Actually, the value of a particular debt portfolio is based upon the likelihood that a debtor will succumb to the pressure exerted by the threat or entry of a judgment rather than the legitimacy of the debt. *See FTC, Collecting Consumer Debts: The Challenges of Change - A Workshop Report*, 20 (2009) (hereinafter “*FTC Challenges of Change*”) (debt buyers use mathematical scoring models based on likelihood of collection to determine whether to purchase a portfolio and how much to pay).¹⁶ Debt buyers pay more for freshly charged-off delinquent debt. *Id.* “[H]eavily worked-over accounts or those for which the statute of limitations has expired fetch less than a penny on the dollar.” *Horwitz Jan. 2013*. Debt is sold at such a cheap price because “the proof required to obtain a judgment in the creditor’s favor is lacking, usually as a result of poor record keeping on the part of the creditor.” *See MBNA Am. Bank, N.A. v. Nelson*, 15 Misc. 3d 1148(A), *2, 841 N.Y.S. 2d 826 (Civ. Ct. 2007); *See also FTC Debt Buying Report* at 23-24.

¹⁶ Available at <http://www.ftc.gov/bcp/workshop/debtcollection/dcwr.pdf>.

C. Debt Buyers Offend the Integrity of Courts by Flouting Evidentiary and Procedural Rules

The debt buyer business model has implicated court systems in a way that challenges judicial integrity. Courts have become the preferred venue for collections because debtors frequently succumb to the pressure exerted by the threat or entry of a judgment, even if they do not owe the debt alleged. As explained by one commentator, “a civil filing serves as a credible threat to inflict harm on the defendant[‘s credit rating and thus] may induce the defendant to pay.” Richard Hynes, *Broke But Not Bankrupt: Consumer Debt Collection In State Courts*, 60 Fla. L. Rev. 1, 20 (2008).

Debt collectors have achieved overwhelming success with judicial collections because of the high likelihood of default judgments. Judith Fox, *How Forum Determines Substance in Judicial Debt Collection*, 31 Banking and Financial Services Rev. 11, 11-12, n.13 (2012); Bernice Yeung, *Some Lawyers Want to Keep Debt Collection Out of the Courts*, N.Y. Times (Apr. 23, 2010) (finding California collection suits increased twenty five percent in five years and noting “[t]he debtors don’t respond [to suits] because they don’t know how, and that’s how the debt buyers make their money”).¹⁷ Collectors have a distinct advantage in litigation over alleged debtors, who do not know their legal defenses and who do not understand that statistically, debt buyers have no way of obtaining

¹⁷ Available at http://www.nytimes.com/2010/04/23/us/23sfdebt.html?_r=0.

evidence to prove the vast majority of cases they file. An alleged debtor faced with a court summons believes that a collector would not be allowed to bring a case that could not be proven in court and that he has no choice but to make payments to avoid a judgment. *See Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1489 (M.D. Ala. 1987) (reasoning that unsophisticated “consumers would unwittingly acquiesce” to a time-barred lawsuit instead of defending against it).

Moreover:

even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.

Id. at 1487.

Indeed, it is relatively uncommon for an unsophisticated debtor, who typically cannot afford legal representation, to appear to defend a debt collection lawsuit. *See Horwitz Mar. 2012*; Claudia Wilner et al., *Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers*, Neighborhood Econ. Dev. Advocacy Project 6 (2010) (noting that ninety-five percent of 457,322 lawsuits filed by twenty-six debt buyers against people residing in low- or moderate-income neighborhoods ended in default judgments, and not a single

person in the study was represented by counsel);¹⁸ Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom – In Lawsuits*, Wall St. J. (Nov. 28, 2010) (reporting that by industry estimates ninety-four percent of collections end in default and that “[t]he majority of borrowers don't have a lawyer, some don't know they are even being sued, and others don't appear in court, say judges.”).¹⁹ A 2006–2008 study in New York City Civil Court examined 457,322 debt buyer suits against consumers, in which 26 debt buyers were awarded \$1.1 billion in judgments and settlements. The study found debt buyers prevailed in 94.3% of the cases, usually by default judgments, and that not one person in the sample set was represented by an attorney. Urban Justice Ctr., *How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers*, 1 (May 2010).²⁰ Only ten percent of people sued even answered the complaint. *Id.*

Collector’s abuse of and apparent contempt for the integrity of the judicial process is clearly demonstrated by the widespread practice of “robo-signing”

¹⁸ Available at http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf.

¹⁹ Available at <http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html>.

²⁰ Available at http://www.urbanjustice.org/pdf/press/Debt_Deception_press_release.pdf.

affidavits in millions of cases filed each year. *See NCLC Debt Machine* at 22.²¹ Robo-signing—so dubbed by the media in the foreclosure context—refers to the practice of signing affidavits and other documents so quickly that the affiant could not possibly have verified the information attested to. *Midland Funding, LLC v. Brent*, 644 F. Supp. 2d 961, 966 (N.D. Ohio 2009) (debt buyer employee noting the “percentage of [affidavits] that are checked for accuracy is ‘very few and far between.’”); *see* Peter A. Holland, *The One Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Md. J. of Bus. and Tech. L. 259, 268 (2011) (hereinafter “*Holland*”); *see* David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. Times, A1 (Nov. 1, 2010) (noting robo-signing is a common and long-entrenched practice in the collections industry, although it has garnered far less public attention than in the foreclosure context).²² Researchers in a New York study found that over the course of a year, an affiant for one debt buyer identified himself as the custodian of records in 47,503 lawsuits. *Holland* at 269. An employee of a debt buyer said he was required to sign hundreds of affidavits a day, while an employee of another debt buyer said that she signed, on average, an affidavit every 13 seconds. *Id.*; *see also*, *Horwitz Sept. 2012* (reporting “managers of a credit card processing facility in San

²¹ Available at <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf>.

²² Available at <http://www.nytimes.com/2010/11/01/business/01debt.html>.

Antonio ordered its employees to robo-sign affidavits attesting to the accuracy of debts owed by Chase customers.”). Lawsuits filed in reliance on robo-signed affidavits are filed *without regard for the validity of the debt or the information asserted*. Moreover, they purport to assert the truthfulness of hearsay contained in the business records of *other businesses*, of which they have no knowledge, no access, and no possibility of verifying even if they wanted to. *See Holland* at 272-73.

Courts across the country as well as federal and state enforcement agencies have exposed the widespread use of such false, unverified, and in many cases unverifiable affidavits, which are filed by debt buyers to obtain millions of judgments. *See FTC Debt Buying Report* at 30; *Horwitz Jan. 2013*; *Horwitz Mar. 2012*; *Vassalle v. Midland Funding*, 708 F.3d 747 (6th Cir. 2013), reh’g denied Nos. 11-3814/3961/4016/4019/4021, 2013 U.S. App. LEXIS 7988 (6th Cir. Apr. 19, 2013) (reversing approval of nationwide class action settlement of FDCPA claims asserting collector routinely obtained state court judgments using false affidavits). Some courts attuned to the practice of robo-signing have stepped in to strengthen procedural rules, sometimes with stated offense at the blow to their judicial integrity. *See e.g.* Press Release, N.J. Judiciary, *New Jersey Courts Take Steps to Ensure Integrity of Residential Mortgage Foreclosure Process* (Dec. 20, 2010) (New Jersey Judiciary Chief Justice commented on the use of robo-signing

in the foreclosure context, “For judges to sign an order foreclosing on a person's home, they must first be able to rely on the accuracy of documents submitted by lenders. That step is critical to the integrity of the judicial process.”).

II. State Courts Must Require Strict Adherence to Procedural Rules to Safeguard Consumers

In light of the increasing reliance by debt buyers on judicial collections, court oversight of judicial collections is essential to protect against collection abuses. The FTC notes that “states should take primary responsibility to address abuses in the debt collection process” because “[v]irtually all collection proceedings are decided in state court through the application of state substantive and procedural law.” *FTC Challenges of Change* at 65; *FTC Debt Buying Report* at 1. “The judiciary continues to provide an important role in safeguarding consumer rights and in overseeing the fairness of the debt collection process.” *MBNA Am. Bank, N.A. v. Nelson*, 15 Misc. 3d 1148(A), *1, 841 N.Y.S. 2d 826 (Civ. Ct. 2007).

A. Strict Adherence to Procedural Rules Prevents Courts from Being Used as “Business Generators” for Collectors

Strict adherence to procedural rules, such as requiring collectors to have legally adequate information to support claims and enforcing service of process rules, would weed out non-meritorious lawsuits that would otherwise result in a default judgment. Industry-wide the incidence of default judgments is over eighty

percent, but that number is much lower in courts that stringently enforce court rules. Fox, *supra* at 11-12 (rate of default astoundingly high—eighty seven and eighty one percent—in some Indiana courts while two courts resolve less than one percent of cases by default). A small claims judge in Washington Township, Indiana, for example, has seen substantially fewer debt collection lawsuits since enhancing the court procedures to increase fairness to debtors, because, he says, courts should not function as “business generators for debt collectors.” Jessica Silver-Greenburg, *In Debt Collecting, Location Matters*, Wall St. J. (July 18, 2011) (judge barred private meetings between lawyers and defendants and began reviewing all settlement agreements).

Ohio courts have rules requiring that evidence submitted be verified as to its accuracy and also that attorneys do not mislead the court. *See e.g.* Ohio Civ. R. 11 (attorney’s signature on a pleading attests “that to the best of the attorney’s or party’s knowledge, information, and belief there is good ground to support it”); *Deaton v. McMorrison*, No. 75 CA-07, 1976 Ohio App. LEXIS 6363 *4 (Ohio Ct. App. 1976) (noting that a lawyer’s omission of material factual information on a service of process request would be “an anomaly of the law” because “the burden of ascertaining the truth of a pleading and more certainly the contents of an affidavit by counsel rests upon the attorney”). Courts require of attorneys “objective standards of reasonable diligence and dedication.” *Disciplinary*

Counsel v. Simonelli, 113 Ohio St.3d 215, 218, 863 N.E.2d 1039, ¶23 (2007), citing *Columbus Bar Assn. v. Flanagan*, 77 Ohio St.3d 381, 383, 674 N.E.2d 681 (1997) (“An attorney's neglect of a client's legal matters undermines public confidence in the legal profession . . .”). “[A]ttorneys must use the tools of our legal system as they were intended[, and they have] a duty not to abuse legal procedure.” *Disciplinary Counsel v. Stafford*, 131 Ohio St. 3d 385, 391, 965 N.E.2d 971, ¶30 (2012), citing *Columbus Bar Ass'n v. Finneran*, 80 Ohio St.3d 428, 430, 687 N.E.2d 405 (1997). Indeed this Court has recognized that extra care may be required in ex parte communications such as frequently occur with default judgments. *Stafford, supra* ¶ 87 (O'Donnell, concurring).

In the debt collection context, courts do not tolerate excuses for failure to exercise professional care. See *Erin Servs. Co., LLC v. Bohnet*, 26 Misc.3d 1230(A), 907 N.Y.S.2d 100, at *1 (N.Y. Dist. Ct. Feb. 23, 2010) (finding eighteen ethical violations, warning “[h]igh volume’ debt collection law practices are subject to the same ethical rules as apply to lawyers handling any other civil litigation matter.”); *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, *8 (E.D.N.Y. Sept. 30, 2009) (finding “[a]s in the analogous Rule 11 context, an attorney responsible for issuing and executing a legal document ‘must make a reasonable inquiry personally.’” (quoting *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1280 (3d Cir. 1994))). In *Miller*, the court criticized attorney reliance on the

evaluation of governing law made by previous collectors and the failure to undertake any independent review as being “a naked attempt to substitute their judgment for his own in derogation of his professional duties and his obligations under the FDCPA.” *Miller*, 687 F. Supp. 2d at *10. *Miller* concluded:

in cases such as here, where an attorney commences suit in so uninformed a manner that he is ignorant even as to what law governs his suit, it cannot be said that he has undertaken a level of review sufficient to satisfy even the most general requirements applicable to attorney conduct, let alone the more focused review requirements established by the FDCPA.

Id. at *13.

This case similarly involves an attempt to avoid any consequences for failure to exercise sufficient legal and professional judgment before filing litigation on a debt the collector knew or should have known was time-barred. “Use of the court system to file a baseless legal claim” or “as an instrument of coercion” constitutes abuse of process. *Seipel v. Olympic Coast Invs.*, 2008 MT 237, ¶¶ 25-27, 344 Mont. 415, 188 P.3d 1027 (2008); see, e.g., *Harrington v. CACV of Colo., LLC*, 508 F. Supp. 2d 128, 139 (D. Mass. 2007) (finding “[i]f Defendants intentionally moved for default when they knew that Harrington was not in default, lying to the state court in order to harass or trick Harrington, there is no doubt that that would involve ‘unfair surprise,’ and would be unconscionable by any definition.”).

A court could combat many of the common abuses of the debt buying industry through use of its own procedural rules. The New York Attorney General

obtained an injunction vacating the judgments entered in over 100,000 cases because the complaints were never served upon the alleged debtors. Press Release, N.Y. Att’y Gen., Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation (Jul. 22, 2009).²³ See also FTC, *Repairing a Broken System: Protecting Consumers In Debt Collection Litigation And Arbitration*, 10 (July 2010) (noting high default rate may be due to widespread service of process abuses). Maryland courts dismissed thousands of pending collections cases because the collectors were not licensed in the state. Jamie Smith Hopkins, *Maryland Court Dismisses 3,168 Debt-Collection Cases*, Balt. Sun (Oct. 11, 2012).²⁴

Courts also can prevent abuse by taking a close look at the evidence upon which debt buyers file claims. Debt buyers often assert that the statutes of limitations should be extended by claiming the account is an open account, or that they are suing on a written contract even when they do not have a copy of the contract or any account statements. *Portfolio Acquisitions, L.L.C. v. Feltman*, 391

²³ Available at <http://www.ag.ny.gov/press-release/attorney-general-cuomo-sues-throw-out-over-100000-faulty-judgments-entered-against-new>.

²⁴ Available at http://articles.baltimoresun.com/2012-10-11/news/bs-bz-debt-collection-cases-dismissed-20121011_1_debt-collection-cases-judge-ben-c-clyburn-maryland-court.

Ill. App. 3d 642 (2009) (collector failed to prove written contract subject to 10 year statute of limitations and five year statute for an account stated expired).

Courts must prevent debt buyers from digging themselves out of trouble through sly maneuvering of procedural rules and conjured-up evidentiary defenses. Debt buyers have asserted that they are not governed by the same statute of limitations that applied to the assignor of the debt. *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 415–416, 927 N.E. 2d 1059, 1060–1061 (2010) (assignee cannot stand in a better position than assignor). Recently, the Sixth Circuit Court of Appeals prevented a debt buyer from avoiding class action liability through procedural maneuvers. *Hrivnak v. NCO Portfolio Management*, No. 11-3142, 2013 U.S. App. LEXIS 11687, *7-8 (6th Cir. June 11, 2013) (debt buyer facing FDCPA claim attempted to moot the potential class representative’s claim by offering monetary relief; court held monetary relief is not adequate to moot where injunctive relief requested).

In light of the overall debt buyer business model to use the courts as “business generators,” only strict adherence to court procedures will prevent debt buyers from continuing to engage in abusive collection practices.

B. Statutes Of Limitations are Fundamental to the Fairness of the Justice System, Not Simply a Technicality

The Supreme Court repeatedly has pointed out that “[s]tatutes of limitations are not simply technicalities. On the contrary, they have been long respected as

fundamental to a well-ordered judicial system.” *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). When a collector pursues a time-barred claim, “the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)); *Kimber*, 668 F. Supp. at 1487. Indeed, “it is unjust to fail to put the adversary on notice to defend within a specified period of time and that ‘the right to be free of stale claims in time comes to prevail over the right to prosecute them.’” *Kubrick*, 444 U.S. at 117 (citing *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)). *Gibler v. Trimble*, 14 OHIO 323, 333 (1846) (“Equity will not aid a stale demand, where the party has slept upon his rights, and acquiesced for a great length of time.”). Alleged debtors may well have lost important evidence of a dispute needed to defend against a collection on a stale or time-barred claim.

This recognition is especially critical in cases involving primarily *pro se* debtors. *Kimber* explained:

[T]he unfairness of [filing suit on a time-barred debt] is particularly clear in the consumer context where courts have imposed a heightened standard of care—that sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits.

668 F. Supp. at 1489.

In light of the intentional design of the debt buyer business model, which manipulates the judicial process to take unfair advantage of alleged debtors, it is essential that courts strictly enforce statutes of limitations. *See Diaz v. Portfolio Recovery Assocs., LLC*, No. 10 CV 3920, 2012 U.S. Dist. LEXIS 25802, *26 (E.D.N.Y. Feb. 28, 2012) (rejecting defense to filing on time-barred debt, noting, “these unrepresented debtors ‘routinely waive important defenses such as . . . the statute of limitations,’ while the debt buyers [] ‘manipulate the complicated rules of civil procedure and lax pleading requirements to their advantage.”). There was no accident in this case. Rather, the abuse is the predictable and foreseeable consequence of a collection industry which rewards collection mills for having inadequate information in an overburdened judicial system in which most judgments are granted by default.

C. Consumers, Especially Older Consumers, are Highly Vulnerable To Abusive Collections

In enacting the FDCPA, Congress sought to protect debtors against an industry that it viewed as having little or no market incentive to treat debtors fairly, and a strong “incentive to collect by any means.” Sen. Comm. On Banking, Housing & Urban Aff., S. Rep. No. 95-382, 95th Cong 1st Sess., 2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696 (noting that “[u]nlike creditors, who generally are restrained by the desire to protect their good will,” third-party debt

collectors “are likely to have no future contact with the consumer and are often unconcerned with the consumer’s opinion of them.”).

Despite longstanding efforts by state attorneys general and federal agencies against debt buyers, collection abuses continue to cause substantial suffering and anguish. “Whether or not consumers owe and are liable for the debts collectors are attempting to recover, unlawful collection practices can cause significant reputational damage, invade personal privacy, [] inflict emotional distress[,] interfere[] with a consumer's employment relationships ... [and] impair the consumer's ability to repay debts.” Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775, 65777 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090) (asserting supervisory authority over debt collectors).

As distressing as abusive debt collection practices are for any debtor, they are particularly problematic for older people. See Robert D. Manning, *Role of FCRA in the Credit Granting Process*, Testimony before the House Subcommittee on Financial Institutions and Consumer Credit, 15-16 (June 12, 2003)²⁵ (“There is little margin of error with older populations,” discussing the lessened potential to replace resources and save; also noting findings of “widespread financial illiteracy”) (hereinafter “*Manning*”). For example, many older debtors believe they will go to jail if summoned to court. See Donna S. Harkness, *When Over-*

²⁵ Available at <http://ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf>.

The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly, 16 Elder L.J. 1, 3-4 (2008); Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 1 Elder L.J. 135, 135-37, 151-56 (2008). Older people are more easily upset by an abusive telephone call and the stress from harassing tactics, such as threats that they will lose their homes or go to jail, can threaten their health. The effects of abusive debt collection practices are more acutely felt by people on fixed or limited incomes, such as retirees and low income people. See Manning at 15; see also Deborah L. Cohen, *Attorneys push for change in debt collection*, ABA Journal (May 1, 2013).²⁶ For example, recognizing the vulnerability of low income older people to collection abuses, the Department of Treasury recently promulgated new bank procedures to protect exempt federal benefits from judgment creditors. See Garnishment of Accounts Containing Federal Benefit Payments, 60 Fed. Reg. 32,099 (May 29, 2013) (to be codified at 20 C.F.R. pt. 416).

Older consumers living alone are often targets of abusive collection practices because they may be socially isolated. In addition, because older consumers are at home during daytime hours, they are more accessible to

²⁶ Available at http://www.abajournal.com/magazine/article/attorneys_push_for_change_in_debt_collection/.

collectors. *See e.g.*, Charles Duhigg, *Bilking the Elderly with a Corporate Assist*, N.Y. Times, A1 (May 20, 2007).²⁷ Moreover, the ability of some older people to make financial decisions or to remember the details of stale debts may be impaired by cognitive decline. *See id.* As a result, older people often agree to pay on debts they had already paid in full or never owed in the first place, such as debts of a deceased loved one. *See* Chris Serres, *Death won't stop these debt collectors*, Star Tribune (Mar. 17, 2011).²⁸

Bullying a person into paying an invalid or discharged debt does not make an abusive collection valid or defensible. Debt buyers have intentionally designed a business model that predictably results in collection abuses, including the collection of time-barred debt. They manipulate the power of the courts to force consumers to pay debts whether or not a debt is owed and legally subject to suit. *See McCollough v. Johnson, Rodenberg & Lauinger*, 610 F. Supp. 2d 1247, 1256 (D. Mont. 2009) (finding request for admissions propounded to debtor which asserted information known to be false “appear[ed] to be designed to conclusively establish each element of [the] case and to use the power of the judicial process against a *pro se* defendant to collect a time-barred debt.”), *aff'd*, 637 F.3d 939 (9th Cir. 2011).

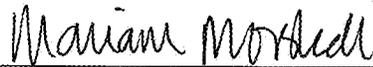
²⁷ Available at http://www.nytimes.com/2007/05/20/business/20_tele.html?pagewanted=all.

²⁸ Available at <http://www.startribune.com/business/103211324.html>.

CONCLUSION

Respectfully, this Court should affirm the decision below so as to halt abusive collection actions, which cause suffering and hardship to debtors and impugn the integrity of the courts.

Respectfully submitted,



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I hereby certify that on this 8th day of August, 2013, that the foregoing

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