

**IN THE MISSOURI SUPREME COURT
SC90902**

ROYAL FINANCIAL GROUP, LLC
RESPONDENT
VS.
MARGARET A. GEORGE
APPELLANT

Appeal from the Circuit Court
Twenty-First Judicial Circuit
St. Louis County, Missouri
The Honorable Sandra Ferragut-Hemphill
Case No. 08SL-AC29780

**BRIEF OF AMICUS CURIAE
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS**

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JURISDICTIONAL STATEMENT

Amicus adopts the jurisdictional statement of the Appellant.

STATEMENT OF INTEREST

The Missouri Association of Trial Attorneys represents the interests of consumers in the state of Missouri. Since economic hard times have found their way to Missouri, MATA attorneys have been representing debtors and other consumers who have been victims of aggressive and oppressive debt collection tactics. MATA attorneys represent consumers in Associate Circuit court on debt collection matters and believe that the issues presented in this case with respect to violations of the Fair Debt Collection Practices Act are significant and require clear elucidation by the Supreme Court.

POINTS RELIED ON

- I. THE RULES OF COURT AND CHAPTER 517 REQUIRE THAT WHEN A DEBT COLLECTOR UNDERTAKES TO SHOW THAT ITS ACTIONS WERE THE RESULT OF BONA FIDE ERROR IT MUST PLEAD THOSE AFFIRMATIVE DEFENSES AND RESPOND TO DISCOVERY REQUESTS RELEVANT TO THOSE DEFENSES OR IT WAIVES THEM.**

Rule 41.01(d)

Rule 55.08

§ 517.031.2 R.S.Mo. (2009)

Stine v. Warford, 18 S.W.3d 601 (Mo. Ct. App. W.D. 2000);

Brown v. Sloan's Moving and Storage Co., 274 S.W.3d 310 (Mo. 1955).

- II. WHERE DEBT COLLECTORS MAKE NO EFFORTS TO INVESTIGATE THE LEGAL MERIT OF COLLECTION CLAIMS, AND PURPOSEFULLY REFUSE TO PUT DATES IN THEIR PETITIONS, THEY VIOLATE THE FAIR DEBT COLLECTION PRACTICES ACT WHEN THEY SUE ON TIME-BARRED CONSUMER DEBT.**

15 USC § 1692

Rule 55.03(c)

Freyermuth v. Credit Bureau Svs., 248 F.3d 767 (8th Cir.2001)

ARGUMENT

I. THE RULES OF COURT AND CHAPTER 517 REQUIRE THAT WHEN A DEBT COLLECTOR UNDERTAKES TO SHOW THAT ITS ACTIONS WERE THE RESULT OF BONA FIDE ERROR IT MUST PLEAD THOSE AFFIRMATIVE DEFENSES AND RESPOND TO DISCOVERY REQUESTS RELEVANT TO THOSE DEFENSES OR IT WAIVES THEM.

About 90% of the collection work done by firms like Royal Financial Group and Miller & Steeno is done in Associate Circuit Court. The vast majority of the cases are uncontested matters with attorneys taking default judgments preparatory to executing on a debtor's assets.¹ It is somewhat unusual for a defendant to mount a defense in a collection action, or to hire an attorney. Debtors often do not have

¹ For a review of industry practices and the economic impact of debt collection actions in the United States see W. Glaberson, *In New York, Some Judges Are Now Skeptical About Debt Collectors' Claims*, NEW YORK TIMES, May 7, 2010.

assets to hire an attorney. Many are represented, if at all, by attorneys from the various legal aid societies.²

Because so many of these cases are handled with summary disposition, debt collectors bend the already flexible rules of the Associate division in aid of speed and finality. When a debtor does file the rare counterclaim, it is frequent that the plaintiff debt collector simply fails or refuses to answer the counterclaim because, in most cases, he will not have to. Similarly, in many cases, refusing to answer discovery in a debt collection case carries no real penalty for the debt collector. But where the debt collector intends to assert an affirmative defense, this lackadaisical approach to the Rules of Civil Procedure carries with it the risk of waiver.

Rule 41.01(d) states that Rule 41.01 through Rule 101 apply to civil actions pending in the associate circuit court “except where otherwise provided by law.” § 517.031, RSMo. (2009), governing procedure in Associate Circuit court, states in relevant part:

517.031. 1. The plaintiff shall file a written petition containing the facts upon which the claim is founded. A copy of any written instrument or

² *Id.*

account in support of the petition should be attached and filed. The pleadings of the petition shall be informal unless the court in its discretion requires formal pleadings.

2. Affirmative defenses, counterclaims and cross claims shall be filed in writing not later than the return date and time of the summons unless leave to file the same at a later date is granted by the court. No other responsive pleading need be filed. If no responsive pleading is filed, the statements made in the petition, affirmative defenses, counterclaims or cross claims shall be considered denied except as provided in section 517.132.

Given that Rule 41.01 and the statute require that affirmative defenses be pleaded, Rule 55.08 provides in relevant part:

55.08. Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute,

discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense. A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation.

Finally, the Fair Debt Collection Practices Act at 15 USC § 1692k(c) provides:

(c) A debt collector may not be held liable in any action brought under this title 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.

Taken together the foregoing provisions establish (1) that a defense of bona fide error is an affirmative defense; and (2) that such affirmative defense must be

pleaded in Associate Circuit court. The analysis begins with the federal statute. It requires that a debt collector assume the burden of proof by a preponderance of the evidence to show that the violation was not intentional, was the result of bona fide error, and that there were procedures maintained to avoid such error. This is because the burden of proof remains with the party having the affirmative of an issue until the termination of the case. *Brown v. Sloan's Moving and Storage Co.*, 274 S.W.3d 310 (Mo. 1955). Blacks defines an affirmative defense as:

In pleading, matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it.

BLACK'S LAW DICTIONARY, Sixth Edition.

Royal Financial Group never filed an answer to the counterclaim filed by Appellant in this action. Chapter 517 does not require it to file an answer to the counterclaim unless Royal Financial Group wants to assert an affirmative defense. If it wants to assert an affirmative defense, the rules of pleading are designed to give the other party fair notice of that defense so as to comply with fundamental notions of procedural due process. *Weber v. Weber*, 908 S.W.2d 356 (Mo. Banc 1995); *Kerth v. Polestar Entertainment*, ___ S.W.3d ___, 2010 WL 2502831. Having failed to assert the affirmative defense in writing as required, Royal Financial Group has waived the issue for appellate review. *Ray v. Nethery*, 255 S.W.2d 817 (Mo. 1953) (failure to

raise defect of parties by proper pleading waives that defect); *Leslie v. Mathewson*, 257 S.W.2d 394 (Mo. Ct. App. 1953) (failure to plead lack of capacity to sue waives that defense); *Shaw v. Burlington Northern, Inc.*, 617 S.W.2d 455 (Mo. Ct. App. S.D. 1981); *Winthrop Sales Corp. v. Shelton*, 389 S.W.2d 70, 73 (Mo. Ct. App. 1965) (requirement that affirmative defense be pleaded is not a mere technicality); *Burton v. Everett*, 845 S.W.2d 710 (Mo. Ct. App. W.D. 1993) (by not pleading expiration of statute of limitations with respect to child support arrearages, husband waived defense); *See also Century Fire Sprinklers, Inc. v. CNA/Transportation Ins. Co.*, 23 S.W.3d 874, 879 (Mo. Ct. App. W.D. 2000); *State ex rel. Heiserman v. Heiserman*, 941 S.W.2d 768, 770 (Mo. Ct. App. S.D. 1997).

But the record in this case demonstrates not only that Royal Financial Group never filed an answer, but that it never complied with orders from the court compelling the production of discovery materials directly relevant to the affirmative defense it never pleaded. Appellant George properly sought a protective order to prevent Royal from using any documents at the trial of the collection case (a case the Respondent dismissed on the eve of trial). Having dismissed its original claim, and having refused to comply with discovery, the trial court would have been within its discretion to prohibit Royal Financial Group from introducing evidence that was

never provided to Appellant in discovery.³ Royal Financial Group is then in the unique position of complaining, on appeal to this Court, that it never got the opportunity to put on a defense when it (1) never complied with a court order compelling production of documents; and (2) never pleaded any defense so as to give notice to Appellant as to what issues it might raise.

The issue upon which the Respondent sought transfer to this Court was the procedural question of whether the Eastern District should have remanded the case

³ Rule 61.01 governing sanctions for failure to make discovery provides that an order may be entered to strike pleadings and render judgment by default against a party who fails to obey an order to answer interrogatories. Rule 61.01(b)(1). Imposition of sanctions pursuant to Rule 61.01 is a matter within the sound discretion of the trial court. *Portell v. Portell*, 643 S.W.2d 18, 20 (Mo.App.1982). Exercise of this discretion will not be disturbed upon review unless exercised unjustly. *In re Marriage of Dickey*, 553 S.W.2d 538, 541 (Mo.App.1977). “The trial judge has an obligation to see that discovery rules are followed and to expedite litigation....” *Russo v. Webb*, 674 S.W.2d 695, 698 (Mo.App.1984); *Giesler v. Giesler* 731 S.W.2d 33, 34 (Mo.App. E.D. 1987)

back to the trial court to allow Royal Financial Group to mount a defense it never pleaded and submit evidence that it never provided to the Appellant during discovery. Doing so would likely have been pointless first because it waived any affirmative defense by not pleading it; and second because it failed to comply with discovery that would have been relevant on those issues.

Respondent lacks clean hands, and this Court should not allow Respondent to use its failure to cooperate in discovery as both a sword and a shield.

II. WHERE DEBT COLLECTORS MAKE NO EFFORT TO INVESTIGATE THE LEGAL MERIT OF COLLECTION CLAIMS, AND PURPOSEFULLY REFUSE TO PUT DATES IN THEIR PETITIONS, THEY VIOLATE THE FAIR DEBT COLLECTION PRACTICES ACT WHEN THEY SUE ON TIME-BARRED CONSUMER DEBT.

Debt collection work is high-volume legal work.⁴ In 2009 breach of contract and suit on account collection claims accounted for 88% of the filings in Cape Girardeau.⁵ Clay County Circuit Clerk Steve Haymes told Missouri Lawyers Weekly that the cases take up more than fifty percent (50%) of the Associate civil docket.⁶ Collection lawyers are candid in admitting that they rarely verify the factual

⁴ . Glaberson, note 1, *supra*.

⁵ A. Riley, *Invasion of the Zombie Debt Claims*, 23 MISSOURI LAWYERS WEEKLY 20, page 12.

⁶ *Id.*

information given to them by their client.⁷ The Respondent in this action has filed over 5,000 cases according to a Casenet query on July 19, 2010. It is clear both from the facts of the case appearing in the Appellant's brief as well as from the Eastern District's opinion in this case that Royal Financial Group made no serious effort to verify that the Appellant ever had a valid debt.

Similarly, there is no question that those who practice collection law in Missouri fail to appreciate the Fair Debt Collection Practices Act and its prohibitions against asserting time-barred and uncollectible claims.⁸ This is because many of these collection attorneys represent "third tier" collector/creditors.

When the original creditor attempts to collect a debt in its own name the Fair Debt Collection Practices Act does not apply absent certain statutory exceptions

⁷ "Creditor cases are pretty routine, and most cases depend on what your client tells you." [Irwin] Frankel said. "Divorce attorneys don't investigate whether the client is telling them their spouse is deathing them is true. You are just taking the evidence that you client is giving you and proceed on it." *Id.*

⁸ See generally, A. Riley, *Invasion of the Zombie Debt Claims*, 23 MISSOURI LAWYERS WEEKLY 20

involving the use of named collectors. See, e.g., 15 USC § 1692a(6). The reproachful call from Mastercard alerting the consumer to a late payment is not considered an attempt to collect a debt because it is the original or “first tier” creditor.

At some point the creditor asks a third-party debt collection company to collect the debt in the name of the creditor. These collectors are “second tier” creditors because while the account remains with the original creditor, a third party doing business as a collection agency is actually collecting the debt. At some point however, if the collection agency can either not locate or not motivate the debtor to pay, the defendant may either initiate a lawsuit, or sell the debt and write off the loss against its profits. When the creditor writes off the debt, it is often sold to a third tier collector.

Third tier collectors are companies like Royal Financial Group, CCR Unifund, and Calvary Investments.⁹ These entities purchase distressed consumer receivable portfolios from the original creditors. In short, just as in the case at bar, Royal Financial Group and companies like it go to a company like Chase Bank and, for pennies on the dollar, buy up debt that the original creditor has determined to be

⁹ Glaberson, note 1, *supra*.

uncollectible for any number of reasons.¹⁰ They obtain bulk assignments of the debts they are going to attempt to collect.¹¹ According to a recent article in the New York Times, sometimes the lawyers and the companies they collect for have very close connections.¹² In one case a Nassau County district judge found that the credit card company did not have “a scintilla of evidence,” in a case brought in that court.¹³ The third tier debt collectors then engage in a series of letters or telephone calls to determine if the consumer can be lured into paying the debt. When they cannot, the

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* “The suit received an unusual amount of attention. The judge, Michael A. Ciaffa, said that it ‘regrettably, involves a veritable ‘perfect storm’ of mistakes, errors, misdeeds and improper litigation practices.’ Judge Ciaffa said the law firm, Eltman, Eltman & Cooper, ignored court orders, made a ‘demonstrably false’ assertion and harassed the woman for payment even after its suit was dismissed.”

collector files an action in Associate Circuit Court. Usually that action is filed without any consideration given to whether the debt may in fact be time barred.

A review of the petition filed by Royal Financial Group in this action (LF at 5; Appellant's Exhibit A) will demonstrate that Royal has not pleaded any dates of any kind in its action on account. From the face of the petition a court could not tell whether the debt was created in 1910 or 2010 because the petition omits these critical details.

The omission of relevant dates is not thought to be an oversight by the collection attorney, but rather, a safety measure to ensure that the errant default judgment is not overturned because the debt was time-barred on the face of the petition. Given that collectors frequently file actions on account past the five year statute of limitations, including dates would likely cause an Associate Circuit judge doing his duty to refuse a request for a default judgment. Absent that date on the petition, and absent that date information in the verification, a debtor sued on a seven-year-old debt would have a more difficult time raising the date issue as a defense. The reason these collectors use these tactics, and others like them, is because they fatten the bottom line, and there are very few real impediments to their doing so.

For many Missourians, only the Fair Debt Collection Practices Act stands between them and these third-tier collector's tactics. When a debt collector sues to collect on debts clearly outside the statute of limitations and debts for which the debtor simply has no proof, he violates the Fair Debt Collection Practices Act. *Freyermuth v. Credit Bureau Services, Inc.*, 248 F.3d 767, 771 (8th Cir. 2001)

Congress, in passing the Fair Debt Collection Practices Act clearly identified the need for the statute:

(a) Abusive Practices

There is abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs and to the invasions of individual privacy.

(b) Inadequacy of Laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

15 USC § 1692. A large body of generally pro-consumer opinions in the federal district courts and state appellate courts have upheld the public policy purpose of the statute in applying the law to the specific factual setting at issue here and determining that attempting to collect a time-barred debt violates the Fair Debt Collection Practices Act.

Freyermuth v. Credit Bureau Services, Inc., 248 F.3d 767, 771 (8th Cir. 2001) held that a creditor does not violate the Fair Debt Collection Practices Act where it merely sends a letter signed by an attorney. However, the holding seems predicated on the fact that the statute of limitations is an affirmative defense and has seldom been followed by other courts. See, e.g., *Ballard v. Equifax Check Services, Inc.*, 158 F.Supp.2d 1163 (E.D. Ca. 2001)(“The court has reviewed the Eighth Circuit's decision in *Freyermuth v. Credit Bureau Svs.*, 248 F.3d 767 (8th Cir.2001) and respectfully declines to follow the same...” holding that a threat of litigation was sufficiently described when the letter was on law firm stationery); *Perretta v. Capital Acquisitions & Mgmt Co.*, 2003 WL 21383757 (N.D.Cal.)(interpreting statements like those in *Freyermuth* to be actionable); but see, *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324 (6th Cir. 2006)(declining to extend the *Freyermuth* holding).

Several federal district courts interpreting 15 USC § 1692 et seq. have also concluded that the filing of a lawsuit to collect a time-barred debt is deceptive or

abusive to the unsophisticated consumer. *See, e.g., Goins v. JBC & Assoc.*, 352 F.Supp.2d 262 (D.Conn.2005); *Martinez v. Albuquerque Collection Services*, 867 F.Supp. 1495, 1506 (D.N.M.1994)(“A collection agency's attempts to collect on time-barred accounts violate the FDCPA.”); *Beattie v. D.M. Collections, Inc.*, 754 F.Supp. 383, 393 (D.Del.1991)(“[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.”). *Thompson v. D.A.N. Joint Venture III, L.P.*, 2007 WL 1625926 (M.D.Ala.). In *Thompson*, the court held that the defendant's failure to move to set aside the underlying state court default judgment after a summary judgment ruling that the underlying state court action violated the FDCPA because it was time-barred constituted an additional FDCPA violation. *Thompson* at *2. *Shorty v. Capital One Bank*, 90 F.Supp.2d 1330 (D.N.M.2000); *Kimber v. Fed. Fin. Corp.*, 668 F.Supp. 1480 (M.D.Ala.1987); *Jenkins v. General Collection Co.*, 538 F.Supp.2d 1165 (D. Neb. 2008)(It may be inferred from *Freyermuth* that a violation of the FDCPA has occurred when a debt collector attempts, through threatened or actual litigation, to collect on a time-barred debt that is otherwise valid.); *Larsen v. JBC Legal Group, P.C.*, 533 F.Supp.2d 390 (E.D.N.Y. 2008); *Hekkert v. MRC Receivables Corp.*, 655 F.Supp.2d 870 (N.D. Ill. 2009)(Court found *Goins*, *Kimber*, persuasive and held that attempting to collect time barred debts violates the Act).

These district courts have employed a variety of interpretive rationales for concluding that the filing of time-barred lawsuits violates the Fair Debt Collection Practices Act. In *Goins*, for example, the district court held that the threat to file suit on a time-barred debt constitutes a "misleading representation" because attorneys must represent to the court that they have undertaken a reasonable inquiry into whether claims brought are warranted by existing law under Rule 11 of the Federal Rules of Civil Procedure. *Goins*, 352 F.Supp.2d at 272. Because sanctions "would be appropriate if an attorney knowingly filed suit on an undisputedly time-barred claim," a letter threatening suit on such a claim "threaten[s] litigation where such suit would be improper." *Id.* The district court in *Kimber* similarly held that letters threatening to sue on a time-barred claim are "fraudulent" because a debt collector cannot "legally prevail in such a lawsuit." 668 F.Supp. at 1489. As explained by the district court,

it is obvious to the court that by employing the tactics it did, FFC played upon and benefitted from the probability of creating a deception. Honest disclosure of the legal unenforceability of the collection action due to the time lapsed since the debt was incurred would have foiled FFC's efforts to collect on the debt. So instead, the corporation

implicitly misrepresented to Kimber the status of the debt, and thereby misled *333 her as to the viability of legal action to collect.

Id. (reasoning that unsophisticated "consumers would unwittingly acquiesce" to a time-barred lawsuit instead of defending against it).

In *Jenkins*, a class action brought under the Fair Debt Collection Practices Act, defendants moved to dismiss claims that collection of time-barred matters violated the Act. The district court disagreed finding that actual litigation brought by the defendants against the debtors satisfied the requirement for deceptive practices and taking actions that could not legally be taken. *Id.* at 1172.

The strongest policy argument in favor of holding debt collectors responsible for attempting to collect time-barred debts was offered by the New York District Court in *Larsen v. JBC Legal Group, P.C.*, 533 F.Supp.2d 390 (E.D.N.Y. 2008). The court said:

Although it is permissible for a debt collector to seek to collect on a time-barred debt voluntarily, it is prohibited from threatening litigation with respect to such a debt. *See Baptist*, 2007 WL 1989450, at *4, 2007 U.S. Dist. LEXIS 49476, at *13 (citing *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir.2001)); *see also Goins v.*

JBC & Assoc., P.C., 352 F.Supp.2d 262, 272 (D.Conn.2005) (“[A]s the statute of limitations would be a complete defense ..., the threat to bring suit under such circumstances can at best be described as a ‘misleading’ representation, in violation of § 1692e.”).

Under New York law, the statute of limitations for an action to recover for a fraudulent check is six years. *See* N.Y. C.P.L.R. 213. At the time that defendants issued the October 24, 2003 debt collection notice to plaintiff, the check referenced in the communication, which was dated April 14, 1993, was more than ten years old. (Larsen Decl., Ex. A.) Accordingly, any action to collect on that debt would have been time-barred. Given the fact that Boyajian, the owner and operator of JBC, as well as the President of ORM, is a licensed attorney, it is certainly reasonable to conclude that defendants were aware that any legal action with respect to plaintiff's purported debt would be fruitless. “To allow a debt collector to threaten a consumer with legal action, even though the statute of limitations would provide the consumer with the ultimate defense, would be to encourage manipulation and misuse of the legal system.” *Baptist*, 2007 WL 1989450, at *5, 2007 U.S. Dist. LEXIS 49476, at *15.

Id. at 303.

In Missouri, in addition to the dictates of the federal statute at issue here, lawyers are held to a specific standard in pleading set out in Rule 55.03(c). That rule, in relevant part, requires:

Representation to the Court. By presenting and maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, or other paper filed with or submitted to the court, an attorney or party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

(1) The claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....

Rule 55.03(c)

The allegations in the petition filed by Royal Financial Group were not in compliance with Rule 55.03(c). This is evident because the allegations are not pleaded on information or belief, but are pleaded as facts. At the time the case was filed it is unlikely that the defendant ever had any evidentiary support for its allegations as witnessed by its complete failure to cooperate in discovery. Compliance with Rule 55.03(c) is not optional under Missouri's rules, and neither should compliance with 15 USC § 1692 be.

Here there is no question that Royal Financial Group commenced litigation against Ms. George. There is no question that any debt was time barred.¹⁴

¹⁴ Should Royal Financial suggest otherwise, this Court must remember that Royal Financial Group refused to cooperate in discovery and refused to provide any documents substantiating its claim.

Defendant offered no evidence at trial on the age of the debt, and likely could not have offered any in view of its termagant refusal to cooperate in discovery.

Importantly, at trial in this case, Royal Financial Group never disputed and never contradicted, by evidence of any kind, Ms. George's specific statements that she had not used a credit card or paid a credit card bill in 9 or 10 years. It never challenged the statute of limitations evidence.¹⁵ How could it?

The pleadings on file with the court in the form of the original petition were already lodged with the court, and the court could take judicial notice of those pleadings as evidence of an attempt to collect a time-barred debt. No other evidence was required to sustain the counterclaimant's burden on the issue of liability for violating the Fair Debt Collection Practices Act.

¹⁵ Assuming that it was collecting a valid debt it is reasonable to assume that Royal Financial Group, during the pendency of the action, could have gotten the account history and transaction record from Chase Bank. Its failure to do so and its failure to supply requested discovery relevant on these issues is a powerful admission that the Respondent failed to comply with the statute and Missouri's rules.

Before the Eastern District the Respondent framed this case as a “no evidence” case. In doing so, it seems to have conveniently overlooked its own failure to obey an order compelling discovery and failed to appreciate how this refusal to cooperate prejudiced the Appellant’s ability to offer evidence. Apparently Royal Financial Group and its attorneys do not make the connection between the Rules of Civil Procedure (Rule 56) and the result in this case.

This Court has an opportunity to offer clear guidance to debt collectors and their attorneys and explain the risks in adopting the Royal Financial Group approach to collection litigation. It has the option, as Judge Wolff has done in *Klotz v. St. Anthony’s Medical Center*, ___ S.W.3d. ___, 2010 WL 1049422 and *State Bd. Of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003)¹⁶, to lay down bright-line rules for collectors and to remind collection attorneys that they are held to the same ethical and pleading standards as any other lawyer under Rule 55.03.

¹⁶ “I write separately to offer advice to lawyers on expert witnesses and gentle advice for the board on the future of this case against Dr. McDonagh.”

III. CONCLUSION

Respectfully, this Court should find that a debt collector who fails to verify the statute of limitations for a debt, fails to verify the assignment of the debt, and refuses to cooperate in discovery in such an action violates the Fair Debt Collection Practices Act.

This Court should either retransfer the matter to the Eastern District, or write an opinion giving judgment to the Counterclaimant.

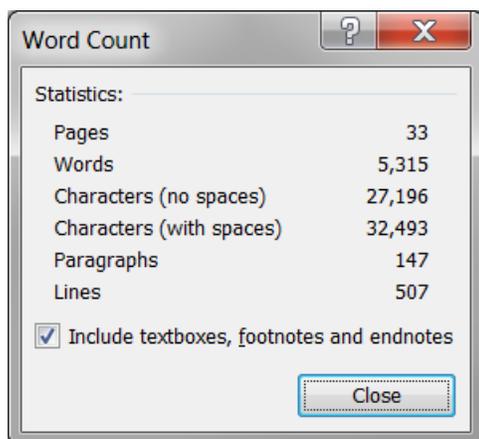
Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

Comes now the Amicus and certifies that this brief is in compliance with Rule 84.06(c) in that the brief from the Table of Contents to the Signature Block, inclusive of footnotes, contains 5,315 words, and the file containing the brief has been scanned for viruses and found to be virus free by Norton Antivirus.



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CERTIFICATE OF SERVICE

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