IN THE SUPREME COURT
STATE OF MISSOURI

Keith Jackson ,	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. SC95771**
	)	
Dennis J. Barton III,	)	
	)	
Respondent.	)	

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On August 19, 2015, the Circuit Court of St. Louis County entered judgment granting Defendant Dennis J. Barton III's Motion to Dismiss with prejudice. Appellant timely appealed to the Eastern District of the Missouri Court of Appeals.

On April 26, 2016 the Eastern District of the Missouri Court of Appeals issued its opinion affirming the trial court's judgment granting Defendant's motion to dismiss. Appellant filed a Motion for Rehearing and an Application for Transfer to the Missouri Supreme Court, both of which the Eastern District of the Missouri Court of Appeals denied on June 8, 2016.

Appellant filed a timely Application for Transfer to this Court pursuant to Missouri Supreme Court Rule 83.04. On August 23, 2016, this Court sustained Appellant's application and ordered transfer of this appeal. Accordingly, this Court has appellate jurisdiction over this appeal under Article V, Section 10 of the Missouri Constitution and Supreme Court Rules 83.04 and 83.09.

STATEMENT OF FACTS

Between June 2011 and April 2012, Appellant Jackson received dental services from LifeSmile Dental Care ("LifeSmile") on three separate occasions. *Legal File* ("*LF*") at 52-55 (First Amended Petition ¶ 16, 34, 41). Before receiving his first treatment, LifeSmile quoted Appellant not only the cost of the dental work but also the precise amount Appellant would owe after the application of Appellant's insurance. Id. at ¶¶ 18, 34, 42. Because he did not have enough cash, LifeSmile agreed to allow Appellant to pay over an extended period of time. Id. at ¶¶ 17, 19, 36, 43. Appellant and LifeSmile agreed that their transaction regarding dental work would not be complete until Appellant had paid LifeSmile in accordance with this agreement. Id. at ¶¶ 20, 37, 44. At no time, however, did Appellant ever sign any written agreement with LifeSmile. Id. at ¶ 23.

On September 9, 2013, Respondent filed a lawsuit against Appellant in the Circuit Court for St. Louis County, Missouri, Associate Division on LifeSmile's behalf ("debt collection lawsuit"). Id. at ¶62. The debt collection lawsuit sought $458.52 together with interest, reasonable attorney's fees, and costs of court. Id. The debt collection lawsuit relied on a form contract with a forged signature purporting to be Appellant's, which changed the pricing terms for the dental services. Id. at ¶¶ 24- 30. Appellant alleges that Respondent knew, or should have known, that Appellant's signature was forged, and also that Respondent knew, or should have known, that Appellant did not owe LifeSmile the purported balance. Id. at ¶¶ 63 - 65.

Appellant hired an attorney to defend himself from the debt collection lawsuit that Respondent filed. Id. at ¶ 66. Now unable to obtain a default or consent judgment against an unrepresented consumer, Respondent obtained a trial setting for June 10, 2014. Id. at ¶ 67. Appellant pleaded that this was a deliberate tactic; Respondent knew his lawsuit was baseless, and that he could not prevail at trial, but hoped that Appellant would not be able to pay the attorney's fees to defend the case. Id. at ¶ 70. Appellant's attorney did incur, and charged to Jackson, substantial fees to prepare for trial on the merits. Id. at ¶ 68. On June 10, 2014, Appellant appeared by his counsel and was prepared to demonstrate the contract was forged and that Appellant did not owe the $458.52 debt. Id. Respondent did not appear for his own case and allowed it to be dismissed for failure to prosecute. Id. at ¶ 69.

On July 16, 2014, after the trial court dismissed the debt collection lawsuit, Respondent sent Appellant another written demand for payment. Id. at ¶ 72. Within this separate communication, Respondent demanded payment of $551.34, or $92.82 more than the amount Respondent sought in the debt collection lawsuit. Id.

On August 7, 2014, Respondent moved to set aside the dismissal of the debt collection lawsuit. Id. at ¶ 75. Respondent ultimately revived the dismissed suit, and thus Respondent was again attempting to collect from Appellant illicit late fees, principal, attorneys' fees, and pre-judgment interest. Id. at ¶ 76.

After Respondent dismissed the reopened collection suit, Appellant, through counsel, filed the instant case against Respondent on January 29, 2015. *LF* 8. In response,

Respondent filed a motion to dismiss, and Appellant was granted leave to file his First Amended Petition. Id. at 22, 48-49. Respondent filed his Motion to Dismiss Plaintiff's First Amended Petition and a Memorandum of Law in Support, which Respondent attached as an exhibit pleadings from the underlying debt collection lawsuit. Id. at 70-94.

Appellant filed a response, and attached as an exhibit a copy of an opinion issued by the United State District for the Northern District of Illinois. Id. at 104-114. Since the case was only at the initial pleadings stage, Appellant did not attach – though he is in possession of – copies of the billing and forged contract which demonstrate Respondent demanded payment on a knowingly false amount. Id. Appellant also took the depositions of Blake Setien, Brent Setien, and Sally K. Hebert, who own and operate LifeSmile. Id. at 124-155. After an initial hearing, the Court requested supplemental briefing. Id. at 117. Appellant did not attach the transcripts of the depositions he had since taken, or any other external documentation, to his supplemental brief. Id. at 156-162.

On August 19, 2015, the Court issued its Order and Judgment, granting Respondent's Motion to Dismiss Plaintiff's First Amended Petition. Id. at 169. On appeal, the Missouri Court of Appeals affirmed the Trial Court's dismissal ("Opinion"). This Court granted transfer after the Court of Appeals' Opinion.

POINTS RELIED ON

I. The Court of Appeals erred in affirming the dismissal of Appellant's FDCPA claim because it was not barred by the statute of limitations, in that Respondent committed multiple discrete collection actions within one year of Appellant filing his Petition.

Heintz v. Jenkins, 514 U.S. 291 (1995)

Mattson v. USW Communications, Inc., 967 F.2d 259 (8th Cir. 1992)

Hageman v. Barton, 817 F.3d 611 (8th Cir. Mar. 29, 2016)

Glazewski v. CKB Firm, P.C., 2015 WL 661278 (N.D. Ill. Feb. 15, 2015)

15 U.S.C. § 1692k

II. The Court of Appeals erred in affirming the dismissal of Appellant's First Amended Petition with prejudice because the record does not support converting Respondent's motion to dismiss into a motion for summary judgment, in that the parties were not given notice, and the Trial Court's order did not consider matters outside the pleadings.

Hoover v. Mercy Health, 408 S.W.3d 140 (Mo. 2013)

Magee v. Blue Ridge Professional Bldg., 821 S.W.2d 839(Mo. 1991)

Mo. Rev. Stat. § 516.100

III. The Court of Appeals erred in affirming the dismissal of Appellant's MMPA claim because Respondent's conduct was in connection with Appellant's purchase of dental services, in that collection of the alleged debt arose from the underlying transaction.

Conway v. CitiMortgage, Inc., 438 S.W.3d 410 (Mo. 2014)

Watson v. Wells Fargo Home Mortgage, Inc., 438 S.W.3d 404 (Mo. 2014)

Mo. Rev. Stat. § 407.025

15 C.S.R § 60-8.100

15 C.S.R. § 60-8.110

STANDARD OF REVIEW

The standard of review of the trial court's granting of Defendant Dennis J. Barton III's Motion to Dismiss is *de novo*. Hess v. Chase Manhattan Bank, USA, NA, 220 S.W. 3d 758, 768 (Mo. 2007). This is true even if the motion to dismiss is treated as a motion for summary judgment. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

While the Court of Appeals converted Defendant Dennis J. Barton III's Motion to Dismiss to a Motion for Summary Judgment, this was in error as outlined in Point II, *infra*. Therefore, this Court should assume "that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo. 1993).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF APPELLANT'S FDCPA CLAIM BECAUSE IT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS, IN THAT RESPONDENT COMMITTED MULTIPLE DISCRETE COLLECTION ACTIONS WITHIN ONE YEAR OF APPELLANT FILING HIS PETITION.

Congress enacted the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, in 1977 to protect consumers from "abusive, deceptive, and unfair debt collection practices by debt collectors." 15 U.S.C § 1692a. The stated purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692. As a broad remedial statute, the terms of the FDCPA "are to be applied in a liberal manner" to effectuate the Congressional findings and purposes stated in 15 U.S.C. § 1692. Schuller v. AllianceOne Receivables Management, Inc., Case No. 4:15 CV 298 CDP, 2016 WL 427961, *6 (E.D.Mo. 2016).

Congress created a private cause of action to allow consumers to seek relief from debt collection misconduct, including collection attorneys who seek improper amounts during litigation. 15 U.S.C. § 1692(k); Heintz v. Jenkins, 514 U.S. 291, 293 (1995). The FDCPA addresses a broad range of abusive debt collection practices, including unfair, abusive, misleading, deceptive, and unconscionable conduct. 15 U.S.C. § 1692d-f. A debt collector who violates the proscriptions of the FDCPA is subject to civil liability actual

damages plus a statutory penalty up to $1,000.00. 15 U.S.C. § 1692k(a). The FDPCA provides that:

> An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year *from the date on which the violation occurs*.

15 U.S.C. § 1692k(d) (emphasis added).

Thus, the date each "violation occurs" is the operative inquiry as to whether the consumer has timely sought relief within the applicable statute of limitations. Where the statute's language is clear, courts should be cautious in crafting interpretations that expand or contract a consumer's rights. See Wolff Shoe Co. v. Director of Revenue, 762 S.W. 2d 29, 31 (Mo. 1988) (""[W]here a statute's language is clear and unambiguous, there is no room for construction."). The FDCPA, including its statute of limitations, must be enforced "as Congress has written it." Frey v. Gangwish, 970 F.2d 1516, 1521 (6th Cir. 1992).

A. The Eighth Circuit Has Held that Each "Violation Occurs" When the Debt Collector Has Its "Last Opportunity to Comply" With the Act.

The approach the Eighth Circuit has adopted—which has been followed by the Second, Third, Fifth Ninth, Tenth, and Eleventh Circuits in whole or in part—analyzes when the debt collector had "its last opportunity to comply with the FDCPA." Mattson v. USW Communications, Inc., 967 F.2d 259, 261 (8th Cir. 1992); Benzemann v. Citibank N.A., 806 F.3d 98, 103 (2nd Cir. 2015); Peterson v. Portfolio Recovery Associates, LLC,

430 Fed.Appx. 112, 115 (3rd Cir. 2011); Serna v. Law Office of Joseph Onwuteaka, P.C., 732 F.3d 440, 448 (5th Cir. 2013); Naas v. Stolman, 130 F.3d 892, 893 (9th Cir. 1997); Johnson v. Riddle, 305 F.3d 1107, 1114 [n4] (10th Cir. 2002); Maloy v. Phillips, 64 F.3d 607, 608 (11th Cir. 1995).[1]

In Mattson, the Eighth Circuit Court of Appeals reasoned that the statute of limitations does not run when the conduct of the debt collector begins, but rather when it is complete. 967 F.2d at 261. There, a consumer filed an FDCPA suit within one year of the date he had received a letter from a debt collector. Id. at 260. The consumer alleged that the letter falsely implied nonpayment would result in the consumer's arrest in violation of the FDCPA. Id. However, more than one year had passed from the date the debt collector mailed its letter. Id. Since the FDCPA is a strict liability statute that focuses on the actions of the debt collector, the Mattson Court observed that liability attaches the moment the debt collector had its "last opportunity" to comply, rather than when the consumer received the letter. Id.

[1] While this Court is not bound to follow a federal court of appeals' interpretation of a federal statute, the courts of our state "look respectfully to such opinions for such aid and guidance as may be found therein." Wimberly v. Labor & Indus. Relations Comm'n of Missouri, 688 S.W.2d 344, 347 (Mo. 1985) (citing Hanch v. K.F.C. National Management Co., 615 S.W. 28, 33 (Mo. 1981).

More recently, the Eighth Circuit applied the FDCPA's statute of limitations in the context of multiple collection communications, some of which had occurred more than one year prior to filing the FDPCA claim while others occurred less than one year from the filing date. See Hageman v. Barton, 817 F.3d 611 (8th Cir. Mar. 29, 2016). In Hageman, the plaintiff alleged that the defendant initially filed a lawsuit in St. Louis County attempting to collect amounts the plaintiff never owed. Id. at 614. In addition, the plaintiff alleged that the defendant did not actually represent the medical provider and did not have permission to file suit solely in its name. Id. The defendant then later filed a registration of foreign judgment on the same debt in Madison County, Illinois, falsely and fraudulently increasing the balance the plaintiff allegedly owed. Id. Once again, the plaintiff alleged the defendant still did not represent the medical provider nor did he have permission to file suit, or register the judgment, in its name. Id. Notably, the debt collector's violation of purporting to represent a creditor with whom he did not possess an actual attorney-client relationship was the same violation in the underlying collection suit as the violation within the subsequent registration of foreign judgment and garnishment proceedings. Id.

Even though the debt collection attorney's misconduct during the registration of foreign judgment process was the same violation he committed during the original collection suit, the Eighth Circuit analyzed each of these actions as discrete events giving rise to FDCPA liability. Id. at 616. With respect to the original suit, every action was committed more than one year from the date the plaintiff filed his FDCPA claim arising out of that alleged litigation misconduct. Id. at 616-617. Therefore, the Court held that

plaintiff's claims relating to the original St. Louis County lawsuit were time-barred. Id. On the other hand, the same FDCPA violations stemming from the subsequent Madison County registration of foreign judgment, and the related garnishment proceeding, took place less than one year from the filing date of the plaintiff's FDCPA lawsuit. Id. The Court thus held that these violations were not time-barred even though the plaintiff's allegations were predicated on the same misconduct that the debt collection attorney had first committed during the St. Louis County action. Id. at 621. The Eighth Circuit's decision in Hageman implicitly acknowledges that each step of litigation constitutes a new "communication" and possesses its own limitations period. Id. at 619. This is true even where subsequent violations are premised upon the same misconduct a debt collector commits within earlier, time-barred communications. See id.

The Eighth Circuit thus employs a straightforward test: events that occur more than one year before a plaintiff's filing of a lawsuit are barred while communications that happen within the previous one year fall within the FDCPA's statute of limitations. Hageman, 817 F.3d at 616. In other words, each and every discrete action taken by a debt collector can constitute a violation that possesses its own statute of limitations. See also Puglisi v. Debt Recovery Solutions, LLC, No. 08–CV–5024, 2010 WL 376628, *3 (E.D.N.Y. January 26, 2010); Huertas v. U.S. Dept. of Education, Civil No. 08–3959, 2009 WL 3165442, *2 (D.N.J. 2009); Kaplan v. Assetcare, Inc., 88 F.Supp.2d 1355, 1360 (S.D. Fl. 2000); Pittman v. J.J. MacIntyre Co. of Nevada, Inc., 969 F. Supp. 609, 611 (D. Nev. 1997).

The District Court for the Eastern District of Missouri, the same geographic region in which the St. Louis County Circuit Court sits where Appellant originally filed this action, has applied the Hageman Court's reasoning to continued litigation misconduct that occurs within the same, uninterrupted matter. In Wade v. Account Resolution Corporation, *et al.*, the Honorable John A. Ross recently rejected Respondent's argument that any FDCPA violation that arises during a collection lawsuit accrues at the time the lawsuit is filed and served. No. 4:15-CV-1354 JAR, 2016 WL 4415353, *1 (E.D.Mo. Aug. 19, 2016).

There, the consumer alleged that the defendants unlawfully added prejudgment interest to a default judgment that they took against him, which the defendant had obtained within one year of the filing of his FDCPA claim. Id. The defendants argued that any violation they had committed must necessarily have accrued at the time the debt collection lawsuit was filed, because the petition specifically sought the same improper prejudgment interest. Id. The plaintiff argued that his FDCPA claim was based not on the contents of the debt collection petition, but rather the collection of unlawful prejudgment interest within the default judgment. Id. Judge Ross agreed with the plaintiff. Id. Judge Ross reasoned that "the statute of limitations is triggered in the Eighth Circuit when the debt collector had 'its last opportunity to comply with the FDCPA.'" Since the defendants' last opportunity to comply was "when they obtained default judgment against Plaintiff," Judge Ross held the allegations relating to the improper collection of prejudgment interest occurred within the one-year limitations period. Id.

B. The Court of Appeals' Application of the FDCPA's Statute of Limitations Is Inconsistent With the "Last Opportunity to Comply" Standard.

In its Opinion, the federal court decisions upon which the Missouri Court of Appeals, Eastern District, relied are confined to the unusual – and inapposite – situations where a *plaintiff* attempts to capture additional, otherwise past-the-statute of limitations conduct, by arguing that each step of litigation constitutes part of a "continuing violation." Calka v. Kucher, Krau & Bruh, LLP, No. 98 Civ. 0990(RWS), 1998 WL 437151, *3 (S.D.N.Y. 1998); Slorp v. Lerner, Sampson & Rothfuss 587 Fed. Appx. 249, 257 (6th Cir. 2014). The idea behind a "continuing violation" theory is for a *plaintiff* to extend the FDCPA's statute of limitations by linking earlier FDCPA violations to more recent conduct. See Midwestern Machinery v. Northwest Airlines, 392 F. 3d 265, 269 (8th Cir. 2004); Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 763 (Mo.Ct.App. E.D. 1999). In this way, a *consumer* could sue a debt collector for not only the debt collector's actions taken within the previous one year, but also for any related actions taken by the debt collector more than one year before.

The Missouri Court of Appeals' Opinion turned this standard on its head and applied a new test that no other federal or state court has previously adopted. The cases the Missouri Court of Appeals cited do *not* stand for the proposition that discrete litigation conduct occurring within the FDCPA's one-year statute of limitations period is barred by earlier debt collector malfeasance. Such a holding is inherently incompatible with an

analysis of a debt collector's "last opportunity to comply." By looking at the "later effects of an earlier time-barred violation," the Missouri Court of Appeals, Eastern District, instead focused on the debt collector's "first opportunity" to comply with the FDCPA. Jackson v. Barton, No. ED103370, p. 7-8 (Mo.Ct.App. E.D. 2016).

This Court should reject the line of reasoning that disregards the independent violations that Appellant alleges Respondent committed and that assumes all litigation conduct flows from the filing and/or service of a debt collection lawsuit. The alternative, as even the Opinion acknowledges, would be to allow debt collectors to immunize themselves from future claims by strategically timing their FDCPA violations. Jackson v. Barton at p. 10. This Court can and should remove the newly-created avenue that allows debt collectors to keep violating the FDCPA with impunity if they manage to wait 366 days after they first violate the law.

Moreover, under the Court of Appeals' standard, the statute of limitations is not measured by the date of each collection communication. Instead, it is contingent on the trial court performing a qualitative analysis as to the "closeness" of the communications each time a consumer files an action involving multiple collection communications. As a result, a consumer cannot simply look at the date of a collection communication to determine whether a claim arising out of that communication is timely. The very reason the Eight Circuit originally adopted the "last opportunity to comply" standard is that it is "easy to determine, ascertainable by both parties, and may be easily applied." Mattson, 967 F.2d at 261.

Therefore, consistent with that standard, this Court should recognize that subsequent violations of the FDCPA remain actionable even they are the same or substantially related to earlier, otherwise time-barred misconduct. See Schuh v. Druckman & Sinel, L.L.P, 602 F.Supp.2d 454, 466 (S.D.N.Y. 2009).

C. All of the Collection Conduct from Which Appellant Seeks Relief Occurred Less Than One Year from the Filing Date of His Original Petition.

Within his First Amended Petition, Appellant outlined three discrete violations of the FDCPA that Respondent committed during the limitations period. First, Respondent continued to prosecute a debt collection action without the means or intent of proving his allegations; this conduct culminated on July 10, 2014 when Respondent refused to appear at his own trial setting and continued through October 2014 when he finally dismissed the action. *LF* 58 (First Amended Petition, ¶ 69). Second, after the underlying collection lawsuit had been dismissed, Respondent mailed a letter to Appellant on July 16, 2014, demanding an unexplainable increased amount of $551.34. Id. at ¶ 72. Third, on August 7, 2014, Respondent reopened the dismissed underlying collection lawsuit and, once again, began his attempts to coerce payment on an otherwise false amount due. Id. at ¶¶ 61, 75. Notably, Respondent possessed a final opportunity to comply with the FDCPA before taking these additional actions, each of which occurred within one year of Appellant's filing of the instant lawsuit on January 29, 2015.

1. Respondent's action in setting the case for trial to coerce a payment on the knowingly false debt and then choosing to not appear constitutes discrete litigation misconduct that occurred within one year of Appellant's filing of his FDCPA claim.

The United States Supreme Court, the Eighth Circuit Court of Appeals, and the United States District Court for the Eastern District of Missouri have all repeatedly held that the FDCPA protects consumers from debt collectors who violate their rights during the course of a debt collection lawsuit. See Heintz v. Jenkins, 514 U.S. 291, 296, 299 (1995) (holding that "the [FDCPA] applies to . . . consumer-debt-collection activity, even when that activity consists of litigation."); Hinten v. Midland Funding, LLC, No. 2:13 CV 54 DDN, 2013 WL 5739035, at *6 (E.D. Mo. Oct. 22, 2013) ("The Act's prohibitions apply to collection efforts through litigation") (citing Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814, 818 (8th Cir.2012)). Conduct that independently violates the FDCPA is actionable if it falls within the limitations period, even if undertaken in pursuit of litigation that was filed outside the limitations period. Jones v. Investment Retrievers, LLC, No. 3:10–CV–1714, 2011 WL 1565851, *3 (M.D.Pa. 2011) citing Heintz v. Jenkins, 514 U.S. at 294. In the context of litigation, every pleading constitutes the "last opportunity to comply with the FDCPA." Collins v. Erin Capital Mgmt., LLC, 290 F.R.D. 689, 698 (S.D. Fla. 2013).

In his First Amended Complaint, Plaintiff pleads, at the very least, the minimum facts necessary to support his claims under Sections 1692d, e, and f of the FDCPA. Under

those sections of the FDCPA, it is a violation for a debt collector to file a collection lawsuit, *and then continue to pursue it*, once the debt collector knows it does not, and will not, possess the underlying evidence to support its allegations. Hinten, 2013 WL 5739035; Brewer v. LVNV Funding, LLC, No. 4:14CV00942 AGF, 2014 WL 5420274 (E.D. Mo. Oct. 22, 2014); Chamineak v. Jefferson Capital Systems, LLC, No. 4:15-CV-419 (CEJ), 2015 WL 4207084 *4 (E.D. Mo. July 10, 2015); Royal Fin. Group, LLC v. Perkins, 414 S.W.3d 501, 505 (Mo.Ct.App. E.D. 2013) (holding that the debt collector's violation arose from the "clearly empty threat to actually prosecute the lawsuit" after filing the initial petition).

Moreover, the violation does not occur (and, thus, the corresponding statute of limitations does not accrue) at the time of filing. As multiple cases have recognized, there is a qualitative difference between not possessing the necessary evidence on hand to immediately prove one's claim at the time of filing and the unlawful practice of continuing to pursue a collection lawsuit without ever intending on obtaining that evidence with the hope of simply obtaining a default or consent judgment, as Appellant alleges Respondent did here. Compare Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006) with Chamineak v. Jefferson Capital Sys., LLC, 4:15-CV-419 CEJ, 2015 WL 4207084, at *4 (E.D. Mo. July 10, 2015) (distinguishing Harvey by noting that the consumer did not just allege the debt collector filed a collection without the *immediate* means of proving its allegations but rather kept the collection action open in the hopes of obtaining a consent or

default judgment up until the point the consumer hired counsel and served discovery requests at which time the debt collector dismissed its own case).

In this case, Appellant pleaded that, in a tactic designed to harass Appellant by causing him to incur substantial and unnecessary fees, Respondent purposefully chose to ignore the trial date of July 10, 2014. *LF* 58 (First Amended Petition ¶ 69). Respondent hoped to use the pragmatic economics of the small amount at issue in the lawsuit to coerce Appellant into paying the otherwise false debt rather than incur the costs for an attorney to prepare for trial. Id. When Respondent's calculated gamble did not pay off, Respondent then chose not to appear at his own trial setting. Id. Defendant chose this tactic not at the time of filing – when he may still have been able to obtain a default judgment – but after he knew that "Plaintiff paid his attorney substantial fees to prepare for trial." Id. at ¶ 68 Drawing all reasonable inferences from Plaintiff's First Amended Petition, Appellant has stated a valid FDCPA claim arising out of Respondent's continued maintenance of a collection suit and corresponding (and deliberate) failure to appear at the June 10, 2014 trial setting. Chochorowski v. Home Depot U.S.A., Inc., 295 S.W.3d 194, 197 (Mo.Ct.App. E.D. 2009). Plaintiff filed his Original Petition only seven (7) months after this post-filing conduct, on January 29, 2015. *LF* 50.

The Court of Appeals thus erred in holding that all litigation misconduct that occurred within the limitations period was time-barred simply because Respondent also initiated the underlying collection suit more than one year before Appellant filed his FDCPA claim.

2. Respondent mailed a letter to Appellant after the underlying debt collection lawsuit was already dismissed, which contained a different amount due and was dated less than one year from Appellant's filing of his FDCPA claim.

Section 1692e of the FDCPA prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt," including the "false representation of the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). This requirement applies to all collection letters, including, but not limited to, the debt collector's initial letter. See id. This includes misstating the amount of the debt. Wideman v. Kramer & Frank, P.C., No. 4:14-CV-1495-SNLJ, 2015 WL 1623814 *2-3 (E.D. Mo. April 10, 2015). A debt collector violates Section 1692e(2)(A) by sending two separate payment demands with discrepant amounts due. See, e.g., 15 U.S.C. § 1692e(2)(A) and § 1692f(1); Eger v. Messerli & Kramer, P.A., 14-CV-1424 MJD/FLN, 2015 WL 868021, at *4 (D. Minn. Feb. 27, 2015) ("Considering the Eighth Circuit's strict interpretation of the FDCPA's terms, this discrepancy in the judgment amount quoted to Plaintiff in the January 21, 2014 letter could constitute a 'false representation of ... the character, amount, or legal status of any debt....' 15 U.S.C. § 1692e(2)(A).'"); DeFrancesco v. Veripro Sols. Inc., 2:14-CV-27-FTM-29DNF, 2015 WL 179376, at *2 (M.D. Fla. Jan. 14, 2015) (denying defendant's motion to dismiss under the FDCPA arising out of the collector's misrepresentation of two different amounts due on

the same debt where there was no legal explanation to the rate of the increase in the second letter).

Even when a collector only slightly increases the amount of a debt from the correct figure, the Eighth Circuit has upheld the FDCPA's strict liability posture. See Duffy v. Landberg, 215 F.3d 871, 874-75 (8th Cir. 2000) (collector automatically added $100 to the debt when state law provided only that a court *could* issue a civil penalty against consumer for *up to* $100); see also Eger v. Messerli & Kramer, P.A., No. 14–cv–1424 MJD/FLN, 2015 WL 868021 *3-4 (D. Minn. February 27, 2015) (holding the debt collection attorney violated Subsection 1692e(2)(A) by sending a letter to the consumer demanding $4,203.02 when at the time, the true judgment amount totaled at least $50 less).

In this case, on July 16, 2014, after the underlying collection lawsuit was already dismissed, Respondent served Appellant with a demand for payment in the amount of $551.34. *LF* 58 (First Amended Petition ¶ 72). During the collection suit, Respondent only attempted to collect "$458.52 together with interest, reasonable attorney's fees pursuant to contract, [and] costs of court." Id. at 57, ¶ 61. At the time of the July 16, 2014 payment demand, Respondent had not been awarded costs of court or attorney's fees. Id. at 58, ¶ 72. Therefore, the only other remaining explanation for the increase in balance was the further assessment of prejudgment interest and/or other illusory charges that Respondent did not originally pursue within the collection suit. Id. at 59, ¶ 76-77.

The increase in balance between the amount sought in the collection petition and the July 16, 2014 payment demand far exceeded the amount of prejudgment interest that

could have accrued between those two dates.[2] Respondent demanded payment of nearly $100 more than principal debt obligation Respondent had sought in the now-dismissed collection lawsuit. *LF* 57, ¶ 61 and 58, ¶ 72. Thus, the July 16, 2014 collection letter did not simply repeat the same misinformation from the collection suit. In fact, the *very* reason it was a violation is that the amounts Respondent attempted to collect were not the same. Even assuming Appellant owed the debt, Respondent was prohibited from attempting to collect two entirely different amounts—a discrepancy which cannot otherwise be explained away by adding the interest that could have accrued between those two dates. Because the July 16, 2014 letter differed from the statements in the debt collection lawsuit, it inherently is a discrete and separate collection action. In addition, at the time the letter was sent, the underlying debt collection lawsuit was dismissed. It defies logic to characterize this communication as a "later effect" of a legal proceeding that did not exist at the time.

Communications subsequent to the filing of a debt collection lawsuit do not always constitute the "same violation" simply because the same debt is involved. To hold otherwise invites debt collectors to engage in increasingly violative conduct the moment

[2] Between the filing date of the collection lawsuit and Respondent's July 16, 2014 payment demand, 310 days elapsed. Taking the otherwise fabricated collection lawsuit amount of $458.52, multiplying it by 9% interest per annum, and multiplying that product by 310/365 days, yields a maximum accrued interest of $35.04 for the 310-day period ending on July 16, 2014.

one year passes from the filing of an initial collection lawsuit. A debt collector, such as Respondent, would be immunized from liability for sending collection letters demanding amounts greater than its debt collection lawsuit sought, so long as more than 365 days had elapsed. By simply and properly recognizing that each collection communication constitutes a discrete violation subject to the FDCPA's one-year statute of limitations eliminates this gamesmanship.

Respondent served his separate payment demand on July 16, 2014, after the collection lawsuit was already dismissed, and less than seven months from the date Plaintiff filed his Original Petition on January 29, 2015. The Court of Appeals thus erred in holding that the July 16, 2014 discrete payment demand was time-barred.

3. By taking the affirmative action of reopening the underlying debt collection lawsuit, Respondent engaged in discrete litigation conduct within one year of Appellant's filing of his FDCPA claim.

On or about August 7, 2014, Respondent filed a "Motion to Set Aside Default Judgment [*sic*]," which the court granted over Appellant's objection. *LF* 59 (First Amended Petition, ¶ 75); LF p. 90-93. In Missouri, it has long been the rule that "a motion to set aside . . . is an *independent action*, the determination of which is an independent judgment." Kueper v. Murphy Distributing, 834 S.W.2d 875, 878 (Mo.Ct.App. E.D.1992) (emphasis added). Thus, by choosing to file the motion, Respondent engaged in a discrete and independent action which possesses its own statute of limitations. There is little doubt that a new lawsuit constitutes discrete, actionable litigation conduct under the FDCPA.

Likewise, Respondent's action of reinstating the collection lawsuit against Appellant was the functional equivalent of filing a new case, and in fact, possessed a new case number.

Based on Appellant's research, only one other court has addressed the applicability of the FDCPA's statute of limitations to the revival of a previously-dismissed lawsuit. See Glazewski v. CKB Firm, P.C., 2015 WL 661278, *2 (N.D. Ill. Feb. 15, 2015). In Glazewski, a debt collection attorney filed a debt collection suit that was dismissed without prejudice in 2012. Id. at *1. Thereafter, the collection attorney reinstated the suit in 2014 when the plaintiff allegedly stopped making voluntary payments. Id. Within one year of the debt collector's motion to reinstate the collection suit, the plaintiff filed an FDCPA claim alleging the debt collection attorney violated the FDCPA by bringing a legal action in the wrong venue. Id. Importantly, the venue in which the debt collection attorney attempted to reinstate the action was the same wrongful venue, and thus the same alleged violation, in which the debt collector filed the original suit in 2012. Id. In response, the debt collection attorney filed a motion to dismiss and argued that the FDCPA claim was time-barred since the alleged violation first occurred in 2012. Id. at *2.

The Glazewski court disagreed and noted that although the attorney filed suit in 2012, the case was dismissed; "[i]f that had been the end of it, then the Court" would have agreed that the FDCPA case was time-barred. Id. However, the fact the collection attorney moved to reinstate the suit within the limitations period was "close enough to the filing of a [new] suit" to be considered a discrete and independent action under the FDCPA. Id. The court found the situation to be analogous to a debt collector filing a garnishment that

is improper in form or which seeks unlawful amount even though the lawsuit was initially filed more than one year prior. Id. In such cases, courts have unambiguously agreed that filing new garnishments constitutes an independent and actionable conduct, even though they stem from a lawsuit that was filed outside of the limitations period. Id. citing Fox v. Citicorp Credit Svcs., Inc., 15 F.3d 1507, 1515 (9th Cir. 1994); Blakemore v. Pekay, 895 F.Supp. 972, 983 (N.D. Ill. 1995); see also Sprinkle v. SB&C Ltd., 472 F.Supp.2d 1235 (W.D. Wa. 2006); Collins, 290 F.R.D. at 698.

Courts also agree that allegations arising out of a second collection lawsuit are not time-barred even if the second suit is premised upon the same or substantially similar allegations as an earlier, time-barred lawsuit. See, e.g., Boldon v. Riverwalk Holdings, Ltd., Civil NO. CV 15-2105 (JRT/JSM), 2016 WL 900639, at *3 (D. Minn. Mar. 9, 2016). In Boldon, the United States District Court for the District of Minnesota applied the Eighth Circuit's "last opportunity to comply" standard to decline a debt collection attorney's argument that the filing of a second lawsuit is "a new communication . . . concerning an old claim." Id. The court was concerned about the timing of the "new" communication being so long after the "first" communication. Id. Exactly as Appellant has warned in this case, any other holding would endorse "a framework whereby a debt collector could violate the FDCPA and then lull the debtor into thinking that it had reformed its violative conduct, only to recommence the same violative conduct . . . leaving the debtor without any recourse." Id. As the Boldon court reasoned, "[a] debt collector could gain immunity from liability simply by laying in the weeds until the expiration of the limitations period." Id.

The court thus held that filing a second complaint, like the reopening of Respondent's debt collection lawsuit, was the "last opportunity to comply with the FDCPA" and, therefore, "a new claim that triggered a new limitations period." Id.

The reasoning of the Glazewski and Bolden courts apply here with equal vigor. As of August 7, 2014, Respondent made the voluntarily choice to seek payment for amounts that Appellant did not, and does not, owe. Id. at ¶ 76. Respondent's misconduct included, but was not limited to, the unlawful back-dating of prejudgment interest on the entire alleged principal balance from the earliest of the three service dates that comprised the charges. Id. at ¶ 77. After the initial action was dismissed for Respondent's failure to prosecute, there was nothing compelling Respondent to file a motion to reopen the lawsuit. Respondent possessed a separate and last chance to comply with the FDCPA before choosing to reinitiate the collection lawsuit. While such an action may be *authorized* by Missouri Rules of Civil Procedure, Respondent was not *compelled* to do so. Respondent assumed the associated risk of liability by reopening a lawsuit and seeking illicit amounts from Appellant. The fact that Respondent may have also violated the FDCPA when he filed the initial collection petition does not insulate the subsequent, independent, and voluntary action of reinitiating the lawsuit.

Respondent had a last chance to comply with the FDCPA by not choosing to reopen the lawsuit on August 7, 2014. Since Appellant filed his Original Petition just five months later on January 29, 2015, the Court of Appeals erred in holding that Respondent's discrete action of reinitiating the collection action occurred outside the limitations period.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF APPELLANT'S FIRST AMENDED PETITION WITH PREJUDICE BECAUSE THE RECORD DOES NOT SUPPORT CONVERTING RESPONDENT'S MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT, IN THAT THE PARTIES WERE NOT GIVEN NOTICE, AND THE TRIAL COURT'S ORDER DID NOT CONSIDER MATTERS OUTSIDE THE PLEADINGS.

At the Trial Court level, Appellant briefed and argued against Respondent's Motion to Dismiss. *LF* 107-114. By its own terms, Respondent's motion sought dismissal pursuant to "Missouri Rule of Civil Procedure 55.27(a)(6) as Plaintiff failed to state a claim against Defendant for which relief can be granted." *LF* 70 (Defendant Dennis J. Barton III's Motion to Dismiss Plaintiff's First Amended Petition ¶ 4). The Trial Court's Order states "Defendant, Dennis J. Barton III's, ("Barton") Motion to Dismiss Plaintiff's First Amended Petition is called, heard, and granted." *LF* 169. On appeal, for the first time, the motion was treated as one for summary judgment. *Opinion* 3-4.

A. The Court of Appeals Erred in Converting the Motion to Dismiss to a Motion for Summary Judgment.

"The difference between summary judgment and dismissal of the claim is significant because the standard of appellate review is different." Magee v. Blue Ridge Professional Bldg., 821 S.W.2d 839, 843 (Mo. 1991). As this Court explained, the reason

the difference in standard of review is significant is because it changes what the reviewing court can actually consider:

> When reviewing the grant of a motion to dismiss a petition, all facts alleged in the petition are deemed true and the plaintiff is given the benefit of every reasonable intendment. When reviewing a summary judgment, the appellate court looks not just to the petition but to all the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits to determine if there is any material fact issue and that the moving party was entitled to judgment as a matter of law.

Id. (internal citations omitted).

The Opinion of the Court of Appeals in this case cites the general rule that "a trial court usually must give notice to the parties that it is treating a motion to dismiss as a motion for summary judgment." Opinion, p. 4; accord Shores v. Express Lending Services, Inc., 998 S.W.2d 122, 126 (Mo.Ct.App. E.D. 1999); Gramlich v. Travelers Ins. Co., 640 S.W.2d 180, 183 (Mo.Ct.Ap. E.D. 1982). However, the Opinion of the Court of Appeals added that "notice is *not* required . . . when a party fails to object to the introduction of such evidence by another party." Id. (emphasis added). The Opinion cites to one case as the basis for the additional requirement that a party must "object" to documents attached as exhibits to a motion to dismiss. Id. citing Mitchell v. McEvoy, 237 S.W.3d 257, 259 (Mo.Ct.App. E.D. 2007). The Court of Appeals, Eastern District, has previously relied on its Mitchell decision for this same proposition, including in a case that this Court reversed.

Hoover v. Mercy Health, No. ED 97495, 2012 WL 2549485 (Mo.Ct.App. E.D. 2012) (reversed by Hoover v. Mercy Health, 408 S.W.3d 140, 142 (Mo. 2013)).

This Court chose not to adopt a requirement that a party needs to object to the introduction of evidence and specifically declined to treat a motion to dismiss as a motion for summary judgment when the record did not indicate such a conversion had occurred. Hoover, 408 S.W.3d at 142. In Hoover, the defendant attached a contract and account notes, among other things, to its motion to dismiss the plaintiff's first amended petition. Id. at 141. The plaintiff did not file a memorandum in response to that motion to dismiss, although it had done so for the motion to dismiss the original petition. Id. The defendant argued, and the Court of Appeals agreed, that the motion to dismiss should have been considered as one for summary judgment. Id.; Hoover v. Mercy Health, 2012 WL 2549485 at *2.

However, simply because some records had been attached to a motion, this Court did not presume that the trial court had "considered the matters presented outside the pleadings." Id. at 142. This Court examined the trial court's ruling on the motion and found that "the face of the judgment . . . demonstrates that the trial court did not do so." Id. As in this case, the "trial court's declaration that it was granting the defendants' motion to dismiss stands as an affirmative statement that the trial court *did not* consider any facts outside the pleadings." Id. (emphasis added).

Moreover, this Court emphasized that parties must be given notice and a reasonable opportunity to submit evidence before converting a motion to dismiss to a motion for

summary judgment. Id. At the trial court stage in our case, as in Hoover, there was "nothing in the record to suggest that the trial court notified the parties it would be treating the motion to dismiss as a motion for summary judgment pursuant to Rule 55.27(a)." Id. Indeed, Appellant's Response to Respondent's Motion to Dismiss makes no references to any exhibits, Appellant attached only a courtesy copy of a relevant Illinois decision, and the Motion explicitly states "**"**If the contest is on the pleadings, Plaintiff must be allowed to move forward." *LF* 107-114 (Plaintiff's Response to Barton's Motion to Dismiss p. 1). After this Court's decision in Hoover, reliance on Mitchell to determine the standard of review is misplaced. The correct standard of review for this case is that for a motion to dismiss.

B. Appellant Could Have Produced Evidence Concerning Equitable Tolling Had the Court of Appeals Provided Notice that It Was Converting the Motion.

This Court should either adopt the straightforward test that allows a consumer to file an FDPCA claim for any communication that occurs within one year from filing and reverse the dismissal of Appellant's claims for that reason alone or, at the very least, allow Appellant to produce evidence in support of the application of Missouri's tolling doctrines. Using the standard of review applicable to a motion for summary judgment without providing notice of the same would be unjust; Appellant did not have the opportunity to develop and present evidence that would have affected the relevant statute of limitations period. As the Opinion of the Court of Appeals noted, consumers who do not "immediately

recognize that debt collection suits filed against them are unlawful pursuant to the FDCPA . . . can seek the remedies available under appropriate tolling doctrines." Opinion at 11.[3]

Equitable tolling "permits a plaintiff to toll a statute of limitations where 'the defendant has actively misled the plaintiff respecting the cause of action.'" Adams v. Division of Employment Security, 353 S.W.3d 668, 673 (Mo.Ct.App. E.D. 2011); Ross v. Union Pacific Railroad Co., 906 S.W.2d 711, 713 (Mo. 1995) citing Leake v. University of Cincinnati, 605 F.2d 255, 258 (6th Cir. 1979) ("The doctrine has been applied, for example, when a defendant's active misrepresentation caused the plaintiff to let the filing period lapse"). Appellant pleaded that Respondent employed deception and misrepresentation in connection with the collection of the alleged debt. *LF* 62 (First Amended Petition, ¶¶ 94-96).

[3] Appellant notes that the Eighth Circuit Court of Appeals has rejected equitable tolling. Mattson v. U.S. W. Comm'ns, Inc., 967 F.2d 259 (8th Cir.1992); accord Hageman, 2016 WL 1212235 at *4-*5. The Eighth Circuit, however, also rejected a "later effects" test like the one articulated by the Court of Appeals. A consumer can plead an FDCPA claim for any communication that has occurred within one-year. See id. Should this Court adopt the same "later effects" test, without equitable tolling, it would, as the Court of Appeals observed, "deny a consumer the protection the statute was intended to provide." Opinion, p. 10.

With the opportunity to conduct discovery, the record would contain sufficient evidence that the statute of limitation was tolled due to Respondent's deception and misrepresentations. Plaintiff was served with the debt collection lawsuit in October 2013, but did not receive discovery responses until February 21, 2014. Appendix, A-62 ("Certificate of Service" of discovery responses). Not until Appellant received these responses did he understand that Respondent was relying on a fabricated contract with a forged signature that significantly changed the terms of his payment arrangements with LifeSmile. This forged contract forms the basis of the amount Respondent attempted to collect from Appellant. *LF* 57 (First Amended Petition, ¶¶ 63-65). Using February 19, 2014 as the date Appellant's FDCPA claims accrued brings the filing of the instant case, on January 29, 2015, within the statute of limitations.

Furthermore, on July 31, 2015, Appellant conducted depositions of Dr. Sally Herbert, Dr. Brett Setien, and Dr. Blake Setien, each of whom is a dentist and owner of LifeSmile, the named-creditor in the underlying debt collection lawsuit. *LF* pp. 124-155. Their testimony establishes that even Appellant's creditor did not know about Respondent or his actions with regard to collecting the alleged debt:

> Q: To your knowledge, have you or LifeSmile Dental Care North ever entered into an attorney agreement with Dennis Barton or The Barton Law Group, LLC?
>
> A: Not to my knowledge.

LF 136 *(Deposition of Blake Setien 10:1-5).*

Q:	Do you have personal knowledge of any instance other than the Keith Jackson case where Dennis Barton attempted to collect money on behalf of LifeSmile Dental Care North?
A:	This is the first I'm hearing of The Barton Law Group.

LF 147 *(Deposition of Brent Setien 30:14-19).*

Q:	Who would it have been at LifeSmile Dental Care North that would have had to provide Dennis Barton or The Barton Law Group with permission to file this suit?
A:	I honestly wouldn't know, but I would imagine -- is this Barton Law Group affiliated with a collection company? I don't know that I've ever been aware of LifeSmile Dental Care ever hiring a law firm to pursue an outstanding debt.

LF 147 *(Deposition of Brent Setien 31:4-12).*

Moreover, their testimony supports Appellant's allegations that Respondent was the party responsible for the collection of the false amount due in the debt collection lawsuit:

Q:	Do you know how LifeSmile's collectors arrived at a balance due of $458.52 for Mr. Jackson?
A:	No.

LF 136 *(Deposition of Blake Setien 9:20-22).*

Q:	Do you recall anything about making the affidavit?
A:	Absolutely not.
Q:	Did you yourself draft up this affidavit?
A:	Absolutely not.

LF 136 *(Deposition of Blake Setien 12:21-25).*

Q:	Did you know when you signed this affidavit what it would be used for?
A:	No, I did not.

LF 137 *(Deposition of Blake Setien 13:14-16).*

Q:	Did you do anything to double-check whether the sum in here, 458.52, was true and correct?
A:	No, I did not.

LF 137 *(Deposition of Blake Setien 13:14-19).*

Q:	Did you know what statute or contract entitles LifeSmile to reasonable attorneys' fees?
A:	I do not.

LF 147 *(Deposition of Blake Setien* 14:17-19).

Q:	Exhibit 5 shows an amount transferred to collection of $359.20; correct?
A:	Correct.

Q:	Do you know any explanation for the discrepancy between that amount and the $458.52 in the lawsuit, Exhibit 1?
A:	I do not.

LF 131 *(Deposition of Sally Hebert* 31:17-23).

Given that LifeSmile, the named-plaintiff in the lawsuit, did not know or understand what was occurring at the time Respondent filed the lawsuit in its name (with or without LifeSmile's legal authority remains an open question), Appellant cannot fairly be charged with such immediate knowledge. Appellant's cause of action could not have accrued until Appellant had the opportunity to learn of Respondent's collection misconduct which gave rise to the violations Appellant pleaded within his First Amended Petition. Appellant was not given that opportunity as a result of Respondent's motion to dismiss being granted. The record is scant, which underscores the importance of employing the standard of review for a motion to dismiss. Appellant includes just a portion of the evidence here to show that, even if this Court adopts the Court of Appeals' interpretation of the FDCPA's statute of limitations, justice requires that the case be remanded so that Appellant can expound on the tolling doctrines available in Missouri.

C. Appellant Pleaded Sufficient Facts in the First Amended Petition to Justify the Tolling of the One-Year Statute of Limitations Given that Appellant's Damages Were Not Fully Capable of Ascertainment and

that Respondent Continued to Violate the FDCPA Through the Limitations Period.

As outlined *supra*, Appellant suggests that, by its own terms, the FDCPA allows consumers to seek relief from any communication or action – related or unrelated to a prior violation – within one-year of its occurrence. However, in the event this Court adopts the Court of Appeals' interpretation of the FDCPA's statute of limitation, Missouri's equitable tolling doctrines combined with the proper standard of review on a motion to dismiss nevertheless supports a reversal of the Trial Court's Order dismissing Appellant's claims based on the statute of limitations.

1. Appellant's damages were not "fully capable of ascertainment" until October 2, 2014.

In Missouri, a civil action accrues not when the "wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained." Mo. Rev. Stat. § 516.100. In this case, Appellant pleaded that he incurred, and continued to incur, significant funds to "pay for the defense of Defendants' baseless action against him." *LF* 58 (First Amended Petition, ¶ 78). The full measure of damages was not capable of ascertainment until the resolution of the underlying debt collection lawsuit. Only at that time was Appellant able to know the total sum he had to expend for his defense. Under Section 516.100, the statute of limitations was tolled while Respondent pursued the debt

collection lawsuit. Respondent continued to demand the knowingly false debt obligation up to and through October 2, 2014 when Respondent finally dismissed the underlying debt collection lawsuit and ceased demanding Appellant pay the debt. *LF* 94.

2. Respondent "continued" its violative collection action up to and through October 2, 2014.

As a corollary to the "capable of ascertainment" language, Missouri also recognizes the "continuing violation theory exception" to the statute of limitations. Weiss v. Rojanasathit, 975 S.W.2d 113, 119 citing Davis v. Laclede Gas Co., 603 S.W.2d 554, 556 (Mo. 1980). Under this theory, a plaintiff can bring a lawsuit for an action that occurs outside the statute of limitations period, provided that said action is part of an "ongoing practice or pattern" of violations. Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754 , 763 (Mo.Ct.App. E.D. 1999). Thus, to the extent the Court of Appeals was correct that all of Respondent's FDCPA violations stemmed from the filing of the debt collection lawsuit, the statute of limitations was tolled as Appellant suffered "new or subsequent injuries or damages." Weiss, 975.S.W.2d at 119. The record in this case shows that the last action in the underlying debt collection lawsuit was October 2, 2014. Appendix, A-64. Appellant filed his Original Petition within one year of that date and, therefore, within the statute of limitations period.

Applying the correct standard of review applicable to a motion to dismiss, Appellant's First Amended Petition already contains sufficient facts to toll the relevant statute of limitations to a date well-within the limitations period. In the alternative,

Appellant requests this Court remand the case and provide Appellant an opportunity to plead additional facts to support the application of Missouri's tolling doctrine. This remedy is particularly appropriate given that Appellant had little reason to believe equitable tolling was applicable in light of the existing case law in the Eighth Circuit, which the Court of Appeals ultimately chose not to adopt.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF APPELLANT'S MMPA CLAIM BECAUSE RESPONDENT'S CONDUCT WAS IN CONNECTION IN WITH APPELLANT'S PURCHASE OF DENTAL SERVICES, IN THAT COLLECTION OF THE ALLLEGED DEBT AROSE FROM THE UNDERLYING TRANSACTION.

The Missouri Merchandising Practices Act ("MMPA") is a remedial statute, the fundamental purpose of which is the "protection of consumers." Berry v. Volkswagen Group of America, Inc., 397 S.W. 3d 425, 433 (Mo. 2013). The MMPA creates a cause of action for "any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020." Mo. Rev. Stat. § 407.025. What constitutes an unlawful practice is not limited to finite rules, but "extends to the infinite variations of human invention." 15 C.S.R § 60-9.040. Like the FDCPA, the MMPA "should be liberally construed to protect consumers." State ex rel. Nixon v. Continental Ventures Inc., 84 S.W.3d 114, 117 (Mo.Ct.App W.D. 2002).

A. Appellant Pleaded Sufficient Facts to State a Claim Under the MMPA.

Appellant has pleaded all essential elements of an MMPA claim: (1) Plaintiff purchased merchandise, (2) for personal, family, or household purposes, (3) Plaintiff suffered an ascertainable loss of money, and (4) this loss was the result of an act declared unlawful under the MMPA. Edmonds v. Hough, 344 S.W.3d 219, 223 (Mo. App. E.D. 2013); *see* Mo. Rev. Stat. § 407.025.1. First, Appellant purchased dental services. *LF* 52-56. Second, the purchase was made for personal use: Appellant purchased the dental services for himself. Id. Third, Respondent's unfair and deceptive business practices caused Appellant an ascertainable loss of money in the amounts he paid for attorneys' fees to defend against Respondent's lawsuit. Id. at 62. Finally, Appellant alleges several MMPA violations, as set forth below:

Date	Action	MMPA Violations	Citation
9/9/13	Barton sues Plaintiff to recover the LifeSmile debt	1) Attempting to recover a debt Barton knows or should know that Jackson does not owe 2) Attempting to collect illicit fees & charges 3) Proffering an "agreement" to pay such fees with a forgery of Jackson's signature 4) Forcing Jackson to incur attorneys' fees to defend a lawsuit Barton knows is baseless	LF, 57-58, 62

7/10/14	Barton sets the case for trial but refuses to appear	1) Forcing Jackson to incur attorneys' fees in preparation of trial when Barton knew his lawsuit was baseless	LF, 58, 62
7/16/14	Barton sends a written demand for payment to Jackson	1) Attempting to recover a debt Barton knows or should know that Jackson does not owe 2) Attempting to collect illicit fees & charges 3) Attempting to collect pre-judgment interest as of the date of the first visit, when Barton knew the entire alleged debt was not incurred on that date	LF, 58-59, 62
8/7/14	Barton reinstates the lawsuit against Jackson	1) Attempting to recover a debt Barton knows or should know that Jackson does not owe 2) Attempting to collect illicit fees & charges 3) Attempting to collect pre-judgment interest as of the date of the first visit, when Barton knew the entire alleged debt was not incurred on that date	LF, 59, 62

Because LifeSmile performed the dental services on credit, the parties contemplated at the time of the sale that Appellant would be paying on the account over an extended period of time. *LF* 36 at ¶ 19. The parties recognized that the transaction would not be complete until LifeSmile obtained payment, voluntary or otherwise, on any remaining amount due after insurance payments. *LF* 36 at ¶ 20. The parties agreed that Appellant would pay $355.80 as his share of the cost of dental work . Id. at ¶¶ 18, 34, 42. Including insurance payments, Appellant actually paid $1,563.80 out of the total agreed-upon cost of $1,585.00 for all the dental work he received. Id. at ¶¶ 51-52.

Notwithstanding, Respondent, acting as LifeSmile's agent, filed a lawsuit against Appellant and sought "$458.52 together with interest, reasonable attorney's fees *pursuant to contract*, costs of court and for all other and further relief this Court deems just and proper." *LF* 59 at ¶ 61 (emphasis added). After the lawsuit was dismissed for failure to prosecute, Respondent sent Appellant a letter demanding payment an increased balance of $551.34. Id. at ¶ 72. Respondent then had the lawsuit reinstated without any revisions to the description of the alleged debt. Id. at ¶¶ 75-77. Respondent's debt collection lawsuit against Appellant relied on and incorporated a forged contract, purportedly changing the terms of payment for the dental services. Id. at ¶¶ 24 -28, 63. Respondent's collection actions are intertwined with and are inherently premised upon the financial arrangements made in the context of the sale.

B. The Court of Appeals Erred In Holding that Debt Collection Activities Are Not "In Connection With" the Originating Sale that Creates the Debt Obligation.

To be unlawful under the MMPA, an act must be committed "in connection with the sale or advertisement of any merchandise in trade or commerce." Mo. Rev. Stat. § 407.020.1. The MMPA's definition of "sale" describes a typical consumer transaction, in which a consumer receives "merchandise for cash or on credit." Mo. Rev. Stat. § 407.010(6). In general, most consumer transactions involve these two components: (1) receipt of goods and/or services by a consumer, and (2) payment for the goods and/or services by a consumer. To be in connection with the sale, then, an MMPA case must therefore relate to either the goods and/or services the consumer received, or the payment by the consumer for the goods and/or services.

The majority of MMPA cases tend to discuss a consumer's issues with the merchandise itself, for example, a vehicle. See Andra v. Left Gate Property Holding, Inc., 453 S.W.3d 216, 223 (Mo. 2015); Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC, 361 S.W.3d 364, 375 (Mo. 2012). The case at bar, on the other hand, alleges unfair practices in connection with the *payment* for the merchandise. Under these circumstances, this Court has already found that the collection of unpaid amounts necessarily occurs "in connection with" the corresponding sale from which the debt originated.

1. This Court's Conway and Watson decisions reaffirm that Respondent's collection conduct occurred "in connection with" the sale.

This Court recently analyzed the phrase "in connection with" in the context of post-sale debt collection conduct. Conway v. CitiMortgage, Inc., 438 S.W.3d 410, 412 (Mo. 2014); Watson v. Wells Fargo Home Mortgage, Inc., 438 S.W.3d 404, 405 (Mo. 2014). Both cases found that collection efforts related to a home mortgage were "in connection with" the original purchase.

In Conway v. Citimortgage, Inc., the homeowner-plaintiffs filed suit against FNMA and Citimortgage for unfair activities under the MMPA in connection with the collection of the homeowners' delinquent mortgage balance. 438 S.W.3d at 412. The plaintiffs had $15,000 escrowed with Citimortgage, who was servicing the loan. Id. The plaintiffs fell $9,000 behind on their loan payments. Id. Citimortgage refused to apply the $15,000 from the escrow account to the loan balance and instead elected to foreclose on the property. Id. Even after the foreclosure, the defendants failed to remit to plaintiffs the $15,000 that had been held in escrow. Id.

As Appellant requests here, this Court reversed the trial court's dismissal in Conway, which was based on the mistaken belief that that the MMPA "does not apply to post-sale ... activity wholly unrelated to claims or representations made before or at the time of the transaction." Id. at 413. In Conway, the trial court's ruling was wrong in at least two respects. First, as this Court noted, "a violation can happen at any time before, during or after a sale." Id. at 414. Of particular importance to Appellant's instant claims,

this Court held that a party's post-sale right to obtain payment on any past due amount "is part of that sale and is, therefore, 'in connection with' the loan." Id. at 415. Second, this Court held that the MMPA does not apply only to collection misconduct "when the entity engaged in the misconduct was a party to the transaction at the time the transaction was initiated." Id. Instead, the statute broadly applies to "any person" which "does not contemplate a direct contractual relationship between plaintiff and defendant." Id. at 416 (citing Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667, 669 (Mo. 2007)).

Even though, on its facts, Conway did not involve third-party debt collection, this Court made it a point to expressly overrule two Missouri Court of Appeals' decisions that previously had held third-party debt collection activities were not "in connection with" the initial sales transactions. Conway,438 S.W.3d at 415 abrogating State ex rel. Koster v. Professional Debt Management, LLC, 351 S.W.3d 668, 674 (Mo.Ct.App. E.D. 2011); State ex rel. Koster v. Portfolio Recovery Associates, LLC, 351 S.W.3d 661, 667 (Mo.Ct.App. E.D. 2011). Those decisions were premised on Respondent's same argument in this case that the debt collectors are not parties to the original transactions. Id. This Court rejected that argument, reasoning that "the MMPA was enacted to supplement the common law definition of fraud, there is no compelling reason to interpret 'in connection with' to apply only when the entity engaged in the misconduct was a party to the transaction at the time the transaction was initiated as Professional Debt and Portfolio Recovery Associates require." Id. at 415. Therefore, a defendant debt collector need not be one of the "original parties in a transaction" to be subject to the MMPA. See id. at 416.

After Conway, a debt collector cannot escape liability based on the temporal scope of the MMPA or the fact that it entered the relationship after a consumer's transaction. Despite Conway's unambiguous holding, the Court of Appeals in this case suggested that the result in Watson was intended to reflect that this Court "did not intend to swing wide the door on MMPA claims." Opinion, p. 13. In Watson, however, the plaintiff's wrongful foreclosure claims against the loan servicer, Wells Fargo, were in fact found to be "in connection with" a sale. Watson, 438 S.W.3d at 407-408. One of the conclusions in Waston was that the consumer stated a claim under the MMPA relating to "a party's rights to collect." Id. at 407-408. Appellant's MMPA claim in the instant case is consistent with this portion of the Watson decision. See id.

The distinguishing feature of Watson was that the plaintiff and defendant were also "contemplating creating a new agreement." Id. at 408. In Appellant's Substitute Brief, the plaintiff only argued in passing that this subsequent loan modification was itself a "sale," and that therefore the defendant's "bad faith negotiation" was in connection to that sale. Watson v. Wells Fargo Home Mortgage, Inc., Appellant's Substitute Brief, at 15-16 (Jan. 27, 2014). This argument was not further explored, however, such that liability for conduct relating to the "new agreement" had to be anchored to the original loan transaction. In that narrow context only, this Court found the negotiation for the "new agreement" was not "in connection with" the normal "bundle of services" for the loan. Watson, 438 S.W.3d at 408.

This Court held that collection of amounts owed, on the hand, was part of the "rights and obligation…fixed at the outset" of the transaction. Id. In this respect, both Conway *and* Watson are consistent with a finding that Appellant has stated a claim arising out of post-sale collection conduct in this case.

2. Appellant pleaded activity that possesses at least a minimal relationship to the sale.

The language of the MMPA is "drafted broadly" by design. Ward v. West County Motor Co., Inc., 403 S.W.3d 82, 85 (Mo. 2013). This Court's approach consistently hews to giving maximum breadth to the MMPA's provisions. See Detling v. Edelbrock, 671 S.W.2d 265, 272. (Mo. 1984) (interpreting the term "merchandise" broadly); Ports Petroleum Co., Inc. of Ohio v. Nixon, 37 S.W.3d 237, 240 (Mo. banc 2001) (interpreting an unlawful practice to "cover every practice imaginable and every unfairness to whatever degree"); Huch v. Charter Communications, Inc., 290 S.W.3d 721, 724 (Mo. 2009) (giving broad scope to the meaning of the statute).

The phrase "in connection with" should thus not be read as a term of limitation, but as one of enlargement. The United States Supreme Court has espoused this approach in its interpretation of the identical phrase "in connection with the purchase or sale" in the context of securities fraud. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 US 71, 85 (2006). The phrase is found in the Securities Litigation Uniform Standards Act, which, like the MMPA, is also remedial legislation to be given "a broader and more liberal interpretation." Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511

U.S. 164, 195 (1994). This is an admittedly broad interpretation, but the goal should be to provide the maximum amount of protection to consumers for unfair and deceptive conduct. Even with this broad interpretation, the statute is self-limiting by simply refraining from engaging in unfair business practices or causing a consumer an ascertainable loss of money or property.

Applying this principle to the terms in Section 407.020 prevents "evasion by overly meticulous definitions." Clement v. St. Charles Nissan, Inc., 103 S.W.3d 898, 900 (Mo.Ct.App. E.D. 2003). Unlike all of the other terms in Section 407.020(1), "in connection with" is not defined. In the absence of a statutory definition, the phrase "in connection with" is given its plain and ordinary meaning as derived from the dictionary. Conway, 438 S.W.3d at 414. citing Ports Petroleum Co., Inc. of Ohio v. Nixon, 37 S.W.3d 237, 240 (Mo. banc 2001). "'[T]o connect' is defined as 'to have a relationship.'" Id. citing Webster's Third New International Dictionary 480 (1993). This term, in turn, requires an examination of the particular facts in a given case.

Therefore, to plead an MMPA claim, a Plaintiff must "include a short and plain statement of the facts" establishing a relationship with the original sale. See Missouri Rule of Civil Procedure 55.05. The initial burden on the consumer is only to "plead sufficient information to enable the defendant to understand" the nature of the relationship being alleged. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W. 2d 371, 379 (Mo. 1993). "If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief,

then the petition states a claim." Ste. Genevieve Sch. Dist. R-II, et al. v. Bd. of Aldermen of Ste. Genevieve, et al., 66 S.W.3d 6, 11 (Mo. banc 2002).

The Court need not, for a motion to dismiss, analyze the contours of the relationship. Whether the alleged violation is sufficiently "in connection with" the original sale, for purposes of liability, can and should be left to the ultimate fact finder. Missouri already considers the existence of many relationships to be a question of fact. See Johnson v. Bi-State Development Agency, 793 S.W.2d 864, 867 (Mo. 1990) (principal-agent and employer-employee); Millard v. Corrado, 14 S.W.3d 42, 52 (Mo.Ct.App. E.D. 1999) (physician-patient); McFadden v. State, 256 S.W.3d 103, 160 (Mo. 2008) (attorney-client). The factors to be weighed in each situation are not susceptible to a mechanical application. See St. Charles County v. Hunter, 950 S.W.2d 593, 594 (Mo.Ct.App. E.D. 1997).

The ultimate determine of whether any given action is "in connection with" is not reasonably susceptible to an arbitrary bright-line about what kinds and how close of a relationship must exist for a consumer to state an MMPA claim. Allowing fact finders to decide on a case-by-case basis harmonizes the lack of a definition of "in connection with" and the broad scope and application of the statute. In this case, for example, Respondent attempted to collect monies that were allegedly due as a result of the original transaction. Appellant also pleaded that the parties agreed the relationship would not be complete until Appellant had paid. At a minimum, Appellant has alleged conduct that would allow a reasonable fact finder to establish a connection with the original sale. The Court of Appeals

thus erred in drawing their own conclusions about whether Respondent's role was "in connection" with the underlying purchase of services.

3. The lack of any express exemption for debt collectors under the MMPA as well as the recently adopted code of state regulations provides additional support that the MMPA applies to third party debt collectors.

As provided, the MMPA applies broadly to "any person." Mo. Rev. Stat. § 407.020.1. If the Missouri legislature wanted to create a blanket exemption for debt collectors, they knew how to and could have done so. See Mo. Rev. Stat. § 407.020.2 (listing a class of persons who are exempt from criminal liability under the Act); Mo. Rev. Stat. § 407.025 (no comparable exemptions, including but not limited to debt collectors, in the context of civil liability). The lack of any such language creating exemptions must be taken as purposeful on the part of the legislature. Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 552 (Mo. 1987) citing Gray v. Wallace, 319 S.W.2d 582, 585 (Mo. 1958) ("Our responsibility is to 'determine the legislative intent from what the legislature said and not from what we think the legislature…inadvertently failed to say.'").

The fact that Missouri, unlike other states, does not have a separate statute dealing specifically with debt collection activity lends further support for the legislature's intent that the MMPA to apply to debt collectors. While there exists a federal law regulating debt collectors, there is trade-off made for providing strict liability and a statutory penalty in exchange for a short one-year statute of limitations from the date of a violation. In this way, a debt collector is subject to liability for technical violations of even without any proof

of actual loss. Sunga v. Broome, 1:09CV1119 JCC, 2010 WL 3198925, at *5 (E.D. Va. Aug. 12, 2010) (noting that "the FDCPA is extraordinarily broad and must be enforced as written, even when eminently sensible exceptions are proposed in the face of an innocent and/or a de minimis violation."). The MMPA, on the other hand, provides a five-year statute of limitations, but only if the consumer can establish an "ascertainable loss of money or property." Mo. Rev. Stat. § 407.025.1. Thus, consumers should be able to seek relief under the general MMPA provision *if* they can otherwise demonstrate an unfair debt collection practice that caused them actual damages.

Lastly, insofar as there was previously any doubt about the intended applicability of the MMPA to debt collectors, that should no longer be the case in light of the new provisions of the Missouri Code of State Regulations. "The Missouri attorney general has authority to promulgate rules necessary to the administration and enforcement of the provisions of Chapter 407, RSMo." Mo. Rev. Stat. § 407.145. "[I]t is an unfair practice for any person to threaten to file a civil action, or to file a civil action…if such debt has been…deemed fully satisfied pursuant to an agreement with the consumer and the creditor." 15 C.S.R § 60-8.100. Similarly, "is unfair practice to seek or obtain without valuable consideration a reaffirmation of an obligation arising out of any debt…. [t]hat has been deemed fully satisfied pursuant to an agreement with the consumer and the creditor." 15 C.S.R § 60-8.110. These regulations subject "any person" taking certain debt collection activities to MMPA liability. "Rules duly promulgated pursuant to properly

delegated authority have the force and effect of law." Page Western, Inc. v. Community Fire Protection Dist., 636 S.W. 2d 65, 68 (Mo. 1982).

These new provisions were a direct result of the Missouri Attorney General's attempt to use the MMPA to combat the very same debt collection misconduct in the context of lawsuits from which Appellant seeks relief. Appendix, A65 "Proposed Rule Changes to Curb Abusive Debt Collection in Missouri's Judicial System," Missouri Attorney General Chris Koster (Dec 3, 2015). Of note, the Missouri Attorney General highlighted some of the widespread issues stemming from collection lawsuits, including debt collection attorneys filing suits with insufficient documentation and trying to assess attorneys' fees against consumers without any valid contract. Appendix, A72 ("Worse yet . . . some attorneys claim contractual entitlement to fees even though they do not possess the contracts contemplating such fees. Collecting reasonable attorneys fees under a contract is proper; allowing attorneys to realize an extra-judicial windfall is not.").

Notably, the very same issues the Missouri Attorney General identified and sought to prevent with the new provisions echo Appellant's claims within his First Amended Petition. Appellant alleges that Respondent filed a collection suit with insufficient documentation to support the alleged amount owed; instead, Respondent relied upon a knowingly fabricated agreement. *LF* 60-61, ¶ 86. Appellant also alleges the Respondent attempted to artificially inflate the amount due by "backdating" all of the dental services that gave rise to the debt to the earliest date in order to assess an unlawful amount of prejudgment interest. *LF* 59, ¶ 74. Appellant further alleges that Respondent attempted to

collect attorneys' fees that were not authorized by any law or contract—not even the forged contract. *LF* 57-58, ¶¶ 61-62, 65. Taken as true, it is difficult to conceive of a more unfair and deceptive business practice.

CONCLUSION

Contrary to Respondent's argument, the FDCPA's statute of limitations does not apply only to a debt collector's earliest violation. Each individual collection communication possesses its own limitations period, regardless of whether a debt collector previously violates the FDCPA outside of the statute of limitations period in substantially the same manner as a violation within the limitations period. The case law within the Eighth Circuit demonstrates that this is true even when a debt collection attorney continues to commit the same violation within the context of a collection lawsuit. Respondent in this case committed multiple, discrete violations within one year of the filing date of Plaintiff's FDCPA claim. The Court of Appeals erred when it found that the Respondent's earlier violations outside of the limitations period prospectively insulated any future violations within the statute of limitations, and its judgment should be reversed.

This Court recognizes that the submission of materials outside the pleadings does not automatically convert a motion to dismiss into one for summary judgment. The record in this case does not reveal that the Trial Court gave notification or considered the documents. The Court of Appeals erred in perpetuating a standard that requires Appellant to affirmatively object to avoid a significant change to the standard of review. Given the

availability of tolling doctrines, the judgment should be reversed to allow Appellant an opportunity to develop and present evidence in support of equitable tolling.

Respondent's conduct in collecting the alleged debt was, by its very nature, in connection with the dental services giving rise to that alleged unpaid balance. Emphasizing the MMPA as a broad, remedial statute, this Court has articulated two principles that develop the scope of activities that can be considered to be "in connection with" a purchase of merchandise. First, a defendant need not be a party to the original underlying transaction. Second, the violative conduct can be committed at any time before, during, or after the underlying transaction. In this case, Appellant alleges an ongoing relationship between the sale of merchandise and Respondent's unlawful collection actions. The Court of Appeals thus erred when it found an exemption for debt collection attorneys that is not supported by the text of the statute or its implementing regulations.

Appellant Keith Jackson respectfully requests that this Court reverse the decision of the Trial Court and Court of Appeals and remand the case for further proceedings in accordance with the Missouri Rules of Civil Procedure.

Respectfully submitted,

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/s/ Bryan E. Brody

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IN THE SUPREME COURT
STATE OF MISSOURI

Keith Jackson	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. SC95771**
	)	
Dennis J. Barton III,	)	
	)	
Respondent.	)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Appellant's Substitute Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b).

Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 14,677.

Respectfully submitted,

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	)	
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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned does hereby certify that, on this October 3, 2016, a true and correct copy of the foregoing Appellant's Substitute Brief was electronically served upon the attorney for Respondent, Dennis J. Barton III, via case.net at the date and time filed, and via electronic mail to dbarton@bartonlawllc.com.

Respectfully submitted,

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