IN THE SUPREME COUT OF THE STATE OF MISSOURI

CACH, LLC,

Plaintiff/Respondent,

v. SC 91780

JON ASKEW,

Defendant/Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri

Associate Division

Honorable Dale Hood, Judge

BRIEF *AMICI CURIAE* OF NATIONAL CONSUMER LAW CENTER IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

The National Consumer Law Center is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a non-profit corporation in 1969 at Boston College School of Law, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. NCLC has been referred to as the "leading non-profit low-income consumer advocacy organization in the country." Mazola, et al. v. May Department Stores Co., No. 97- CV-10872-NG, 1999 WL 1261312 at *4 (D. Mass. January 27, 1999).

NCLC has focused considerable attention on abusive debt collection practices, which include the initiation of massive numbers of lawsuits by debt-buyers whose claims are widely based on insufficient evidence. NCLC publishes a comprehensive series of

treatises on an extensive array of consumer protection laws[1]. Among them is *Collection Actions* (2nd ed. 2011), nearly 600 pages long and designed to assist attorneys, creditors and debt collectors in complying with the law. In addition, NCLC publishes *Fair Debt Collection* (7th ed. 2011) and *Truth in Lending* (7th ed. 2011), also important to debt collection lawsuits.

STATEMENT OF FACTS

In the last ten years, the debt-buying industry has grown immensely. Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change, A Workshop Report,* iv (Feb. 2009) (hereinafter *"Challenges of Change"*). This growth coincided with the deregulation of creditors' credit card practices, opening the door to the use of punishing fees, exorbitant interest rates, and an array of hidden charges. *See Marquette*

[1] This Court in *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 670 (Mo. 2007) referred to NCLC as a "national expert" in consumer law and cited its treatises for support. The United States Supreme Court has also relied upon NCLC's treatise on debt collection practices. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, n.12 at 1618 (U.S.2010) ("Cf. generally R. Hobbs, National Consumer Law Center, Fair Debt Collection § 7.2 (6th ed.2008 and Supp.2009) (surveying case law on scope of § 1692k(c))").

Nat'l. Bank of Minneapolis v. First of Omaha Service Corp, 439 U.S. 299 (1978); *Smiley v. Citibank (SD), N.A.,* 517 U.S. 735 (1996). Creditors frequently profit more from the piling on of disproportionate fees and penalties than from the regular payment of debt. Kathleen W. Johnson, *Recent Developments in the Credit Card Market and the Financial Obligations Ration,* Fed. Res. Bulletin, 474 (Autumn 2005). Given the gains to be made from a consumer's default, creditors have concerned themselves much less with consumers ability to pay, extending credit to consumers whose desperate financial circumstances make it more likely that they will not keep up. Not surprisingly, these practices have led to a major increase in consumer debt, default, and debt collection. Federal Reserve Board, *Statistical Release – Consumer Credit Historical Data (Revolving)*, *available at* www.federal reserve.gov/releases/ g19/hist/cc_hist_mt.tx.

In the past, creditors dealt with bad debts by taking them as tax write-offs, while consumers suffered the consequences of bad credit. Now, however, creditors sell the defaulted-on accounts en masse to third-party debt buyers like CACH, in addition to writing off the bad debt. The consumer now suffers additional consequences, including aggressive and relentless debt-collection tactics by companies with whom they are not familiar; the repeated reporting of the alleged debt on their credit reports; the frequent inability to verify the accuracy of the debt or the amount sought either because the original creditor is not identified or the claim regards an alleged debt for which the consumer long ago lost any records they might have had; and perhaps worst of all, the intimidating predicament of being sued in a court of law, regardless of their ability to afford counsel.

Central to the debt-buying industry's profit model, is the use of the courts to pursue the stale debts they purchase. *See* Dale K. Irwin, Debra K. Lumpkins, and Amy Sweeny Davis, *Defending Consumer Debt Collection Suits,* MO. BAR CLE, CONSUMER L. & PRAC. §6.38 (2010) (hereinafter "*Defending Consumer Debt").* The industry has overwhelmed our courts with scores of lawsuits, so much so that entire dockets have been dedicated to handling these cases. *Id.* In St. Louis alone, ten dockets per week are reserved for credit card collections, with hundreds of cases per docket. Indeed, this is where Askew's case got its start. Large numbers of cases end in default judgment such that debt-buyers never have to prove them. When a consumer is fortunate enough to retain counsel, however, an obvious conflict surfaces between the debt-buying industry's profit model and the court system's demand for reliable and competent evidence.

The collection industry is anticipated to net annual revenues worth $11.6 billion by 2011, while the estimated net revenue collection law firms will reap is $2.3 billion dollars. *Collecting Consumer Debts: The Challenges of Change, A Workshop Report,* iv (Feb. 2009). Debt-buying companies purchase bad debts for just a few cents on the dollar. *Debt Portfolio Prices Edge Higher,* Collections & Credit Risk (March 23, 2010), http://www.collectionscreditrisk.com//news/debt-portfolio-prices-edge-higher-3001103-1.html. ("Fresh chargeoffs are selling in the upper end of the 3 cents to 8 cents on the dollar range" with older accounts selling for even less).

These debts are sold so cheaply because all that is typically transmitted to the buyer is a recordless Excel spreadsheet listing thousands of debts, each one represented by a single line of data listing nothing more than the alleged debtors' names, account

numbers, addresses, social security numbers, date of last payment, and account balances, if that. *Defending Consumer Debt.* While debt-buyers will attempt to puff up their cases by attaching their own employee's affidavits summarizing the information he or she reads from the database, the reality is that the majority of debt-buyer lawsuits are based on this line item summary data alone[2]. *Id.*

With good reason, sellers frequently refuse to warrant the collectability or the accuracy of the account information. *Id.* Account records themselves come at an additional cost, if they are made available at all. Even when debt-buyers obtain account records, they are very often vague, contradictory, and incomplete. *See MBNA America Bank, N.A v. Nelson,* 15 Misc. 3d 1148[A], *1, 841 N.Y.S.2d 826 (N.Y. Civ. Ct. 2007) ("[T]he proof required to obtain a judgment in the creditor's favor is lacking, usually as a result of poor record keeping on the part of the creditor.") NCLC members in Missouri who regularly handle debt-buyer cases find that, in those rare situations where documents are produced by a suing debt-buyer, they include agreements that cannot be tied to the

[2] *See* David Siegel, *Debt Collectors Face a Hazard: Writer's Cramp,* N.Y. TIMES, Oct. 31, 2010 (quoting deposition dialogue between consumer protection attorney, Dale Irwin, and a CACH employee responsible for attesting in affidavits to information gleaned only from a line of data on a computer screen: "'So,' asked Dale Irwin…'if you see on the screen that the moon is made of green cheese, you trust that CACH has investigated that and has determined that in fact, the moon is made of green cheese?' 'Yes,' Mr. Mills replied).

consumer, bills of sale that are incomplete and do not conclusively establish ownership, and account records that fail to justify and explain the amount being sought. *Defending Consumer Debt.* Indeed, debt-buyers are rarely able to explain what portion of an alleged balance is comprised of interest, fees, or purchase amounts. Armed with only incomplete information, it is not uncommon for debt-buyers to pursue the wrong person or the wrong amount.

Consequently, consumers are deprived of the ability to challenge erroneous transactions or demonstrate how much of their debt is due to purchases versus questionable finance charges and junk fees. *See In re Blair, Amended Order Overruling Objection to Claims,* Civ. No. 02-1140 (W.D.N.C. Feb. 10, 2004) (finding claims against 31 different individuals in bankruptcy court by major credit card company revealed that on average, 57% of the debts consisted of interest and fees). If the original creditor's records are erroneous, those errors will simply be transmitted undetected to the buyers that follow. *Comment of ACA International Submitted to FTC,* 43 n.55 (June 6, 2006). ("No amount of due diligence on the part of debt buyers can cure deficiencies in the original data transmitted by an original credit grantor.") *See also Hooper v. Capital Credit & Collection Services, Inc.* No. CV 03-793-JE, 2004 WL 825619 (D. Or. Apr. 13, 2004) (finding attempted collection of debt already paid to original creditor resulted from original creditor's bookkeeping errors and may violate the FDCPA).

The risk that account information is erroneous increases with multiple resales of accounts from one debt-buyer to another. According to an officer of an Illinois debt buyer who had purchased, or ostensibly purchased, bad paper, "[t]he same portfolio is

sold to multiple buyers; the seller doesn't actually own the portfolio put up for sale; half the accounts are out of statute [of limitation]; accounts are rife with erroneous information; access to documentation is limited or nonexistent." Corinna C. Petry, *Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can used to avoid nasty surprises,* Collections & Credit Risk, pg. 24, Vol. 12, No. 3 (March 2007).

In 2004, the Federal Trade Commission ("FTC") asked the federal district court to freeze the assets and halt the debt collection activities of a debt-buying company after the FTC determined that the company had been using threats, intimidation, and harassment to obtain payments on debts that were not actually owed. The FTC determined that a shocking 80% of the company's collections were derived from debts not legitimately due. The FTC found that consumers were paying on the debts even though they did not owe them because they wanted to put an end to the aggressive debt collection tactics. FTC Press Release, *FTC Asks Court to Halt Illegal CAMCO Operation; Company Uses Threats, Lies, and Intimidation to Collect "Debts" Consumers do Not Owe* (Dec. 8, 2004), *available at* http://www.ftc.gov/opa/2004/12/camco.shtm.

The reshuffling of accounts among debt-buyers also leads to attempts to collect debts the consumer already paid. Most commonly, consumers pay the debt to one debt-buyer, not knowing the debt buyer has already sold the account to another. *See, e.g., Overcash v. United Abstract Grp., Inc.,* 549 F.Supp. 2d 193, 195 (N.D. N.Y. 2008); *Chiverton v. Fed. Fin. Grp., Inc.,* 399 F. Supp. 2d 96, 99 (D. Conn. 2005); *Fontana v. C. Barry & Assocs., LLC,* No. 06-CV-359A, 2007 WL2580490, at *1 (W.D. N.Y. Sept. 4,

2007). The repeated reselling of accounts can also lead to disputes among creditors about who really owns the account. *Wood v. M&J Recovery LLC,* CV 05-5564, 2007 U.S. Dist. LEXIS 24157, *1 (E.D. N.Y. Apr. 2, 2007) (featuring four different firms filing cross claims against one another for right to collect one particular debt).

Debt buyers routinely sue massive numbers of consumers in court with no better proof than what has been described above. Courts have criticized that "lawyers engaged in the collection of assigned debts seem especially prone to pursuing claims improperly, often at the expense of the most vulnerable members of our society." *Erin Servs. Co., LLC. V. Bohnet,* 2010 NY Slip Op 503274U, *1 (N.Y. Dist. Ct. Feb. 23, 201). The court found:

> No proof of due diligence in investigating the accuracy of the different listings is submitted. The computer records are also notable for what they fail to include: namely, proof of the assignment of the original account by First USA, proof that defendant actually owed money on that account at the time of the assignment, and proof that plaintiff had a good faith basis for pursuing the claim at the time the action was commenced in 2004.

Id.

While purchasing accounts on the cheap may result in large profit margins, it creates fertile ground for errors and abuse. Every industry shares the desire to keeps its costs as low as possible in order to maximize profits. The problem here is, of course, that the debt collection industry lowers its costs by refusing to purchase the competent records needed as proof in the very courts it chooses to use as its premier debt collection tool.

The courts stand at the gateway and can ensure that only sound evidence becomes the bases for judgments against the consumers sued. Indeed, the courts have an "important role in safeguarding consumer rights and in overseeing the fairness of the debt collection process." *MNBA,* 15 Misc. 3d 1148[A] at 1. If the courts lower evidentiary standards to accommodate the improvident practices of debt-buyers, consumers will too often be deprived of justice and the integrity of our courts will suffer.

ARGUMENT

The Uniform Business Records as Evidence Act Protects Consumers

The critical role played by the rules of evidence in ensuring the soundness of legal proceedings is especially pronounced when examined in the context of the lackadaisical record keeping practices of the debt-collection industry. *See Turley v. State,* 571 S.W.2d 465, 466 (Mo.App. 1978). The hearsay rule is designed to ensure the trustworthiness of documents. *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 616 (Mo. 2006). The business records exception to the hearsay rule should apply only if all of the demands of § 490.680 are satisfied. *Estate of White, Matter of,* 665 S.W.2d 67, 69 (Mo.App.S.D. 1984). When treated as mere technicalities that can be relaxed or glossed over, the rationale for the exception is undermined and the documents cannot be considered reliable. *See Discover Bank v. Smith,* 326 S.W.3d 120 (Mo. App. S.D. 2010) ("While the seriatim recitals of the prerequisites encompassed in section 490.680 may appear at first blush to be but talismanic formulas whose mere recitations at trial bring about a magical acceptance of a document into evidence, each statutory requirement,

nevertheless, is grounded upon reason, verity and efficiency."); See *also Kitchen v. Wilson,* 335 S.W.2d 38, 44 (Mo. 1960).

Exhibit 2, consisting of a woefully incomplete collection of billing statements, is a prime example. The trial court admitted the documents without any testimony pertaining to (1) their mode of preparation, (2) whether they were created in the ordinary course of business, or (3) when they were created – all of which are fundamental to the business records exception to the hearsay rule. Because the foundation required by § 490.680 was not even close to satisfied, they are rendered unreliable.

For example, the records declare a balance without providing any explanation as to how that balance was achieved. Not being an employee of the company that generated the records, the sponsoring witness was not in a position to explain. She could not say how the records were prepared. That means neither the court nor the attorneys had any ability to demonstrate that the amount demanded was accurate and in line with the terms of the credit card agreement, assuming *arguendo* that the credit card agreement was valid. No one can say what portion of the amount came from purchases, from fees, and from interest. Given that the creditor itself likely refused to vouch for the validity of the balance, allowing these records into evidence sets an extremely harmful precedent that demeans our system of justice and will let debt buyers off the evidentiary hook while consumers literally pay the price.

The admission of **Exhibit 7**, the bill of sale between Washington Mutual and Worldwide, was equally problematic. The sponsoring witness did not testify that she had been trained at either institution and could not, as a result, do anything except speculate

about those business' record-keeping practices. Even if she had been trained, it is unlikely that such training would be enough to provide the necessary familiarity required by § 490.680 RSMo. Yet, she was permitted to lay the "foundation" for a bill of sale that did not in anyway implicate the Askew account. *See Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App., 2010); *C & W Asset Acquisition, LLC v. Somogyi,* 136 S.W.3d 134, 139 (Mo. Ct. App. 2004); *Zundel v Bommarito,* 778 S.W. 2d 954, 958 (Mo. Ct. App. 1989).

By admitting this critical document into evidence without the testimony of a qualified witness, the trial court created the risk that Askew will be pursued by other creditors who also claim to have purchased the account from Washington Mutual or its successors. *See, e.g, Chiverton v. Fed. Fin. Grp., Inc.*, 399 F. Supp. 2d 96, 99 (D. Conn. 2005) (determining that former debtor paid one collection agency, but another firm later claimed that it bought the debt and made multiple threatening and harassing phone calls to the former debtor).

The court also erred in admitting **Exhibit 9**, the redacted page from an Excel spreadsheet containing Askew's name and other data. This exhibit presents yet another example of the careless record-keeping practices of the debt-buying industry. The sponsoring witness could not say how the document was prepared, who prepared it, or when it was made and the document itself contained no such indicators. This is the only document that attempts to provide the crucial link between Askew and CACH yet its foundation was astonishingly deficient. The court's ruling, as with **Exhibit 7**, subjects

Askew to the risk of having other debt buyers claim in the future to have purchased his account.

Perhaps most troubling of all was the court's admission of **Exhibit 11**, the alleged credit card agreement created by Providian, without which there could be no conceivable case. Here, the sponsoring witness conceded that she had no personal knowledge of Providian's business practices, but the court permitted her to lay an extremely wanting "foundation" anyway. The witness could not say if the document was prepared in the ordinary course of business, she had no personal knowledge as to when the document was prepared, and she could not describe the mode of the document's preparation. The generic agreement represents yet another document that contained no links to Askew: no account number, no name, no address, not even a date. A records custodian from Providian or its successor was needed to lay a proper foundation for this document. For whatever reason, CACH chose not to call one. Because of this choice, the document did not carry any plausible reliability and it should have been excluded from evidence.

Failure to Prove Standing Subjects Consumers to Collections on Paid Accounts

Finding that CACH had established standing to sue without sufficient evidence lends itself to abuses in the debt buyer industry by subjecting Askew and other consumers to duplicative judgments on a single debt. This practice pervades the entire debt buyer industry because it is an inevitable result of the debt buyer business model. In this case, if CACH were able to successfully collect from Askew based on the document fragments it submitted, there would be no protections for Askew if a true owner of the debt sought to collect from him at a later point in time. Such lawsuits are all too common.

Reported cases from around the nation demonstrate that debtors do face multiple collection attempts or lawsuits by competing entities which lack standing. Collection attempts by firms without standing come in many varieties. Most commonly, the debtor pays Debt Buyer A, but then Debt Buyer B later attempts to collect. *See Overcash,* 549 F. Supp. 2d at 195; *Chiverton,* 399 F.Supp 2d at 99; *Fontana,* No. 06-CV-359A, 2007 WL 2580490, at *1.

Sometimes, debtors pay Debt Buyer A though Debt Buyer A had already sold the debt to Debt Buyer B without debtor notification. *See Smith v. Mallick,* 514 F.3d 48, 50 (D.C. Cir. 2008). Other times, debtors pay the original creditor prior to a debt buyer's collection attempts. *See Assocs. Fin. Servs. Co. v. Bowman, Heintz, Boscia, & Vician, PC,* No. IP 99-1725-C-M/S, 2004 U.S. Dist. LEXIS 6520, at *5-*9 (S.D. Ind. Mar. 31, 2004).

There are several other ways firms may try to collect paid debt. One debt collector may attempt to collect twice on the same debt. *See Capital Credit & Collection Serv., Inc. v. Armani,* 206 P.3d 1114, 1116-18 (Or. Ct. App. 2009). Firms may even sue each other over the right to collect debt. *See Wood v. M&J Recovery LLC,* CV 05-5564, 2007 U.s. Dist. LEXIS 24157, *1 (E.D. N.Y. Apr. 2, 2007).

In fact, a simple Westlaw search reveals numerous other examples:

McCammon v. Bibler, Newman & Reynolds, P.A. 493 F. Supp.2d 1166 (D. Kan. 2007): finding that a collection agency pursued former debtor for payment and obtained judgment despite knowing that former debtor had paid original creditor.

Grimsley v. Messerli & Kramer, P.A. No. 08-548 (JRT/RLE), 2009 WL 928319, at *1 (D. Minn. March 31, 2009): finding firm collecting on already paid debt.

Sweatt v. Sunkidd Venture, Inc. No., C05-5406FDB, 2006 WL 1418652, at *1 (W.D. Wash. May 18, 2006): noting firm collecting on debt already paid.

Hooper v. Capital Credit & Collection Services, Inc. No. CV 03-793-JE, 2004 WL 825619 (D. Or. Apr. 13, 2004): finding attempted collection on debt already paid to original creditor potentially due to original creditor's bookkeeping errors.

McHugh v. Check Investors, Inc. No. Civ.A. 5:02CV00106, 2003 WL 21283288, * at 2 (W.D. Va. May 21, 2003): finding that former debtor had paid debt before collection agency ever began collection attempts.

Proving ownership is more than a mere technicality. There is good reason to hold debt-buying plaintiffs to their burden to prove standing with reliable, complete evidence supported by a sound foundation. If firms do not establish proper ownership of a debt, as CACH failed to do in the case at bar, great harm can come to consumers.

Account Stated: Prior Payments Do Not Equate to an Agreement as to Amount Due

Mrs. Askew's payment on the account should not be treated as an implied promise on the part of her husband to pay the amount CACH demanded in its suit. As already set forth in the fact section above, it is not uncommon for consumers to pay on debts they do not owe because they simply wish to the put the matter to rest. This is precisely why 80% of CAMCO's collections came from illegitimate debts. FTC Press Release, *FTC Asks Court to Halt Illegal CAMCO Operation; Company Uses Threats, Lies, and Intimidation to Collect "Debts" Consumers do Not Owe* (Dec. 8, 2004), *available at*

http://www.ftc.gov/opa/2004/12/camco.shtm. Permitting courts to find the existence of an implied promise to pay a balance based solely on prior payments would deprive consumers of legitimate defenses while allowing debt-buyers to collect through the courts debts that are not actually due.

GENERAL CONCLUSION

The debt buying industry thrives by purchasing stale debts for pennies on the dollar, debts that it collects using aggressive debt collection methods and the courts. Debt buying companies choose to purchase these debts, knowing that the balances may not be accurate, knowing that it will probably not be able to obtain the proof necessary to prevail on a case at trial. They do so because the cost is low and the chance that consumers will hire lawyers to protect their rights are low too. When a consumer does assert his or her rights, our rules of the evidence offer the only hope that the consumer will receive justice in the face of an industry known for using data and records plagued by inaccuracies. If those standards are weakened to accommodate an industry that chooses to purchase stale debt and chooses to go forward on cases without the proper evidence, consumers will suffer unfairly and confidence in our courts will decline. NCLC respectfully asks this Court to reverse the trial court's judgment and require debt-buyers to comply with the rules of evidence and standards of proof that are the bulwarks of our system of justice.

Respectfully submitted,

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CERTIFICATION

Appellant hereby certifies that the foregoing Brief *Amici Curiae* for National Consumer Law Center in Support of Appellant includes all of the information required by Missouri Rule 55.03 and states that the Brief complies with the limitations of Missouri Rule 84.06(b). This *Amicus Curiae* Brief is 4,580 words long.

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CERTIFICATE OF SERVICE

The undersigned hereby subscribes and certifies that a copy of the foregoing was affixed with proper First Class postage, deposited in the U.S. Mail on October 11th, 2011, and addressed to the following attorney(s) of record, said attorney(s) having also been served a copy of the foregoing via the Supreme Court of Missouri's electronic filing system:

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