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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE

FIRESIDE BANK f/k/a FIRESIDE THRIFT CO.,
(CAVALRY INVESTMENTS, LLC – Appellant of Record)
Appellant,

v.

JOHN W. ASKINS and LISA D. ASKINS,
Respondents.

BRIEF OF AMICUS CURIAE STATEWIDE POVERTY ACTION NETWORK

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Statewide Poverty Action Network ("Poverty Action") is Washington State's largest anti-poverty organization, committed to building grassroots power to end causes of poverty and create opportunities for everyone to prosper. Poverty Action's advocacy is directed by people with low incomes, ensuring accountability to the communities that are most directly impacted by the effects of poverty. Poverty Action's advocacy is informed by a racial equity analysis, which recognizes that as longstanding racial disparities in wealth and income have continued, households of color are much less likely to have assets or cash on hand to handle unexpected expenses or a loss of income. As a result, households in communities of color are at significant risk for overwhelming debt than white households.

Poverty Action recognizes that consumers fall into debt for a variety of reasons, including illness, job loss, or other life-changing situations. It believes that everyone, regardless of their income, should have fair and reasonable consumer protections that safeguard their assets and their ability to meet their basic needs. To that end, Poverty Action has a substantial interest in the development of Washington law to protect the thousands of Washington consumers who, like John and Lisa Askins, face exploitative and unlawful debt collection practices.

Among the many consumer debt issues that concern Poverty Action are predatory and unfair collection practices associated with the

debt buying industry, where old, uncollected debts and court judgments are sold for pennies on the dollar and without warranties to debt buyers like Appellant Cavalry Investments, LLC ("Cavalry"). In this type of transaction, there is no means to ensure whether interest, fees, and other charges added to the principal over time are in fact lawful and correct. As a result, debt buyers often, unlawfully, shift the burden to consumers to prove they do not owe the debt in the amount alleged.

This amicus brief addresses the broader legal and policy issues involving the debt buyer industry and the direct effect of these practices on consumers like John and Lisa Askins and should assist the Court in evaluating and deciding the important issues in this appeal.

II. STATEMENT OF THE CASE

Amicus adopts and incorporates by reference the Statement of the Case of Respondents John and Lisa Askins. *See* Respondents' Br. at 3-13.

III. ARGUMENT

A. Serious Problems Endemic in the Debt Buying Industry, Where Consumer Debts Are Sold "As Is," Result in Unlawful Collection Practices That Have a Devastating Effect on Consumers.

1. The Development of the Debt Buying Industry Has Created an Environment Where Unlawful Collection Practices Flourish.

The most significant change in the debt collection industry in the last two decades is the advent and growth of debt buying. *See* Jake

Halpern, *Bad Paper: Chasing Debt from Wall Street to the Underworld* (Farrar, Straus and Giroux, New York: 2014). In a report on the debt buying industry, the Federal Trade Commission explained that debt buyers purchase charged-off debt or other delinquent consumer debt portfolios for pennies on the dollar[1] from creditors or prior assignees of the debt. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 23 (2013) ("FTC Debt Buyer Report"), *available at* https://www.ftc.gov/reports/structure-practices-debt-buying-industry .

The accounts are sold "as is," often repeatedly from debt buyer to debt buyer, pursuant to contracts called "forward flow agreements" in which the seller states that the debts may not be owed or not in the amount stated, and the essential documentation may be missing. *See* Peter Holland, *Debt Buyer Lawsuits and Inaccurate Data,* Communities & Banking (Spring 2014), at 1. Selling an account "as-is" often translates into unreliable records being used to collect on debts or to enforce judgments for those debts already reduced to judgment. According to the FTC, "both sellers and buyers kn[o]w that some accounts included within a portfolio might have incomplete or inaccurate data, including data on important information such as the then-current balances on debts." FTC Debt Buyer Report at C-7-8. "Most significantly, debt buyers often did not

[1] The FTC's investigation of debt buyers revealed that the average price paid for purchased consumer debt was 4 cents per dollar of debt face value, with older debt selling for a lower price. FTC Debt Buyer Report at ii.

receive the information needed to break down outstanding balances on accounts into principal, interest, and fees." *Id.* at 36.

Consumer debts are usually sold without any warranties whatsoever. *See* FTC Debt Buyer Report at iii, 24-28 (finding that "sellers generally disclaimed all representations and warranties with regard to the accuracy of the information they provided at the time of sale about individual debts"); *see also* Dalié Jimenez, *Dirty Debts Sold Dirt Cheap*, 52 Harvard J. on Legislation 41 (Winter 2015) (independent study of 84 purchase and sale agreements for consumer debts finding that "in many contracts, sellers disclaim all warranties about the underlying debts sold or the information transferred"). As Professor Dalié Jimenez, a leading expert on the debt buying industry, has explained, when a debt is conveyed in the commercial context, the purchase and sale agreement includes warranties from the seller and is not akin to a quitclaim deed where a property interest is conveyed without warranties. *Id.* at 45. While it makes sense that "a rational buyer at a minimum would want the seller to warrant that (1) it has title to the accounts it is selling, (2) it has complied with applicable consumer protection laws, and that (3) the information it is acquiring about the debt and the debtor is accurate[,]" this is not the practice in the debt buying industry. *Id.* at 45-46. Instead, the purchase and sale agreements include "'reliance waivers,' a declaration from the buyer that it has not relied on any statements or representations the seller may have made at any point." *Id.* at 47. Certain "material aspects

of the transaction" are disclaimed, including "compliance with applicable laws" and "that the amounts listed as owed by the account holders are correct." *Id.*

Information on the debts sold is usually transmitted in large spreadsheets, which is problematic when substituted for original account-level documentation and court records. Creditors (and collectors) make mistakes when transferring information from the original documentation to spreadsheets. *See, e.g., Chase Bank, USA N.A. and Chase Bankcard Services, Inc.,* No. 2015-CFPB-0013 (Consumer Fin. Prot. Bureau July 8, 2015) (Consent Order) ¶¶ 24-27 (listing examples), *available at* https://files.consumerfinance.gov/f/201507_cfpb_consent-order-chase-bank-usa-na-and-chase-bankcard-services-inc.pdf. A spreadsheet is unlikely to include an itemization of the debt that distinguishes between principal, interest, and the various fees and charges that have accumulated over time, both pre- and post-judgment. And, if debt buyers receive only spreadsheets conveying basic information about the debt, and a detailed history of payments and garnishments is missing, they will not have documents in hand that are necessary to accurately respond to questions or disputes, and may resort to guesses or estimates, and, as is the case here, attempt to shift the burden of proof to the consumer.

While most debts sold have not yet been reduced to judgment, debt buyers do purchase "judgment accounts" like the Askins' account, which result from an unpaid legal judgment. FTC Debt Buyer Report at D-9; *see*

also Jimenez, *Dirty Debts Sold Dirt Cheap*, at 54 (discussing debt buyer industry practices and noting that debt may be sold "even after a judgment has been entered against a consumer"). Judgment accounts are attractive to debt buyers because the amount the court awards to the creditor replaces the original debt and "creates a new debt obligation that, typically, commences a new statute of limitations period and may also permit additional collection methods (e.g., garnishment of wages or bank accounts or liens against real property) that may not have been available prior to the judgment." FTC Debt Buyer Report at D-9.

As Human Rights Watch explained in a recent report, "[t]he debt buying industry's business model is rooted in a very simple logic. If debt buyers can acquire debts cheaply enough, and develop efficient, low-cost methods of pursuing debtors, they can realize substantial profits by collecting even a small percentage on the debts they purchase." Human Rights Watch, "Rubber Stamp Justice: U.S. Courts, Debt Buying Corporations, and the Poor" (2016) at 11, *available at* https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor.

2. Cavalry's Enforcement of the Judgment Against the Askins Without Definitive Proof of the Amount Owed Is a Direct Consequence of the Debt Buying Industry's Standard Practices.

The Askins' case exemplifies the trickle-down effect on consumers of the debt buying industry practices described above. Fireside Bank, to whom the used car dealer assigned the retail installment contract after the Askins purchased a used vehicle, filed a lawsuit in July 2007 to collect an auto repossession and sale deficiency, and three months later, obtained a default judgment of $10,180.32. Respondents' Br. at 4. This amount was in addition to the $10,053.00 the Askins had already paid Fireside over the life of the loan before surrendering the vehicle. *Id.* Over the next five years, Fireside recovered funds from the Askins on 12 writs of garnishment, in the amount of $10,849.16. *See id.* at 4-6 (detailing garnishments).[2] Cavalry purchased the judgment in September 2012 and was able to obtain a garnishment judgment and order to pay based on a writ of judgment previously issued to Fireside; thereafter, Cavalry filed five additional declarations for writs of garnishment. *Id.* at 7-8.[3] At the point when the Askins obtained legal representation through the Northwest Justice Project, they had paid approximately $22,102.38 for the used car purchased for $14,813.44.[4] Respondents' Br. at 8. Cavalry

[2] The Askins' brief includes citations to the specific garnishment papers filed between 2007 and 2012, with a detailed chart provided at page 5.
[3] The Askins' brief includes citations to the garnishment papers Cavalry filed between 2013 and 2015, with a detailed chart provided at page 7.
[4] The purchase price of the used 2000 Dodge Durango was $14,813.44, $13,713.44 of which was financed. CP 4-7.

claimed in its garnishment papers that over $10,722.48 was still owed on the judgment. *Id.*

What happened next is all-too-typical of the problems that arise when debts are bought and sold in bulk with no warranties and limited backup information. After the Askins retained Northwest Justice Project to represent them and disputed the amount alleged owed, Cavalry's counsel provided the Askins' counsel with what he described as "an Amortization of the account from the date of the judgment until it was assigned to our client and transferred to our office." CP 422. In the subsequent dispute, which led to the Askins' motion for order to show cause why a full satisfaction of judgment should not be entered based on the payments received, irregularities in the "amortization" and attempts to collect amounts in addition to the principal that were not authorized by law, Cavalry provided three other inconsistent, and conflicting, "amortizations." Respondents' Br. at 9-12; *see* CP 372, 408-409, 412, 445, 450-457. Cavalry admitted in its trial court briefing that the initial amortization "mistakenly included costs and fees that should not have been included as they were not awarded by the Court." CP 430. The trial court recognized that Cavalry's later attempts to, in its own words, "cure[ ] this defect" by submitting the subsequent amortizations were nothing more than eleventh-hour efforts to eliminate unauthorized costs and avoid liability. *See* CP 462-63 (Order Denying Motion for Reconsideration; finding that Cavalry "submits a new 'accounting' wherein it attempts to

back out the unauthorized costs in order to cure the various violations of RCW 19.16.250(21)"). Cavalry's attempts to "do the math" and reverse-engineer the (apparently limited) records it had purchased with the Askins' judgment, reconcile the same with the garnishment papers, and do so in a way that resulted in an amount due that did not include unlawful costs, were, and are, troubling.

3. Unlawful Collection Practices Undermine Consumers' Economic Security.

The unfair and unlawful debt collection practices that arise out of debt buyers' customary practices can have a devastating effect on low-income people like John and Lisa Askins.[5] As one recent report explained, millions of Americans "live with the possibility that, at any moment, their wages or the cash in their bank accounts could be seized over an old debt." Paul Kiel, "So Sue Them: What We've Learned About The Debt Collection Lawsuit Machine," *ProPublica*, May 5, 2016, *available at* https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine.

Every dollar paid to a debt buyer that may or may not be owed impairs consumers' ability to pay legitimate creditors for rent and health insurance premiums, keep families out of bankruptcy and preserve assets

[5] As the Askins explain in their brief, Mr. Askins' typical earnings after withholdings were under $3,000 a month. Respondents' Br. at 6 n.2. That the Askins were living on a very limited income is made clear by the fact that they qualified for legal services provided by Northwest Justice Project, Washington's publicly funded legal aid program.

for ensuring family and community stability. In many states, including Washington (which is one of the least protective states in the country with regard to the amount of earned income protected from garnishment), judgments are valid for 10 years and renewable for up to another 10 years. *See* RCW 6.17.020(1) (providing that judgments may be enforced within ten years of entry); RCW 6.17.030 (court can grant additional ten years during which judgment can be enforced). The ability to enforce a judgment for up to 20 years prevents consumers and their families from being able to make ends meet or to get a fresh start. When families are living paycheck to paycheck – assuming there is a wage earner in the household – their income goes to necessities like rent, food, and utility payments. *See, e.g.,* Paul Kiel & Annie Waldman, "The Color of Debt: How Collection Suits Squeeze Black Neighborhoods," ProPublica (Oct. 8, 2015), *available at* https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods."A garnishment hits this kind of household budget like a bomb." *Id.* Thus, the radiating harms from a debt buyer lawsuit can be devastating on a low-income family's housing and economic stability long after the judgment is entered.

The harsh consequences of this broken system fall disproportionately on people and communities of color. *See, e.g.,* Kiel & Waldman, "The Color of Debt"; *see also* Susan Shin & Claudia Wilner, New Economy Project, "The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality,"

at 5 (2013), *available at* https://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf (finding that zip codes with highest rate of default judgments in debt collection cases were predominantly in non-white communities); Human Rights Watch, "Rubber Stamp Justice" at 22 (explaining that debt collection lawsuits "seem to fall disproportionately on minority communities").

Because of the devastating financial impact debt buyers' actions can have on people struggling to make ends meet, there is a compelling interest in ensuring that debt buyers, and indeed, all debt collectors, act in accordance with the law and that justice is done. It is incumbent on the courts to ensure that debt buyers are not able to enforce judgments against consumers using unfair and unlawful methods that include adding fees and interest in amounts not permitted by the law. Turning a blind eye to those practices, or excusing their consequences as "no harm, no foul" math errors, only exacerbates the problem.

B. Shifting the Burden to Consumers to Prove They Do Not Owe a Debt, or to Prove the Amount Properly Owed, Is Contrary to the Collection Agency Act and Basic Contract Law.

Washington courts "construe consumer protection statutes...liberally in favor of the consumers they aim to protect." *Jametsky v. Olsen*, 179 Wn.2d 756, 765, 317 P.3d 1003 (2014) (requiring liberal construction of the Distressed Property Conveyances Act, RCW chapter 61.34); *see also Carlsen v. Global Client Solutions*, 171 Wn.2d 486, 498, 256 P.3d 321 (2011) (explaining that "as a remedial statute

enacted to stem the 'numerous unfair and deceptive practices' rife in the growing debt adjustment industry, the debt adjusting statute should be construed liberally in favor of the consumers it aims to protect"). The Collection Agency Act, chapter 19.16 RCW ("CAA') is no exception. The remedial purpose of the CAA permeates the statute. Violations of the CAA's "prohibited practices" section, RCW 19.16.250, are per se "unfair and deceptive acts in the conduct of trade or commerce" for purposes of the Consumer Protection Act, chapter 19.86 RCW ("CPA"). *See* RCW 19.16.440. As a result, all CPA remedies are available to consumers alleging CAA violations, including exemplary damages and attorneys' fees. *See* RCW 19.86.090. And, the CAA itself provides an additional remedy when debt collectors engage in statutorily prohibited practices: stripping the debt to principal. *See* RCW 19.16.450. The Washington Supreme Court has confirmed that "[t]he business of debt collection affects the public interest" and explained that "collection agencies are subject to strict regulation to ensure they deal fairly and honestly with alleged debtors." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 54, 204 P.3d 885 (2009).

For these reasons, this Court should strictly construe the CAA's prohibition on collecting amounts in addition to principal unless those amounts are "allowable interest, collection costs or handling fees expressly authorized by statute, or, in the case of suit, attorney's fees and taxable court costs],]" *see* RCW 19.16.250(21). There is nothing in the

CAA providing that all amounts added to the principal are presumed lawful until challenged by the alleged debtor. The effect of reversing the trial court's order, and agreeing with Cavalry that the Askins did not meet "their" burden of proof, would be to allow debt collectors to demand information or documentation from consumers, or otherwise shift the burden to the consumer to disprove that they owe the alleged debt and whether interest, fees, and other charges added to the principal over time are in fact lawful and correct.

Shifting the burden to consumers to show that they do not owe the debt, or do not owe a debt in the alleged amount, would also fly in the face of black letter contract law. Generally, a plaintiff alleging breach of contract "must establish the existence of a valid and enforceable contract, the rights of the plaintiff and obligations of the defendants under the contract, violation of the contract by the defendant, and damages to the plaintiff." *Citoli v. City of Seattle*, 115 Wn. App. 459, 476, 61 P.3d 1165 (2002). In short, debt collectors, including debt buyers, must meet the same burden of proof that applies to any other party seeking to recover an amount allegedly owed. In a hypothetical breach of contract lawsuit between multi-million dollar corporation "A" and multi-million dollar corporation "B" which resulted in a judgment for "A," it is unfathomable that "A" could add interest and fees to the judgment over time without proof that the interest and fees were both lawful and accurate. It should be just as unfathomable for a large debt buyer corporation like Cavalry to

enjoy a relaxed standard of proof when it seeks to enforce a judgment in a consumer collection case, to which fees and interest have been added over time. Given the recurring problems with the integrity of the account information that debt buyers purchase, coupled with the imbalance of power that already exists between debt buyers and struggling consumers, debt buyer litigants are the last type of litigant that should enjoy the benefits of shifting the burden to consumers to prove that the debt is valid and the amount sought is correct and authorized by law. Here, just as it would in a commercial dispute with another corporation, Cavalry should bear the burden of proof, and should be required to produce reliable evidence of the amount sought, not a series of inconsistent accountings.

IV. CONCLUSION

For struggling Washington households, abusive debt collection and judgment enforcement tactics simply compound the harms caused by insufficient income, unexpected financial emergencies, or predatory lending. The cumulative impacts of these practices are real, and vulnerable communities are more likely to be affected by these abuses. To that end, confirming the broad and remedial scope of the Collection Agency Act, Chapter 19.16 RCW, and affirming the trial court's decision stripping the Askins' debt to principal will send a strong message to debt buyers that engaging in the type of practices that affected the Askins will not be tolerated. Amicus Poverty Action respectfully requests this Court affirm the

trial court's orders finding that Cavalry violated the RCW 19.16.250(21) by collecting or attempting to collect amounts to which it was not entitled and holding that the debt should be stripped to principal, pursuant to RCW 19.16.450.

DATED this 20th day of April, 2018.

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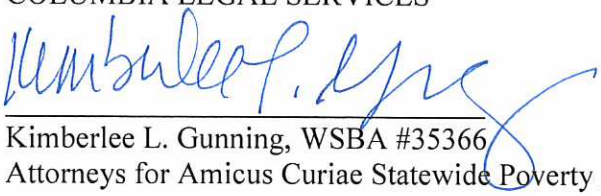

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DECLARATION OF SERVICE

I, Annabell Joya, a legal assistant at Columbia Legal Services, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing to be filed electronically and served via the Washington State Appellate Courts' Portal, by email and by first-class mail, postage prepaid, upon the following counsel of record:

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