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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ON CERTIFICATION FROM THE UNITED STATES DISTRICT  
COURT, EASTERN DISTRICT OF WASHINGTON AT SPOKANE

IN

KELLI GRAY, ET AL., PETITIONERS,

vs.

SUTTELL & ASSOCIATES, ET AL., RESPONDENTS.

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RESPONDENTS/DEFENDANTS MIDLAND FUNDING, LLC,  
MIDLAND CREDIT MANAGEMENT, INC., AND ENCORE  
CAPITAL GROUP, INC.'S RESPONSE TO *AMICUS CURIAE*  
MEMORANDUM OF THE NORTHWEST JUSTICE PROJECT

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 ORIGINAL

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## I. INTRODUCTION

The amicus brief submitted by the Northwest Justice Project (“NJP”) should be given little weight. It is based on a plain misreading of the Washington Collection Agency Act (“CAA”) and ignores recent amendments to the CAA that are not retroactive, and do not become effective until October 1, 2013. NJP also fails to recognize that, since at least 2004 and for the entire time at issue in this case, the Washington Collection Agency Board (“Collection Agency Board”) and Department of Licensing explicitly rejected the view that debt purchasers were included in the definition of “collection agency” under the CAA.

Nevertheless, NJP wants this court to read the previous version of the CAA to require debt purchasers, such as Midland Funding, to be licensed as a “collection agency.” Clearly, they were not; especially in the case of Midland Funding, whose purchased accounts were only collected upon by its licensed parent, Midland Credit Management, Inc. (“MCM”). Simply put, the CAA was never meant to cover debt purchasers—until it was specifically amended to do so. The arguments advanced by NJP do not change this.

## II. DISCUSSION

### A. Debt Purchasers, Such As Midland Funding, Were Not Included In The CAA's Pre-Amendment Definition Of "Collection Agency," And Thus, Were Not Required To Be Licensed.

NJP's primary argument that the CAA definition of "collection agency" was meant to include debt buyers is that the term "solicit claims for collection" within Section 19.16 of the CAA applied to debt purchasers "because they seek to **purchase (i.e. solicit)** claims from creditors that they later try to collect for themselves." NJP Br. at 2-3 (emphasis added). This is false. Nothing in the phrase "solicit claims for collection" indicates inclusion of debt purchasers. NJP does not cite any authority, other than its own subjective view that "solicit" means the same as "purchase." Indeed, NJP's interpretation is at odds with the pre-amendment CAA as a whole, which never mentions debt purchasers or regulates them until the 2013 Amendments.<sup>1</sup> In other words, the 2013 Amendments would not have been necessary had the definition of "collection agency" already included debt purchasers.

This Court has explained that the plain meaning of a statute

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<sup>1</sup> The Senate Bill Report for the 2013 Amendments to RCW 19.16 explicitly states that the amendment "[r]evises the definition of 'collection agency,' to include debt purchasers. Midland Respondents' Appendix p. 16.

“is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” *In re Estate of Blessing*, 174 Wash. 2d 228, 231, 273 P.3d 975, 976 (2012). In that regard, to determine the ordinary meaning of an undefined term, this Court looks to standard English language dictionaries. See, e.g., *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash. 2d 869, 877-78, 784 P.2d 507, 511 (1990).

A review of the definition of “purchase” and “solicit” only further supports that debt purchasers did not fit into the definition of a “collection agency” under the CAA. The definition of “purchase” according to Black’s Law Dictionary is “[t]he act or an instance of buying.” Black’s Law Dictionary does not define “solicit” but it does define “solicitation” as “[t]he act or an instance of requesting or seeking to obtain something; a request or petition.” Black’s Law Dictionary (9th ed. 2009) (emphasis added).

Other courts have relied upon the common dictionary definition of “solicit” and found that it means “to approach with a request or a plea (as in selling or begging) ... to endeavor to obtain by asking or pleading ...” *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011)

*cert. denied*, 132 S. Ct. 1566 (U.S. 2012) (quoting Webster's Third New International Dictionary 2169 (unabridged ed. 1993)). "In other words, [a] solicitation is nothing more than a request in which the solicitor communicates, in some fashion, his desire that the person solicited do something, such as give money, join an organization, transact business, etc." *Id.* Thus, contrary to NJP's assertion, it is more than plain that words "solicit" and "purchase" are not synonymous.

NJP also spends time in its brief focusing on the placement of the "inclusion of a comma in RCW 19.16.100(2)(a) after 'soliciting claims for collection'" in the definition of "collection agency." NJP Br. at 2 n.2. This argument is confusing and makes no sense; especially when a contextual reading of the CAA definitions are undertaken.<sup>2</sup> In that regard, a consistent, logical, contextual reading of the pre-comma portion of § 19.16.100(2)(a) is that a "collection agency" is a third-party collector who contacts account owners/collectors to ask for the opportunity to collect on those accounts. This is consistent with the post-comma portion of the definition "collecting or attempting to collect claims owed or due

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<sup>2</sup> "Unless a different meaning is plainly required by the context..." indicating the Legislature's intent to refer to the context of the statute. See RCW 19.16.100.

or asserted to be owed or due *another person*,” which refers to a third-party collector collecting on behalf of an account owner/creditor. See RCW 19.16.100(2)(a). Contrary to the argument advanced by NJP, the comma between the two phrases does not strip them of a common context, rather, the entire sentence refers to third-party collection agencies who: (1) seek business by contacting account owners to request placement of delinquent accounts with them for collection, and (2) collect or attempt to collect on those accounts.

The context of the complete definition of “collection agency” further supports Respondents’ interpretation of the CAA. For instance, RCW 19.16.100(2)(b) and (c) include third parties and those who appear to be third parties. Specifically, subsection (b) includes those who furnish forms for collection **“even though the forms may be or are actually used by the creditor himself or herself in his or her own name.”** RCW 19.16.100(2)(b) (in relevant part) (emphasis added). Mention of the word “creditor” and the creditor’s use of the regulated forms does not make the creditor a “collection agency” or even subject to working further through the CAA, RCW 19.16. At the same time, subsection (c) includes as a “collection agency” someone who uses a fake name

in an attempt to make it look as if they are a third-party collection agency attempting to collect a debt. In sum, the complete definition of "collection agency" thus supports the interpretation that third-party collection agencies are included in 19.16.100(2)(a), but not an account owner, such as Midland Funding. *See also, Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1220 (W.D. Wash. 2011) (examining the CAA's complete definition of "collection agency" and finding that attorneys who collect on their own claims are excluded from the definition.)

Moreover, other definitions in the CAA also indicate that "collection agency" does not include debt purchasers. For example, in defining the term "out-of-state collection agency," the Legislature cited to Section 1692a(6) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), which contains the more broadly defined term "debt collector," but chose to use the narrower term "collection agency." RCW 19.16.100 (8) defines "client" or "customer" to mean "any person authorizing or employing a collection agency to collect a claim," which suggests that a debt purchaser who does not itself attempt to collect debts, but employs a collection agency to collect for it would be a client or customer, not a collection agency. In other words, under the definition of "Out-

of-State Collection Agency,” Midland Funding is a “client” and MCM is an out-of-state collection agency, who is licensed in Washington. RCW 19.16.100(4). *See also*, Midland Respondents’ Brief pp. 6-7.

Simply put, Respondents’ interpretation of the CAA’s licensing requirement is consistent with the CAA, because a third-party collection agency would then be licensed before it begins contacting account owners to seek placement of delinquent accounts with the collection agency for collection, or for advertising that it is available to do so. In contrast, NJP’s interpretation of “solicit claims for collection” would illogically and unreasonably require that a debt purchaser be licensed in Washington as a “collection agency” before it attempted to purchase a portfolio of delinquent accounts anywhere in the country, or even advertised that it was in the market for such a purchase. Nothing in the CAA supports such an bizarre interpretation.

Finally, reading the statutory scheme of the CAA as a whole further indicates that it was intended to regulate third-party debt collectors, not debt purchasers. Prior to the 2013 Amendments, RCW 19.16.260 required a “collection agency” to be licensed prior to filing a lawsuit for the collection of a claim for “any third party,”

indicating that "collection agency" is separate from the account owner and that the "collection agency" is the entity that must be licensed—not the account owner. Under RCW 19.16.430(2), a collection agency that operates without a license may be penalized by not getting paid its collection fee. This further supports the interpretation that "collection agency" means a third-party collector and not a debt purchaser, who would not get paid a fee for collecting the money it is already owed as the owner of the account. Accordingly, "collection agency" should not be read expansively to encompass debt purchasers prior to the 2013 Amendments.

**B. The CAA's New Licensing Provisions Do Not Apply To Debt Purchasers Until The Amendments Become Effective.**

NJP attempts to make a "policy" argument that the CAA's protection of consumers is substantive and important in protecting against abuses. That may be true. However, NJP's policy argument does not change the meaning of the statute as the Legislature wrote it and NJP provides no legal authority for a contrary interpretation. NJP's argument that debt purchasers should be licensed so that they are subject to additional consumer safeguards is one of the reasons that the Legislature chose to enact the 2013 Amendments. But those amendments are not

retroactive and nothing indicates (nor does NJP argue) that the 2013 Amendments were a clarification of existing law.<sup>3</sup> Rather, as noted above, the 2013 Amendments revised the definition of "collection agency" to include debt purchasers, indicating that they are a new addition to the CAA, not an existing category of regulated entities. See Midland Respondents' Appendix p. 16.

NJP's citations to other purported supplemental authorities also do not support any policy argument that debt purchasers were required to be licensed prior to the amendments. NJP Br. at 4-5. For example, the Federal Trade Commission studies that the "advent" of debt purchasing is a "recent" development and further suggest that the 2013 Amendments reflect the Legislature recently becoming aware of these developments and choosing to expand the CAA to regulate debt purchasing.

NJP also cites to its own statistics regarding default judgments for an entirely different company, Portfolio Recovery

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<sup>3</sup> NJP also argues that the change to the CAA does not make the licensing issue moot. NJP Br. at 6-7. The Midland Respondents agree that the certified questions are not technically moot. The 2013 Amendments go into effect later this year and are not retroactive. In other words, whether a debt purchaser, such as Midland Funding, was required to be licensed between 2008 and 2010 when it filed lawsuits against the remaining plaintiff is still at issue in the underlying lawsuit from which the certified questions arise. What is moot is the argument that debt purchasers be read into the CAA as "collection agencies" to promote regulation, without any legal authority for such an interpretation.

Associates ("PRA"): NJP Br. at 5. This shows nothing about Midland Funding and fails to consider that, unlike in PRA's case, MCM is Midland Funding's licensed affiliate that engaged in collection activity. See Midland Respondents' Br. pp. 6-7.

C. **Since At Least 2004, The Collection Agency Board And The Licensing Department Construed The CAA Not To Apply To Debt Purchasers.**

NJP chooses to selectively ignore the Collection Agency Board and Department of Licensing's long-held position (encompassing the time-period at issue in this case) that debt purchasers, such as Midland Funding, were not required to be licensed under the CAA. Instead, NJP cites only to a September 28, 2012, resolution by the Collection Agency Board that states as follows:

The [Collection Agency Board] should continue to review issues related to what extent debt buyers are collection agencies pursuant to RCW 19.16, and that the Board's current and past minutes are not intended for use as a persuasive authority on these issues.

NJP Br. at 7.

As Respondents set forth in their respective Response Briefs, in 2004, the Collection Agency Board passed a resolution, after considering the research, analysis, and upon the advice of the

Washington State Attorney General, that debt purchasers (i.e. buyers) were not subject RCW 19.16 and did not have to be licensed as collection agencies. ECF 429, Exs. A-D. In 2010, the Licensing Department relied upon the Board's 2004 resolution in advising a debt buyer that it did not need to be licensed under RCW 19.16. ECF 429, Exs. A-D. Further, in 2011, the Licensing Department provided an affidavit in *Cach, LLC v. Volk*, Superior Court for King County Case No. 09-2-22506-1SEA, certifying that the Licensing Department relied upon the Collection Agency Board's meeting minutes from July 14, 2004, to inform a debt purchaser that it did not have to be licensed under RCW 19.16. ECF 429, Ex. A, pp. 4-5. Thus, prior to the Collection Agency Board's September 2012 resolution to review issues regarding to what extent debt purchasers are collection agencies under RCW 19.16, the Collection Agency Board and the Licensing Department plainly considered debt purchasers not to be regulated by the CAA.<sup>4</sup> Irrespective, nothing in the Board's minutes for the

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<sup>4</sup> NJP's Fred Corblt, who signed the Amicus Brief and who was a member of the Collection Agency Board, was specifically reminded of the Board's and Licensing Department's actions during the Board's October 2011 meeting when he proposed a legislative amendment to the CAA to include debt purchasers. See ECF 429, Ex. C, meeting minutes of October 2011 Board meeting, paragraph 2.2 (p. 31). At the next Board meeting on February 10, 2012, the Attorney General reported on whether debt purchasers were covered by RCW 19.16, however the minutes of that meeting do not

September 2012 meeting suggest that RCW 19.16 governs debt purchasers or requires them to be licensed to file a lawsuit in Washington courts.

On February 22, 2013, the 2013 Amendments to RCW 19.16 to add debt purchasers was first read in the Legislature. See 1822-S.SL, p. 1. As noted above, the provision adding debt purchasers goes into effect on October 1, 2013. *Id.* p. 12. Thus, debt purchasers, such as Midland Funding, were not subject to RCW 19.16 at any time prior to October 1, 2013, and certainly not during the events alleged in the federal lawsuit for which these certified questions are pending.

Finally, while selectively citing to one of the Collection Agency Board's meeting minutes, NJP also attempts to minimize the Collection Agency Board's authority. NJP Br. at 7-8. This is simply an attempt to avoid the Collection Agency Board's position to which NJP does not agree and has tried to erase. The Collection Agency Board's duties require advising the Licensing Department regarding rules and making recommendations about administering the CAA. See RCW 19.16.351. It is axiomatic that the Licensing

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state what the Attorney General concluded. ECF 429, Ex. D, p. 37, ¶ 2.1. Tellingly, however, Mr. Corbit then moved to recommend that RCW 19.16 be amended to include debt purchasers and the motion passed. *Id.*

Department is authorized to enforce licensing under the CAA. See RCW 18.235.005, 18.235.010(5), 18.235.020(b)(2), 18.235.030. Accordingly, the Collection Agency Board's resolutions that debt purchasers were not included in the definition of "collection agency" directly contributed to the Licensing Department advising an attorney for a debt buyer and a Washington state court that debt purchasers were not regulated by RCW 19.16. Thus, contrary to NJP's assertions otherwise, the Collection Agency Board's resolutions do have legal significance, especially to the extent the Licensing Department relies upon them in enforcing the CAA.

D. **The Cases Recited In NJP's Amicus Brief Do Not Hold That A Debt Purchaser Previously Needed Be Licensed Under The CAA.**

NJP sets forth three decisions from courts that it claims have concluded that debt buyers are collection agencies. NJP Br. at 8-11. In addition, NJP claims that the FDCPA also supports this view. However, a review of the cases cited by NJP, along with a recent decision by the United States Court of Appeals for Ninth Circuit, undercuts NJP's arguments.

First, in *Semper v. JBC Legal Group*, 2005 WL 2172377 (W.D. Wash. 2005), the court held only that a law firm collecting a debt belonging to another must be licensed as a collection agency.

Contrary to what NJP claims, *Semper* does not stand for the proposition that the CAA requires debt purchasers to be licensed and does not hold that debt purchasers are subject to the CAA.

The second case cited by NJP, *In Re Krysl*, 304 B.R. 425 (Or. 2004), is also distinguishable. The collection agency in *Krysl* claimed exemption from Oregon licensing as a “factoring agency,” but had failed to meet the Oregon statutory requirements, making it a collection agency under Oregon law. *In Re Krysl*, 304 B.R. 425, 428-29, 431 (Or. 2004). Notably, the collection agency also admitted that if the debtor paid the creditor instead of the collection agency, the debt was considered satisfied. *Id.* at 427. In other words, the debt was being collected for another. Although Oregon’s licensing statute bears little resemblance to the CAA, Oregon law does distinguish between “collection agencies” and “clients.” *Id.* at 429. Thus, even if Oregon law did at all apply to this case, which it does not, unlike the collection agency in *Krysl*, it is undisputed that Midland Funding is only a debt purchaser, it does not collect for others. On the contrary, it is MCM, Midland’s licensed parent, which collects for others.

Third, the Portfolio Recovery Associates, LLC v. Alexander case cited by NJP case, is distinguishable because PRA both

owned the debt and was collecting on the debt itself. Again, this is not the case with Midland Funding. PRA also failed to dispute any material facts, thereby waiving its arguments that it was not a "collection agency," under the CAA. Further, the court in Alexander did not provide any reasoning for its conclusion that the CAA applied to PRA. NJP's Amicus Appendix 19-23, p. 3, lines 5-18. Thus, the lower court's holding is not persuasive on the certified issues before this Court.

Finally, NJP's reference to the FDCPA definition of "debt collector" is misplaced as the CAA defines a different term. See above Section I.A. Moreover, the Ninth Circuit's recent decision in *Schlegel v. Wells Fargo Bank, N.A.*, No. 11-16816, -- F.3d. ---, 2013 WL 3336727 \*\*1-4 (9th Cir. 2013) places into doubt the argument that the Midland Funding is even a "debt collector" under the FDCPA, because its collection efforts, if any, relate only to debts owed to itself.

In *Schlegel*, the Ninth Circuit upheld the dismissal of a putative class action claim that Wells Fargo was a "debt collector" under the FDCPA because it was collecting debts originally owed to others. *Id.* at \*4. By way of background, Wells Fargo had sought to collect on a debt originally owed to another entity before it was

assigned to Wells Fargo. Specifically, plaintiffs claimed that Wells Fargo fit the definition of a debt collector under the FDCPA, which includes those “who regularly collect[] or attempt[] to collect, directly or indirectly, debts owed or due or asserted to be owed to another.” *Id.* at \*3 quoting 15 U.S.C. 1692a(6). The Ninth Circuit, in upholding the dismissal of plaintiffs’ FDCPA claims against Wells Fargo, explained as follows:

This argument fails, because it would require us to overlook the word “another” in the second definition of “debt collector.” The complaint makes no factual allegations from which we could plausibly infer that Wells Fargo regularly collects debts owed to someone other than Wells Fargo. Because NTFN, Inc. assigned the Schlegels’ loan and deed of trust to Wells Fargo, **Wells Fargo’s collection efforts in this case relate only to debts owed to itself.** The statute is not susceptible to the Schlegels’ interpretation that “owed or due another” means “originally owed or due another.”

*Id.* at \*4 (emphasis added)

Like Wells Fargo, it is undisputed that Midland Funding, at most, only collects debts owed to itself. Thus, while the new amendments to the CAA require Midland Funding to be licensed, there is now even less to support the view that Midland Funding fit

into the previous definition of a "collection agency" under the CAA because Midland Funding may have been deemed a "debt collector" under the FDCPA.

E. **NJP's Proposed Burden/Benefit Test And Rendition Of Consumers' Purported Rights Do Not Support A Finding That The CAA Previously Required Debt Purchasers, Such As Midland Funding, To Be Licensed.**

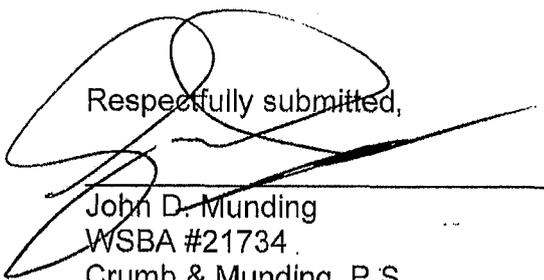
At the end of its amicus brief, NJP sets forth an argument that there is little burden for Midland Funding to become licensed as a "collection agency" under the CAA. NJP Br. at 13-14. This confuses the issues before the Court on the certified questions. Nowhere has Midland Funding argued that it would be a burden to obtain a collection agency license; rather, the issue is whether it was required to do so under the CAA. It is undisputed that MCM has long been licensed and is the parent company of Midland Funding. Thus, prior to the amendments, licensing Midland Funding would have been redundant (and the CAA did not require it). See Midland Respondents' Brief pp. 6-7. Now that the CAA will be changed to require licensing effective October 1, 2013, Midland Funding has applied to be licensed under the CAA.

Further, NJP's argument that Washington consumers would have no recourse if Midland Funding is not found to have been

required to be licensed is also without merit. It is undisputed that consumers can seek relief through the filing of Washington Consumer Protection Act (“WCPA”) claims against debt purchasers, which has four-year statute of limitations. See ECF 429, Ex. C, p. 17. This is exactly what the plaintiffs did in the federal case from which the certified questions before this Court arise. Midland Respondents’ Brief, 6-9 (citing to Federal Court’s Motion to Dismiss Order, which held, in part, that Plaintiff Scott had met the WCPA’s pleading requirements against Defendants, including Midland Funding, ECF 416, pp. 6-15.) See also, *Panang v. Farmers Ins. of Washington*, 166 Wash. 2d 27, 54 (2009)(explaining that the WCPA covers claims not available under the CAA).

### III. CONCLUSION

The arguments advanced in NJP’s amicus brief do not alter the fact that debt purchasers, especially those with circumstances similar to Midland Funding, were not a “collection agency” as defined by RCW 19.16.100, and thus, were not required to be licensed under RCW 19.16 prior to filing any lawsuits in Washington on debts that they were owed. Thus, NJP’s arguments should be given no weight.



Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin J. McDonnell, certify that on the 5th day of August, 2013, I caused true and correct copies of the foregoing, Respondents/Defendants Midland Funding, LLC, Midland Credit Management, Inc., and Encore Capital Group, Inc.'s Response to *Amicus Curiae* Memorandum of the Northwest Justice Project, to be served on the following persons by First Class U.S. Mail, postage prepaid:

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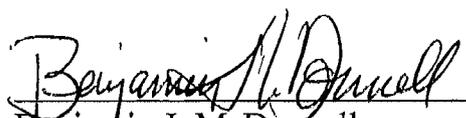
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Benjamin J. McDonnell

## OFFICE RECEPTIONIST, CLERK

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Washington State Supreme Court, Clerk of Court:

Please find attached for filing in the following matter Respondents/Defendants Midland Funding, LLC, Midland Credit Management, Inc., and Encore Capital Group, Inc.'s Response to *Amicus Curiae* Memorandum of the Northwest Justice Project ("Response"):

*Kelli Gray, et al. v. Suttell & Associates, et al.*, Case No. 88414-5.

The Certificate of Service is submitted for filing contemporaneously with the attached Response.

Please call or email should there be any questions. Thank you.

Respectfully,  
Ben

—  
**Benjamin J. McDonnell**  
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