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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CHAD M. CARLSEN, and SHASTA L. CARLSEN, husband and wife, individually, and on behalf of a Class of similarly situated Washington families; and CARL POPHAM and MARY POPHAM, husband and wife, individually and on behalf of a Class of similarly situated Washington families,

Plaintiffs,

v.

GLOBAL CLIENT SOLUTIONS, LLC an Oklahoma limited liability company; ROCKY MOUNTAIN BANK & TRUST, a Colorado financial institution; JOHN AND JANE DOES A-K,

Defendants.

**GLOBAL CLIENT SOLUTIONS, LLC &
ROCKY MOUNTAIN BANK & TRUST'S
ANSWER TO BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF WASHINGTON**

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|--------------------|
| TABLE OF AUTHORITIES | iii |
| I. PREFACE..... | 1 |
| A. INTERESTS OF THE ATTORNEY GENERAL | 1 |
| B. FEDERAL TRADE COMMISSION'S AMENDED TELEMARKETING SALES RULE | 2 |
| II. THE ATTORNEY GENERAL SIMPLY REPEATS OTHER BRIEFS AND ARGUES MATTERS NOT BEFORE THIS COURT ON CERTIFIED QUESTIONS..... | 2 |
| III. THE ATTORNEY GENERAL IGNORES THE PLAIN LANGUAGE OF THE DEBT ADJUSTING ACT | 3 |
| IV. ARGUMENT | 4 |
| A. INTRODUCTION | 4 |
| B. THE ATTORNEY GENERAL ARGUES CERTIFIED QUESTION THREE IN CIRCULAR FASHION..... | 6 |
| C. THE IMPLIED CAUSE OF ACTION CONTENTION IS AN ATTEMPT TO TRUMP THE EXPRESS STATUTORY LANGUAGE THAT EXEMPTS RMBT AND GLOBAL FROM THE DEBT ADJUSTING ACT ... | 8 |
| 1. By its express terms, the Debt Adjusting Act protects consumers from and provides a civil remedy against debt adjusters | 9 |

| | | |
|----|--|----|
| 2. | By its express terms, the Debt Adjusting Act provides enforceable rights to an identifiable class, which militates against overriding the legislature and writing in an implied cause of action for aiding and abetting..... | 10 |
| 3. | By its express terms, the Debt Adjusting Act denies the Attorney General the very language he asks this Court to write into the statute..... | 14 |
| D. | THERE IS NO REASON TO CONSIDER THE RESTATEMENT (SECOND) OF TORTS § 876(B) AS A BASIS OF LIABILITY | 15 |
| E. | THE DEBT ADJUSTING ACT AND CONSUMER PROTECTION ACT, IF APPLIED AS THE ATTORNEY GENERAL ARGUES, ARE UNCONSTITUTIONAL | 17 |
| F. | THE DEBT ADJUSTING ACT DOES NOT ACCOMMODATE THE APPLICATION OF JOINT AND SEVERAL OR CONCURRENT TORTFEASOR LIABILITY TO THIS BANKING RELATIONSHIP | 19 |
| V. | CONCLUSION..... | 20 |
| | CERTIFICATE OF SERVICE | 22 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>Page</u> |
|---|--------------------|
| <i>Allen v. American Land Research</i> , 95 Wn.2d 841, 631 P.2d 930 (1981)..... | 19 |
| <i>Browning v. Slenderella Sys. Of Seattle</i> , 54 Wn.2d 440, 341 P.2d 859 (1959)..... | 10, 11, 12, 13 |
| <i>Cazzanigi v. General Elec. Credit Corp.</i> , 132 Wn.2d 433, 938 P.2d 819 (1997)..... | 14 |
| <i>Citizens for Responsible Wildlife Mgmt. v. State</i> , 149 Wn.2d 622, 71 P.3d 644 (2003)..... | 3, 15 |
| <i>Doherty v. Federal Trade Comm'n</i> , 392 F.2d 921 (6th Cir. 1968) | 18 |
| <i>Federal Trade Comm'n v. Neovi, Inc.</i> , 604 F.3d 1150 (9th Cir. 2010) | 18 |
| <i>Halberstam v. Welch</i> , 705 F.2d 472 (D.C. Cir. 1983)..... | 16 |
| <i>In re Citicorp Credit Serv.</i> , 116 F.T.C. 87 (1993)..... | 18 |
| <i>In re Litton Indus.</i> , 97 F.T.C. 1 (1981)..... | 19 |
| <i>In re Value Vision Int'l</i> , 132 F.T.C. 338 (2001)..... | 18 |
| <i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)..... | 10 |

| | |
|---|-------|
| <i>Naches Valley Sch. Dist. No. JT3 v. Cruzen,</i> 54 Wn. App. 388, 775 P.2d 960 (1989)..... | 13 |
| <i>Ochoa Ag Unlimited, L.L.C. v. Delanoy,</i> 128 Wn. App. 165, 114 P.3d 692 (2005), <i>review denied,</i> 156 Wn.2d 1021, 132 P.3d 735 (2006)..... | 15 |
| <i>Pleas v. City of Seattle,</i> 49 Wn. App. 825, 746 P.2d 823 (1987)..... | 3, 18 |
| <i>Seattle-First Nat. Bank v. Shoreline,</i> 91 Wn.2d 230, 588 P.2d 1308 (1978)..... | 20 |
| <i>Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1,</i> 140 Wn.2d 403, 997 P.2d 915 (2000)..... | 15 |
| <i>Venwest Yachts, Inc. v. Schweickert,</i> 142 Wn. App. 866, 176 P.3d 577 (2008)..... | 8 |
| <i>Westview Inv. v. U.S. Bank, N.A.,</i> 133 Wn. App. 835, 138 P.3d 638 (2006)..... | 20 |

STATUTES

| | |
|----------------------------|------|
| RCW § 18.28 | 4 |
| RCW § 18.28.010 | 9 |
| RCW § 18.28.010(2)..... | 3 |
| RCW § 18.28.010(2)(b)..... | 11 |
| RCW § 18.28.080 | 7, 8 |
| RCW § 18.28.185 | 9 |
| RCW § 18.28.190 | 3, 9 |
| RCW § 18.28.200 | 9 |

RCW § 18.28.2201

RCW § 19.864, 9

RULE

RAP 10.3(e)3

REGULATIONS

16 C.F.R. § 310.2(m)2

16 C.F.R. § 310.4(a)(5)(ii)2, 5

RESTATEMENTS

Restatement (Second) of Torts § 874A9

Restatement (Second) of Torts § 876B.....15, 16

OTHER AUTHORITIES

“Consent Decree and Judgment,” *State of Washington v. Freedom Debt Relief, LLC a Delaware limited liability company*, Case No.: __, State of Washington, King County Superior Court. <http://www.atg.wa.gov/pressrelease.aspx?id=27454>.....17

Telemarketing Sales Rule <http://www.ftc.gov/os/2010/07/R411001finalrule.pdf>.....5

Telemarketing Sales Rule Debt Relief Rule Fact Sheet – 7/28/10 at <http://www.ftc.gov/os/2010/07/100729tsrfactsheet.pdf>.....2, 5

I. PREFACE

A. INTERESTS OF THE ATTORNEY GENERAL

The Attorney General has ample statutory power to pursue the debt settlement industry. What he does not have, but what he seeks by filing an Amicus Brief in this cases, is to expand his executive authority, by asking this Court to legislate judicially in the area of “debt adjusting,” where the Washington Legislature has expressly and clearly spoken. Indeed, the Attorney General unabashedly declares his desire to usurp the legislature’s power by arguing that “implying a cause of action” against RMBT and Global “will support the Attorney General in deterring and enjoining those who assist [debt adjusting],” even though he already has the power.¹

The points of law the Attorney General argues are wrong at many levels as discussed below. For example, had the legislature intended the DAA to apply to entities “doing business ... relating to banks,” it could have left that exemption out. It did not. Likewise, had the legislature wanted there to be civil “aid or abet” liability, it would not have limited such liability to a criminal penalty, which it did. Overall, the Amicus Brief repeats facts the Carlsens argue and argues matters not before this Court.

¹ AG Amicus Br. at p. 11. *See* RCW § 18.28.220, “Violation of Injunction -- Civil Penalty. Any person who violates any injunction issued pursuant to this chapter shall forfeit and pay a civil penalty of not more than one thousand dollars. For the purpose of this section the superior court issuing any injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for the recovery of civil penalties.”

**B. FEDERAL TRADE COMMISSION'S AMENDED
TELEMARKETING SALES RULE**

In 2010, the United States Federal Trade Commission ("FTC") amended the Telemarketing Sales Rule ("Final Rule") to give direction to companies the FTC defines as "debt relief companies". The Final Rule imposes a federal scheme of regulation on "debt relief companies" providing "debt relief services."² It makes clear that a bank processing agent such as Global and a bank such as RMBT, which simply provide a federally insured bank account and attendant services and none of the "debt relief services" the Final Rule defines, are not considered a "debt relief company".³ It also makes a clear distinction between a "debt adjuster" and an "intermediary" company like Global that establishes and maintains a "dedicated bank account" for the customer.⁴ This aspect of the Final Rule both codifies and legitimizes two common practices of the debt relief industry that the Attorney General assails in this case.

**II. THE ATTORNEY GENERAL SIMPLY REPEATS
OTHER BRIEFS AND ARGUES MATTERS NOT
BEFORE THIS COURT ON CERTIFIED
QUESTIONS**

² 16 CFR § 310.2(m).

³ See *Telemarketing Sales Rule Debt Relief Rule Fact Sheet* – 7/28/10 at <http://www.ftc.gov/os/2010/07/100729tsrfactsheet.pdf>

⁴ 16 CFR § 310.4(a)(5)(ii).

The purpose of an amicus brief is to help the court with points of law, not to reargue the facts.⁵ Indeed, this Court should not consider, never mind decide a case on the basis of, arguments an amicus raises where the issue was not raised below.⁶ The Amicus Brief here is a dissertation, full of hypotheses not made below about how judicial activism can be used to do an “end-run” around the express language in the Washington Debt Adjusting Act. Consequently, the Amicus adds nothing of use to the Certified Questions before this Court.

III. THE ATTORNEY GENERAL IGNORES THE PLAIN LANGUAGE OF THE DEBT ADJUSTING ACT

The Attorney General uses the Statement of the Case to rail against debt settlement companies, but ignores the central facts pertinent to this case: the Washington Debt Adjusting Act (“DAA”) as crafted by the Washington legislature exempts those “doing business . . . relating to banks” from its coverage⁷ and expressly limits “aid or abet” liability to a criminal (misdemeanor) penalty.⁸ RMBT is a state chartered, FDIC insured Bank. Global is likewise subject to FDIC and OCC regulation and provides account servicing for RMBT account holders. Both are doing

⁵ See RAP 10.3(e) (limiting the content of an amicus brief to the issues of concern to amicus.) See, also *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003).

⁶ See, e.g. *Pleas v. City of Seattle*, 49 Wn. App. 825, 827 n.1, 746 P.2d 823 (1987).

⁷ RCW § 18.28.010(2).

⁸ RCW § 18.28.190.

business relating to banks. Defying the legislature's codified wisdom, the Attorney General manufactures statutory liability where none exists, arguing that RMBT and Global aid or abet others who are allegedly charging "predatory" fees beyond the statutorily permitted percentage in RCW chapter 18.28 and so violate the Consumer Protection Act ("CPA"), RCW § 19.86. The DAA, however, expressly exempts RMBT and Global and does not provide a civil right of action based on an aid or abet theory.

IV. ARGUMENT

A. INTRODUCTION

The Attorney General introduces his arguments with two pages unsupported by the record accusing the debt settlement industry of various evils. Based on that anecdotal condemnation (ignoring the billions of dollars of consumer debts that the industry has resolved for its clients), he jumps to the conclusion that RMBT and Global are debt adjusting and are acting in a deceptive way because by providing bank accounts to bank clients, RMBT and Global "serve a major part of the industry."⁹ He implicitly suggests that DAA is impotent because: the "FTC [Final] Rule is prospective" and "[h]olding Global and Rocky accountable [for the reputed sins of the entire debt settlement industry] is important".¹⁰ There is simply no substance to the implicit suggestion that those the Washington

⁹ AG Amicus Br. at pp. 4-5.

¹⁰ AG Amicus Br. at pp. 4-5.

legislature saw fit to exclude from the definition of “debt adjuster” -- RMBT and Global -- will escape meaningful regulation by the Final Rule or other federal regulatory banking schemes or will not be held accountable for those things that they, not others, may have done wrong.

First, the FTC in its comments approvingly singled out Global, by name, with respect to the mechanics of opening and administering the dedicated bank account.¹¹ Simply put, despite the Attorney General’s fear that Global and RMBT will not be held accountable, the FTC explained that Global and RMBT have been accountable all along.

The Final Rule imposes a federal scheme of regulation upon “debt relief companies” providing “debt relief services.” In this regard, the Final Rule makes expressly clear that RMBT and Global do not provide “debt relief services” and are thus not considered a “debt relief company” and that the RMBT “dedicated bank account” is a recommended component of the newly regulated debt relief industry regulatory scheme.¹² That the Final Rule is prospective does not change the fact that Global and RMBT have been engaged in business in precisely the way the FTC’s Final Rule now say is perfectly legitimate.

¹¹ The acronym “GCS” is assigned to Global in the FTC’s List of Commenters and Short-Names/Acronyms Cited in the SBP at pp. 187-89 of the Final Rule. See Telemarketing Sales Rule Debt Relief Rule Fact Sheet – 7.28.10 (<http://www.ftc.gov/os/2010/07/100729tsrfactsheet.pdf>); 16 CFR Part 310 Telemarketing Sales Rule (<http://www.ftc.gov/os/2010/07/R411001finalrule.pdf>).

¹² 16 CFR § 310.4(a)(5)(ii).

Second, RMBT and Global are (and always have been) accountable to state banking regulators, the U.S. Department of the Treasury, the Federal Reserve, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. Importantly neither Global nor RMBT have been shown (in contrast to the AG's hyperbolic accusations) to have done anything wrong, and so under the Final Rule may legitimately continue providing the very same services lambasted here. There is simply no substance to the AG's fear that somehow those the Washington Legislature saw fit to purposefully exclude from the definition of "debt adjuster" will escape meaningful regulation or be unaccountable. The FTC, for instance, realized that the intermediaries (like Global) who administer the dedicated bank accounts need not be regulated as "debt relief companies," again deferring to the legion of other state and federal governmental and quasi governmental agencies that already provide comprehensive oversight to those financial services companies.

B. THE ATTORNEY GENERAL ARGUES CERTIFIED QUESTION THREE IN CIRCULAR FASHION

To say as the Attorney General does that debt settlement companies that are debt adjusting are subject to the statutory fee limits on debt adjusters begs the question because that is precisely what the statute

says. If the only question being asked is whether the statute applies to debt adjusting, then no further discussion is necessary. After all, Global and RMBT readily concede that “[b]y its plain language, the fee limitations set forth in RCW § 18.28.080 apply only to a debt adjuster, who by contract charges a fee for debt adjusting.”¹³

The Attorney General, however, wants to avoid a plain reading of the DAA. Indeed, the only reason he discusses certified Question Three is to set up a false premise for his remaining arguments. He reverses the statutory focus, ignoring to whom debt adjusting fees are actually paid, focusing instead on where the money is held from which such fees are paid.¹⁴ RCW § 18.28.080, however, says, in pertinent part, that

By contract a debt adjuster may charge a reasonable fee for debt adjusting services . . . [which] may not exceed fifteen percent of the total debt listed by the debtor on the contract.

The RMBT bank account agreement administered by Global is for a dedicated bank account, and expressly is not a contract for “debt adjusting services.” The mere fact that Global and RMBT serviced a dedicated bank account, which the FTC Rule states is perfectly acceptable, does not make

¹³ Global, RMBT Br. at p. 17; *see also* pp. 37-42.

¹⁴ RMBT never collected a fee [Ct. Rec. 70 at ¶¶ 14 & 15 & Ex. J pp. 21-23 (Doc. 70-9) & Ex. K (Doc. 70-11)], yet, the AG reasons RMBT violated the fee provision because, by contract, someone else (the debt adjuster) collected a fee. Here, the AG is advancing the Carlsens’ and Pophams’ untenable contention that it is “immaterial” whether RMBT or Global actually received any payment (although that is what the plain language of the statute constrains). Again, DAA places limits on the actor collecting the fee, not on the Bank (which could easily have been the client’s personal bank rather than RMBT/Global) where the monies used to pay the fee were being held.

either liable for any payment to which the client agreed in writing and later authorized or the percentage fee collected or retained by the debt adjuster under that same contract for debt adjusting services.

The suggestion that the plain language of the DAA needs to be “interpret[ed]”¹⁵ to apply to the bank where the money is held (and so to RMBT and Global) is also belied by the case the AG cites: *Venwest Yachts, Inc. v. Schweickert*,¹⁶ which made clear that “If the statute’s meaning is plain on its face, we give effect to that plain meaning.” On its face RCW § 18.28.080 limits the fee that “[b]y contract a debtor adjuster may charge.” The DAA must be given its plain meaning.

Global and RMBT did not “misread Question 3”.¹⁷ Each said the plain language of the fee limitation provision in RCW § 18.28.080 applies to a debt adjuster who contracts with a debtor for a fee, not to the Bank holding or agent servicing a bank account. Certified Question Three does not – as the FTC Rule makes clear – prohibit RMBT from holding and Global from servicing a dedicated bank account, it merely proscribes a limit on the fee a debt adjuster can by contract charge.

C. THE IMPLIED CAUSE OF ACTION CONTENTION IS AN ATTEMPT TO TRUMP THE EXPRESS STATUTORY LANGUAGE THAT EXEMPTS RMBT AND GLOBAL FROM THE DAA

¹⁵ AG Amicus Br. at p. 6.

¹⁶ 142 Wn. App. 866, 893, 176 P.3d 577 (2008).

¹⁷ AG Amicus Br. at p. 7.

The Attorney General devotes four and one-half pages of the Amicus Brief driving, notwithstanding the legislature's chosen design, to this single conclusion: "implying a cause of action against aiders and abettors is consistent with the purpose of the DAA".¹⁸ The contention is untenable, for at least three separate reasons.

1. By its express terms, the DAA protects consumers from and provides a civil remedy against debt adjusters.

The DAA regulates debt adjusters, and benefits those consumers who, by contract with a "debt adjuster", obtain "debt adjusting" services -- each of which is a defined term.¹⁹ By its express language, the statute defines the class of consumers it intends to benefit.

Moreover, the DAA provides three separate remedies for a violation *by a debt adjuster*, i.e., (1) an "unfair or deceptive act or practice . . . under 19.86 RCW"; (2) a criminal penalty for a violator or one who "aids or abets" a violator; and (3) an Attorney General "action" to "restrain or prevent any violation of this chapter."²⁰ There simply is no reason to look to the *Restatement (Second) of Torts* § 874A or the "historic

¹⁸ AG Amicus Br. at p. 11. The Attorney General is simply advancing the Carlsens' and Pophams' "collaboration" argument, which is improper in an amicus brief.

¹⁹ RCW § 18.28.010

²⁰ RCW §§ 18.28.185; 18.28.190; & 18.28.200, respectively.

lineage” of implying a “private remedy”²¹ because in the DAA the legislature provided very adequate and readily available remedies against those the statute targets: debt adjusters, while logically not against those, like RMBT and Global, the legislature expressly excluded from the ambit of the statute, a decision the Attorney General seeks to undo here.

2. **By its express terms, the DAA provides enforceable rights to an identifiable class, which militates against overriding the legislature and writing in an implied cause of action for aiding and abetting.**

There is no dispute that the DAA is a remedial statute, but unlike in *Browning v. Slenderella Sys. Of Seattle*,²² where there was literally no civil statutory cause of action, the DAA provides express civil remedies. *Browning* does not justify the judicial activism the Attorney General solicits.

Before enactment of the Civil Rights laws prohibiting racial discrimination, Slenderella Systems openly denied Mrs. Browning admission to a public accommodation solely on the basis of her race. She sued citing a state criminal statute. More than fifty (50) years ago this Court allowed her a claim for compensatory damages for racial discrimination based upon a violation of the public accommodation laws,

²¹ AG Amicus Br. at p. 7; & fn. 1 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

²² 54 Wn.2d 440, 446, 341 P.2d 859 (1959).

notwithstanding that those laws were criminal in nature with no private civil remedy. This Court explained its reasoning in simple terms: race discrimination is a wrongful act intentionally done, something the legislature, were it to consider it, would not condone.²³

For several reasons, *Browning* simply fails to provide a jurisprudential basis for ignoring the express civil remedies and limitations the legislature wrote into the DAA in order to undo the legislatively created exemption; or, to do what the legislature declined to do, create a civil remedy against Global and RMBT for aiding and abetting debt adjusting. First, unlike in *Browning* where the lawsuit focused on the party guilty of race discrimination, here the Carlsens, the Pophams, and the Attorney General focus not on the offending debt adjusters but on RMBT and Global. Second, in *Browning* the Court applied a racial discrimination statute to the primary actor, who could not point to an exemption in the statute, unlike in the instant case where there is an express statutory exemption from the DAA for those “doing business ... relating to banks”.²⁴ Finally, this Court decided *Browning* before the enactment of federal or state discrimination laws, which fill that void in a way the legislature (not a court) has chosen and now afford specific civil remedies. At the time she sued, Mrs. Browning had no available statutory civil

²³ *Id.*

²⁴ RCW § 18.28.010(2)(b).

remedy, other than the public accommodation statute, which did not provide a civil remedy at all. In contrast, here the legislature has provided specific and adequate civil remedies to Washington state consumers and to the Attorney General for that matter.

In the overall context in which *Browning* was decided, one can easily understand this Court's reasoning and why it construed that statute as remedial and found that the seemingly exclusive criminal penalty did not preclude a civil remedy for Mrs. Browning. Today, more than fifty years after this Court decided *Browning* and in a wholly different context with the express civil remedies provided in the DAA, there is little room to trump the legislature's carefully crafted exemptions and civil remedies and its decision to limit the aid and abet portion of the DAA to a criminal penalty. The DAA applies a civil remedy to those who, by contract, provide debt adjusting services; the DAA only affords a criminal penalty for those who actually aid or abet a violation. Quite the opposite of what the Attorney General argues,²⁵ the DAA's exemptions, civil remedies and its specific limitation of aid and abet to the criminal context "[counter]indicates the legislature's intent to create a right of protection"

²⁵ AG Amicus Br. at p. 9.

beyond those it expressly provided, negating the predicate this Court needs to imply a cause of action.²⁶

Likewise the AG's reliance on *Naches Valley Sch. Dist. No. JT3 v. Cruzen*²⁷ is misplaced. In *Naches Valley* the appellate court simply employed traditional statutory construction principles by construing an undefined statutory term to effect the remedial purpose of the statute sued under. Unlike in *Naches Valley*, where the statute did not define the critical term so that the intended coverage of the term was necessarily debated, here the legislature has specifically defined the term debt adjusting and afforded specific civil remedies to an aggrieved consumer. The AG simply cannot get around the existing remedy language of the DAA and neither *Browning* nor *Naches Valley*, which operate only where the legislature had not previously ventured, justify judicially amending a statute the legislature fully understood and chose to write the way it did.

Finally, in the face of the plain language in the DAA, the AG offers three unavailing reasons to preempt the legislature and imply a civil aid or abets remedy: that: (1) there "is no indication" that the criminal penalty in the DAA is "exclusive;" (2) there "is no indication" that the aid and abet civil remedy language did not once exist in the DAA and was "later eliminated"; and (3) there "is no provision . . . elsewhere in the

²⁶ AG Amicus Br. at p. 9.

²⁷ 54 Wn. App. 388, 398-99, 775 P.2d 960(1989).

[DAA]" that suggests the criminal remedy "was the only one the legislature intended."²⁸ The answer to all the Attorney General's rank speculation is painfully simple: if the legislature had wanted both a civil and a criminal aid and abet penalty, the obvious way to express its intent would have been to say so. *Cazzanigi v. General Elec. Credit Corp.*²⁹ teaches that where a statute provides a private remedy elsewhere, as does the DAA, no additional cause of action can be implied. Legislative intent is first determined by what the legislature said, not as the Attorney General argues here, by (1) what it did not say, (2) what it might have said, and (3) what it did not say somewhere else in the statute.

3. By its express terms, the DAA denies the Attorney General the very language he asks this Court to write into the statute.

Without any citation to legal authority, the AG asks this Court to write a private action for aid or abet liability into the DAA, he says, to help make "consumers whole by all who participate and profit from illegal debt adjusting schemes" and to "support the Attorney General in deterring and enjoining those who assist (sic)" in debt adjusting violations.³⁰

Ironically, the DAA already defines what is illegal or impermissible for debt adjusters. What the AG is really saying is that he

²⁸ AG Amicus Br. at p. 10.

²⁹ 132 Wn.2d 433, 445, 938 P.2d 819 (1997).

³⁰ AG Amicus Br. at p. 11.

should have power to pursue those “doing business . . . relating to banks,” a power the legislature expressly withheld. He is also saying that he should be allowed to deem a bank and its processing agent in violation of the law, notwithstanding the FTC Final Rule, which makes the very type of dedicated bank account held at RMBT and serviced by Global perfectly permissible, that is, perfectly legal. This Court should decline the invitation to legislate in an area where the legislature spoke so plainly.

D. THERE IS NO REASON TO CONSIDER THE RESTATEMENT (SECOND) OF TORTS § 876(B) AS A BASIS OF LIABILITY

The District Court’s certified questions should define the issues to be considered here. Neither the District Court nor Plaintiffs, in the version of their Complaint upon which the certified questions are predicated or in their initial brief here, advance an independent aid and abet cause of action. This Court does not consider issues raised first and only by amici,³¹ and should decline the AG’s invitation to create an independent aid or abet cause of action.³² An amicus brief is intended to help with points of law raised,³³ not to argue facts or theories never alleged in the Complaint.³⁴

³¹ *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (citing *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1*, 140 Wn.2d 403, 413, 997 P.2d 915 (2000)).

³² AG Amicus Br. at pp. 11-13.

³³ *Ochoa Ag Unlimited, L.L.C. v. Delanoy*, 128 Wn. App. 165, 114 P.3d 692 (2005), *review denied*, 156 Wn.2d 1021, 132 P.3d 735 (2006).

³⁴ *See, e.g.*, AG Amicus Br. at *e.g.*, p. 13 (“If the debt settlement companies Global and Rocky worked with and served violated the DAA that is evidence of the kind

Moreover, the legal authority the AG cites is unavailing. In *Halberstam v. Welch*,³⁵ the live-in companion of a burglar appealed from a judgment finding that she was civilly liable, as joint venturer and coconspirator, for a killing committed by the burglar, even though she was not present. Analogizing RMBT and Global's business practices -- conduct endorsed in the FTC Final Rule - to that of an accomplice to a murder is beyond the pale. Such reliance on the *Halberstam* fact analogy is designed to invoke images of the most heinous of conduct and, thereby, to demonize RMBT and Global. Lest the AG forget, (1) the Washington legislature did not make aid or abet a part of the DAA's civil remedy, let alone an independent tort, (2) the FTC Final Rule finds perfectly acceptable a dedicated bank account service, and (3) common law torts are not a vehicle to do an end-run around what the legislature dealt with expressly in the DAA.

Ironically, after all of the tacit and suggestive condemnation of the debt settlement industry, the Attorney General just announced a settlement with the debt settlement company for the Carlsens, the debt adjuster that actually charged and collected the allegedly excess fees Plaintiffs seek to recover. As described in the AG's Press Release of March 3, 2011, the

of third-party wrongdoing needed to establish the first element of aiding and abetting liability under § 876(b) . . . Global and Rocky should be liable for civil aiding and abetting under § 876(b).")

³⁵ 705 F.2d 472 (D.C. Cir. 1983).

primary actor with potential liability makes no admission of liability and consumers are getting a 100% refund of the excess fees upon which this claim is predicated, an award of full relief which undercuts the Attorney General's argument here that there is no civil remedy for consumers.³⁶

So, while the Attorney General is settling with the actual debt adjuster, in the Amicus Brief he fans the embers of a separate fire hoping to create an independent basis for liability against a bank and its agent who are merely maintaining a dedicated bank account at the account holder's direction, something perfectly acceptable under the FTC's Final Rule. Put in simple terms, in light of the settlement the Attorney General urges a position that would see the Carlsens potentially reap a wind-fall: a full recovery under the AG Settlement with the debt adjuster and a separate potential recovery under an independent tort claim for the identical damages against RMBT and Global for aiding and abetting.

E. THE DAA AND CPA, IF APPLIED AS THE AG ARGUES, ARE UNCONSTITUTIONAL

Ignoring the exemption Global and RMBT enjoy under the DAA as well as the express limitation on aid or abet liability, the Attorney General announces that if the debt settlement company violated the CPA,

³⁶ See "Consent Decree and Judgment," *State of Washington v. Freedom Debt Relief, LLC a Delaware limited liability company*, Case No.: __, State of Washington, King County Superior Court. <http://www.atg.wa.gov/pressrelease.aspx?id=27454>.

then “Global and Rocky should also be liable”³⁷ for providing “substantial assistance,”³⁸ if Global and RMBT “should have known that a debt settlement company was violating the DAA.”³⁹ In support, the AG argues “helper liability,” under a string cite of four FTC cases, which simply do no analogize here for at least three separate reasons.⁴⁰

First, an Amicus is not permitted to litigate factual matters or argue issues prohibited to a party as the AG does here.⁴¹ In effect, the AG is signaling his theory of how to create “helper” liability (presumably limited, as is the FTC, to an enforcement action rather than a private civil remedy) at the very time he has entered a settlement with the primary actor, where the primary actor literally makes no admission of wrong doing. Second, “helper” liability is just another attempt to do an end-run around the DAA’s exemption of Global and RMBT and the limitation on aid or abet liability. Finally, three of these cases pre-date the FTC’s Final Rule, which makes the dedicated bank account structure used here perfectly acceptable. If the AG disagrees with what the FTC Final Rule

³⁷ AG Amicus Br. at p. 14.

³⁸ AG Amicus Br. at p. 15.

³⁹ AG Amicus Br. at p. 16.

⁴⁰ *In re Citicorp Credit Serv.*, 116 F.T.C. 87 (1993), *Federal Trade Comm’n v. Neovi, Inc.*, 604 F.3d 1150, 1156 (9th Cir. 2010), *In re Value Vision Int’l*, 132 F.T.C. 338 (2001), *Doherty v. Federal Trade Comm’n*, 392 F.2d 921, 928 (6th Cir. 1968).

⁴¹ *Pleas v. City of Seattle*, 49 Wn. App. 825, 828 fn. 1, 746 P.2d 823 (1987)

establishes in this area of the law he should either take it up with the FTC or go to the legislature to change the DAA.

Citing two more cases from the early 1980s,⁴² the AG offers one more theory as a way to do an end-run around the DAA arguing that “one who enables” “with means and instruments” is “equally responsible.”⁴³ The attempt fails primarily because there is no reason to look outside the DAA, which provides adequate civil remedies, especially since the FTC has legitimized precisely the “means and instruments”, *i.e.*, the dedicated bank accounts, the Attorney General attempts to demonize here.

If the DAA and CPA are amended by judicial fiat as the AG requests to create helper, joint tortfeasor or means and instruments liability, the DAA and the CPA are unconstitutional since the CPA would then make actionable that which the DAA and the Final Rule permits.

F. THE DAA DOES NOT ACCOMMODATE THE APPLICATION OF JOINT AND SEVERAL OR CONCURRENT TORTFEASOR LIABILITY TO THIS BANKING RELATIONSHIP

The Attorney General offers two more speculative contentions not raised by the Carlsens, which were not argued to the district court or contemplated by its certified questions and should not be considered here: that “joint and several liability would apply here” and that Global and

⁴² *In re Litton Indus.*, 97 F.T.C. 1, 48 (1981); *Allen v. American Land Research*, 95 Wn.2d 841, 847, 631 P.2d 930 (1981).

⁴³ AG Amicus Br. at p. 16.

RMBT would be “concurrent tortfeasors” “if the trial court finds” the debt settlement company “committed a wrong.”⁴⁴ The reliance on *Westview Inv. v. U.S. Bank, N.A.*,⁴⁵ a CPA case and *Seattle-First Nat. Bank v. Shoreline*,⁴⁶ a wrongful death action, is simply misplaced for the reasons discussed above. There is just no reason to disregard the express language the legislature used in the DAA; there is no reason to rummage through ever possible tort theory of potential liability to create a remedy here, when one already exists; and there is no reason to imply any of the theories of liability the Attorney General suggests.

V. CONCLUSION

By definition, RMBT and Global are not debt adjusters because they are doing business related to banks. They do not charge or retain any debt adjusting fee (as they do none) or retain any fees for banking services exceeding the statutory threshold. Neither can be civilly liable for aiding and abetting, as the DAA does not contain such a remedy and its criminal penalty does not afford an implied civil right of action. The District Court’s Certified Question Three should be answered No, if applied to RMBT and Global because of an erroneous conclusion that they are debt adjusters under the DAA, and Question Four should be answered no.

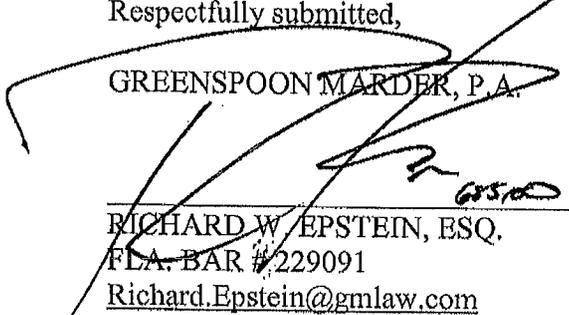
⁴⁴ AG Amicus Br. at p. 17 and fn. 2.

⁴⁵ 133 Wn. App. 835, 853 P.3d 638 (2006).

⁴⁶ 91 Wn.2d 230, 588 P.2d 1308 (1978).

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Respectfully submitted,


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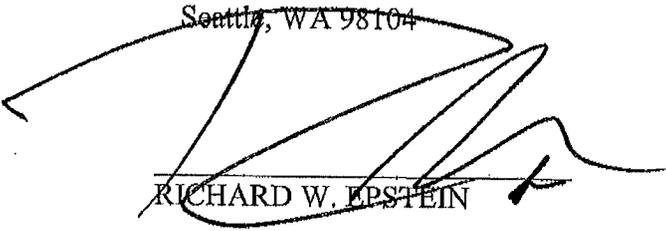
I hereby certify that on March 8, 2011, I electronically filed the foregoing with the Clerk of the Court by attaching a copy to an email addressed to Supreme@court.wa.gov. I also provided copies of the foregoing documents to the following parties via email and U.S. Mail, postage prepaid, addressed as follows:

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