NO. 19-100

In the Supreme Court of the United States

CROWN ASSET MANAGEMENT, LLC,

Petitioner,

v.

MARY BARBATO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the record show that Crown Asset Management, LLC—including persons and firms whose acts are attributable to it under standard principles of agency law—collects the debts it purchases through litigation and communications?

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INTRODUCTION

Respondent Mary Barbato requests that the Petition for Certiorari be denied.

There is no division among the Courts of Appeals.

Petitioner's factual assertions concerning Crown's alleged lack of involvement in debt collection are false. Crown engages in direct debt collection under this Court's precedents, including the filing and active prosecution of thousands of debt collection lawsuits against consumers. Since the Third Circuit remanded for further fact-finding on what Crown does, this matter is not ripe for review.

Differences in rulings on whether various debt buyers are FDCPA debt collectors among the district courts are fact-dependent. Petitioner's assertion that there is a uniform method of operation among debt buyers and that Crown's description of its business typifies that method of operation is simply not true.

The Court of Appeals correctly interpreted the FDCPA. Contrary to Petitioner's assertion, it did not hold that the purchase of bad debts without any attempt to collect them made Crown a "principal purpose" debt collector. Crown's position is based on the premise that the actions of attorneys, collection agencies, and other persons regarded as agents under standard principles of agency law should, for some reason, not be attributed to Crown. The slight differences in text between the definitions of "debt collector" in the FDCPA furnish no basis for holding that Congress intended wholesale displacement of the law of agency.

Nor does the Third Circuit's holding make either the definition of "creditor" or that of "debt collector" meaningless. Claims by Crown and its amici that the Third Circuit made an "end run" around *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718 (2017), are unfounded.

I. THERE IS NO DIVISION AMONG THE COURTS OF APPEALS

As Crown admits (Petition, pp. 16-17), there is no division of authority amongst the Courts of Appeals as to how to apply the "debt collector" definition to debt buying entities. This is, in fact, the first Court of Appeals decision to address that issue; a similar issue is presently pending before the Ninth Circuit in *McAdory v. M.N.S. & Associates, LLC*, No. 18-35923 (appeal filed Oct. 31, 2018, argument set for Oct. 23, 2019). Generally, the absence of a split of authority among the Courts of Appeals mitigates against review by this Court. *See* Supreme Court Rule 10(a). The Petition discusses conflicts among district court decisions (Petition, p. 16), which as set forth below are largely fact-dependent.

Crown cites (Petition, p. 16) as inconsistent the Massachusetts decision in *Dorrian v. LVNV Funding, LLC*, 479 Mass. 265, 94 N.E.3d 370 (2018), but that case turned on Massachusetts law and agency deference. Massachusetts separately regulates debt collectors and creditors, and requires licensing and examination of debt collectors. For purposes of these regulations, Massachusetts chose to treat debt buyers that purchase debts in default as "creditors." *Id.* at 378 n. 12. The Banking Division's regulations provided that a "buyer of debt in default that is not directly engaged

in collection of those debts is not required to obtain [a debt collection] license so long as collection activity is performed by [a] licensed debt collector." *Id.* at 377. The Massachusetts court's decision that LVNV Funding, LLC was not a debt collector turned on "[t]he [Banking] division's long-standing interpretation of G. L. c. 93, § 24," holding that "[w]e approve the division's reasonable and expert interpretation in this complex regulatory environment." *Id.*

A decision holding that a given entity should be regulated as a creditor rather than a debt collector under Massachusetts law, where a regulation specifically defines it as such, is not persuasive authority to interpret a federal law where no similar regulation exists. The FDCPA, unlike Massachusetts law, does not apply to creditors (unless they use a false name), and does not require licensure of anyone.

Dorrian, in any event, addresses issues of state law, not the FDCPA. State legislatures are free to follow similar definitions to those found in the FDCPA, or not, as they see fit. However, those decisions have no bearing on how the FDCPA should be interpreted.

II. THE PETITION IS BASED ON UNTRUE FACTUAL ASSERTIONS

There is a problem with the asserted factual predicate of the certiorari petition—it is untrue. Crown asserts that it is a "passive debt buyer" that "does not itself communicate with the debtors." (Petition, p. 4.) It further asserts, without any support, that "[t]he relevant facts are undisputed and representative." (Petition, p. 23.) Both of these assertions are false.

The District Court's decision which was affirmed by the Third Circuit was one denying both parties' motions for summary judgment, *i.e.*, the decision found that issues of fact existed, and ordering further fact-finding proceedings. Those proceedings have been stayed as a result of the filing of the petition for certiorari. When the stay is lifted, Respondent Barbato expects to prove that Crown's activities are far more extensive than it claims in its petition.

Crown regularly undertakes debt collection activity itself, including the filing of thousands of collection lawsuits with Crown as the plaintiff. At the time Ms. Barbato responded to Crown's summary judgment motion in May 2016 (Dkt. #94.) she showed that Crown had filed over 270 lawsuits in Pennsylvania state courts, more than 850 lawsuits in Illinois, 118 cases in Indiana trial courts for which electronic dockets are available, and over 700 cases in New York State trial courts during 2012-2014. (Dkt. #94, pp. 3-4 of 12; Dkt. #94-1; Dkt. #94-2.) The total number of cases Crown filed in New York, at any time, was then over 3,000. (Dkt. #94-1.) Current searches of the same dockets show that Crown's lawsuit filings have increased substantially.

In at least some of these cases, Crown employees executed affidavits in lieu of testifying. (Dkt. #94-3.) Some of the affidavits were signed by Jessica Foster (Dkt. #94-3, pp. 36, 44, 54, 64, 72, 80, 88, 96, 107, 116, 117, 124, 131, 138, and 145 of 147.) Ms. Foster was deposed (Dkt. #80-3) and testified that she was Crown's Director of Outsourcing and then promoted to Vice President of Operations. (*Id.*, p. 7.) The notaries before whom these affidavits were executed

are located in Georgia, where Crown is headquartered. The Georgia Secretary of State's website shows that these notaries have email addresses such as lhall@ crownasset.com. And, as with any party that retains counsel to file a lawsuit, as the named plaintiff Crown exercises substantial control over its counsel.[1]

Crown, through its affiliate CAM1, had a "Collection Services Agreement" with Turning Point Capital, Inc., the entity that sent the offending collection letter to Ms. Barbato. The agreement (Dkt. #80-8, authenticated by Dkt. #80-3, p. 19) authorized Turning Point to receive money on behalf of Crown and required Turning Point to remit and account to Crown for money received on Crown's debts. It required Turning Point to maintain "a complete, correct and current record of each account, which [CAM1] may access and review at any time." It required Turning Point to use "due diligence" to collect Crown's accounts and authorized Turning Point to settle accounts owned by Crown. (Collection Services Agreement, § 4.2)

Crown expected Turning Point to send a demand letter to the consumer "relatively quickly" after an account was placed, within 3 to 5 days. (Dkt. #80-3, p. 32-33) Crown monitored the performance of collection agencies in collecting money and allocated new accounts based on past performance. (Dkt. #80-3, p. 48)

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[1] On occasion these lawsuits go to trial. On at least one occasion in 2019, a representative of Crown with the title of "portfolio manager" appeared in Cook County, Illinois and gave live testimony. *Crown Asset Management, LLC v. Bogdan Szwajnos*, 2018-M5-008436 (June 24, 2019).

The Collection Services Agreement gave CAM1 "the right to examine and audit [Turning Point's] business, operations, security architecture, systems, procedures and practices that relate to the Services and the Agency's obligations under this Agreement." It provided that CAM1 "may, among other audit tasks, measure or evaluate Agency's performance and professionalism, verify the accounting of all funds, including any trust account, verify the accuracy and propriety of all commissions verify the timeliness of recording and remitting payments, verify the adequacy of cash controls, and verify Agency's overall compliance with this Agreement." The agreement provided that "Audits may be performed, either on-site or remotely, at [CAM1's] discretion. Agency shall grant [CAM1] access to its system of record via electronic access to permit remote audits." Ms. Foster in fact visited Turning Point's offices prior to hiring it and periodically afterwards. (Dkt. #80-3, pp. 15-18.)

Crown audits collection agencies and attorneys whom it hires and has an audit and compliance manager to effectuate that process. (Dkt. #80-3, pp. 24-6.) As of December 2015, Crown reviews forms or templates of collection agency letters for certain points (Dkt. #80-3, pp. 14-15, 74), although it may not have in the past. The points for which Crown audits letters are required disclosures. (3:13cv2748, Dkt. #80-3, pp. 25-26.) Audits also involve review of operations, accounting, training, compliance, procedures, and data physical security. (3:13cv2748, Dkt. #80-3, p. 29.)

The agreement provided that "Agency shall allow full and free access to records relating to any Account forwarded and shall provide necessary technical

assistance as required to access these records." It provided that CAM1 "agrees to advise Agency of the exceptions/discrepancies identified in any audit and agrees to allow Agency a reasonable period of time to respond to them. Where [CAM1] determines Agency shall take corrective measures, Agency shall submit to [CAM1] a corrective action plan that will correct any deficiencies." It required Turning Point to indemnify Crown against liability arising from its conduct and to maintain insurance for Crown's benefit. Crown had a very similar agreement with Greystone Alliance, LLC. (Dkt. #86-4.)

When Crown hired a new collection agency, or "servicer," it provided the agency with a "welcome packet" (Dkt. #86-6) which required the agency to provide "status updates" (Dkt. #86-6 pp. 5 and 14) and advised the agency of expected "projected liquidations." (Dkt. #86-6 p. 6.) "Status updates . . . allow [Crown] to track the collection treatment process of accounts placed with [the servicer]." (Dkt. #86-6 p. 14.) It also provided the agency with the means to request account documentation, or "media," from Crown, necessary if suit was filed or a consumer requested verification (Dkt. #86-6 p. 8.)

Substantially all of Crown's revenue comes from the collection of consumer debts. Some of the revenue is generated from lawsuits, such as those described above. Some is generated from having third party collection agencies dun the consumers prior to suit.

III. CROWN ENGAGES IN DIRECT DEBT COLLECTION UNDER THIS COURT'S PRECEDENTS

Crown's assertion that it does not engage in debt collection activity is inconsistent with this Court's decisions. The filing of thousands of collection lawsuits against consumers is certainly "debt-collection activity." *See Heintz v. Jenkins*, 514 U.S. 291 (1995). Crown's assertion that it "does not itself communicate with the debtors" and "never interacts with debtors" when a process server hands the consumer a summons and complaint headed "*Crown Asset Management, Plaintiff v. Consumer, Defendant*" is contrary to this Court's decision in *Heintz*, as well as ordinary English usage. Similarly, having Crown employees testify against consumers, either by affidavit or in open court, simply does not comport with Crown's description of itself as a "passive debt buyer."

While Crown points out that Ms. Barbato was one of several hundred consumers who received collection letters from an agency Crown hired, the statutory test looks to the "principal purpose" or "regular" business activities of the putative "debt collector," not what it did in a particular case. If Crown sues or threatens to sue thousands of consumers, its "principal purpose" cannot be said to exclude "any debt-collection activity" or any "interact[ion] with respondent or other consumers."

The Court of Appeals remanded the matter to the District Court for factual determination of what Crown's business activities actually consist of. Those activities are not as represented in the petition.

Generally, this Court does not grant petitions for certiorari where the questions presented are based

on one party's view of disputed and unresolved questions of fact. *See Needelman v. United States*, 362 U.S. 600 (1960) (Justice Frankfurter dissenting from dismissal of certiorari as improvidently granted). This Court has preferred to resolve legal issues in the context of developed factual records, not abstractly. *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). The foregoing illustrates why this is a sound policy. Review, if any, by this Court should await proceedings in the lower courts, regarding the extent of Crown's actual business activities.

IV. THE DIVERSITY OF BUSINESS PRACTICES OF DIFFERENT DEBT BUYERS MAKES THE ISSUE OF WHETHER A DEBT BUYER IS A DEBT COLLECTOR AN INHERENTLY FACT-INTENSIVE ISSUE; FEW IF ANY DEBT BUYERS FIT THE MODEL POSTULATED BY CROWN

While there are various rulings on the passive debt buyer issue percolating in the district courts (Petition, pp. 16-17), this activity is in substantial part because the business models of various debt buying entities are quite different, and the application of the definition of "debt collector" in the FDCPA tends to be highly fact-dependent. Petitioner's notion that there is a uniform method of operation among debt buyers and that Crown's description of its business typifies that method of operation is simply not true.

Indeed, Respondent's counsel believe that there are few if any debt buyers that do not have regular contact with debtors, at least through the threat of lawsuits,

the actual filing of such suits, and credit reporting. Toothless debt buyers don't get paid.[2]

Crown wants to take harsh collection actions against debtors, or threaten such action, and reap the benefit of such actions, but at the same time distance itself from the actions.

To the extent that the district court decisions touch upon the issues addressed by the Third Circuit, they generally find it persuasive. A number of courts outside the Third Circuit have held, subsequent to *Henson*, that debt buyers are debt collectors under the "principal purpose" test or that a triable issue of fact existed on the point. *Mullery v. JTM Capital Management*, 18cv549 and 18cv566, 2019 WL 2135484, *3-4 (W.D.N.Y. May 16, 2019) ("so long as the collection of debts sustains the business, unaided by other significant sources of revenue, the collection of debts must be the primary purpose of the business and it does not matter if the debt buyer hires a third party to obtain payment from the debtor"); *Mitchell v. LVNV Funding, LLC*, 2:12cv523, 2017 WL 6406594 (N.D. Ind. Dec. 15, 2017); *McMahon v. LVNV Funding, LLC*, 12cv1410, 2018 WL 1316736 (N.D. Ill. March 14, 2018);

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[2] One major debt buyer, Midland Funding, LLC states in form collection complaints that "the majority of Plaintiff's consumers ignore calls or letters, and some simply refuse to repay their obligations despite an apparent ability to do so. When this happens, Plaintiff must decide then whether to pursue collection through legal channels, including litigation like the present action against Defendant. Although the Account is now in litigation, Plaintiff remains willing to explore a mutually-beneficial solution through voluntary payment arrangements, if possible." *Midland Funding LLC v. Flores*, 2018-M1-106654 (Circuit Court of Cook County), complaint, par. 12.

Reygadas v. DNF Associates LLC, 18cv2184, 2019 WL 2146603, *2-3 (W.D. Ark. May 16, 2019); *Long v. Pendrick Capital Partners II, LLC*, 374 F.Supp.3d 515, 535-36 (D. Md. Mar. 18, 2019); *Torres v. LVNV Funding, LLC*, 16cv6665, 2018 WL 1508535, *4 (N.D. Ill. Mar. 27, 2018); *Tabiti v. LVNV Funding, LLC*, 13cv7198, 2019 WL 1382235, *8 and n. 8 (N.D. Ill. Mar. 27, 2019); *Skinner v. LVNV Funding, LLC*, 2018 WL 319320 (N.D. Ill. Jan. 8, 2018); *Carlo v. Midwest Recovery Systems, LLC,* 1:18cv31, 2018 WL 5267163 (N.D. Ohio, Oct. 23, 2018).

The cases cited by Petitioner (Petition, p. 16) as contrary stem largely from poor records. For example, Petitioner cites *Gold v. Midland Credit Management, Inc.*, 82 F.Supp.3d 1064 (N.D.Cal. 2015). This was a summary judgment decision which first refused to apply agency principles to determine what human actions Midland Funding, LLC was legally responsible for, stating that "a principal must be a debt collector in order to be held vicariously liable for the debt collection activities of another." *Id.* at 1072. However, if the principal is an entity such as Midland Funding, all liability is vicarious. The court then stated that the plaintiff had failed to put forth any evidence showing any collection activity attributable to Midland Funding: "Plaintiff offers no evidence to hint at a triable fact on this issue, relying solely on legal argument in opposition to Midland Funding's summary judgment motion." *Id.*

Other decisions involving Midland Funding have come to the opposite conclusion where a proper record was furnished. *Valenta v. Midland Funding, LLC,* 17cv6609, 2019 WL 1429656, *3 (N.D. Ill., March 29,

2019) ("plaintiff has adduced evidence of collections activity in the form of the collections lawsuits MF has filed" and that the persons conducting collection activity on debts owned by Midland Funding were its agents).

V. THE THIRD CIRCUIT'S DECISION IS CORRECT AND CONSISTENT WITH THE TEXT OF THE FDCPA AND *HENSON*

In addition to misstating the facts, the Petition misrepresents the Court of Appeals' decision.

A. Contrary to the Petition's Assertion (Petition, pp. 17-18), the Court of Appeals Did Not Hold That the Purchase of Bad Debts Without Any Attempt to Collect Them Made Crown a "Principal Purpose" Debt Collector

Crown claims that the Third Circuit held that the purchase of bad debts without any attempt to collect them makes the purchaser a "principal purpose" debt collector. "The court of appeals construed the 'principal purpose' prong of the 'debt collector' definition in a way that is utterly divorced from the natural meaning of the text. . . . The plain text of the 'principal purpose' prong of the definition does not encompass a passive debt buyer that never interacts with debtors." (Petition, pp. 17-18) However, the Third Circuit expressly held to the contrary, stating that if Crown "buy[s] debt for the charitable purpose of forgiving it, or . . . for the purpose of reselling it to unrelated

parties at a profit," then "the entity's 'principal purpose' would not be collection." (16a.)[3]

Thus, the Third Circuit recognized that it was necessary that the principal purpose of Crown's business involve attempts by human actors to collect the debts owed to Crown for the purpose of obtaining money for Crown. Furthermore, the Third Circuit held that if a majority of the putative debt collector's revenue was from the liquidation of defaulted consumer debts, that would demonstrate that its principal business activity or principal purpose was debt collection, as the revenue represents the fruit of the actions by human actors on its behalf.

B. Crown's Position Is Based on a Distortion of the Law of Agency

Crown's position is based on the premise that the actions of attorneys, collection agencies, and other persons regarded as agents under standard principles of agency law should, for some reason, not be attributed to Crown. Crown claims that the word "collection" in the "principal purpose" part of the "debt collector" definition and a negative inference from the words "directly or indirectly" in the "regularly collects" part of the "debt collector" definition some-

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[3] Amicus ACA International claims (p. 8) that it "is unaware that any of its members have as their principal business purpose the beneficent forgiveness of debts." However, ACA International's membership consists of debt collectors. Entities that buy bad consumer debt for the purpose of forgiving it are charitable organizations, not "debt collectors." There are such entities: RIP Medical Debt states "We are a 501(c)(3) charity that has abolished $715 million in medical debt for about 240,000 Americans." (https://www.ripmedicaldebt.org/about/)

how require this result. Crown's interpretations are wrong; the Third Circuit's decision is consistent with the FDCPA.

First, the FDCPA leaves no doubt that its application is not restricted to individuals. Instead, it also applies to legal entities such as Crown. *See, e.g.*, 15 U.S.C. § 1692a(6)(B) (exclusion for "any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control"); 15 U.S.C. § 1692e(14) (prohibiting "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization."); 15 U.S.C. § 1692l (administrative enforcement against national banks, Federal savings associations, other member banks of the Federal Reserve System, commercial lending companies, and Federal credit unions, all of which are entities).

Second, liability of an entity can exist only because it is considered legally responsible for the conduct of some human actors. "Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014).

Third, the law of agency defines what human actions are legally attributable to an entity. As the Third Circuit correctly noted, this Court has held that where a statute refers to a legal entity performing acts, it means that the law of agency applies to determine whose actions are considered those of the entity. *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (holding that Fair Housing Act imposes vicarious

liability for racial discrimination according to traditional agency principles, as outlined in HUD regulations); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565-574 (1982) (holding that "general principles of agency law" may establish a basis for liability in private antitrust actions under 15 U.S.C. § 15); *United States v. A & P Trucking Co.*, 358 U.S. 121, 121 (1958) (partnership can violate Interstate Commerce Act based on agency principles).

Here, the Third Circuit carefully analyzed relevant aspects of the law of agency, and remanded the matter for factual determinations under that law. As set forth below, the Court of Appeals' approach was correct.

The specific arguments that Crown makes based on the text of the FDCPA lack merit:

1. The Use of "Collection" and "Collects" In The Two "Debt Collector" Definitions Does Not Signify Congressional Displacement of the Law of Agency.

Crown argues that the use of two different variants of the word "collect" in the FDCPA precludes the use of normal agency principles here. It compares the use of the term "collection" in the phrase "in any business the principal purpose of which is the collection of any debts," with the use of the word "collects" in the phrase "regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." Crown asserts that the use of the noun "collection" in one part of the definition, as compared with the verb "collects" in another, is indicative of Congressional intent to displace or modify the law of agency in determining what acts are attributable to

an entity. This argument is unsupportable. Normal agency principles must be applied to determine what human actions are sufficient.

There is no question but that Crown directed, caused and put into motion efforts to liquidate the debts while Crown continued to own them, that such efforts resulted in the collection of money, and that the money went into Crown's pockets. Indeed, all of the money that went into Crown's pockets was from the liquidation of consumer debts. There is also no question but that the Court of Appeals required that attempts be made to collect the debts owned by Crown before Crown could be a "debt collector."

As the Third Circuit pointed out, "collection" is slightly broader, but both "collection" and "collects," as applied to a corporation or other entity, necessarily contemplate the acts of human beings attributed to the entity under principles of agency law. Crown does not suggest any body of law other than that of agency that can be used to determine whether and when the efforts of human agents to collect Crown's debts are attributable to it.

2. The Use of "Directly or Indirectly" in One of the Definitions of "Debt Collector" Does Not Signify Congressional Displacement of the Law of Agency in the Other Definition.

Crown also argues that the use of "directly or indirectly" in the "regularly collects" portion of the "debt collector" definition—"regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"—but

not in the "principal purpose" portion renders normal agency principles inapplicable under the "principal purpose" portion. This argument is also ill-founded.

The reference to "indirectly" in the "regularly collects for another" portion of the "debt collector" definition is necessary to cover persons that provide deceptive "skip tracing" and asset location services for others engaged in debt collection, but who do not themselves seek or collect money. *See, e.g.*, *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1147 (9th Cir. 1998). The outsourcing of such ancillary collection services was a major problem prior to the enactment of the FDCPA, when the Federal Trade Commission repeatedly pursued firms that obtained information about consumers by purporting to seek employment references, inviting the recipient to collect a prize, or otherwise engaging in deception.[4] The per-

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[4] One enterprising pair of skip tracers operated under such names as "National Research Company," "National Marketing Service," "United States Credit Control Bureau," "Claims Office," "Bureau of Verification," "Bureau of Reclassification," "Reverification Office" and "Disbursements Office." They would disseminate—at the rate of 700,000 every six months—forms with titles such as "Current Employment Records" and "Change of Address" and which requested address, employment, banking, and similar information. They also sent out "Claimants Information Questionnaires" asking the recipient to verify that he or she was the party entitled to receive unclaimed money. *Mohr v. FTC*, 272 F.2d 401 (9th Cir. 1959) (affirming first cease and desist order); *People v. National Research Co.*, 201 Cal.App.2d 765, 20 Cal.Rptr. 516 (1962) (injunctive action to restrain practices); *In re Floersheim*, 316 F.2d 423 (9th Cir. 1963) (contempt proceeding based on first cease and desist order); *Floersheim v. FTC*, 411 F.2d 874 (9th Cir. 1969) (affirming another cease and desist order); *Floersheim v. Weinburger*, 346 F.Supp. 950 (D.D.C. 1972), aff'd, *Floersheim v. Engman*, 161

sons engaged in such activities always did it for "another."

Congress expressly intended to define such pretextual information gathering activity as debt collection and outlaw it in enacting the FDCPA. S. Rep. No. 95-382, p. 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696 ("The committee has found that debt collection abuse by third party debt collectors is a widespread

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U.S.App. D.C. 30, 494 F.2d 949 (1973) (attempted declaratory action by collectors seeking to determine whether they were in compliance with the second cease and desist order); *United States v. Floersheim*, 74cv484, 1980 WL 1852, 1980-2 CCH Trade Cas. ¶63,368 (C.D.Cal. 1980) (civil penalty action for noncompliance with second cease and desist order).

Other firms used notices representing that the sender had correspondence or packages for delivery to a debtor; these would be sent to references used by a debtor. *Dejay Stores, Inc. v. FTC*, 200 F.2d 865 (2d Cir. 1952); *Rothschild v. FTC*, 200 F.2d 39 (7th Cir. 1952).

Others pretended to be auditors. *In re London Credit & Discount Corp.*, 78 FTC 541 (1971) (consent order); *In re Marjorie P. Ingram*, 67 FTC 1065 (1965) (consent order).

Yet others called themselves "State Credit Control Board", *Slough v. FTC*, 396 F.2d 870 (5th Cir. 1968), "Business Research" and "Affiliated Credit Exchange," *Bernstein v. FTC*, 200 F.2d 404 (9th Cir. 1952), "Manpower Classification Bureau" and "American Deposit System," *Rothschild v. FTC, supra*, 200 F.2d 39 (7th Cir. 1952), "General Forwarding System," *Silverman v. FTC*, 145 F.2d 751 (9th Cir. 1944), "National Retail Board of Trade" and "National Liquidators, Inc.", *In re National Retail Board of Trade*, 57 FTC 666 (1960), "Retail Board of Trade," *In re Rice*, 53 FTC 5 (1956), "Allied Information Service" and "National Deposit System," *In re Wacksman*, 56 FTC 1615 (1960), "Cavalier Reserve Fund" and "Liberty Reserve Fund," *In re Pitler*, 56 FTC 803 (1960) and "National Clearance Bureau," *National Clearance Bureau v. FTC*, 255 F.2d 102 (3d Cir. 1958).

and serious national problem. Collection abuse takes many forms, including . . . obtaining information about a consumer through false pretense, impersonating public officials and attorneys. . . . "). Congress enacted multiple prohibitions in the FDCPA for that purpose. 15 U.S.C. §§ 1692e(9) (outlawing "[t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval."); 1692e(10) (outlawing "[t]he use of any false representation or deceptive means . . . to obtain information concerning a consumer"); 1692e(11) (prohibiting "[t]he failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector. . . . "); 1692e(14) (outlawing "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization."). The coverage of "indirect" debt collection actions brings persons engaging in such deceptions within the FDCPA, even if they never demand money.

Again, there is no indication that Congress intended wholesale displacement or modification of the law of agency to determine what actions are considered those of a "debt collector," or what other legal principles would govern that determination.

3. The Third Circuit's Decision Does Not Make "Creditor" or the Alternative Definitions of "Debt Collector" Meaningless

The fact that under the Third Circuit's decision some entities may be both creditors and debt collector does not make either term meaningless. There remain many entities that qualify as one, but not the other. For example, banks, auto finance companies, retailers, and other credit grantors are "creditors," but not "debt collectors." The reasoning of the Third Circuit would not alter this outcome, as the "principal"—over 50%—business purpose must be the "collection of any debts." As the lower courts have repeatedly held, the "principal purpose" of loan originators, banks, retailers and credit unions is the extension of credit, banking, and the sale of goods and services. *See, e.g.*, *Bank of N.Y. Mellon Tr. Co. N.A. v. Henderson*, 862 F.3d 29, 34 (D.C. Cir. 2017); *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1145 (9th Cir. 1998). Their exclusion from coverage from the statute is deliberate, as these entities, unlike entities like Crown "generally are restrained by the desire to protect their good will when collecting past due accounts." S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Hiring others to collect the small percentage of their portfolios that go into default does not change their "principal purpose" any more than a bank which hires another firm to originate loans for it.

The "regularly collects" definition retains independent meaning as well, applying to entities who regularly collect debts for others but whose principal

purpose is not debt collection. A general practice law firm that has consumer debt collection as 1/3 of its practice is an obvious example. A collection agency that handles mostly commercial debts but collects consumer debts 1/4 of the time is another.

Finally, there are some entities—Respondent contends that Crown is one of them—that may satisfy both definitions. Nothing is "meaningless."

C. The Third Circuit Correctly Applied the Law of Agency to Determine What Acts Are Attributable to Crown

All of Crown's arguments amount to the proposition that its relationship with the human actors who demand and receive payment, file lawsuits in the name of Crown, provide testimony against debtors through affidavits and in court, and perform other actions necessary to turn the debts into cash, is such that their conduct should not be attributed to it. Thus, Crown argues that Crown merely "referred [the debts] to a third party to perform collection" and that Crown "neither communicated with respondent itself nor supervised the third party's activities." (Petition, p. 4)

As set forth above, this characterization is not true. Some of the human actors are clearly direct employees of Crown. Crown employees are directly involved in providing testimony and affidavits in connection with the lawsuits. Crown monitored the performance of its collection agencies and rewarded or punished them based on that performance. Thus, Crown's own employees were clearly involved in collection activity.

While some of the persons actually collecting the debts were outside attorneys and independent contractor collection agents, the actions of attorneys and similar agents in pursuing lawsuits, making representations to courts and adverse parties, and conducting negotiations have historically been legally attributable to the client, even if the client is not responsible for their physical conduct. "One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor." *Restatement (Second) of Agency* § 14N (1958).

> In fact, most of the persons known as agents, that is, brokers, factors, attorneys, collection agencies, and selling agencies are independent contractors as the term is used in the Restatement of this Subject, since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of them services. However, they fall within the category of agents. They are fiduciaries; they owe to the principal the basic obligations of agency: loyalty and obedience. . . .

Restatement (Second) of Agency § 14N (1958), comment a (emphasis added).

The only significance of the distinction between employees or servants and independent contractor agents is the principal's liability for unintended physical harm caused by an employee or servant. That is, Crown is responsible for its attorney's representations to a court on its behalf, but is not liable if the

attorney strikes a pedestrian while driving to the courthouse. The FDCPA is generally concerned with representational conduct only.

Crown's statement that it does not "supervise" any of the third parties is untrue—the parties' agreement provides for substantial supervision, including auditing and accounting. As the Third Circuit pointed out, the hallmark of agency is the principal's right to control the agent, not whether it actually exercises that right. (18a) Crown clearly had the right. Additionally, Crown accepts the money resulting from the collection efforts with knowledge or reason to know of the means used to collect, which amounts to ratification of the collection efforts used to generate the money.

There is nothing "tortured" (Petition, p. 6) about any of this. What is "tortured" is the position of Petitioner and its amici, which at bottom is that "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts," excludes or limits the application of normal agency principles to determine the liability of entities that must necessarily act via human agents. On Crown's theory, when a Crown employee executes an affidavit used to verify a collection complaint in an action entitled "*Crown Asset Management v. Consumer*" and the document is handed to Consumer, this is a communication from the process server, or from the attorney, but Crown has nothing to do with it. That position is so manifestly contrary to 1 U.S.C. § 1, precedent, and common sense as to require its rejection.

Refusing to attribute the conduct of any agents to a "principal purpose" debt collector would (1) effectively

immunize the debt buyer from liability, and (2) encourage the debt buyer to hire agents who are impecunious and irresponsible—which is exactly what happened in the case at bar (Petition, p. 5). This formula would deprive consumers of redress. Forbidding attribution is inconsistent with the express Congressional imposition of liability on debt collectors organized as corporate entities.

Creating a wholly new body of law to determine what conduct is attributable to "principal purpose" debt collectors would cast litigants into uncharted waters, with large litigation costs. There is also no reason to take such drastic action, given the historic use of general agency principles under federal statutes and the lack of any guidance in the FDCPA as to what other legal principles might apply.

Amicus Receivables Management Association International states that there are numerous "secondary market" purchasers of current consumer debts of various types, mostly mortgages. Again, the debts in question are not in default when they become involved with them, and the purchasers do not want the debts to go into default. The defendant in *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718 (2017), would appear to be one such entity, engaged in the purchase of current consumer automobile finance contracts from car dealers.

Crown's business is obviously and qualitatively different. In Crown's case, 100% of its debts in its portfolio were in default at the time Crown first had anything to do with them. The "principal purpose" of its business—indeed the only purpose—is collection of those defaulted debts.

The Third Circuit remanded for factfinding on the issue of the relationship of the various human actors doing the collection to Crown. The Third Circuit held that if an entity's principal source of revenue is liquidation of defaulted consumer debts, it is a debt collector even if it hires agents to do the liquidating, and that agents can include attorneys and other persons who are independent contractors. Its decision was sound, and until the District Court makes findings as to what Crown does and through whom, this Court should decline review.

D. *Henson* Does Not Apply

Crown claims that the Third Circuit made an "end run" around *Henson v. Santander Consumer USA Inc.*, *supra*, 137 S.Ct. 1718 (2017). However, the portion of the "debt collector" definition involved in this case is the one that *Henson* expressly declined to address—"in any business the principal purpose of which is the collection of any debts." *Id.* at 1721. Nothing that the Third Circuit did is an "end run" around a decision which declined to address the language at issue. This Court did not hold that "an entity that purchases debts for its own account, and then itself collects those debts," never was a "debt collector" (Petition, p. 9); rather, it held that such an entity was not collecting for "another," as required by the "regularly collects" portion of the "debt collector" definition. (137 S. Ct., at 1721)

The lower courts in *Henson* had found that the "principal purpose" of Santander was not debt collection—it was a finance company that acquired a small proportion of defaulted debts along with a normal performing portfolio. The consumers did not argue

otherwise. (137 S.Ct., at 1721) The Court assumed that Santander's "primary business is loan origination and not the purchase of defaulted debt". (137 S.Ct., at 1725) Accordingly, the *Henson* court had no occasion to interpret the "principal purpose" prong, and expressly and carefully disclaimed any intention of doing so.

Crown and its amici proceed from the assumption that the *Henson* court exempted from the scope of the FDCPA all entities that purchase defaulted debt. There is simply no basis for that assumption. An entity whose sole business is that it acquires defaulted consumer debt and has employees and non-employee agents collect that debt from the consumers is "any business the principal purpose of which is the collection of any debts," 15 U.S.C. § 1692a(6). It is Crown and its amici, not Respondent, that seek to "amend," rather than "apply," the statute.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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