13-2742

13-2747(Con), 13-2748(Con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MONIQUE SYKES; REA VEERABADREN; KELVIN PEREZ; and CLIFTON ARMOOGAM, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees

v.

MEL S. HARRIS AND ASSOCIATES LLC; MEL S. HARRIS; MICHAEL YOUNG; DAVID WALDMAN; KERRY LUTZ; TODD FABACHER; LEUCADIA NATIONAL CORPORATION; L-CREDIT, LLC; LR CREDIT, LLC; LR CREDIT 10, LLC; LR CREDIT 14, LLC; LR CREDIT 18, LLC; LR CREDIT 21, LLC; JOSEPH A. ORLANDO; PHILLIP M. CANNELLA; SAMSERV, INC.; WILLIAM MLOTOK; BENJAMIN LAMB; MICHAEL MOSQUERA; AND JOHN ANDINO,

Defendants-Appellants.

v.

MEL HARRIS JOHN/JANE DOES 1-20, LR CREDIT JOHN/JANE DOES 1-20; AND SAMSERV JOHN/JANE DOES 1-20,

Defendants.

On Appeal from the United States District Court for the Southern District of New York, No. 09 Civ. 8486

BRIEF OF AMICI CURIAE AARP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE

Jean Constantine-Davis*
**Counsel of Record*
AARP FOUNDATION LITIGATION
601 E St., NW
Washington, DC 20049
(202) 434-2060
jcdavis@aarp.org
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENTS

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, Experience Corps, d/b/a. AARP Experience and AARP Financial. AARP has no parent corporation, nor has it issued shares or securities.

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of § 501(c)(3) of the Internal Revenue Code. It has no parent corporations and no publicly held company owns 10% or more of its stock. NCLC is not a corporate party within the meaning of Federal Rules of Appellate Procedure 26.1 and 29(c).

The National Association of Consumer Advocates is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. It is organized under the laws of the State of Massachusetts and is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

November 13, 2013

Respectfully Submitted

/s/Jean Constantine-Davis
Jean Constantine-Davis
AARP Foundation Litigation

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INTERESTS OF AMICI CURIAE

Entry of judgment based on fraud on the court can be devastating to the financial security of older and low income people. A judgment appears on one's credit report, affecting a person's ability to find or keep a job, rent an apartment, and obtain a mortgage. It can make it harder or impossible for people living on the margins to meet one's most basic needs for shelter, utilities, food, health care, and medicine. For many unfortunate people, a garnishment that freezes funds in a bank account may be the first indication they have that they have been sued: widespread service of process abuse by debt collectors prevents alleged debtors from having their day in court or even knowing that a lawsuit has been filed against them. Amici have a strong interest in ensuring that systemic changes are implemented to safeguard against both judgments in lawsuits that are not properly served and those that are not based on reliable evidence that the debt buyer actually owns the debt and is only collecting on valid claims, against the right person, and for the right amount. Millions of people every year are subject to bogus lawsuits that do not meet these basic principles of fairness and due process.

Amici[1] are national consumer advocacy organizations, each representing the interests of low income consumers who are struggling to defend themselves from

[1] Pursuant to F.R.A.P. 29(c)(5) amici curiae certify that the statements expressed in this brief represent the considered opinion of the amici in their capacity as advocates of low-income and older people. Amici have authored this brief in its entirety and have no interest in the outcome of

abusive and fraudulent collection practices. Each has extensive experience participating in state and federal court actions challenging practices similar to those alleged in the case at bar. Amici participate as well to advance public policy to protect people from fraudulent debt buyer litigation. Amici's participation in this case will raise issues which might otherwise escape the Court's attention and will assist this Court in understanding and evaluating the issues raised on appeal.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly concerned about fraudulent and abusive practices being used to collect stale and invalid debt, to which older people are especially vulnerable. Many older people believe they will go to jail if summoned to court on an alleged debt. Older people are more easily distressed by the threat of a court judgment against them, and many believe that they will lose their homes, pensions, or bank accounts if they are sued by a debt collector. As a result, older people often feel coerced into paying debts they had

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the particular litigation between Appellants and Appellees except the institutional interests described within. No persons or entities have made any monetary or other contribution to the preparation or submission of this brief other than amici, their members, and counsel.

already paid in full or never owed in the first place, such as debts of a deceased loved one. AARP has an interest in protecting older people from abusive collection practices such as those alleged in this case.

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions for low income and elderly consumers. Since its founding as a non-profit corporation in 1969 at Boston College School of Law, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal

support. NCLC is recognized nationally as an expert in debt collection issues, including the Fair Debt Collection Act, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years. NCLC is, among other roles and accomplishments, author of a widely praised twenty-volume series of treatises on consumer law, including *Fair Debt Collection* (7th ed. 2011 and Supp.) and *Collection Actions* (2d ed. 2011 and Supp.). The Supreme Court of the United States has relied upon *Fair Debt Collection* as supporting authority. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 591 n.12 (2010).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal challenges the certification of a class action brought to combat—systemically and effectively—alleged widespread fraud on the courts to obtain default judgments *en masse* perpetrated by Defendants-Appellants. Debt buyers industry-wide routinely file false affidavits specifically designed to create the misleading impression that the debt buyer owns the debt and is entitled to judgment against the person sued and for the amount claimed. Such affidavits are filed to hoodwink courts and obtain judgments worth billions of dollars that could not be obtained absent fraud and that violate court procedures and state and federal

laws designed to ensure a fair judicial system and fair debt collection practices even when a judgment is entered by default.

The truth is that the information upon which millions of judgments are based is grossly and inherently unreliable. First, banks sell inherently unreliable information without warranties and with explicit disclaimers as to the accuracy of the data, which later becomes the subject of judicial collection despite such disclaimers. Second, in most cases when debt is sold on the secondary market, there is no supporting account data available from *any* source that would enable a debtor or debt buyer to verify the accuracy of the data sold. *See* Fed. Trade Comm'n, Repairing A Broken System: Protecting Consumers In Debt Collection Litigation And Arbitration, i (July 2010), *available at* www.ftc.gov/os/2010 /07/debtcollectionreport.pdf.

Debt buyers routinely and affirmatively seek to conceal from the courts and alleged debtors that the information upon which they base millions of lawsuits is inherently unreliable. The price of delinquent debt on the secondary market, typically only a few cents on the dollar, reflects its sale subject to explicit disclaimers as to accuracy, without any warranties, and without any supporting documentation. *See* Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry (Jan. 3, 2013) ("FTC, Debt Buying Report"). Debt Buyers aren't concerned about such disclaimers the way an ordinary purchaser of assets would

be because they know that few debtors retain their own, years-old paperwork to establish what, if anything, is really owed and that virtually all debt collection suits will go to default or be settled.

Recent enforcement actions by federal bank regulators and state attorneys general against large national banks confirm that debt sold on the secondary market is rife with errors and nearly always unsupported by any documentation. Debt buyers defraud the courts when they assert via form affidavits produced by computer software and not read by any human being that they have personal knowledge of the accuracy of information obtained from banks with disclaimers as to its accuracy. Even if a debt buyer purports to have some information about a debt, it is nevertheless unable to testify competently or truthfully about the billing practices and business records of banks or prior debt buyer owners of the debt.

The entry of default judgments based on fraudulent affidavits of service and of merit, drafted deceptively to make it appear that the debt buyer is entitled to judgment, seriously harms older and low income people and impugns the integrity of the courts. For example, one consumer had paid her debt in full, but even proof of payment would not deter debt buyers to whom her account was sold. Her three year nightmare ended only after she filed her own lawsuit. Maria Aspan, *Borrower Beware: B of A Customer Repaid Her Bill Yet Faced a Collections Nightmare,* Am. Banker, (Mar. 29, 2012, 5:47 p.m. ET) http://www.Americanbanker.com

/issues/177_62/bofa-credit-cards-debt-collections -delinquent-robosigning-047991-1.html.

The certification of this class action, which challenges practices by which default judgments are obtained by fraud *en masse,* is clearly appropriate, superior and not an abuse of discretion. A class action is necessary to remedy abuses arising from standardized debt collection industry practice of seeking and obtaining default judgments through automated processes that produce false and misleading affidavits. Such practices are not likely to be challenged individually by debtors against whom judgments are entered by default. As correctly found by the lower court, common issues clearly predominate over any individual ones and a class action is a superior means to address widespread fraud engaged in industry-wide to obtain default judgments. Amici urge this court to affirm the certification of the class.

ARGUMENT

I. Industry-wide, Debt Buyers Purchase Debt Sold Without Warranties, Subject To Explicit Disclaimers As To Accuracy And Reliability, And Without Supporting Documentation, Then Fraudulently Assert Through Sworn Affidavits Personal Knowledge That The Debt Sued Upon Is Accurate.

Systemic, class action relief is necessary to remedy and prevent debt buyer's industry-wide exploitation of the court system. Millions of judgments are entered by default each year based on fraudulent affidavits filed in support of judicial

collection actions. The Defendants-Appellants' challenge to the certification of the class in this case should be rejected. As aptly argued by Plaintiffs-Appellees, it is clear that the requirements of Fed.R.Civ.P. 23 have been satisfied. Class action relief is the superior means to remedy and deter such practices because despite applicable laws, court procedures, and enforcement actions designed to prevent the abhorrent practices alleged in this lawsuit, they have become standard practice in the secondary debt collection market and continue to plague courts and low income people nationwide.

A. Banks Sell And Debt Buyers Resell Only Unverifiable Electronic Summaries Of Account Information In Huge Debt Portfolios Known To Be Inaccurate And Unreliable, As Reflected In Both The Terms Of The Sales Agreement And Purchase Price.

The debt buying industry has attempted to keep secret and confidential the terms upon which banks and debt buyers sell debt portfolios to subsequent debt buyers because such terms are the Achilles Heel of the debt buying industry. The agreements reveal the inadequacy of the information upon which millions of judgments are entered every year. Enforcement actions have exposed the rampant fraud at the heart of the judicial collection abuses that plague consumers and courts nationwide.

Charged off debt is sold by large banks subject to explicit disclaimers regarding the reliability and accuracy of the information sold. When debt buyers file affidavits in support of default judgments, they routinely conceal from the

courts highly relevant terms of sales agreements that warn that the information transmitted by the original creditor typically disclaims "'any representations, warranties, promises, covenants, agreements, or guaranties of any kind or character whatsoever' about the accuracy or completeness of the debts' records," and reveal that "some of the claims it sold might already have been extinguished in bankruptcy court," some balances are "approximate,"... or some "consumers have already paid back in full." Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, Am. Banker (Mar. 29, 2012, 6:31 p.m. ET), http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html ("Horwitz Mar. 2012") ("Bank of America's caution that its card records may be incomplete or inaccurate suggests that documentation and accuracy problems may originate at the debt's source."). Such agreements directly contradict the sworn affidavits routinely filed by debt buyers in court in support of default judgments that assert debt buyers have personal knowledge of the debt alleged, that the information they have is completely reliable, and comes from a reliable source. *See* Peter A. Holland, *The One Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Md. J. of Bus. and Tech. L. 259, 268 (2011). Moreover, the only information typically purchased about debt sold on the secondary market is a summary of thousands of accounts contained in the portfolio. Typically, no

supporting documentation that would enable anyone to verify the accuracy of information regarding the alleged debts is available from any source, including the original creditor. *See* FTC, Debt Buying Report, at ii-iv. The scant information that is purchased by debt buyers typically is transmitted via an unprotected electronic Excel spreadsheet which may be changed at any time, by any person, intentionally or inadvertently. If any documentation about an alleged debt is available from an original creditor at all, debt buyers are often precluded by the terms of the sales agreement from obtaining it, or may obtain it only at significant cost and only for a limited period of time. *Id.,* at ii-iv.

The quality of debt portfolios sold in the secondary market is reflected in the purchase price: debt buyers pay, on average, only 4 cents on the dollar. *Id*. The price debt buyers pay for a particular debt portfolio is based primarily upon the likelihood that a debtor will succumb to the pressure exerted by the threat or entry of a judgment and the supply of debt available for sale rather than the legitimacy of the debt. *See* Fed. Trade Comm'n, Collecting Consumer Debts: The Challenges of Change - A Workshop Report, 20 (2009), *available at* http://www.ftc.gov/bcp/workshop/debtcollection/dcwr.pdf ("FTC, Challenges of Change") (debt buyers use mathematical scoring models based on likelihood of alleged debtor being susceptible to judicial collection, such as having attachable wages or assets, to determine whether to purchase a portfolio and how much to pay).

Debt buyers and industry trade groups concede that the industry's "lack of such records fail to serve the interests of consumers in obtaining documentation of disputed accounts or the legitimate interests of credit grantors and debt collectors in collecting debts that are genuinely owed." Comment of Portfolio Recovery Associates, Inc. Submitted to FTC (June 5, 2007), 2, *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/index.pdf. Industry trade groups acknowledge that "[n]o amount of due diligence prior to the purchase of a portfolio can cure deficiencies in the original data transmitted by an original credit grantor." Comment of ACA International Submitted to FTC, 43 n.55 (June 6, 2006), *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00016.pdf. Nevertheless, they seek to excuse their own irresponsible and fraudulent actions, such as filing inaccurate and unsupportable debt collection lawsuits, claiming that "[t]he due diligence process and representations and warranties in the purchase agreement help ensure the accuracy and integrity of the debts sold." Comment of DBA Submitted to FTC (June 2, 2007), 12, *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00010.pdf ("DBA Comments"). The value of such representations and warranties have clearly been grossly overstated by the industry, as revealed by the explicit terms of purchase agreements the debt buyers have sought to keep secret. *See* David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. Times, A1 (Nov. 1, 2010),

http://www.nytimes.com/2010/11/01/business/01debt.html (reporting bank employee alleged finding in portfolio being sold to debt buyer "about 5,000 accounts [in a portfolio of 23,000 accounts with] incorrect balances, incorrect addresses….[and] where consumer had won a judgment"); Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—In Lawsuits*, Wall St. J. (Nov. 28, 2010, 12:01 a.m. ET), http://online.wsj.com/article/SB100014240527 02304510704575562212919179410.html (describing "court-appointed auditor's conclu[sion] . . . that Capital One pursued 15,500 'erroneous claims' seeking money previously erased by a bankruptcy-court judge).

Inaccurate information about alleged debt is compounded by multiple re-sales of debt to subsequent debt buyers, such as Defendant-Appellant Leucadia. For example, according to an officer of an Illinois debt buyer who had purchased, or ostensibly purchased, bad paper, "[t]he same portfolio is sold to multiple buyers; the seller doesn't actually own the portfolio put up for sale; half the accounts are out of statute [of limitation]; accounts are rife with erroneous information; access to documentation is limited or nonexistent." Corinna C. Petry, *Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can use to avoid nasty surprises*, Collections & Credit Risk, 24, Vol. 12, No. 3 (March 2007). Indeed, the Federal Trade Commission ("FTC") has concluded that "[w]hen accounts are

transferred to debt collectors, the accompanying information often is so deficient that the collectors seek payment from the wrong consumer or demand the wrong amount from the correct consumer." FTC, Challenges of Change, at 25.

Record-breaking and increasing numbers of consumer complaints about third party debt collection abuses have attracted the attention of federal and state enforcement agencies. The FTC subpoenaed records from the nine largest debt buyers. Based on its study of approximately 5000 debt portfolios, containing approximately 90 million accounts, the FTC found that "each year, [debt] buyers sought to collect about one million debts consumers did not owe," and this may understate the problem. FTC, Debt Buying Report, at iv. Many of such attempts end in entry of default judgments obtained in reliance on false affidavits filed by debt buyers.

B. Enforcement Actions Brought Against Banks That Sell Delinquent Debt Confirm That It Is Inherently Unreliable, Explicitly Contrary To Assertions In Fraudulent Affidavits Routinely Filed By Debt Buyers.

Recently, state attorneys general and federal regulators have focused on the practices of banks that sell invalid, disputed, or fully paid debts, as well as debt not supported by adequate information, which has resulted in a flood of collection lawsuits being filed in state courts. *See* Horwitz, March 2012 (noting 13 states investigating sale of invalid debt by banks that results in widespread debt collection abuses). In May, 2013, the California Attorney General filed suit to hold

a bank "accountable for systematically using illegal tactics to flood California's courts with specious lawsuits against consumers" and claiming that it "employed unlawful practices as shortcuts to obtain judgments against California consumers with speed and ease that could not have been possible if [it] had adhered to the minimum substantive and procedural protections required by law." Press Release, CA Att'y Gen., *Attorney General Kamala D. Harris Announces Suit Against JPMorgan Chase for Fraudulent and Unlawful Debt-Collection Practices* (May 9, 2013), *available at* http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase.

The shockingly inadequate debt portfolio sale practices of the nation's largest banks infects the entire secondary debt collection market, casting serious doubt upon the veracity of any affidavit filed in court that alleges reliance upon or accuracy of debt information sold by banks. This conclusion is reinforced by the fact that most of the debt sold on the secondary market originates from one of the five largest banks: including the same ones exposed for producing fraudulent, robo-signed mortgage foreclosure documentation in order to obtain judicial foreclosures. *See* Joint Press Release, Board of Gov. of the Fed. Res. Syst., Office of the Comptroller of the Currency, *Independent Foreclosure Review to Provide $3.3 Billion in Payments, $5.2 Billion in Mortgage Assistance* (Jan. 7, 2013), http://www.federalreserve.gov/newsevents/press/bcreg/20130107a.htm. According

the Office of the Comptroller of the Currency, ("OCC"), which regulates national banks, "[t]he majority of bank debt sales activity is concentrated among the 19 largest banking organizations, with the five largest making up about 82 percent of the annual total average sales of debt." *Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Fin. Inst. and Consumer Prot. S. Comm. on Banking, Hous., and Urban Affairs* (2013) (statement of Thomas Curry, Comptroller of the Currency) (discussing guidance to the largest banks problems of banks selling debt without adequate controls).

The allegations about banks selling invalid and discharged or disputed debt, having inadequate internal controls, and a record of falsifying documents related to mortgage foreclosures prompted the OCC to investigate allegations of fraud related to bank's sale of delinquent credit card debt.[2] In July, 2013, the OCC issued additional guidance to banks that it supervises reminding them of their obligation to ensure the integrity of the data sold on the secondary market. *Id.* Among other requirements, the OCC guidance requires banks to implement enhanced procedures when it sells debt, such as contractually restricting the ability of initial debt buyers to sell debt purchased from the bank to subsequent debt buyers and limiting sale of

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[2] Under the Interagency Uniform Retail Classification and Account Management Policy guidelines, banks must charge off open-ended retail credit loans, such as credit cards, once they have become 180 days past due. *See* OCC Bulletin 2000-20, *Uniform Retail Credit Classification and Account Management Policy,* http://www.occ.gov/news-issuances/bulletins/2000/bulletin-2000-20.html.

portfolios to debt buyers that pursue judicial collection without adequate documentation or verification. *Id*., at 8and Attached Guidance, at 14.

The OCC followed up its industry-wide guidance by bringing an enforcement action against one bank, which entered into a consent order agreeing to correct its flawed collection procedures. *See* JPMorgan Chase Bank, N.A., No. 2013-138 (Dep't of Treas. Sept. 18, 2013) (Consent Order), *available at* http://www.occ.gov/static/enforcement-actions/ea2013-138.pdf (agreed order imposing $60 million penalties and ordering correction of debt sale and collection deficiencies). Shortly thereafter, the bank announced it would simply close its consumer debt collection unit. *See* Chris Cumming, *JPM to Shutter Litigation Group for Consumer Debt Collection,* Am. Banker (Oct. 17, 2013 8:59 a.m. ET), http://www.americanbanker.com/issues/178_201/jpm-to-shutter-litigation-group-for-consumer-debt-collection-1062882-1.html.

The OCC enforcement pressure has prompted other banks to examine and correct their debt collection and debt sale procedures and practices as well. *See* Jeff Horwitz and Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales,* Am. Banker (Jul. 2, 2013, 1:24 p.m. ET), http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html; Maria Aspan, *Wells Fargo Halts Card Debt Sales as Scrutiny Mounts,* Am. Banker (Jul. 29, 2013, 10:00 p.m. ET), http://www.americanbanker.com/issues/178_144/

wells-fargo-halts-card-debt-sales-as-scrutiny-mounts-1060922-1.html; Kevin Wack, *Chase Debt Collection Deal May Set Template for Industry Reform*, Am. Banker (Sept. 19, 2013, 5:13 p.m. ET), http://www.americanbanker.com/issues/178_182/chase-debt-collection-deal-may-set-template-for-industry-reform-1062291-1.html. "Most observers expect a shake-out of the entire debt industry with federal agencies like the CFPB and state supervisors like New York's banking superintendent, Benjamin Lawsky, proposing rules to stop collectors from using shoddy documents to win cases against consumers." Rachel Witkowski, *CFPB Debt Collection Rules May Move in Unprecedented Direction,* Am. Banker (Nov. 6, 2013, 12:01 a.m. ET), http://www.americanbanker.com/issues/178_214/cfpb-debt-collection-rules-may-move-in-unprecedented-direction-1063431-1.html.

The predicted shake-out is already apparent. For example, Wells Fargo recently filed suit after ignoring, for approximately 18 months, reports that debt buyer United Credit Recovery, LLC, was assigning tranches of debt it purchased from Wells Fargo after producing false affidavits of reliability that bore Wells Fargo bank logos, forged signatures of Wells Fargo officers, and fraudulent notarizations to make the information it sold appear more trustworthy in collection activities of subsequent debt buyers. *See* Complaint, *Wells Fargo v. United Credit Recovery, LLC*, Case No. 6:13-cv-01465-JA-GJK, (M.D. Fla. Sept. 20, 2013). Wells Fargo had been alerted to the practices, according to Wells Fargo's

complaint, approximately 18 months prior to filing suit, by an email explaining that reports of the forgeries were being published openly by industry news sources. *Id*., Para. 16. Wells Fargo also admitted that it was alerted to those practices by the Colorado Attorney General, which provided it with thousands of documents with identical forged Wells Fargo officer signatures. *Id*., at Para. 17. The Wells Fargo complaint, among other significant revelations, confirms that Wells Fargo sold debt portfolios without warranties, without supporting documentation, and without assurances that the debt it sold is accurate or reliable. Moreover, the complaint and supporting documentation confirm that according to the agreement between Wells Fargo and United Credit Recovery, LLC, subsequent "third party debt buyers had no right to rely on any Wells Fargo representations or warranties. . . Such buyers had no rights under the Purchase Agreement and could not demand documentation from Wells Fargo." *Id*., at Para. 12. Terms restricting the access of subsequent debt buyers to supporting documentation are commonly included in agreements between banks and debt buyers that resell such questionable debt. *See* Holland, at 268.

Following on the heels of Wells Fargo's lawsuit, the Minnesota Attorney General also filed suit against United Credit Recovery, LLC, to protect residents of Minnesota and the integrity of Minnesota courts from the fraudulent affidavits being manufactured and used to obtain thousands of fraudulent judgments. *See*

Press Release, *Attorney General Lori Swanson Sues Florida Company For Creating Manufactured Affidavits To Aid In Collection Of Overdraft Debt Purchased From Large Banks Lawsuit Seeks to "Protect the Integrity of the Legal System*" (Oct. 30, 2013), http://www.ag.state.mn.us/Consumer/PressRelease /131030FloridaManufacturedAffidavits.asp:

> While made to appear as if they were individually and personally signed and sworn to by the bank officers before a notary, the affidavits were actually created using computer software that simply cut and pasted into an affidavit template a bank officer's signature and notary from a different document. UCR then sold the affidavits to other debt buyers. The affidavits were then used to aid in the collection of the alleged customer debt, directly with consumers and through presentation to courts, both by UCR in some cases and more frequently by subsequent debt buyers to which UCR resold the debt and affidavits.

Id.

II. Class Action Relief Is Necessary To Remedy And Deter Industry-Wide Fraudulent Practices Used To Obtain Default Judgments In The Secondary Debt Collection Market.

Unless claims to address the systemic abuses inherent in the debt buying industry are brought as a class action, it is unlikely that the goals of Congress in enacting the Fair Debt Collections Practices Act, ("FDCPA"), to deter abusive collection practices will be achieved. The FDCPA "was enacted to eliminate abusive debt collection practices; to ensure that debt collectors who abstain from such practices are not competitively disadvantaged; and to promote consistent state

action to protect consumers." *Jerman v. Carlisle,* 559 U.S. at 577. Congress found:

> While unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial.

Consumer Credit Protection Act, S. Rep. No. 95-382, at 2 (1977). The FDCPA was subsequently amended[3] to remove the exemption for attorneys collecting debts on behalf of a client in "direct response to the explosive growth in the number of law firms that had entered the debt collection business and were abusing the exemption." Statement of Congressman Frank Annunizzo, 132 Cong. Rec. H10031 (Daily Ed. Oct. 14, 1986); *see Heintz v. Jenkins*, 514 U.S. 291 (1995) (holding the FDCPA applies to lawyers engaged in litigation). As courts have noted, "the FDCPA is 'extraordinarily broad,' crafted in response to what Congress perceived to be a widespread problem." *Hartman v. Great Seneca Fin. Corp*., 569 F.3d 606, 611 (6th Cir. Ohio 2009) (quoting *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. Ky. 1992)).

The instant class action is an appropriate, superior means to ensure that debt collection practices are fair and to remedy and deter fraudulent practices that harm alleged debtors and the integrity of the courts. Courts play an essential role to

[3] Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986).

enforce the goals of the FDCPA. Affirmative FDCPA lawsuits brought in federal court deters collection law firms from merely "review[ing] the collection files with such speed that no independent judgment could be found to have been exercised, and then issu[ing] form collection letters with the push of a button." *Miller v. Upton, Cohen & Slamowitz*, 697 F. Supp. 2d 86, 95 (E.D.N.Y. Sept. 30, 2009) (quoting *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 306 (2d Cir. 2003)).

A. The Challenged Practices Raise Significant Systemic Concerns About Due Process And Fairness That Cannot Be Addressed Adequately In Individual Cases.

High rates of default judgments in debt buyer cases have emboldened the debt buying industry to file lawsuits *en masse* for which they have no competent, admissible evidence to prove that they own the debt they seek to collect, that they are suing the right person and for the right amount, and that they have a legal right to a judgment. *See Holland*, at 268. In other words, they cannot meet the substantive requirements to obtain a judgment. *See* 6 Am. Jur. 2 Assignments §148 (2013) ("The assignee's burden of proving the existence of the assignment is met by evidence that is satisfactory in character to protect the defendant from another action by the alleged assignor, and which shows that there was a full and complete assignment of the claim from an assignor who was the real party in interest with respect to the claim."). These essential requirements are not mere technicalities, but rather, implicate due process: entry of judgment in favor of a debt buyer, based

on false affidavits, does not protect debtors from subsequent claims on the same alleged debt. *Id*.; Holland, at 270-71. For example, if judgment is entered and the alleged debtor pays on the judgment, he may nevertheless be forced to pay a second time to the rightful owner of the debt.

Judicial collections based on false affidavits, as alleged in this case, also raise fundamental fairness concerns: even if the debt buyer purportedly has some records of the original creditor, the debt buyer is not competent to lay a proper foundation as to the accuracy and reliability of the business records of the original creditor. As explained by the Missouri Supreme Court in *CACH, LLC v. Askew*, "[a]ll of the requirements of [the business record exception to the hearsay rule] must be satisfied for a record to be admitted as competent evidence." 358 S.W. 3d 58, 63 (Mo. 2012) (en banc). The court explained:

> To satisfy [all the] requirements [of the business records rule], the records 'custodian' or 'other qualified witness' has to testify to the record's identity, mode of preparation, and that it was made in the regular course of business, at or near the time of the event that it records. For that reason, a document that is prepared by one business cannot qualify for the business records exception merely based on another business's records custodian testifying that it appears in the files of the business that did not create the record.

Id. Thus, at most, a records custodian of a debt buyer is competent to establish only personal knowledge of the debt buyer's own record keeping practices—not personal knowledge of the original creditor's or previous debt buyer's record keeping procedures, and not of the debtor or the debt itself.

It is even questionable whether an affiant of a debt buyer is competent to testify to its own business records in light of widespread evidence of robo-signing. *See* Rick Jurgens & Robert J. Hobbs, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts*, Nat'l Consumer Law Ctr. (2010), 22. 22. The term "robo-signing," so familiar in the foreclosure context has been used to describe debt buyer's practice of executing false affidavits used in litigation nationwide so quickly that it would be impossible for them to verify the information they are attesting to is accurate. *See Midland Funding, LLC v. Brent*, 644 F. Supp. 2d 961, 966 (N.D. Ohio 2009) (debt buyer employee admitting to robo-signing affidavits pursuant to standard company procedure and noting the "percentage of [affidavits] that are checked for accuracy is 'very few and far between.'"); Jeff Horwitz, *State AGs Probing Sales of Credit Card Debt*, Am. Banker (Sept. 17, 2012, 1:22 p.m. ET), http://www.americanbanker.com/issues /177_180/state-attorneys-general-probing-sales-of-credit-card-debt-1052724-1.h tml (reporting "managers of a credit card processing facility . . . ordered its employees to robo-sign affidavits attesting to the accuracy of debts owed"); Holland, at 269.

Debt buyers attempt to evade fundamental rules of evidence that ensure judgments are based upon only competent, trustworthy evidence by claiming that the records regarding the debt are reliable and integrated into their own business

records. This integration argument fails to overcome the fundamental problem that employees of debt buyers cannot testify competently or truthfully that they have personal knowledge about the trustworthiness of the recordkeeping practices of the banks that created the records. *See* Fed.R.Ev. 803(6)(D) and (E); *Commonwealth Fin. Systems v. Smith*, 15 A.3d 492 (Pa. Super 2011) (debt buyer employee cannot authenticate creditor' records because they are not a custodian or qualified witness); *Beneficial Maine v. Carter*, 25 A3d 96 (2011) (a qualified witness would have to testify to familiarity with the original creditor's record keeping practices).

Indeed, as discussed, the underlying record keeping practices of the bank have themselves been revealed to be shoddy and inaccurate. In any event, a business record integration argument will not assist a debt buyer because in most cases, the sales agreements between the bank and the initial debt buyer explicitly disclaim the accuracy and reliability of the accounts sold. Thus, for most debt buyer claims, "there is no circumstantial guarantee of sincerity" to permit the admission of explicitly inaccurate and unreliable bank records. *CACH, LLC v. Askew,* 358 S.W.3d at 63.

A debt buyer's inability to verify the accuracy of the information sued upon also raises significant fairness concerns. The FDCPA imposes requirements designed to prevent debt collectors from "dunning the wrong person or attempting to collect debts which the consumer has already paid." *Chaudhry v. Gallerizzo*,

174 F.3d 394, 406 (4th Cir. 1999); accord *Clark v. Capital Credit & Collection Servs*., 460 F.3d 1162, 1173 (9th Cir. Or. 2006) (adopting standard). The FDCPA protects debtors from abusive collection practices even if they owe a debt. According to one debt buyer trade group, "[v]erification as required by the FDCPA, however, involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed…" DBA Comments, at 12. Another trade group has asserted that proof should not be required because the documentation "is often unattainable for a variety of reasons, the most important of which is that the original creditor no longer has the information or did not have it when selling an account or turning an account over for collection." Holland, at 262.

Given the inherently inaccurate information banks and debt buyers have about alleged debts, such scant verification is clearly inadequate and would lead to absurd consequences. *See* David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, (describing debt buyer admitting in deposition to attesting in affidavits to information gleaned only from a line of data on a computer screen: "'So,' asked Dale Irwin… 'if you see on the screen that the moon is made of green cheese, you trust that CACH has investigated that and has determined that in fact, the moon is made of green cheese?' 'Yes,' Mr. Mills replied"). Certainly, such scant verification does not comport with standards required of attorneys filing lawsuits.

See Upton, Cohen & Slamowitz, 687 F. Supp. at 101 (finding "[a]s in the analogous Rule 11 context, an attorney responsible for issuing and executing a legal document 'must make a reasonable inquiry *personally*.'" (quoting *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1280 (3d Cir. 1994) (emphasis added)). Nor should it form the basis for judgments based on false affidavits.

Due to the significant barriers presented by the structure and limitations of the secondary debt collection market, a debt buyer should be unable to obtain default judgments on claims filed *en masse*. *See* NCLC, Debt Machine, at 11. Producing via software form affidavits that are not even read by the affiant, as alleged in this case, surely cannot satisfy the demands of fairness and due process.

B. The Fraudulent Practices Alleged Cannot Effectively Be Challenged Without A Class Action Because Judgments Are Entered Overwhelmingly By Default Rather Than After A Contested Trial.

Class action is a superior method to resolve the claims asserted herein because of the systemic nature of the violations alleged to obtain default judgments, which are entered without the alleged debtor raising any defense. It is entirely unrealistic to presume that the systemic fraudulent practices used to obtain default judgments can be challenged effectively through individual lawsuits. As the court found in *Kalish v. Karp & Kalamotousakis, LLP*, 246 F.R.D. 461 (S.D.N.Y. 2007),

> litigating as a class retains substantial value because it encourages the prosecution of claims *en masse* that would not be prosecuted individually. In the FDCPA context, while the potential for higher individual recoveries exists, realizing that potential requires assuming that each putative class member is aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her case. (quotation marks and citation omitted). Those transaction costs are not insubstantial and have prompted other courts in this Circuit to conclude that litigating as a class is superior to litigating individual FDCPA claims...

Id., 246 F.R.D. at 464. Similarly, in *Jerman v. Carlisle*, 271 F.R.D. 572, 576, 2010 U.S. Dist. LEXIS 132034 (N.D. Ohio 2010), the court certified the class, finding

> Many plaintiffs may not know their rights are being violated, may not have a monetary incentive to individually litigate their rights, and may be unable to hire competent counsel to protect their rights. A class action is judicially efficient in lieu of clogging the courts with thousands of individual suits. The FDCPA itself recognizes the propriety of class actions by providing special damages sections for class action cases. 15 U.S.C. §§ 1692a & b.

Id., 271 F.R.D. at 577 (quoting *Sledge v. Sands*, 182 F.R.D. 255, 259 (N.D. Ill. 1998)) (citing *Kelly v. Montgomery Lynch Assoc*., 2007 U.S. Dist. LEXIS 93656, 2007 WL 4562913 (N.D. Ohio 2007)). Thus, contrary to Defendants-Appellants' arguments, the mere fact that an individual may have an individual defense to entry of a judgment does not preclude an FDCPA class action challenging the systemic practice of obtaining *default* judgments by filing fraudulent affidavits of service and merit. In the context of default judgments, individual defenses clearly are irrelevant and do not predominate over or otherwise prevent certification of the common questions identified by Plaintiffs-Appellees and the lower court.

Class certification is entirely appropriate in this case, as it provides a superior means to remedy and deter widespread, fundamentally unfair, and allegedly illegal collection practices by the debt buying industry of using false affidavits to conceal defects that should prevent judgments from being entered. Such practices harm a vast number of consumers and impugn the integrity of courts nationwide.

C. The Challenged Practices Certified For Class Treatment Cause Significant Harm To Alleged Debtors.

Because most debt buyer judgments are entered by default, debt buyers have enjoyed the absence of adversarial proceedings and rigorous judicial scrutiny that would normally prevent entry of judgments on invalid or insufficient claims and fraudulent affidavits. They know few debtors will be able to defend against even spurious claims. *See* Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—In Lawsuits*, (reporting that by industry estimates ninety-four percent of collections end in default). Debtors who receive notice of a lawsuit—although many do not because of fraudulent and faulty service—usually appear without legal representation if they appear at all. *Id*. (noting "[t]he majority of borrowers don't have a lawyer, some don't know they are even being sued, and others don't appear in court, say judges."). Most capitulate without a fight because they've long since thrown out or lost their own records, or do not know they can assert defenses. As a result, unsophisticated alleged debtors may be pressured into paying debts

they do not owe. *See* Statement of Policy Regarding Communications in Connection With the Collection of Decedents' Debts, 76 Fed. Reg. 44,915 (July 27, 2011); *see also* Press Release, *FTC Issues Final Policy Statement on Collecting Debts of the Deceased* (July 20, 2011) (discussing abuses related to collection of decedents' debts from families and survivors who are not legally obligated to pay).

Contrary to the shocking assertion of Defendant-Appellant LR Credit, Op. Br. at 14, the entry of a judgment based on fraud causes significant harm and can have considerable long-term negative consequences, particularly for low income and older people who live on the margins. Recognizing that the coercive power wielded by debt buyers through judicial debt collection creates a major consumer protection concern, the Consumer Financial Protection Bureau ("CFPB") has asserted supervisory authority over debt buyers, stating:

> Whether or not consumers owe and are liable for the debts collectors are attempting to recover, unlawful collection practices can cause significant reputational damage, invade personal privacy, [ ] inflict emotional distress[,] interfere[] with a consumer's employment relationships . . . [and] impair the consumer's ability to repay debts.

Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65775-01, 65777 (Oct. 31, 2012) (to be codified at 12 C.F.R. pt. 1090).

Indeed, the mere threat of litigation is sufficient to force payment even if a debtor has a valid defense. As explained by one commentator, "a civil filing serves as a credible threat to inflict harm on the defendant['s credit rating and thus] may

induce the defendant to pay." Richard Hynes, *Broke But Not Bankrupt: Consumer Debt Collection In State Courts*, 60 Fla. L. Rev. 1, 20 (2008). An unsophisticated, alleged debtor faced with a court summons may believe that a collector would not be allowed to bring a case that could not be proven in court and that he has no choice but to make payments and may be unable to avoid a judgment. *See Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (reasoning that unsophisticated "consumers would unwittingly acquiesce" to a time-barred lawsuit instead of "expend[ing] energy and resources and subject[ing] herself to the embarrassment of going into court to present the defense").

CONCLUSION

This Court should protect alleged debtors and the integrity of courts by rejecting Defendants-Appellants' challenge to the class certification order entered in this case.

November 13, 2013

Respectfully Submitted

/s/Jean Constantine-Davis
Jean Constantine-Davis*
**Counsel of Record*
AARP Foundation Litigation
601 E St., NW
Washington, DC 20049
202-434-2060
jcdavis@aarp.org
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2013, an electronic copy of the foregoing Brief of Amici Curiae AARP, National Association of Consumer Advocates, and National Consumer Law Center in Support of Plaintiffs-Appellees Urging Affirmance was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Jean Constantine-Davis
Jean Constantine-Davis

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November 13, 2013

/s/Jean Constantine-Davis
Jean Constantine-Davis