No. 19-100

In The

Supreme Court of the United States

CROWN ASSET MANAGEMENT, LLC,

Petitioner,

v.

MARY BARBATO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RMAI AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Receivables Management Association International, Inc., is a non-profit corporation, has no parent entity and no publicly held company owns 10% or more of its stock.

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RMAI respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Receivables Management Association International, Inc. (RMAI) is the nonprofit trade association that represents more than 500 companies that purchase or support the purchase of performing and nonperforming receivables on the secondary market.

The existence of the secondary market is critical to the functioning of the primary market in which credit originators extend credit to consumers.[2] An efficient secondary market lowers the cost of credit extended to consumers and increases the availability and diversity of such credit. To be sure, a recent study of empirical data found that greater barriers to debt

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] See generally, David E. Reid, *The Value of Resale on The Receivables Secondary Market*, RMAI White Paper (Apr. 2016) (publicly available at https://rmaintl.org/wp-content/uploads/2019/01/RMAI-Secondary-Market-White-Paper-2016-FINAL.pdf and last accessed July 16, 2019).

collection activities has a direct correlation to decreases in both consumer access to credit and financial health.[3]

As an international leader in promoting strong and ethical business practices within the receivables industry, RMAI launched the Receivables Management Certification Program (RMCP) in 2013 with the stated mission to "provide enhanced consumer protections through rigorous and uniform industry standards of best practice." RMAI requires all its member companies that are purchasing receivables on the secondary market to become certified through RMAI's RMCP as a requisite for membership.[4]

The RMCP is a comprehensive and uniform source of industry standards that has been recognized by the collection industry's federal regulator, the Consumer Financial Protection Bureau, as "best practices."[5]

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[3] Julia Fonseca, Katherine Strair, Basit Zafar, Federal Reserve Bank of New York, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection*, Staff Report No. 814 (May 2017) (publicly available at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf?la=en and last accessed July 16, 2019).

[4] RMAI, Receivables Management Certification Program (publicly available at https://rmaintl.org/wp-content/uploads/2019/03/Certification-Policy-version-7.0-FINAL-with-Hyperlinks.pdf and last accessed July 16, 2019).

[5] Consumer Financial Protection Bureau, *Small Business Review Panel For Debt Collector and Debt Buyer Rulemaking – Outline Of Proposals Under Consideration and Alternatives Considered*, p. 38 (July 28, 2016) (publicly available at https://tinyurl.com/y4hjzd5d and last accessed Aug. 14, 2019).

In addition to requiring that certified companies comply with local, state and federal laws and regulations concerning collection activity, the RMCP goes above and beyond the requirements of local, state and federal laws and regulations by requiring its member companies to comply with additional requirements not addressed by existing laws and regulations. Because RMAI's certification program exceeds state and federal requirements, it has chosen to take this same approach with passive debt purchasers who are required to be FDCPA compliant regardless that the statute's definitions would suggest otherwise.

The RMCP has enhanced both the accuracy and integrity of debt collection by certified companies. By RMAI estimates, since the CFPB began tracking debt collection complaints in 2013, when calculating the percentage of certified companies' complaints over the total of "debt collection" complaints, almost all certified companies had nearly zero percent or no complaints.

When interpretations of statutory requirements create confusion, as is the case here, RMAI will assist its members so they can maintain their heightened compliance standards.

SUMMARY OF ARGUMENT

More than $3 trillion of consumer credit, perhaps the majority of U.S. consumer credit, is held by companies that purchase debt solely for the purpose of investment. They engage others to service and collect the debts they acquire. They do not interact with their debtors, do not make loans or provide checking accounts. Often, they have no employees or physical location. These companies are sometimes called "passive" debt buyers. In addition to purchasing performing loans, they also acquire defaulted loans, but the purpose of these companies remains the same – the acquisition of debt for the sole purpose of investment.

The federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*., regulates the conduct of debt collectors and is largely aimed at persons who collect on behalf of creditors. But the Court of Appeals for the Third Circuit has held that debt buyers can also be creditors if the debt they acquire is in default at the time of its acquisition. The Third Circuit recognized that this "default test" ignores the fact that debt purchasers are "nominally creditors," but believed the structure of the FDCPA signaled Congressional intent to focus on the status of the debt at acquisition when determining whether one is a debt collector.

In *Henson v. Santander*, this Court after reviewing the structure and legislative history of the FDCPA, held that the question of whether one is an FDCPA debt collector cannot be determined by the status of the debt at the time it is acquired.

In the decision below the Third Circuit incorrectly held that a person is a debt collector merely because they acquire debt. The reasoning of the decision below ignored the fact that the FDCPA defines creditors as persons "to whom a debt is owed." Further, it incorrectly construed the FDCPA's definition of debt collector to include persons who purchase debt with the intention that it be paid by the debtor. In doing so, it unwittingly reclassified the majority of creditors holding $3 trillion of consumer loans as FDCPA "debt collectors," imposing disruptive requirements and restrictions and creating confusion in the U.S. consumer credit market that can only be cured by this Court's review.

REASONS FOR GRANTING THE PETITION

Because The Decision Below Conflicts With The Court's Decision In *Henson v. Santander*, The Court Should Grant Review Now To Eliminate The Uncertainty Of The FDCPA's Application To Creditors Holding More Than $3 Trillion In Purchased Consumer Debt.

As framed by Petitioner the Question Presented is "[w]hether a passive debt buyer – an entity that purchases defaulted debts for its own account . . . is a debt collector" under the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*. And while this is the question as it relates to the Petitioner, the decision of the Court of Appeals for the Third Circuit has much wider implications for disruption of the consumer financial services industry. The decision below does this by erroneously holding that a debt collector under 15 U.S.C. § 1692a(6) includes persons whose business has as its principal purpose the acquisition of debt, and seeks to have those debts paid. *Barbato v. Greystone All., LLC*, 916 F.3d 260, 267-268 (3d Cir. 2019).

The Third Circuit's interpretation of the FDCPA's definition of debt collector is so broad it swallows the much larger secondary market of all purchased consumer debt and in doing so disrupts the well-understood regulatory and legislative framework behind the creditor/debt collector distinction.

The impact of this holding is made profound by the fact that most U.S. consumer debt is owned by entities who purchase debt for the very purpose of having it paid. Andrea Ryan, Gunnar Trumbull, Peter Tufano, *A Brief Postwar History of U.S. Consumer Finance*, Harvard Business School, Working Paper 11-058, p. 23 (2010). The Third Circuit has, without consideration of this fact, transformed into debt collectors many entities we would otherwise understand to be creditors. And it arrived at this conclusion after the Court had provided clear guidance in interpreting the FDCPA to avoid this very result. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725, 198 L.Ed.2d 177, 184 (2017) ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage. . . .").

The FDCPA was enacted to protect consumers from abusive conduct by debt collectors. *Henson*, 137 S. Ct. at 1720, 198 L.Ed.2d at 179. "Debt collectors" are persons who regularly collect debts owed to others, or whose business' "principal purpose . . . is the collection of any debts." 15 U.S.C. § 1692a(6). In addition to prohibiting debt collectors from engaging in particular conduct (see, e.g., § 1692c(a)(1) concerning communications at an inconvenient time or place), debt collectors are required to make certain disclosures to consumers in connection with debt collection communications. See, e.g., § 1692g(a) (mandating particular disclosures in the initial or within five days of the initial communication); § 1692e(11) (requiring particular disclosures in the initial written communication and in all subsequent debt collection communications).

The decision below creates immediate uncertainty by suddenly applying FDCPA requirements to a secondary market that as of June 2019 was composed of entities that acquired and held, collectively, more than $3 trillion in purchased consumer mortgage debt and $18 billion of all types of consumer credit not secured by real estate. Federal Reserve, *Mortgage Debt Outstanding (Table 1.54)*, June 2019 (publicly available at https://tinyurl.com/y6n3vljz or https://doi.org/10.5281/zenodo.3367774); Federal Reserve, *Consumer Credit – G.19, for June 2019*, released Aug. 7, 2019 (publicly available at https://www.federalreserve.gov/releases/g19/current/g19.pdf or https://doi.org/10.5281/zenodo.3367778) both last accessed Aug. 13, 2019.

A. The Third Circuit's Expansive Reading Captures All Debt Purchasers.

In *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403-404 (3d Cir. 2000) the Third Circuit introduced its "default status" test and found that an entity which purchased past due municipal water and sewer obligations and then assigned the accounts to another for collection, was a debt collector under § 1692a(6) because there was "no question that the 'principal purpose' of NTF's business is the 'collection of any debts,' namely, defaulted obligations which it purchases from municipalities." *Id.*, at 404. But § 1692a(4) defines a creditor as a person "to whom a debt is owed," and while it would seem the debt purchaser in *Pollice* was such an entity, the court did not address its application to the debt purchaser other than to reference § 1692a(4) in a footnote. *Id.*, at 403 n. 26.

The question of debt purchaser status as a creditor was squarely addressed by the Third Circuit in *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007). It concluded that " . . . as to a specific debt, one cannot be both a 'creditor' and a 'debt collector,' as defined in the FDCPA, because those terms are mutually exclusive." *Id.*, at 173. While the default status test can distinguish the two, the Third Circuit acknowledged that the test had shortcomings because it "overlooks the fact that the person engaging in the collection activity may actually be owed the debt and is, therefore, at least nominally a creditor." *Id*. But "Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.*

Henson abrogated the default test. *Barbato*, 916 F.3d at 266 citing *Tepper v. Amos Fin.*, LLC, 898 F.3d 364, 367 (3d Cir. 2018). But in its place the Third Circuit introduced the "acquisition of debt" test. *Id.*, at

267. "As long as a business's raison d'être is obtaining payment on the debts that it acquires, it is a debt collector. Who actually obtains the payment or how they do so is of no moment." *Id.*

By tying the mere acquisition of debt as the determining factor of debt collector status under the FDCPA, the Third Circuit unwittingly transformed most holders of U.S. consumer credit into debt collectors.

B. Passive Debt Purchasers Are Significant Actors In The Consumer Credit Industry.

Unlike the default test, the "acquisition" test implicates the activities of the greater consumer credit industry. It is axiomatic that a creditor to whom a debt is owed expects it to be repaid, so classifying FDCPA debt collectors as entities whose principal business is to acquire debt does little to sort out creditors from debt collectors.

Creditors, like Petitioner, purchase loans for the principal purpose of making profit on their investment. The acquisition of debt by these creditors is not to assemble a "collection" of debt as the Third Circuit would have it, but rather to bundle together loans and offer investors an opportunity to make a profit when the debts are paid by borrowers.[6] Petitioner is part of a

[6] As Petitioner points out, "[t]he FDCPA is plainly not using the term 'collection' in the sense of a grouping of objects, such as a church collection, a collection of stamps, or a collection of

larger secondary market that holds over $3 trillion in consumer debt and regularly participates in the purchase and sale of billions of dollars of consumer debt every month.

Aside from the potential profit for investors, the business of purchasing consumer debt benefits commercial banks through increased liquidity and decreased loan loss risk. It has fostered investment in U.S. credit markets, increased the availability of new capital that would otherwise not be available for lending and led to the creation of innovative consumer credit products such as marketplace lending which has brought credit to the unbanked and distressed borrower. See generally, W. Scott Frame, *Marketplace Lending's Role in the Consumer Credit Market*, Federal Reserve Bank of Atlanta (Sept. 2015) (publicly available at https://tinyurl.com/y4uysryu and last accessed Aug. 13, 2019). Only a brief introduction to the secondary market of purchased debt is needed to appreciate the wide-spread disruption caused by the Third Circuit's decision to categorize these entities as FDCPA debt collectors.

1. Securitization.

Consumer financing has evolved well beyond the model of a local bank lending to its customer. In the latter half of the 20th century, "securitization" of consumer debt became a popular way for banks to

baseball cards; rather, it is referring to (and regulating) the act of collection." *Petitioner's Brief*, p. 19.

transform their illiquid assets, consumer loans, into liquid assets by bundling together a number of consumer loans and selling them to unrelated entities known as special purpose vehicles (SPVs). Andreas A. Jobst, *A Primer On Structured Finance*, Journal of Derivatives and Hedge Funds, Vol. 13, No. 3, p. 201 (Nov. 2007); see also Office of the Comptroller of the Currency, *Asset Securitization, Comptroller's Handbook*, p. 2 (Nov. 1997) (hereinafter, "*OCC Handbook*") (publicly available at https://tinyurl.com/yxrywsan and last accessed Aug. 15, 2019) (noting that loan securitization began "with the structured financing of mortgage pools in the 1970s."). After the loans are assigned to the SPV, it issues securities to investors and uses the proceeds of the security sales to pay the originator. Board of Governors of the Federal Reserve System, Supervision and Regulation Letter 90-16 (FIS), *An Introduction to Asset Securitization – Volume 1*, pp, 7-8 (May 25, 1990) (publicly available at https://tinyurl.com/y4whljsx and last accessed Aug. 13, 2019).

These securitizations were transformative because they resulted in the separation of the traditional lending functions of origination, servicing and funding. *OCC Handbook*, p. 7. Unlike "direct lending," a bank now originates a loan and divorces itself from the borrower by selling the loan to an SPV. But although the SPV is now the creditor, it has no interaction with its borrower. Servicing of the debt is carried out by a "servicer." The servicer is responsible for customer interactions, account management, billing and collections. *Id.*, p. 10. The SPV and its investors are passive participants and do not engage in any decision making concerning the loans. Their only concern is a successful investment. Gary Gorton and Andrew Metrick, *Securitization*, National Bureau of Economic Research Working Paper 18611, p. 10 (Dec. 2012) ("[T]he SPV is not an actively managed vehicle.") (publicly available at https://tinyurl.com/y2haznwj and last accessed Aug. 15, 2019); Gary B. Gorton, Nicholas S. Souleles, *Special Purpose Vehicles and Securitization, The Risks of Financial Institutions*, University of Chicago Press, p. 550 (Jan. 2007) ("SPVs have no purpose other than the transaction(s) for which they were created, and they can make no substantive decisions; the rules governing them are set down in advance and carefully circumscribe their activities. Indeed, no one works at an SPV and it has no physical location.").

By all accounts, a considerable amount of consumer debt in the U.S. today is not held by the originating lender but is instead assigned to special purpose vehicles (SPVs). Ryan, *et al.*, *A Brief Postwar History of U.S. Consumer Finance*, p. 23. "By 2006, approximately 55% of all mortgages, 45% of all credit card loans, and 16% of non-revolving loans (many of which are auto installment loans) were securitized." *Id.*, p. 24. Today the business of securitizing consumer debt, by acquiring debt for the purpose of having it paid, " . . . plays an essential role in the financial system and the broader U.S. economy. It is a mainstream source of credit and financing for individuals and businesses and finances a substantial portion of all consumer credit." *Securitization of Assets: Problems and Solutions*, *Testimony* *before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 111th Congress, 1st session, p. 25 (2009) (Testimony of Mr. George Miller).

The benefits of securitization are not limited to investors. Securitization benefits lenders by "converting an on-balance-sheet lending business into an off-balance-sheet income stream that is less capital intensive." *OCC Handbook*, p. 4. These credit sales lower originating lender's borrowing costs, provide additional capital for expansion or reinvestment and improve the lender's risk management. *OCC Handbook*, p. 4.

Borrowers also benefit from securitization through increased credit availability and credit under terms the originating lender may not have provided had it kept the loan on its balance sheet. *OCC Handbook*, pp. 4-5. In the case of credit card debt, it has enabled originators to serve a diverse customer base at rates lower than those lenders would have offered had they kept the credit card loans on their balance sheets. *Id.*, p 5. As a result, the sale of debt to entities like Petitioner has "significantly expanded both the availability of credit and the pool of cardholders" since the late 20th Century. *Id.*, p. 5.

2. Marketplace Lending.

Although there has been a dramatic decrease in the securitization of consumer loans since the 2007 financial crisis, "marketplace lending" is an emerging and fast-growing alternative to traditional lending for consumers and small businesses. Angela M. Herrboldt, *Marketplace Lending*, Supervisory Insights, Federal Deposit Insurance Corporation, Vol. 12, Issue 2, p. 12 (Winter 2015) (publicly available at https://tinyurl.com/y35es9l9 and last accessed Aug. 12, 2019); David W. Perkins, *Marketplace Lending: Fintech in Consumer and Small-Business Lending*, Congressional Research Service, p. 1 (Sept. 4, 2018) (publicly available at https://tinyurl.com/y4r4ybmk and last accessed Aug. 12, 2019). Marketplace lenders typically make small, unsecured, short-term loans. *Id.*, p. 2. Although a few make direct loans, marketplace lenders also work with partner banks. Under this model, the marketplace lender passes the prospective borrower's application along to a partner bank. If the partner bank issues a loan, the loan is sold to the marketplace lender, who then offers it for sale to investors. See generally, Frame, *Marketplace Lending's Role in the Consumer Credit Market*. Marketplace lenders also engage in securitizations. Rather than purchasing the loan from a partner bank itself, the marketplace lender sells its loans to an SPV which bundles together various loans for third party investment. See, e.g., LendingClub, *LendingClub securitization program* (June 22, 2017) ("To provide another way for institutional investors to access the consumer credit asset class, LendingClub sponsors securitization transactions backed by loans facilitated through our platform.") (publicly available at https://www.lendingclub.com/investing/institutional/securitization and last accessed Aug. 14, 2019).

3. Sales of Defaulted Debt.

Like performing loans, nonperforming loans are also sold on the secondary market. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry*, p. 1 (Jan. 2013) (publicly available at https://tinyurl.com/yyw2cyav and last accessed Aug. 12, 2019). And just as selling performing loans strengthens an originating creditor's balance sheet, the sale of defaulted debt "decreases the losses [creditors] incur in extending credit, which, in turn, is likely to lead to an increase in the amount of credit extended and a decrease in the price of that credit. *Id.*, at 11.

RMAI members include companies that purchase debt. Some of these companies purchase defaulted debt, but others purchase portfolios of performing debt. These companies are further categorized as "active" or "passive" debt purchasers.

The difference between active and passive debt purchasers is substantial. Companies that are "active" engage in the management and servicing of their purchased portfolios. They can employ hundreds if not thousands of people who provide various functions such as determining what debt portfolios are purchased, how they are to be liquidated and then how to carry out the process of liquidating the purchased debt. "Passive" debt purchasers share none of these attributes. These companies by and large serve to hold portfolios of debt for either financing or investment purposes. Passive debt purchasers do not engage with their debtors. To be sure, passive debt buyers can also be SPVs and will have no physical location or employees. It is no more than the documents under which it was formed. Gorton and Souleles, *Special Purpose Vehicles and Securitization, The Risks of Financial Institutions*, p. 550. And the facts reveal this is the case here. Respondent did not allege having any interaction with Petitioner. *Barbato*, 916 F.3d at 262.

As between the passive purchaser of performing debt and one who purchases defaulted debt, there is no other distinction other than the status of the debt at the time it was acquired. But both act in the same manner, by purchasing debt, and for the same purpose, as an investment vehicle. As such, "is it really impossible to imagine that reasonable legislators might contend both ways on the question whether defaulted debt purchasers should be treated more like loan originators than independent debt collection agencies?" *Henson*, 137 S. Ct. at 1725, 198 L.Ed.2d at 185. The answer to these questions "are matters for Congress, not this Court, to resolve." *Id.*

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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