IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 17-2851

JAMES TEPPER and ALLISON TEPPER

Appellees

v.

AMOS FINANCIAL, LLC

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Brief of the Appellees, James Tepper and Allison Tepper

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I. STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been previously before this Honorable Court. Presently, an application for reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1692k(a)(3) filed by the appellees/plaintiffs below, James Tepper ("**Mr. Tepper**") and Allison Tepper ("**Mrs. Tepper**") (Mr. Tepper and Mrs. Tepper are collectively herein referenced as the "**Teppers**"), is pending in the underlying action below before the Honorable J. Curtis Joyner. The parties have submitted all materials requested by Judge Joyner, who has indicated that he will make a decision regarding the amount of attorney's fees and costs to which the Teppers are entitled during the pendency of this appeal.

In addition, there is a state court action in foreclosure captioned *Amos Financial, LLC v. Tepper, et al.*, Case No. 150303302 (Pa. Com. Pl., Philadelphia Cnty.) (the "**Foreclosure Action**") currently pending before the Court of Common Pleas for Philadelphia County. In the Foreclosure Action, appellant/defendant below, AMOS FINANCIAL, LLC ("**Amos**") asserted a foreclosure claim against the Teppers and the Teppers asserted a counterclaim for breach of contract against Amos.

Immediately prior to the start of the trial in the Foreclosure Action before the Honorable Gene Cohen, Amos's foreclosure claim was dismissed due to Amos's procedural noncompliance. The Foreclosure Action proceeded to a one-day bench

trial on the Teppers' counterclaim. After the state court trial, and on October 20, 2017, Judge Cohen (1) ruled in Amos's favor and against the Teppers on the Teppers' breach-of-contract counterclaim; and (2) ruled in the Teppers' favor and against Amos on the merits of Amos's previously dismissed foreclosure claim. All parties filed motions for post-trial relief, which are currently pending before Judge Cohen.

II. STANDARD OF REVIEW

The district court correctly decided the legal issue of whether Amos is a "debt collector" under 15 U.S.C. § 1692a(6), over which determination this Court has plenary review. *See Estate of Schwing v. The Lilly Health Plan*, 562 F.3d 522, 524 (3d Cir. 2009) ("Our review of the District Court's legal conclusions is plenary, and we apply the same standard of review that the Court should have applied."). The district court's conclusion that Amos is a "debt collector" is supported by the district court's factual findings, which factual findings this Court may review under the clearly erroneous standard. *See Lovett v. Weeks Marine Inc.*, 99 F. App'x 428, 430 (3d Cir. 2004) (citing Fed. R. Civ. P. 52(a)) ("A district court's findings of fact are reviewed under a clearly erroneous standard.").

III. STATEMENT OF THE CASE

A. Factual Background

1. The Tepper Loan Serviced by NOVA Bank

The Teppers, who are husband and wife, reside at 2111 Spring Garden Street, Philadelphia, Pennsylvania (the "**Tepper Residence**") with their two young children. (App. 4–5). On November 27, 2009, the Teppers entered into a home equity line of credit (the "**Tepper Loan**") with NOVA Bank by executing the Credit Agreement and Disclosure (the "**Credit Agreement**"). (App. 5, 52–56).

The Tepper Loan was a variable interest loan that required the Teppers to make minimum monthly interest-only payments for ten years and a final balloon payment for the entire unpaid principal balance upon the maturity of the Tepper Loan. (App. 52–56). The purpose of the Tepper Loan was for personal, family, and household purposes or personal investment purposes, (App. 5), and was secured by a mortgage on the Tepper Residence (the "**Mortgage**"), (App. 5).

In the nearly three (3) year period between November 27, 2009 and October 26, 2012, NOVA Bank serviced the Tepper Loan and sent the Teppers monthly statements, which statements provided detailed information about the Tepper Loan. (App. 7–8). The Teppers made their monthly payments on the Tepper Loan pursuant to the information provided in the statements during the nearly three years of NOVA Bank's servicing of the Tepper Loan. (App. 8).

2. NOVA Bank's Closure and Amos's Purchase of the Tepper Loan

On October 26, 2012, the PENNSYLVANIA DEPARTMENT OF BANKING AND SECURITIES closed NOVA Bank, and the FEDERAL DEPOSIT INSURANCE CORPORATION (the "**FDIC**") was appointed as receiver for NOVA Bank. (App. 8). After NOVA Bank's closure, the Teppers stopped receiving monthly statements regarding the Tepper Loan. (App. 8). Instead of statements, the FDIC sent the Teppers letters that informed the Teppers of (a) NOVA Bank's closure; (b) the FDIC's role as receiver; and (c) the FDIC's intention to market and sell all of NOVA Bank's assets, including the Tepper Loan. (App. 8).

To stay current on the Tepper Loan after NOVA Bank's closure, Mr. Tepper mailed a check to the FDIC in the amount of the Teppers' last payment made to NOVA Bank prior to NOVA Bank's closure. (App. 9). The FDIC neither (a) cashed the check, nor (b) returned it to the Teppers. (App. 9). Thereafter, rather than attempt sending further payments to the FDIC, the Teppers waited for their next periodic statement, which they believed would be sent by the subsequent servicer of the Tepper Loan. (App. 9).

On January 16, 2013, notwithstanding the Teppers' earnest efforts to keep the Tepper Loan current, the FDIC declared the Tepper Loan to be in default. (App. 9). On March 28, 2013—more than two months after the FDIC declared the Tepper Loan to be in default—Amos purchased the loan package that included the

Tepper Loan and the Mortgage on the Tepper Residence from the FDIC. (App. 9). At the time of purchase of the Tepper Loan, Amos considered the Tepper Loan to be in default. (App. 9).

3. Nature of Amos's Business

Amos is a limited liability company existing and operating under the laws of the State of Illinois, having its office and principal place of business at 3330 Skokie Valley Road, Suite 30, Highland Park, Illinois. (App. 5). It is not qualified as a financial institution or lender under any federal or state law. (App. 42, 60). Rather, Amos's sole business is acquiring and servicing nonperforming and semi-performing loans. (App. 5, 237).

At the time Amos purchased the Tepper Loan from the FDIC, it was not registered to do any business in Pennsylvania, and did not so register until October 25, 2015—more than two years after it purchased the Tepper Loan. (App. 5). Amos is registered as a debt collector that handles consumer debt in multiple states.[1]

[1] The evidence of Amos's status as a registered debt collector dealing with consumer loans in multiple states in the form of publicly available information was submitted to the district court as Exhibits 1, 2 & 3 to the Plaintiffs' Supplemental Brief dated June 19, 2017 (the "**Tepper Supplemental Brief**") (district court ECF Docket No. 48, App. 38). The Tepper Supplemental Brief and the exhibits thereto have not been included in the Appendix, since, pursuant to the Rules of Appellate Procedure, "[m]emoranda of law in the district court should not be included in the appendix." Fed. R. App. P. 309(a)(2). Nevertheless, this information is part of the district court record, so the Teppers and the Court may rely on this information.

4. Amos's Pre-Litigation Collection Efforts

After Amos purchased the Tepper Loan, instead of sending the Teppers detailed periodic statements, Amos sent the Teppers three demand letters (collectively, the "**Amos Demand Letters**"), wherein Amos demanded payments from the Teppers for certain unexplained lump sums. (App. 10–11, 72–73, 75, 83–84). Each of the three Amos Demand Letters contained the following provision:

> **This is an attempt to collect a debt. Unless you dispute the validity of this debt, or any portion thereof, within thirty (30) days after receipt of this letter, we will assume the debt to be valid. If you notify us in writing within thirty (30) days after receipt of this letter that the debt, or any portion thereof, is disputed, we will obtain verification of the debt and a copy of such verification will be mailed to you. If you request it in writing, within thirty (30) days after receiving this notice, we will provide you with the name and address of the original creditor, if different from us.**

(App. 73, 75, 84) (boldface in the original). At the bottom of each Amos Demand Letter was the following sentence: "**Amos Financial LLC is attempting to collect**

See id. ("Parts of the record may be relied on by the court or parties even though not included in the appendix."). Moreover, this information is publicly available at NMLS Consumer Access, Amos Financial LLC, http://www.nmlsconsumeraccess.org/EntityDetails.aspx/COMPANY/1111855 (last visited Dec. 8, 2017) and *2017 Paid Debt Collectors and Creditors/Assignees*, Iowa Department of Justice Office of the Attorney General, https://www.iowaattorneygeneral.gov/media/cms/Formatted_Spreadsheet_3DE52390AE035.pdf (last updated Nov. 14, 2017, 11:54 AM), and the Court is requested to take judicial notice of this information pursuant to Fed. R. Evid. 201.

a debt and any information obtained will be used for that purpose.") (App. 73, 75, 84) (boldface in the original).

Subsequently, in November 2014, the Teppers received from Amos the Act 91 Notice, wherein Amos alleged that (a) the Teppers have not made monthly payments on the Mortgage since November 2012; (b) the Mortgage was in default; (c) Amos intended to foreclose on the Tepper Residence; and (d) the amount purportedly past due was $22,445.99. (App. 12, 90–98). The Act 91 Notice provided **no** explanation as to (1) what the purportedly past-due amount represented vis-à-vis the Teppers' alleged obligations on the Tepper Loan, or (2) how the purportedly past-due amount was calculated. (App. 90–98)

5. The Foreclosure Action and Amos's Subsequent Collection Efforts

Amos initiated the Foreclosure Action against the Teppers in the Court of Common Pleas for the Philadelphia County, Pennsylvania on March 26, 2015. (App. 12–13). At the time Amos commenced the Foreclosure Action, it was **not** registered to do any business in Pennsylvania and did not so register until October 25, 2015—seven months after the initiation of the Foreclosure Action. (App. 5).

Shortly after Amos initiated the Foreclosure Action, Mr. Tepper contacted Amos in an attempt to amicably resolve the issue of the alleged delinquency of the Tepper Loan and requested to be provided with statements for the Tepper Loan. (App. 13, 146–48). Later that day, Nareg Korogluyan ("**Mr. Korogluyan**")—the

operations officer for Amos and second in command in Amos's management hierarchy—returned Mr. Tepper's phone call. (App. 13, 148–49). During the telephone conversation between Messrs. Korogluyan and Tepper (the "**Phone Conversation**"), Mr. Korogluyan told Mr. Tepper that (1) the Teppers "did not deserve statements," (2) the Tepper Residence belonged to Amos, and (3) there was nothing the Teppers could do to save the Tepper Residence from being taken by Amos. (App. 13–16).

On April 8, 2015, John Carroll ("**Attorney Carroll**")—an attorney employed by Amos—sent an email to Mr. Tepper on behalf of Amos (the "**Amos Email**"). (App. 16, 100–01). In the Amos Email, Attorney Carroll purportedly provided Mr. Tepper with "an updated reinstatement amount" of $29,132.06 allegedly necessary to "reinstate" the Tepper Loan, which "reinstatement amount" purportedly "consist[ed] of $28,390.58 in interest, and $741.48 in legal fees and costs." (App. 100). **No** information about the Tepper Loan principal or explanation how Amos calculated the interest portion of the alleged "reinstatement amount" was provided in the Amos Email. (App. 100–01). The Amos Email was concluded with the following statement: "**Amos Financial LLC is attempting to collect a debt and any information obtained will be used for that purpose.**" (App. 101) (boldface and underline in the original).

B. Procedural History

The Teppers initiated the action below under the Federal Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (the "**FDCPA**") by filing the Complaint on October 26, 2015. (App. 41–59). Amos filed the Answer on December 29, 2015. (App. 60–102). The trial was eventually scheduled for April 5, 2017. (App. 37). Before trial, the parties submitted their respective proposed findings of fact and conclusions of law. (App. 330–396).

1. The Parties' Pretrial Arguments

In the Teppers' Proposed Findings of Fact and Conclusions of Law (the "**Tepper FF&CL**"), the Teppers argued that, under the settled Third Circuit law as it was at the time of filing the Tepper FF&CL, Amos was a "debt collector" as defined under 15 U.S.C. § 1692a(6) because (1) the Tepper Loan was in default at the time when Amos purchased the Tepper Loan, and (2) Amos considered the Tepper Loan to be in default. (App. 349–51). The Teppers then argued Amos violated the FDCPA through (1) its written communications with the Teppers, and (2) the verbal statements made by Mr. Korogluyan to Mr. Tepper during the Phone Conversation. (App. 351–70). In support of their argument that Mr. Korogluyan's statements violated the FDCPA, the Teppers pointed to the fact that, at the time Amos commenced the Foreclosure Action, it was not registered to do business in

Pennsylvania and, therefore, could not prosecute the Foreclosure Action under the applicable Pennsylvania statutes. (App. 365).

In Amos's Proposed Findings of Fact and Conclusions of Law (the "**Amos FF&CL**"), Amos did not contest its status as a "debt collector" as defined under 15 U.S.C. § 1692a(6). (App. 378–96). In response to the Teppers' argument that Amos's initiation of the Foreclosure Action was improper for its failure to register to do business in Pennsylvania prior to commencing the Foreclosure Action, Amos argued that it was not required to register as a foreign business entity because its sole business was acquisition and collection of debt. (App. 391).

2. The Trial

The action below proceeded to a one-day bench trial before the Honorable J. Curtis Joyner on April 5, 2017. (App. 103–329 [the trial transcript]). During trial, Mr. Korogluyan testified that Amos's **sole** business was acquisition and collection of debt, including consumer debt. (App. 237 [Tr. 135:13–21]). Mr. Korogluyan also testified that Amos calculated the amounts it alleged to be owed on the Tepper Loan in the Act 91 Notice and the Amos Email using an increased interest rate of 9.49 percent. (App. 242–48 [Tr. 140:7–146:3]).

3. The Parties' Post-Trial Arguments

Pursuant to the district court's request, the parties filed their respective supplemental proposed findings of fact and conclusions of law. (App. 330–461). In

the Teppers' Supplemental Proposed Findings of Fact and Conclusions of Law (the "**Tepper Supplemental FF&CL**"), the Teppers pointed to Mr. Korogluyan's testimony that Amos's sole business is the acquisition and collection of nonperforming and semi-performing debt as further support of the fact that Amos was a "debt collector" under the FDCPA. (App. 412). The Teppers then argued that (1) the Credit Agreement did not authorize Amos to increase the interest rate on the Tepper Loan without first terminating and accelerating the Tepper Loan; (2) Mr. Korogluyan testified that Amos was calculating the amounts purportedly past-due on the Tepper Loan alleged in the Act 91 Notice and the Amos Email, even though Amos never terminated and accelerated the Tepper Loan; and (3) such attempts to collect improperly calculated amounts constituted further violations of the FDCPA. (App. 414–15).

In Amos's Supplemental Proposed Findings of Fact and Conclusions of Law (the "**Amos Supplemental FF&CL**"), Amos did not challenge its status as a "debt collector" under the FDCPA. (App. 445–61). Amos did, however, point to Mr. Korogluyan's testimony regarding Amos's sole business being the acquisition and collection of defaulted debt to once again argue that it was not required to register as a foreign business entity with the Pennsylvania Department of State prior to commencing the Foreclosure Action. (App. 448–49).

4. The *Henson* Decision and Supplemental Briefing

On June 12, 2017—after the district court trial and after the parties submitted their respective supplemental proposed findings of fact and conclusions of law—the United States Supreme Court issued its decision in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) (hereinafter, *SCOTUS Henson*). *SCOTUS Henson* dealt specifically with the issue of whether an entity that purchases a defaulted debt from another party and then attempts to collect on that debt for its own account qualifies as a "debt collector" under 15 U.S.C. § 1692a(6). *See generally SCOTUS Henson*, 137 S. Ct. 1718. Because *SCOTUS Henson* abrogated the Third Circuit law, which focused on whether the debt at issue was in default at the time of its acquisition to determine if the acquiring entity was a "debt collector" under § 1692a(6) of the FDCPA, the district court ordered the parties to submit supplemental briefs on the issue of whether Amos qualifies as a "debt collector" under the FDCPA after *SCOTUS Henson*, which supplemental briefs the parties timely filed. (App. 38, district court ECF Docket Nos. 48 & 49).

5. The District Court Decision and the Final Order

On August 9, 2017, the district court below issued its decision (the "**Decision**"). (App. 4–31). In the Decision, the district court determined that (1) the Tepper Loan qualified as "debt" as defined under 15 U.S.C. § 1692a(5); (2) Amos was a "debt collector" as defined 15 U.S.C. § 1692a(6); and (3) Amos's violated

the FDCPA. (App. 20–29). Specifically, the district court found the following FDCPA violations:

1. The Act 91 Notice and the Amos Email failed to disclose sufficient details regarding the amount and character of the alleged Tepper Loan debt, thereby violating 15 U.S.C. § 1692e(2) (App. 25–27);
2. Amos violated 15 U.S.C. § 1692e by calculating the purportedly past-due amounts contained in the Act 91 Notice and the Amos Email using the increased interest rate of 9.49 percent—something that Amos was not permitted to do under the terms of the Credit Agreement without first terminating and accelerating the Tepper Loan—and attempting to collect such improperly calculated amounts (App. 27); and
3. Mr. Korogluyan's statements that (a) Amos owned the Tepper Residence and that (b) there was nothing the Teppers could do to keep Amos from taking the Tepper Residence amounted to false representations and deceptive means to collect on the Tepper Loan, thereby violating 15 U.S.C. § 1692e(10) (App. 27–28).

The district court decided, however, that Amos was not liable for any claims asserted by the Teppers based on Amos's failure to register as a foreign business entity with the Pennsylvania Department of State prior to commencing the

Foreclosure Action. (App. 28–29). In doing so, the district court specifically recognized Amos's argument that it was not required to register as a foreign business entity "in order to collect on debt." (App. 28).

Also on August 9, 2017, the district court issued an Order, awarding the Teppers of $1,000 in statutory damages—the maximum amount authorized under 15 U.S.C. § 1692k(a)(2)(A)—and deeming the Teppers to be entitled to recover reasonable attorney's fees and costs incurred in prosecuting the action below (the "**Order**"). (App. 2–3).

6. The Appeal

On August 23, 2017, Amos filed its Notice of Appeal of the Order and the Decision. (App. 1). The only issue appealed by Amos is the district court's determination that Amos was a "debt collector" as defined under 15 U.S.C. § 1692a(6).

IV. SUMMARY OF THE ARGUMENT

The FDCPA is a consumer protection statute that prohibits abusive and deceptive debt collection practices by debt collectors. While the FDCPA applies to statutorily defined "debt collectors," it does not apply to "creditors." Section 1692a(6) of the FDCPA provides a two-part definition of a "debt collector": someone that either (1) has a business whose principal purpose is collection of any debts, or (2) regularly collects debts owed to others.

Prior to the Supreme Court's *SCOTUS Henson* decision, the law in the Third Circuit was that an entity that did not originate the debt that it tried to collect was a "debt collector" if the debt in question was in default at the time of its acquisition by the entity. *SCOTUS Henson* abrogated the "default" approach and held that an entity is a "debt collector" under the "regularly collects" prong of § 1692a(6) only if the debt in question is owed to a third party, and is not a "debt collector" under that prong if it attempts to collect a debt for its own account. However, *SCOTUS Henson* explicitly excluded from its holding the question of whether an entity that attempts to collect a debt for its own account qualifies as a "debt collector" under the "primary purpose" prong of § 1692a(6).

In light of *SCOTUS Henson*'s narrow holding, the district court below determined that Amos—whose sole business is the acquisition and collection of defaulted debts—is a "debt collector" under the "primary purpose" prong § 1692a(6) even though it was attempting to collect a debt for its own account. Other district courts in the Third Circuit interpreted *SCOTUS Henson* in the exact same manner, holding that an entity collecting a debt for its own account is a "debt collector" when the primary purpose of its business is debt collection. These interpretations are consistent with the two-prong approach adopted by the courts of appeals that have had an opportunity to interpret § 1692a(6) in the wake of *SCOTUS Henson*.

Moreover, the district court's interpretation of the "primary purpose" prong of § 1692a(6) is the only one possible under the applicable rules of statutory construction, as (1) the surplusage canon, (2) the presumption that different words in statutory provisions carry different meanings, and (3) the last antecedent rule lead to only one conclusion: an entity whose only business to collection of debts is a "debt collector" under the "primary purpose" prong, even if it owns the debt on which it attempts to collect. And contrary to Amos's argument, this interpretation is not inconsistent with the definition of "creditor" under § 1692a(4).

The evidence before the district court below clearly showed that Amos's sole business was acquisition and collection of defaulted debts. Therefore, the district court correctly determined that Amos is a "debt collector" under the "primary purpose" prong of 15 U.S.C. § 1692a(6) and, therefore, subject to all the requirements of the FDCPA.

V. ARGUMENT

A. The FDCPA Only Applies to "Debt Collectors"

"The FDCPA is a consumer protection statute that prohibits certain abusive, deceptive, and unfair debt collection practices." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1171 n.1 (2013). "Congress enacted the [FDCPA] to eliminate abusive debt collection practices which contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."

Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000), *as amended* (Sept. 7, 2000) (internal quotation marks omitted).

"The FDCPA's provisions generally apply only to 'debt collectors.' Creditors—as opposed to 'debt collectors'—generally are not subject to the FDCPA." *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000). Section 1692a of the FDCPA defines a "debt collector" as follows:

> The term "debt collector" means any person who [1] uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or [2] who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). In other words, the statute provides two different ways that an entity can qualify as a "debt collector" for the purposes of the FDCPA: (1) have collection of "any debts" as the "principal purpose" of its business, or (2) "regularly collect[]" debts "owed or due . . . another." *Id.*

The statute also provides the following definition of "creditor":

> The term "creditor" means any person who [1] offers or extends credit creating a debt or [2] to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

Id. § 1692a(4). As applied to a specific debt, an entity cannot be simultaneously a "creditor" and a "debt collector." *See McDermott v. Nationstar Mortgage, LLC*, 143 F. Supp. 3d 290, 296 (E.D. Pa. 2015) (citing *Schlosser v. Fairbanks Capital*

Corp., 323 F.3d 534, 536 (7th Cir. 2003)) ("The two FDCPA categories—debt collectors and creditors—are, for purposes of applying the statute to a particular debt, mutually exclusive.").

B. The Third Circuit's Approach to Determining If an Entity Is a "Debt Collector" Prior to *SCOTUS Henson*

Prior to *SCOTUS Henson*, the determination of whether an entity attempting to collect a debt that it acquired from a third party was a "debt collector" under § 1692a(6) depended on the status of the debt at the time of its acquisition. *F.T.C. v. Check Inv'rs, Inc.*, 502 F.3d 159, 172–74 (3d Cir. 2007), *abrogated by SCOTUS Henson*, 137 S. Ct. 1718. "[D]ebts that do not originate with the one attempting collection, but are acquired from another, the collection activity related to that debt could logically fall into either category." *McDermott*, 143 F. Supp. 3d at 297 (quoting *Schlosser*, 323 F.3d at 536).

Pursuant to the approach used by the Third Circuit courts prior to *SCOTUS Henson*, "one attempting to collect a debt is a 'debt collector' under the FDCPA if the debt in question was in default when acquired. Conversely, . . . an entity is a creditor if the debt it is attempting to collect was not in default when it was acquired." *Check Inv'rs, Inc.*, 502 F.3d at 173 (citing *Pollice*, 225 F.3d at 403–04). *See also McDermott*, 143 F. Supp. 3d at 298 (quoting *Schlosser*, 323 F.3d at 536) ("[C]ourts have concluded that the FDCPA 'treats assignees as debt collectors if

the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not.'").

C. The Scope and Significance of *SCOTUS Henson*

In *SCOTUS Henson*, the Supreme Court abrogated the "default" test developed by some courts of appeals, including this Court. *See generally SCOTUS Henson*, 137 S. Ct. 1718. To understand the scope and significance of *SCOTUS Henson*, however, it is necessary to, first, understand the issues litigated below and the decision by the Court of Appeals for the Fourth Circuit addressing those issues, and, second, carefully examine the *SCOTUS Henson* opinion itself.

1. Fourth Circuit Henson

The lawsuit underlying *SCOTUS Henson* involved allegations of various FDCPA violations made by several Maryland consumers against, *inter alia*, SANTANDER CONSUMER USA, INC. ("**Santander**")—a consumer finance company—who had purchased the loans at issue from another entity after those loans went into default. *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 134 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 810 (2017), *and aff'd*, 137 S. Ct. 1718 (2017) (hereinafter, *Fourth Circuit Henson*). Santander filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that it was not a "debt collector" as defined under the statute. *Id.* The district court granted Santander's motion to dismiss, holding that Santander, as a consumer finance company that was

attempting to collect on the debt in its own name, did not fit the statutory definition of a "debt collector." *Id.*

The Fourth Circuit agreed with the district court, holding that Santander was not a "debt collector" as defined under § 1692a(6). *Id.* "[T]his provision defines a debt collector as (1) a person whose *principal purpose* is to collect debts; (2) a person who *regularly* collects debts *owed to another*; or (3) a person who collects *its own debts*, using *a name other than its own* as if it were a debt collector." *Id.* at 136 (emphasis in the original). Having decided that an entity may qualify as a "debt collector" only if it falls into one of these three categories, the Fourth Circuit quickly dispensed with the first and the third category, since the plaintiffs did not allege any facts that could support Santander qualifying as a "debt collector" under either of those definitions:

> Applying these allegations to the definition of debt collector in § 1692a(6), it is apparent that Santander does not fall within the first or third definitions of debt collector. The complaint does not allege, nor do the plaintiffs argue, that Santander's *principal business* was to collect debt, alleging instead that Santander was a consumer finance company. The complaint also does not allege, nor do the plaintiffs contend, that Santander was using a name other than its own in collecting the debts.

Id. at 137 (emphasis in the original).[2] "Thus, to allege that Santander was a debt collector, the complaint is left to satisfy the second definition of debt collector—that Santander regularly collects debts owed to others and was doing so here." *Id.*

The plaintiffs argued that Santander fit the second class of "debt collectors" because the debt in question was in default at the time Santander acquired it, and "that the *default status* of a debt is determinative of whether a person who purchased the debt is a debt collector." *Id.* at 138 (emphasis in the original). The Fourth Circuit—recognizing that the default status of the debt at the time of acquisition was the approach taken by other circuits (including the Third Circuit) to determine if an entity was a "debt collector"—declined to adopt this approach, focusing instead on the party to whom the debt was owed at the time of the collection activity in question:

> The material distinction between a debt collector and a creditor—**at least with respect to the second definition of "debt collector" provided by § 1692a(6)**—is therefore whether a person's regular collection activity is only *for itself* (a creditor) or whether it regularly collects *for others* (a debt collector)—not, as the plaintiffs urge, whether the debt was in default when the person acquired it.

[2] Indeed, per the district court opinion, "Plaintiffs expressly state that 'Santander issues and services tens of thousands of car loans each year.'" *Henson v. Santander Consumer USA, Inc.*, No. CIV.A. RDB-12-3519, 2014 WL 1806915, at *5 (D. Md. May 6, 2014) (hereinafter, *District Court Henson*) (quoting the plaintiffs' brief in opposition to Santander's motion to dismiss).

Id. at 136–37 (bolded/underlined emphasis added, italicized emphasis in the original). Because, at the time of the alleged collection activity, the debt in question was owed to Santander, the Fourth Circuit deemed Santander to be a "creditor," not a "debt collector" under the "regularly collects" prong of § 1692a. *Id.* at 138.

2. SCOTUS Henson

The Supreme Court affirmed the *Fourth Circuit Henson* decision. *SCOTUS Henson*, 137 S. Ct. at 1726. In so doing, the Supreme Court analyzed the text of the second half of the first sentence of § 1692a(6)—"regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another"—and determined that "owed or due . . . another" modified the phrase "regularly collects or attempts to collect . . . debts." *Id.* at 1721–24. Based on the textual analysis, the Supreme Court reasoned, for an entity to qualify as a "debt collector" under the "regularly collects" prong of § 1692a(6), the debts it "regularly seek[s] to collect" must be debts "owed . . . another," and not those "for its own account." *Id.* The Supreme Court agreed with the Fourth Circuit's analysis, deeming the default status of the debt in question at the time of its acquisition to be irrelevant in determining whether the acquiring entity qualified as a "debt collector." *Id.* at 1723–25. In doing so, the Court abrogated the "default" test for the purpose of determining whether a non-originating entity acquiring a debt was a

debt collector under the "regularly collects" prong of § 1692a(6) that was used, *inter alia*, in the Third Circuit up to that point. *See id.* at 1721 (recognizing the "default" approach set forth in *Check Investors*).

But even prior to beginning its analysis of the "regularly collects" prong of § 1692a(6), the Supreme Court explicitly stated and made clear what issues it was **not** deciding:

> Before attending to that job, though, we pause to note two related questions we do not attempt to answer today. First, petitioners suggest that Santander can qualify as a debt collector not only because it regularly seeks to collect for its own account debts that it has purchased, but also because it regularly acts as a third party collection agent for debts owed to others. Petitioners did not, however, raise the latter theory in their petition for certiorari and neither did we agree to review it. **Second, the parties briefly allude to another statutory definition of the term "debt collector"—one that encompasses those engaged "in any business the principal purpose of which is the collection of any debts." § 1692a(6). But the parties haven't much litigated that alternative definition and in granting certiorari we didn't agree to address it either.**

Id. at 1721 (emphasis added).

Therefore, while the Supreme Court determined that the "regularly collects" prong of § 1692a(6) can only be satisfied when the entity engaged in debt collection is doing so on behalf of a third party, *SCOTUS Henson* did **not** impose the same requirement on the "principal purpose" prong of the statutory definition of a "debt collector." As the following discussion demonstrates, the "owed or due .

. . another" language that applies to the "regularly collects" prong (as determined in *SCOTUS Henson*) does **not** apply to the "principal purpose" prong, and an entity like Amos—whose business consists solely of acquisition and collection of nonperforming and semi-performing debts—is a "debt collector" under § 1692a(6) even when it collects the debts for its own account.

D. Under the "Primary Purpose" Prong of § 1692a(6), an Entity Whose Primary Business Is Debt Collection Is a "Debt Collector" Even If It Collects Debt for Its Own Account

Recognizing *SCOTUS Henson*'s narrow holding, the district court below interpreted the portion of § 1692a(6) not affected by *SCOTUS Henson* to mean that an entity like Amos—whose sole business is the acquisition and collection of debts for its own account—is a "debt collector" under the "primary purpose" prong of the statute. Three other decisions issued since *SCOTUS Henson* by the district courts in the Third Circuit interpreted the "primary purpose" prong of § 1692a(6) in the same exact way as the court below did. The interpretation of § 1692a(6) by the court below and the other district courts in the Third Circuit is consistent with the two-prong approach adopted by other courts of appeals since *SCOTUS Henson* and recognized by this Court even prior *SCOTUS Henson*.

1. The Courts' Interpretation of § 1692a(6) and *SCOTUS Henson*

In *Chenault v. Credit Corp Solutions, Inc.*, in response to the defendant's argument that, after *SCOTUS Henson*, it did not qualify as a "debt collector"

because it was attempting to collect a debt for its own account, the U.S. District Court for the Eastern District of Pennsylvania provided the following analysis:

> The FDCPA defines a debt collector as: "(1) 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, or (2) who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be due another."
>
> In *Henson*, the Supreme Court addressed whether Santander Consumer USA Inc., an entity that purchased defaulted loans and sought to collect on those loans, was a debt collector who "regularly collects or attempts to collect...debts... due another" under the second prong of 15 U.S.C. § 1692a(6). In holding that Santander was not a debt collector, the Court concluded that, under that prong of the statute, "Congress did not intend for debt buyers to be considered debt collectors for the purposes of the Act, where the debt buyer attempted to collect debts which the debt buyer owned." *Henson* declined to address whether Santander constituted a debt collector under the first prong of the statute. Thus, defendant in this case may be a debt collector subject to the FDCPA under the first prong of the statute if its "principal purpose is the collection of debts or because it regularly engages in the collection of debts."
>
> Defendant is registered as a collection agency in the state of Utah; moreover, according to defendant's website, the company "is a debt collector" that "purchases and collects consumer debt including unpaid retail finance and sales finance credit cards and personal loans." The Court concludes that plaintiff has presented sufficient evidence that defendant is a business whose "principal purpose" is the collection of debts. Accordingly, defendant is governed by the FDCPA.

Chenault v. Credit Corp Solutions, Inc., No. CV 16-5864, 2017 WL 5971727, at *2 (E.D. Pa. Dec. 1, 2017) (internal citations omitted).

Similarly, in *Barbato v. Greystone Alliance, LLC*, the U.S. District Court for the Middle District of Pennsylvania held that an entity that purchased defaulted debt and attempted to collect on that debt was a "debt collector" under the "primary purpose" prong of § 1692a(6):

> Crown maintains that it was a subsequent purchaser of plaintiff's defaulted Account, . . . thus rendering it a creditor under *Henson*.
>
> Contrary to Crown's position, the court does not read *Henson* as impacting FDCPA cases beyond those which include a dispute concerning the second of the definition of "debt collector" in § 1692a(6). . . . [T]his court declines to expand *Henson* and hold that Crown can no longer be considered a "debt collector" since it was assigned plaintiff's defaulted debt, and thus is a creditor even if it fits the principal purpose definition which was not addressed in *Henson*. As such, while the court agrees with Crown that plaintiff's FDCPA claims fail insofar as she is relying on the second statutory definition of "debt collector", which was at issue in *Henson*, since it applies to "debts owed... another," and the debt here was owed to Crown, it does not agree with Crown that it can no longer be considered a "debt collector" under the first statutory definition, not at issue in *Henson* . . . .

Barbato v. Greystone Alliance, LLC, No. CV 3:13-2748, 2017 WL 5496047, at *8 (M.D. Pa. Nov. 16, 2017), *appeal filed*, No. 17-8064 (3d Cir. Nov. 27, 2017) (internal citations omitted).[3]

[3] The *Barbato* court relied, in part, on the district court opinion below that is the subject of *this* appeal. *See Barbato*, 2017 WL 5496047, at *8 (citing *Tepper v. Amos Fin., LLC*, No. 15-CV-5834, 2017 WL 3446886, at *8 (E.D. Pa. Aug. 11, 2017)).

Finally, the U.S. District Court for the Middle District of Pennsylvania in *Schweer v. HOVG, LLC* similarly held that a debt purchaser whose primary business is acquisition and collection of debts qualified as a debt collector under the "primary purpose" prong, even though it owned the debt that it was trying to collect:

> Under the FDCPA, a debt collector is defined as "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, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." In *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017), the Supreme Court specifically addressed only whether or not the defendant could be found a debt collector when attempting to collect debts owed to itself as opposed to "another." In holding that they could not, the *Henson* Court appears to address circumstances similar to this one, where Pendrick, as owner of the debt, and regardless of the origins of the debt, cannot be considered a debt collector under the Act for attempting to collect a debt that they own. But the *Henson* Court also made clear that its holding in that matter was narrow, and did not address the applicability of "in any business the principal purpose of which is the collection of any debts [.]"
>
> It is that unaddressed language that Schweer asks the Court to apply to Pendrick now. As stipulated in the joint case management plan, Pendrick's principal purpose of business "is to buy defaulted debts and thereafter attempt to collect those debts." The Defendants stipulated specifically that Pendrick is indeed a debt collector for the purposes of the Act. Thus, the Court finds that *Henson* does not shield Pendrick from liability, as Pendrick fits in the remainder of the definition of a debt collector unaddressed by *Henson*.

Schweer v. HOVG, LLC, No. 3:16-CV-01528, 2017 WL 2906504, at *5 (M.D. Pa. July 7, 2017) (internal citations omitted) (alteration in the original).

All these district court decisions—including that of the court below—are in line with the analysis provided by the courts of appeals that have had the opportunity to interpret *SCOTUS Henson*. Two different courts of appeals have expressly adopted the two-prong approach in determining whether a debt purchaser is a "debt collector" under § 1692a(6) in light of *SCOTUS Henson*. *See Kurtzman v. Nationstar Mortg. LLC*, --- Fed. Appx. ----, No. 16-17236, 2017 WL 4511361, at *3 (11th Cir. Oct. 10, 2017) (alteration in the original) (dismissing the complaint because it (1) was "silent regarding whether the principal purpose of Nationstar's business is collecting debts"—*i.e.* contained no factual allegations that would satisfy the "primary purpose" prong; and (2) only contained "formulaic recitation of the statutory language" of the "regularly collects" prong—"that Nationstar 'regularly attempts to collect debts not owed to [it].'"); *Bank of New York Mellon Tr. Co. N.A. v. Henderson*, 862 F.3d 29, 34 (D.C. Cir. 2017) (citing 15 U.S.C. § 1692a(6) and *SCOTUS Henson*, 137 S. Ct. at 1723–24) ("The Bank is neither type of debt collector. There is no evidence to indicate the Bank's 'principal' business is debt collection. Nor is the debt the Bank is seeking to collect 'due another'; on the

contrary, the debt is due to the Bank as the current holder of the Note and Deed of Trust.").

Moreover, even prior to *SCOTUS Henson*, this Court explicitly recognized the two separate prongs under § 1692a(6)—the "principal purpose" prong and the "regularly collects" prong—and considered both prongs in conjunction with the now-abrogated default analysis. *See Siwulec v. J.M. Adjustment Servs., LLC*, 465 F. App'x 200, 203 (3d Cir. 2012) (alterations in the original) (quoting 15 U.S.C. § 1692a(6)) ("[T]he statutory definition of debt collector turns on 'the principal purpose' of a business and/or the 'regular[ ] collect[ion] of debts.'"); *Oppong v. First Union Mortg. Corp.*, 215 F. App'x 114, 118–19 (3d Cir. 2007) (determining that the defendant was "a debt collector under the FDCPA because it 'regularly' collect[ed] debts owed to another," even though it did not satisfy the "principal purpose" prong).

Since the Supreme Court issued the *SCOTUS Henson* decision, the district courts in the Third Circuit have nearly unanimously[4] interpreted the "primary

[4] In *Chernyakhovskaya v. Resurgent Capital Services L.P.*, the U.S. District Court for the District of New Jersey dismissed the plaintiff's Amended Complaint—without prejudice—against an entity that purchased a defaulted debt and tried to collect on that debt. *Chernyakhovskaya v. Resurgent Capital Servs. L.P.*, No. 2:16-CV-1235 (JLL), 2017 WL 3593115, at *9 (D.N.J. Aug. 18, 2017). The *Chernyakhovskaya* court determined that the Amended Complaint did not make sufficient factual allegations that the debt buyer qualified as a "debt collector as defined by the Supreme Court in *Henson*." *Id.* The court, however, expressly permitted the plaintiff to file a second Amended Complaint that would allege facts

purpose" prong of § 1692a(6) to include entities whose primary business is acquisition and collection of debt for their own accounts. This interpretation is in line with the two-prong approach adopted by courts of appeals that have had an opportunity to interpret § 1692a(6) in light of *SCOTUS Henson*. As the following discussion shows, this interpretation of § 1692a(6)—unlike the one proposed by Amos—is also supported by the applicable rules of statutory interpretation and, contrary to Amos's argument, is in no way inconsistent with the definition of "creditor" set forth in § 1692a(4).

2. Rules of Statutory Construction

In order to determine whether an entity like Amos qualifies as a "debt collector" under the "principal purpose" prong of § 1692a(6), the court must look to the text of the statutory provision in question. *See SCOTUS Henson*, 137 S. Ct. at 1721 ("[W]e begin, as we must, with a careful examination of the statutory text."). In interpreting the statutory text, the court should employ the applicable canons of statutory interpretation. *See Loughrin v. United States*, 134 S. Ct. 2384,

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sufficient to show that the debt buyer qualified as a "debt collector" in light of *SCOTUS Henson*. *See id.* ("To the extent Plaintiff may cure any deficiencies as to the allegations against LVNV, the Court will allow Plaintiff to file a second Amended Complaint."). As indicated in *Barbato*, the *Chernyakhovskaya* court's decision to allow the plaintiff "to file a second amended complaint to 'cure any deficiencies as to the allegations against LVNV'" meant that the court needed "to see if plaintiff could show that the principal purpose of LVNV's business was the collection of any debts." *Barbato*, 2017 WL 5496047, at *5 (quoting *Chernyakhovskaya*, 2017 WL 3593115, at *9).

2390 (2014) (applying "general canons of statutory interpretation" to the federal bank fraud statute); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) (applying "ordinary canons of statutory interpretation" to § 101 of the Copyright Act).

When a court interprets a statute, it must, if at all possible, do so in a way that gives effect to every word of the statute and does not render any portion thereof redundant or duplicative. *See Lowe v. S.E.C.*, 472 U.S. 181, 208, n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); Antonin Scalia & Bryan A. Garner, *Reading Law* 176 (2012) (internal footnote omitted) ("Because the legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant. If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.").

Such interpretation that avoids surplusage is particularly important when the statute contains provisions separated by a disjunctive "or." *See Reiter*, 442 U.S. at 338–39 ("That strained construction would have us ignore the disjunctive 'or' and

rob the term 'property' of its independent and ordinary significance . . . . Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not.").

Moreover, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). *See also SCOTUS Henson*, 137 S. Ct. at 1723 ("[W]hen we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning."); *Loughrin*, 134 S. Ct. at 2390 (alteration in the original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning."); 82 C.J.S. *Statutes* § 388 ("[W]here a legislature uses similar but different terms in a statute, particularly within the same section, it is presumed that the legislature intended such terms to have different meanings."); 73 Am. Jur. 2d *Statutes* § 122 (internal footnotes omitted) ("Where different language is used in different parts of a statute, it is presumed that the language is used with a different intent. Likewise, the use of differing language in otherwise parallel statutory provisions supports an inference that a difference in meaning was intended.").

Finally, pursuant to the "'rule of last antecedent,' . . . a limiting clause or phrase . . . should ordinarily be read as modifying **only** the noun or phrase that it immediately follows."). *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (emphasis added). *See also* Scalia & Garner, *supra*, at 144 ("A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent."). In *Barnhart*, the Supreme Court provided the following hypothetical illustration of the last-antecedent rule, the rationale behind it, and how the rule applies:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house—for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically prohibiting the one activity—hosting a party—that was most likely to cause damage and most likely to occur.

Barnhart, 540 U.S. at 27–28.

Applying the foregoing rules of statutory interpretation to § 1692a(6) in light of the *SCOTUS Henson* decision can lead to only one conclusion: an entity whose

primary business is debt acquisition and collection is a "debt collector" under the "principal purpose" prong of 1692a(6), even if it attempts to collect the debt for its own account.

Section 1692a(6) provides the following two-prong definition of a "debt collector": any entity that

1. "[U]ses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of **any** debts, **or**"
2. "[W]ho regularly collects or attempts to collect, directly or indirectly, debts **owed or due or asserted to be owed or due another**."

15 U.S.C. § 1692a(6) (emphasis added). The disjunctive "or" indicates that Congress intended to provide two different and distinct ways for an entity to qualify as a "debt collector" under the statute.

SCOTUS Henson held that an entity cannot be the statutorily defined "debt collector" under the "regularly collects" prong of § 1692a(6) unless it collects the debts on behalf of another party. *SCOTUS Henson*, 137 S. Ct. at 1721–26. The reason for such interpretation of the "regularly collects" prong of § 1692a(6) was the phrase "owed or due or asserted to be owed or due another" immediately following the word "debts" contained in that portion of the statutory definition. *Id.* at 1721–24. The Court expressly stated that it was not deciding the issue of what it

meant to be a "debt collector" under the "principal purpose" prong of the statute—*i.e.* the portion of § 1692a(6) immediately preceding the disjunctive "or." *Id.* at 1721. Pursuant to the last-antecedent rule, the phrase "owed or due or asserted to be owed or due another" modifies **only** the word "debts" that immediately follows the disjunctive "or"—*i.e.* the one contained in the "regularly collects" prong of the statute. It does **not** modify the word "debts" that precedes the disjunctive "or"—*i.e.* the one contained in the "principal purpose" prong.

Moreover, the restrictive language modifying the word "debts" under the "regularly collects" prong— "owed or due . . . another"—is completely different from the expansive and all-encompassing "any" describing "debts" in the "primary purpose" prong. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (some internal quotation marks omitted) ("[T]he word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind."). Such difference in the language describing "debts" in each prong indicates that Congress intended different scopes of "debts" to apply to each prong in determining whether an entity that attempts to collect such "debts" is a "debt collector": only debts owed to other parties when the entity simply "regularly collects" such debts, but **all** debts—*i.e.* debts being collected on behalf of third parties **and** debts being collected for one's own account—if the "primary purpose" of the entity's business is debt collection. The

latter is Amos's business model—Amos acquires and collects defaulted debts and does not extend credit or generate loans of its own.

In its Brief, Amos argues that the "due or owed . . . another" requirement contained in the "regularly collects" prong should also apply to the "primary purpose" prong of § 1692a(6). However, in addition to violating (1) the last-antecedent rule, and (2) the presumption that different language contained in different portions of the same statute indicates different meaning, Amos's proposed interpretation violates (3) the rule against surplusage. If the Court were to adopt Amos's proposed statutory interpretation, a "debt collector" would be an entity (1) that regularly collects debts owed or due to third parties, or (2) whose principal purpose is collecting debts owed or due to third parties. However, any entity whose principal purpose is collecting debts on behalf of third parties would necessarily be engaged in regular collection of such third-party debts. Stated differently, under Amos's proposed interpretation, nobody would be able to satisfy the "regularly collects" prong without also satisfying the "principal purpose" prong. Such interpretation would make the "principal purpose" prong completely redundant: it would not add anything beyond what the "regularly collects" prong already achieves.

Amos then appears to argue (without much statutory analysis) that interpreting the "primary purpose" prong to include all debts—those owed to third

parties and those owed to the collecting entity itself—would somehow be inconsistent with the definition of "creditor" set forth in § 1692a(4). Section 1692a(4) defines "creditor" as "any person who [1] offers or extends credit creating a debt or [2] to whom a debt is owed." 15 U.S.C. § 1692a(4). Section 1692a(6) also provides two different ways for an entity to be a "debt collector": (1) being engaged in regular collection activities for debts due to third parties, or (2) being engaged in business whose primary purpose is collections of any debts. Amos appears to argue that the "primary purpose" prong as interpreted by the court below—*i.e.* that that an entity whose sole business is debt collection is a "debt collector" even if it attempts to collect debt for its own account—is inconsistent with the "to whom the debt is owed" prong of the "creditor" definition set forth in § 1692a(4), and, under the district court's interpretation, Amos is both a "creditor" and a "debt collector." Examining the two definitions in conjunction with each other, however, demonstrates that Amos's "inconsistency" argument is meritless.

To demonstrate that the "creditor" and "debt collector" definitions can be harmonized under the district court's interpretation of § 1692a(6), it is useful to look at illustrations of different types of "creditors" and "debt collectors" as defined under §§ 1692a(4) & 1692a(6). Clearly, a lending institution such as NOVA Bank would qualify as a "creditor" under the "extends credit" prong of § 1692a(4), since it extends credit that creates the debt (such as the Tepper Loan).

SCOTUS Henson's "repo man"—*i.e.* "someone hired by a creditor to collect an outstanding debt"—would unquestionably qualify as a "debt collector" under the "regularly collects" prong, since such "repo man" regularly collects debts owed to third parties. *See SCOTUS Henson*, 137 S. Ct. at 1720 ("Everyone agrees that the term embraces the repo man—someone hired by a creditor to collect an outstanding debt.").

Under the remaining two categories, an entity that is attempting to collect on a debt that it acquired from another party can be either (1) a "creditor" under the "to whom the debt is owed" prong of § 1692a(4), or (2) the "debt collector" under the "primary purpose" prong of § 1692a(6). The statutory category into which such entity would fit would depend on that entity's business model. With respect to the debt involved in the *Henson* litigation, Santander was a "creditor" under the "to whom the debt is owed" prong § 1692a(4) because, while it did not originate the debt at issue on which it was attempting to collect, its primary business was **not** debt collection. The *Henson* plaintiffs expressly acknowledged that "Santander was a consumer finance company" that "issues and services tens of thousands of car loans each year." *Fourth Circuit Henson*, 817 F.3d at 137; *District Court Henson*, 2014 WL 1806915, at *5.

Like Santander, Amos did not originate the debt involved in the litigation before the court below—the Tepper Loan. But unlike Santander, Amos does not

originate or actually service **any** loans. Amos's **only** business is the acquisition of defaulted debts from third parties and the subsequent collection of such defaulted debts. As a result of its business model, Amos is a "debt collector" under the "primary purpose" prong of § 1692a(6) because it is a non-originating entity to whom the debt is owed **and** whose primary business is debt collection.

To summarize, the two different types of "debt collectors" and the two different types of "creditors" as defined in the statute can be exemplified by the following entities:

1. *SCOTUS Henson*'s "repo man": "debt collector" under the "regularly collects" prong of § 1692a(6) by virtue of its regular debt collection activities for debts owed to third parties;
2. Amos: "debt collector" under the "primary purpose" prong of § 1692a(6) by virtue of having debt collection as the primary purpose of its business;
3. NOVA Bank: "creditor" under the "extends credit" prong of § 1692a(4) by virtue of origination of the debt such as the Tepper Loan;
4. Santander: "creditor" under the "to whom the debt is owed" prong of § 1692a(4) by virtue of collecting debt on its own account **and not** having debt collection as the primary purpose of its business.

This framework easily harmonizes the "creditor" and "debt collector" definition distinctions set forth in §§ 1692a(4) & 1692a(6), respectively, and completely refutes Amos's "inconsistency" argument.

The "owed or due . . . another" requirement set forth in *SCOTUS Henson* for the "regularly collects" prong of § 1692a(6) does **not** apply to the "primary purpose" prong. This interpretation of the statute (1) has been adopted by the district courts in the Third Circuit; (2) is consistent with the two-prong approach adopted by the courts of appeals interpreting *SCOTUS Henson*; (3) is the only one possible under the applicable rules of statutory interpretation; and (4) contrary to Amos's argument, does not conflict with the statutory definition of a "creditor." Therefore, an entity like Amos—whose sole business is acquisition and collection of nonperforming and semi-performing debts—qualifies as a "debt collector" under the "primary purpose" prong even when it seeks to collect a debt for its own account. As the following discussion demonstrates, under this legal framework, the district court correctly determined that Amos is a "debt collector" as defined under § 1692a(6) and is, therefore, liable for its violations of the FDCPA.

E. The District Court Correctly Concluded That Amos Is a "Debt Collector" under the "Primary Purpose" Prong of § 1692a(6)

As Amos readily admits in the Answer, it is not a financial institution or lender under any federal or state law. (App. 42, 60). At the time Amos purchased

the Tepper Loan from a failed Pennsylvania bank, it was not even registered to do business in Pennsylvania, and did not so register until two years later. (App. 5). Amos is, however, registered as a debt collector that handles consumer debt in multiple states.[5] At trial, Mr. Korogluyan testified that Amos's sole business is the acquisition and collection of nonperforming and semi-performing debt. (App. 5, 237). It was Mr. Korogluyan's trial testimony that was the basis of the district court's determination that Amos was a "debt collector" under the "primary purpose" prong of § 1692a(6). (App. 21–22).

Moreover, throughout this litigation, Amos has repeatedly argued that it was not required to register as a foreign business entity with the Pennsylvania Department of State because its sole business was acquisition and collection of debts. (App. 391, 448–49). In the Decision, the district court appeared to agree with Amos's position, holding that it did not violate the FDCPA by commencing the Foreclosure Action without first registering with the Pennsylvania Department of State. (App. 28–29).

Finally, in the Amos Demand Letters and the Amos Email, Amos has repeatedly represented itself to be a debt collector by including the "attempting to collect a debt" language. (App. 73, 75, 84, 101). In fact, Amos clearly recognized itself to be a debt collector by including in the Amos Demand Letters the specific

[5] *See* n.1, *supra*.

language required under § 1692g of the FDCPA. (App. 73, 75, 84).[6] Such self-identification as a "debt collector," in conjunction with Mr. Korogluyan's trial testimony that Amos's sole business is acquisition and collection of defaulted debts, Amos's failure to register with the Pennsylvania Department of State as a foreign business entity, and its registration in multiple states as a debt collector handling consumer debt, further supports Amos's status as a "debt collector" under the "principal purpose" prong of § 1692a(6). *See Glover v. F.D.I.C.*, 698 F.3d 139, 152, n.8 (3d Cir. 2012) ("In filing the Foreclosure Complaint against Glover, the

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[6] Pursuant to § 1692g(a), the debt collector is required to provide the consumer with, *inter alia*, the following statements within five days of the initial communication:

> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. § 1692g(a). These statutorily required statements were included in each of the Amos Demand Letters (App. 73, 75, 84), which shows that Amos considered itself to be a debt collector subject to the FDCPA requirements when it sent them.

Udren Defendants self-identified as a 'debt collector' and confirmed that the Foreclosure Complaint was 'an attempt to collect a debt,' and Glover's pleadings allege that the Udren Defendants engaged in such litigation as a common debt collection practice. We therefore have no hesitation in concluding that the Udren Defendants meet the FDCPA definition of 'debt collector.'"); *Barbato*, 2017 WL 5496047, at *16 (quoting *Hooks v. Forman Holt Eliades & Ravin LLC*, No. 11 CIV. 2767 LAP, 2015 WL 5333513, at *12 (S.D.N.Y. Sept. 14, 2015)) (some internal quotation marks omitted) (alterations in the original) ("Although Alibrandi[v. Fin. Outsourcing Svs., Inc., 333 F.3d 82 (2d Cir. 2003),] did not hold that the mere use of a 'debt collector' disclaimer automatically transforms a person into a debt collector for purposes of the FDCPA, it does direct the court to consider the disclaimer in the totality of facts of each particular case."); *Plouffe v. Bayview Loan Servicing, LLC*, No. 5:15-CV-05699, 2016 WL 6442075, at *6 (E.D. Pa. Oct. 31, 2016) (deeming the defendant to be a "debt collector" under § 1692a(6) because, *inter alia*, the defendant "repeatedly represented that it was a debt collector for purposes of the FDCPA.").

All the evidence presented to the district court below clearly demonstrated that Amos's sole business was the acquisition and collection of defaulted debts. Under the "primary purpose" prong of § 1692a(6), an entity like Amos, whose primary business is debt collection, qualifies as a "debt collector" even if it owns

the debt that it attempts to collect. Therefore, the district court correctly decided that Amos is a "debt collector" and is subject to all FDCPA requirements.

VI. CONCLUSION

For all the foregoing reasons, plaintiffs/appellees, James Tepper and Allison Tepper, respectfully request that this Court affirm the decision and order of the district court below dated August 9, 2017. Additionally, because 15 U.S.C. § 1692k(3) provides for a mandatory award of attorney's fees and costs of litigation,[7] the Teppers request that this Court award them reasonable attorney's fees and costs associated with this appeal.[8] Once directed by the Court, the Teppers will provide

[7] "[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of . . . (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1692k(a). The award of reasonable attorney fees to the prevailing FDCPA plaintiff is mandatory and is not subject to the court's discretion. *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991).

[8] Because the fee-shifting provision in § 1692k(a)(3) provides for recovery of reasonable attorney's fees and costs by a plaintiff that successfully prosecutes an FDCPA claim, the plaintiff is entitled to also recover reasonable attorney's fees and costs associated with a successful appeal. *See generally Maldonado v. Houstoun*, 256 F.3d 181 (3d Cir. 2001) (awarding reasonable attorney fees incurred in the appeal to the successful appellee under the applicable fee shifting statute (15 U.S.C. § 1988(b)); *Shelton v. Restaurant.com Inc.*, 3:10-CV-00824-MAS-DEA, 2016 WL 7394025, at *10–*14 (D.N.J. Dec. 21, 2016), *appeal dismissed*, No. 17-1078, 2017 WL 3401231 (3d Cir. Apr. 20, 2017) (awarding reasonable attorney's fees incurred in the course of several appeals under the fee shifting provision of the New Jersey consumer protection statute). While the Teppers have submitted their application for an award of reasonable attorney's fees

the certifications necessary for the Court to determine the amount the Teppers are entitled to recover.

Respectfully submitted,

FELLHEIMER & EICHEN LLP

Dated: December 21, 2017

/s/ Gleb Epelbaum

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to the district court for successful prosecution of the action below, the application does not include any attorney's fees or costs associated with this appeal.

Certificate of Compliance with Fed. R. App. P. 32(a)

I, Gleb Epelbaum, hereby certify as follows:

1. This Brief of the Appellees, James Tepper and Allison Tepper complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because this Brief contains 11,138 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief of the Appellees, James Tepper and Allison Tepper complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

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Certification Pursuant to 3d Cir. L.A.R. 31.1(c)

I, Gleb Epelbaum, certify pursuant to 3d Cir. L.A.R. 31.1(c) as follows:

1. The text of the electronic Brief of the Appellees, James Tepper and Allison Tepper filed with this Court is identical to the text in the paper copies submitted to this Court.

2. Prior to electronic submission to this Court, the file containing the Brief of the Appellees, James Tepper and Allison Tepper was scanned for viruses using Avast Business Security, version 17.8.2527 (build 17.8.3705.249), and no virus was detected.

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Certification of Bar Membership

I, Gleb Epelbaum, certify pursuant to 3d Cir. L.A.R. 46.1(e), that I am a member of the Bar of this Court.

Respectfully submitted,

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Certificate of Service

I, Gleb Epelbaum, certify that on the below date, I have caused a true and correct copy of the Brief of the Appellees, James Tepper and Allison Tepper to be served upon filing on the following, who is registered as a CM/ECF Filing User and therefore consents to electronic service pursuant to 3d Cir. L.A.R. 113.2, via this Court's electronic docketing system pursuant to 3d Cir. L.A.R 31.1(c):

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