Introduction and Summary

Defendant's argument rests entirely on its untenable assertion that the Supreme Court in *Henson v. Santander Consumer USA, Inc*., __ U.S. __, 137 S.Ct. 1718, 2017 WL 2507342 (2017), held that it cannot be a "debt collector" under the Fair Debt Collection Practices Act ("FDCPA") because it is the current owner of Plaintiff's debt that it obtained after default. In a narrow opinion, *Henson* held that an entity that "regularly" purchases defaulted debts to collect for its own account is not a "debt collector" pursuant to the second prong of the definition in 15 U.S.C. § 1692a(6) covering a person who "regularly collects or attempts to collect ... **debts owed or due ... another**." (Emphasis added.) Thus, Defendant does not address the dispositive issue here – that Congress chose to subject it to FDCPA coverage under the first prong of the § 1692a(6)'s alternative definition applicable to an entity engaging "in any business the principal purpose of which is the collection of any debts" The Supreme Court expressly warned in *Henson* that "we do not attempt to" address this "principal purpose" prong because "the parties haven't much litigated that alternative definition and "in granting certiorari we didn't agree to address it." 2017 WL 2507342, *3. Defendant's exclusive reliance on *Henson* is accordingly unavailing.

Defendant's sole business as shown by the [SJ: summary judgment here record /MTD: the specific allegations of the complaint], is to purchase portfolios of defaulted consumer debts at steep discounts for pennies on the dollar and then attempt to collect those debts from individual consumers such as Plaintiff; its sole revenue source is derived from debt collection. This business model is precisely the type of debt collection activity that the plain language of the "principal purpose" prong covers. This alternative definition excludes the "owed or due another" component of the second definition that compelled the result in *Henson*, thus eliminating any

basis for Defendant to claim that because it is the current owner of the debt it is exempt from Congress's efforts to rein in and regulate Defendant and its fellow professional debt collection industry members.

This conclusion was confirmed by other sources even before *Henson* was decided. For example, the seminal opinion of the 11th Circuit in *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015), the original precedent establishing the rule that the Supreme Court adopted in *Henson*, thoroughly explained how its ruling still preserved the FDCPA's applicability under the "principal purpose" definitional prong to a professional bad debt portfolio buyer such as Defendant. 797 F.3d at 1316 n.8. The Supreme Court's pinpoint citation to *Davidson* when identifying the Circuit conflict precipitating its grant of certiorari expressly referenced the portion of the *Davidson* ruling preserving this distinction. 2017 WL 2507342, *2. In addition, years of regulatory enforcement by the agencies chosen by Congress to administer the FDCPA have consistently applied this statute to the bad debt portfolio buyer industry. This history shows the continued need for FDCPA coverage and vigorous enforcement as to this industry.

I. *Henson* Does Not Apply to "Principal Purpose" Debt Buyers

In *Henson,* the Supreme Court unanimously held that Santander was not a debt collector under one of the FDCPA's two definitions of "debt collector." This narrow opinion held that Santander was not subject to the FDCPA as an entity "regularly" collecting debts "owed or due another." The Supreme Court explicitly stated that it was not addressing application of the FDCPA's alternative "principal purpose" definition, which was not at issue since it had not been presented by the parties and did not fall within the scope of its grant of review. 2017 WL 2507342, *3. As the Court of Appeals below had noted, "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." *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 137 (4th Cir. 2016).

The record in *Henson* showed that Santander was in fact in the auto finance business and thus its principal business was extending credit. It purchased a portfolio of auto paper from CitiFinancial. A percentage of the $3.55 billion portfolio, consistent with the usual default rates on consumer automobile paper, was in default. The plaintiffs' debts were among those in default. *See* 817 F.3d at 134, 140; *Henson v. Santander Consumer USA, Inc.*, 2014 WL 1806915, at *4 (D. Md. May 6, 2014).

The relevant portion of the FDCPA definition of "debt collector" is "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." 15 U.S.C. §1692a(6). Plainly, "[t]he FDCPA establishes two alternative predicates for 'debt collector' status — engaging in such activity as the 'principal purpose' of the entity's business and 'regularly' engaging in such activity. 15 U.S.C. § 1692a(6)." *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56, 61 (2d Cir. 2004); *accord, Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1316 n.8 (11th Cir. 2015); *Schlegel v. Wells Fargo Bank, N.A.*, 720 F.3d 1204, 1208 (9th Cir. 2013); *Hester v. Graham, Bright & Smith*, 289 Fed. Appx. 35, 41 (5th Cir. 2008); *Little v. World Fin. Network, Inc.*, 1990 WL 516554, *2–4 (D. Conn. July 26, 1990) ("the two prongs of the statutory definition of debt collector are separated by a comma and the word 'or', indicating that there are alternative definitions."). An entity meeting either one of the

two definitions qualifies as a debt collector. *See Davidson v. Capital One Bank (USA), N.A.*, *supra.*

The *Henson* opinion held that, because Santander owned all legal and equitable rights to the debts in question, it did not qualify under the "regularly collects" part of the definition because the debts that it was collecting were not "owed or due or asserted to be owed or due another." The opinion does not purport to address entities engaged in "any business the principal purpose of which is the collection of any debts," and that portion of the statutory definition was disclaimed in briefs and oral argument. The Supreme Court accordingly limited the focus of its opinion:

> 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. [¶] With these preliminaries by the board, we can turn to the much narrowed question properly before us.

2017 WL 2507342, *3.

In the relatively short time since *Henson* was decided, courts have already rejected the argument that an entity's current ownership of the debt completely disqualifies it as a "debt collector" and adopted the contrary rule that bad debt buyers are covered under the "principal purpose" prong. *Chenault v. Credit Corp. Solutions, Inc.,* 2017 WL 5971727, *2 (E.D. Pa. Dec. 1, 2017) (concluding that debt buyer defendant was a debt collector under principal purpose prong); *Barbato v. Greystone Alliance, L.L.C.,* 2017 WL 5496047, *10 (M.D. Pa. Nov. 16, 2017) (same); *Tepper v. Amos Fin., L.L.C.*, 2017 WL 3446886, *8 (E.D. Pa. Aug. 11, 2017) (same); *Schweer v. HOVG, L.L.C.*, 2017 WL 2906504, *5 (M.D. Pa. July 7, 2017) (same). *See also McMahon v. LVNV Funding, LLC*, 2018 WL 1316736, at *14 (N.D. Ill. Mar. 14, 2018) ("a reasonable juror could reach a verdict in favor of plaintiff on the question of whether the

principal purpose of LVNV's business is debt collection"); *Mitchell v. LVNV Funding, LLC,* 2017 WL 6406594, *4-5 (N.D. Ind. Dec. 15, 2017) (concluding that "*Henson* explicitly did not address the first prong in the definition of a debt collector" and that "there exists a material factual dispute regarding LVNV's principal business activities"); *Skinner v. LVNV Funding*, 2018 WL 319320, *3-4 (N.D. Ill. Jan. 8, 2018) (concluding that "a debt purchaser can still qualify as a debt collector under § 1692a(6) if its principal purpose is the collection of debts" but that plaintiff presented insufficient evidence regarding defendant's principal purpose).

Thus, as shown below, a debt buyer such as Defendant, whose primary or only business purpose is the acquisition and collection of portfolios of defaulted debts, remains a covered debt collector under the FDCPA.

II. "Owed or Due Another" Modifies *Only* the Second, "Regularly Collects" Definition of Debt Collector

The phrase "debts owed or due or asserted to be owed or due another" that was dispositive in *Henson* is properly read as modifying *only* the second prong of the definition, that is, one "who regularly collects or attempts to collect, directly or indirectly," and not the first prong, "any business the principal purpose of which is the collection of any debts."

The principle of statutory construction known as "the rule of the last antecedent" controls here. The Supreme Court has described this rule as follows:

> When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the 'rule of the last antecedent.' See *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). The rule provides that 'a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.' *Ibid.*; see also Black's Law Dictionary 1532–1533 (10th ed. 2014) ('[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing'); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012).

Lockhart v. United States, 136 S. Ct. 958, 962-63, 194 L. Ed. 2d 48 (2016).

In *Lockhart*, the Court held that in a statute enhancing sentences for prior convictions for crimes "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," the limiting phrase "involving a minor or ward" applied only to "abusive sexual conduct" and not the other two crimes, so that a prior conviction for sexual abuse of an adult triggered the enhancement. Applying *Lockhart*, "the rule of the last antecedent" dictates that the FDCPA's definition of a "principal purpose" debt collector is not limited to those entities collecting debts "owed or due or asserted to be owed or due another."

Circuit Courts agree. In *Davidson*, the 11th Circuit specifically stated that under the two-prong definition "'principal purpose' [is] not modified by 'owed or due another.'" 797 F.3d at 1316 n.8. The Ninth Circuit concurs. *Schlegel v. Wells Fargo Bank, N.A.,* 720 F.3d at 1209 ("This argument fails, because it would require us to overlook the word 'another' in the second definition of 'debt collector'").

The "last antecedent" principle applies with particular force in the case of the FDCPA definition of "debt collector," because the two prongs distinguish between collecting "debts owed or due or asserted to be owed or due another" and collecting "any debts." It is settled that "the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see also HUD v. Rucker*, 535 U.S. 125, 131 (2002); *United States v. Clayton*, 613 F.3d 592, 596 (5th Cir. 2010) ("The CCPA uses the modifier 'any' in describing the tax debts to which it applies, a term we must construe as 'broad' and 'ha[ving] an expansive meaning.'" (quoting *Ali,* 552 U.S. at 219)). The Supreme Court has therefore explained that where, as here, Congress "did not add any language limiting the breadth of [the] word ['any']," it "must" be read "as referring to all" of the type to which it refers. *Gonzales*, 520

U.S. at 5; *see also Merritt v. Dillard Paper Co.,* 120 F.3d 1181, 1186 (11th Cir.1997). "Any" is an all-encompassing term which "contains no hint of an exception." *Hutto v. Finney*, 437 U.S. 678, 694 (1978); *Brooks v. United States*, 337 U.S. 49, 51 (1949); *Duffy v. Landberg*, 133 F.3d 1120, 1122-23 (8th Cir. 1998) (FDCPA's use of "any obligation" is broad). In other words, the word "any" is as expansive as possible.

Applied here, "any debts" is facially broader than "debts owed or due or asserted to be owed or due another," since this latter usage defines a subset containing fewer than all debts. *See Davidson v. Capital One Bank (USA), N.A., 7*97 F.3d at 1316 n. 8 ("'Any debts' means 'all debts,' including debts acquired from another, in default, or owed to the collecting entity.") The "owed or due or asserted to be owed or due another" language therefore cannot be applied to "any debts." Thus, the "principal purpose" definition covers all consumer debts, even if they are not owing to another and are instead owned by the debt collector defendant.

III. Both "Regular" Debt Collectors and "Principal Purpose" Debt Buyers Are Regulated By The FDCPA Because They Can Operate Without Regard to Any Need to Preserve Consumer Good Will

One justification for treating third party debt collectors and persons primarily engaged in the purchase and collection of debt as covered by the FDCPA is the fact that such entities do not need to preserve consumer "good will." According to the legislative history of the FDCPA, creditors, "who generally are restrained by the desire to protect their good will when collecting past due accounts," are not covered by the FDCPA, but entities who may have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them," are covered. S. Rep. 95–382, at 2 (1977), 1977 WL 16047, *2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696. *Aubert v. American General Finance, Inc.*, 137 F.3d 976, 978 (7th Cir.1998) ("Because creditors are generally presumed to restrain their abusive collection practices out of a desire to protect

their corporate goodwill," creditors who attempt to collect debts "in their own name and whose principal business is not debt collection ... are not subject to the [FDCPA]."

Neither third party collectors, nor in particular entities whose principal or sole business is the collection of debts, have "good will" in that sense–they are simply interested in collecting and are not interested in getting business in the future from the consumer. *See, e.g., Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1059 n. 1 (9th Cir. 2011) (referencing "the sizeable growth in the debt buying industry" and documenting "that the average price for purchase of an obsolete debt at $0.045 per dollar"). Their client is not the consumer at all, but the merchant or creditor that hires them or sells debts to them. As one court explained:

> [T]here exists a logical distinction between the two types of entities identified in the alternative segments of the definition. The primary activity of an ordinary retailer (for example) is not the collection of debts, though it may regularly try to collect debts from its own customers. Such a company is constrained naturally in its debt collection activities with its own customers by concern over the effect of generating adversarial relationships. No such natural constraints exist if a company whose primary purpose is not debt collecting, such as a retailer, regularly collects debts for other companies, however, since any adversarial relationships stemming from debt collecting are generated with other companies' customers, and do not affect that company's primary activity. Furthermore, if a company's primary purpose is debt collection, then the natural constraints also do not apply, since that company's primary purpose is not dependent upon favorable relationships with customers. Thus, there are two situations where natural constraints do not protect against objectionable debt collection practices. The statutory definition of debt collector covered by the Act's prohibitions precisely identifies these two situations.

Little v. World Fin. Network, Inc., 1990 WL 516554, *2–4 (D. Conn. July 26, 1990); *accord Davidson v. Capital One Bank (USA), N.A.,* 797 F.3d at 1316 n.8. However, a company like Santander, which is basically a credit grantor but acquires defaulted debts with sufficient

frequency to meet the "regularly" test,[1] ***does*** have “good will” concerns and ***does*** want to obtain further business from consumers.

Defendant in contrast does not have such concerns. Its insulation from such market-based forces and constraints may explain at least in part the unfortunate history of predatory and unlawful collection misconduct documented by the FTC and the CFPB while enforcing the FDCPA against the defendant’s bad debt portfolio buyer industry. See 15 U.S.C. § 1692l (Administrative enforcement). Among those actions is the following sampling that illustrates the critical need for FDCPA coverage of the bad debt portfolio buyer industry: *United States v. Capital Acquisitions & Management Corp.*, 2004 WL 577482 (2004) (FTC News Release, Consent Decree);[2] *In re Encore Capital Group, Inc., Midland Funding, L.L.C., Midland Credit Management, Inc., and Asset Acceptance Capital Corp*., 2015 WL 5667140 (Sept. 9, 2015) (CFPB Consent Order); *In re Portfolio Recovery Associates*, *L.L.C.,* 2015 WL 5667141 (Sept. 9, 2015) (CFPB Consent Order); *see also* FTC, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010);[3] FTC, The Structure and Practices of the Debt Buying Industry (Jan. 2013).[4]

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[1] “[A] person may regularly render debt collection services, even if these services are not a principal purpose of his business. Indeed, if the volume of a person's debt collection services is great enough, it is irrelevant that these services only amount to a small fraction of his total business activity; the person still renders them ‘regularly.’” Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997). *Accord Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti,* 374 F.3d 56, 61 (2nd Cir. 2004).

[2] Available at https://www.ftc.gov/sites/default/files/documents/cases/2004/03/040324cag0223222.pdf.

[3] Available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.

[4] Available at https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

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