No. 19-3167

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STEPHANIE REYGADAS,
Plaintiff-Appellee,

v.

DNF ASSOCIATES, LLC,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Arkansas
Case No. 2:18-cv-02184
Hon. P.K. Holmes, III

APPELLEE'S BRIEF

Corey D. McGaha
Crowder McGaha, LLP
5507 Ranch Drive, Suite 202
Little Rock, AR 72223
(501) 205-4026

Adam R. Pulver
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Attorneys for Appellee

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Defendant-Appellant DNF Associates, LLC buys defaulted consumer debts and tries to collect on them by a variety of means. Here, DNF bought a disputed debt allegedly owed by Plaintiff-Appellee Stephanie Reygadas and sued her to collect that debt. After her counsel successfully obtained a dismissal of that action, DNF hired a third party to contact her and collect the debt on DNF's behalf. Although DNF knew that Ms. Reygadas was represented, it did not share this information with its agent, and the agent contacted Ms. Reygadas directly in an attempt to collect the debt.

The district court held that DNF was subject to the Fair Debt Collection Practices Act (FDCPA) and its Arkansas analog as a "debt collector," because DNF's "principal purpose" is debt collection, even if it hires others to achieve that purpose. Applying general principles of agency law, the court found DNF liable for violating the FDCPA's prohibition on contacting a consumer directly to collect a debt when the consumer is represented by counsel. On appeal, DNF challenges the district court's well-supported legal conclusions and application to the undisputed facts as to both issues.

The case presents questions of first impression in this Circuit, and Ms. Reygadas agrees that it merits fifteen minutes of oral argument per side.

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STATEMENT OF ISSUES

This appeal presents two issues:

First, is a company whose entire business model is buying defaulted debt, with the sole intent that it be collected upon, a "debt collector" for purposes of the Fair Debt Collection Practices Act (FDCPA) and the Arkansas Fair Debt Collection Practices Act (AFDCPA) because it is a "business the principal purpose of which is the collection of any debts," 15 U.S.C. § 1692a(6), *see also* Ark. Code Ann. § 17-24-502(5)(A), even when the company hires a third party to interact with consumer debtors?

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017)

Barbato v. Greystone Alliance, LLC, 916 F.3d 260 (3d Cir.), *cert. denied sub nom. Crown Asset Mgmt. LLC v. Barbato,* 140 S. Ct. 245 (2019)

McMahon v. LVNV Funding, LLC, 301 F. Supp. 3d 866 (N.D. Ill. 2018)

Second, does a debt collector violate statutory prohibitions against directly contacting a consumer represented by counsel to collect a debt, 15 U.S.C. § 1692c(a)(2), Ark. Code Ann. § 17-24-504(a)(2), when the debt collector knows that a consumer is represented by counsel and hires a third-party agent to contact that consumer to collect a debt without sharing that

knowledge, and that agent contacts the consumer directly to collect the debt without the attorney's consent?

In re Sterling, 933 F.3d 828 (7th Cir. 2019)

Schmitt v. FMA Alliance, 398 F.3d 995 (8th Cir. 2005)

Restatement (Third) of Agency § 7.04 (2006)

STATEMENT OF THE CASE

In 2014, Plaintiff-Appellee Stephanie Reygadas had a dispute with an online merchant, Purchasing Power, over a camera she ordered. JA387; JA119–120. Purchasing Power insisted that Ms. Reygadas owed it money, considered her account in default, and sold the account to Defendant-Appellant DNF Associates, LLC. JA120. DNF then retained a law firm, the Jacob Law Group PLLC (Jacob), to aid it in collecting on the purported debt. *Id.* Represented by Jacob, DNF filed a state court lawsuit against Ms. Reygadas on December 6, 2016. *Id.* The lawsuit was one of at least 129 debt collection lawsuits DNF filed in the state of Arkansas alone between September 7, 2016, and March 29, 2019. JA61.

After being sued, Ms. Reygadas hired an attorney who, on January 30, 2017, filed a motion to dismiss the case and served the motion on DNF. *Id.*

On January 4, 2018, the state court granted Ms. Reygadas's motion and dismissed the case without prejudice for insufficiency of process. *Id.*

At some time in the following months, DNF engaged a different third party, Radius Global Solutions, LLC (RGS), to take actions to collect from Ms. Reygadas on DNF's behalf. JA34; JA120. DNF gave RGS Ms. Reygadas's address and telephone number, but it neither provided RGS with the information it had about her attorney nor even informed RGS that Ms. Reygadas was represented by counsel. JA34; JA120. Pursuant to its contract with DNF, on July 4, 2018, RGS sent a letter to Ms. Reygadas's home address regarding the purported debt owed to DNF. JA49. That letter offered to "settle" on behalf of DNF for $401.58. JA16–17.

In October 2018, Ms. Reygadas, through her counsel, filed this action against DNF. JA2. The operative complaint alleged that DNF was a "debt collector" as defined in both the FDCPA, 15 U.S.C. § 1692a(6), and AFDCPA, Ark. Code Ann. § 17-24-502(5)(A), because the principal purpose of its business is the collection of debts. JA10. It further alleged that DNF's acts and omissions, as well as those of its agents, violated multiple provisions of the FDCPA and the AFDCPA, including both statutes' prohibition on direct

contact with a consumer debtor known to be represented by counsel, 15 U.S.C. § 1692c(a)(2); Ark. Code Ann. § 17-24-504(a)(2). JA19–20.

On March 15, 2019, DNF moved for summary judgment, arguing both that it was not a debt collector and that it could not be held liable for RGS's contact with Ms. Reygadas because *RGS* lacked knowledge that Ms. Reygadas was represented by counsel. Dkt. 25. On the former question, DNF did not dispute that its business model was to buy defaulted debts that it then hired third parties to collect upon. Rather, DNF made the legal argument that such a model does not reflect a "principal purpose" of debt collection absent direct consumer interaction. *See* Dkt. 27 at 19–20 (supporting memorandum); Dkt. 25-1 (affidavit of DNF officer explaining business). On the issue of liability, DNF asserted that it could not have violated the FDCPA if its agent RGS did not independently violate the FDCPA. Dkt. 27 at 23.

Ms. Reygadas opposed DNF's motion. Dkt. 28. As to DNF's "debt collector" status, Ms. Reygadas submitted evidence of DNF's business activity, including documentation of more than one hundred collections suits filed in Arkansas alone and documentation related to DNF's licensure as a collection agency in Arkansas, including a certification by a DNF

manager related to his debt-collection experience. Dkt. 29-2 through 29-4; *see also* JA80–118 (sample of exhibits). She argued that this activity, and DNF's own evidence regarding its business model, demonstrated a principal purpose of debt collection under the plain meaning of that term. Dkt. 28 at 3–7. On the ultimate question of liability, she argued that general principles of agency allowed DNF to be held liable for RGS's actions, not because DNF's knowledge was imputed to RGS, but because DNF *itself* knew that Ms. Reygadas was represented by counsel when it retained RGS to contact her. *Id.* at 9–10.

In reply, DNF did not introduce any additional evidence to support its assertion that its business purpose was something other than debt collection, but instead relied solely on its legal argument. Dkt. 30. With respect to liability, DNF did not argue that RGS's actions on its behalf were unauthorized. *Id.*

The district court ruled on DNF's motion on May 16, 2019, rejecting all of DNF's arguments. As to whether DNF was a debt collector, the district court looked to dictionary definitions of the words "principal" and "purpose" to conclude that:

> the plain meaning of the statutory definition classifies a business as a "debt collector" if the business's primary objective is to ensure that debts it is owed are collected.

JA123 (citing *Principal*, Merriam-Webster's Dictionary (Online 2019); *Purpose*, Merriam-Webster's Dictionary (Online 2019); and *Barbato*, 916 F.3d at 267). The court rejected DNF's argument that the FDCPA's "principal purpose" definition requires direct consumer interaction, explaining that "DNF's preferred reading of the first ['principal purpose'] definition—that in order for a business's principal purpose to be collection of debt … the debt buyer [must] engage in the act of collecting debt—would effectively render the second ['regularly collects'] definition as surplusage," as it is only that "second definition that requires active collection." *Id.* (citing *Barbato*, 916 F.3d at 267). The court also rejected DNF's argument that its principal purpose was "debt purchasing," explaining that "if debt purchasing was its principal purpose, [DNF] would not have a profitable business." JA123.

On the issue of liability for violating the prohibition on direct contact with a represented consumer debtor, the district court found that there was no dispute that DNF had actual knowledge that Ms. Reygadas was represented by counsel and that, under general agency principles, "DNF was

liable when RGS contacted Reygadas directly to fulfill the objective of the agency relationship." JA125. The court explained that:

> DNF cannot now argue as a matter of law that it cannot be held liable for RGS's actions because it chose not to share with RGS that Reygadas was represented by counsel. If DNF, as a debt collector, wanted to avoid principal liability for the actions of RGS, it should have notified RGS that Reygadas was represented by counsel and could only be communicated with through her attorney.

Id.

The district court thus denied DNF's motion for summary judgment, and *sua sponte* granted summary judgment to Ms. Reygadas on the issues of whether DNF was a debt collector and whether there had been a violation of the FDCPA. JA121, JA121 n.3, JA125.

Ms. Reygadas subsequently accepted a Rule 68 Offer of Judgment as to the amount of damages, and judgment was entered in her favor on September 17, 2019. Dkt. Nos. 51–52. This appeal followed.

SUMMARY OF ARGUMENT

Appellant DNF is a company that engages in one business: It purchases defaulted debts and then uses a variety of methods to attempt to collect on those debts, including filing collection lawsuits against consumer debtors and retaining third parties to contact consumers to collect debts on

its behalf. This case involves DNF's attempts to collect on a disputed debt from Appellee Stephanie Reygadas using both of these methods. First, DNF filed a lawsuit against Ms. Reygadas in an Arkansas state court. Represented by counsel, she successfully moved to have that case dismissed. DNF then hired a third-party, RGS, to contact Ms. Reygadas directly in an attempt to collect the same debt. DNF provided RGS with Ms. Reygadas's contact information but did not inform RGS that she was represented by counsel. RGS then contacted Ms. Reygadas directly, without her counsel's consent, seeking to collect the debt.

Both the FDCPA and AFDCPA prohibit a debt collector from directly contacting a consumer to collect a debt where the debt collector "knows the consumer is represented by an attorney," without the consent of that attorney. 15 U.S.C. § 1692c(a)(2); Ark. Code Ann. § 17-24-504(a)(2). The district court correctly concluded that DNF violated this prohibition because (1) it is a debt collector; (2) it knew Ms. Reygadas was represented by an attorney; and (3) its authorized agent contacted Ms. Reygadas directly, without her attorney's consent.

In arguing for reversal, DNF asks this court to adopt an atextual reading of the statutory definition of "debt collector" to exempt DNF from

the statutes' reach—a reading with which the only court of appeals to have addressed the issue disagrees, as do an increasing number of district courts. DNF also urges this Court to ignore general principles of agency, which the Court has already indicated control determinations of liability under the FDCPA, so as to immunize it from liability for its agent's authorized acts.[1] The Court should do neither and should instead affirm the judgment of the district court.

First, the district court was correct to conclude that DNF is a debt collector. In the FDCPA, Congress specified two ways an entity can be a "debt collector" and thus liable for violations of the statute. One definition, not at issue here, covers any entity that "regularly collects or attempts to collect" certain debts owed to another. 15 U.S.C. § 1692a(6). The other definition, which focuses on the entity's purpose rather than its actions, encompasses businesses "the principal purpose of which is the collection of any debts." *Id.*

[1] Ms. Reygadas agrees with DNF that the AFDCPA and FDCPA are identical in all aspects relevant to this appeal. *See* Appellant's Br. 1, n. 1. Because DNF did not address the AFDCPA claim separately in its brief, Ms. Reygadas does not either.

As the district court explained, the plain meaning of the "principal purpose" definition is that a business is a "'debt collector' if the business's primary objective is to ensure that debts it is owed are collected." JA 123; *see also Barbato*, 916 F.3d at 267. DNF argues that a business can have a principal purpose of debt collection only if it directly interacts with consumer debtors, but the statutory text contains no such requirement. Unlike the "regularly collects or attempts to collect" definition, the "principal purpose" definition focuses on an entity's purpose—its objectives and goals—not the actions it takes or how it takes them. A "direct interaction" requirement like the one proposed by DNF would collapse the FDCPA's two alternative definitions of the term "debt collector."

Faced with a statutory text that does not support its position, DNF relies heavily on other parts of the FDCPA's "scheme" and on its legislative history to support the addition of a direct-consumer-interaction requirement to the "principal purpose" definition. But neither the statutory scheme nor the legislative history supports such a conclusion, let alone allows this Court to disregard the plain meaning of the statute's text. Whether or not Congress explicitly considered entities who choose to structure their business as DNF does, the statute's plain language affords no basis for carving out such

entities. As the Supreme Court recently explained with respect to the definitional sections of the FDCPA, "it is never [the courts'] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

Applying the plain-text definition to the record before it, the district court properly concluded that DNF has a principal purpose of debt collection. The record demonstrates that DNF's entire business model involves purchasing defaulted debts with the intent of collecting on them, and that DNF accomplishes this purpose, as it did in this case, by hiring lawyers to commence lawsuits to collect on debts and hiring other third parties to help it collect on debts in other ways. DNF introduced no evidence that would create a dispute of material fact as to whether it has some other principal purpose.

As to the second issue, DNF maintains that it cannot be held liable for the actions of its agent because the agent itself, which did not know Ms. Reygadas was represented by counsel, cannot be held liable for violating the FDCPA. That statement of law is incorrect. Under general principles of

agency, a principal is directly liable for its authorized agent's conduct when that conduct, *if undertaken by the principal*, would subject the principal to liability. Restatement (Third) of Agency § 7.04. The comments to the Restatement even give as an example the scenario here: Where an agent may not be liable because it lacked the requisite knowledge, the principal will still be liable if *it* had that knowledge and the agent acted on its behalf. *Id.* cmt. b. There is no dispute that DNF had actual knowledge that Ms. Reygadas was represented by counsel and thus that if DNF had done what its agent, RGS, did, DNF would have violated the FDCPA. No legal or policy rationale supports immunizing DNF simply because it hired someone to do what it was barred from doing itself. As one court of appeals has held, "A debt collector should not be able to avoid liability for unlawful debt collection practices simply by contracting with another company to do what the law does not allow it to do itself." *Janetos v. Fulton Friedman & Gullace*, LLP, 825 F.3d 317, 325 (7th Cir. 2016).

Because DNF has a principal purpose of collecting debts, it knew Ms. Reygadas was represented by counsel, and its authorized agent contacted Ms. Reygadas to collect a debt without her counsel's consent, the decision below should be affirmed.

ARGUMENT

I. DNF has a "principal purpose" of debt collection and is a debt collector.

The district court correctly concluded that DNF is a debt collector under the FDCPA's "principal purpose" definition. DNF challenges this conclusion both as a legal matter, arguing that the court erroneously failed to read a "direct consumer interaction" requirement into the statute, Appellants' Br. 8–40, and as a factual matter, suggesting that the record evidence was insufficient to allow the court to conclude that DNF had a principal purpose of debt collection, Appellants' Br. 45–46. The district court's legal conclusions were correct, however, and its factual findings are well-supported by the record, because there is no evidence that DNF has *any* purpose other than the collection of consumer debts.

A. An entity need not directly interact with consumers to have a purpose of debt collection.

The plain meaning of the words of the statute confirms the district court's conclusion that a business may have a "principal purpose" of debt collection without directly interacting with consumer debtors. The "principal purpose" definition, unlike the "regularly collects" definition, focuses not on a business's actions, but on its objectives. Thus, in *Barbato*, the

only court of appeals decision squarely addressing the issue, the Third Circuit explicitly rejected the very argument made by DNF here. *See* 916 F.3d at 267. While DNF relies heavily on three contrary district court decisions from outside this circuit and a state court decision interpreting a state law, the district court's decision here, like *Barbato*, is consistent not only with the plain text of the statute, but also with the increasing majority of district court decisions to address the issue.[2]

In addition, the agency with enforcement and rulemaking authority under the FDCPA has provided strong support for the view that debt buyers

[2] District court decisions outside the Third Circuit reaching conclusions consistent with that of the district court here include *Rivas v. Midland Funding LLC*, 398 F. Supp. 3d 1294, 1303 (S.D. Fla. 2019); *Mullery v. JTM Capital Mgmt., LLC*, No. 18-CV-549, 2019 WL 2135484, at *3 (W.D.N.Y. May 16, 2019); *Valenta v. Midland Funding, LLC*, No. 17 C 6609, 2019 WL 1429656, at *3 (N.D. Ill. Mar. 29, 2019); *Long v. Pendrick Capital Partners II, LLC*, 374 F. Supp. 3d 515, 536 (D. Md. 2019); *Bradley v. Selip & Stylianou, LLP*, No. 17-CV-6224-FPG, 2018 WL 4958964, at *6 (W.D.N.Y. Oct. 15, 2018); *Hughes v. United Debt Holding*, No. 18 C 2235, 2018 WL 3970143, at *2 (N.D. Ill. Aug. 20, 2018); *Meola v. Asset Recovery Sols., LLC*, No. 17-cv-01017, 2018 WL 5020171, at *5–*6 (E.D.N.Y. Aug. 15, 2018); *Hordge v. First Nat'l Collection Bureau, Inc.*, No. 4:15-CV-1695, 2018 WL 3741979, at *5 (S.D. Tex. Aug. 7, 2018); *Torres v. LVNV Funding, LLC*, No. 16 C 6665, 2018 WL 1508535, at *5 (N.D. Ill. Mar. 27, 2018); *McMahon v. LVNV Funding, LLC*, 301 F. Supp. 3d 866, 884 (N.D. Ill. 2018); *Mitchell v. LVNV Funding, LLC*, No. 2:12-CV-523-TLS, 2017 WL 6406594, at *5–*7 (N.D. Ind. Dec. 15, 2017); and *Munoz v. Pipestone Fin., LLC*, 397 F. Supp. 2d 1129, 1133 (D. Minn. 2005).

may have a principal purpose of collecting debt regardless of whether they collect it themselves or do so through agents. Specifically, in a pending rulemaking, the Consumer Financial Protection Bureau has approvingly cited *Barbato* for the proposition that "a debt buyer whose principal purpose was debt collection was an FDCPA-covered debt collector even though the debt buyer outsourced its collection activities to third parties." Proposed Rule, Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,289 (May 21, 2019). The agency identified four categories of "debt collectors as defined in the FDCPA," including:

> debt buyers, which purchase delinquent debt and attempt to collect it, either themselves or through agents, or who may have as their principal purpose the collection of consumer debt[.]

Id. at 23,372.

Although not binding on this Court, this range of persuasive authority reflects a common understanding of the words of the statute, which lacks the direct interaction requirement DNF seeks to impose.

1. The plain text of the statute focuses on a business's objective, not how that objective is accomplished.

In statutory interpretation cases, this Court "begin[s] by analyzing the statutory language, giving words their ordinary, contemporary, common

meaning unless they are otherwise defined in the statute itself." *United States v. Smith*, 756 F.3d 1070, 1073 (8th Cir. 2014) (cleaned up) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); *Hennepin County v. Fed. Nat'l Mortg. Ass'n*, 742 F.3d 818, 821 (8th Cir. 2014)); *see also Dunham v. Portfolio Recovery Assocs., LLC*, 663 F.3d 997, 1002 (8th Cir. 2011) (looking to dictionary definitions to determine meaning of word "alleged" in FDCPA). "If the language's meaning is unambiguous when read in its proper context, then, this first canon is also the last: judicial inquiry is complete." *Id.* (cleaned up) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

As the district court correctly concluded, the plain language of the "principal purpose" definition of the FDCPA focuses on whether an entity's goal or objective is debt collection; it contains no direct interaction requirement. The district court was thus correct to apply this plain meaning of the statute to the facts before it and to disregard DNF's appeal to legislative history and policy arguments.

DNF claims it "does not dispute the district court's interpretation" of the word "purpose," but it argues that an entity can have a purpose of the collection of debts only if it "engage[s] in the actual collection of debts."

Appellant's Br. at 10. This argument is inconsistent with the common meaning of the word "purpose." Both in 1977 and today, the ordinary meaning of the word "purpose" is an objective or goal. *See Black's Law Dictionary* 1112 (5th ed. 1979) ("That which one sets before him to accomplish; an end, intention, or aim, object, plan, project."); *see also* JA123 (citing 2019 dictionary definition); *Barbato*, 916 F.3d at 2677 ("'purpose' is defined as something that one sets before himself as an object to be attained: an end or aim" (citing *Webster's Third New Int'l Dictionary* 1847 (1976))); *Bhutta v. Comm'r*, 145 T.C. 351, 362–63 (2015) (finding all of the ordinary definitions of word "purpose" "focus on the object or goal to be attained"). Purpose is a measure of intent, not of action, as recognized by courts in a variety of contexts. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 492 n.17 (2000) (noting 1968 dictionary "unsurprisingly defines 'purpose' as synonymous with intent"); *Tarvestad v. United States*, 418 F.3d 1043 (8th Cir. 1969) ("'evil motive' and 'bad purpose' are words of equivalent meaning"); *Canada v. Dominion Enter.*, No. 4:13CV00345 JLH, 2014 WL 2204913, at *3 (E.D. Ark. May 27, 2014) (collecting cases and definitions of "purpose" under the Driver's Privacy Protection Act as referring to objective).

Common usage of the term "purpose" makes clear that an entity can have a purpose even if it relies on others to achieve that purpose. A concert hall's purpose is to provide entertainment, even if it pays bands to entertain the crowds. A real estate broker's purpose is to sell real estate, even if he or she solely relies on independent contractor agents to interact with buyers.

As the Third Circuit explained in *Barbato*, the ordinary meaning of the word "purpose" in section 1692a(6) leads inevitably to the conclusion that, "[a]s 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." *Barbato*, 916 F.3d at 267. An entity's "purpose" does not change based on whether it hires others to contact consumers or does it itself; in either case, the goal, the end result the business seeks, remains the collection of debt.

For this reason, DNF's extensive focus on the meaning of the word "collection," Appellant's Br. at 11–12, is misplaced. DNF is correct that "collection" involves *someone* taking action. But whether an entity has collection as its objective does not depend on whether it takes that action itself, or whether it hires someone to take that action on its behalf. To have a goal of something is not the same as engaging in that activity. The organizers

of a fundraiser for hunger relief have a purpose of feeding the hungry; they are not "engaged in the act" of feeding the hungry. Similarly, having a business purpose of debt collection is different from "engaging in the act of" collecting debts.

Thus, as the district court held, the relevant question in determining whether an entity qualifies as a debt collector under the principal purpose prong is not whether an entity "engages in the act" of debt collection, but whether an entity's "principal business aim" is to collect debt, *Larroza v. Resurgence Capital, LLC*, No. 17 C 8512, 2018 WL 2118134, at *2 (N.D. Ill. May 8, 2018), or whether the collection of debt is merely incidental or ancillary to the business's primary purpose. This definition is consistent not only with the one applied by the Third Circuit in *Barbato*, but also with the definition of "purpose" utilized in a number of earlier FDCPA cases.

For example, in *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), the plaintiff brought an FDCPA claim against National Tax Funding (NTF), a company that purchased delinquent claims from municipalities, and then contracted out to a third party, CARC, to "contact[] homeowners in order to collect on the delinquent claims." *Id.* at 386. The Third Circuit held that, despite the lack of direct contact between NTF and

consumer debtors, NTF was a debt collector under both of the two statutory definitions. *Id.* at 404. As to the principal purpose prong, it explained "there is 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.*

Similarly, in *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992), the Fourth Circuit rejected a lawyer's argument that he did not qualify as a debt collector under the principal purpose prong because he was engaging in "the practice of law," not debt collection. *Id.* at 316. The relevant question, the court explained, is not "what name is applied to [the business's] activities." *Id.* Because 70 to 80 percent of the lawyer's fees were generated in debt collection cases, "it [was] clear that the 'principal purpose' of his work was the collection of debt." *Id.*

Cases where courts have found entities *not* to have a principal purpose of debt collection are equally instructive. These cases—involving banks, property management companies, retailers, and resorts—illustrate the sorts of entities the "principal purpose" definition is intended to exclude, and also show that an entity's purpose and the activities it engages in to pursue those purposes are distinct concepts. *See, e.g.*, *Bank of N.Y. Mellon Tr. Co. N.A. v.*

Henderson, 862 F.3d 29, 34 (D.C. Cir. 2017) (debt collection not bank's principal purpose); *McCready v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006) (same as to eBay); *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1145 (9th Cir. 1998) (Western Union); *Larroza*, 2018 WL 2118134, at *1 (private detective and process service companies); *Alexander v. Omega Mgmt., Inc.*, 67 F. Supp. 2d 1052, 1055 (D. Minn. 1999) (property management company); *Griffin v. Bailey & Assocs., Inc.*, 855 F. Supp. 1047, 1048–49 (E.D. Mo. 1994) (resort management company). Although many of these cases involved entities that directly contacted consumers to collect a debt, the main *purpose* of their businesses was not debt collection.

Unlike the businesses in such cases, businesses like DNF lack a *raison d'etre* other than the collection of the defaulted debts they buy. "If the collection of debts is precisely what sustains the business, unaided by any other significant sources of revenue, then the 'collection of ... debts' must be the business's 'primary purpose.'" *McMahon*, 301 F. Supp. 3d at 884 (ellipsis in original). "Simply because [DNF] 'outsources' its debt collection to [RGS] or other subcontractors does not mean that [DNF] sheds its essential character as a debt collection business or is somehow converted into something other than a debt collector." *Norman v. Allied Interstate, LLC*, 310

F. Supp. 3d 509, 515 (E.D. Pa. 2018); *see also Barbato*, 916 F.3d at 268 ("The existence of a middleman does not change the essential nature—the 'principal purpose'—of [defendant]'s business.").

2. DNF's argument confuses the FDCPA's alternative "principal purpose" and "regularly collects" definitions.

In addition to violating the plain language of the statute, adding a "direct interaction" requirement to the principal purpose definition as DNF suggests would render that definition largely superfluous. The principal purpose definition would be largely redundant if it only captured entities that regularly actively and directly collect debt themselves.

When interpreting statutes, courts "presume differences in language like this convey differences in meaning." *Henson*, 137 S. Ct. at 1723; *see also Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 63 (2006). Where, as here, Congress has provided two alternate definitions, courts construe each to refer to "something different to avoid being superfluous." *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 825 (8th Cir. 2009). Applying this canon, courts have repeatedly found that the FDCPA's statutory language makes "clear that Congress intended the 'principal purpose' prong to differ from the 'regularly' prong of its definition of 'debt collector.'" *Schroyer v. Frankel*, 197

F.3d 1170, 1174 (6th Cir. 1999) (citing *Garrett v. Derbes*, 110 F.3d 317, 281 (5th Cir. 1997) (per curiam)); *see also James v. Wadas*, 724 F.3d 1312, 1317 (10th Cir. 2013); *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1209 (9th Cir. 2013).

The most logical reading—and one that avoids superfluity—is that Congress intended the "principal purpose" prong to cover entities that do *not* "regularly collect" debts, but whose principal goal is debt collection regardless of how they carry out that goal. "Otherwise why add [it] at all?" *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019). This reading is supported by both the meaning of the word "purpose" and other differences between the wording of the two definitions:

> In contrast to the "regularly collects" definition, where Congress explicitly used the verb "to collect" in describing the actions of those it intended the definition to cover, in the "principal purpose" definition, Congress used the noun "collection" and did not specify who must do the collecting or to whom the debt must be owed. Thus, by its terms, the "principal purpose" definition sweeps more broadly than the "regularly collects" definition ….

Barbato, 916 F.3d at 267 (internal cites omitted).

In *Schlegel*, the Ninth Circuit was faced with the flip side of DNF's argument here. There, the plaintiff alleged that the "principal purpose" definition focused on whether any *activity* of the entity had a purpose of debt

collection, arguing that Wells Fargo's interactions with it to collect a debt involved such activities. 720 F.3d at 1209. The court rightly rejected that argument, noting that the principal purpose inquiry focuses on the business's purpose as a whole rather than on the activities it undertakes. *Id*; *see also Garrett*, 110 F.3d at 318 ("[A] person may regularly render debt collection services, even if these services are not a principal purpose of his business.").

Just as directly interacting with a consumer debtor to collect a debt does not prove that a business's "primary purpose" is debt collection, as *Schlegel* held, *not* having such a direct interaction does not establish that a business lacks such a primary purpose. If the only way an entity could have a principal purpose of debt collection would be by "regularly collect[ing]" debts, the definitions would almost entirely overlap. As *Schlegel* and *Barbato* recognize, the two definitions of debt collector ask different questions: One asks what is the business's purpose; the other asks what are the business's regular activities. Thus, as one district court explained, "[e]ven if the second prong may require interaction with debtors, the plain language of the first prong does not." *McMahon*, 301 F. Supp. 3d at 884.

For these reasons, the Supreme Court's holding in *Henson* is of limited relevance to the statutory question at issue here, despite DNF's assertions. *See* Appellant's Br. at 24–26. *Henson* considered the question whether an entity that is collecting on debts it owns that were already in default when it acquired them is collecting on debt "owed or due another" under the "regularly collects" prong. Justice Gorsuch's opinion for the Court explicitly stated that it was *not* addressing the principal purpose prong, 137 S. Ct. at 1721, and the language it did construe is absent from the principal purpose prong. Indeed, in adopting the same view ultimately accepted in *Henson*, the Eleventh Circuit explicitly acknowledged that "entities that regularly acquire and pursue collection of defaulted debts" could still be debt collectors under the principal purpose prong, noting that "'principal purpose' [is] not modified by 'owed or due another.'" *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1316 n.8 (11th Cir. 2015); *see also Barbato*, 916 F.3d at 266–67 (explaining that *Henson* did not alter case law on "principal purpose" definition); *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 135 (4th Cir. 2016), *aff'd*, 137 S. Ct. 1718 (2017) (noting that its holding does not apply "when the 'principal purpose' of the person's business is to collect

debt"). The Court should maintain the distinction between the two definitions.

3. The "construction and scheme" of the FDCPA do not require adding a consumer interaction requirement.

Attempting to evade the FDCPA's plain language, DNF argues that the "construction and scheme" of the FDCPA require the Court to add a direct consumer interaction requirement to the principal purpose definition. Nothing about the rest of the FDCPA compels such a conclusion, however, or allows the Court to disregard the plain meaning of the word "purpose" in its definitions section.

Much of DNF's argument is based on the notion that DNF owned the debt at issue here. But to the extent that DNF suggests that the definitions of creditor and debt collector are mutually exclusive, the plain language of the statute does not indicate as much. Although a circuit split existed on this point prior to the Supreme Court's decision in *Henson*, the Court's decision in *Henson* ended the debate. *Compare Schlegel*, 720 F.3d at 1208 n.2 (mutual exclusivity of terms "finds no support in the text of the FDCPA"), *with FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007) (finding terms mutually exclusive); *see also May v. NCEP, LLC*, No. 4:13CV1583 CDP, 2014

WL 2009081, at *3 n. 5 (E.D. Mo. May 16, 2014) (noting divide and lack of Eighth Circuit case law). As the Third Circuit has explained, the notion that "debt collector" and "creditor" were mutually exclusive terms was tied to courts' focus on whether a loan was in default at the time an entity acquired it in determining whether an entity was a debt collector. *Tepper v. Amos Fin., LLC*, 898 F.3d 364, 367 (3d Cir. 2018). But "*Henson* rejected the 'default' test, and with it, the basis for treating the terms 'debt collector' and 'creditor' as mutually exclusive." *Barbato*, 916 F.3d at 266 (citing *Tepper*).[3]

As the Third Circuit in *Tepper* and *Barbato* and the Ninth Circuit in *Schlegel* have noted, nothing in the text of the FDCPA suggests that an entity cannot both be a creditor and a debtor. Although DNF maintains there is an

[3] This Court has never held that the categories are mutually exclusive, though in dicta in *Schmitt v. FMA Alliance*, the Court quoted the Seventh Circuit's decision in *Randolph v. IMBS, Inc.*, 368 F.3d 726, 729 (7th Cir. 2004), for the proposition that "[a] distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditors' activities at all." 398 F.3d 995, 998 (8th Cir. 2005). The Seventh Circuit's statement in *Randolph* arose in a different context, however. And while that court had in *other* cases concluded that the categories were mutually exclusive based on the default test, the Supreme Court explicitly abrogated that court's case law in this area in *Henson*, 137 S. Ct. at 1721 (abrogating *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008)). This Court had also explicitly applied the default test to find the owner of a debt was a debt collector in *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947, 951–52 (8th Cir. 2006), with analysis that does not survive *Henson*.

"overarching difference" between the definitions of creditor and debt collector in the statute based on whether the entity is the owner of the debt, and thus the "only way a creditor can become a debt collector" is via the "false name exception" in § 1692a(6), Appellant Br. at 23, the language of the statute suggests otherwise.

Whereas the "regularly collects" definition is limited to those who collect "debts owed or due or asserted to be owed or due another," the "principal purpose" definition contains no such limitation. DNF's argument that this omission is equivalent to "silence" as to whether the "principal purpose" definition applies to entities who are debt owners, DNF Br. at 25, is not supported by the structure of the statute or basic principles of statutory interpretation. The first clause of § 1692a(6), the "principal purpose" definition, refers to the collection of "*any* debts":

> "debt collector" means 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 …

15 U.S.C. § 1692a(6). The second clause does not use the word "any," but rather qualifies "debts" based on ownership:

> … or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due

another.

Id.

Courts must presume that Congress's different wording was intentional. "'[L]imiting words' that appear in one provision are not ordinarily read into another that omits them, because we presume that 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 373 (3d Cir. 2012) (quoting *Burlington Northern*, 548 U.S. at 62–63); *see also Geston v. Anderson*, 729 F.3d 1077, 1082 (8th Cir. 2013) (applying same presumption); *Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688 (8th Cir. 2012) (same). If Congress intended to apply the "owed or due another" limitation on debts in the "principal purpose" definition, it would have done so. It did not, and instead used the word "any." "[A] legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank*, 503 U.S. at 253–54, *quoted in United States v. I.L.*, 614 F.3d 817, 820 (8th Cir. 2010); *see also Owner-Operator Ind. Drivers Ass'n v. Supervalu, Inc.*, 651 F.3d 857, 862 (8th Cir. 2011). The principal purpose definition thus applies to those with a principal purpose of collecting *any* debt, not just debts owed to another.

Not only does the difference in the two definitions explain that creditors *can* be debt collectors if they have a principal purpose of debt collection, it explains why the False Name Exception is not superfluous, regardless of how the "principal purpose" definition is interpreted. Without it, a creditor that uses a false name to collect debts owed to it would be considered a debt collector only if the creditor's principal business purpose was debt collection. With the False Name Exception, that creditor can be considered a debt collector even if its primary business is the sale of widgets, so long as it "regularly collects" debts.

Because the plain language construction of the statute indicates that Congress intended for ownership of the debt to limit *only* the "regularly collects" definition, DNF's claim that *Henson*'s discussion of debt ownership in interpreting the "regularly collects" definition "provides valuable insight" into what Congress meant as to the principal purpose definition, Appellant's Br. at 24, lacks merit. Instead, the design of the statute reveals Congress did *not* intend to limit the "principal purpose" definition to those collecting debts for others.

DNF's references to the statutory exclusions from the definition of debt collector in 15 U.S.C. § 1692a(6)(A)–(F) fare no better. No one disputes that

the statute *does* generally apply to third parties that directly engage in collection activity. The fact that Congress specifically excluded some such third parties does not mean that every entity that does *not* engage in direct collection is also excluded. Notably, the exclusions appear largely targeted at individuals and entities that would never be subject to the "principal purpose" definition, including, for example, officers of the United States acting in their official capacity, 15 U.S.C. § 1692a(6)(c), and consumer credit counseling non-profits, 15 U.S.C. § 1692a(6)(e). The exclusions do not implicitly limit the scope of the "principal purpose" definition.

Finally, DNF's drive-by references to other provisions of the FDCPA for the proposition that the FDCPA regulates "interactions with a consumer," *see* Appellant's Br. at 28 (citing 15 U.S.C. §§ 1692c, 1692d, 1692e, and 1692f), are irrelevant. That the FDCPA regulates interactions with consumers is not in dispute. The issue is who may be held liable when those interactions are unlawful. As explained above, there is no basis for concluding that liability is only limited to those with direct interactions. Indeed, the statute explicitly provides for liability for those who "indirectly" collect debts under the "regularly collects" definition. *See, e.g.*, *Polanco v. NCO Portfolio Mgmt.*, 132 F. Supp. 3d 567, 580 (S.D.N.Y. 2015). And, as noted

above, courts have repeatedly held that debt collectors may be held liable for the interactions their agents have with consumers.

4. Legislative history does not support the addition of a direct interaction requirement to the "principal purpose" prong.

As this Court has explained, "when 'statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative.'" *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1159 (8th Cir. 2008) (quoting *N. States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996)). And as the Supreme Court stated in *Henson*, courts are not to base their analysis of the FDCPA on their sense of "congressional goal[s]," but rather, the text. *Henson*, 137 S. Ct. at 1725. Accordingly, the district court was correct to reject DNF's argument that the legislative history of the FDCPA supports the idea of adding a "direct interaction" requirement to the "principal purpose" definition. JA123–24.

DNF's primary argument about legislative history is that there is no evidence that Congress had entities like DNF in mind when it enacted the FDCPA. But in *Henson*, the Supreme Court was clear that courts may not rewrite the FDCPA based on impressions of what Congress did or did not

have in mind, untethered to the statutory text. *See* 137 S. Ct. at 1725. Even if Congress did not think about debt buyers that contract with others to collect on their behalf, those entities are still "debt collectors" under the statute if they fall within the statutory definition. As the Fourth Circuit noted, as to whether an entity has a principal purpose of collecting debts, "the statutory language of the FDCPA is sufficiently clear, and the legislative history sufficiently sparse, that the legislative history has relatively little persuasive weight in comparison to the plain meaning of the statute." *Scott*, 964 F.2d at 317; *see also Barbato*, 916 F.3d at 269 (declining to consider the FDCPA's legislative history because the statutory definition is clear).

In any event, the legislative history hardly compels the conclusion that Congress must have intended to exclude entities like DNF. At most, the legislative history that DNF cites demonstrates nothing more than that the business model DNF has adopted is not the one that was of primary concern to Congress in 1977. That Congress may have been motivated primarily by concerns about third-party debt collectors is immaterial. In arguing otherwise, DNF starts from the incorrect presumption that a statute does not apply to an entity like DNF unless there is explicit evidence that the

legislature had such entities specifically in mind.[4] That presumption flips the rules of statutory interpretation on their head. "Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *see also Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 215 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended."). Accordingly, courts have consistently found statutes to apply to situations other than "the principal evil Congress was concerned with" at the time of enactment, *Oncale*, 523 U.S. at 79–80, including scenarios Congress did not even contemplate. *See, e.g.*, *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1347 (11th Cir. 2014); *United States v. Sprenger*, 625 F.3d 1305, 1307 (10th Cir. 2010); *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663–64

[4] The Massachusetts Supreme Judicial Court in *Dorrian v. LVNV Funding, LLC*, 94 N.E.3d 370, 376 (Mass. 2018), which looked to the legislative history of the FDCPA in interpreting the Massachusetts debt collection law, likewise started from this incorrect presumption. In interpreting state law, *Dorrian* also relied heavily on a "long-standing" interpretation of the relevant state enforcement agency. 94 N.E.3d at 377–78. Here, on the other hand, the relevant federal agency has endorsed the contrary reasoning of *Barbato*, even if only tentatively. *See* 84 Fed. Reg. at 23,289, 23,372.

(D.C. Cir. 2009); *see also Henson*, 137 S. Ct. at 1725 (stating "it is of course our job to apply faithfully the law Congress has written[;] it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced").

Nothing in the legislative history suggests that Congress intended the FDCPA *not* to apply to entities like DNF. "Had Congress intended to limit the FDCPA's application to debt collectors with "direct interaction with consumers," it could have done so. *Cf. DePierre v. United States*, 564 U.S. 70, 85 (2011) (declining to narrow statutory application to principal concern "[i]n the absence of any indication in the statutory text that Congress intended" to so limit statute); *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 397–98 (5th Cir. 2008) ("These bits of legislative history, moreover, establish only that their speakers were concerned about regulating drug manufacturing; they do not express any plain intent to refrain from further regulating the drugs created through pharmacy compounding."). Moreover, DNF's arguments about how state legislatures have responded in the past decade to changes in the debt-collection industry are irrelevant to determining the meaning of a federal statute enacted in 1977. That Congress

has not amended the FDCPA explicitly to cover entities like DNF is as consistent with an understanding that they are already included as it is with a congressional desire to exclude such entities. "Congressional inaction lacks persuasive significance." *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017).

Notably, this case is not one where application of the statute as written would run contrary to Congress's explicitly stated intent or somehow do violence to Congress's goals, and certainly not one where would be absurd. *See United States v. Jongewaard*, 567 F.3d 336, 340 (8th Cir. 2009) (where there is no evidence "that enforcing the statute as written would produce absurd results, we need not consider the legislative history"). The only effect of applying the "principal purpose" definition to entities like DNF would be to hold such entities liable for debt-collection practices made illegal under the statute. That result would be consistent with the oft-stated principle that remedial legislation like the FDCPA "should be construed liberally in favor of those persons it was meant to benefit and protect." *Maune v. Int'l Bhd. of Elec. Workers, Local No. 1, Health & Welfare Fund*, 83 F.3d 959, 964 (8th Cir. 1996); *see also Rand Corp. v. Yer Song Moua*, 559 F.3d 842 (8th Cir. 2009) (Truth-in-Lending Act, as remedial legislation and a "consumer protection act,"

should "be construed broadly in favor of consumers"); *Weast v. Rockport Fin., LLC*, 115 F. Supp. 3d 1018, 1021 (E.D. Mo. 2015) ("The FDCPA is a broad remedial statute and its terms are to be applied 'in a liberal manner.'" (quoting *Picht v. Hawks*, 77 F. Supp. 2d 1041, 1043 (D. Minn. 1999), *aff'd*, 236 F.3d 446 (8th Cir. 2001)).

DNF offers no argument as to how this outcome would be contrary to Congress's goals. Indeed, there are good reasons why entities like DNF should be held liable where original creditors are not—reasons reflected in the FDCPA's legislative history itself. The 1977 Senate Report accompanying the FDCPA explains that "independent debt collectors" were the main target of the statute because, unlike the originators of loans, they "are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. These characteristics likewise distinguish an entity like DNF from originators of loans, like the camera seller, "who generally are restrained by the desire to protect their good will when collecting past due accounts." *Id.* "Independent debt collectors," on the other hand, profit only when they collect on a debt, and so "too often" have "the incentive to collect by any means." *Id*. This concern applies fully to entities like

DNF—whose sole source of income is the debts they collect—and makes them "far more like a repo man than a creditor and gives [them] every incentive to hire the most effective repo man to boot." *Barbato*, 916 F.3d at 269.

Reading entities like DNF out of the FDCPA's coverage would leave them with incentives to hire the most aggressive, fly-by-night agents, even if those agents may be violating the law. It would contravene the FDCPA's goals (and its plain text) to allow entities whose lifeblood is aggressive debt collection to evade the statute when the statute's clear terms cover them.

DNF's argument that Congress did not intend for the statute, as a whole, to apply to those who do not interact with debtors directly is also belied by Congress's *explicit* contemplation of some such liability—as the alternative statutory definition of debt collector includes those who regularly "indirectly" collect debts owed to another. 15 U.S.C. § 1692a(6). If, for example, RGS had subcontracted out activity to collect on Ms. Reygadas's debt rather than doing it itself, it would still be a "debt collector" under the regularly collects prong (as well as the principal purpose prong), although it did not directly interact with her. *See, e.g.*, *Polanco*, 132 F. Supp. 3d at 580 (discussing indirect liability under regularly collects prong). The assertion that Congress could not have intended to cover those who do not directly

collect debts is untenable given that Congress explicitly provided for liability for "indirect" collection.

The suggestion that Congress did not intend to regulate any entities other than those who directly interact with consumers also runs up against the fact that courts both in this circuit and across the country have recognized vicarious liability under the FDCPA for decades—applying the FDCPA in situations where the defendant entity never interacted with the consumer. *See Scott v. Portfolio Recovery Associates, LLC*, 139 F. Supp. 3d 956, 965 (S.D. Iowa 2015) (collecting cases); *see also Janetos*, 825 F.3d at 325–26; *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1172 (9th Cir. 2006); *Pollice*, 225 F.3d at 404–05; *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994); *McWilliams v. Advanced Recovery Sys., Inc.*, 174 F. Supp. 3d 936, 942 (S.D. Miss. 2016); *Polanco*, 132 F. Supp. 3d at 584–85; *Chapman v. J & M Secs., LLC*, No. 4:15cv1042 TCM, 2015 WL 5785952, at *3 (E.D. Mo. Oct. 1, 2015); *Boldon v. Messerli & Kramer, P.A.*, 92 F. Supp. 3d 924, 934 (D. Minn. 2015); *Schultz v. Arrow Fin. Servs., LLC*, 465 F. Supp. 2d 872, 875–76 (N.D. Ill. 2006). Indeed, DNF conceded below "that one debt collector may be held liable for the debt collection activities carried out on behalf of another debt collector." Dkt. 27 at 21.

In finding vicarious liability appropriate under the FDCPA, courts have repeatedly rejected the same argument that DNF makes here: that because Congress intended to regulate interactions with consumers, only those who engage in such interactions directly can be liable under the FDCPA. For example, in holding that a company that operates similarly to DNF could be held liable for actions of a contractor similar to RGS, the Seventh Circuit explained:

> A debt collector should not be able to avoid liability for unlawful debt collection practices simply by contracting with another company to do what the law does not allow it to do itself. Like the Third Circuit, we think it is fair and consistent with the Act to require a debt collector who is independently obliged to comply with the Act to monitor the actions of those it enlists to collect debts on its behalf.

Janetos, 825 F.3d at 325; *see also Pollice*, 225 F.3d at 405 (stating that it is a "fair result" that "an entity that is itself a 'debt collector'… should bear the burden of monitoring the activities of those it enlists to collect debts on its behalf"); *Plummer v. Atlantic Credit & Finance, Inc*, 66 F. Supp. 3d 484, 493 (S.D.N.Y. 2014) ("A debt collector may not avoid FDCPA liability simply by hiring another to engage in unlawful debt collection activities on its behalf.").

To be clear, Ms. Reygadas does not suggest that an entity that uses an agent to interact directly with consumer debtors to collect debts on its behalf

is *always* a debt collector under the principal purpose definition. Rather, the recognition of the availability of vicarious liability under the statute shows that the statute does not preclude liability simply because an entity did not directly interact with a consumer debtor.

B. The record supports the district court's conclusion that DNF is a debt collector.

Although Ms. Reygadas did not cross-move for summary judgment, the district court *sua sponte* granted partial summary judgment on her behalf, as it was entitled to do, concluding that there was "no genuine issue of material fact[] that DNF is a 'debt collector' under the FDCPA and the AFDCPA." JA124.[5] DNF does not point to a single disputed fact in the record that would make the district court's conclusion inappropriate—rather, it disagrees with the legal conclusions drawn from those facts. That disagreement is inextricably tied to its erroneous argument that the "principal purpose" definition is limited to entities that engage in debt

[5] DNF does not argue that the grant of summary judgment was procedurally improper, nor could it; because DNF did not "raise[] an objection before the district court when summary judgment was entered, … [it] has waived any defect in notice." *Figg v. Russell*, 433 F.3d 593, 597 (8th Cir. 2006). Even if it had not, DNF has made "no showing that it was not afforded a full and fair opportunity to develop the record." *Johnson v. Bismarck Public Sch. Dist.*, 949 F.2d 1000, 1005 (8th Cir. 1991).

collection directly. Under the correct statutory interpretation, the evidence in the record was sufficient for the district court to conclude that DNF's principal, and indeed *only*, purpose was the collection of debts.

DNF first argues both that its principal purpose is "buying debt as an investment" and that its "intent" is to "profit from its investment in debt." Appellant's Br. at 27. Under the meaning of the word "purpose" as discussed above, "buying debt" is not a purpose, but rather an act taken in furtherance of a purpose. As the district court correctly noted, "if debt purchasing was [DNF's] principal purpose, it would not have a profitable business." JA123. An entity does not buy debt simply to hold onto it or hang it on a wall—and DNF did not introduce any evidence suggesting that it does so. To the extent DNF argues that it buys debt with a purpose of "profiting" off it, while "profit" is certainly a business objective, every for-profit entity in America could similarly claim its purpose is "profiting from its investments"—including entities that all parties agree are debt collectors. Simply redefining its purpose at such a high level of generality does not create a dispute of fact that would make summary judgment improper.

Rather, "the better indicator of an individual's purpose is his conduct and not the individual's self-serving representations regarding his purpose."

Bhutta, 145 T.C. at 363. And the record of what DNF actually *does* in order to profit would permit a rational fact-finder to reach only one conclusion: DNF has a goal of debt collection.

First, according to its own statement of material facts, "DNF is a purchaser of debt, and contracts with and/or retains law firms and debt collection agencies to engage in the collection of the debt owned by DNF." JA051 (¶ 1). At no point in this litigation (including on appeal), despite ample opportunity, has DNF suggested that it has any other business activities. It does not claim that it is an initial lender; it does not claim that it buys debts to forgive them or to resell them; it does not claim that it sells widgets.

Although this concession alone (absent contrary facts) would be enough to compel the conclusion that DNF's principal purpose is debt collection, Ms. Reygadas also produced a variety of evidence demonstrative of DNF's goals of debt collection. The evidence included documents from over 125 cases filed by DNF in a three-year period in Arkansas alone, each seeking to collect on a consumer debt, and each including an affidavit from DNF's New York-based Managing Partner. The district court properly considered these dozens of actions as evidence of DNF's purpose. DNF's contrary argument on appeal is merely a repetition of its mistaken view that

the *only* way to have a purpose of debt collection is to interact with consumers directly. *See* Appellant's Br. at 39. As explained above, that view is wrong. Contrary to DNF's assertion, Appellant's Br. at 39–40, DNF's retention of attorneys to file collections suits on its behalf is probative of DNF's objective and intent, regardless of whether all actions taken by those attorneys can be attributed to DNF for liability purposes.[6] The undisputed fact that DNF hired someone to collect consumer debt on its behalf at least 125 times in a three-year period in a single state, and had its managing partner participate in the collection effort by submitting individualized affidavits in each case, is certainly probative of DNF's "business purpose."

Finally, Ms. Reygadas submitted other evidence probative of DNF's purpose, not cited by the district court, including DNF's licensure as a collection agency, and the representations of DNF's Manager in connection with that application that he had "over 20+ years in the Collection Business"

[6] That said, courts in this circuit and other circuits have repeatedly held that under the FDCPA, "a debt collector can be liable for the actions of its attorney." *Scott v. Portfolio Recovery Assocs.*, 139 F. Supp. 3d at 965 (collecting cases).

Dkt. 29-6 at 15, as well as certifications as to his completion of an "FDCPA Essentials for Collectors" training course, *id.* at 17.[7]

The record is similar to that before several courts that have found entities that function just like DNF to have a principal purpose of debt collection. In *Valenta*, for example, a district court granted summary judgment to a plaintiff on a debt buyer's "debt collector" status based solely on the defendant's assertion in its statement of material facts that its "sole business purpose is to purchase debt," which it "assigns … to [a third-party] for servicing and collection." 2019 WL 1429656, at *3. The court explained that such a statement "left no doubt that debt collection is its lifeblood." *Id.* And in *Rivas*, 398 F. Supp. 3d at 1303, a district court found a debt buyer was a debt collector where "a) it buys thousands of defaulted debts every year; b) it is the plaintiff in thousands of state court suits to collect those debts; and c) it is not involved in any other business." *See also Torres*, 2018 WL 1508535, at *5 (granting summary judgment on debt collector status where debt buyer had a collection agency license, pursued collection of debt by placing

[7] Although Ms. Reygadas does not maintain this evidence would be independently dispositive, it is corroborative, particularly given the lack of *any* contrary evidence suggesting DNF had some other business purpose.

accounts with servers, and did not claim to have any other purpose). The record supports the same factual conclusions here.

II. The district court properly found DNF liable for violating the prohibition on contact with represented consumer debtors.

A debt collector violates the FDCPA when it (1) has actual knowledge that a consumer creditor is represented by counsel, and (2) it directly contacts that consumer anyway, without the consent of its counsel. 15 U.S.C. § 1692c(a)(2); *see also* AFDCPA, Ark. Code Ann. § 17-24-504(a)(2); *Schmitt v. FMA Alliance*, 398 F.3d 995 (8th Cir. 2005). Applying general principles of agency law, the district court correctly concluded that DNF violated this prohibition through its agent's contact, on DNF's behalf, with Ms. Reygadas, a debtor DNF whom knew was represented. JA125. The court pointed out that there was no dispute that DNF had actual knowledge that Ms. Reygadas was represented by counsel, and that DNF was responsible for the actions taken by RGS "to fulfill the objective of the agency relationship." *Id.* On appeal, DNF does not dispute either of these conclusions. Rather, its sole argument, made without citation, is that "naturally, … if RGS did not violate the FDCPA and AFDCPA as DNF's agent, DNF could not have violated the statutes either." Appellant's Br. at 45. DNF's "natural" argument is directly

contrary to well-accepted agency principles, which provide that "[a] person may be subject to tort liability because of an actor's conduct although the actor is not subject to liability." Restatement (Third) of Agency § 7.04, cmt. c.

This Court, like others, has previously applied "general principle[s] of agency law" to determining liability under the FDCPA. *Schmitt*, 398 F.3d at 997–98; *see also Barbato*, 916 F.3d at 269 (noting traditional agency principles apply to FDCPA); *Clark*, 460 F.3d at 1173 (finding "general principles of agency" apply to FDCPA and citing Restatement); *Powers v. Credit Mgmt. Servs., Inc.*, 313 F.R.D. 103, 107 n. 3 (D. Neb. 2016) (applying "agency principles" to determine liability in FDCPA case); *Schultz*, 465 F. Supp. 2d at 877–78 (applying Restatement of Agency and finding entity like DNF liable for agent's action under FDCPA).

The relevant agency principle here is that a principal is subject to liability for its agent's conduct within the scope of its authority where "the agent's conduct, *if that of the principal*, would subject the principal to tort liability." Restatement (Third) of Agency § 7.04 (emphasis added); *see also id.* § 7.03 (same).[8] The comments to the Restatement give as an example the

[8] DNF's admitted failure to provide RGS with the information in its possession indicating that Ms. Reygadas was represented by counsel, JA034,

situation where "an agent's action may not be tortious because the agent lacks information known to the principal." *Id.* at § 7.04 cmt. b. In such a case, the principal would be liable, even though the agent would not.

The Seventh Circuit recently applied this principle in a case involving similar relevant facts. In *In re Sterling*, 933 F.3d 828 (7th Cir. 2019), the court held that a company could be found in contempt where its lawyer maintained a state-court collection action on its behalf against a consumer, even though a federal bankruptcy court had already discharged the debt at issue. The company there argued that it did not willfully violate the discharge order even though it knew of the order and authorized the lawyer to proceed on its behalf, because its *lawyer* lacked knowledge of the discharge order, and it was its lawyer that took the prohibited actions with respect to the state court proceedings. *Id.* at 833–34. Although the court

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could also give rise to liability under a different theory—that of DNF's "negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." *See* Restatement (Third) of Agency § 7.05(1). Although the district court did not address this theory, the undisputed facts in the record establish that it was foreseeable that RGS would contact Ms. Reygadas directly if DNF only provided RGS with her direct contact information and did not indicate she was represented by counsel. The Court need not address this theory of liability in light of the more straightforward theory discussed above, which directly contradicts DNF's sole argument on appeal.

agreed that the *lawyer* could not be held in contempt for this reason, it rejected the argument that the *company* could not be found in contempt because it had actual knowledge of the discharge order and the lawyer was acting as its authorized agent. *Id.* at 830–31. In so doing, the court expressly rejected the exact argument made by DNF here and explained that "agency law … operates to impute an agent's conduct to a principal, even if that conduct did not, standing alone, constitute a tort." *Id.* at 834. Citing the Restatement, the court found that the lawyer's actions could be imputed to the company, and these actions, combined with the company's actual knowledge, met the requirements for civil contempt. *Id.*

The relevant facts in this action are not different from those in the scenario contemplated in the Restatement example or the facts of *Sterling*. RGS itself may not have violated the FDCPA because it lacked the requisite knowledge. But, as the district court noted, "it is DNF's knowledge as the principal debt collector that is critical to the inquiry." JA125. And DNF, the principal, undisputedly had actual knowledge of Ms. Reygadas's represented status. Accordingly, DNF would have violated the FDCPA if it reached out to Ms. Reygadas directly. It thus is directly liable even though it took the prohibited action through its agent.

DNF argues the district court improperly conflated direct liability and vicarious liability, Appellant's Br. at 40, but it is DNF that confuses the two concepts. Here, DNF is directly, not vicariously, liable because it took action through its agent that it could not lawfully take; its liability is not derivative of the agent's. As quoted in the Reporter's Notes to the Restatement, "If I authorize a statement knowing it to be untrue, I will be liable in deceit, regardless of whether the person who actually speaks is wholly innocent. My liability is primary, not vicarious." Robert Stevens, Why Do Agents "Drop Out"?, Lloyd's Mar. & Com. L.Q. 101, 104 (2005), *quoted in* Restatement (Third) of Agency § 7.04, Reporter's Note b. The same logic applies where DNF authorized an action knowing it would be prohibited by the statute, whether or not RGS was wholly innocent.

It is "fair and consistent with the [FDCPA]" to hold DNF directly liable for the acts of its authorized agent in this way. *Janetos*, 825 F.3d at 325. "Holding otherwise would create a loophole in the law through which creditors could avoid liability … by failing to notify their agents of" relevant facts. *Sterling*, 933 F.3d at 834. "A debt collector should not be able to avoid liability for unlawful debt collection practices simply by contracting with another company to do what the law does not allow it to do itself." *Janetos*,

825 F.3d at 325. This Court, like the Seventh Circuit, should "decline to incentivize such careless behavior." *Sterling*, 933 F.3d at 834.

Because no relevant facts were in dispute and DNF does not claim otherwise, the district court appropriately granted summary judgment in Ms. Reygadas's favor based on its correct application of agency principles.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Adam R. Pulver

Adam R. Pulver
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Corey D. McGaha
Crowder McGaha, LLP
5507 Ranch Drive, Suite 202
Little Rock, AR 72223
(501) 205-4026

Attorneys for Plaintiff-Appellee

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 11,270s words.

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February 11, 2020

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiff-Appellee

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I hereby certify that on February 11, 2020, the foregoing brief has been served through this Court's electronic filing system upon counsel for the Defendant-Appellee:

Brendan H. Little, Esq.
Sean M. O'Brien, Esq.
Lippes Mathias Wexler Friedman LLP
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiff-Appellee