No. 18-35923

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JILLIAN McADORY,
Plaintiff-Appellant,

v.

M.N.S. & ASSOCIATES, LLC, foreign limited liability company,
Defendant,

and

DNF ASSOCIATES, LLC, foreign limited liability company,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Oregon
Case No. 3:17-cv-00777-HZ
Hon. Marco A. Hernandez

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INTRODUCTION

The question in this appeal is whether an entity whose business consists of buying defaulted debt with the sole intent that it be collected upon is a "business the purpose of which is the collection of any debts," 15 U.S.C. § 1692a(6), even if it hires a third party to do its collecting. As the only federal court of appeals to address the question has held, in reasoning cited approvingly by the relevant federal agency—and an increasing majority of district courts have agreed—the statute's plain language provides that the answer is yes: whether an entity engages in collection activity itself or hires others to do so does not alter its "purpose." A purposive inquiry correctly focuses on a goal or aim, not the means used to achieve that goal or aim.

The contrary textual argument of appellee DNF Associates (DNF) about the "principal purpose" definition of "debt collector" in the Fair Debt Collection Practices Act (FDCPA) ignores the meaning of the word "purpose" and, in so doing, creates an illogical redundancy with the alternate, "regularly collects" definition of 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 legislative history to support the addition of a direct-consumer-interaction requirement into the "principal

purpose" definition. But neither the 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).

Because Ms. McAdory properly alleged that DNF's principal, and only, purpose is the collection of debts, she has stated claims against DNF as a debt collector under the FDCPA. The decision below should be reversed.

ARGUMENT

I. An Entity Need Not "Engage in the Act" of Debt Collection to Have a Purpose of Debt Collection.

The plain language of the "principal purpose" definition encompasses entities that have a goal of the collection of debts. The statutory language

does not require that those entities directly interact with debtors. The Court need go no further to rule in Ms. McAdory's favor.

Acknowledging that a statute's language is the starting point of any statutory interpretation, DNF argues that the plain language of the statute contains a direct interaction requirement. In so doing, it focuses solely on the meaning of the word "collection," defining the word as the "the act or process of collecting" and concluding that such an "act or process" requires direct consumer interaction. DNF Br. at 21-22. This argument misses the mark because it does not address the most pertinent language: DNF states that "the parties[ʻ] disagreement relates to the interpretation of the phrase 'the collection of any debt,'" DNF Br. at 21, but ignores the first part of that phrase, "purpose of … the collection of any debt." By ignoring "purpose of," DNF both reads out a vital part of the statutory definition, and impermissibly conflates the "principal purpose" definition with the statute's alternative "regularly collects" definition.

The meaning of the term "purpose" is key to the "principal purpose" definition. As explained in Ms. McAdory's opening brief, Opening Br. at 14–18, and acknowledged in *Barbato v. Greystone Alliance, LLC*, 916 F.3d 260, 267 (3d Cir. 2019), a purpose is a goal or an aim. And DNF plainly has a goal or

aim of debt collection; indeed, in its brief, it concedes, "There is no doubt that DNF hopes that the third parties with whom it contracts will collect on the debt owed to DNF." DNF Br. at 27. This "hope" is DNF's principal purpose.

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. It is also different from "be[ing] in the business of" debt collection—the formulation utilized by the court in *Gold v. Midland Credit Management, Inc.*, 82 F. Supp. 3d 1064, 1071 (N.D. Cal. 2015), relied upon by DNF, DNF Br. at 22. A talent booker is "in the business of" entertainment; he is not "engaged in the act" of entertaining.

The difference between a "purpose" of debt collection and "engaging" in debt collection is evident not only as a matter of plain language and ordinary meaning, but also from the statute's two alternate definitions of "debt collector": an entity (1) "the principal purpose of which is the collection of any debts," *or* (2) "who regularly collects or attempts to collect, directly or indirectly, debts." 15 U.S.C. § 1692a(6). If, as DNF asserts, an

entity cannot have a principal purpose of "the collection of debt [if] it is not engaged in 'the act or process of collecting,'" DNF Br. at 22, the "principal purpose" definition would be largely duplicative of the "regularly collects" definition.

Reading "principal purpose of … collection" and "regularly collects" to be synonyms, as DNF suggests, would thus not only run contrary to the words' ordinary meanings, but also disregard the principle that, 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). The more natural reading is that Congress intended for the "principal purpose" definition to apply to at least some entities that do not "regularly collect." "Otherwise why add [it] at all?" *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019). As *Obduskey* confirmed, the presumption against surplusage applies in interpreting the definitional sections of the FDCPA. *Id.*

DNF again ignores the meaning of the term "purpose" in attempting to dismiss the Third Circuit's opinion in *Barbato*. Contrary to DNF's suggestion, the heart of the Third Circuit's analysis was not a choice between two different meanings of the word "collection." Rather, the court's key

conclusion was that "[t]he existence of a middleman does not change the essential nature—the 'principal purpose'—of [an entity]'s business." 916 F.3d at 260.

Several recent decisions from courts outside the Third Circuit have reached the same conclusion. *See, e.g.*, *Reygadas v. DNF Assocs.*, No. 2:18-CV-0218, 2019 WL 2146603, at *2 (W.D. Ark. May 16, 2019) (finding "principal purpose" definition's "language does not include a requirement that the business is the entity that must do the collection"); *Mullery v. JTM Capital Mgmt., LLC*, No. 18-CV-549, 2019 WL 2135484, at *3 (W.D.N.Y. May 16, 2019) (finding plausible allegation that debt collection is principal purpose where entity "'had' another entity send the plaintiffs collections letters demanding payment of the debt it purchased"); *Valenta v. Midland Funding, LLC*, No. 17 C 6609, 2019 WL 1429656, at *2–3 (N.D. Ill. Mar. 29, 2019) (finding entity like DNF is a debt collector under "principal purpose" definition, as "debt collection is its lifeblood," despite lack of direct collection activity); *Long v. Pendrick Capital Partners II, LLC*, --- F. Supp. 3d ---, 2019 WL 1255300, at *13 (D. Md. Mar. 18, 2019) ("[T]his Court fails to see why outsourcing collection matters would change the debt buyer's principal business purpose.").

DNF's assertion, made for the first time on appeal, that it and other "debt buyers" have a "principal purpose" of "buying debt for investment purposes" with an objective of "profit[ing]," DNF Br. at 44, is not only unsupported by the allegations of the complaint, but illogical. Every business has an objective of profiting. Even the traditional third-party debt collector, which DNF acknowledges is plainly within the scope of the statute, has an objective of profiting from its investments. To allow a business to self-define its primary purpose at such a high level of generality would be absurd.

As DNF acknowledges, "the better indicator of an individual's purpose is his conduct and not the individual's self-serving representations regarding his purpose." *Bhutta v. Commissioner*, 145 T.C. 351, 363 (2015), *quoted in* DNF Br. at 44. If an entity has a purpose other than debt collection, one would expect it to undertake conduct directed at a goal other than debt collection. But as alleged in the complaint, and confirmed by DNF's own explanation of how it "profits" from its "investments" in debts, the *only* conduct DNF undertakes to "profit" off the debts it buys is to hire others to collect it. *See, e.g.*, DNF Br. at 14 ("In hopes of profiting on its investment, DNF contracts with third party debt collectors and attorneys to engage in

collection efforts."); *id.* at 18 (noting the only way DNF profits is if third parties "collect on the debt owed to DNF"); *see also id*. at 45-46 (quoting FAC ¶ 6). DNF does not buy debt, repackage it, and sell it; it does not buy debt and allow it to passively accumulate value in the abstract; and it does not engage in traditional debt servicing.

Notably, in a recent proposed rule, the Consumer Financial Protection Bureau (CFPB)—the federal agency with enforcement and rulemaking authority under the FDCPA—rejects DNF's suggestion that debt buyers by definition do not have a principal purpose of debt collection. The CFPB approvingly cites *Barbato* as standing 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. 23274, 23289 (May 21, 2019). The agency identifies 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[.]

84 Fed. Reg. at 23372. This acknowledgement that the "principal purpose" definition can apply to debt buyers, even those who do not themselves

"attempt to collect" debt, is incompatible with DNF's argument that debt buyers' only principal purpose is "profiting" off of debts.[1]

As one court recently explained in finding that DNF is a debt collector and denying its motion for summary judgment, "DNF's primary objective is to collect on debt accounts it purchased in order to turn a profit." *Reygadas*, 2019 WL 2146603, at *3.

II. Nothing in the FDCPA Requires an Atextual Interpretation of the "Principal Purpose" Definition.

In interpreting a statutory provision, courts look not just to the text of that provision, but to "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), *quoted in Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050 (9th Cir. 2018). But DNF has failed to identify any aspect of the "construction and scheme of the FDCPA," DNF Br. at 26, that supports its reading of the "principal purpose" definition, much less compels disregard of the meaning of the word "purpose."

[1] Ms. McAdory does not argue that any deference is owed to the CFPB's proposed rule, but cites it for persuasive value and evidence of the ordinary understanding of the statute's plain text. *Cf. Tedori v. United States*, 211 F.3d 488, 492 (9th Cir. 2000) (noting proposed rules "carry no more weight than a position advanced on brief"); *Rogers v. City of San Antonio*, 392 F.3d 758, 762 n.7 (5th Cir. 2004) (citing proposed rule for its "persuasive authority").

First, DNF suggests that it cannot be a debt collector because it is a creditor. This Court has previously "reject[ed] this per se rule, which finds no support in the text of the FDCPA." *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1208 n.2 (9th Cir. 2013). Even in those circuits that *had* embraced such a rule, the Supreme Court's decision in *Henson* overruled it. As *Barbato* explains, the Third Circuit's prior conclusion that "debt collector" and "creditor" were mutually exclusive terms was tied to its focus on whether a loan was in default at the time an entity acquired it. *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*).

DNF's assertion that an entity cannot be a debt collector if it is "the owner of the debt," DNF Br. at 28, is premised on another collapsing of the two definitions under the statute. But 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 30, 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. The presumption is 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). If Congress intended to apply the "owed or due another" limitation on debts in the "principal purpose" definition, it would have done so, and not instead used the word "any."

To the extent that DNF's argument is that "debt collection" inherently only applies to debts "owed or due another," that argument also conflicts

with principles of statutory interpretation, as it would make Congress's use of that phrase in the "regularly collects" definition superfluous. *See Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246, 1250 (9th Cir. 2000) ("Statutory constructions which render other provisions superfluous are disfavored.").[2]

Because the plain language construction of the statute indicates that Congress intended for ownership of the debt to limit the "regularly collects" definition, and *only* that 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, DNF Br. at 29, lacks merit. Instead, the design of the statute strongly suggests Congress did *not* intend to limit the "principal purpose" definition to those collecting debts for others.

DNF's drive-by references to other provisions of the FDCPA, *see* DNF Br. at 31 (citing 15 U.S.C. §§ 1692c, 1692d, 1692e, and 1692f), fare no better.

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[2] DNF also briefly argues that 15 U.S.C. § 1692g(a)(5) is proof that Congress meant to create mutually exclusive categories of "creditor" and "debt collector." DNF Br. at 31. The language of that paragraph, however, indicates nothing of the kind. Section 1692g(a)(5) requires a debt collector to provide the name and address of the "original creditor, if different from the current creditor." The provision by no means suggests that the debt collector cannot itself be the current creditor.

That the FDCPA regulates "interactions with a consumer" is not in dispute—the issue is who may be held liable when those interactions are unlawful. As Ms. McAdory has explained, Opening Br. at 31–33, there is no basis for concluding that liability is only limited to those with direct interactions: 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 this and other courts have repeatedly held that debt collectors may be held liable for the interactions their agents have with consumers. *See* Opening Br. at 31–33 (citing *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1172 (9th Cir. 2006); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994); *Janetos v. Fulton Friedman & Gullace, LLP*, 825 F.3d 317, 325 (7th Cir. 2016); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 405 (3d Cir. 2000); *Plummer v. Atl. Cred. & Fin., Inc.*, 66 F. Supp. 3d 484, 493 (S.D.N.Y. 2014)).

III. Holding Entities Like DNF Liable for Unlawful Collection Practices by Their Agents Is Consistent with Other Indicia of Congressional Intent.

DNF argues that, to the extent the statute is ambiguous, the Court should look to legislative history to interpret the meaning of the "principal purpose" definition. But the statute is not ambiguous. As the district court

noted, when the "principal purpose" definition is construed "in the literal sense," entities like DNF fall squarely within it because they "purchase[] debt for the purpose of making money by hiring a third party to collect on that debt." Dkt. 27-7 at 7. And as the Supreme Court stated in another FDCPA case, courts are not to base their analysis of the statute based on their sense of "congressional goal[s]," but rather the presumption "'that [the] legislature says ... what it means and means ... what it says.'" *Henson*, 137 S. Ct. at 1725 (second brackets and ellipses in original) (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005)).

In any event, 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, like the Massachusetts Supreme Judicial Court in *Dorrian v. LVNV Funding, LLC*, 94 N.E.3d 370, 376 (Mass. 2018), starts from the incorrect presumption that the FDCPA does not apply to an entity like DNF unless there is explicit evidence that Congress had such

entities specifically in mind when it enacted the FDCPA.[3] That presumption flips the rules of statutory interpretation on their head. Courts have repeatedly held that statutes may apply to situations other than "the principal evil Congress was concerned with" at the time of enactment, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998), including scenarios Congress did not contemplate, *see 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 to *not* 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

[3] In interpreting the Massachusetts debt collection 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 23289, 23372.

"[i]n the absence of any indication in the statutory text that Congress intended" to so limit statute). 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 no more indicates a congressional desire to exclude such entities than an understanding that they are already included. "Congressional inaction lacks persuasive significance." *Star Athletica, L.L.C. 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 intent or somehow do violence to Congress's goals. *Cf. Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 968 (9th Cir. 2013) (consulting legislative history to see if interpretation "clearly is inconsistent with congressional intent or leads to absurd results"). The only effect of applying the "principal purpose" definition to entities like DNF would be to hold additional entities liable for actions already illegal under the statute. That result would be consistent with this Court's repeated holdings that ambiguities in the FDCPA are to be interpreted liberally to

protect consumer debtors. *See, e.g.*, *Hernandez v. Williams, Sinman & Parham PC*, 829 F.3d 1068, 1078–79 (9th Cir. 2016).

DNF offers no argument as to how this outcome would be contrary to Congress's goals, but instead argues that businesses with its model should not be held to a "higher standard" than original creditors. But there are indeed good reasons why entities like DNF should be held liable where original creditors are not—reasons reflected in the FDCPA's legislative history itself. As noted in Ms. McAdory's opening brief, entities like DNF, unlike original creditors, "are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them," and are thus not "restrained by the desire to protect their good will when collecting past due accounts" and "too often" have "the incentive to collect by any means." S. Rep. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. 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.

IV. Ms. McAdory Has Alleged Sufficient Facts to Show DNF Is a Debt Collector Under the Statute's Plain Language.

Absent the "direct interaction" requirement that the district court erroneously added to the "principal purpose" definition, there is no question that Ms. McAdory adequately alleged that DNF's primary goal is to collect debt, and, therefore, DNF is a debt collector. DNF does not argue otherwise in its brief: It relies exclusively on its argument that only entities that directly interact with consumers can be debt collectors and on its assertion that DNF "did not have any contact with McAdory and does not engage in any collection activity relative to the debts it owns." DNF Br. at 47. DNF's argument for dismissal thus stands or falls on its attempt to limit the "principal purpose" definition to entities that engage in debt collection directly.

Under a proper construction of the "principal purpose" definition, the Court must allow Ms. McAdory's action to proceed. As Ms. McAdory has alleged, DNF's sole source of income is debt collection, DNF buys defaulted debts solely for the purposes of collecting on them, and DNF orchestrates the collection of debts via a network of contractors it hires and directs for that purpose. *See* ER 70 (FAC ¶ 6); ER 43 (SAC ¶ 7). These factual allegations

are sufficient to allow the Court to draw a reasonable inference that DNF is a debt collector at the motion to dismiss stage. *See Schlegel*, 720 F.3d at 1208 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *cf. Mullery*, 2019 WL 2135484, at *3 (finding similar allegations allowed reasonable inference that entity's principal purpose was debt collection); *Ramos v. LVNV Funding, LLC*, No. 18-5496, 2019 WL 1994463, at *2 (E.D. Pa. May 3, 2019) (same); *Arango v. GMA Invs., LLC*, No. 18-9813, 2019 WL 1916202, at *3 (D.N.J. Apr. 30, 2019) (same).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) and the Rules of this Court, it contains 4,091 words.

2. This brief 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Book Antiqua.

May 31, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2019, the foregoing brief has been served through this Court's electronic filing system upon counsel for the Defendant-Appellee:

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