APPENDIX B

As requested, this position paper is submitted by representatives of the Arizona Creditor Bar Association (hereinafter "ACBA"), which had two members participate in the lengthy process of the Committee on Court Rules of Procedure in Limited Jurisdiction Courts (hereinafter "LJRC").

The ACBA takes great pride in the work that they do. They strive for accuracy in all aspects of their practice representing creditors and fully recognize that abuses in the debt collection industry are harmful not only to consumers, but to debt collectors as well. However, the ACBA takes great issue not only with the substance of the Legal Services Committee (hereinafter "LSC") memo, but also with the way it was presented. By circumventing and marginalizing the goals that LJRC worked so hard to achieve, LSC has turned this important process into one of conflict rather than compromise – confrontation rather than cooperation. Instead of working together as the LJRC did for almost a year, the ACBA and LSC are opposing parties, and the Rules Committee must act as judge. The ACBA believes that allowing the LSC to intercede after so much collaboration and compromise would do a huge disservice to the process, the participants and the profession. In the course of the LJRC's meetings, the individuals on the committee all wanted things they did not get. But the beauty of collaboration is that the best solutions rise to the top. The LJRC achieved its goal and its recommendations should be adopted.

LSC's constituents were well represented on the LJRC committee by attorneys from DNA People's Legal Services, Community Legal Services, Inc. and Southern Arizona Legal Aid, Inc., as well as by Veronika Fabian, a well-respected consumer attorney. Everything that LSC now asks for was previously proposed, discussed and debated several times. Many proposals from members of LSC were accepted over objections from other members of the LJRC. The proposals LSC now seeks were rejected. After months of deliberation, the committee unanimously proposed the present rules.

The ACBA believes that the LSC's proposals should be rejected without consideration and that the Civil Rules of Procedure for Limited Jurisdiction Courts (hereinafter "Proposed Rules") should be adopted as unanimously presented. The ACBA representatives on the LJRC have deep respect for the other committee members, the year-long process that created the Proposed Rules, and the Proposed Rules themselves. When viewed in their proper context, the Proposed Rules balance the due process rights of all parties, provide several avenues to prevent and correct errors, and ensure an orderly administration of justice.

If they are considered, the LSC recommendations should be rejected on their merits. It is improper and unfair to place a higher burden on one sub-set of plaintiffs without a very compelling reason. The proposed rules, along with a host of other rules and laws, adequately protect defendants in collection cases. Moreover, all of LSC's proposals were debated at length.[1] For various reasons, including resulting inconsistencies between justice court and

[1] Mr. Young and Ms. Fabian actively participated in the LJRC *ad hoc* Committee's discussions about consumer protection and debt collection cases. They suggested most, if not all, of the recommendations advanced by the LSC to the LJRC Committee. Two that we do not specifically address are the "due diligence" clause and "attorney verification" requirement. They were rejected because both of these requirements already exist. *See*, Proposed Rule 109(b); Ethical Rules 1.3; Ariz.R.Civ.P. 11. Instead, the LSC acts as if the Legal Services Committee is proposing changes that the LJRC overlooked. The LJRC compromised on some of the recommendations, rejected others, and

superior court, redundancy, common sense and fairness to all who seek access to our courts, they were modified or rejected by the LJRC.

The LSC memo also completely ignores that the debt collection industry is one of the most highly regulated in the country. There is very significant and onerous federal legislation that already governs – and punishes – debt collectors for the conduct Mr. Restaino seeks to prevent. These laws provide ample protection to debtors and offer them a path to financial reward if a violation occurs. Defendants in debt collection actions filed in justice courts, whether by assignees or collection agencies, are protected from unscrupulous behavior by a bevy of federal and state laws or rules. A partial list of these laws and rules includes: the Fair Debt Collection Practices Act ("FDCPA"), the Fair Credit Reporting Act ("FCRA"), federal bankruptcy laws, the Proposed Rules, the Arizona Rules of Civil Procedure, the Arizona Rules of Evidence, and the Arizona Rules of Professional Conduct ("Ethical Rules"). Each of these laws and rules imposes duties on debt collectors and their agents, including their attorneys. This oversight is particularly important in debt collection cases.

1. The Fair Debt Collection Practices Act

The FDCPA requires assignees of debts and collection agencies to inform debtors by "written notice" of the "amount of the debt," "the name of the creditor to whom the debt is owed," that, if disputed, the debt collector will "obtain verification of the debt" and mail a copy to the consumer, and that the name and address of the "original creditor" are available upon written request within this thirty-day period.[2] If assignees of debts and collection agencies ignore this requirement it is at their own peril; like the other protections of the FDCPA, this requirement carries a statutory penalty and is a strict liability statute.[3]

The vast majority of debt collectors filing suit in Arizona's justice courts strive for strict compliance with the FDCPA and other federal and state laws. Before filing suit, a debt collector is required to mail the notice just described to the consumer, giving them thirty days to dispute the debt. They will then make phone calls to attempt to contact the debtor and discuss payment arrangements, validate or verify the debts that are disputed, and have an attorney review the file to determine if a lawsuit should be filed. Some law firms send an additional letter to the accountholder warning that suit will be filed against them. At each of these points, debtors can obtain information about the identity of the creditor who owns the right to collect on the debt, the amount of the debt, the source of the debt, the delinquency date and settlement options.

The majority of debts are resolved at this point. In many instances either the consumer cannot be located or the debt collector determines that the consumer has no ability to pay and litigation would be futile, and therefore the account is closed. Or, if the consumer and the debt collector can reach an amicable solution, or if the attorney discovers a reason that the suit should not be filed, then the the account is resolved through settlement. This means

---

adopted some of them in the Proposed Rules. Members of the LJRC who suggested changes that were not adopted now seek to raise the same issues as comments to the Proposed Rules.

[2] 15 U.S.C. 1692g(a).

[3] 15 U.S.C. 1692k.

that fewer debtors enter the judicial system in the first place, thanks in part at least, to existing federal law. It also means that the vast majority of debtors who are paying attention to their own finances have information about the creditor seeking payment and the original creditor, the amount of the debt, and other relevant information. Moreover, all members of the ACBA, which account for seventy-five percent of the suits filed in justice courts across the state, list the name of the original creditor in the complaint if they are representing a debt buyer.

Not only does the FDCPA mandate the notice requirements, it lists a whole host of conduct by either the owner of the debt, a debt collector, or the attorney, that results in violation of the statute.[4] The prohibitions have been interpreted to find liability when the wrong party is sued[5]; when suit is filed after a debt has been paid[6]; when suit is filed after the statute of limitations has expired[7]; when monies are sought that the plaintiff is not legally entitled to[8]; when a plaintiff asks for the wrong amount or wrong interest rate[9]; when it is difficult for "the least sophisticated debtor" to understand a letter or a pleading[10]; when language is confusing or overshadowing[11]; when "robo-signing" occurs[12]; and on and on. In 2011 there were 11,811 FDCPA cases filed. This is in addition to 1,838 Fair Credit Reporting Act (FCRA) claims, 660 Telephone Consumer Protect Act (TCPA) claims, and 1,462 Truth in Lending Act (TILA) claims.[13] These numbers represent only those suits filed in U.S. District Courts, and include 12,640 unique Plaintiffs.[14] Each individual violation of the FDCPA carries a $1,000.00 penalty.[15] But the real

---

[4] 15 U.S.C 1692g and h.

[5] *Velazquez v. NCO Fin. Sys.*, 2011 U.S. Dist. LEXIS 57896 (E.D. Pa. May 31, 2011) ("[W]e find that demanding payment from the wrong individual, even where the collector mistakenly sends one letter may give rise to a claim under the FDCPA as a matter of law.").

[6] *Grimsley v. Messerli & Kramer, P.A.*, 2009 U.S. Dist. LEXIS 26652 (D. Minn. Mar. 31, 2009) ("If a rational trier of fact concluded that [an alleged debtor] had, indeed, faxed or delivered proof of payment to [debt collector], [debt collector's] filing of a lawsuit on July 17, 2007, would constitute a violation of the FDCPA because it would, among other violations, represent a false characterization of the debt as unpaid, or could be an unconscionable attempt to collect a debt in light of defendants' knowledge that the debt was already paid.").

[7] *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393 (D. Del. 1991) ("[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.").

[8] *McCollough v. Johnson, Rodenberg & Lauinger*, 587 F. Supp. 2d 1170, 1178 (D. Mont. 2008)("Requesting fees or costs not authorized by law violates the FDCPA.").

[9] *Veach v Sheeks*, 316 F3d 690 (7th Cir. 2003). ("Since debtor was not liable for treble damages, fees, and costs until court judgment awarded such amounts, collection agent's notice of claim asserting such amounts as amount of debt violated 15 USCS § 1692g(a)(1).

[10] *Wilson v Quadramed Corp.* 225 F3d 350 (3rd Cir. 2000). ("Validation notice is to be interpreted from perspective of least sophisticated debtor.").

[11] *Ellis v Solomon & Solomon, P.C.* 591 F3d 130 (2nd Cir. 2010), cert den 130 S Ct 3333 (2010). ("Validation notice is overshadowed under 15 USCS § 1692g(b) where debt collector serves consumer with process initiating lawsuit during validation period, without clarifying that commencement of lawsuit has no effect on information conveyed in validation notice.").

[12] *Midland Funding v. Brent*, 644 F.Supp.2d 961 (N.D. Ohio 2009).

[13] http://www.insidearm.com/daily/collection-laws-regulations/collection-laws-and-regulations/fdcpa-lawsuits-set-another-record-in-2011

[14] *Id.*

[15] 15 U.S.C. 1692k (establishing statutory damages for violations of the FDCPA).

hammer of the FDCPA is not its strict liability, but in its mandate of the award of attorney fees, which can far exceed the statutory penalties.

The FDCPA is so powerful that it has created its own cottage industry of consumer attorneys looking for any debtor, no matter how small the claim, how poor the defendant, or how tenuous the violation, to initiate an FDCPA claim against both the plaintiff and the law firm or collection agency. The FDCPA provides ample protection to the consumer, and those protections are far more powerful than the LSC's proposals.

2. The Legal Services Committee's Position Does Not Justify Creating a Completely Separate, More Burdensome and Unfair Standard for Accessing the Courts For One Narrow Class of Plaintiff

Ignoring all of the incentives for debt buyers to avoid mistakes, Mr. Restaino attributes his anecdotal host of errors to the "debt buyer's lack of evidence" before suit is filed. His response requires one class of plaintiffs to prove their case at the outset. In addition, he would require the justice court judges to act as *de facto* attorneys for those defendants who chose to ignore the claims against them. This will place a huge burden on the justice courts and goes against the very principle of the participatory nature of the American system of justice.

Most of the LSC's recommendations and language comes from the Federal Trade Commission ("FTC"), a very consumer-oriented agency that promulgated the FDCPA. The LSC relies on the FTC's recent report entitled "Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration" ("FTC Report"). In the Executive Summary of the report, the FTC explains the importance of the debt-collection industry:

> Credit benefits consumers by allowing them to obtain goods and services without paying the entire cost at the time of purchase. This lets consumers make purchases they might not otherwise be able to afford, and allows them to benefit from goods and services immediately while paying for them over time. Because consumers sometimes fail to pay their creditors, debt collection plays a vitally important role in the consumer credit system. Debt collection benefits individual creditors, of course, who are repaid money they are owed. More importantly, however, by providing compensation to creditors when consumers do not repay their debts, the debt collection system helps keep credit prices low and helps ensure that consumer credit remains widely available.

Ironically, while the FTC does suggest some changes, its two primary concerns regarding the high default judgment rate in debt collection cases were not directed at the creditor.[16] The FTC's investigation revealed that the primary reasons consumers tend not to participate in the litigation (other than having no valid defense) are problems with service of process and the high cost of defending a lawsuit. Ignoring this, the LSC quotes recommendations made by consumer attorneys to the commission.[17] After a thorough review of the consumer attorneys' position and current law in very consumer–friendly states, the FTC rejected those recommendations:

---

[16] FTC Report II(a) and (b). The FTC was also concerned with the uncertainty of the statute of limitations. FTC Report IV. Arizona recently remedied that problem with the amendment of Arizona Revised Statute Section 12-548 (providing a definitive six-year statute for credit card debt).

[17] "Consumer advocates tended to favor extensive attachments to complaints, such as the underlying contract giving rise to the debt or evidence of the underlying contract (including the applicable terms and conditions and the signed account application), copies of account statements or other records of the debt, and the chain of title showing how the collector came to own the particular obligation." FTC Report III(a)(2).

> Although some consumers and courts would benefit if they knew more about the debt, including information about the underlying contract and transaction history, mandating the attachment of extensive documentation about the debt (such as contracts and account statements) would result in increased costs to collectors and court systems. The Commission therefore recommends that courts rigorously apply current court rules to require that contracts or other documentation be provided with complaints only if they are necessary for consumers to answer the complaint or for courts to decide whether to grant motions for more definite statements or for default judgments

Neither the Proposed Rules nor the Arizona Rules of Civil Procedure expect plaintiffs or defendants in any civil action to have all of the evidence necessary to establish their claims at trial when suit begins. Instead, both sets of procedural rules allow plaintiffs and defendants to engage in pre-trial discovery using a variety of formal and informal methods. There are several major changes from the Arizona Rules of Civil Procedure that will make it easier for the self represented litigant to participate in the process.

Some of those changes include requiring an attachment to the Summons of a one page "Notice to Defendant." This notice summarizes a defendant's rights and responsibilities, which parallel the "residential eviction information sheet." Clear notices will be attached to all discovery documents advising the party of the consequences caused by a failure to participate in the litigation. For example, the party propounding the Request for Admission must send a notice that will allow the responding party to an additional fifteen days to respond to the Request for Admission.[18] In addition, defendants receive additional notices of their rights and responsibilities. For example, all motions must include a notice advising the responding party to file written response to the motion.[19] The Proposed Rules also require that the "request for entry of default judgment without a hearing" be mailed to the defaulting party.[20] These changes from the Arizona Rules of Civil Procedure assist individuals who wish to participate in their case.

The LSC supposes that better written, more informative pleadings would cause more people to respond to lawsuits. On that basis, he criticizes the "standard collection complaint" because it is a "form pleading" that does not identify the original creditor[21], include the contract and proof of ownership, state the date of default, or provide a calculation of damages. In fact, all members of the ACBA use unique complaints that must comply with various requirements of the FDCPA, including the section that requires all communications to a debtor be simple and clear, as if they were directed to "the least sophisticated debtor."[22]

Even assuming, *arguendo,* that the LSC's claim captures the essence of the "standard collection complaint," his criticism is off base. Arizona courts follow a notice pleading standard in civil cases. The Proposed Rules adopt

---

[18] *See*, Proposed Rules 126(d).

[19] *See*, Proposed Rules 128(c).

[20] Proposed Rules 140(e).

[21] Presuming that debtors ignore pleadings because they "do not recognize the debt buyer" is disingenuous. All members of the creditors bar, representing 75% of all collection cases filed in Justice Court, include the name of the original creditor in their pleadings. Moreover the FDCPA requires that information, and more, be provided to the debtor well before suit is filed.

[22] *See, e.g., Swanson v. Southern Oregon Credit Service,* 869 F.2d 1222 (9th Cir. 1988) (applying the "least sophisticated debtor" to 15 U.S.C. 1692g.)

this notice pleading standard.[23] The purpose of the notice pleading standard is to "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved."[24] Courts must also assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom.[25] If a complaint alleges the existence of a contract, its breach, damages, and the right to enforce the contract passing to the plaintiff, then these well-pled averments establish the nature and basis of the claim. Complicating the pleadings of one subset of plaintiffs in one subset of Arizona's courts will not create more participation in court cases.

Mr. Restaino presupposes that the high rate of default in collection cases is a direct result of the lack of information they receive in the complaint, or because they lack attorneys to represent them,[26] or because someone other than the original creditor is pursuing payment.[27] He provides no evidence whatsoever that default rates are substantially lower when merchants sue debtors directly instead of debt buyers suing debtors. Nor does he account for the rate of success debt buyers have in obtaining judgments against defendants who are represented by counsel. Indeed, defendants in debt collection cases may decide not to answer the complaint, no matter how well plead, for a variety of reasons. Defendants with more debt than income may decide to seek the protections offered by the Bankruptcy Code instead of answering a lawsuit. Or they may decide that they do not need to answer because they have no assets and are "judgment proof." Some defendants may decide that appearing to contest the plaintiff's claim is a waste of time, energy, and money because they owe the debt and have no meritorious defense.

If defendants in a debt collection case decide to contest the claim but believe the complaint is missing vital information, the Proposed Rules provide several avenues for resolving their concern. The first avenue is to affirmatively allege all of the defenses that may become applicable to the case through discovery, engage in discovery, and raise those defenses via a motion to dismiss, a motion for summary judgment, or at trial. The second

---

[23] *See*, Proposed Rules 110(b)(4) (requiring complaints to include a "short and clear statement of the factual basis of each claim and that shows that the party has a right to relief from the court.").

[24] *Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956).

[25] *Doe ex rel. Doe v. State*, 200 Ariz. 174, 175, P 2, 24 P.3d 1269, 1270 (2001).

[26] The Proposed Rules cannot force attorneys to defend debt collection cases and they cannot make them more affordable. A "clearer" complaint will not alleviate this problem. The Proposed Rules aim to provide debtors who represent themselves with a clearer understanding of their duties, options, and rights in court. If Mr. Restaino sees a larger problem with the system than procedure, he should go to the legislature and ask that the substantive laws be changed. His attempts to do so here, under the guise of procedural changes, are disingenuous and improper

[27] Mr. Restaino seems to have a very low opinion of "debt buyers." Yet, the transfer of the right to enforce a contract creating a debt or the amount of consideration paid for that transfer does not negate the debtor's liability or the availability of legal recourse to anyone seeking enforcement of a contract. The practice of selling defaulted debt by creditors and lenders serves a vital economic purpose: it makes credit available, accessible, and stable to all consumers. Judge Richard A. Posner observed:

> There is an innocent reason that creditors assign collection to other firms rather than doing it themselves. It is the same reason that most manufacturers sell to consumers through independent distributors and dealers rather than doing their own distribution. Outsourcing phases of the total production process facilitates specialization, with resulting economies. Specialists in debt collection are likely to be better at it than specialists in creating credit card debt in the first place. *Olvera v. Blitt & Gaines P.C.*, 431 F.3d 285, 288 (7th Cir. 2005).

Moreover, because the debt-buyer has paid significantly less than face value for the non-performing debt, it allows them to settle the debt for far less than the original creditor was willing to accept prior to charge-off.

is to enter a general denial, engage in discovery, and then move to amend the answer based on the additional evidence.[28] If defendants reasonably believe that the complaint in their case is missing essential information, and do not want to engage in discovery, the Proposed Rules allow them to bring a motion for a more definite statement which, if granted, would require the plaintiff to provide additional information before an answer is required.[29] Moreover, as discussed earlier, the consumer may dispute the debt, under the FDCPA, after the initial contact and the plaintiff may not proceed with the lawsuit until the debt is validated.[30] Each of these alternatives provides every defendant with access to evidence, facts, and information that will assist him or her with their defense. Plaintiffs should not be required to establish their case at the outset.

The LSC then asks for a heightened default standard in collection cases, particularly by requiring the court to make specific findings of fact before granting plaintiffs in consumer collection cases a default judgment.[31] These requirements create a presumption that the ownership of the debt is invalid and then requires the plaintiff to rebut the presumption by a legal standard far beyond what is normally required in any contract case.[32] It even instructs the court on how to interpret the best evidence rule, in a manner that LSC knows will likely make it impossible for anyone but the original creditor to prevail. The LSC would require the court to decide whether plaintiffs in consumer debt collection cases have "establish[ed] the business records exception to Rule 803 of the Rules of Evidence, *but only for records of the company for which the affiant or declarant is* employed." (Emphasis added.)[33] By adding this language, the LSC has adopted a significant piece of substantive law that does not currently exist in this state,

---

[28] *See*, Proposed Rules 119(a).

[29] *See*, Proposed Rules 116(a)(3).

[30] 15 U.S.C 1692g(b)

[31] The LSC has offered no evidence showing how these specific findings of fact will prevent errors, why they are unnecessary in other contexts, or why defendants sued in superior court should not enjoy these protections. The LSC has ignored the other Proposed Rules designed to correct errors in judgments and orders.

[32] The LSC cites the "Landlord Tenant Rules adopted by the Supreme Court" as justification of this position. Arizona landlord and tenant law is governed by statutes regulating the parties, which the Rules of Procedure for Eviction Actions expressly recognize. These requirements do not exist under the common law of contracts. Moreover, the compelling interest in ensuring the rights of an individual prior to eviction does not exist when entering judgment against a consumer who did not pay his American Express bill.

[33] Before recommending that only employees can establish the business records exception to the rule against hearsay, the LSC should square its position with the statement that the business records exception to the rule against hearsay was intended to bring the "realities of business and professional practice into the courtroom and the statute should not be interpreted narrowly to destroy its obvious usefulness." *Merrick, v. United States Rubber Co.*, 7 Ariz. App. 433, 436, 440 P.2d 314, 317 (Ct. App. 1968) (interpreting the predecessor to Arizona's Rules of Evidence). Several courts in other states have considered the issue and held that a purchaser who incorporates another's business records into its own business records is a competent and qualified witness under Rule 803(6). *See, Simien v. Unifund CCR Partners*, No. 01-08-00593-CV, Tex. App., First District, April 15, 2010; *Jaramillo v. Portfolio Acquisitions, LLC*, No. 14-08-00939-CV, Tex. App., Fourteenth District, March 30, 2010; *Calvary Portfolio Servs., LLC v. Kimbaris*, A-2062-10, Super. Ct. App. Div. N.J. (Dec. 7, 2011). These states are in accord with the federal courts to consider the issue. The courts have held that "that a record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of Rule 803(6) are satisfied." *Brawner v. Allstate Indem. Co.*, 591 F.3d 984, 987 (8th Cir. 2010); *see also, United States v. Childs*, 5 F.3d 1328, 1333-1334 (9th Cir. 1993) (summarizing the positions of the circuit courts).

all under the guise of a justice court procedural rule. This is improper on many levels, including as a violation of the constitutional principle of separation of powers.

The Proposed Rules allow parties to seek a default judgment without a hearing if an application of default is not responded to in a timely manner, the claim is for a sum certain, and a "supporting affidavit concerning the claimed amount, along with attachments that prove the amount of the claim" is attached to the motion.[34] By this point, defendants have had three notices of the lawsuit: service of the complaint, service of the entry of default, and service of the motion for judgment without a hearing. If they have not responded by now, their due process rights are protected. They have had ample notice and several opportunities to be heard. Even if the requirements are met, however, the court "may decline a request for entry of a default judgment and may instead set the matter for a default hearing."[35] If a default hearing is scheduled, the defaulting party may participate if they appear and the court "may receive evidence."[36] Thus, the Proposed Rules already allow individual justices of the peace to obtain additional information from the party seeking default at the court's discretion.

3. Conclusion

While the LSC's proposals appear to be designed to protect consumers, in reality, they only benefit the irresponsible consumer who can use them to wiggle out of paying a valid debt while punishing the vast majority of responsible Arizona consumers. As the FTC recognized in rejecting these very proposals, doing so would result in far greater economic harm to the very consumers the LSC seeks to protect by severely curtailing their ability to secure credit. Moreover, these suggestions deny a specific group of plaintiffs access to the justice courts by heaping burdens upon them and the courts hearing their cases. In addition, it attempts to create and define substantive rights. These proposals are not rules of procedure, so promulgating it violates Arizona's constitutional separation of powers. Debt collection is driven by the substantive law of contracts, but the proposed changes impose sanctions on a specific class of plaintiffs who attempt to use the substantive law to enforce their rights. Promulgating the rules as LSC recommends would be irresponsible, offensive to those who served the State Bar when requested, and exceeds the authority of the Committee on Civil Rules of Procedure in Limited Jurisdiction Courts.

[34] Proposed Rules 140(e).
[35] Proposed Rules 140(e).
[36] Proposed Rules 140(f).

HAMEROFF LAW GROUP, P.C.

A Professional Corporation

David E.Hameroff
Eric J. Thomae
Garrett M. Culver
3443 E. Ft. Lowell Rd., Ste. 101
Tucson, AZ 85716-1617
Phone: (520)622-0340
Facsimile: (520)791-9357

Lisa Loo
Chair, Rules Committee
Board of Governors
State Bar of Arizona

February 4, 2012

Re: Proposed Changes to the Rules of Procedure in Limited Jurisdiction Courts (R-12-006).

Dear Ms. Loo:

The rules proposed by the Committee on Civil Rules of Procedure in Limited Jurisdiction Courts are the result of over 700 "man hours" in meetings alone, not to mention hundreds more in preparation and sub-committee meetings. Prior to making any decision on a subsequent revision of the rules, it is important to fully understand who was involved and what steps were taken in drafting these rules.

The Committee on Civil Rules of Procedure in Limited Jurisdiction Courts was composed 16 Members, along with 2 Court Services Division staff, and also had frequent guests at the meetings. Among the Members of the Committee were 1 Judicial Education Officer, 1 Superior Court Judge, 4 Justice Court Judges, a Court Administrator, 4 attorneys affiliated with Legal Services, 2 creditors' rights attorneys, a member of the general public, and two members well known to the Board of Governors, William Klain and David Rosenbaum.

Members of the Committee

Chair:

Paul Julien
Judge Pro Tem and Judicial Education Officer
Administrative Office of the Courts

Members:

Honorable Hugh Hegyi
Superior Court
in Maricopa County

Stanley Hammerman
Hammerman & Hultgren, P.C.
Maricopa County

Honorable Jill Davis Lake Havasu Consolidated Courts Mohave County	**Emily Johnston** Public Member, Arizona Judicial Council Pima County
Honorable Timothy Dickerson Sierra Vista Justice/Magistrate Court Cochise County	**Nathan Jones** DNA People's Legal Services Coconino County
Honorable Maria Felix Pima County Consolidated Justice Court	**William Klain** Lang Baker & Klain, PLC Maricopa County
Honorable Gerald Williams North Valley Justice Court Maricopa County	**George McKay** Community Legal Services, Inc. Maricopa County
Mary Blanco Court Manager, Encanto Precinct Maricopa County	**David Rosenbaum** Osborn Maledon, P.A. Maricopa County
Veronika Fabian Choi and Fabian, PLC Maricopa and Coconino Counties	**Anthony Young** Southern Arizona Legal Aid, Inc. Pima County
David Hameroff Hameroff Law Group, P.C. Pima County	*Court Services Division Staff:* Mark Meltzer Julie Graber

This diverse group met 8 times over a nearly eight month period, from March 2, 2011 to October 25, 2011, in order to draft the rules as submitted. Each of these meetings lasted approximately five hours and required many more hours of preparation. The meetings were conducted in accordance with the rules of parliamentary procedure in order to assure that all parties were heard and that all discussions were conducted in a professional and productive manner.

Some of the frequently discussed aspects of the proposed rules were those that deal with the heightened disclosure and pleading standards in collection cases. Following a discussion during the June 9, 2011 meeting regarding a heightened disclosure requirement, it was proposed that the language requiring a Plaintiff in a consumer debt collection case be required to disclose evidence establishing the chain of title for ownership of the debt be removed from the rule. This motion ultimately passed with a 9-5 vote. *See Committee Minutes* dated June 9, 2011, p. 2-3:

> At the April 20 meeting, a "special rule" for collection cases, which would require plaintiff to disclose evidence of the debt during or before the pretrial conference, had been moved from Rule 16 to Rule 26.1. This special rule was further discussed. Some members believed that the proposed provision was one-sided because it did not impose a corresponding duty on defendants, and that it was redundant and duplicated other obligations under Rule 26.1. Other members felt that bringing relevant documents to a pretrial conference would help make the conference a meaningful event, and that a second mention of this duty would emphasize its importance.
>
> As a consequence of this discussion, the provision was moved back to draft Rule 16(b). This provision was further modified to provide:
>
> - That both parties, and not solely the plaintiff, are required to exchange relevant documents.

- That it applies to all cases, and not just to cases involving "written consumer debt."
- That if a party does not personally attend the conference but rather appears by telephone, the party must provide these documents in advance of the conference.
- That if there are good reasons why these documents are not "reasonably available", the court may grant an additional fourteen days to provide them.

The members generally agreed that these changes would further the mandate of A.O. 2011-13 by making pretrial conferences in justice courts more meaningful. Although every justice court may not schedule a pretrial conference in civil cases, for those that do these provisions should make the conference more productive, and should promote the possibility of a case being settled at the conference.

A separate provision for collection cases in Rule 26.1 was also discussed. Because the ownership of consumer debt is a recurrent issue in collection cases, the suggested provision would require a plaintiff in a 26.1 disclosure statement to provide evidence of the chain of title of debt ownership. As many as three-quarters of civil cases in justice court, or even more, are suits for the collection of consumer debts. Defendants in these cases frequently have questions about why a particular plaintiff, who may be an assignee of the original debt, has filed the suit. Members opposed to this proposed provision stated that it would impose a substantive requirement rather than a procedural one; that the proposed language would apply to a subset of cases rather than to cases generally; that other disclosure obligations dictate that this type of evidence be provided in assignment cases even without a special rule; and that the proposed language would not improve the quality of evidence that should be produced. A motion was then made:

Motion: that proposed language in Rule 26.1, which would require a plaintiff in a consumer debt collection case to disclose evidence establishing the chain of title for

Continued on next page of minutes . . .

ownership of the debt, be removed from the rule. The motion was seconded and further discussed. Motion passed by a vote of 9-5-0. **RCiP.LJC 11-007**

This heightened disclosure requirement for collection cases was again considered by the committee during the September 28, 2011 meeting. A motion that the language requiring "copies of documents concerning assigned debts" be removed from the new disclosure rule and that it remain in the rule requiring the documents to instead be brought to the pre-trial conference was made and passed by a vote of 9-6-1. *See Below, Committee Minutes* dated September 28, 2011, p. 6-7. The Committee also passed a motion requiring the complaint in collections cases to include the identity of the original owner of the debt with a unanimous vote. *Committee Minutes* dated September 28, 2011. p 6-7:

3. Disclosure concerning assigned debts in collection cases. The Chair continued with an issue concerning assigned debts in collection cases, specifically, how to provide the defendant-debtor with information about the identity of the original creditor. Ms. Fabian stated that this information, along with the terms of the contract and documentation of the last payment, should be provided early in the litigation, perhaps as attachments to the complaint. She said she benefits from early disclosure to determine if statutes of limitation, choice of law, and other defenses might be available.

The Chief Justice entered the room and briefly thanked the members of the Committee for their time and effort on this project.

Mr. Klain then reiterated his prior position: that the rules should not single out a class of plaintiffs by requiring heightened disclosure. Whether information should be disclosed depends on the particular case, and if a defendant is entitled to the information, there is a process under the discovery rules for obtaining it. Judge Williams stated that the rules should not require attaching documents to complaints; in light of the number of complaints that proceed to default, such a requirement would burden the courts with unnecessarily thick case files. Mr. Hammerman reminded the members that the draft rules are procedural, not evidentiary, and that the rules should not require production of items such as original contracts that contradict federal lending laws. He said that the rules should not have different disclosure standards for plaintiffs and defendants. He mentioned that the members previously discussed this issue, and resolved it by a formal motion at the June 9 meeting, and a member read aloud a portion of the June 9 minutes. Members then made and voted on motions:

Motion: A motion was made to include in the rule on the content of the complaint (currently Rule 111) a requirement that the complaint include, in actions to recover on a debt, the identity of the original owner of the debt. The motion was seconded and it carried unanimously. **RCiP.LJC 11-013**

Motion: A motion was made that the disclosure requirements, currently set out in paragraphs (c), (d), and (e) of Rule 122 concerning pretrial conferences, be removed to a new, separate rule on disclosure statements, for inclusion with the rules on discovery. The motion was seconded and it carried unanimously. **RCiP.LJC 11-014**

Motion: A motion was made and seconded that a requirement currently contained in Rule 122(c)(4), entitled "copies of documents concerning assigned debts", be removed from the new disclosure rule and that it remain in the rule on pretrial conferences, so that plaintiffs in assigned debt cases would be required to bring specified documents to the pretrial conference. Comments concerning this motion included the following:

Continued on next page of minutes . . .

- The documents might not be available at the time of the pretrial conference.
- What is the sanction if the documents aren't brought to the pretrial conference? Without a sanction, the requirement is not useful.
- The requirement unfairly singles out a particular class of plaintiffs.
- Creditor-plaintiffs already have a duty under the disclosure rule to disclose any exhibits they will use to prove a case, and this rule is cumulative and unnecessary.
- In cases where disclosure statements have been exchanged before the pretrial conference, this requirement is redundant.

The motion passed, 8-6-1. **RCiP.LJC 11-0015**

The discussion on this last motion revealed that issues concerning the language of this rule still remain, and Mr. Young, Mr. Hammerman, Ms. Fabian, and Judge Williams as a workgroup will discuss them and propose solutions. At this point Mr. Hammerman left the meeting, designating Mr. Hultgren as his proxy. Mr. Hultgren noted that at the pretrial conference in certain precincts, the clerk provides the parties with a form to complete, the parties return the completed form to the clerk, and the conference is over without the parties ever seeing the judge. Mr. Young stated the workgroup would consider this scenario in addressing issues under the pretrial rule.

Action: The workgroup will report at the next Committee meeting.

The committee then *again* revisited the issue of a special disclosure requirement in collection cases in the final meeting on October 25, 2011. At that time, the committee agreed to form a well balanced workgroup of: Mr. Hammerman, Mr. Hameroff, Mr. Young, Ms. Fabian, and Judge Williams. It was then unanimously agreed upon by motion that if workgroup agrees to language for Rule 121(a)(4) regarding the disclosure requirement for collection cases, the language would be deemed adopted by the full committee. This workgroup then agreed to meet

on November 8, 2011 at the office of Mr. Hammerman. *See DRAFT Committee Minutes* dated October 25, 2011, p. 4:

> **4. Cases involving assigned debts.** The Chair then turned to an issue that has divided the Committee: a special disclosure requirement in cases of assigned debts (draft Rule 121(a)(4).) Mr. Hameroff had provided the members with a legal memorandum that contended, among other things, that a separate disclosure requirement imposed on plaintiffs in assigned debt cases might violate the equal protection clause, and that it may constitute a substantive requirement rather than a procedural rule. The memo also took the view that other, general provisions of the disclosure rule adequately covered disclosing relevant information in assigned debt cases. A member opined that disagreement about this single issue could cloud much of the good work done by this Committee. Mr. Klain added that he was opposed to creating a different standard for a specific type of plaintiffs; he had to leave the meeting at this time but he recommended deletion of this provision.
>
> The Chair then asked individual members of the Committee to express their views on this proposed rule. The membership appeared split, and a suggestion was made to submit a report that included both views as well as alternative versions of this rule. The workgroup comprised of Mr. Hammerman, Mr. Hameroff, Mr. Young, Ms. Fabian, and Judge Williams also offered to meet and attempt a resolution of this issue. It was noted that no further Committee meetings are anticipated prior to submitting the Committee's report to the Arizona Judicial Council. A motion was then made that if the workgroup agrees to language for Rule 121(a)(4) and the disclosure requirement for assigned debt cases, that their agreed-upon language would be deemed adopted by the full Committee and included within the draft version of the rules.
>
> **Motion:** That motion was seconded, and carried unanimously. **RCIP.LJC 11-019**
>
> The members of this workgroup agreed to convene at Mr. Hammerman's office on November 8, 2011.

Following a meeting on November 8, 2011, the workgroup agreed upon and drafted specific language for Rule 121, and the approval by all members of the workgroup, and thus the committee as a whole, was evidenced by the five workgroup members' signatures attached as the final page of this letter. *See Part VI: Disclosure Statements and Discovery.*

The recommendations of this committee were not reached in haste. The rules, as proposed, were only agreed upon after months of study, deliberation, and compromise. Due to the diligent efforts of the members coupled with the procedural safeguards afforded by parliamentary procedure, the proposed rules achieve the goals of simplicity, functionality, and equality.

Sincerely,

/s/ David E. Hameroff
David E. Hameroff, Esq.
Hameroff Law Group, PC

PART VI: Disclosure Statements and Discovery.

Rule 121: Duty to serve a disclosure statement.

a. Disclosure of information. Within forty days after the Defendant has filed an answer, or at a time directed by the court, each party must serve on the other parties a written disclosure statement. Every party's disclosure must include the following information:

> *(3) Copies of exhibits and information.* (i) A party must provide copies of any documents or exhibits the party will use to support a claim or defense, including copies of electronically stored documents; (ii) In a contested case based upon the collection of a consumer debt (a debt entered into for personal, family, or household purposes), the Plaintiff must disclose all available evidence related to the allegations contained in the complaint. These include: 1. the agreement between the creditor and consumer, if available, upon which the complaint is based; 2. any available billing statement to the consumer; 3. if the debt has been assigned, evidence that the Plaintiff is the owner of the debt; 4. information concerning the date of the last payment made by the consumer, if available; (iii) If the party intends to use at trial any document, object, or exhibit that cannot be easily copied, the party must make the item reasonably available for inspection by the other parties at the pretrial conference or as otherwise agreed to by the parties.

The above language is approved as is and shall not be reformatted or modified in any way.

Stanley M. Hammerman, Esq.

David E. Hameroff, Esq.

Veronika Fabian, Esq.

Hon. Gerald Williams

Anthony L. Young, Esq.

HAMMERMAN & HULTGREN, P.C.

Stanley M. Hammerman
Jon R. Hultgren
Vincent M. Creta

Jennifer R. Spiegel
Holly R. Pepi

ATTORNEYS AT LAW
3101 N. CENTRAL AVENUE, SUITE 500
PHOENIX, ARIZONA 85012

Telephone: (602) 264-2566
Fax: (602) 266-3488

www.hammerman-hultgren.com

February 6, 2012

Lisa Loo, Chair, Rules Committee
Board of Governors
STATE BAR OF ARIZONA
4201 N. 24th Street, Ste. 200
Phoenix, AZ 85016-6288

RE: **Comments to the proposed Civil Rules of Procedure for Limited Jurisdiction Courts**

Dear Ms. Loo:

As a member of the committee that drafted the proposed Civil Rules of Procedure for Limited Jurisdiction Courts, I am hereby responding to the comments of Gary Restaino of the Legal Services Committee. By way of background, I have been practicing law in Arizona for nearly 37 years and have a great deal of experience in the Justice Courts. These courts are very often the only experience that members of the public have with our justice system and, therefore, the rules and access to the courts should be as simple and user-friendly as possible. I know that Justices of the Peace do their best to be as fair and considerate as possible to those who come before them.

I am troubled by Mr. Restaino's assertion that the rules do not do enough for "low income Arizona consumers." The vast majority of people who are sued in consumer debt cases are not "low income consumers," but rather, middle class people who have overextended themselves with credit card debt. Frankly, there would be very little need for collection services if the cases were against "low income consumers." The reference to a New York study and unsubstantiated anecdotal evidence are without substance and merit.

Where Mr. Restaino states that a large percentage of cases filed are against "low income Arizona consumers," what facts support this contention? Where is the evidence that "the wrong consumer is often sued by debt buyers?" Where are the examples of people being sued numerous times for the same debt as well as violating the Arizona statutes of limitation?

As an attorney in the credit industry, I take these allegations very seriously. The way that most of my colleagues and my office handle these claims is very similar. We are all governed by the Fair Debt Collection Practices Act. We send out an initial letter to the debtor identifying the claim and inviting them to communicate with us. We call the debtors and try to resolve the claim, as that is in the best interest of not only the creditors, but also the debtors. If that fails, we file suit - again, they have the opportunity to dispute the claim. Many consumers settle their claims after suit is filed. If they do not answer within the time limit, they are mailed a default application giving them more time to respond. There is complete fairness throughout the entire process.

The Committee on Limited Jurisdiction Courts consisted of four (4) legal services attorneys/members and two (2) others who have served as legal services attorneys. There was also an attorney who exclusively represents debtors and only two (2) creditors' attorneys on the Committee. Nonetheless, despite some serious differences of opinion, we endeavored to reach a consensus and were successful in that regard. When we approached "crunch time," I put together a subcommittee which met in my office for nearly four (4) hours to see if a consensus could be reached. We had different points of view, but realized that an agreement of compromise and consensus was in everyone's best interest. By a unanimous vote, we all signed the attached Agreement. This Agreement was signed by an experienced legal services attorney, a respected attorney who represents debtors, an attorney who represents debt buyers, a Justice of the Peace who has already incorporated the attached Rule into his court proceedings, and myself. I ask that you give deference to this Agreement. We do not believe that rules requiring "heightened pleadings" is justified. When consumers abuse their credit cards by irresponsible conduct, we are all victims. It is unfair to expect "debt buyers" to prove their case in a complaint with original contracts which may no longer exist or have been entered into by the click of a computer. The Rules provide due process to all parties and should not be thrown out by anyone's special interests.

If I thought that the allegations referred to by Mr. Restaino and his committee were prevalent in Arizona, I would be standing next to him seeking further reform, but that is not the case. The Committee has spent numerous hours reforming these Rules. I look forward to meeting with interested parties on February 10th and will be glad to further discuss these issues at that time.

Sincerely,

Stanley M. Hammerman

SMH/tmz
Enclosure

c: Paul Julien, Mark Meltzer, and Kathleen Lundgren (via e-mail)

PART VI: Disclosure Statements and Discovery.

Rule 121: Duty to serve a disclosure statement.

a. Disclosure of information. Within forty days after the Defendant has filed an answer, or at a time directed by the court, each party must serve on the other parties a written disclosure statement. Every party's disclosure must include the following information:

> *(3) Copies of exhibits and information.* (i) A party must provide copies of any documents or exhibits the party will use to support a claim or defense, including copies of electronically stored documents; (ii) In a contested case based upon the collection of a consumer debt (a debt entered into for personal, family, or household purposes), the Plaintiff must disclose all available evidence related to the allegations contained in the complaint. These include: 1. the agreement between the creditor and consumer, if available, upon which the complaint is based; 2. any available billing statement to the consumer; 3. if the debt has been assigned, evidence that the Plaintiff is the owner of the debt; 4. information concerning the date of the last payment made by the consumer, if available; (iii) If the party intends to use at trial any document, object, or exhibit that cannot be easily copied, the party must make the item reasonably available for inspection by the other parties at the pretrial conference or as otherwise agreed to by the parties.

The above language is approved as is and shall not be reformatted or modified in any way.

Stanley M. Hammerman, Esq.

David E. Hameroff, Esq.

Veronika Fabian, Esq.

Hon. Gerald Williams

Anthony L. Young, Esq.