No. 15-

IN THE

Supreme Court of the United States

ZWICKER & ASSOC., P.C., ANNE SMITH AND DEREK SCRANTON,

Petitioners,

v.

DAWSON W. WISE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Do the First Amendment to the Constitution and the *Noerr-Pennington* Doctrine apply to a prayer for relief in a state court complaint so as to provide a defense to a suit under the Fair Debt Collection Practices Act ("FDCPA") (15 U.S.C. § 1692, et. seq.)?

2. Is a communication incidental to a state court action protected by the First Amendment, as held in *Sosa v. DirecTV*, 437 F.3d 923, 936-37 (9th Cir. 2006)?

3. Does the FDCPA apply to attorneys' communications with courts?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Zwicker & Assoc., P.C. has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

The key issues in this case revolve around whether an attorney can be held liable under a federal consumer protection statute where the conduct complained of is the prayer for relief in a state court collection suit. The imposition of such liability violates the Petition Clause of the First Amendment to the Constitution and the *Noerr-Pennington* Doctrine.

Petitioners, representing a creditor client, sued Respondent on a defaulted credit card account. The prayer to the complaint requested an award of attorney's fees, a remedy indisputably provided for in the contract between Respondent and Petitioner's client and permitted under the law of Utah, which was the law specified in that contract as controlling the rights of the parties. Respondent sued Petitioners under the FDCPA, asserting that Ohio law (the law of the forum) did not permit recovery of such fees, even though the contract and applicable Utah law provided otherwise.

In 1986 Congress deleted the attorney exemption to the Fair Debt Collection Practices Act (FDCPA), subjecting attorneys to potential liability under what has repeatedly been characterized as a strict liability statute. In 1995, this Court held in *Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995)

that attorneys are "debt collectors" under the FDCPA, even when their activities consist solely of litigation. In issuing that decision this Court rejected concerns that the inclusion of attorneys who litigate as debt collectors was likely to destroy certain well-established legal doctrines such as litigation immunity.

In the last two decades the consequences of *Heintz* have included the elimination of litigation immunity, the erosion of witness immunity, and now, the decision in the present case depriving Petitioners of First Amendment rights. The decision of the Court of Appeals exposes Petitioners to strict liability based solely upon the prayer for attorney's fees in the state court complaint. Petitioners are not accused of making a single false statement to Respondent. It is not alleged that the underlying state court complaint made an affirmative representation that is false, *e.g.*, "Plaintiff is entitled to recover fees" or "the law provides for an award of fees." Petitioners' simply asked the Court, consistent with the underlying contract, to award "attorney's fees" in addition to the over $40,000 that Respondent owed to their client.

The Court of Appeals recognized that Petitioners' client was entitled to those fees ***if*** the choice of law provided for by Respondent's cardmember agreement is controlling. However, it concluded that the District Court failed to perform a sufficiently rigorous analysis on the choice of law issues, and it reversed a decision in favor of Petitioners, remanding the case for further proceedings. Put differently, the choice of law analysis is so complicated that an experienced federal district judge apparently did not get it right the first time, yet Petitioners will be held to a strict liability standard under the FDCPA if

the District Court next decides that Utah law does not apply. Although the District Court has not yet made this determination, the Court of Appeals decision erred on an issue of Constitutional importance and that error has far-reaching implications to creditors and the attorneys representing them in collection litigation.

By rejecting the First Amendment/*Noerr-Pennington* arguments (which the appellate panel relegated to a footnote) the Court of Appeals' decision allows the FDCPA to create an untenable burden on attorneys. An attorney who seeks to advance her client's case with a novel theory or who asks for relief that is discretionary with the trial court risks incurring strict liability under the FDCPA if the claim or request is unsuccessful. This risk creates an inherent conflict between attorneys and their clients and unduly burdens Constitutionally-protected petitioning conduct. The Court of Appeals' decision conflicts with decisions from this Court and the Ninth Circuit holding that the Petition Clause and *Noerr-Pennington* Doctrine provide defenses to statutory causes of action. It also conflicts with decisions of the Seventh and Eighth Circuit Courts of Appeal holding that communications with courts are not subject to the FDCPA.

This case potentially impacts every attorney in the United States who regularly files suits on behalf of creditors. Petitioners seek a ruling by the Court as to the Constitutionally-protected nature of the conduct at issue and as to an issue not reached in *Heintz* -- whether the FDCPA regulates attorneys' communications with courts.

OPINIONS BELOW

The Decision of the United States Court of Appeals for the Sixth Circuit is reported as *Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710 (6th Cir. 2015), and the order denying rehearing *en banc* is at 2015 U.S. App. LEXIS 7661. Copies of both orders are reproduced as Appendices A and B. The decision of the United States District Court for the Northern District of Ohio is unreported but found in Lexis at 2014 U.S. Dist. LEXIS 23044 and is reproduced as Appendix C.

JURISDICTION

The Court of Appeals entered its judgment on March 12, 2015 and subsequently denied a Petition for re-hearing *en banc* on April 23, 2015. This Petition is timely filed pursuant to Sup. Ct. R 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The decision below of the Court of Appeals for the Sixth Circuit conflicts with decisions from the United States Courts of Appeal for the Seventh and Eighth Circuits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const. Amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

> people peaceably to assemble, and to petition the government for a redress of grievances.

15 U.S.C. §1692e(2) and (10) provide, in pertinent part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (2) The false representation of--
>
> (A) the character, amount, or legal status of any debt; or
>
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
>
> * * *
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

15 U.S.C. §1692f(1) provides, in pertinent part:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

Pertinent provisions of the Fair Debt Collection Practices Act are reproduced in Appendix E.

STATEMENT

1. The First Amendment protects the right to petition the government for redress of grievances (the Petition Clause). US Const. Amend. I. This foundational principle of American jurisprudence was further clarified by the *Noerr-Pennington* doctrine, which provides that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); Although this doctrine was initially applied to the Sherman Act, the *Noerr-Pennington* doctrine has been extended and applied to non-antitrust claims involving the National Labor Relations Act, RICO and the Fair Debt Collection Practices Act. *See, e.g., Giles v. Phelan, Hallinan & Schmieg, LLP*, __F.Supp.2d__, No. 11-6239, 2013 U.S. Dist. LEXIS 78161 *17-18 (D.N.J. June 4, 2013) (discussing and citing extensions of *Noerr-Pennington*); *Satre v. Wells Fargo Bank, NA*, 507 F. App'x 655 (9th Cir.Jan.2, 2013) (rejecting FDCPA claim pursuant to *Noerr-Pennington*); *Sosa v. DirecTV*, 437 F.3d 923, 929 (9th Cir. 2006) (*Noerr-Pennington* stands for a generic rule, applicable to any statutory construction that could implicate the rights protected by the Petition Clause.)

2. Dawson Wise ("Wise") entered into a credit card Agreement (the "Cardmember Agreement") with American Express Centurion Bank ("Amex"). Appendix at 25. That Cardmember Agreement granted Wise access to a credit card account which he used to incur debt of over $40,000. In the Cardmember Agreement[1], Wise agreed that Utah law would govern the "legality, enforceability, and interpretation" of the Agreement and the Account. He further expressly agreed that (1) Amex was located in Utah, (2) Amex held the account in Utah, and (3) the contract was entered into in Utah. With this written Cardmember Agreement in place, Wise incurred and defaulted on over $40,000 in credit card debt. Appendix at 26. Amex sued Wise in the Summit County, Ohio Court of Common Pleas, with Petitioners acting as legal counsel to Amex. Appendix D.

3. Seeing that his liability was certain, Wise quickly filed for bankruptcy protection and filed this federal action against Petitioners. The basic theory of liability was that Petitioners allegedly violated state and federal law when they "attempted to collect attorney fees" in connection with collection of the account. Specifically, Wise alleged that Petitioners prayed for "attorney fees" in the common pleas court complaint. *Id*. Wise also alleged generally that

1. The "Applicable Law" clause in the Agreement provides as follows:

> This Agreement and your Account, and all questions about their legality, enforceability and interpretation, are governed by the laws of the State of Utah (without regard to internal principles of conflicts of law), and by applicable federal law. We are located in Utah, hold your Account in Utah, and entered into the Agreement with you in Utah.

Petitioners attempted to collect attorney fees before and after filing the complaint in the common pleas court, but he has specifically asserted only a single claim by Petitioners for fees – that which was made in the prayer to the state court complaint:

> WHEREFORE, the Plaintiff, AMERICAN EXPRESS CENTURION BANK demands judgment against Defendant(s), DAWSON WISE, on Counts One and Two of its Complaint, in the sum of $40,047.98, plus pre-judgment interest at the statutory rate from the date of filing to the date of judgment, plus post-judgment interest on the balance at the statutory rate from the date of judgment, **plus attorney fees**, plus court costs.

Appendix at 5 and 44. (emphasis added). This entire case is based upon the words "plus attorney's fees" in that prayer for relief.

4. Petitioners moved for judgment on the pleadings, and the District Court granted that motion, concluding that Utah law governed the contract and therefore: (i) fees were recoverable as prayed for by Petitioners; and (ii) Petitioners were not liable to Respondent. Appendix C.

5. On appeal, the Sixth Circuit Court of Appeals reversed, concluding that the District Court did not have enough facts to determine if Ohio or Utah had a materially greater interest in the action. That Opinion reasoned that:

> [A] careful examination of the contacts of each state to the agreement was necessary

> to determine whether Ohio has a materially greater interest in the fee shifting provision and, if so, whether its law would have applied absent a choice of-law provision. . . . . Wise can provide answers to many of the unresolved questions above, including where he paid his bills, where he signed or accepted the credit card, where he made his purchases, and where he decided not to repay. It is therefore possible that the district court could resolve the choice-of-law issue with an affidavit from him. However, the district court may also determine that the issue would benefit from limited discovery into the contacts of each state to the contract.

Appendix at 20-21. As discussed below, the Panel's Opinion demonstrates the importance of applying *Noerr-Pennington* doctrine to these limited facts.

6. The Court of Appeals' decision in this case conflicts with decisions of the Supreme Court and the Ninth Circuit holding that the *Noerr-Pennington* Doctrine applies to statutory causes of action. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638 (9th Cir. 2009); *See, also, Satre v. Wells Fargo Bank, NA*, 507 F. App'x 655 (9th Cir.Jan.2, 2013), applying *Noerr-Pennington* to dismiss an FDCPA case.

7. The Court of Appeals' decision in this case conflicts with decisions of the United States Court of Appeals for the Seventh and Eighth Circuits holding that the FDCPA does not regulate the contents of communications with

courts. *See O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1141, 181 L. Ed. 2d 1017 (2012) and *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814 (8th Cir. 2012).

REASONS FOR GRANTING THE PETITION

This case raises the important issue of whether an attorney may be held liable under the FDCPA for making a good faith prayer for relief, supported by fact and law (or at least a good-faith argument for same), in a state court suit. According to the Sixth Circuit, the FDCPA allows for the imposition of liability when an attorney simply asks a court for relief, despite the fact that such relief is not objectively baseless and the request does not contain materially false representations. The First Amendment, as clarified under the *Noerr-Pennington* doctrine, bars the imposition of liability for filing a suit where the attorney has a reasonable basis in law and fact for doing so. If, on remand, the District Court decides that Ohio law governs in this case, Petitioners will face a claim under a strict liability statute for having made a plausible, good-faith prayer for relief on behalf of their client.

By ruling that the FDCPA can trump the First Amendment in this case the Sixth Circuit has disregarded the warning of this Court that the FDCPA should not be assumed to compel absurd results when applied to debt collecting attorneys. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 600, 130 S.Ct. 1605, 1622, 176 L.Ed.2d 519, 539 (2010). The consequence is an additional problem that this Court has warned against – lawyers will face liability for an unsuccessful suit, even when the suit makes no factual representations that are

false. *See Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995); *Jerman*, 130 S.Ct. at 1622; *see also*, *Stratton v. Portfolio Recovery Associates*, 770 F.3d 443, 454 (6th Cir. 2014) (Batchelder, J., dissenting). In fact, by permitting potential FDCPA liability under the facts of this case the Court of Appeals' decision chills the likelihood that any creditor's lawyers will ever be willing in the future to help it secure a judicial determination of a contract issue such as the choice of law issue in the underlying suit.

I. The Decision of the Court of Appeals Unconstitutionally Burdens Petitioning Conduct and Splits with the Decisions of Other Circuits

There are few rights more important than those protected by the First Amendment to the United States Constitution.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const Amend. 1. In the words of Judge Cudahy of the Seventh Circuit Court of Appeals:

> This right has deep common law roots and is the foundation of our republican (although not necessarily Republican) form of government. *See McDonald v. Smith*, 472 U.S. 479 (1985); *United States v. Cruikshank*, 92 U.S. 542,

> 552, 23 L. Ed. 588 (1875); *see also Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342 (7th Cir. 1977). Thus, parties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-44, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961).

Tarpley v. Keistler, 188 F.3d 788, 794 (7th Cir. 1999).

Private attorneys have both the privilege and duty to petition the government on behalf of their clients, most particularly when praying for relief in a court complaint. Attorneys play a crucial role in advancing their clients' requests to state courts. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (law restricting arguments available to attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"), cited in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 623, 130 S.Ct. 1605, 1635, 176 L.Ed.2d 519, 553 (2010) (Kennedy, J., dissenting). That petitioning conduct includes requests to courts and communications incidental to a court action.

Here, Petitioners respectfully assert that the Sixth Circuit erred on this issue of Constitutional importance. The Sixth Circuit Opinion's relevant footnote states:

> The defendants' argument that the *Noerr-Pennington* doctrine limits the application of the FDCPA to their activities is inapposite. The FDCPA specifically includes lawyers and litigation activities within its purview. See *Heintz v. Jenkins*, 514 U.S. 291 (1995). The defendants present no cases in which a court has applied the *Noerr-Pennington* doctrine to FDCPA claims. In fact, this circuit has already rejected *Noerr-Pennington* protection for false statements in a debt-collector's complaint, recognizing that the Petition Clause does not protect "sham petitions, baseless litigation, or petitions containing 'intentional and reckless falsehoods.'" *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 616 (6th Cir. 2009) (quoting *McDonald v. Smith*, 472 U.S. 479, 484 (1985)). The defendants attempt to distinguish *Hartman* by maintaining that there is a special protection for representations and demands made only in a complaint's prayer for relief. Even if such protection existed, it would not protect these defendants because Wise pled that they demanded attorney's fees in contexts outside the litigation.[2]

Appendix at 21. This case does not involve "sham petitions, baseless litigation, or petitions containing 'intentional and reckless falsehoods." The analysis of the Sixth Circuit

2. Although Wise made such a general allegation he did not actually plead or refer to a single instance in which such alleged conduct ever took place. That is because there was no such instance.

demonstrates that there is a bona fide dispute over which state's law applies to the contract dispute between Wise and Petitioners' client, and it recognizes that if Utah law applies then the state court had the ability to award fees to that client.

The decision unnecessarily burdens conduct that is protected by the First Amendment. In fact, the Court of Appeals' rationale demonstrates the need for attorneys to be able to advocate positions and issues not yet determined in existing case law. The Sixth Circuit found that the underlying choice of law issue on which liability would rest is so complex that the District Court failed to perform a sufficiently rigorous analysis. At the same time, if the result of that more rigorous analysis is a reversal of course resulting in a determination that Ohio law governs the contract between Wise and Petitioners' client the Court of Appeals' decision equates the mere request for relief (and determination of choice of law) with "sham" and fraudulent pleadings.

First, "if such [First Amendment] protection existed" for a prayer for relief to a court, as stated by the Panel, it *would* protect these Petitioners from the class action claim based on the prayer for relief in the state court suit. As it stands, Petitioners (a law firm and its lawyers) face liability for making a prayer for relief that had a reasonable basis in fact and law (so reasonable that the District Court in this case agreed with them). The Sixth Circuit's Opinion implicitly recognized that the prayer for relief might have been successful in the state court (but for the Plaintiff's bankruptcy which prevented any ruling in the state court). However, the Sixth Circuit's footnote ruling on this Constitutional issue effectively allows the

Noerr-Pennington doctrine to be trumped by the FDCPA. As this Court knows, an act of Congress does not take precedence over the Constitution. *Marbury v. Madison*, 5 U.S. 137, 177-178, 2 L.Ed. 60, 73-74 (1803). *See, also, Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876; 175 L. Ed. 2d 753 (2010) (recognizing that a statute cannot override the protections of the First Amendment).

Allowing this suit to proceed does not merely chill a lawyer's (and thus, her client's) petitioning speech, but freezes it altogether. Courts have repeatedly held that the FDCPA is a strict liability statute, imposing liability even for unintentional violations. *Russell v. Equifax ARS*, 74 F.3d 30, 33 (2d Cir. 1996); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir. 1997); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006); *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008). Furthermore, lawyers have been denied the defense of litigation immunity in FDCPA cases. *Sayyed v. Wolpoff & Abramson, LLP*, 485 F.3d 226, 229-30 (4th Cir. 2007). The First Amendment is the last refuge for lawyers who wish to advocate in good faith for their clients.

If a lawyer incurs liability under the FDCPA merely for asking a court for relief, then creditors' attorneys cannot carry out their ethical duties of competence, diligence, and advocacy when clients need them to advance, clarify, or, extend the law or make a good-faith argument to reverse existing law. This case is the poster child for such a problem. The Sixth Circuit does not foreclose the possibility that Petitioners' client was entitled to the relief requested. Rather, it recognizes the possibility that Utah

law governs the attorney's fees issue and finds that the choice of law determination necessary to resolve that issue is a highly complex one. If the District Court on remand ultimately decides that Ohio law governs, then Petitioners will face a claim under a strict liability statute for having made not a sham or fraudulent prayer for relief but one so plausible that the District Court found it to be proper.

This Court has warned that the FDCPA should not be assumed to compel absurd results when applied to debt collecting attorneys. *Jerman*, 559 U.S. at 600, 130 S.Ct. 1605, 1622, 176 L.Ed.2d 519, 539. By ruling that the FDCPA can trump the First Amendment in this case the Sixth Circuit has disregarded that warning. The consequence is an additional problem that this Court has warned against – lawyers will face liability for an unsuccessful suit, even when the suit makes no factual representations that are false. *See Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995); *Jerman*, 130 S.Ct. at 1622; *see also*, *Stratton v. Portfolio Recovery Associates*, 770 F.3d 443 (6th Cir. 2014) (Batchelder, J., dissenting). Respectfully, making attorneys the strictly liable insurers of their clients' success falls within the realm of 'absurd" results.

II. The 9th Circuit Decision in *Sosa* Provides a Circuit Split Where Demands Incidental to The State Court Suit Are Also Protected

In *Sosa v. DirecTV* the defendant DirecTV sent out pre-suit demand letters to thousands of recipients alleging that the recipients had illegally accessed the satellite television signal. *See Sosa v. DirecTV,* 437 F.3d 923, 936-37 (9th Cir. 2006). Sosa, one of the recipients of

the pre-suit demand letters filed a class action lawsuit against DirecTV alleging violations of the federal RICO Act. *Id.* The 9th Circuit found:

> In light of *BE & K's* application of *Noerr–Pennington* to the NLRA, we conclude that the *Noerr–Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause. *See White v. Lee,* 227 F.3d 1214, 1231 (9th Cir.2000) (holding, before *BE & K*, that because it "is based on and implements the First Amendment right to petition," the *Noerr–Pennington* doctrine is not limited to the antitrust context, but "applies equally in all contexts"). Under the *Noerr–Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise.[5] We will not "lightly impute to Congress an intent to invade ... freedoms" protected by the Petition Clause. *Noerr,* 365 U.S. at 138, 81 S.Ct. 523.
>
> In determining whether the burdened conduct falls under the protection of the Petition Clause, we must give adequate "breathing space" to the right of petition. *BE & K,* 536 U.S. at 531, 122 S.Ct. 2390. On the other hand, neither the Petition Clause nor the *Noerr–Pennington* doctrine protects sham petitions, and statutes need not be construed to permit them. Where,

> however, the burdened conduct could fairly fall within the scope of the Petition Clause and a plausible construction of the applicable statute is available that avoids the burden, we must give the statute the reading that does not impinge on the right of petition.[6]

Sosa v. DIRECTV, Inc., 437 F.3d 923, 931-32 (9th Cir. 2006). The Ninth Circuit has since confirmed the ruling in *Sosa* by affirming a similar case that applied the *Noerr-Pennington* doctrine in accordance with *Sosa* (finding those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct") *Satre v. Wells Fargo Bank, NA*, 507 F. App'x 655 (9th Cir. 2013).

The parallels between this case the *Sosa* are obvious, but the Circuits have reached opposite results. The plaintiffs in *Sosa* received pre-suit demand letters from DirecTV (which allegedly violated the federal RICO Act) requesting settlement of the claims, and the Court found those demands to be Constitutionally protected. *Sosa, supra.* Here, Wise pled (falsely and without any factual assertions) that Petitioners demanded attorney's fees in contexts outside the litigation, and the Court of Appeals held that any such demands were not Constitutionally protected.

Unlike the Ninth Circuit in *Sosa*, the Sixth Circuit has left the door open to liability against the Petitioners by allowing Wise's case to continue. Wise has alleged generally, and without any specific facts, that he received requests for fees outside of the prayer to the complaint, and he makes general non-factual allegations that others may

have received such requests. So far as any alleged pre-suit or post-suit requests for attorney's fees are concerned, the Ninth Circuit has found that these communications would be protected by the *Noerr-Pennington* doctrine as they were incidental to litigation. *See Sosa, supra.* However, in this case the Sixth Circuit found that "[e]ven if such protection existed, it would not protect these defendants because Wise pled that they demanded attorney's fees in contexts outside the litigation. " This places the two opinions in direct opposition to one another. Petitioners respectfully request that the Court grant certiorari so that the Circuit split on this important Constitutional issue can be resolved.

III. The 6th Circuit's Application of the FDCPA to Communications with Courts Is at Odds with Decisions of the 7th and 8th Circuits

In *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1141, 181 L. Ed. 2d 1017 (2012) the Court of Appeals held that the FDCPA does not apply to communications to judges, such as pleadings. In *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814 (8th Cir. 2012), the Court of Appeals held that the FDCPA rejected the concept of FDCPA liability based solely upon an unsuccessful state court Claim. "If judicial proceedings are to accurately resolve factual disputes, a lawyer 'must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' testimony was false.'" Id. at 819-20, *citing Imbler v. Pachtman*, 424 U.S. 409, 439, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (White, J., concurring).

The decision of the Sixth Circuit Court of Appeals in this case is in conflict with *O'Rourke* and *Hemingsen*. The Court of Appeals in the instant case would permit Petitioners to face potential liability under the FDCPA based upon a communication with the state court.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Court of Appeals should be reversed.

Respectfully Submitted,

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July 2015

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 23, 2015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-3278

DAWSON W. WISE,

Plaintiff-Appellant,

v.

ZWICKER & ASSOCIATES, P.C.; ANNE SMITH; DEREK SCRANTON,

Defendants-Appellees.

April 23, 2015, Filed

JUDGES: BEFORE: SILER, SUTTON, and STRANCH, Circuit Judges.

OPINION

ORDER

The court received a petition for rehearing *en banc*. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision

of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing *en banc*.

Therefore, the petition is denied.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MARCH 12, 2015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-3278

DAWSON W. WISE,

Plaintiff-Appellant,

v.

ZWICKER & ASSOCIATES, P.C.; ANNE SMITH; DEREK SCRANTON,

Defendants-Appellees.

December 3, 2014, Argued
March 12, 2015, Decided
March 12, 2015, Filed

JUDGES: Before: SILER, SUTTON, and STRANCH, Circuit Judges.

OPINION BY: JANE B. STRANCH

OPINION

JANE B. STRANCH, Circuit Judge. Plaintiff Dawson Wise appeals the district court's judgment on

the pleadings dismissing his claims under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, et seq., and the Ohio Consumer Sales Practices Act (OCSPA), Ohio Rev. Code §§ 1345.02, 1345.03. The claims arise from an attempt by the defendants—two lawyers and their law firm—to collect attorney's fees pursuant to a consumer credit card agreement (Agreement). Ohio does not enforce provisions for the collection of attorney's fees in such consumer contracts, but Utah, the state designated in the Agreement's choice-of-law clause, does. Wise contends that Ohio law governs, barring the fees, and that the defendants' state court complaint was therefore a false or misleading representation or an unfair practice in violation of the FDCPA. The district court concluded on the basis of the pleadings and attached documents that Utah law applies to the issue and dismissed the case. Because the pleadings do not resolve the question of which law would govern the attorney's-fee question, we REVERSE and REMAND the case for further proceedings on the federal claim. On the state law claim, however, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

Wise is a resident and citizen of Akron, Ohio. American Express Centurion Bank (American Express) extended an offer of credit to Wise by sending him a credit card and accompanying "Agreement Between American Express Credit Cardmember and American Express Centurion Bank." *See* R. 1-2. Wise accepted the offer by keeping and using the credit card. *Id*. at PageID 13 ("When you keep, sign, or use the Card issued to you ... you agree to the terms of this Agreement."). The Agreement provides:

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> This Agreement and your Account, and all questions about their legality, enforceability and interpretation, are governed by the laws of the State of Utah (without regard to internal principles of conflicts of law), and by applicable federal law. We are located in Utah, hold your Account in Utah, and entered into this Agreement with you in Utah.

Id. at PageID 16. It also provides, in the event of default: "You agree to pay all reasonable costs, including reasonable attorneys' fees, incurred by us [] in connection with the collection of any amount due on your Account." *Id*. at PageID 15.

Wise defaulted on the credit card account, and American Express retained Zwicker & Associates, P.C., to collect the debt. Two attorneys at the firm, Derek Scranton and Anne Smith, contacted Wise and demanded payment on the debt, as well as attorney's fees for their collection activities. They also filed suit in the Ohio Court of Common Pleas in Summit County for breach of contract and unjust enrichment. The prayer for relief in the state court lawsuit recites, in relevant part, "WHEREFORE, the Plaintiff, AMERICAN EXPRESS CENTURION BANK demands judgment against Defendant(s), DAWSON WISE, on Counts One [Breach of Contract] and Two [Unjust Enrichment] of its Complaint, in sum of [the amount owed] ... plus attorney fees." R. 1-1, PageID 12. Wise subsequently filed for bankruptcy, staying the state court lawsuit.

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Wise filed this putative class action lawsuit in the Northern District of Ohio against the two attorneys and their firm, seeking to represent consumers from whom they demanded attorney's fees. Noting that Ohio law bars contracts that would require payment of attorney's fees on the collection of consumer debt, Wise contends that their demands for fees, both prior to and during litigation, violated the federal FDCPA and state OCSPA.

The defendants first filed an unsuccessful motion to compel arbitration, based on an arbitration clause in the Agreement. Noting that the Agreement contained a choice-of-law clause designating Utah and that the application of Utah law to the arbitration question would not violate a fundamental policy of Ohio, the district court applied Utah law and determined that the case fell outside the scope of the arbitration clause.

The defendants then filed a motion for judgment on the pleadings, which the district court granted. The court concluded that Utah law governed and allowed for the collection of attorney's fees, that there was therefore no violation of the FDCPA, and that the Agreement was not governed by the OCSPA. Wise appealed.

II. DISCUSSION

A. Federal FDCPA Claims

Congress passed the FDCPA to address "what it considered to be a widespread problem" of consumer abuse at the hands of debt collectors. *Frey v. Gangwish*,

970 F.2d 1516, 1521 (6th Cir. 1992). It sought to "eliminate abusive debt collection practices by debt collectors [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. §1692(e). In reaction to the size of the problem, it crafted "an extraordinarily broad" remedial statute. *Frey*, 970 F.2d at 1521. Among other restrictions, the Act bars debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, or using "unfair or unconscionable means to collect or attempt to collect any debt," *id*. § 1692f. In each section, Congress provided a non-exhaustive list of examples of banned practices.

Wise brought FDCPA claims under both the false-or-misleading-representations section, § 1692e, and the unfair-practices section, § 1692f, but both sets of claims reflect the same basic allegation. Wise contends that Ohio law barred American Express from obtaining attorney's fees on the collection of his debt; the actions of the defendants in representing American Express—demanding attorney's fees before the lawsuit and including the attorney's fees provision in the complaint's prayer for relief—were therefore misleading.[1]

1. Specifically, Wise points to the following examples from the statute's nonexhaustive lists of false and misleading representations and unfair practices:

> o § 1692e(2)(A): "The false representation of . . . the character, amount, or legal status of any debt."

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Under the FDCPA, a plaintiff does not need to prove knowledge or intent to establish liability, nor must he show actual damages, which "places the risk of penalties on the debt collector that engages in activities which are not entirely lawful, rather than exposing consumers to unlawful debt-collector behavior without a possibility for relief." *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 449 (6th Cir. 2014). In other words, if a debt collector seeks fees to which it is not entitled, it has committed a prima facie violation of the Act, even if there was no clear prior judicial statement that it was not entitled to collect the fees. *See id.* at 450—51. Notably, in *Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich L.P.A.*, 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010), the Supreme Court held that mistakes of law regarding the FDCPA itself constitute violations of the Act for which a debt-collector attorney may not invoke the Act's bona fide error defense, 15 U.S.C. § 1692k(c). *Id.* at 604—05. The Supreme Court declined to address whether the defense is available for mistakes of law other than the FDCPA itself, *id.* at 580 n.4, but the discussion

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o § 1692e(2)(B): "The false representation of . . . compensation which may be lawfully received by any debt collector for the collection of a debt."

o § 1692e(5): "The threat to take any action that cannot legally be taken . . . ."

o § 1692f(1): "The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

of the affirmative defense makes clear that mistakes of state law can give rise to liability.

As the district court noted, the present case turns on the question of whether Utah or Ohio law governs the contract. This court has generally characterized Ohio law as "prohibit[ing] creditors from recovering attorney's fees in connection with the collection of a consumer debt," *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008). It would be more precise to describe Ohio law as refusing to enforce such fee-shifting provisions. "Ohio has long adhered to the 'American rule' with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as part of the costs of litigation." *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009 Ohio 306, 906 N.E.2d 396, 400 (Ohio 2009). The exceptions to the rule are "when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant." *Id.* (citation omitted). Ohio common law historically refused to enforce contracts for fee-shifting, particularly in the context of collection on a defaulted debt. *See Miller v. Kyle*, 85 Ohio St. 186, 97 N.E. 372, 372--73, 9 Ohio L. Rep. 526 (Ohio 1911) ("In this state it has been firmly established, and long and constantly maintained, that such contracts for the payment of counsel fees upon default in payment of a debt will not be enforced."); *see also Leavans v. Ohio Nat'l Bank*, 50 Ohio St. 591, 34 N.E. 1089, syllabus[2] (Ohio 1893). In more

2. The syllabus of an Ohio Supreme Court opinion is binding law. Ohio Rep. Op. R. 2.2.

recent years, Ohio courts have enforced fee-shifting provisions in a number of contracts, while maintaining the law of *Miller* and *Leavans*. *See Wilborn*, 906 N.E.2d at 401 & n.2. Finally, in 2000, the Ohio General Assembly passed a statute allowing for enforcement of fee-shifting provisions in certain commercial credit contracts. The statute limits the enforceability of such provisions to contracts for debt that is not "incurred for purposes that are primarily personal, family, or household," and only if that debt is in an amount greater than $100,000. Ohio Rev. Code § 1319.02(A)(1).[3] The General Assembly's exclusion of "personal, family, or household" debt reinforces Ohio's common-law rule that such provisions are not enforceable.

If Ohio law clearly applied to this case, the analysis could end here; the fee-shifting provision would be unenforceable. *See Barany-Snyder*, 539 F.3d at 332 (discussing fee-shifting on a contract for personal indebtedness between an Ohio university and an Ohio student). And the defendants' demands for fees during and outside litigation would therefore be misleading. The Agreement states, however, that "This Agreement and your Account, and all questions about their legality, enforceability and interpretation, are governed by the laws of the State of Utah." And Utah law freely enforces fee-shifting provisions in consumer credit agreements: "A consumer credit agreement may provide for the payment of reasonable attorney's fees in the event of default and referral to an attorney." Utah Code § 70C-2-105.

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3. This statute was previously codified at Ohio Rev. Code § 1301.21.

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The question presented is whether the Summit County Common Pleas Court would have applied Ohio or Utah law in deciding whether to enforce the fee-shifting provision.[4] Ohio has adopted sections 187 and 188 of the Restatement (Second) of Conflict of Laws to govern choice of law in contract disputes. *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St. 3d 474, 2001 Ohio 100, 747 N.E.2d 206, 220 (Ohio 2001). Because the Sixth Circuit, in cases under federal common law, has also adopted these sections and the Ohio approach to applying them, both Ohio and Sixth Circuit precedents shed light on the appropriate application of the Restatement. *See Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 570--71 (6th Cir. 2001) (quoting, in case brought under ERISA, *Int'l Ins. Co. v. Stonewall Ins. Co.*, 86 F.3d 601, 606 (6th Cir. 1996), a case applying Ohio choice-of-law principles).

Before actually answering the choice-of-law question, we must respond to Wise's misunderstandings regarding choice-of-law analysis. Wise first argues that the court should apply the choice-of-law principles for torts because

4. Wise argues that *Gionis v. Javitch, Block, Rathbone, LLP*, 238 F. App'x 24 (6th Cir. 2007), makes the choice-of-law provision irrelevant. The agreement at issue in *Gionis* did include a choice-of-law provision that favored a state in which fee-shifting provisions are enforceable, but the *Gionis* defendants waived the argument that the other state's law applied. *See id.* at 30 n.1 (Steeh, D.J., dissenting). All parties therefore agreed that Ohio law would govern the fee-shifting provision, rendering it unenforceable. *Gionis* held that an affidavit asserting a right under an unenforceable provision of a debt contract constitutes a misrepresentation of the debt and a threat to take action that cannot legally be taken. *Gionis*, 238 F. App'x at 29—30.

the FDCPA sounds in tort. But the issue on which there is a choice-of-law dispute is a contract issue—the enforceability of a provision of the Agreement. Wise then suggests that, if contract choice-of-law principles do apply, the court should take notice that the Agreement was a contract of adhesion—that American Express fully drafted the Agreement, including its designation of Utah law, without an opportunity for Wise to negotiate. He argues that the court should therefore disregard the choice-of-law provision of the contract because it does not reflect a choice of both parties. Regardless of whether the credit card agreement was adhesive under Ohio or Utah law, Wise's blanket conclusion is faulty. The Restatement generally respects choice-of-law provisions, even in adhesion contracts. But it addresses such contracts, specifying that the adhesive nature of a contract merits more careful scrutiny to ensure that application of the choice-of-law provision does not "result in substantial injustice." Restatement (Second) of Conflict of Laws § 187, cmt. b.

The appropriate analysis therefore begins with § 187, which instructs courts to generally respect choice-of-law provisions. *See Tele-Save Merchandising Co. v. Consumers Distrib. Co., Ltd.*, 814 F.2d 1120, 1122 (6th Cir. 1987) ("Ohio choice-of-law principles strongly favor upholding the chosen law of the contracting parties."). The Restatement then sets out two exceptions. The court should apply the choice-of-law provision unless either

> (a) the chosen state has no substantial relationship to the parties or the transaction

> and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2). The first exception does not apply to this case because there is a reasonable basis for the parties' choice of Utah law—American Express's Utah citizenship.

The second exception requires a more complicated, three-part analysis. The court must determine (1) whether enforcing the fee-shifting provision of the Agreement would be contrary to a fundamental policy of Ohio; (2) whether Ohio has a materially greater interest in the determination of the particular issue; and (3) whether Ohio law would control the Agreement in the absence of the choice-of-law provision. *See DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 924 (6th Cir. 2006) (applying federal common law).

As the district court recognized, it would be against the fundamental policy of Ohio to enforce the fee-shifting provision. A rule of law "which is designed to protect a person against the oppressive use of superior

bargaining power" will generally be interpreted to reflect the fundamental policy of a state. *Century Bus. Servs., Inc. v. Barton*, 197 Ohio App. 3d 352, 2011 Ohio 5917, 967 N.E.2d 782, 794—95 (Ohio Ct. App. 2011) (quoting Restatement § 187 cmt. g); *see also Tele-Save Merch. Co.*, 814 F.2d at 1123 (citing § 187 cmt. g). vo Ohio's policy against enforcing fee-shifting provisions in consumer-debt contracts protects customers like Wise against the creditor's superior bargaining power. A fee-shifting provision also encourages creditors to sue for defaulted debt and discourages debtors from fighting back. Fee-shifting presents "an ongoing threat that likely higher attorney fees would be assessed so long as the litigation continues." *Gionis*, 238 F. App'x at 29.

The second question is whether Ohio "has a materially greater interest than the chosen state in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 187(b)(2). For this question, Ohio courts evaluate the relationship of the two states to the agreement. Considering a consumer investment contract in *Sekeres*, the Ohio Supreme Court emphasized the location of the "act which ultimately created the contract" and the location of performance of the contract to determine whether Ohio had a "materially greater interest" than the chosen state. *Sekeres*, 508 N.E.2d at 942—43. In *Jarvis v. Ashland Oil, Inc.*, 17 Ohio St. 3d 189, 17 Ohio B. 427, 478 N.E.2d 786 (Ohio 1985), the Ohio Supreme Court determined that Ohio did not have a materially greater interest in a contract where neither party to the contract was an Ohio citizen and the contract was not performed in Ohio. *Id.* at 789. Similarly, in the federal-law case of *DaimlerChrysler*, this

court considered the location of the negotiation, execution, and performance of the contract. 448 F.3d at 927. The *DaimlerChrysler* court also considered the location of the parties with a relevant interest in the specific provision at issue. *Id.* ("[N]one of the Michigan entities involved in this litigation has an interest in which claimant prevails. The Plan will pay out the same amount of money regardless of to whom it is ultimately paid."). Considering these cases together, a few main contacts emerge as primary considerations in determining whether a state has a materially greater interest in enforcement of a provision: the citizenship of the parties to the contract; the locations of creation, negotiation, and performance of the contract; and the location of parties with an interest in the specific provision of the contract.

Returning to Wise's Agreement, there is not enough evidence about these contacts to determine whether Ohio has a materially greater interest than Utah. One party to the contract is an Ohio citizen. "[T]he act which ultimately created the contract" was Wise's use or retention of the credit card, which plausibly occurred in Ohio. *See Sekeres*, 508 N.E.2d at 943. Both Wise (in Ohio) and American Express (in Utah) have an interest in the fee-shifting provision--one of them will be stuck with the lawyers' bill. The location of performance of the agreement is less clear. "[A] bank credit card, as in this case, is a three-party, three-part agreement between the bank, the consumer and the merchant." *Bank One, Columbus, N.A. v. Palmer*, 63 Ohio App. 3d 491, 579 N.E.2d 284, 285 (Ohio Ct. App. 1989) (citing *Preston State Bank v. Jordan*, 692 S.W.2d 740 (Tex. App. 1985)). The promise by the bank is to

advance funds to merchants on the consumer's behalf, in exchange for a promise by the consumer to repay those amounts on a monthly basis. *Jordan*, 692 S.W.2d at 742. There is no information in the record regarding the location of American Express's advances to merchants on Wise's behalf. As for Wise's promise to repay, the performance of such a promise occurs where the contract requires that the repayment be made. *See* Restatement (Second) of Conflict of Laws § 195. Although "[m]oney lent by a bank is usually repayable at the bank itself," *id.* § 195 cmt. d, the Agreement had a specific provision that overrode this default rule. The Agreement instructed Wise to send payments "to the payment address shown on your billing statement." R. 1-2, PageID 14. In light of the national character of American Express, it is plausible that the payment address is located in Ohio. *See Homa v. American Express Co.*, 558 F.3d 225, 232 (3d Cir. 2009) ("[American Express Centurion Bank] is a wholly owned subsidiary of [American Express Corporation], a New York corporation, and, despite the contract's statement that AECB is located in Utah, Homa must mail his credit card payments to Florida.") *abrogated on other grounds by AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

Instead of considering the relevant contacts, the district court simply noted that each state had some policy interest in the enforceability or non-enforceability of the provision and recited the statements from the Agreement itself: "Comparing both [Ohio's and Utah's] interests and considering that one party is located in Utah, holds the debtor's account in Utah, and entered into the Agreement

in Utah, the Court cannot say that Ohio's interest is materially greater than Utah's." R. 40, PageID 416. The presence of a non-Ohio party to a contract and its general business operation outside the state is insufficient to determine that Ohio does not have a materially greater interest in the contract. *See, e.g., DaimlerChrysler*, 448 F.3d at 927.

The final inquiry is whether, "under the rule of § 188, [Ohio] would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement (Second) of Conflict of Laws § 187(b)(2). Section 188 provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

We must therefore also look to the factors articulated in § 6:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Application of §§ 6 and 188 of the Restatement requires a sensitive, fact-specific analysis. "The key to our analysis is that the choice of law principles found in the Restatement need not be given equal weight in every circumstance, nor are they intended to be exclusive. They also are relatively elastic, and in some cases equivocal." *Int'l Ins. Co.*, 86 F.3d at 606. "[E]ven when sections 6 and 188 are read together, it is clear they only provide a broad general framework for the resolution of choice of law issues in the context of a contract dispute. Within that framework, a judge must balance principles, policies, factors, weights, and emphases to reach a result, the derivation of which, in all honesty, does not proceed with mathematical precision." *Id.*

In *Jarvis v. First Resolution Mgmt. Corp.*, 2012 Ohio 5653, 983 N.E.2d 380 (Ohio Ct. App. 2012) (discretionary appeal accepted), the Ninth District Court of Appeals—which takes appeals from the Summit County Court of Common Pleas—applied this test to a credit card agreement without a choice-of-law provision. *Id.* at 387—88. As relevant factors, the *First Resolution* court examined where the consumer primarily used the card (where the card issuer performed its obligation under the agreement), where she paid her bill (performing her obligation under the agreement), where the final act creating the agreement took place, and where she decided not to pay the amounts owed. *Id.* at 388.

A complete analysis of these factors would have revealed just how little information was in the record. Again, the ultimate creation of the contract plausibly occurred in Ohio, and it is not clear where the performance of the contract occurred. It is plausible from the complaint that Wise decided not to make payments in Ohio. The contacts with Utah relate to the contract in ways not considered relevant by the *First Resolution* court: One party to the contract is a Utah citizen, the initial offer was made from Utah, and the account is held in Utah. It is plausible that many of the relevant contacts will relate more closely to Ohio, such that Ohio law would apply absent the choice-of-law provision, but any certainty on the issue would be premature.

In summary, by adopting § 187 of the Restatement, Ohio recognized two principles—that choice-of-law provisions in contracts are generally respected, and that § 187(2) contains exceptions to this principle that entail fact-intensive inquiry. Applying the exception in § 187(2)(b) begins with a determination of whether the choice-of-law provision to be enforced would violate a fundamental policy of Ohio. Because the fee-shifting provision here conflicts with such a fundamental policy, a careful examination of the contacts of each state to the agreement was necessary to determine whether Ohio has a materially greater interest in the fee-shifting provision and, if so, whether its law would have applied absent a choice-of-law provision. The pleadings do not provide sufficient facts to make a determination on these two issues, so the court should not have granted the motion for judgment on the pleadings. Wise can provide answers to

many of the unresolved questions above, including where he paid his bills, where he signed or accepted the credit card, where he made his purchases, and where he decided not to repay. It is therefore possible that the district court could resolve the choice-of-law issue with an affidavit from him. However, the district court may also determine that the issue would benefit from limited discovery into the contacts of each state to the contract.[5]

B. Ohio OCSPA Claim

Wise also appeals the dismissal of his claim under the OCSPA, which provides: "No supplier shall commit an unfair or deceptive act or practice in connection with

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5. The defendants' argument that the *Noerr-Pennington* doctrine limits the application of the FDCPA to their activities is inapposite. The FDCPA specifically includes lawyers and litigation activities within its purview. *See Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). The defendants present no cases in which a court has applied the *Noerr-Pennington* doctrine to FDCPA claims. In fact, this circuit has already rejected *Noerr-Pennington* protection for false statements in a debt-collector's complaint, recognizing that the Petition Clause does not protect "sham petitions, baseless litigation, or petitions containing 'intentional and reckless falsehoods.'" *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 616 (6th Cir. 2009) (quoting *McDonald v. Smith*, 472 U.S. 479, 484, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985)). The defendants attempt to distinguish *Hartman* by maintaining that there is a special protection for representations and demands made only in a complaint's prayer for relief. Even if such protection existed, it would not protect these defendants because Wise pled that they demanded attorney's fees in contexts outside the litigation.

a consumer transaction." Ohio Rev. Code § 1345.02(A); *see also* § 1345.03(A) (similarly protecting against "unconscionable" acts and practices). The statute defines "consumer transaction" to specifically exclude transactions between consumers and financial institutions, as defined at Ohio Rev. Code § 5725.01, with certain exceptions that do not apply here. Ohio Rev. Code § 1345.01(A). American Express is a "state chartered industrial loan bank chartered in the state of Utah," R. 1-1, PageID 10, and as such, meets the definition of a financial institution in Ohio Rev. Code § 5725.01(A)(3).

A debt collector is governed as a "supplier" by the OCSPA if the underlying debt was accrued during a consumer transaction. *See, e.g., Schroyer v. Frankel*, 197 F.3d 1170, 1177 (6th Cir. 1999) (concerning debt collection for an unpaid plumbing bill); *Celebrezze v. United Research, Inc.*, 19 Ohio App. 3d 49, 19 Ohio B. 131, 482 N.E.2d 1260, 1262 (Ohio Ct. App. 1984). However, Wise's allegations of unfair, deceptive, and unconscionable activity all arise in connection with one transaction: his credit card agreement with American Express. This transaction between a consumer and a financial institution falls outside Ohio's statutory definition of a "consumer transaction." There is some authority holding that the OSCPA applies to debt collection activities where the debt arises out of a transaction with a financial institution but is later sold to another entity that is not a financial institution. *See Williams v. Javitch, Block & Rathbone, LLP*, 480 F. Supp. 2d 1016, 1024 (S.D. Ohio 2007). In this case, however, the debt has always been held by American Express, a financial institution; its agents fall outside the

scope of the OCSPA. *See Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 412 (6th Cir. 1998); *Martin v. Gen. Motors Acceptance Corp.*, 160 Ohio App. 3d 19, 2005 Ohio 1349, 825 N.E.2d 1138, 1147 (Ohio Ct. App. 2005). The claim under the OCSPA was properly dismissed.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of the state law claim, REVERSE the dismissal of Wise's federal claim, and REMAND for further proceedings in accordance with this opinion.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED FEBRUARY 21, 2014

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

CASE NO. 5:12-cv-1653

DAWSON W. WISE,

Plaintiff,

vs.

ZWICKER & ASSOCIATES, PC, *et al.*,

Defendants.

February 21, 2014, Decided
February 21, 2014, Filed

JUDGES: HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE.

OPINION BY: SARA LIOI

Appendix C

OPINION

ORDER AND OPINION

This matter is before the Court on defendants' motion for judgment on the pleadings. (Doc. No. 26.) Plaintiff has filed a response (Doc. No. 30), and defendants have filed a reply. (Doc. No. 35.) Also before the Court is plaintiff's motion for leave to file a response to defendants' reply (Doc. No. 36), which is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

American Express Centurion Bank ("American Express") extended credit to plaintiff, who thereby assented to the "Agreement Between American Express Credit Cardmember and American Express Centurion Bank" ("Agreement"). (Doc. No. 1-2.) The Agreement provides:

> This Agreement and your Account and all questions about their legality, enforceability and implementation, are governed by the laws of the State of Utah (without regard to internal principles of conflicts of law) and by applicable federal law. We are located in Utah, hold your Account in Utah, and entered into this Agreement with you in Utah.

(*Id.* at 16.) The Agreement also states, "You agree to pay all reasonable costs, including reasonable attorneys' fees, incurred by us [] in connection with the collection of any amount due on your Account." (*Id.* at 15.)

Plaintiff defaulted. On June 27, 2011, American Express filed suit against plaintiff in the Summit County Common Pleas Court. (Doc. No. 1 at 3.) American Express demanded "judgment against Defendant(s), DAWSON WISE, on Counts One and Two of its Complaint, in the sum of $40,047.98, plus pre-judgment interest at the statutory rate from the date of filing to the date of judgment, plus post-judgment interest on the balance at the statutory rate from the date of judgment, *plus attorney fees*, plus court costs." (Doc. No. 1-1 at 12 (emphasis added).) In the Summit County litigation, defendant Zwicker & Associates, a corporation specializing in debt collection, and two of its attorneys, defendants Derek W. Scranton and Anne M. Smith (collectively, "defendants"), represented American Express. (Doc. No. 1 at 3.)

Based upon defendants' demand in the state court complaint for attorney fees (Doc. No. 1-1 at 12), as well as defendants' efforts to "[seek] such attorney fees outside of the formal proceedings of state court[,]" plaintiff sued defendants for violating the Fair Debt Collection Practices Act ("FDCPA")[1] and the Ohio Consumer Sales Protection Act ("OCSPA"). (Doc. No. 1 at 4.) Specifically, plaintiff asserts violations of 15 U.S.C. § 1692e(2)(A)-(B); 15 U.S.C. § 1692e(5); 15 U.S.C. § 1692f(1); and 15 U.S.C. § 1692e(10).[2] Plaintiff also asserts violations of Ohio Rev. Code §§ 1345.02 and 1345.03, both of which prohibit certain acts in connection with consumer transactions. In essence, plaintiff claims that Ohio law prohibits seeking

1. The parties do not dispute that the Fair Debt Collection Practices Act applies to these defendants: "attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." *Heintz v. Jenkins*, 514 U.S. 291, 299, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995).

Appendix C

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2. In relevant part, the statutes provide:

> A debt collector may not use any false, deceptive or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> ***
>
> (2) The false representation of--
>
> (A) the character, amount, or legal status of any debt; or
>
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
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> ***
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
>
> ***
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a customer.

15 U.S.C. § 1692e.

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

attorney fees in connection with consumer debt collection, rendering defendants' demand for fees a "false, deceptive, misleading, and threatening" debt collection practice in violation of state and federal law. (Doc. No. 1 at 4.) In his complaint, plaintiff details three scenarios in which defendants wrongfully demanded attorney fees: (1) in the state court complaint filed by defendants; (2) "[e]ven before filing a complaint in state court against consumers such as named [p]laintiff[;]"[3] and (3) "outside the formal proceedings of state court" after filing the state court complaint. (Doc. No. 1 at 3-4.)

Defendants filed a motion to compel arbitration (Doc. No. 17), which was denied. (Doc. No. 21.) In its Memorandum Opinion and Order denying the motion to compel, the Court ruled that the Agreement between plaintiff and American Express "contains a choice of law clause designating Utah law" as the governing law and further finding that "Ohio law calls for the clause to be applied, [so] the Court will evaluate the Agreement under Utah law." (Doc. No. 21 at 217.) Based, in part, upon the choice of law clause, defendants have filed a motion for judgment on the pleadings (Doc. No. 26), claiming that,

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(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

15 U.S.C. § 1692f.

3. Plaintiff initially sought to certify a class, but the Court denied without prejudice his motion for certification. (Doc. No. 22.)

because Utah law applies and provides for attorney fees, plaintiff's complaint fails as a matter of law. In opposition, plaintiff states that Ohio law applies. (Doc. No. 30.)

II. STANDARD OF REVIEW

Under Rule 12(c), a party may move for judgment on the pleadings any time after the pleadings are closed but early enough not to delay trial. Fed. R. Civ. P. 12(c). The standard of review for a motion for judgment on the pleadings is the same as for a motion to dismiss for failure to state a claim for relief under Rule 12(b)(6). *E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001) (citing *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998)). To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must plead facts sufficient to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed. 2d 929 (2007). Although this pleading standard does not require great detail, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id*. at 555 (citing authorities).

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (quoting *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973)). The district court, however, "need not accept as

true legal conclusions or unwarranted factual inferences." *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999) (citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)). "The motion is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991) (citation omitted).

In ruling on a Rule 12(c) motion, the court considers all available pleadings, including the complaint and the answer. *See* Fed. R. Civ. P. 12(c). "The court can also consider (1) any documents attached to, incorporated by, or referred to in the pleadings; (2) documents attached to the motion for judgment on the pleadings that are referred to in the complaint and are central to the plaintiff's allegations, even if not explicitly incorporated by reference; (3) public records; and (4) matters of which the court may take judicial notice." *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 832 (N.D. Ohio 2010) (citations omitted).

III. LAW AND ANALYSIS

A. The FDCPA Claims

The Court's task is simple. It must determine whether Utah or Ohio law applies to the Agreement. If Ohio law applies, as described below, attorney fees were verboten, and plaintiff has stated a plausible claim for relief. If Utah law applies, attorney fees were proper and provided for in the Agreement. Under Utah law, plaintiff has failed to state a claim under the FDCPA.

Appendix C

In what is now Ohio Rev. Code § 1319.02, Ohio law allows recovery of attorney fees when a contract of indebtedness that includes a commitment to pay attorney fees "is enforced through judicial proceedings or otherwise after maturity of the debt." The statute specifically and unambiguously states that a contract of indebtedness does not include "indebtedness incurred for purposes that are primarily personal, family, or household." Ohio Rev. Code § 1319.02(A)(1). In short, "Ohio law prohibits creditors from recovering attorney's fees in connection with the collection of a consumer debt." *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (citing *Gionis v. Javitch, Block & Rathbone, LLP*, 238 F. App'x 24, 25 (6th Cir. 2007)). Defendants' demand for attorney fees contradicted Ohio law and may have given rise to an FDCPA claim, if Ohio law applies. On the other hand, the Utah Consumer Credit Code[4] explicitly provides for attorney fees in connection with consumer debt. "A consumer credit agreement may provide for the payment of reasonable attorney's fees in the event of a default and referral to an attorney[.]" Utah Code Ann. § 70C-2-105.[5] Both events occurred with

4. The Utah Consumer Credit Code "appl[ies] to all credit offered or extended by a creditor to an individual person primarily for personal, family or household purposes." Utah Code Ann. § 70C-1-201.

5. Plaintiff argues that "[i]t is not at all clear that Utah law would allow creditors to obtain fees from customers." (Doc. No. 30 at 310 n.12.) Plaintiff cites *Hooban v. Unicity Int'l, Inc.*, 2012 UT 40, 285 P.3d 766 (Utah 2012), in support of his meritless argument. That case, which dealt with Utah's reciprocal attorney fees statute, does nothing to contradict the plain language of the Utah Consumer Credit Code.

respect to plaintiff: he defaulted, and American Express retained attorneys to file a state court debt collection action. Under Utah law, a lawful demand for attorney fees is not false, misleading, unfair, or unconscionable and thus cannot raise an FDCPA claim.

1. The Law of the Case Doctrine

The Court issued a Memorandum Opinion and Order in this case stating "[b]ecause the Agreement contains a choice of law clause designating Utah law, and because Ohio law calls for the clause to be applied, the Court will evaluate the Agreement under Utah law." (Doc. No. 21 at 217.) Under the doctrine of law of the case, that determination ought to apply to all future proceedings in this case. *Wilkins v. Jakeway*, 44 F. App'x 724, 728 (6th Cir. 2002) ("The law of the case doctrine provides that 'findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation.'") (quoting *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994)). In a sense, the Court previously determined the issue being litigated: which state's laws apply to the Agreement. As an "issue[] previously determined[,]" enforcing the Agreement under Utah law has become the law of the case. *Holloway v. Brush*, 220 F.3d 767, 777 (6th Cir. 2000). In another sense, the issue before the Court—whether choice of law principles require Ohio *attorney fees* law to apply notwithstanding the Agreement's choice of law clause—remains undecided. *See, e.g., Wilkins*, 44 F. App'x at 728 (earlier ruling affirming denial of motion to dismiss was not law of the case in subsequent motion for summary judgment because issues and standards of

review were different). This case does not require such nuance: Utah law applies under the doctrine of law of the case as well as choice of law principles.

2. Choice of Law

This suit arises under the FDCPA, a federal statute. Yet, whether the debt collection practices complained of support an FDCPA claim depends on which state's law applies to the Agreement. *See Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 621 (6th Cir. 2012) (applying this analysis to FCRA claim requiring interpretation of underlying contract). Because the Court is not sitting in diversity, it applies contract choice of law principles derived from federal common law.[6] *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 570 (6th Cir. 2001); *see also Coppock v. Citigroup, Inc.*, No. C11-1984-JCC, 2013 U.S. Dist. LEXIS

6. In his purported response to defendants' reply, plaintiff argues for the application of tort choice of law principles. Even if the Court were to consider this pleading, the result would not change. According to plaintiff, "this case sounds in tort, not in contract, [so] it is governed by the tort choice-of-law principles enunciated in *Morgan v. Biro Mfg. Co., Inc.*, 15 Ohio St. 3d 339, 15 Ohio B. 463, 474 N.E.2d 286 (1984)." (Doc. No. 36-1 at 374.) Plaintiff's cart is miles before his horse. His argument presumes that the Agreement's provisions for attorney fees and for enforcement under Utah law somehow do not apply. It further presumes that Ohio's prohibition against attorney fees in collection of consumer debt applies instead. Presuming both, plaintiff then argues that he suffered a tortious injury and is entitled to tort choice of law principles. Plaintiff's argument is conceptually hollow. The Court must determine which law applies to the Agreement before it can determine whether a tortious injury occurred at all.

40632, 2013 WL 1192632, at *2 (W.D. Wash. Mar. 22, 2013) (applying federal common law to choice of law analysis in FDCPA case). "In the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflicts [sic] of Law[s.]" *Med. Mut. of Ohio*, 245 F.3d at 570 (quoting *Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 130 (6th Cir. 1996), *vacated in part by Bickel v. Korean Air Lines Co.*, 83 F.3d 127 (6th Cir. 1996)).[7]

Under the Restatement, the law of the state chosen by the parties to a contract will be enforced unless "[t]he chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice," or the "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue[.]" *Johnson v. Ventra Grp., Inc.*, 191 F.3d 732, 739 (6th Cir. 1999) (quoting Restatement (Second) of Conflict of Laws § 187(2)).[8] The Court must accordingly respect and apply

7. The Court's previous choice of law analysis, as well as plaintiff and defendants' arguments referred to Ohio's choice of law principles, while following the Restatement (Second) of Conflict of Laws in substance.

8. The Court does not consider § 187(1) of the Restatement. Though case law on the issue is thin, § 187(1) "concerns only those 'matters which the parties are generally considered to have the power to determine by contractual agreement.'" *Lifestyle Improvement Ctrs., LLC v. East Bay Health, LLC*, No. 2:13-cv-735, 2013 U.S. Dist. LEXIS 144685, 2013 WL 5564144, at *7 (S.D. Ohio Oct. 7, 2013) (quoting George F. Carpinello, *Testing the Limits of Choice of Law Clauses: Franchise Contracts as a Case Study*, 74

the parties' choice of Utah law unless one of the exceptions applies. Plaintiff argues that both exceptions do.

Under the first exception, plaintiff's assertion that Utah "lacks a substantial relationship to any of the parties in this case or the transaction at issue, i.e. Defendants' debt collection efforts" strains credulity. (Doc. No. 30 at 310.) Plaintiff shifts the analysis from what law should apply to the *Agreement* to what law should apply to the *parties in the case*. The Restatement asks what state's law governs the Agreement, specifically the "contractual rights and duties" of the parties to the Agreement—plaintiff and American Express. Restatement (Second) of Conflict of Laws § 187(2). American Express, a party to the Agreement but not the lawsuit, is a Utah-based corporation who entered into the Agreement with plaintiff in Utah. Utah thus has a substantial relationship to the parties to the Agreement and the Agreement itself.[9]

Marq. L. Rev. 57, 60 (1990)). Section 187(2), on the other hand, deals with "issues which at least one interested jurisdiction has not left to party autonomy." *Id*. The Court's inquiry falls solidly within § 187(2): the availability of attorney fees is an issue that Ohio has decided for the parties through an outright ban. The parties had no power to agree to attorney fees if they were indeed contrary to the applicable state's law.

9. Even if the Restatement required a state to have a substantial relationship with the parties to the lawsuit rather than the parties to the contract, the result would not change. Though plaintiff describes the transaction as "Defendants' debt collection efforts," a better description of the transaction at issue might be: defendants' debt collection efforts on behalf of a Utah client on a Utah debt arising from a Utah agreement.

Plaintiff cannot escape the Agreement's terms or his contractual rights and duties just by suing a non-party. *See Johnson*, 191 F.3d at 739 (When plaintiff sued a non-party to a contract, he was "bound by the choice of law provision negotiated for and agreed to in his contract."). The substantial relationship exception fails plaintiff.

Under the second exception, plaintiff must show that application of Utah law would be contrary to a fundamental policy of Ohio law *and* that Ohio has a materially greater interest than Utah in the issue. Defining "fundamental policy," the Sixth Circuit has stated, "a statute may embody a fundamental state policy if it is designed to protect a person against the oppressive use of superior bargaining power [as, for example, in a statute] involving the rights of an individual insured as against an insurance company[.]" *Tele-Save Merch. Co. v. Consumers Distrib. Co., Ltd.*, 814 F.2d 1120, 1123 (6th Cir. 1987) (citation omitted) (alteration in original). Utah law would contravene a fundamental policy of Ohio law when "there are significant differences in the application of the law of the two states." *Banek v. Yogurt Ventures USA, Inc.*, 6 F.3d 357, 362 (6th Cir. 1993) (citation omitted). Here, Ohio's attempt to shield Ohio debtors from extra debt collection-related fees exacted by those with superior bargaining power fits within the definition of a fundamental policy. Moreover, Utah's attorney fee policy directly opposes Ohio's attorney fee policy. Utah permits attorney fees in consumer debt collection, and Ohio does not. *Compare* Utah Code Ann. § 70C-2-105 *with Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008).

Though plaintiff has shown contravention of a fundamental Ohio policy, he has not shown that Ohio has a materially greater interest than Utah. Plaintiff states "the parties and the transaction[] share many connections to Ohio, yet seemingly none to Utah. Thus, Ohio has a materially greater interest in the transaction at issue." (Doc. No. 30 at 311.) Again, plaintiff substitutes the parties *to the lawsuit* for the parties *to the Agreement*, the proper subject of the Restatement's inquiry. Utah's interest in enforcing an attorney fees clause—in all respects proper under Utah law—in a contract signed by a Utah party abounds. Ohio also has an interest in prohibiting attorney fees in consumer debt collection cases against Ohio debtors. Comparing both interests and considering that one party is located in Utah, holds the debtor's account in Utah, and entered into the Agreement in Utah, the Court cannot say that Ohio's interest is materially greater than Utah's. *See Sekeres v. Arbaugh*, 31 Ohio St. 3d 24, 26, 31 Ohio B. 75, 508 N.E.2d 941 (1987) (Ohio did not have materially greater interest when contract was performed and given final approval in another state). Respecting the parties' choice and protecting their justified expectations, Utah law applies.

In a similar case, the Sixth Circuit, though it did not discuss choice of law,[10] tacitly approved this Court's decision to apply Utah law. It noted, when, as here, a credit card company, through counsel, "attache[s] the credit card

10. "[I]t appears that appellant waived its argument that the case may be disposed of on the basis that Arizona law . . . governed Ms. Gionis' contract[.]" *Gionis v. Javitch, Block, Rathbone, LLP*, 238 F. App'x 24, 30 n.1 (6th Cir. 2007) (Steeh, J., dissenting).

agreement to the complaint," plaintiff has "less room to argue" that the applicable law is Ohio law "since the agreement explicitly defines 'applicable law' as 'federal law and laws of [Utah].'" *Gionis v. Javitch, Block, Rathbone, LLP*, 238 F. App'x 24, 29 (6th Cir. 2007). Here, plaintiff has no room to argue for Ohio law. Plaintiff agreed to be governed by Utah law, attorney fees fall within that Agreement, and this Court already has decided that Utah law applies to the Agreement.

Under Utah law, American Express properly contracted for attorney fees. Defendants' demand for fees upon plaintiff's default was proper and lawful. Nor do defendants' alleged attempts to collect attorney fees outside of the state court complaint violate Utah law. Plaintiff has failed to state a claim for relief under the FDCPA, and his FDCPA claims are DISMISSED.[11]

B. Ohio Claims

The Court has already held that Utah law governs claims arising from the enforcement of the Agreement. Accordingly, plaintiff is precluded from bringing claims pursuant to Ohio statutory law that may have arisen in relation to the Agreement. *See Concheck v. Barcroft*, No. 2:10-cv-656, 2011 U.S. Dist. LEXIS 88964, 2011 WL 3359612, at *8 (S.D. Ohio Aug. 3, 2011). Ohio law does not

11. Having disposed of plaintiff's FDCPA claims on the basis of contract interpretation, the Court does not find it necessary to address the Noerr-Pennington doctrine, absolute privilege, or litigation immunity.

apply.[12] Moreover, given that Utah law allows for attorney fees, the actions complained of cannot rise to the level of deceptive consumer practices under Ohio law. Plaintiff's OCSPA claims are DISMISSED.

IV. CONCLUSION

For the reasons set forth above, defendants' motion for judgment on the pleadings is GRANTED. This case is DISMISSED.

IT IS SO ORDERED.

Dated: February 21, 2014

/s/ Sara Lioi

12. Even if the OCSPA or Ohio law applied to this dispute, they do not apply to defendants in this context. The OCSPA "specifically excludes transactions between financial institutions and their customers." *Lee v. Javitch, Block & Rathbone, LLP*, 522 F. Supp. 2d 945, 956 (S.D. Ohio 2007). An OCSPA claim, therefore, "would not lie against" a law firm "directly represent[ing]" a financial institution "in attempting to collect [a] debt[.]" *Id*. A cursory look at the state court complaint (Doc. No. 1-1), shows that defendants directly represented American Express, a financial institution exempt from the OCSPA; thus, "the transaction sued on would not be covered by the statute." *Id*. If defendants had instead purchased the debt from American Express, *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 976 (N.D. Ohio 2009), or had been assigned the debt, *Lee v. Javitch, Block & Rathbone, LLP*, 484 F. Supp. 2d 816, 821 (S.D. Ohio 2007), neither of which the parties allege, the OCSPA would properly apply to the dispute. In this case, however, the OCSPA does not cover the dispute or the defendants.

Appendix C

HONORABLE SARA LIOI

UNITED STATES DISTRICT JUDGE

JUDGMENT ENTRY

For all of the reasons set forth in the Court's Order and Opinion, filed contemporaneously with this Judgment Entry, defendants' motion to dismiss is GRANTED and this case is hereby DISMISSED WITH PREJUDICE. This case is closed.

IT IS SO ORDERED.

Dated: February 21, 2014

/s/ Sara Lioi

HONORABLE SARA LIOI

UNITED STATES DISTRICT JUDGE

APPENDIX D — COMPLAINT OF THE SUMMIT COUNTY COMMON PLEAS COURT, SUMMIT COUNTY, OHIO, FILED JUNE 27, 2011

SUMMIT COUNTY COMMON PLEAS COURT
SUMMIT COUNTY, OHIO

CASE NO. 2011 06 3500

AMERICAN EXPRESS CENTURION BANK
c/o ZWICKER & ASSOCIATES, P.C.
2300 LITTON LANE, SUITE 200
HEBRON, KY 41048,

Plaintiff,

vs.

DAWSON WISE
419 DORCHESTER RD
AKRON, OH 44320,

Defendant(s).

COMPLAINT

IN ACCORDANCE WITH CIVIL
RULE 4.6[C] OR [D] AND 4.6 [E] AN
ORDINARY MAIL WAIVER IS REQUESTED

1. Plaintiff is a state chartered industrial loan bank chartered in the state of Utah with a principal place of business in Salt Lake City, Utah.

2. Upon information and belief, Defendant(s) is/are an individual(s) who resides and/or maintains an address and/or domicile sufficient to allow this Court to maintain jurisdiction and venue of Plaintiff's claims.

COUNT ONE

3. Paragraphs One (1) and Two (2) are incorporated by reference as if fully repeated herein.

4. The Plaintiff extended credit to Defendant(s) at Defendant(s) request, under account number ending in 1003.

5. The statement(s) of the balance due and/or application for credit, either in writing, telephonic or electronic submission via the internet, is attached hereto as Exhibit "A."

6. By use or [ineligible] of the account, Defendant(s) became bound by the terms and conditions of the agreement, a copy of which is attached hereto as Exhibit "B."

7. Defendant(s) has/have defaulted upon the obligation to repay the Plaintiff the monies advanced for goods and services charged by failing to make the required payments when due. By virtue of the Defendant(s)' said default, Plaintiff has exercised its rights pursuant to the terms of the agreement to accelerate the time for payment of the entire balance in the amount of $40,047.98.

8. Although demand has been made upon Defendant(s) to liquidate the balance due and owing, Defendant(s) has/have failed and refused to do so.

COUNT TWO

9. Paragraphs One (1) through Eight (8) are incorporated by reference as if fully repeated herein.

10. Plaintiff restates the allegations of Count One of its Complaint as if fully set forth herein.

11. Plaintiff conferred a benefit upon Defendant(s) by extending Defendant(s) credit under the account.

12. Defendant(s) benefited from the account by accepting and retaining the goods and/or services paid for by Plaintiff's extension of credit without paying for said credit.

13. That as a result, Defendant(s) has/have been unjustly enriched by using the credit card account indicated above without paying for it.

14. As a direct and proximate result of Defendant(s) unjust enrichment, Plaintiff has been damaged in the amount of the remaining balance due and owing $40,047.98.

15. Although due demand has been made upon the Defendant(s) to liquidate the balance due and owing, Defendant(s) has/have failed and refused to do so.

Appendix D

WHEREFORE, the Plaintiff ,AMERICAN EXPRESS CENTURION BANK demands judgment against Defendant(s), DAWSON WISE, on Counts One and Two of its Complaint, in the sum of $40,047.98, plus pre-judgment interest at the statutory rate from the date of filing to the date of judgment, plus post-judgment interest on the balance at the statutory rate from the date of judgment, plus attorney fees, plus court costs.

Respectfully submitted,

ZWICKER & ASSOCIATES, P.C.

/s/_____
DEREK W. SCRANTON (0075231)
ANNE M. SMITH (0042139)
Attorneys for Plaintiff
2300 LITTON LANE, SUITE 200
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HEBRONLITIGATION@
ZWICKERPC.COM

This law firm is attempting to collect this debt for our client and any information obtained will be used for that purpose.

Appendix D

EXHIBIT A

INTENTIONALLY OMITTED

APPENDIX E — RELEVANT STATUTORY MATERIALS

15 U.S.C. § 1692e

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

2) The false representation of—

   A. the character, amount, or legal status of any debt; or

   B. any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

4) The representation or implication that nonpayment of any debt will result in the arrest

or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

   A. lose any claim or defense to payment of the debt; or

   B. become subject to any practice prohibited by this subchapter.

7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

13) The false representation or implication that documents are legal process.

14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a (f) of this title.

15 U.S.C. §1692f

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

   A. there is no present right to possession of the property claimed as collateral through an enforceable security interest;

   B. there is no present intention to take possession of the property; or

   C. the property is exempt by law from such dispossession or disablement.

7) Communicating with a consumer regarding a debt by post card.

8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

15 U.S.C. §1692k

a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

1) any actual damage sustained by such person as a result of such failure;

2)

A. in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

B. in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

e) Advisory opinions of Bureau

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.