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January 4, 2024

Hon. Richard T. Fields (Associate Justice)
Hon. Douglass P. Miller (Associate Justice)
Hon. Manuel A. Ramirez (Presiding Justice)
California Court of Appeal
Fourth Appellate District, Division Two
3389 12th Street
Riverside, CA 92501

RE: *Moten v. Transworld Systems Inc.*, Case No. E078871 (filed Dec. 18, 2023)

Dear Justices Fields, Miller, and Ramirez:

The Center for Consumer Law and Economic Justice writes to respectfully request that this Court order its opinion in *Moten v. Transworld Systems Inc.* (*Moten*) certified for publication. (Cal. Rules of Court, rule 8.1120.)

The Court's opinion in *Moten* reinforces and expands an important rule that Civil Code section 47, subdivision (b), California's litigation privilege, cannot be used to defeat allegations under the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) at the pleading stage. Because the opinion would benefit California litigants and trial courts and meets at least three of the standards for publication (California Rules of Court, rule 8.1105(c)), we believe it merits appearance in the Official Reports.

Interest of Amici Curiae

The Center for Consumer Law and Economic Justice is a research center housed at the University of California, Berkeley, School of Law. The Center works to enhance the study, research, and practice of consumer law, and encourages the development of the law affecting individuals in the marketplace. Because unlawful debt collection significantly harms consumers, the Center recognizes the need for published appellate opinions that clearly articulate the protections provided by California law, including the rule that debt collectors cannot invoke a claim of litigation privilege to bypass the Rosenthal Act.

I. The Opinion Should Be Published Because It Meets At Least Three Standards Set Forth in California Rule of Court 8.1105(c).

Rule 8.1105(c) of the California Rules of Court specifies that if an opinion meets any one of the nine standards listed in the rule, that opinion "should" be certified for publication. The opinion in *Moten* meets at least three of those standards.

1. The opinion "explains ... an existing rule of law." (Cal. Rules of Court, rule 8.1105(c)(3)).

The Court's opinion usefully explains the policy-based rationale undergirding the rule that California's litigation privilege cannot be used to evade valid claims brought under the Rosenthal Act. As the Court notes, the Legislature passed the Rosenthal Act to prohibit fraudulent and deceptive debt collection practices, and the Act would be "significantly inoperable" if debt collectors prevailed on a claim of litigation privilege when the two conflict. (Opn. at p. 18.) Because the process of debt collection implicitly involves bringing a debt collection lawsuit, all debt collectors would have to do is file an enforcement suit to insulate themselves from liability for their unlawful and fraudulent debt collection practices. Building on the reasoning in *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal. App.4th 324, 337 (*Komarova*), this Court powerfully reasoned that using the litigation privilege to bar Moten's allegations of fraud at the pleading stage "would undermine the gravamen of the Rosenthal Act." (Opn. at p. 20.)

Additionally, the Court's broad interpretation of *Komarova* will provide crucial guidance for future courts and litigants. In its argument for privilege, Transworld cited federal cases that permitted the claim of litigation privilege to defeat certain Rosenthal Act allegations. (See *Boon v. Professional Collection Consultants* (S.D. Cal. 2013) 978 F.Supp.2d 1157; *Lopez Reyes v. Konosian & Miele, LLP* (N.D. Cal. 2007) 525 F.Supp.2d 1168.) But as this Court points out, *Lopez* was decided before *Komarova*, and *Boon* interpreted *Komarova* narrowly. (Opn. at pp. 20-21.) The Court's opinion here "do[es] not view *Komarova* so narrowly." (Opn. at p. 21) Thus, this opinion will serve as a helpful guidepost signaling a broader application of the *Komarova* rule, which will prevent the litigation privilege from completely immunizing fraudulent debt collectors from liability.

2. The opinion "applies an existing rule of law to a set of facts significantly different from those stated in published opinions."(Cal. Rules of Court, rule 8.1105(c)(2)).

The type of debt collection practice involved in *Moten* is uniquely different from other state court cases. Here, Ms. Moten alleged that Transworld misrepresented its ownership of her debt – a Rosenthal Act violation that is directly implicated in filing a collection suit. While state

courts have already held that collectors cannot invoke the litigation privilege to bar borrowers from bringing debt collection claims under the Rosenthal Act, those precedents involve communication-based activities that are less directly tethered to the debt collection suits. In *Komarova*, a debt collector had incorrectly identified the plaintiff as the owner of a debt. The unlawful activity there was the continued harassment of and attempts to collect debt over the phone from the wrong person. (*Komarova, supra*, 175 Cal.App.4th at p. 333.) Likewise, in *People v. Persolve* (2013) 218 Cal.App.4th 1267, 1271-72, the deceptive activity involved misleading letters that threatened post-judgment remedies to which the collector was not entitled. Here, in *Moten*, the allegedly fraudulent Substitute Rosters were not a wholly communicative activity and have a stronger relationship to the litigation. Thus, the Court's decision to bar the litigation privilege for these facts alleged under the Rosenthal Act is distinct from prior cases and provides significant guidance for future courts and litigants.

As the Court acknowledges, federal district court cases have not uniformly applied *Komarova*. It is true that some federal decisions have adopted the reasoning of that case. (See *Welker v. Law Office of Daniel J. Horwitz* (S.D. Cal. 2010) 699 F.Supp.2d 1164, 1175 [declining to apply the litigation privilege for claims involving an improper dunning letter]; *Huy Thanh Vo v. Nelson & Kennard* (E.D. Cal. 2013) 931 F.Supp.2d 1080, 1097 [declining to apply the litigation privilege for claims involving improper debt collection from the brother of a borrower]; *Holmes v. Elec. Document Processing, Inc.* (N.D. Cal. 2013) 966 F.Supp. 2d 925, 937 [declining to apply the litigation privilege for improper service of process]; *Oei v. N. Star Capital Acquisitions, LLC* (C.D. Cal. 2006) 486 F.Supp.2d 1089, 1101 [declining to apply the litigation privilege for engaging in repeated harassing calls and attempting to collect from the wrong person].) But it is equally true that other decisions have declined to follow state court precedent. (See *Boon v. Professional Collection Consultants* (S.D. Cal. 2013) 978 F.Supp.2d 1157, 1161 [allowing the litigation privilege to bar liability for attempts to collect debt after the expiration of the statute of limitations]; *Lopez Reyes v. Konosian & Miele, LLP* (N.D. Cal. 2007) 525 F.Supp.2d 1158, 1165 [allowing the litigation privilege to bar liability for misrepresentations about the collection amount].) This Court's interpretation of *Komarova*, as applied to the facts of the present case, will set a strong precedent which may help smooth the uneven application of the *Komarova* (or *Komarova/Moten*) rule in the federal courts.

In line with another recent California Court of Appeal decision, *Minser v. Collect Access LLC* (2023) 92 Cal.App.5th 781, 791–92 (2023), publication of this decision would establish what California law is in this area, providing clarity to state superior courts as well as federal district courts. The court in *Minser* broadly followed *Komarova* and denied the litigation privilege defense; however, the deceptive activity there involved a failure to perfect service of process. The procedural nature of the alleged Rosenthal violation in *Minser* is distinct from the substantive fabrication of records here. Additionally, the Court's opinion here includes a broad analysis of the existing case law that is not present in the *Minser* opinion. (See Opn. at pp. 18-

21). The publication of *Moten* would operate, together with *Minser*, to explicate and solidify the law.

3. The opinion "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(6).)

The opinion upholds the statutory rights of consumers to protect themselves from deceptive and fraudulent debt collection practices. This is an issue of continuing public interest that merits publication.

The number of debt collection actions has soared in the past few decades nationwide, and California is no exception. In 2019, 255,089 debt cases were filed in the state – the highest number of debt cases since 2010.[1] That amounts to 37% of the total civil docket.[2] With so many Californians being pursued for debt, it is critically important that the Rosenthal Act remain a viable and visible means to protect borrowers from unlawful collection practices.

Student loan debt – particularly private debt – poses a unique threat to borrowers. Californians carry a high burden of student loan debt, with an estimated 650,000 borrowers owing over $10 billion in private student loans in addition to, or in lieu of, federal student loans.[3] Thousands of these borrowers are sued each year by student loan debt collectors that use the court system to collect on defaulted loans.[4] Of the 12,499 private student loan debt collection suits filed in California between 2008 and 2020, over 60% were brought by National Collegiate Student Loan Trusts (NCSLT)[5] – the Delaware trust claiming ownership of Ms. Moten's loan.

This Court's opinion in *Moten* safeguards an important protection for borrowers by restating and expanding the conclusion in *Komarova* that "the [Rosenthal] Act could be circumvented if the litigation privilege applied." (Opn. at p. 18). Allowing debt collectors to use collection lawsuits to avoid liability for Rosenthal Act violations would permit debt collectors to deceive and defraud borrowers with impunity. The public interest in protecting borrowers demands that collectors not be able to use the litigation privilege to shield themselves from liability.

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[1] Raba, *One-Sided Litigation: Lessons from Civil Docket Data in California Debt Collection Lawsuits*, Debt Collection Lab (July 2023) p. 5, <https://debtcollectionlab.org/research/one-sided-litigation> (as of January 3, 2024).
[2] *Id.*
[3] Raba, *Co-Opting California Courts: How Private Creditors Have Turned the Judiciary Into a Predatory Student Debt Collection Machine* (Aug. 2021) p. 13 <https://protectborrowers.org/wp-content/uploads/2021/08/Co-Opting-CA-Courts.pdf> (as of January 3, 2024).
[4] *Ibid.*
[5] *Id.* at pp. 15-17.

This case solidifies that rule.

II. Conclusion

This Court's opinion in *Moten* should be certified for publication. The opinion explains an existing rule of law, applies a rule of law to a significantly different set of facts, and involves a legal issue of public interest. It sets an important precedent that will protect consumers' ability to use the Rosenthal Act to seek legal redress for unlawful debt collection practices.

We respectfully request that this Court order that the opinion be certified for publication.

Sincerely,

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