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April 13, 2021

AMICUS SUBCOMMITTEE OF THE GOVERNMENT AFFAIRS COMMITTEE
COMMERCIAL LAW LEAGUE OF AMERICA (CLLA)

AMICUS REQUEST:	**Request to file an Amicus Brief in support of Petition for Leave to Appeal to the Court of Appeals (New York) in *People v. Northern Leasing Systems, Inc.,* Index No. 450460/2016**
REQUESTING MEMBER:	**Joseph Sussman (Joseph I. Sussman, P.C.)** **Cedarhurst, NY 11516**

Recommendation to the CLLA Board of Governors, Government Affairs Committee, and Executive Vice President:

The Amicus Subcommittee reviewed this request and it appears that the dispositive issue presented by the trial court's ruling in the special administrative proceeding is primarily an evidentiary issue, rather than an application of a legal standard or administrative regulation in an overly burdensome, unfair, inappropriate, improper, or illegal manner. Moreover, the debts and obligations were being enforced in the New York state trial courts by the collection agencies and their attorneys in a manner that was found to be abusive. On that basis, the ruling does not impinge upon the collective interests of the CLLA membership in safeguarding the fair regulation and operation of the commercial debt collection profession.

It is therefore the position of the Amicus Subcommittee not to recommend CLLA involvement as amicus curie (Friend of the Court).

Sincerely,

Adam L. Streltzer
Chair, *Amicus Subcomittee*

Encl.

JOSEPH I. SUSSMAN, P.C.

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March 30, 2021

Timothy Wan, Esq.
President, Commercial Law League
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Commack, New York 11725

Re: Request to file an Amicus Brief in support of Petition for leave to Appeal to the Court of Appeals in People v. Northern Leasing Systems, Inc. et al.

Dear Mr. Wan:

As a creditor rights law firm and member of the CLLA, I write to you as President of the CLLA to inquire whether the CLLA would be willing file an *amicus* brief in support of our petition for leave to appeal to the New York Court of Appeals from an order of the Appellate Division, First Department, in a special proceeding entitled *People v. Northern Leasing Systems, Inc. et al.*, Index No. 450460/2016 (the "Proceeding"), brought by the New York Attorney General and the Deputy Chief Administrative Judge for New York City Courts, in which the Appellate Division upheld liability against our law firm, our former associate attorney and me, jointly and severally, together with our clients and their principals, for potentially tens of millions of dollars for allegedly violating NY Executive Law § 63 (12) by prosecuting collection actions against guarantors of defaulted commercial credit card equipment finance leases. The issues strike at the heart of our legal profession and in particular for counsel who perform debt collection work.

Since 2002, our firm as collection counsel represented Northern Leasing Systems, Inc. and its affiliates (our clients are hereafter referred to as our "Client Creditors") which engage in business as equipment finance lessors. They finance the acquisition of credit card swiping machines and similar business equipment by merchants (who are not deemed to be "consumers") through U.C.C. Article 2A equipment finance leases ("EFLs) that are typically guaranteed by principals or affiliates of the merchants ("Guarantors").

At the inception of each lease, our Client Creditors pay independent sales organizations ("ISOs") which procure, as independent contractors, the EFLs and forward them to our Client Creditors, which review and if appropriate, accept and fund the transaction entering into the EFLs as lessor.[1]

[1] The ISOs market many different products, such as credit card processing services and credit card processing terminal equipment. As part of marketing these services and equipment,

The EFLs contain standard provisions providing for exclusive jurisdiction in New York County; alternate service of process by certified mail; an unconditional payment obligation for the terms of the lease as well as a merchant lessee's individual guaranty of payment (without requiring Northern to first proceed against the lessee in the event of default under the —all standard provisions that are characteristic of virtually every Article 2A equipment finance lessor in the country and which have long been upheld as enforceable by the courts in every state including New York.

Prior to executing each EFL, our Client Creditors engaged in a comprehensive due diligence process that included a recorded telephone calls with the Guarantor during which call the Guarantor expressly confirmed that he or she signed and understood the terms of the EFLs as well as the business's receipt of the equipment under the EFL; separately executed delivery and acceptance receipts signed by the Guarantor containing his/her similar express acknowledgement as to the receipt of the equipment and the payment terms of the EFL; a credit review, a standard review of the lease documents to identify any irregularities. Following our Client Creditors acceptance and funding of any approved EFL, it always then mailed countersigned copies of the EFL to the lessee and guarantor.

Before commencing any action against Guarantors of defaulted EFLs, our firm conducted our own thorough and independent due diligence, which included a review of our Client Creditors' files and focused on the proper execution of the EFLs and any potential meritorious defense of fraud, forgery or other defenses raised by Guarantors to determine whether we possessed a good faith basis to pursue legal action against each Guarantor. We only commenced actions after concluding there was a good faith basis for doing so and that any alleged defenses likely lacked merit.

In the Proceeding, the New York State Attorney General (the "AG") and the Deputy Chief Administrative Judge for New York City Courts alleged that we violated NY Executive Law § 63 (12) [2] by commencing and prosecuting collection actions since April 11, 2013 against Guarantors of defaulted EFLs on behalf of our clients, "knowing" that the

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the ISOs may offer merchant customers the option to lease the machines through our Client Creditors rather than purchase the machines outright.

[2] NY Executive Law § 63 (12) authorizes the Attorney General to commence a proceeding

> [w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business… for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

Guarantors had valid defenses, such that the ISOs fraudulently induced the lessees/Guarantors to sign the EFLs and or that their signatures on the guarantees and EFLs were forged. A copy of the Petition, the trial court's May 29, 2020 order (the "Trial Court Order") and the First Department's February 11, 2021 order affirming the Trial Court Order (the "Appellate Order") are enclosed.[3]

We are seeking leave to appeal to the Court of the Appeals because both the Trial Court Order and the Appellate Order violated, among other things, two principals at the heart of our profession, which should have immunized us from liability in this proceeding:

First, the United States Supreme Court's *Noerr-Pennington* doctrine, which interprets the Petition Clause of the United States Constitution and immunizes litigants and their counsel from liability based on their litigation activity unless that activity is "sham," *i.e.*, it is "objectively baseless." *See, e.g. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (The sham exception applies only where a litigant pursues a claim that is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr-Pennington*").

Second, the New York Rules of Professional Conduct codified under the Uniform Rules for the N.Y.S. Trial Courts, 22 NYCRR. part 1200 (the "Rules of Professional Conduct") similarly immunize counsel and obligate them to advocate zealously for the clients and refuse only to prosecute those claims that are "frivolous." *See Greene v. Greene*, 47 N.Y.2d 447, 451 (1979) (lawyer "owe a duty to each client to advocate the client's interests zealously" and "resolve all doubts and ambiguous legal questions in favor of his or her client"); *In re Giovanni S.*, 89 A.D.3d 252, 256 (2d Dept. 2011); Preamble: A Lawyer's Responsibilities, Comment [2], of the New York State Bar Association to the Rules of Professional Conduct (the lawyer is only proscribed from assisting a client in conduct which "the lawyer *knows* is illegal or fraudulent…" and cannot be held responsible simply because he "should have known" of the illegal conduct) (emphasis added).

In light of these principles, there was no basis to hold us liable. We presented to the court a "Global Appendix," (enclosed/attached) addressing each respective Guarantors' allegations of fraud, forgery and other alleged defenses, and presented the overwhelming and undisputed record evidence that our Creditor Clients provided to us and upon which we relied to form a good faith basis to commence each collection action against each Guarantor. In each and every case, the evidence squarely refuted the merit of each complaining Guarantor's allegation of fraud, forgery or other improper conduct by ISOs or our Client Creditors. In many instances, we cited and presented the audio recording and verbatim transcripts of the recorded telephone calls with Guarantors or the delivery and acceptance receipts which demonstrated the Guarantors' unequivocal acknowledgment of signing the EFL and his or her understanding as to the EFL's unconditional payment obligation thereunder which acknowledgment was documents long before the EFL defaulted and the Guarantors conveniently raised his or her purported defense.

[3] The Petition also seeks to hold us liable for enforcing as unconscionable the various otherwise legal provisions in the EFLs, such as the forum selection clause and alternative service clause. The Trial Order, after incorrectly finding that we knowingly prosecuted claims against Guarantors with valid defenses of fraud or forgery, agreed that we were also liable for enforcing these EFL provisions. See Trial Order at p. 42-43. It is unclear if the Appellate Order affirmed liability against us based on that conduct.

Where the Guarantor spuriously claimed he or he was unaware of any EFL, we presented documentary evidence from our Client Creditors' files that we reviewed containing these acknowledgments as well as the welcome letters that our Client Creditors invariably sent to the Guarantors containing a copy of the countersigned EFLs and reminded the Guarantors that the EFLs are non-cancelable, and payment histories showing that the Guarantor' allowed his/her business to make payments under the EFL for months and often years without complaint.

Notwithstanding this overwhelming record evidence, the First Department held that the "sheer number" of Guarantor affidavits alleging fraud or forgery proved Petitioners' claim. Appellate Order at p. 13. There were over 100 such affidavits submitted by Guarantors out of thousands of collection actions that we prosecuted on behalf of our Client Creditors.[4] The Court overlooked that the Guarantors' allegations of fraud or forgery were often vague, lacked any corroboration, and were simply the types of easy to allege defenses that debtors often raise when seeking to evade a debt. Further, none of the Guarantors could reconcile their allegations with the documentary evidence that we submitted such as the recorded telephone calls where the Guarantors confirmed that they had signed and understood that the EFLs were non-cancellable only later to claim that their signatures were forged or that some vague misrepresentations should allow them out of the EFLs. The Guarantors' allegations, moreover, were largely hearsay as the Guarantors alleged that ISOs, not employees of our Client Creditors, made the misrepresentations at issue (all such true or untrue representations squarely contradicted by the EFL and disclaimed by the no oral representations clause in the EFLs), such as that, contrary to the plain terms of the EFLs, that the EFLs could be cancelled at any time, the equipment was free or would somehow save the lessees money on credit card processing fees, etc.

Most frightening, the trial court and First Department held inadmissible all of the record evidence that we recited and submitted in the Global Appendix on the grounds that the co-respondent Northern Entities failed to authenticate this evidence as admissible under the business records exception to the hearsay rule. *See* Appellate Order at pp. 9, 13; Trial Court Order at pp. 7-11 (holding inadmissible our Client Creditors' submissions) and at p. 41 (holding that we cannot use this evidence for the same reasons).

This was no mere evidentiary error and instead showed that both courts dangerously misunderstood what constitutes liability under the Petition Clause and the Rules of Professional Responsibility. When we, as lawyers, review a file, we cannot possibly know whether our clients' documents are, in fact, true, whether all of the evidence will ultimately be admissible and whether our clients will win. If all of that were required, it would be impossible to provide effective counsel. Instead, the Petition Clause and our professional obligations require us simply to determine that there is a good faith basis for bringing a claim such that it is not objectively baseless or frivolous. We resolve evidentiary issues through the discovery and trial process.

We did not present our evidence for its truth; we did not attempt to show that we would absolutely win each claim. The hearsay rule, therefore, was inapplicable. Rather, we submitted this evidence to demonstrate that we relied upon this evidence to form a good faith basis to bring each claim against a Guarantor. Our good faith basis for bringing each claim

[4] Our Client Creditors held and serviced hundreds of thousands of EFLs at any one time. Thus, there were thousands of defaults over the relevant period, but these defaults did not represent a significant percentage of the total number of EFLs.

against a Guarantor cannot depend on whether our client was able to authenticate this evidence in a subsequent special proceeding brought by the Attorney General.

The courts' Orders represent a dramatic and unconstitutional interference with debt collection counsels' ability to practice law and subject counsel to liability simply for doing their job and representing their clients zealously. Both Orders set the bar impermissibly high to demonstrate a good faith basis for bringing a claim. The Orders hold that a lawyer will only escape liability if he or she can prove that all evidence relied upon at the outset of a case was admissible and conclusively disproves a debtor's allegations. Further, these orders hold that counsel must cease representing clients where there are large number of complaints of vague and unfounded allegations of fraud or forgery even if they are wholly unsupported and not meritorious.

We would appreciate help from the bar to explain generally how collection actions work, the types of defenses that debtors typically raise in collection actions, the nature of our industry and how these Orders will have a chilling effect on collection counsels' ability to prosecute claims.

If your organization is interested in these issues, please reach out to me or our counsel, Mark M. Rottenberg mrottenberg@rlrpclaw.com and Robert A. Freilich rfreilich@rlrpclaw.com.

Thank you for your consideration.

Very truly yours,

JOSEPH I. SUSSMAN, P.C.

By: _____
Joseph Sussman