COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
District Court, City and County of Denver Hon. EDWARD D. BRONFIN, Judge Hon. BRIAN WHITNEY, Judge Case No. 2010CV8380	
Plaintiff-Appellants: OASIS LEGAL FINANCE GROUP, LLC; OASIS LEGAL FINANCE, LLC; OASIS LEGAL FINANCE OPERATING COMPANY, LLC; and PLAINTIFF FUNDING HOLDING, INC., d/b/a LAWCASH, v. **Defendants-Appellees:** JOHN W. SUTHERS, in his capacity as Attorney General of the State of Colorado, and LAURA E. UDIS, in her capacity as the Administrator, Uniform Consumer Credit Code.	▲ **COURT USE ONLY** ▲ Case No. 2012CA1130
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AMICI CURIAE BRIEF OF THE DENVER METRO CHAMBER OF COMMERCE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). Choose one:

☒ It contains [3,891] words.

☐ It does not exceed ____ pages.

The brief complies with C.A.R. 28(k).

☐ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

As *amici curiae*, we are neither the party raising the issue nor the party responding to the issue.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs Oasis Legal Finance Group, LLC, Oasis Legal Finance LLC, Oasis Legal Finance Operating Company and Funding Holding, Inc. LLC d/b/a LawCash ("plaintiffs") are lawsuit lenders. That is, as the Denver District Court correctly held, they lend money to plaintiff litigants in personal injury cases and charge interest on that loan.

The circumstances and financial terms of lawsuit lending unnecessarily prolong personal injury litigation, and thus occupy court and business resources that could be better utilized. The sole beneficiary is the lawsuit lender. As the district court correctly held, and to avoid the problems caused by unregulated lawsuit lending, appellants' conduct should be regulated by the Colorado Uniform Consumer Credit Code ("UCCC"), C.R.S. § 5-6-101 *et. seq.* (2012).

INTEREST OF *AMICI CURIAE*

Amicus Curiae Denver Metro Chamber of Commerce ("Denver Metro Chamber") is a leading voice for over 3,000 Denver-area businesses and their 300,000 employees, providing advocacy for more than 150 years at the federal, state and local levels and helping shape Colorado's economic and public policy.

Amicus Curiae Chamber of Commerce of the United States of America ("the U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the executive branch, and federal and state courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in – or it initiates – cases that raise issues of vital concern to the nation's business community.

This brief will refer to the Denver Metro Chamber and the U.S. Chamber collectively as "the Chambers."

Amici are well-suited to speak to the negative effects of the rapidly expanding and opaque practice of unregulated contingent lawsuit lending. This largely unregulated industry increases the volume of lawsuits, incentivizes the

litigation of frivolous claims, prolongs litigation, and increases settlement costs – all at the expense of not only the defendant businesses and underlying borrowers, but also and the business sector in general and the court system.

Amici support the position of the Attorney General and Administrator that consumer lawsuit lending is subject to regulation under the UCCC. It is not only the right legal conclusion; it is also the right policy. Regulation of this industry under the UCCC will help to curb the myriad ills caused by lawsuit lending, and will bring the practice into conformity with other regulated consumer lending activity. Because the District Court is among the first courts in the country to have determined that plaintiffs' conduct constitutes lending and is subject to regulation under the UCCC, this case is of critical importance not only to businesses and borrowers in Colorado, but throughout the nation.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The question presented in this case is whether plaintiffs' lawsuit lending is subject to the UCCC. This brief addresses the policy implications of plaintiffs' conduct that support its regulation under the UCCC.

STATEMENT OF THE CASE

The Chambers hereby incorporate by reference the Statement of the Case as set forth in the Attorney General and Administrator's Answer Brief.

ARGUMENT

I. Plaintiffs' Lawsuit Funding Transactions Are Loans Subject to the UCCC

Despite plaintiffs' creative naming conventions for their transactions – such as lawsuit "funding" or "financing," "advancing money," "nonrecourse purchase of litigation proceeds," and the like – at the end of the day, these transactions are *loans charging exorbitant interest rates*. Indeed, despite the obfuscatory descriptions, plaintiffs' transactions are quite simple: the lawsuit lender provides a sum of money, to be repaid, pursuant to a payment schedule, with interest – the rate and amount of which depends on how much time has passed since the money was provided – in exchange for a secured interest in a settlement or verdict. That is a loan, no matter how it is dressed up. The Chambers agree with the Attorney General and Administrator that plaintiffs are "supervised lenders" that must obtain a statutorily-prescribed license in order to do business in Colorado, C.R.S. § 5-2-301(1)(a) (2006), and that there is a strong public interest in the enforcement of such licensing statutes. *See State Bd. Of Chiropractic Exam'rs v. Stjernholm*, 935 P.2d 959, 960 (Colo. 1997).

A. Plaintiffs' Transactions Are Loans Under the UCCC

Plaintiffs' principal argument is that because their agreements with litigation plaintiffs are "non-recourse purchase[s] of litigation proceeds" they are not loans. This argument fails both factually and under *State ex rel. Salazar v. The Cash Now Store Inc.*, 31 P.3d 161 (Colo. 2001), despite plaintiffs' struggle to argue otherwise.

Plaintiffs argue that "the borrower has no obligation, under any circumstance, to ever repay the funds he or she received." *See* Appellants' Opening Brief at 11. Therefore, reason plaintiffs, because the borrower has no absolute or contingent obligation to repay the lender, no loan exists. *Id.* Plaintiffs' argument rests on two faulty premises, one factual and one legal.

First, contrary to plaintiffs' contention that borrowers have no repayment obligation, at the very least, borrowers have an obligation to repay plaintiffs in every instance save when they obtain no judgment in court. Indeed, borrowers have an obligation to repay plaintiffs even if that payment comprises 100 percent of their settlement proceeds. *See* Oasis Purchase Agreement (35473822_Ex-A-to-Amended---Supplemental-Complaint-for-Declaratory-jmt--00959249-, CD p. 78 ("Oasis Agreement"), at p. 85, § 6.1, and Plaintiff Funding Holding Inc. Funding Agreement (35473838_Ex-B-to-Amended---Supplemental-Complaint-for-

Declaratory-Jmt--00959247-, CD p. 91 ("LawCash Agreement"), at p. 97, § 2.1, Addendum, Exhibits 1 and 2. Numerous provisions in plaintiffs' agreements reveal that if borrowers fail to make such payment, plaintiffs have direct personal recourse against borrowers, such as:

- **Oasis Payment Instructions** ("In the event that Seller receives any Proceeds prior to Purchaser receiving full payment of the applicable Oasis Ownership Amount, Seller grants Purchaser the right to effect one or more ACH debit entries, as needed, from Seller's bank to satisfy outstanding amounts dues Purchaser.");
- **Oasis Agreement, § 6.2** ("Should the Oasis Ownership Amount be paid to Seller, Seller is appointed a Purchaser's trustee with respect to said Oasis Ownership Amount, and Seller acknowledges and accepts the trust and that Seller holds the Oasis Ownership amount in trust for Oasis. Seller then shall pay such amounts to Purchaser within ten days of receipt of the Proceeds in (sic) the Legal Claim by Seller…Seller waives any and all defenses with respect to the sale of the Purchased Interest and agrees not to avoid payment of any Proceeds that are payable to Purchaser. Purchaser reserves the right to asses (sic) an additional 1.5 percent (or the highest amount allowed by

law, whichever is lower) per month late fee if the Oasis Ownership Amount is more than 10 days past due.");

- **Oasis Agreement, § 7.1** ("The breach by Seller of any of Seller's obligations under this Purchase Agreement shall constitute an Event of Default hereunder. In an Event of Default, Purchaser shall have all rights, powers, and remedies provided in the Purchase Agreement and as allowed by law or equity.");
- **Oasis Agreement, § 8.5** (providing for jurisdiction and venue for lawsuits arising out of agreement);
- **Oasis Agreement, § 8.6** (waiver of jury trial);
- **LawCash Agreement, § 2.(4.)** (borrower liable for balance due, with charges and interest, until repayment is made in full.);
- **LawCash Agreement § 2.(7.)** ("I hereby waive any defense to payment of the sums due and promise not to seek to avoid payment of any money due to LAWCASH under this Agreement.");
- **LawCash Agreement, § 3.(2.**) ("In the event that the assignment of my interest in the proceeds of the Lawsuit is not permitted by law, then I agree to pay LAWCASH all of the funds under this Agreement immediately upon

the payment of the Lawsuit proceeds as a separate and independent obligation."),

- **LawCash Agreement, § 3.(5.**) ("If LAWCASH must engage the services of any attorney to collect the sum due, then I will be responsible for reasonable attorneys fees and costs for such. I agree that a fee equal to one-third of the money due LAWCASH is a reasonable fee for such purpose.");
- **LawCash Agreement, § 7.(5.)** ("I understand that in the event that you do not receive payment as required by this Agreement and that you need to take action to pursue such payment, you may collect, in addition to the amount due and owing, reasonable attorneys fees and costs in enforcing your efforts. I agree that an amount equal to one third (33⅓%) of the amount due and owing is a reasonable attorney's fee.").

Thus, plaintiffs' own documents belie their key factual contention that borrowers have no repayment obligation.

Even if borrowers had no repayment obligation, the Colorado Supreme Court made clear in *Cash Now* that "the definition of loan under the UCCC does not require repayment." *Cash Now,* 31 P.3d at 165. The court further held that that neither recourse nor an "unconditional obligation to repay" is necessary for the creation of a loan for purposes of the UCCC. *Id.* at 165-66. Rather, the court

stated that a loan is made "when a creditor creates debt by advancing money to the debtor." *Id*. at 166, *citing* C.R.S. § 5-3-106 cmt (1999). Because Cash Now "advance[d] money to taxpayers," it made loans, even in the absence of an unconditional repayment obligation. *Id.* at 166-67. Thus, both because of the nature of the transaction, and the holding in *Cash Now*, plaintiffs make loans for purposes of the UCCC.

Interestingly, according to statements on its website, it appears that plaintiff Oasis Legal Finance LLC is expressly subject to regulation as a lender under the laws of California, Illinois, and Missouri. *See* Oasis website, http://www.oasislegal.com/legal/terms_and_conditions, Addendum, Exhibit 3, at p. 3. Oasis has also been the subject of regulatory enforcement activity due to its lending activities in Maryland.[1] Regulation of plaintiffs as lenders in Colorado would be consistent with the treatment of Oasis by sister states.

[1] In 2009, the Maryland Commissioner of Financial Regulation issued a Summary Order to Cease and Desist in which the Commissioner, among other things "determined that [Oasis'] business activities constituted usurious and unlicensed consumer lending in violation of Maryland law, and that it was in the public interest that [Oasis] immediately Cease and Desist from making consumer loans to Maryland consumers." *See* Summary Order to Cease and Desist, Addendum, Exhibit 4. To settle the matter, Oasis agreed to cease doing business in Maryland so long as Oasis was subject to the consumer lending law, and paid a settlement amount in complete satisfaction of all penalties that could have been assessed in connection with the investigation. *See* Settlement Agreement and Consent Order, Addendum, Exhibit 5.

B. Regulating Plaintiffs under the UCCC is Consistent with the UCCC's Consumer Protection Policy Objectives

The "underlying purposes" of the UCCC include "protecting consumer borrowers against unfair practices by some suppliers of consumer credit." *Cash Now*, 31 P.3d at 166. For this reason, the UCCC requires lenders to provide disclosures to the consumer, such as the loan's finance charge and APR. C.R.S. § 5-3-101(2) (2001) (requiring notices and disclosures of the federal Truth in Lending Act). Lawsuit lenders' practice of disguising exorbitant interest rates, discussed below, is precisely the type of conduct the UCCC is designed to prevent.

Numerous press accounts have highlighted examples of the extreme interest rates charged by lawsuit lenders. For example, according to a report by The New York Times, Larry Long borrowed $9,150 from Oasis to fund a lawsuit against a drug manufacturer. By the time Long received an initial settlement payment of $27,000, 18 months later, he owed Oasis $23,588. Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y Times, Jan. 16, 2011, at 1, Addendum, Exhibit 6. Money owed to a lawsuit lender can exceed proceeds received in litigation. The New York Times reported that one borrower owed her lenders $221,000 after receiving an award of $169,125 for a car accident. Binyamin Applebaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. Times, Nov. 14, 2010, at 2, Addendum, Exhibit 7.

As these examples illustrate, plaintiffs' business model depends on charging exorbitant interest rates – though the interest rates are not immediately apparent to the borrower. A close examination of the Oasis' "Purchase Agreement" illustrates this. The following table shows the "Oasis Ownership Amount ("Payoff Amount") in 6 month intervals as set forth in the Oasis Agreement (which assumes a hypothetical "purchase price" of $1,234.00). *See* Oasis Agreement, Purchase Agreement, p. 1.

Payment Schedule on $1,234.00	**Oasis Ownership Amount**
August 24, 2011 to February 23, 2011	$ 1,851.00
February 24, 2011 to August 23, 2011	$ 2,035.10
August 24, 2011 to November 23, 2011	$ 2,776.50
November 24, 2011 to February 23, 2012	$ 3,085.00
February 24, 2012 to August 23, 2012	$ 3,393.50
August 24, 2012 to February 23, 2013 three years	$ 4,010.50
February 23, 2013 and thereafter	$ 4,219.00

The Oasis Agreement does not disclose an Annual Percentage Rate ("APR"). However, the calculation of the nominal APR amount is possible. This number is derived by adding the contractual interest and fees ("subsequent case review" fee of $20, "case servicing fee" of $30 every six months, $20 subsequent case review for additional funding, and $25 fee for facsimile and photocopying costs per funding) and dividing that number by the original amount of the loan. That number is multiplied by 365 / the amount of days before repayment to find

the APR. Stated as a formula, nominal APR = ((Final payment – Beginning Value) + Additional Charges) / Beginning Value) * (365 / Number of Days before Repayment). The table below shows the nominal APR a borrower would pay at the six-month intervals of the Oasis Payment Schedule:

Beginning Value	Final Payment	Start Date	End Date	#Days	Interest Paid	Additional Charges	Interest Plus Fees	Nominal APR
$ 1,234	$ 1,851	8/24/2010	2/23/2011	183	$ 617	$ 75	$ 692	111.85%
$ 1,234	$ 2,036	8/24/2010	8/23/2011	364	$ 802	$ 105	$ 907	73.71%
$ 1,234	$ 2,777	8/24/2010	11/23/2011	456	$ 1,543	$ 105	$ 1,648	106.87%
$ 1,234	$ 3,085	8/24/2010	2/23/2012	548	$ 1,851	$ 135	$ 1,986	107.20%
$ 1,234	$ 3,394	8/24/2010	8/23/2012	730	$ 2,160	$ 165	$ 2,325	94.19%
$ 1,234	$ 4,011	8/24/2010	2/23/2013	914	$ 2,777	$ 195	$ 2,972	96.16%

If the consumer pays at any time within any particular six month period, he is charged the Payoff Amount for the *entire* six-month period. *See* Oasis Agreement, Purchase Agreement, p. 1. Thus, for example, if the consumer pays one day later than the first six month period, the entire payoff amount for the twelve month period is owed, even if the money was used for six months and one day. This is illustrated in the chart below by the difference in interest rates if the payment is made on August 23, 2011, versus August 24, 2011. The former, made 364 days after the loan was made, yields an interest rate of 73.71%. The latter, made 365 days after the loan was made, yields an interest rate of 133.51%.

Beginning Value	Final Payment	Start Date	End Date	#Days	Interest Paid	Additional Charges	Interest Plus Fees	Nominal APR
$ 1,234	$ 2,036	8/24/2010	8/23/2011	364	$ 802	$ 105	$ 907	73.71%
$ 1,234	$ 2,777	8/24/2010	11/23/2011	365	$ 1,543	$ 105	$ 1,648	133.51%

Indeed, an Oasis executive has stated variously that Oasis typically recovers between 1.4 and 1.8 times the amount of money it advances, and that Oasis charges customers up to 250 percent of the loan amount. *See* Julia Reischal, *As Pre-settlement Financing Takes Hold in Massachusetts, Lawyers Spar Over Pros and Cons,* Mass. Law. Wkly., July 28, 2008, Addendum, Exhibit 8; Binyamin Appelbaum, *Lawsuit Lenders Try to Limit Exposure to Consumer Rules*, N.Y. Times, Mar. 9, 2011, Addendum, Exhibit 9. The LawCash Agreement, at § 2.(1.), requires the borrower to pay a 3.50% "monthly fee" of the funded amount, or at least 42% annually, if not compounded.

II. Public Policy Concerns Underscore The Need to Regulate Consumer Lawsuit Lending

The exorbitant interest rates charged by plaintiffs necessarily make it significantly more difficult for their borrowers to settle their cases as the cost to do so is driven up by the loan costs, which can equal or exceed any proceeds from a lawsuit. This in turn artificially prolongs litigation, leads to cases going to trial that should not, which thus further burdens an already underfunded court system.

The resulting costs, borne ultimately by defendant businesses and the courts, underscore the need for regulation.

A. Unregulated Consumer Lawsuit Lending Will Hurt Colorado Businesses by Prolonging Litigation and Driving Up Settlement Costs

Because lawsuit lenders must recoup exorbitant interest rates, unregulated consumer lawsuit loans impose significant pressure on borrowers to prolong litigation and to seek settlements that are influenced not by the strength of their cases, but by their onerous obligations to the lawsuit lenders. A troubling case arising out of the Ohio courts provides a good example. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003). In *Rancman*, one lawsuit lender advanced the consumer $6,000 against her pending claim in a personal injury case, in exchange for the first $16,800 she would recover if the case was resolved within 12 months, $22,200 if resolved within 18 months, or $27,600 if resolved within 24 months. A different lender advanced the plaintiff another $1,000, secured by the next $2,800 the consumer was expected to collect on her claim. As the *Rancman* court noted, with no superior liens, and assuming a 30% contingency fee charged by her personal injury attorney, the consumer would have received no funds from a settlement of $28,000 or less in the first twelve months. *Rancman*, 789 N.E.2d at 220-21. Further, the advances affected settlements above

$28,000. For example, assuming the plaintiff presumptively would have settled for no less than $80,000, as a result of the interest on the loans, the plaintiff would have to hold out for $98,000 (the sum of the desired $80,000, plus the two loan premiums, minus attorneys' fees on the premiums) assuming the settlement occurred in the first twelve months). *Id.* at 221. This number only increases as time passes.[2]

An example from North Carolina is also illustrative. Leslie Price sued George Shinn, the owner of the Charlotte Hornets, in a civil suit for sexual assault. Price turned down a settlement offer of $1,000,000 and held out for $1.2 million, forcing her attorney to take the matter to trial, which Price lost. Her attorney discovered that Price had received a litigation loan from Future Settlement Funding of Las Vegas, and her contract with Future Settlement would leave her with no money absent a settlement of $1.2 million or more. Price's attorneys sued Future Settlement. In its ruling denying defendants' motion to dismiss, the court stated:

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[2] The court in *Rancman* held that litigation advances were void as a form of champerty and maintenance. *Rancman*, 789 N.E.2d at 221 ("…a lawsuit is not an investment vehicle… An intermeddler is not permitted to gorge upon the fruits of litigation."). After the court's decision, the American Legal Finance Association, the litigation lending industry's trade association, successfully lobbied the Ohio state legislature to overturn Ohio's rule against champerty and maintenance. John P. Barylick & Janna Wims Hashway, Litigation Financing: Preying on Plaintiffs, 59 R.I. B. J., 5, 36 (Mar./Apr. 2011).

"In a twist perhaps unique in law, a court loss resulting in no award of damages was better for the client than a million-dollar settlement." *Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc., et al.*, 162 F.Supp.2d 448, 451(W.D. N.C., Apr. 23, 2001).

Regulation of plaintiffs' conduct under the UCCC will insure that plaintiffs' business model will be licensed and transparent, and that plaintiffs will be prevented from charging interest rates that pervert the prosecution of personal injury cases.

B. Unregulated Lawsuit Lending Will Increase the Burden on Colorado Courts

The costs of an increase in the volume and duration of litigation will not be borne by the business community alone. As unregulated lawsuit lending unnecessarily prolongs often dubious litigation, courts will face even greater strains on their already scarce time and other resources. Between 2008 and 2011, 42 states – including Colorado – cut back on court budgets, and 29 states now face even greater case backlogs. *See* Heather Rogers, *Business-killing Cuts to State Court Systems*, Cal. St. B. J. (Nov. 2012) available at http://www.calbarjournal.com/November2012/TopHeadlines/TH1.aspx, *citing* COSCA Budget Survey Responses, Colorado, available at

http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/budget_survey_121811.ashx, Addendum, Exhibit 10.

Moreover, the lender-financed cases that will end up consuming judicial resources in trial are likely to be the cases with the least merit. As one plaintiff lawyer has noted, where the clients have borrowed more than may reasonably be obtained in mediation, "it ends up that the crummy cases are the ones going to trial." Jack Zemlicka, *Personal Injury Lawyers Face Issues with Loans*, Wis. L. J., July 6, 2009, Addendum, Exhibit 11. There is no question, therefore, that regulation of Plaintiffs' conduct under the UCCC is in the interest of the courts and the business community.

If unregulated consumer lawsuit lending – with its exorbitant interest rates – takes hold in Colorado, then Colorado courts will be compelled to spend more resources managing already crowded dockets; Colorado businesses will end up paying more money to plaintiffs to end lawsuits; and Colorado consumer plaintiffs will then have to turn right around and pay that extra money to the lawsuit lenders. Colorado businesses will lose, Colorado consumers will lose, and the Colorado court system will lose; the lawsuit lenders will be the only winners.

CONCLUSION

Amici Curiae the Denver Metro Chamber of Commerce and Chamber of Commerce of the United States of America respectfully request that this Court affirm the District Court's determination that plaintiffs' practices are subject to regulation under the UCCC. Such a ruling would ensure that plaintiffs' lending activity does not unnecessarily burden the courts and the business community, and would provide predictability and fairness to plaintiffs' conduct.

DATED: December 21, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2012, a true and correct copy of the foregoing ***AMICUS CURIAE*** **BRIEF OF THE DENVER METRO CHAMBER OF COMMERCE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEES** was served via Lexis File & ServeXpress to the following:

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