

1 ARIZONA DEPARTMENT OF FINANCIAL INSTITUTIONS

2 In the Matter of the Collection Agency License of:

No. 10F-BD046-BNK

3 **RECEIVABLES PERFORMANCE**

4 **MANAGEMENT, LLC**

5 20816 44<sup>TH</sup> Avenue West

6 Lynwood, Washington 98036

Petitioner.

**SUPERINTENDENT'S FINAL  
DECISION AND ORDER**

7 The Superintendent of Financial Institutions (the "Superintendent") having reviewed the  
8 record in this matter, including the Administrative Law Judge Decision attached and incorporated  
9 herein by this reference, adopts the Administrative Law Judge's Findings of Fact, Conclusions of  
10 Law and recommended decision as follows:

11 ORDER

12 **IT IS ORDERED** affirming the Cease and Desist Order Number 10F-BD137-SBD issued  
13 on April 6, 2010 except to the provision within the Order that addresses the civil money penalty.

14 **IT IS FURTHER ORDERED** that Petitioner shall pay a civil money penalty in the amount  
15 of \$25,000.00 within forty-five (45) days of the effective date of this Order.

16 NOTICE

17 The parties are advised that, pursuant to A.R.S. § 41-1092.09, this Order shall be final  
18 unless Petitioner submits a written motion for rehearing no later than thirty (30) days after service  
19 of this decision. The motion for rehearing or review must specify the particular grounds upon  
20 which it is based as set forth in A.A.C. R20-4-1219. A copy shall be served upon all other parties  
21 to the hearing, including the Attorney General, if the Attorney General is not the party filing the  
22 claim of error. In the alternative, the parties may seek judicial review of this decision pursuant to  
23 A.R.S. § 41-1092.08(H).

24 DATED this 24th day of April, 2011.

25  
26 

27 Lauren W. Kingry  
28 Superintendent of Financial Institutions

1 ORIGINAL filed this 24th day of April, 2011 in the office of:

2 Lauren W. Kingry, Superintendent of Financial Institutions  
3 Arizona Department of Financial Institutions  
4 ATTN: June Beckwith  
5 2910 North 44th Street, Suite 310  
6 Phoenix, Arizona 85018

7 COPY mailed same date to:

8 Lewis Kowal, Administrative Law Judge  
9 Office of the Administrative Hearings  
10 1400 West Washington, Suite 101  
11 Phoenix, AZ 85007

12 Craig Raby, Assistant Attorney General  
13 Natalia A. Garrett, Assistant Attorney General  
14 Office of the Attorney General  
15 1275 West Washington  
16 Phoenix, AZ 85007

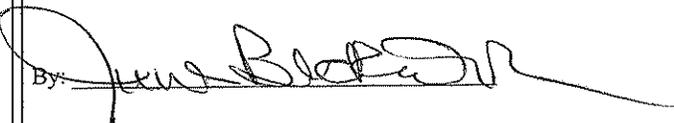
17 Robert D. Charlton, Assistant Superintendent  
18 Arizona Department of Financial Institutions  
19 2910 N. 44th Street, Suite 310  
20 Phoenix, AZ 85018

21 Mr. Howard George, CEO  
22 Receivables Performance Management, LLC  
23 20816 44<sup>th</sup> Avenue West  
24 Lynwood, Washington 98036

25 CT Corporation System,  
26 Statutory Agent for:  
27 Receivables Performance Management, LLC  
28 2394 E. Camelback Road  
Phoenix, AZ 85016

AND COPY MAILED SAME DATE by  
Certified Mail, Return Receipt Requested, to:

Cynthia L. Fulton, Esq.  
Fulton Friedman & Gullance LLP  
2345 E. Thomas Rd., Suite 460  
Phoenix, AZ 85016  
Attorney for Petitioner

By: 



1 3. RPM appealed the Cease and Desist Order, which brought this matter to a  
2 hearing before the Office of Administrative Hearings, an independent State agency.  
3 See Exhibit 3.

4 RPM's Business Practices

5 4. The evidence of record established that RPM has a dialing system which  
6 involves a computer calling a debtor's telephone number and transferring the call  
7 randomly to an RPM collector.

8 5. Robert Polus ("Mr. Polus"), RPM's Vice President of Operations, the only  
9 witness for RPM, testified how the dialing system functions, and the policies and  
10 procedures in place at RPM to assure that debtors are not harassed or exposed to  
11 abusive language. These policies and procedures include monitoring on the floor, as  
12 well as randomly on headsets.

13 6. According to Mr. Polus, the policies and procedures in effect are maintained to  
14 comply with the Fair Debt Collection and Practices Act ("FDCPA"), federal law. RPM  
15 does not make adjustments to account for the differences under state law, unless it is  
16 more stringent. RPM does not view Arizona law pertaining to collection agencies to be  
17 more stringent than the FDCPA.

18 7. RPM's policy requires that, when a consumer tells a collector that they believe  
19 they are being harassed, the collector is to mark the account DNC (Do Not Contact) so  
20 that the telephone number will no longer be called by RPM.

21 8. Mr. Polus testified that every action taken on a particular account is marked in  
22 the account history notes ("Pick Notes") and the entries are permanent.  
23 According to Mr. Polus, if a consumer calls in, even if the collector fails to place a note  
24 about the content of the conversation in the file, the file will still reflect that the call  
25 came in. Likewise, the account history will show every telephone attempt to contact a  
26 consumer, regardless whether the consumer answered the call.

27 9. RPM has a policy for collector oversight that includes a team of people who  
28 listen to calls from offices away from the collection floor where the collectors sit in  
29 cubicles. Before a collector may make calls to consumers, they are trained and tested  
30 on their telephone skills, including teaching them to avoid escalation of a call to anger.

1 RPM also has a group of people who deal with calls that have escalated to a  
2 management level of oversight. There are management people who walk the collection  
3 floor and listen to calls, or assist collectors who may have problems on a call.

4 10. RPM's company maintains a policy that does not permit any obscene or profane  
5 language to be used, either in its building where collection business is conducted, or in  
6 its parking lots. RPM enforces that policy. If a collector uses an inappropriate word to a  
7 consumer, if that language and such language is overheard by an oversight person, the  
8 collector would be required to return to training, or would be dismissed, depending on  
9 whether there had been other problems with that particular employee.

10 11. The Department alleged that RPM engaged in eleven (11) instances of  
11 prohibited conduct and that at least five consumers were subjected to RPM's conduct  
12 that violated certain laws, as set forth below.

13 12. The Department presented evidence that Robbie Schwartz ("Mrs. Schwartz"),  
14 Gale Espinosa ("Mrs. Espinosa"), Monica Roberts ("Ms. Roberts"), James Harvey ("Mr.  
15 Harvey"), and Elizabeth Young ("Ms. Young"), the above-mentioned five consumers,  
16 were contacted by RPM's collectors and misidentified as debtors; either the consumer  
17 had paid the debt which RPM sought to collect, or the consumer did not owe the debt in  
18 the first place.

19 13. All five consumers informed RPM collectors that they were contacted in error. In  
20 each instance, the Department asserted that the response of RPM collectors was  
21 aggressive or arrogant and that RPM continued to contact these persons, ignoring its  
22 duties to investigate or disclose information under Arizona law.

23 14. The Department's Examination Report, containing a summary of five complaints  
24 (Exhibit 1 at pp. 8-9), each setting forth similar allegations against RPM, is "prima facie  
25 evidence of the facts therein." A.R.S. § 6-129(D)

26 Ms. Schwartz's Complainant

27 15. Ms. Schwartz received telephone calls from representatives of RPM claiming  
28 that she owed money on a Sprint account and demanded payment on the debt. Ms.  
29 Schwartz has never been a customer of Sprint and attempted to inform RPM collectors  
30 of this fact.

1 16. RPM's Pick Notes showed that Ms. Schwartz's telephone number was dialed by  
2 RPM at least thirty (30) times on an almost daily basis starting on January 6, 2008.<sup>1</sup>

3 17. Ms. Schwartz testified that she had conversations with the RPM collectors  
4 approximately half a dozen times.

5 18. The entries in the Pick Notes for Mrs. Schwartz's account show that calls were  
6 "hung up" or "hold drop," indicating that RPM collectors had made telephonic contact  
7 with Ms. Schwartz on January 13, 19, 23, and 25, 2008.<sup>2</sup>

8 19. Ms. Schwartz testified that RPM collectors called her a thief and accused  
9 her of non-payments whenever she answered.<sup>3</sup> Ms. Schwartz also testified that on  
10 more than one occasion, RPM's collectors yelled, screamed, and used angry tones with  
11 her.

12 20. Ms. Schwartz could not recall any specific conversation she had with any of the  
13 employees at RPM because it was long ago.

14 21. According to Ms. Schwartz, RPM collectors requested that she provide them with  
15 her telephone number, even though RPM had initiated the telephone contact with her.

16 22. Ms. Schwartz testified that sometimes after Ms. Schwartz refused to disclose  
17 that information, the collector would hang up; other times she was told that RPM would  
18 continue to call her and then hang up. The RPM collector did not explain to Ms.  
19 Schwartz why RPM needed her number, or that it was required to remove her  
20 telephone number from the dialing system. RPM asserted that without confirmation of  
21 the telephone number called, the called number could not be removed from the dialer  
22 system data base.

23 23. Ms. Schwartz testified that on February 3, 2008, she spoke with "a reasonable  
24 person" from RPM who listened to Ms. Schwartz's explanation and suggested that her  
25 identity may have been stolen.

26 24. Ms. Schwartz did not keep the notes she made of the conversations she had

27 <sup>1</sup> RPM's Pick Notes as of June 29, 2008, for Ms. Schwartz admitted into evidence as part of  
28 Department's Exhibit 5 and as part of RPM's Exhibit C.

29 <sup>2</sup> RPM's Pick Notes as of June 29, 2008, for Ms. Schwartz admitted into evidence as part of Department's  
30 Exhibit 5 and as part of RPM's Exhibit C.

1 with RPM collectors.

2 25. Ms. Schwartz filed her online complaint with the Arizona Attorney General's  
3 Office on January 25, 2008, wherein she specifically described her interactions with the  
4 RPM's collectors.<sup>4</sup>

5 26. RPM responded to the Department regarding Ms. Schwartz's complaint and  
6 informed it that Ms. Schwartz's telephone number had been removed from its registry  
7 and that no collection calls had been made after February 3, 2008.<sup>5</sup>

8 Ms. Espinosa's Complaint

9 27. Ms. Espinosa testified that she began receiving telephone calls from RPM  
10 sometime in February or March of 2008, which continued for approximately two months.  
11 Ms. Espinosa also testified that on average she received eight to ten calls per day,  
12 even though she did not answer every call.

13 28. RPM's Pick Notes reflect that Ms. Espinosa's telephone number was dialed by  
14 RPM at least fifty (50) times from January 11, 2008 through April 20, 2008.<sup>6</sup>

15 29. Ms. Espinosa testified that the calls from RPM were frequent enough that it  
16 "became a game between" her husband and her; they would make a mark every time  
17 RPM called on a piece of paper, with RPM's phone number. However, Ms. Espinoza  
18 did not keep the records of the RPM telephone calls.

19 30. At least four or five times when Ms. Espinosa answered the calls coming from  
20 RPM, RPM collectors demanded money from Maria or Mathew Espinosa. Ms.  
21 Espinosa informed RPM collectors that she did not know Maria or Matthew Espinosa  
22 and that these individuals did not live at her household or have her number. RPM  
23 continued to contact Ms. Espinosa even after she told RPM collectors that there were  
24 no persons living at the household by those names.

25 31. Ms. Espinosa testified that RPM collectors responded to Ms. Espinosa's claim of  
26

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27 <sup>3</sup> It is noted that Ms. Schwartz did not mention being called a thief in her complaint against RPM that was  
28 filed with the Department.

29 <sup>4</sup> The online Consumer Complaint admitted into evidence as part of Department's Exhibit 5 and as part  
30 of RPM's Exhibit C.

<sup>5</sup> See RPM letter dated June 29, 2008, admitted into evidence as part of Department's Exhibit 5.

<sup>6</sup> RPM's Pick Notes as of May 30, 2008 for Ms. Espinosa admitted into evidence as part of RPM's Exhibit  
D.

1 misidentification by saying something nasty. Ms. Espinosa acknowledged that she did  
2 not request that RPM provide her with any documentation to show that she owed the  
3 debt after she informed RPM that RPM reached the wrong person.

4 32. Ms. Espinosa testified that the number being called from was a "800" telephone  
5 number. Ms. Espinosa had no recall of the specific conversation or of any message left  
6 on her answering machine. Ms. Espinosa's testimony regarding the telephone number  
7 she saw on her caller ID changed, and she ultimately admitted that she received calls  
8 from more than one telephone number.

9 33. On May 2, 2008, Ms. Espinosa filed a complaint with the Department. The calls  
10 to Ms. Espinosa stopped only after she left a voicemail with RPM, stating that if RPM  
11 did not stop calling, she was going to sue them for harassment.<sup>7</sup>

#### 12 Ms. Roberts's Complaint

13 34. Ms. Roberts testified that she began receiving telephone calls from RPM two or  
14 three months before she filed her complaint with the Department in July 2008.

15 35. On July 23, 2008, Ms. Roberts filed a complaint with the Department stating that  
16 she provided RPM with documentation showing full payment of this debt.<sup>8</sup>

17 36. Ms. Roberts testified that RPM collectors were rude when demanding money,  
18 and they called her frequently, sometimes two or three times per night, for  
19 approximately two months.

20 37. Ms. Roberts disputed the account in the first conversation she had with a person  
21 at RPM. That collector advised her that the only information RPM had in its file was the  
22 information contained in the initial demand letter, and asked her if she had proof of the  
23 payment so that they could forward it to their client to confirm the account had been  
24 wrongly placed with RPM. Ms. Roberts took that to mean that there was no proof of the  
25 validity of the debt. RPM was unable to confirm payments previously made to a prior  
26 purchaser or collector of Ms. Roberts' account.

27  
28 <sup>7</sup> RPM's Pick Notes show the calls from them stopped before Ms. Espinosa's Complaint was made to the  
Department.

29 <sup>8</sup> See Complaint Form dated July 20, 2008 admitted into evidence as part of Department's Exhibit 7.

1 38. In response to Ms. Roberts' request for proof of the debt, RPM stated that the  
2 collection letter was their proof that Ms. Roberts owed the money.

3 39. Ms. Roberts provided to RPM a detailed explanation and proof that she paid  
4 \$500.00 to HSBC in April 2007, and that she made other payments on the account in  
5 June and July 2007.<sup>9</sup> On that same day, July 20, 2008, Ms. Roberts filed a complaint  
6 against RPM with the Department,

7 40. Ms. Roberts testified that RPM collectors used abusive language during the  
8 three conversations she had with RPM collectors and every conversation was hot and  
9 heated.

10 41. RPM collectors failed to act upon information provided to them by Ms. Roberts  
11 by not verifying the validity of the debt and/or not responding to Ms. Roberts' request  
12 for information. RPM failed to verify the debt even though Ms. Robert contested the  
13 debt. 42. RPM collectors made "threats of bad credit reporting" every time, stating  
14 that if Ms. Roberts did not pay the debt, the debt would be turned over to a credit  
15 bureau.

16 43. By the time Ms. Roberts' Complaint had been reviewed by the Department,  
17 RPM's client decided not to pursue the account. RPM cancelled the account as of  
18 August 13, 2008, and the telephone calls stopped.<sup>10,11</sup>

19 Mr. Harvey's Complaint

20 44. Mr. Charlton testified that Mr. Harvey filed a complaint with the Arizona Attorney  
21 General's Office sometime in July 2007. The Complaint summarized the interactions  
22 Mr. Harvey had with RPM as follows:

23 1. Calling 35 times in five weeks [during the period  
24 from June 1, 2007 until July 13, 2007].

25 2. The third call I requested proof or  
26 documentation of a "MCI" bill that I never had. I never got it.

27  
28 <sup>9</sup> See letter dated July 20, 2008 from Ms. Roberts with attachments admitted into evidence as part of  
29 Department's Exhibit 7.

30 <sup>10</sup> RPM asserted that the information provided by the consumer would have produced the same result  
had it been forwarded directly to RPM, rather than by sending it to the Department.

<sup>11</sup> See RPM letter dated January 13, 2009 part of Department's Exhibit 7 at p.1.

1                   3.     One call offered to settle for \$45 instead of this  
2 seven year old bill of \$90. I refused; I never had an MCI  
3 account. Next call said they would write it off. More calls  
4 began 2 weeks later.

5                   4.     I was told that no bills or written documentation  
6 existed.

7                   5.     I asked what address calls were made from, one  
8 of the many addresses given was a home my parents bought  
9 six months ago. I never lived in that house!! The calls were  
10 said to been made 7 years ago. Creepy. (This is obviously a  
11 blatant lie to extort money from me.)

12                   6.     I was yelled at and my credit report was  
13 threatened, your company will keep "dinging" it I was told.

14                   7.     I asked again for written documentation; your  
15 company is legally obligated in 5 days to send it and also you  
16 are to tell me HOW I can protest this. (Consult the FDCP Act).  
17 None of your employees have complied with my request.<sup>12</sup>

18 45.   Mr. Harvey's complaint, which was incorporated in the Department's  
19 Examination Report, states as follows:

20                   [Mr. Harvey] requested proof or documentation of the debt but  
21 was told that none existed. Complainant says that the collector  
22 yelled at him and that his credit report was threatened. He  
23 again asked for written documentation but none of the  
24 employees have complied with his request.<sup>13,14</sup>

25 46.   RPM placed numerous telephone calls to Mr. Harvey's work and home  
26 telephone numbers beginning May 1, 2007, and continuing until July 25, 2007. Such  
27 activity constitutes harassment.<sup>15</sup>

28 47.   On some occasions RPM called Mr. Harvey as many as four or five times per

29 <sup>12</sup> See Correspondence from Mr. Harvey to RPM dated July 16, 2007 admitted into  
30 evidence as part of the Department's Exhibit 4.

<sup>13</sup> Examination Report admitted into evidence as Department's Exhibit 1 at p. 9.

<sup>14</sup> It is noted that Mr. Harvey failed to appear to testify about the accuracy of his complaint.

<sup>15</sup> RPM's Pick Notes as of August 15, 2007 for James Harvey were admitted into evidence as part of  
RPM's Exhibit B.

1 day. RPM also re-dialed Mr. Harvey's number within a very short period of time.<sup>16</sup>

2 48. Mr. Harvey requested that RPM stop contacting him as early as May 17, 2007,  
3 yet the phone calls from RPM continued nearly daily for the following two months.<sup>17</sup>

4 49. Mr. Harvey requested RPM to supply him with documentation regarding the  
5 debt; however, RPM did not respond to the request because it was not in writing.<sup>18</sup>

6 Ms. Young's Complaint

7 50. Mr. Charlton testified that the Department could not locate its copy of the  
8 Complaint lodged by Ms. Young.

9 51. As proof of the substance of Ms. Young's complaint, the Department produced a  
10 form titled "REG/ULA Complaint Summary,"<sup>19</sup> establishing that the complaint was in  
11 fact received and entered into the Department's records on February 14, 2005 as  
12 follows:

13  
14 The complainant claims that she has been in contact  
15 with Sprint regarding an account that was opened in her name  
16 and address, however, the account name has a different date  
17 of birth and social security number. The complainant claims  
18 that Sprint has referred this account to their fraud department  
19 but also turned the account into collections. The complainant  
20 claims that she is receiving harassing telephone calls and is  
21 requesting the calls cease and that any derogatory information  
22 be deleted from the credit bureau.<sup>20, 21</sup>

23 52. In the Department's Examination Report, it was noted that:

24 Complainant [Ms. Young] received several harassing  
25 telephone calls on a debt which she claims is not hers.  
26 Complainant also says that the collector threatened to report

27 <sup>16</sup> RPM's Pick Notes as of August 15, 2007 for James Harvey admitted into evidence as part of RPM's  
28 Exhibit B.

29 <sup>17</sup> RPM's Pick Notes as of August 15, 2007 for James Harvey admitted into evidence as part of RPM's  
30 Exhibit B.

<sup>18</sup> See Correspondence from Mr. Harvey to RPM dated July 16, 2007 admitted into evidence as part of  
the Department's Exhibit 4; Examination Report admitted into evidence as Department's Exhibit 1 at p.  
9.

<sup>19</sup> RPM asserted that it could not verify the accuracy of the Complaint Summary without having the  
actual complaint to review. However, the record reflects that RPM did receive the complaint and  
responded to it but RPM, like the Department, could not locate the complaint. Consequently, pursuant to  
A.R.S. § 6-129(D), the Complaint Summary is considered prima facie evidence that can be rebutted.

<sup>20</sup> Complaint Summary admitted into evidence as Department's Exhibit 8.

<sup>21</sup> It is noted that Ms. Young failed to appear to testify about the accuracy of her complaint.

1 the debt to a collection bureau. Complainant says that the  
2 collector has been rude and refuses to listen to her regarding  
3 the debt.<sup>22</sup>

4 53. While the Complaint Summary does not indicate any threat to report the account  
5 to a credit bureau, it was not explained how that allegation found its way into the  
6 Department's Examination Report. However, the Examination Report is considered  
7 prima facie evidence pursuant to A.R.S. § 6-129(D).

8 54. The Department forwarded Ms. Young's Complaint to RPM and RPM responded  
9 to the Department on April 7, 2005.<sup>23</sup>

10 55. When RPM received notice of the alleged fraud involving Ms. Young, it did not  
11 investigate Ms. Young's claim of misidentification. Instead, it sent information to the  
12 Department to forward to Ms. Young regarding how to report the fraud to its client,  
13 Sprint.

14 56. On May 11, 2005, the Department wrote to RPM and to Ms. Young advising that  
15 there was "insufficient evidence of a violation of the Arizona Revised Statutes Title 6 to  
16 warrant intervention [by the Department] at this time."<sup>24</sup>

17 57. RPM placed numerous telephone calls to Ms. Young's telephone number after  
18 February 14, 2005, when she lodged her complaint with the Department.<sup>25</sup>

19 Mr. Charlton's Testimony

20 58. Mr. Charlton testified regarding the procedures and practices of the Department  
21 regarding the regulation of collection agencies and investigation of consumer  
22 complaints.

23 59. Mr. Charlton testified that RPM should have processes to control their collection  
24 practices in situations when a consumer informs RPM that it reached an incorrect

25 <sup>22</sup> Examiner Comments and Conclusions dated September 5, 2009 admitted into evidence as part of the  
26 Department's Exhibit 1.

27 <sup>23</sup> See Correspondence dated April 7, 2005 from RPM, admitted into evidence as part of RPM's Exhibit F  
28 and as the parties' joint Exhibit I.

29 <sup>24</sup> Exhibit F at p.1.

30 <sup>25</sup> RPM's Pick Notes as of August 5, 2010 for Elizabeth Young admitted into evidence as part of RPM's  
Exhibit F.

1 phone number.

2 60. Mr. Charlton testified that RPM has a duty to investigate as follows:

3 [T]he onus shouldn't be put onto the consumer . . . the  
4 [collection] company should be able to determine who they are  
5 calling, whether they are using automatic dialers [and] . . . find  
6 ways to figure out who they are dealing with and, if necessary,  
7 stop these collection calls and letters. . . . The company needs  
8 to come up with processes to control their collection  
9 practices. . . . It is the licensee's duty . . . to make sure that they  
10 are dealing with the correct person, and to investigate those  
11 claims that this is not my debt or that . . . you are talking to the  
12 wrong person or. . . .<sup>26</sup>

11 61. Mr. Charlton also testified that the Department would have no issue with a  
12 collection agency if it takes some action or investigates allegations of possible identity  
13 theft and stops collection phone calls until it determines that the allegations of  
14 misidentification or identity theft were not an issue.

15 62. According to Mr. Charlton, it should not take government intervention to stop  
16 collection calls that occur without the debt having been verified or there is an  
17 investigation of identity theft. Mr. Charlton testified that RPM continued to contact the  
18 above-mentioned complainants until the Department became involved.

19 63. Mr. Charlton opined that an appropriate penalty in this matter, taking into  
20 consideration five complaints that contained multiple violations, would be \$25,000.00  
21 (\$5,000.00 per complaint).

22 Mr. Polus' Testimony

23 64. Mr. Polus testified that RPM never used a 1-800 number to reach Arizona  
24 residents and that only local callback numbers would show up on the caller IDs of  
25 Arizona residents.

26 65. Mr. Polus testified that RPM subcontracted with voice broadcasting companies,  
27 Live Box and Global Connect, who also made calls on behalf of RPM when RPM was  
28 not meeting its "penetration plan" goals. Mr. Polus, however, did not testify as to  
29

30 <sup>26</sup> 11/01/2010 Hearing Record at 2:05-2:10

1 whether these companies could have used the 1-800 number that Ms. Schwartz and  
2 Ms. Espinosa saw on their caller IDs.

3 66. Mr. Polus testified that although it is unlikely, it is possible for yelling to occur  
4 without being noticed, recorded, or reported by someone. He acknowledged that this is  
5 because a collector, who may have yelled, threatened, used abusive language or  
6 otherwise violated the law, is not likely to make a notation of such conduct when  
7 entering information into RPM's computer system or filling out the Pick Notes as it  
8 would not be in his or her best interest to do so. Additionally, Mr. Polus testified that  
9 when a consumer is disputing a debt, RPM requires that s/he send their request in  
10 writing before RPM undertakes to respond to the request.<sup>27</sup>

11 67. According to Mr. Polus, collection agencies such as RPM, receive accounts from  
12 their clients where the client asserts there is an amount due. If the consumer claims the  
13 amount due is incorrect or that it is paid, the collector must get confirmation from the  
14 consumer to back up the information and forward it to the client, who then determines  
15 the strategy moving forward.

16 68. Mr. Polus testified that RPM makes 220,000 telephone calls to Arizona  
17 consumers monthly and takes 16,200 inbound calls from Arizona consumers during any  
18 given month. Over the last 5 years, the Department has received a total of 4 complaints  
19 that were admitted into evidence in this proceeding.

#### 20 The Pick Notes

21 69. Mr. Polus testified that RPM is able to reconstruct what happened during each  
22 contact between RPM collectors and consumers and can run a report that shows the  
23 duration of a collection call and how many times a debtor's account has been "touched"  
24 or "looked at. However, the Pick Notes do not contain this information and RPM did not  
25 present any document that contained such information.

26 70. Mr. Polus provided what could be considered inconsistent testimony regarding  
27 the meaning of various abbreviated notations used by RPM collectors when filling out  
28 Pick Notes. For example, Mr. Polus testified that the notation "paa" means a "person at

29 \_\_\_\_\_  
30 <sup>27</sup> See Correspondence from Mr. Polus dated August 19, 2007 admitted into evidence as part of RPM's Exhibit B.

1 address" was reached, i.e., somebody answered the phone. Yet, when analyzing Pick  
2 Notes from RPM's contacts with Ms. Espinosa,<sup>28</sup> which reflect that Ms. Espinosa or  
3 somebody at her residence was reached five times, Mr. Polus testified that RPM  
4 collectors did not have an "actual conversation" with Ms. Espinosa until April 20, 2008,  
5 explaining that Ms. Espinosa or somebody at her residence must have hung up the  
6 telephone as soon as they answered it on January 26, 2008, January 27, 2008,  
7 February 10, 2008, or March 31, 2008.<sup>29</sup>

8 71. Mr. Polus also testified that the notation "hung up" on RPM's Pick Notes means  
9 that the telephone call never made it to an RPM representative because the person  
10 hung up during the transfer. However, Mr. Polus also testified that the term "hupxfer"  
11 means that the consumer hung up the phone before the call could get transferred to a  
12 rep. He also testified that the term "hung up" means that somebody at that address  
13 (possibly, a husband or child) answered the phone, stated that the debtor was not  
14 there, and then hung up the phone. Mr Polus further testified that the term "hold drop"  
15 means that a person answered the phone, the call was transferred to a live rep, but  
16 during that transfer period, the consumer hung up without making contact with an  
17 actual rep.

18 72. Mr. Polus testified that the notation "gi" stands for "got information." The Pick  
19 Notes provided by RPM are blank as to what information Ms. Roberts provided to RPM  
20 on July 17, 2008.<sup>30</sup>

### 21 CONCLUSIONS OF LAW

22 1. When a licensee violates any applicable law, rule or order, the Superintendent  
23 of the Department may suspend or revoke its license (A.R.S. § 32-1053(A)(3)) assess a  
24 civil penalty (A.R.S. § 6-132,) or issue a cease and desist order (A.R.S. § 6-137).

25 2. The FDCPA provides that it does not preempt state law unless the federal law

26  
27 <sup>28</sup> RPM's Exhibit D,

28 <sup>29</sup> RPM's Pick Notes as of May 30, 2008 for Ms. Espinosa admitted into evidence as part of RPM's  
Exhibit D.

29 <sup>30</sup> RPM's Pick Notes as of August 6, 2010 for Ms. Roberts admitted into evidence as part of RPM's  
Exhibit E.

1 and state law are inconsistent. See 15 U.S.C. § 1692n. "A state law is not inconsistent  
2 with [the FDCPA] if the protection such law affords any consumer is greater than the  
3 protection provided by [the FDCPA]." *Id.*

4 3. Arizona law provides more protections to consumers and is not preempted by  
5 the FDCPA. Compare 15 U.S.C. § 1692d with A.A.C. R20-4-1511; compare A.A.C.  
6 R20-4-1514 with 15 U.S.C. § 1692g(b).

7 4. Under Arizona law, a collection agency has the duty to deal openly, fairly and  
8 honestly in the conduct of its business and not engage in unfair or misleading practices  
9 or resort to any oppressive means or methods of collection." A.R.S. § 32-1051(3), (4).

10 5. A.A.C. R20-4-1512 provides that "[a] collection agency shall contact a debtor by  
11 telephone only during reasonable hours." "Contact" means "to communicate with, and  
12 includes attempted communications." A.A.C. R20-4-1501(5).

13 6. The Arizona Administrative Code prohibits collection agencies from engaging in  
14 the following acts:

15 (1) using unauthorized or oppressive tactics designed to harass any  
16 person to pay a debt, A.A.C. R20-4-1511(A);

17 (2) using written or oral communications that ridicule, disgrace, or  
18 humiliate any person or tend to ridicule, disgrace, or humiliate any  
19 person, A.A.C. R20-4-1511(B);

20 (3) permitting their agents, employees, representatives, debt  
21 collectors, or officers to use obscene or abusive language in efforts to  
22 collect a debt, A.A.C. R20-4-1511(D);

23 (4) failing to give the debtor access to any of the collection agency's  
24 records that contain the disclosure information listed under A.A.C. R20-4-  
25 1514(A) at the request of the debtor, A.A.C. R20-4-1514(B), or fail to give  
26 the debtor at his or her request, free of charge, a copy of any documents  
27 from its records, A.A.C. R20-4-1514(C).

28 7. To glean the plain meaning of the words, courts may consult a dictionary for  
29 definitions. See *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Com'n*,  
30 229 P.3d 242, 252-53 (App. 2010).

1 8. The term "oppressive" is defined as "1.a. Difficulty to bear: Harsh b. Tyrannical  
2 2. Weighing heavily on the senses or spirit. 1: unreasonably burdensome or severe; 2:  
3 tyrannical; 3: overwhelming or depressing to the spirit or senses." Webster's II New  
4 Riverside University Dictionary 825 (1994).

5 9. The term "harass" means "1. To annoy or torment repeatedly and persistently.  
6 2. To wear out: EXHAUST...." Webster's II New Riverside University Dictionary 564  
7 (1994).

8 10. The term "disgrace" is defined as "1. Loss of honor, respect, or reputation :  
9 SHAME. 2. The condition of being regarded with disapproval. 3. Something that brings  
10 disfavor... ." Webster's II New Riverside University Dictionary 385 (1994).

11 11. The term "humiliate" is defined as "To lower the pride or dignity of : ABASE."  
12 Webster's II New Riverside University Dictionary 597 (1994).

13 12. The term "ridicule is defines as "Words or actions intended to evoke sardonic  
14 laughter at or feelings towards one. To make fun of." Webster's II New Riverside  
15 University Dictionary 1010 (1994).

16 13. When a purported debtor informs a collection agency that the debtor has been  
17 misidentified or that the debt has been paid, collection agencies are required to  
18 investigate any such claim before continuing its collection efforts against the debtor.  
19 See A.A.C. R20-4-1521.<sup>31</sup>

20 14. A claim by the alleged debtor that the debtor is misidentified or the debt paid, or  
21 a request for the collection agency's records by the alleged debtor, need not be in  
22 writing for the collection agency to be required to take an action (i.e., verify the validity  
23 of the debt, provide records, etc.). See A.A.C. R20-4-1514.

24 15. Official reports of the Department are considered prima facie evidence of the  
25 facts therein stated in any action or proceeding wherein the superintendent is a party  
26 See A.R.S. § 6-129(D).

27  
28 <sup>31</sup> Although the Department referred to this rule during the hearing and in its Proposed Findings of Fact  
29 and Conclusions of Law, the rule was not identified in the April 6, 2010 Cease and Desist Order or in the  
30 Notice of Hearing issued in this matter. Consequently, the Administrative Law Judge has no authority to  
address whether RPM violated such rule or any other statute or rule that was not specifically identified n  
the Notice of Hearing issued in this matter. See A.R.S. § 41-1092.02(A)(1).

1 16. The Department bears the burden of proving by a preponderance of the  
2 evidence that RPM has violated State laws pertaining to collection agencies. See  
3 A.A.C. R2-19-119.

4 17. A "preponderance of the evidence is such proof as convinces the trier of fact that  
5 the contention is more probably true than not." Morris K. Udall, ARIZONA LAW OF  
6 EVIDENCE § 5 (1960). It is "evidence which is of greater weight or more convincing than  
7 the evidence which is offered in opposition to it; that is, evidence which as a whole  
8 shows that the fact sought to be proved is more probable than not." BLACK'S LAW  
9 DICTIONARY 1182 (6<sup>th</sup> ed. 1990).

10 18. The Department proved by a preponderance of the evidence that RPM violated  
11 the provisions of law, as set forth below.

12  
13 Violations

14 All Consumer Complaints

15 19. RPM's procedures and processes (including its use of a computer dialer system)  
16 were designed in a way that allowed telephone calls to be made to the above-  
17 mentioned five consumer complainants on a continual basis for several months. The  
18 volume of telephone contacts produced by RPM constitutes a form of oppressive tactics  
19 designed to harass in violation of Arizona law. Thus, RPM violated the provisions of  
20 A.A.C. R20-4-1511(A).

21 20. While RPM argued that the testimony of Ms. Schwartz, Ms. Espinosa, and Ms.  
22 Roberts were unreliable and contradicted by the Pick Notes, RPM relied on the  
23 testimony of Mr. Polus, who conducted an after the fact review of the complaints and  
24 had no direct personal knowledge of the events at issue.

25 21. Even though the Department relied upon Mr. Harvey's complaint and also relied  
26 on the summary of Ms. Young's complaint, such evidence is considered prima facie  
27 evidence pursuant to A.R.S. § 6-129(D).

28 22. RPM relied upon its policies and procedures that were in place during the  
29 relevant time, the Pick Notes, and the testimony of Mr. Polus. However, RPM's  
30 evidence is not as persuasive as the evidence presented by the Department. This is

1 because the Pick Notes, as set forth above, are of limited evidentiary value given that  
2 the collectors involved who made the notes did not testify as to the meaning of the  
3 comments or provide context as to what occurred during the telephone conversations  
4 between a collector and a consumer. Additionally, Mr. Polus did not have first hand  
5 knowledge of the acts at issue and none of the collectors involved in the collection calls  
6 at issue testified at the hearing..

7 23. In its Legal Brief, RPM argues that the Department "cannot carry its burden of  
8 proof" because it allowed spoliation of the evidence by failing to promptly investigate  
9 the complaints filed by Ms. Schwartz and Ms. Espinosa. (RPM's Legal Brief at 7:4-8:5).  
10 However, there was no evidence presented that establishes that the records of the  
11 consumer complainants were ever in the possession or control of the Department. The  
12 Department may not be held accountable for spoliation of the "evidence," when it did  
13 not have custody of such evidence. *Cf. Lips v. Scottsdale Healthcare Corp.*, 224 Ariz.  
14 266, 267, 229 P.3d 1008, 1009 (2010).

#### 15 Ms. Schwartz's Complaint

16 24. The weight of the evidence established that RPM collectors used harsh and  
17 insulting language, including calling her a thief. The weight of the evidence established  
18 that RPM's collectors' communications with Ms. Schwartz were intended to and did  
19 "ridicule, disgrace, or humiliate" Ms. Schwartz. Consequently, RPM violated the  
20 provisions of A.A.C. R20-4-1511(B).

21 25. The Department presented evidence that abusive language occurred with  
22 respect to RPM communications with Ms. Schwartz. However, contrary to the  
23 Department's assertions, the weight of the evidence of record did not establish that  
24 RPM permitted its debt collectors to use abusive language.

25 26. The evidence of record established that RPM does not permit abusive language  
26 and maintains a policy of prohibiting such conduct, which RPM enforces. Thus, the  
27 Department failed to prove by a preponderance of the evidence that RPM violated the  
28 provisions of A.A.C. R20-4-1511(D).

#### 29 Ms. Robert's Complaint

30 27. RPM's collectors threatened to report Ms. Roberts' non-failure to pay her "debt"

1 to a credit bureau credit and these threats were intended to disgrace or humiliate Ms.  
2 Roberts by lowering her status or creditworthiness in her own eyes. RPM's threats of  
3 bad credit reporting directed at Ms. Roberts violated the provisions of A.A.C. R20-4-  
4 1511(B).

5 28. Ms. Roberts requested RPM to provide her with updated information regarding  
6 her account and debt, RPM failed to do so as required by A.A.C. R20-4-1514(B) and  
7 (C). Instead, RPM required that Ms. Roberts disprove that she owed on the account.  
8 Thus, RPM violated the provisions of A.A.C. R20-4-1514(B) and (C).

#### 9 Mr. Harvey's Complaint

10 29. The Administrative Law Judge finds that despite reference to the FDCPA which  
11 is not at issue in the instant hearing, the acts alleged in Mr. Harvey's complaint fall  
12 within the purview of the statutes and rules alleged to have been violated and are  
13 within the scope of the Department's jurisdiction.

14 30. When Mr. Harvey requested RPM to prove that he owed the debt they were  
15 attempting to collect, RPM failed to do so because Mr. Harvey's request was not made  
16 in writing. Consequently, RPM violated the provisions of A.A.C. R20-4-1514(B) and  
17 (C).

#### 18 Ms. Young's Complaint

19 31. There has not been a citation to any statute of limitations that would bar the  
20 Department from proceeding against RPM with respect to Ms. Yong's complaint despite  
21 the fact that the Department did not take disciplinary action against RPM in 2005 when  
22 the complaint was filed.

23 32. RPM's collectors' communications with Ms. Young, including the threat of  
24 reporting to a collection bureau and refusal to listen what Ms. Young had to say,  
25 ridiculed, disgraced, or humiliated Ms. Young or was intended to reduce Ms. Young to  
26 a lower position in her own eyes or the eyes of others. Thus, RPM violated the  
27 provisions of A.A.C. R20-4-1511(B).

#### 28 Civil Penalty

29 33. The Department sought a civil penalty in an amount not less than \$25,000.00.  
30 Pursuant to A.R.S. § 6-132, the Department may impose a civil penalty not to exceed

1 \$5,000.00 per violation per day. The Department did not present evidence that would  
2 support the imposition of the maximum amount of \$5,000.00 per violation and RPM's  
3 evidence did not provide any mitigating factors to consider specifically with respect to  
4 the complaints at issue. <sup>32</sup> Therefore the Administrative Law Judge concludes that the  
5 appropriate amount for each violation (10 violations were found), as set forth above,  
6 shall be \$2,500.00.

7 **ORDER**

8 Based upon the foregoing, the above-mentioned Cease and Desist Order is  
9 affirmed with respect to RPM, except as to the civil penalty, and within thirty days of the  
10 Order entered in this matter, RPM shall pay to the Department a civil penalty in the sum  
11 of \$25,000.00.

12 *In the event of certification of the Administrative Law Judge Decision by the*  
13 *Director of the Office of Administrative Hearings, the effective date of the Order will be 5*  
14 *days from the date of that certification.*

15 Done this day, April 8, 2011.

16  
17 /s/ Lewis D. Kowal  
18 Administrative Law Judge

19  
20 Transmitted electronically to:  
21 Lauren Kingry, Superintendent  
22 Arizona Department of Financial Institutions  
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25  
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<sup>32</sup> The testimony of Mr. Polus established that RPM did not tailor its collection practices in or order to  
comply with Arizona laws pertaining to collection agencies.