UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARTHA VASSALLE, et al., Plaintiff, vs. MIDLAND FUNDING, LLC, et al., Defendant.	Case No. 3:11-cv-00096 HON. DAVID A. KATZ And Related Cases: Case No. 3:10-cv-00091, N.D. Ohio Case No. 3:08-cv-01434, N.D. Ohio

FEDERAL TRADE COMMISSION'S BRIEF AS AMICUS CURIAE

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I. SUMMARY

The Federal Trade Commission ("FTC" or "Commission") submits this brief as *amicus curiae* to express its concerns about the fairness of the class action settlement agreement preliminarily approved by the Court on March 11, 2011. The broad "Class Release" may deprive over a million consumers across the nation of their existing rights to challenge improper judgments entered against them, to defend themselves in ongoing debt collection actions, and to vindicate violations of collections laws in state and federal court by Midland Funding, LLC, Midland Credit Management, Inc., and Encore Capital Group, Inc. (collectively "Defendants") and their agents. The language of the Class Release, which exempts from challenge the use of *any* affidavit in a debt collection lawsuit, would prohibit, *inter alia,* consumers from challenging judgments where they were not properly served but where Defendants submitted an affidavit of

provides Defendants, as compared to the *de minimis* benefits to the class, cast serious doubts as to the fairness, reasonableness, and adequacy of the proposed settlement. Thus, we respectfully suggest that the Court reject the proposed settlement.

Additionally, the proposed claim process lacks important safeguards for class members' personal information. If Defendants' access to and use of information obtained through the claim process is not restricted, consumers may unwittingly provide Defendants with current information that can be used against them in future collection actions by Defendants. It is deceptive to trick consumers into providing personal information for one reason, and then use the information for another, undisclosed, purpose. We therefore respectfully suggest that the Court enter an order limiting Defendants' use of any personal information gathered in the claims process to the claims process itself.

II. STATEMENT OF FTC'S INTEREST

[1] Most recently, in March 2011, the Commission announced a settlement agreement with collector West Asset Management, Inc., resulting in a $2.8 million civil penalty. *United States v. West Asset Mgmt., Inc.*, No. 1:11-cv-0746 (N.D. Ga. Mar. 14, 2011). In October 2010, the FTC reached a settlement agreement with Allied Interstate, Inc., one of the nation's largest debt collectors, resulting in a $1.75 million civil penalty. *United States v. Allied Interstate, Inc.*, No. 10-cv-04295 (D. Minn. 2010). In March 2010, the Commission announced a settlement agreement with collector Credit Bureau Collection Services and two of its officers, resulting in a civil penalty of more than $1 million. *United States v. Credit Bureau Collections Servs., et al.*, No.2:10-cv-169 (S.D. Ohio 2010).

[2] Federal Trade Commission, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE (2009) (hereafter "WORKSHOP REPORT

in debt collection lawsuits at the filing and default stages, particularly in actions brought by debt buyers. Thus, the FTC has considerable experience in issues related to debt buyers and debt collection litigation.

The Commission also actively seeks to safeguard consumers' privacy and the security of their personal information. Section 5 of the FTC Act, 45 U.S.C. § 45(a), and the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. §§ 6801-6809, cover the practices of debt buyers and debt collectors such as Defendants with respect to the privacy and security of personal information. *See* 15 U.S.C. § 6809(3) (governs the collection, sharing, and safeguarding of nonpublic personal information by "financial institutions," a term that includes debt collectors). Among other things, GLBA requires debt collectors to implement appropriate safeguards to protect the security and integrity of "customer" information. Finally, under Section 5 of the FTC Act the Commission has challenged data collection practices as unfair or deceptive if information collected for one purpose was used for another without adequate disclosure and authorization.

In addition to its specific experience with the FDCPA, debt collection, and privacy and data collection issues, the FTC has also studied how best to protect consumer interests and other fairness issues in the class action context, and has a tradition of filing *amicus* briefs commenting on potentially unfair class settlements. As part of its Class Action Fairness Project, the FTC convened a workshop on class action lawsuits in 2004, "Protecting Consumer Interests in Class

[4] *See* Federal Trade Commission, *Agenda*, PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS (2004), *available at* http://www.ftc.gov/bcp/workshops/classaction/agenda.shtm (detailing the workshop agenda and papers submitted in connection with the workshop); *see also,* 18 Geo J. Legal Ethics 1161 (2005) (containing a transcript of the workshop proceedings).

[5] For a list of some the FTC's *amicus* filings, *see* Federal Trade Commission, *Index,* PROTECTING CONSUMER

"information received by debt collectors is often inadequate and results in attempts to collect from the wrong consumer or the wrong amount."[8]

There is no reason to believe that Defendants receive significantly more or higher quality information about the debts they seek to collect than other debt buyers; problems with inadequate information are endemic to the industry. Indeed, in the *Kimble* class complaint, plaintiffs allege that Defendants possess only a computer tape or other electronic listing of debts. (Dkt. 1 at 5.) Moreover, as noted in the *amicus* brief filed by the Attorneys General of 38 states, consumer complaints "allege that Defendants have brought debt collection actions where the amount allegedly owed was inaccurate or the debts were not owed as a result of prior payment, bankruptcy discharge, settlement, or mistaken identity." (Dkt. 27 at 6.) A review of the Commission's own complaint database also reveals more than three thousand consumer complaints alleging inaccurate collections by Defendants. Some complainants specifically commented that they had been sued for debts that they did not owe.[9]

The Commission's 2009 Workshop Report also found significant concerns with debt collection lawsuits, especially in light of the vast number of such suits filed in recent years, and suggested further study.[10] Public comments were solicited and three public roundtables were held to discuss the issue. The resulting 2010 Roundtable Report identified numerous problems with debt collection lawsuits, especially those by debt buyers. One serious problem noted by the FTC was the lack of participation by consumers in debt collection lawsuits. Estimates of the

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[8] *Id*. at 24

[9] *See* Exhibit 1, Declaration of Tracy Thorleifson.

[10] WORKSHOP REPORT, *supra* note 1 at 55-58.

default judgment rate ranged from 60 percent to 95 percent, with most commenters suggesting that the default rate in their jurisdictions was close to 90 percent.[11]

Contributing to the high number of default judgments are the serious problems associated with inadequate service of process, as noted by many consumer advocates.[12] Consumers might not get notice of an action if the summons is delivered to an old or otherwise incorrect address or if it is delivered to the wrong person, such as someone with a similar name. In some cases, process servers simply do not serve the consumer but falsely attest that they have done so.[13] The number of documented systemic problems with service, particularly in large metropolitan areas, caused the Commission to recommend changes in service of process at the state and local level.[14]

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[11] ROUNDTABLE REPORT, *supra* note 2 at 7.

[12] *Id.* at 7-10.

[13] This is sometimes referred to as "sewer service" – the server throws the documents "down the sewer" and then falsifies its affidavit of service. *See, e.g., United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970). The New York Attorney General has filed civil and criminal actions against process servers that falsified affidavits of service. *People v. Zmod Process Corp. DBA Am. Legal Process & Singler*, Index No. 2009-4228 (Erie County Supreme Court) (Apr. 2009) (civil suit); *People v. Singler & Zmod Process Corp. dba Am. Legal Process, Inc.* (Apr. 2009) (felony complaint). *See also In re Pfau v. Forster & Garbus et al.*, Index No. 2009-8236 (Erie County Supreme Court) (July 2009) (civil petition to vacate default judgments obtained against consumers in debt collection cases, filed against numerous attorney collectors who used American Legal Process to serve process and obtained default judgments in New York). An analysis of the records of the process servers in those cases revealed numerous instances in which process servers claimed to: be at two or more locations at the same time; be at two locations in sequence when physically impossible in light of the time required to travel the distance between them; have served documents at times before those documents were received; have attempted service at times before the court index number had been purchased; and have notarized signatures when physically impossible to do so. *In re Hon. Ann Pfau v. Forster & Garbus,* Index No. 2009-8236 (Erie County Supreme Court), Attorney Affirmation of James M. Morrissey (July 2009). *See* ROUNDTABLE REPORT at 8, 9.

[14] ROUNDTABLE REPORT at 10.

It is also likely that, in at least some lawsuits against class members, evidentiary problems exist with affidavits used by Defendants – problems that would seriously call into question the validity of the underlying judgment if the affidavit were challenged. This Court has already found that Defendants filed a false affidavit in which the affiant had no personal knowledge about the debt, including the date of last payment or the outstanding balance. Although the Court found that the account information in the Brent affidavit was "likely" correct, this issue was not litigated. The validity of the information in the other 1.44 million accounts of class members cannot be assumed. Consumer complaints report that at least some judgments obtained by Defendants are not accurate, seeking the wrong amount or targeting the wrong person.[18]

Nor can it be assumed that Defendants could carry their burden of proof in debt collection lawsuits if the affidavits were challenged as not falling within the business records exception to the hearsay rule. In some jurisdictions, Defendants' affidavits would not be admissible to prove the existence, ownership, or amount of the debt because the affiant is not qualified to testify about the record-keeping practices of the creditor from whom the debt was

[18] *Id*.

records exception to hearsay rule because affiant did not have knowledge about the original creditor's preparation of the documents).

Inaccurate affidavits in debt collection lawsuits cause real harm to consumers, whether based on inaccurate information about the amount of the debt or authorized fees and interest, false attestations about service of process, or erroneous assertions regarding the admissibility of an underlying fact. These problems are exacerbated by the large number of default judgments against consumers based on such affidavits. The proposed settlement does not adequately redress these harms.

IV. ARGUMENT

A. The Proposed Class Settlement Must Be Fair, Reasonable, and Adequate to the Entire Settlement Class

Class action settlements may only be approved if the Court determines that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Amchen Products, Inc. v. Windsor,* 521 U.S. 591, 627 (1997) (rejecting settlement agreement as a "global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected"). "The court acts as a fiduciary who must serve as guardian of the rights of absent class members . . . [t]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *Reinstadt v. Apple Computer, Inc.*, 948 F. Supp. 701, 705 (N.D. Ohio 1996), *quoting Gruinn v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); *see also Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (reversing class settlement where district court "did not live up to its fiduciary responsibility as the guardian of the rights of the absentee class members"). Where, as here, the proposed nationwide class has

not yet been certified, the fairness of a proposed settlement is subject to higher scrutiny. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 151 (S.D. Ohio 1992); *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982). Factors to be considered by the Court in assessing fairness include the comparative strength of the plaintiffs' claims with the scope of the relief offered by the settlement, the impact on absent class members, and the public interest. *International Union, U.A.W. v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007); *see also Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990) (a court should determine if the settlement is "fair, adequate, and reasonable, as well as consistent with the public interest").

B. The Proposed Release and Benefit

Under the proposed settlement, class members who do not opt out:

> release and forever discharge Encore Capital Group, Inc. [and its affiliates, agents, and representatives] ("the Released Parties") from all causes of action, suits, claims and demands, whatsoever, known or unknown, in law or in equity, based on state or federal law, which the class now has, ever had or hereafter may have against the Released Parties, arising out of or relating to the Released Parties' use of affidavits in debt collection lawsuits.

(*Brent* Dkt. 107-1, at §V(D)(1).)

Notably, this broad release is not limited to Defendants' conduct at issue in the underlying class actions. Rather, the release appears to cover any affidavit-related claim, including a claim in an offensive lawsuit, counterclaim, or, if read broadly, affirmative defense. The far narrower class complaints focus on Defendants' use of affidavits signed by employees who falsely attested to personal knowledge about the account being collected. The release, covering all claims arising out of or relating to Defendants' *and* their agents' – use of affidavits in debt collection suits, is not so limited. Instead, its sweeping language would potentially apply to claims related to affidavits that may have improperly relied on inadmissible evidence or

affidavits falsely attesting to service of process. It would also shield affidavits used by Defendants' agents, including attorneys filing suit on behalf of Defendants. These factually different scenarios were not addressed by the plaintiffs and issues related to such situations were not litigated. *Cf. Grimes v. Vitalink Comm'ns Corp.*, 17 F.3d 1553, 1563-64 (3rd Cir. 1994) (settlement may release claims based on different legal theory from that alleged in complaint only when the claims "[depend] upon the very same set of facts"); *quoting, Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 18 (2d Cir. 1981). In exchange for this sweeping release, class members are eligible to claim a check of up to $10 (and only if they timely submit a claim form).

The proposed settlement also provides for a stipulated injunction that requires Defendants to implement certain affidavit procedures for use in future proceedings. Unlike the broad class release, however, these procedures are narrowly tailored to the facts of the underlying class action: Defendants must only implement affidavit procedures aimed to "prevent the use of affidavits in debt collection lawsuits where the affiant does not have personal knowledge of facts set forth in the affidavit." Defendants need not establish procedures to ensure that affidavits are based on credible and accurate information and supported by admissible evidence. Moreover, this injunctive relief is limited to twelve months, and it does not require Defendants to take any action to address judgments already obtained using false affidavits.

[19] Section 813(a)(3) of the FDCPA authorizes the payment of costs and reasonable attorneys fees in any successful action. 15 U.S.C. § 1692k(a)(3).

challenge Defendants' use of affidavits in pending debt collection lawsuits and in actions to set aside improperly obtained judgments.

The judgments insulated under this settlement would include default judgments where the consumer was not properly served, judgments for the wrong amount or against the wrong person, and judgments relying on inadmissible hearsay where Defendants could not sustain their burden of proof if their affidavits were disallowed. Although the number of class members affected by these issues is unknown, such problems were reported frequently in the Commission's studies, especially in actions brought by debt buyers.[20] Given the uncontroverted evidence that Defendants favored expediency over accuracy in their litigation practices – this Court has already found that Defendants' employees failed to check the accuracy of affidavits prior to signing them, and falsely swore to personal knowledge of the affidavits' contents – other errors are especially likely.

These judgments, likely for hundreds or thousands of dollars, can be enforced against consumers for as long as fifteen or twenty years,[21] accruing interest all the while. They negatively impact consumers' credit reports and subject consumers to wage garnishments and levies against bank accounts and tax refunds. Where the judgment accurately reflects the underlying debt and Defendants carried their burden of proof with admissible evidence, such

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[20] *See supra* at 4-9.

[21] In many states, including Florida, Indiana, Iowa, New Jersey, New York, and Virginia, the statute of limitations on a judgment runs 20 years or more. *See, e.g.*, Fla. Stat. Ann. § 95.11(1) (West 2011) (20 years); Ind. Code Ann. § 34-11-2-11 (West 2011) (20-years); Iowa Code Ann. § 614.1.6 (West 2011) (20 Years); Mass. Gen. Laws Ann. Ch. 260, § 1 (West 2011) (20 years); N.J. Stat. Ann. § 2A:14-5 (West 2011) (20 years); N.Y. C.P.L.R. § 211 (McKinney 2011) (20 years); and Va. Code Ann. § 8.01-251 (West 2011) (20 years).

judgments play an important role in the collections process, and fairly hold consumers accountable for their actions. However, especially where there are questions about the validity of the debt or the amount owed, or where Defendants played fast and loose with the rules of evidence and disadvantaged a defaulting debtor, the value to consumers of being able to defend against a collection action or set aside a judgment is incalculable.

Weighed against this, the proposed class benefit is grossly disproportionate. It is not fair, adequate, or reasonable to require consumers to give up significant and valuable defenses to potentially erroneous legal claims for, at most, $10. The waiver applies to over a million judgments with known defects, many of which could not be successfully relitigated. If anything, this settlement provides a windfall to Defendants, who are purchasing *res judicata* (notice.ng)]TJ 4TT2 1 T

[22] The claim form sent to consumers instructs them to provide their current address and phone numbers. (*Brent* Dkt.107-2.) Class members who timely submit the claim forms will receive a check from the settlement fund. (*Brent*

of Am., Inc., FTC Dkt. No. C-4079 (May 6, 2003) (consent order) (alleging that it was deceptive to collect personal data from students for educational purposes and then sell the data to commercial marketers); *In the Matter of The Nat'l Research Ctr. for College & Univ. Admissions,* FTC Dkt. No. C-4071 (Jun. 28, 2003) (consent order) (same).

To avoid potential harm to consumers from participating in the settlement, the Court's order governing the claims process should explicitly require Defendants to limit the use of consumers' personal information to only the processing of claims.

F. The Public Interest is Not Served by the Proposed Class Settlement

In assessing the fairness of a class settlement, the Court should also consider whether the settlement serves the public interest. *Int'l Union*, 497 F.3d at 631. More than a million consumers may lose important rights to defend against or seek to set aside potentially improperly obtained judgments. The impact of the proposed settlement in instances where Defendants have improperly obtained judgments for the wrong amount or against the wrong person is particularly egregious. Class members also forfeit the affirmative right to seek recompense for injury under the FDCPA and state consumer protection laws. Moreover, given the fraudulent and deceptive practices that the Court found Defendants to have engaged in, there is little justice in allowing Defendants to shield themselves from all future liability, while also insulating 1.44 million judgments from collateral attack for the paltry sum of $10 per judgment. Finally, the stipulated injunctive relief is almost wholly inadequate. It provides no relief to class members who have already been harmed by Defendants' false affidavits and, even though Defendants engaged in the underlying bad conduct over a period of at least six years, the requirement that Defendants develop and follow appropriate affidavit procedures is limited to twelve months. While the

proposed settlement clearly benefits Defendants, class counsel, and the named plaintiffs, it leaves the other million consumers that Defendants harmed in a worse position. This is not in the public interest.

V. CONCLUSION

For the reasons stated above, the Commission respectfully requests that the Court reject the proposed settlement. It is not fair, adequate, or reasonable and its entry would not serve the public interest.

Dated: June 21,2011

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on June 21, 2011, a copy of the foregoing was filed electronically with the Court's Case Management/Electronic Case Files (CM/ECF) docketing system. Notice of this filing will be sent by operation of the CM/ECF system. Parties may access this filing through the CM/ECF. In addition, the following will receive a copy of the foregoing by email (MYF Legal Services) or by first class mail (all others listed):

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Federal Trade Commission

EXHIBIT ONE

[redacted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

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Consumer Sentinel Network ("CSN"). CSN is the Commission's central consumer protection complaint database. It houses complaints received in the past five years.

3. CSN includes complaints received via the secure website

[redacted]

https://www.ftccomplaintassistant.gov or the toll-free helpline: 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The database also includes consumer complaints that are mailed to the Commission. In addition, the CSN database includes complaints forwarded by, or entered directly, into the database by a number of state attorneys general, other law enforcement authorities, Better Business Bureaus, and consumer protection organizations [redacted]

examples of each. The following excerpts are illustrative of these complaints:

- My name is Albert C. . . . then they started to garnish my wages. I know the name of the company is Midland Funding LLC. I have never heard of this company before they have taken a garnishment out on me in Madison county and I have not lived there in almost 10 yrs and I don't know what the bill is from!!! They have not contacted me at all.

[redacted]

tax refund. I feel that this is unfair because I was unaware of this and never got any form of notification isn't this illegal? I still haven't received any information about this and was able to obtain the information I do have by surfing the Internet about this company. Please help!

- The FIRST time I heard of this debt was when they tried to garnish my wages on 11162010. I immediately sent them a Certified Letter requesting the REASON for the Wage Garnishment and PROOF that I actually owed this money. I have not yet received anything from this company. They are trying to garnish my wages again and still have

[redacted]

- Consumer stated the debt collector has been attempting to collect a debt that [redacted]

not obtained by her. Consumer stated that the company filed a suit against her in the state of Illinois. Consumer stated the company wanted her to travel to Illinois, to appear in court. . . . .

- Consumer wrote that a debt collector, Midland Funding LLC has garnished their [redacted]

wages for an acct that she never opened over seven years ago. Consumer states that she has been disputing the acct for years, but the company was still allowed to garnish her wages. . . .

- I was sued by Midland Credit Management by Rubin & Rothman. I was never

- Midland Funding LLC shows up on my credit report as a judgment. I cannot contact them, I have know idea what this is for. I just received a detailed credit report, (Feb 2011). On that report is a judgment from Midland Funding LLC dated 2007. I have tried to locate and contact this business and cannot find a phone number or active business. I have not received anything by mail or communication from this company, ever. The judgment is for $650.00 and I completely have no idea what it is for. I did not

[redacted]

open or have any credit accounts from 2005 until recently. . . . If I in fact owe someone $650, I want to pay it. (First I need clarification.) If it is not legitimate I want it removed

[redacted]

no one even tried to get your paperwork." The third time they reset the court date they told me the hearing would be on the 19th of January 2009. They were in court on the 14th of January, 2009, but I was not because I was told the 19th. Because I was not there to defend myself they got a judgment against me for a bill that is not mine. . . .

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 7, 2011 Tracy S. Thorleifson

Tracy S. Thorleifson