No.

IN THE
Supreme Court of the United States

LEVI HUEBNER,

Petitioner,

v.

MIDLAND CREDIT MANAGEMENT, et al,

Respondents.

On Petition For Writ Of Certiorari
To The Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e(8), 1692g(a)(3), is a debt collector required to treat a consumer's oral dispute with the same validity as one made in writing as held by the First, Second (*pre-Huebner*), Fourth, Sixth, and Ninth Circuits, together with the Consumer Financial Protection Bureau (CFPB); or treat the dispute with less validity as held by the Third Circuit for not being in writing; further is the collector precluded from requiring the consumer disputing a debt to disclose *why* there is a dispute, as held by the First, Second (*pre-Huebner*), Fifth, and Seventh Circuits, together with the CFPB; or as the Second Circuit (*post-Huebner*), which held the collector can treat the dispute with less validity for failing to disclose "why" there is a dispute; or as the First, Fifth, and Seventh Circuits held that the statutory protection of 15 U.S.C. § 1692e(8) "knows or should know" standard requires no notification by the consumer, written or oral, and instead, depends solely on the debt collector's knowledge that a debt is disputed?

2. Does the evaluation of the least sophisticated consumer rest upon a question of fact as held by the Sixth, Seventh, and Eleventh Circuits together with the States of New York, Maryland, and California; or a question of law as held by the Second, Third, Fourth, Fifth, Ninth, and Tenth Circuits together with the State of Oklahoma?

PARTIES TO THE PROCEEDINGS

The petitioner is LEVI HUEBNER, on behalf of himself and all other similarly situated consumers, the named plaintiff in the court of origin at the Eastern District of New York.

The Respondents are MIDLAND CREDIT MANAGEMENT, INC., and MIDLAND FUNDING, LLC., the named as defendants in the court of origin.

The interested parties are POLTORAK PC, ELIE C. POLTORAK, the former counsel of Huebner in the court of origin.

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Levi Huebner respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit ("Second Circuit").

OPINIONS BELOW

The decision by the Second Circuit affirming on July 19, 2018 is published in the Federal Reporter as *Huebner v. Midland Credit Mgmt., Inc.*, 897 F.3d 42 (2d Cir. 2018). (a3). The District Court for the Eastern District of New York ("District Court") granted summary judgment and denied class certification on June 6, 2016, unpublished and cited by WestLaw as 2016 WL 3172789. (a31).

Intertwined, are the following decisions: On Feb. 11, 2015, the District Court *sua sponte* issued a fact-finding charging Levi Huebner ("Huebner") with "entrapping" the debt collector and accusing Huebner along with Interested Parties, Elie C. Poltorak ("Poltorak") of attempting to "make a little money," published in the Federal Report as *Huebner v. Midland Credit Mgmt., Inc.*, 85 F. Supp. 3d 672 (E.D.N.Y. 2015). (a57). On May 1, 2015, the District Court entered an order sanctioning Interested Parties for hiding the theory of the case, unpublished and cited as 2015 WL 1966280. (a73). On November 10, 2016, the District Court sanctioned Petitioner with attorney fees, unpublished and cited as 2016 WL 6652722. (a90). On December 23, 2016, the District Court entered an unpublished order setting the sanction as $9,850. (a106).

JURISDICTION

This case was initiated by Huebner in the Eastern District of New York against Midland Credit Management, Inc., and Midland Funding, LLC. ("Midland") pursuant to 15 U.S.C. §§ 1692e(8), (10). (a205). On July 19, 2018, the Second Circuit decided a timely appeal. (a3). On September 26, 2018, the Court (Ginsberg, *J.*) extended to December 17, 2018 the time to file this petition. (a1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Fair Debt Collection Practices Act (FDCPA) are:

> 15 U.S.C. § 1692a(3): The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.
>
> 15 U.S.C. § 1692e: A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing…
>
> (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

The other FDCPA sections that are relevant to the Act are reproduced in the appendices. (a113).

STATEMENT OF THE CASE

I. The Fair Debt Collection Practices Act

1. The FDCPA was enacted to regulate against "abusive, deceptive, and unfair debt collection practices" to reduce instances of personal bankruptcies, marital instability, loss of jobs, and invasions of individual privacy. 15 U.S.C. § 1692(a).

"The right to dispute a debt is the most fundamental of those set forth in § 1692g(a)..." *Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 286 (2d Cir. 2013).

Congress displaced defamation laws under the Fair Credit Reporting Act, 15 U.S.C. § 1681h(e) with "qualified immunity from state law defamation claims to those who furnish information to a consumer reporting agency." *Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp. 2d 582, 597 (D. Md. 1999). As a direct result, its counterpart in the FDCPA, 15 U.S.C. § 1692e(8), requires debt collectors to communicate a debt as disputed; this protects consumers from an otherwise defamatory remark, i.e. which

could slander a consumer as "debtor," "deadbeat" "untrustworthy," etc.

The right to dispute a debt serves several purposes. For instance, a dispute moots a claim for account stated. If "there is no record of dispute relating to any of the items or a sustained failure to object" courts frequently accept a claim for account stated. *McIntosh v. Controlled Credit Corp.*, 2018 WL 4761456, at *7 (S.D. Ohio Sept. 30, 2018). Especially since many debt collection lawsuits rely on the legal theory of "account stated" as the cause of action. *See* Emanwel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 Vt. L. Rev. 339 (2013). As held in *Toland v. Sprague*, 37 U.S. 300, 333 (1838) "In short, when there is a settled account, that becomes the cause of action." Account stated has a lesser burden of proof and serves "as an alternative to an action for breach of contract." *McIntosh v. Controlled Credit Corp.*, 2018 WL 4761456, at *8 (S.D. Ohio Sept. 30, 2018). "More generally, it goes without saying that a creditor must first have judgment before he is entitled to collect from one who has disputed the debt, and it frequently happens that the losing debtor pays up without more." *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 98 (1992) (White concurring).[1]

[1] If the debt is disputed, a collector is not precluded from bringing a State action and attempting to prove its right to payment. *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135

There are other important purposes for the right of having a debt designated as disputed. First, consistent with the objective of § 1692(a), a dispute to the validity of a debt prevents a debt collector or the creditor to whom debt is owed from filing an involuntary bankruptcy petition against the debtor pursuant 11 U.S.C § 303(b)(1). *Fustolo v. 50 Thomas Patton Drive, LLC*, 816 F.3d 1 (1st Cir. 2016). Second, "once a consumer disputes a debt orally under section 1692g(a)(3), a debt collector cannot communicate that consumer's credit information to others without disclosing the dispute. 15 U.S.C. § 1692e(8)." *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487, 491 (4th Cir. 2014); *see* also *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005) ("Oral dispute of a debt precludes the debt collector from communicating the debtor's credit information to others without including the fact that the debt is in dispute"). Third, the consumer's credit score would have lesser adverse effect if a debt is marked as disputed. *Evans v. Portfolio Recovery Assocs., LLC*, 889 F.3d 337, 345 (7th Cir. 2018) ("The defendant's decision to report the debt but not the dispute resulted in a much lower credit score for the plaintiff than a report of both the debt and the dispute.")

(2d Cir. 2010) (when a consumer disputes the debt, "the debt collector is allowed to demand immediate payment and to continue collection activity"), *Hill v. Accounts Receivable Servs., LLC*, 888 F.3d 343, 346 (8th Cir. 2018) ("The fact that a lawsuit turns out ultimately to be unsuccessful does not make the bringing of it [pursuant to the FDCPA] an 'action that cannot legally be taken").

Fourth, "Also, if a consumer owes multiple debts and makes a payment, a debt collector cannot apply that payment to a debt that has been disputed orally. See 15 U.S.C. § 1692(h)." *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487, 491 (4th Cir. 2014). Fifth, "[W]hen a furnisher reports a dispute, its report confirms that the consumer has actually contacted the furnisher and explained that the consumer believes he does not owe the debt." *Saunders v. Branch Banking and Tr. Co. Of VA*, 526 F.3d 142, 150 (4th Cir. 2008).

2. The crux of this case seeks review of the requirement that collectors communicate disputed debt as disputed. A number of conflicts exist among the Circuits.

First Conflict. In an effort to advance its collection activities, can the debt collector require the consumer to disclose *why* there is a dispute to the debt?

In summary as outlined *infra*, the First, Second (*pre-Huebner*), Fifth, and Seventh Circuits all hold that a debt collector cannot require the consumer to state the reason for the dispute and the Consumer Financial Protection Bureau ("CFPB") embraces the same view. The basis for the policy is the posture of the collection industry, as Midland with its debt, often have nothing more than a spreadsheet consisting of "information about the Consumer, such as name, address, social security number, and information about the Debt, including the purported

amount of the Debt, contract interest rate, and dates of origination and default." (a140). Other than that little information, the debt collector in most instances will not possess any evidence or information (i.e. contract, invoice, service order, etc.) which gave rise to such disputed debt. Rather, the debt collector, who seeks to induce payment by means of verbal and written persuasion to induce payment, disparages the dispute by twisting the consumer's own words into a basis for harassing the consumer to pay that disputed debt. In an effort to avoid such types of harassment, the approach of the FDCPA is that the collector should not become the inquisitor and arbiter to harass the consumer for exercising the right to dispute an alleged debt.

The First, Fourth, and Fifth Circuits have all held that the consumer is not required to state a reason for disputing a debt: "a dispute as to amount need not be material to generate a disqualifying bona fide dispute under 11 U.S.C. § 303(b)(1)." *Fustolo v. 50 Thomas Patton Drive*, LLC, 816 F.3d 1, 10 (1st Cir. 2016); *Sayles v. Advanced Recovery Sys., Inc.*, 865 F.3d 246, 250 (5th Cir. 2017) (FDCPA does not require disputes to be "material," and distinguishing such disputes from Consumer Credit Protection Act (CCPA), 15 U.S.C. §§1601–1693r), *Brady v. Credit Recovery Co.*, 160 F.3d 64, 67 (1st Cir. 1998), *DeKoven v. Plaza Assocs.*, 599 F.3d 578, 582 (7th Cir. 2010). Indeed, "we have no doubt that a debt collector is not allowed to suggest that the effect of disputing a debt is different than what the

FDCPA provides. To give the required notice of a right to dispute the debt while simultaneously and inaccurately disparaging the benefit of the right is to cause the consumer to think that the right to dispute has less benefit than is actually the case." *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 105 (1st Cir. 2014). "[A] disputed debt differs materially from an undisputed debt even if the consumer would not succeed at a trial of the dispute." *Saunders* at 150. A consumer needs only to "state simply, 'I dispute the debt.' These four words alone activate all of Cadleway's obligations under the FDCPA." *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 507 (7th Cir. 2008) (Rovner concurring in part).

The CFPB offers the same guidance to consumers to inform the debt collector, "You're saying: 'This is not my debt'" or "I do not have any responsibility for the debt you're trying to collect." (See sample letter,[2] a203-204). The same position is found in the Consent Order by the CFPB, in which the Respondents were fined for requiring consumers to prove the dispute.[3] (a158).

The consumer in essence cannot be expected to answer with legal reasoning when disputing a debt

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[2] https://www.consumerfinance.gov/ask-cfpb/what-should-i-do-when-a-debt-collector-contacts-me-en-1695/

[3] Midland contended that the Consent Order is not "evidence." However, the CFPB's interpretation of the FDCPA guides the Court. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984). Neither the Second Circuit nor the District Court addressed the Consent Order.

at a time when the consumer is already at the disadvantage of the professional debt collector, who may be attempting to convince the debtor that debt is owed. "This makes sense because unsophisticated consumers cannot be expected to assert their rights in legally precise phrases." *Gruber v. Creditors' Prot. Serv., Inc.*, 742 F.3d 271, 274 (7th Cir. 2014). A "consumer can, without giving a reason, require that the debt collector verify the existence of the debt before making further efforts to collect it." *Id.*

The Second Circuit (*pre-Huebner)* took the same view "The consumer's right to take the position, at least initially, that the debt is disputed does not depend on whether the consumer has a valid reason not to pay. The consumer, for example, may not recognize the name of the creditor, may not know whether she incurred the debt, may have a question whether the debt (or part of it) has been paid, or may be unsure of the amount. Assuming the debt is in fact owed, these would not be 'valid reasons' not to pay it." *DeSantis v. Computer Credit, Inc.*, 269 F.3d 159, 162 (2d Cir. 2001). "Upon the debtor's non-written dispute, the debt collector would be without any statutory ground for assuming that the debt was valid...." *Hooks* at 285.

However, the Second Circuit (*post-Huebner*) denied its precedent by holding that the debt collector can obligate the consumer to articulate "why" the debtor wished to dispute debt as "endeavoring to learn more" about the debtor's dispute in order to "resolve" the debt. (a18).

Second Conflict. There is a three-way split among the Circuits as to whether the consumer must communicate the dispute in writing or orally and whether those responsibilities are simply triggered once the collector learns of the dispute, irrespective how the knowledge is obtained.

The Third Circuit holds that a consumer must make a written dispute and oral disputes are not protected by the FDCPA. *Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991). The Sixth Circuit found a collector liable for affording the consumer to orally seek verification and dispute a debt as opposed to only doing so in writing. *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 762 (6th Cir. 2018) also see *Bishop v. Ross Earle & Bonan, P.A.*, 817 F.3d 1268, 1274 (11th Cir. 2016) (similar holding).

The First, Second, Fourth, Sixth, and Ninth Circuits have rejected *Graziano* and held that oral disputes trigger protections by the FDCPA. *Clark* at 490-491; *Hooks* at 285–87 (2d Cir. 2013); *Camacho* at 1080–82; *Macy* at 757, *Brady* at 67.

The First, Fifth, and Seventh Circuits hold that the statutory protection of §1692e(8) "'knows or should know' standard requires no notification by the consumer, written or oral, and instead, depends solely on the debt collector's knowledge that a debt is disputed, regardless of how or when that knowledge is acquired." *Brady* at 67, *Sayles* at 249, and *Evans* at 347.

Inadvertently, the Seventh Circuit addressed the conflict without deciding whether a dispute must be made orally or in writing. See *Smith v. GC Servs. Ltd. P'ship*, 907 F.3d 495, 501 (7th Cir. 2018).

The CFPB holds that, "In truth and in fact, under the FDCPA, the failure to dispute a Debt in writing within a certain period of time does not shift the legal burden to Consumers to prove in court that they do not owe a Debt." (a158-9, a165).

This Court has recognized the conflict among the Circuits in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 621 (2010) without resolving the conflict,[4] and the conflict has persisted ever since. See *Caprio v. Healthcare Revenue Recovery Grp., LLC*, 709 F.3d 142, 149 (3d Cir. 2013) in which the Third Circuit persisted in its position despite *Jerman* holding that a debt collector's reliance on *Graziano* in requiring a dispute to be in writing is not a *bona fide* defense.

3. How should courts view the consumer, as the *least sophisticated* or *unsophisticated*; and should courts evaluate that consumer's claim as a question of fact or as a question of law? The crux of this question goes to the heart of understanding when and how a court can attach characteristics to the consumer.

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[4] "We likewise express no view about whether inclusion of an 'in writing' requirement in a notice to a consumer violates § 1692g, as that question was not presented in the petition for certiorari." *Jerman* at 580.

Third Conflict. There is a well-established split among all the Circuits and several State courts. As seen *infra* in decisions of the Sixth, Seventh, and Eleventh Circuits as well as in the States of New York, Maryland, and California have held that conceptualizing the hypothetical consumer is a question of fact. The Second, Third, Fourth, Fifth, Ninth, and Tenth Circuits together with the State of Oklahoma all assume that the hypothetical consumer should be treated as a question of law.

The Circuits Holding as a Question of Law. The District of Columbia Circuit in a FDCPA case held that "The district court properly resolved these questions as a matter of law." *Jones v. David Sean Dufek*, 830 F.3d 523 (D.C. Cir. 2016)[5] *cert. denied*, 137 S. Ct. 1336 (2017).[6] In the Second Circuit "Although courts are divided on whether breach of the least sophisticated consumer standard is a question of law or fact, the trend in the Second Circuit is to treat this question as a matter of law that can be resolved on a motion to dismiss." *Beauchamp v. Fin.*

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[5] The District Court in the D.C. Circuit sometimes applies the question of fact standard. See *Mann v. Bahi*, 251 F. Supp. 3d 112, 126 (D.D.C. 2017) ("Whether information 'has a tendency to mislead' is also based on the 'reasonable consumer' standard, and is therefore usually question of fact").

[6] *Jones'* Petition for Certiorari addressed that "The Circuits Are Intractably Divided Over Whether Application Of The Least Sophisticated Or Unsophisticated Consumer Standards To A Collection Letter Is A Question Of Law Or Fact." *Jones v. Dufek*, 2017 WL 104697 (U.S.) at *10.

Recovery Servs., Inc., No. 10 CIV. 4864 SAS, 2011 WL 891320, at *2 (S.D.N.Y. Mar. 14, 2011). The Second Circuit, as applied in case at issue, decided *de novo* how "the 'least sophisticated consumer' would interpret it." (a17). In the Third Circuit, "We agree with the majority that whether language in a collection letter contradicts or overshadows the validation notice is a question of law." *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 (3d Cir. 2000), as amended (Sept. 7, 2000). In the Fourth Circuit, "Although we have never directly addressed whether application of the objective least-sophisticated-consumer test to the language of a dunning letter is a question of law, we have assumed that to be the case." *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 395 (4th Cir. 2014). In the fifth Circuit, "Although we have never expressly stated that the application of the unsophisticated consumer standard to the language of a debt collection letter is a question of law, we have always assumed this to be the case." *Gonzalez v. Kay*, 577 F.3d 600, 609–10 (5th Cir. 2009). "[T]he Eighth Circuit has not squarely addressed this question. However, this district has concluded that the Eighth Circuit likely would treat it as a question of law, and I agree." *Bland v. LVNV Funding, LLC*, 128 F. Supp. 3d 1152, 1158 (E.D. Mo. 2015). In the Ninth Circuit, whether "a collection letter overshadows or contradicts the validation notice so as to confuse a least sophisticated debtor is a question of law." *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997). The Tenth Circuit has not directly addressed the issue, but on the district court level it has been

considered a question of law. *Boedicker v. Midland Credit Mgmt., Inc.*, 227 F. Supp. 3d 1235, 1238 (D. Kan. 2016); *Smothers v. Midland Credit Mgmt., Inc.,* No. 16-2202-CM, 2016 WL 7485686, at *2 (D. Kan. Dec. 29, 2016) (relying on the dicta of *Sheriff v. Gille*).

In the State of Oklahoma, whether "[t]he notice overshadows or contradicts the mandatory notice if it makes the least unsophisticated consumer uncertain as to his or her rights" is a question of law. *Mendus v. Morgan & Assocs., P.C.*, 994 P.2d 83, 89 (Okla. Civ. App. 1999).

The Circuits Applying Question of Fact. The Sixth Circuit holds "whether a letter is misleading raises a question of fact. Generally speaking, a jury should determine whether the letter is deceptive and misleading." *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015). The Seventh Circuit "treat the question of whether an unsophisticated consumer would find certain debt collection language misleading as a question of fact." *Lox v. CDA*, Ltd., 689 F.3d 818, 822 (7th Cir. 2012). The Eleventh Circuit holds, "we are confident that whether the 'least sophisticated consumer' would construe Credit Bureau's letter as deceptive is a question for the jury." *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1177–78 (11th Cir. 1985) followed in *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1307 (11th Cir. 2015).

Several States are also in favor of applying the question of fact. In California, "Whether a practice

is deceptive, fraudulent, or unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides' and which usually cannot be made on demurrer." *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1164 (Cal. Ct. App. 2018). In New York, "whether, as lay members of the public, they could reasonably have obtained the necessary information without resort to legal expertise, or were likely to have been misled by defendants' conduct, are questions of fact." *Corsello v. Verizon New York Inc.*, 21 Misc. 3d 1116(A) (N.Y. Sup. 2008), *aff'd* as modified, 77 A.D.3d 344 (N.Y. App. Div. 2010) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995). In Maryland, whether "a significant number of unsophisticated consumers would attach importance to the information in determining a choice of action" is a question for the jury. *Forrest v. P & L Real Estate Inv. Co.*, 134 Md. App. 371, 396 (2000). "In the usual case, whether an omission would be important to a significant number of unsophisticated consumers is a question of fact for the jury and not a question of law for the court. Only when the facts do not allow for a reasonable inference of materiality or immateriality should the issue be decided as a matter of law." *Green v. H & R Block, Inc.*, 355 Md. 488, 524 (1999).

This Court has also taken a conflicting approach. In *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 475 (1992) the Court considered whether "a company is able to price

discriminate between sophisticated and unsophisticated consumers" as a question of fact. The definition the Court used is that the sophisticated consumer protects the "uninformed" consumer. However, in *Sheriff v. Gillie*, 136 S. Ct. 1594, 1603 (2016) the Court noted in a footnote when the relevant facts are undisputed, in the context of the FDCPA it is a question of law as to whether the collector's action would mislead the least sophisticated consumer. Later on, this Court held, "to determine whether a statement is misleading normally requires consideration of the legal sophistication of its audience." *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1413 (2017). In *Midland v. Johnson* the Court found that the statute and procedural rules of the bankruptcy regime already defined the sophistication of its audience, which involved a bankruptcy trustee who must review each proof of claim on its validity and pose an objection where appropriate. Thus, where the scope of the audience is defined by law that audience is a question of law. The same cannot be said for evaluating the consumer where the statute has not defined the impact on its audience.

II. Midland's Practices on Handling a Dispute

1. Midland's protocol[7] instructs its employees that whenever a consumer calls to dispute a debt, to ask "probing questions" as to the basis for the

[7] Confirmed through discovery produced in the District Court.

dispute. (a48). The protocol instructs employees to ask for proof to substantiate the dispute and advise the consumer to submit the dispute in writing. (a249). Throughout the protocol, Midland directs its employees to document all the answers stated by the consumer. (a249 "Responsibility for providing documentation is on the consumer to validate the dispute claim Documentation must be provided to move forward with the dispute"). Nowhere in its protocols does Midland instruct its employee to inform the consumer whether the debt has been marked as disputed; thus, leaving the consumer in the dark. (a256-a258).

2. The CFPB issued a lengthy Consent Order charging Midland, alongside its associate entities, with *inter alia* (1) whenever a debt is acquired, Midland disregards the designation of dispute and forces the consumer to dispute *de novo* (a140), (2) informs "the Consumer has the burden of proving that he or she does not owe a Debt" (a145), (3) misrepresented "to Consumers, directly or indirectly, expressly or by implication, that under the FDCPA, the failure to dispute a Debt in writing within a certain period of time shifts the legal burden to Consumers to prove in court that they do not owe a Debt" (a158), and (4) reassigns disputed debt without communicating the dispute (a165).

III. The Controversy in this Case

1. Huebner, a practicing attorney, found himself on the consumer's end, with a debt that has been

disputed in writing.[8] (a5). The original debt collector, I.C. Systems ("I.C."), received Huebner's written dispute, marked the debt as disputed and ceased collection without ever verifying the debt. (a268-269). Thereafter came Afni, Inc. ("Afni"), a subsequent debt collector, that also received Huebner's written dispute, marked the debt as disputed and ceased collection without ever verifying the debt. (a269).

Subsequently, Midland assumed the debt and reported so on Huebner's credit report without the designation of disputed. Huebner called Midland to check on what it would take to have the debt marked as disputed, and/or deleted from his credit report. Both parties recorded the conversation (Huebner and Midland).[9] (a256). Huebner asked, "I want to know what do I have to do if I want to dispute the debt?" (a69). Midland's immediate response was "Just advise me what your dispute is and I can see if I can assist you with that?" (a69). Huebner initially did not answer the "probing questions," but was pressed to answer "why" he is disputing the debt. (a69-a72).

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[8] Huebner's practice involves a diversity of criminal defense and civil litigation in the State of New York. Prior to this action, Huebner successfully litigated fewer than five FDCPA cases, and has never been sanctioned or disciplined by any tribunal.

[9] "Your call may be monitored or recorded. If you do not wish for this to happen, please advise the person who answers your call." (a68).

2. After considerable research, Huebner brought suit asserting that the FDCPA allows disputing a debt without having to articulate the basis of the dispute. Huebner pled that pursuant to § 1692e(8) the policy of questioning the basis for the dispute is a misleading communication to the hypothetical consumer; because effectively Midland communicates that unless the consumer provides a satisfactory reason for the dispute the debt, the dispute will not be communicated. (a208). Further, a false communication that a consumer must disclose why the debt is disputed pursuant to § 1692e(10) an attempt (using false means) to obtain information concerning a consumer to advance the collection of a disputed debt. (a213).

It is undisputed that during the conversation Midland did not communicate to Huebner that the debt has been marked as disputed. (a64-a72). Huebner's entire case is based on the principle that Midland requires consumers to provide a valid reason for disputing a debt. (a213). To better articulate the gravity of this allegation, the amended complaint also alleged *inter alia* "upon information and belief" that Midland also dishonors written disputes that are not accompanied by a valid reason articulating why there is a dispute. (a207). Huebner also alleged "upon information and belief" that Midland's policy, in communicating that a reason is required for disputing a debt, effectively communicates to the consumer that he could not dispute his debt orally. (a207-a208). These allegations were legal theories,

while they may have not been written as a perfect statement, they were based on the perspective of the hypothetical consumer, who would understand that the failure to communicate that the debt has been marked as disputed is effectively the same message that the consumer's oral dispute was not accepted.[10]

Midland filed an answer asserting affirmative defenses, asserting that they deleted earlier communications from Huebner's credit report and therefore allegedly were no longer obligated to communicate the debt as disputed. (a59).

3. At the Initial Status Conference, the District Court directed Huebner to produce the recording to chambers for an *in-camera* inspection off-the-record. (a60). That same day, the District Court judge typed a transcript of the recording and *sua sponte* issued a fact-finding charging Huebner with "entrapping" the debt collector and accusing Huebner, with his attorney, Poltorak, of attempting to "make a little money."[11] (a63). These inferences by the District Court are entirely based on (i) Huebner's recording

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[10] "Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346 (2014).

[11] At that point, Midland's answer and affirmative defenses did not mention or infer entrapment, it was the District Court that *sua sponte* first raised such allegation.

of the phone call (even though Midland also recorded the conversation) and asking what he needed to do to dispute his debt, and (ii) that Huebner did not satisfactorily answer the basis for the dispute by insisting that the debt is "non-existent." (a60).

The District Court interpreted as a matter of law that Huebner's recording the phone call is proof of a "setup" (a63) and his refusing to answer the probing questions and clarifying the basis for disputing was an "attempt at entrapment" (a58) to "bait" Midland into misrepresentations about the debt (a60). The District Court went as far as to sua sponte conclude as a matter of law that Midland "in this case did everything by the book." (a58). Having made factual interpretations solely based on its *sua sponte* inference, the District Court concluded as a matter of law that "not even the least sophisticated consumer, could reasonably be confused or misled." (58). In the same order, the District Court ordered Huebner to show cause as to why the amended complaint should not be dismissed together with an award of sanctions. (a63).

Although, the amended complaint clearly spelled out the theory of this entire case as squarely focused on the phone call and Midland's policy requiring the consumer to state a reason when disputing the debt as being a violation of § 1692e(8), (10)[12]

[12] The amended complaint clearly stated:

> 11. On or about October 17, 2013, Plaintiff called and spoke to Emma, a

(and did not mention any allegation under § 1692g), the District Court took the basis of this suit out of context by assuming that this case is based on requiring the consumer to submit their dispute in "writing." (a60).

In response to the order to show cause and in an effort to show that there was no entrapment present, Huebner came forward with the entire background of the disputed debt, along with all the

---

representative from Midland Credit Management, Inc., regarding an account with Verizon, purchased by the Defendant, account number: 855-965-9948. 12. The Plaintiff inquired as to how he could go about disputing the alleged debt. 13. The Defendant responded: "Advise me what the dispute is," "why are you disputing (the debt), you need to tell me what you are disputing." 14. The Defendant threatened the failure to communicate that a disputed debt is disputed, in violation of 15 U.S.C. § 1692e(8). 15. The FDCPA does not require the consumer to provide any reason at all in order to dispute a debt. . . . 39. Defendant violated the FDCPA. Defendant's violations with respect to the above said messages include, but are not limited to, the following: (a) Denying the Plaintiff the right to dispute the debt verbally; (b) Requiring the Plaintiff to provide a valid reason to dispute the alleged debt; (c) Failing to communicate that a disputed debt is disputed; (d) The Defendant made the above false statements in violation of 15 U.S.C. §§ 1692e(8) and 1692e(10).

factual allegations of how the debt was disputed with the original creditor and its debt collectors I.C. and Afni.[13] Although, pursuant to "the pleading standard Rule 8 announces does not require 'detailed factual allegations'" (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), Huebner provided the entire background of the debt, to show the genuineness of the dispute as the debt being non-existent, and in further effort to show that he did not attempt to entrap the collector but made the phone call in good faith. Facing the *sua sponte* fact-finding becoming the law of the case, Huebner moved to reassign the case pursuant to *Ligon v. City of New York*, 736 F.3d 118, 128 (2d Cir. 2013), vacated in part, 743 F.3d 362 (2d Cir. 2014) "Even where there is reason to believe that a district judge would fairly conduct further proceedings on remand, 'in determining whether to reassign a case we consider not only whether a judge could be expected to have difficulty putting aside his previously expressed views, but also whether reassignment is advisable to preserve the appearance of justice"). Other grounds for reassignment were the judge's mutual funds is in a company that owned 10% percent stock of Encore (Midland's parent company) combined with the *sua sponte* fact-findings made reassignment advisable to preserve the appearance of justice.

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[13] Both the District Court and the Second Circuit failed to acknowledge the uncontested fact that Huebner had disputed the debt in writing with I.C. and Afni, and was made to re-dispute an already disputed debt.

In deciding the order to show cause and motion for reassignment, the District Court sanctioned Poltorak $500 for hiding the theory of the case on the basis that Huebner's amended complaint did not articulate the entire background of the debt (notwithstanding Rule 8 pleading standard does not require informing facts beyond the cause of action). (a73). The District Court focused its analysis on the mutual funds as being only $9 and not warranting reassignment, but did not address whether there would be difficulty setting aside previously expressed views deciding that "The collection company [Midland] in this case did everything by the book" and then accusing Huebner of a "setup" and that "Plaintiff and his lawyer decided they were going to outsmart the collection company and make a little money while at it." (a63).

4. Thereafter, during discovery when it became apparent that Midland's policy manual directs its employees to ask probing questions and direct consumers to submit their disputes in writing, Huebner moved by letter motion to strike the answer for falsely stating the exact opposite. The District Court denied that letter motion without prejudice, requiring the parties to file a joint letter on the issue by November 13, 2016, and sealed that letter for quoting that confidential policy (notwithstanding that the confidentiality protective order allowed quoting the manuals). Thereafter, the parties drafted a joint letter addressing the confidentiality manuals, in which Huebner sought to remove its

"confidential" designation in anticipation of filing a motion to strike the answer. On November 13, 2016, Midland changed course and decided that it wished to make a separate pleading to confirm the "confidentiality" designation. To comply with the strict timeline set by the District Court, Huebner was forced to file his letter advising the District Court that Midland did not wish to participate in the joint letter. One hour later, that same day, the District Court *sua sponte* sanctioned Huebner $350 for attempting to delay the action. (a93-a94).

5. On summary judgment, the District Court repeated its earlier findings as a matter of law, finding that Huebner attempted to entrap the debt collector, and therefore is disqualified from being a class plaintiff, and dismissed the third amended complaint, as a matter of law, concluding that Huebner did not suffer a cognizable injury. (a20). The District Court went on to conclude, "the least sophisticated consumer would not be an experienced FDCPA lawyer trying to manufacture an FDCPA claim." (a44).

6. In opposition to the motion for attorney fees and sanctions, Huebner recited his belief why this case had merit, and reaffirmed that he did not attempt to entrap the debt collector. (a256). Huebner denied the allegation that he called to dispute the debt to "manufacture" a lawsuit, and cited that this Court has held that testers have standing to sue (*Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371-73 (1982) (a258), but nevertheless maintained that he "only called to ensure my debt was marked as

disputed" (a304, a270, 274). In deciding to issue sanctions, the District Court echoed that "plaintiff's conduct was the antithesis of that which the 'least sophisticated consumer' would have undertaken" and "is what used to be called barratry." (a103). The District Court entered "a substantial sanctions award" to punish "what should have been a minor litigation." (a104-a105). The sanction was set as $9,850. (a108).

7. The Court of Appeals for the Second Circuit affirmed the District Court's several decisions in its entirety. (a5-a6). The Second Circuit denied its prior precedent, where they originally held that no reason is required to dispute a debt by holding that the debt collector can obligate the consumer to articulate why the debtor wished to dispute the debt as "endeavoring to learn more" about the debtor's dispute in order to "resolve" the debt. (a18). The Second Circuit did not address that endeavoring the consumer with questions why he or she chose to exercise their right to dispute a debt constitute a deceptive method used in an "attempt to collect any debt" in violation of § 1692e(10) by simply replacing the statutory word "collect" with its own word "resolve" thus condoning prohibited conduct.

Furthermore, in its decision, the Second Circuit conjectured, "Indeed, Huebner suggested in his opposition to sanctions that he had called Midland not to dispute his debt, but rather to 'test[ ]' its FDCPA compliance." (a15) (brackets in original). Petitioner respectfully submits that this characterization is clearly erroneous since Huebner stated the

exact opposite, and for that reason his opposition to sanctions is attached in the appendices: "Even if I only called MCM to gather evidence of a FDCPA violation (and never mind that I only called to ensure my debt was marked as disputed), Defendants argument of entrapment still fails to void the longstanding of testers." (a304-5).

Also, the Second Circuit conflated two legal theories as one,[14] "According to Huebner's first amended complaint, Elliott told him 'that he could not orally dispute' his debt but must do so in writing and 'that he must have a reason to dispute a debt'." (a10). In reality, the amended complaint stated:

> 19. Upon information and belief, Midland Credit Management, Inc. and its employee wrongfully stated to the Plaintiff that he could not orally dispute the debt with Midland Credit Management, Inc.
>
> 20. Upon information and belief, Midland Credit Management, Inc. and its employee wrongfully stated to the Plaintiff that he must have a reason to dispute a debt.

---

[14] FRCP Rule 8(d)(2)-(3) state: "A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. (3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses— as it has, regardless of consistency."

(a207-a208). While the Second Circuit singled out the word "orally" from the amended complaint and reading into "orally" as meaning that a dispute must be "in writing," the amended complaint simply pled that the failure to inform that a debt has been marked as disputed, for the hypothetical consumer, the message is that the consumer's oral dispute was not accepted.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT CREATED A CONFLICT ABOUT AN ISSUE THAT COMPROMISE THE RIGHTS OF THOUSANDS OF CONSUMERS AND PERPETRATES A CONFLICT WITH THE CFPB.

According to the CFPB, Midland and its associate entities receive "an average of 30,000 written disputes and complaints and 10,000 oral disputes and complaints directly from Consumers in a typical month relating to Encore's Debt collection and credit reporting. Another approximately 100,000 Consumer disputes have come to Encore in a typical month through e-OSCAR, the web-based communications system used by the nationwide Consumer reporting agencies to communicate with data furnishers regarding Consumer disputes." (a144).

As outlined above in First Conflict, the Second Circuit created a conflict onto the process of disputing a debt. Originally, the Second Circuit—along with the other Circuits who have addressed the issue, held that the FDCPA prohibits the collector

from requiring the consumer to provide a valid reason for disputing the debt. In an unexplained denial of prior precedent, the Second Circuit created a conflict by holding that whenever a consumer disputes a debt, the collector may endeavor to press the consumer to explain the basis for disputing the debt.

According to the Second Circuit, "The 'least sophisticated consumer' would have interpreted Elliott not as threatening Huebner, or even conveying false information about his debt, but rather as endeavoring to learn more about Huebner's dispute so that Midland could resolve it." (a18).

The Second Circuit's approach requires review by this Court because the consumer cannot be expected to answer a legal reasoning when disputing a debt at a time when the consumer is already at the disadvantage of the professional debt collector, acting as an inquisitor and arbiter to force the debtor to forgo a dispute and pay the disputed debt.

First, the Second Circuit's approach is erroneous because the only way a collector considers a debt as resolved is if the debt is paid in full. Common sense informs that debt collectors are in the collection business to induce consumers to pay its debt portfolio. The collectors duty to record disputes without censorship comes from the FDCPA's requirement that disputes be communicated under § 1692e(8). The Second Circuit's approach of endeavor to resolve is also a paradox with § 1692e(10), which prohibits, "The use of any false representation or

deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." Thus, the idea that the collector can "obtain information concerning a consumer" by pretending that the consumer's dispute must pass the "why" test is "a false representation or deceptive means to collect or attempt to collect any debt" by replacing the statutory words of *obtain* for *endeavor* and *collect* for *resolve* to legalize what the statute prohibits. The Second Circuit's rebranding the statutory proscription into a permissible scheme distorts the statutory context of § 1692e(10).

Second, the term endeavor is defined in the Oxford Dictionaries as "make[ing] it one's duty to do something" and "the action of endeavoring; effort or pains directed to attain an object." Oxford University Press, *Oxford English Dictionary*, p. 158, Endeavour (1982). In the context at issue can mean, the collector may exert an explanation for disputing the debt. How hard the collector can bait the consumer is likely up to the interpretation of the collector, the Second Circuit has not defined that. CFPB disciplined Midland's endeavor practice for censoring consumer disputes debt by requiring "proof" in order for a dispute to be communicated. (a144-a146).

This endeavor process, now prescribed by the Second Circuit, created a direct conflict with the position CFPB took against Midland. This conflict creates an injustice to Midland as it does to the consumer, especially since Midland, along with its associate entities, were fined by the CFPB for

requiring consumers to submit proof substantiating a dispute to an alleged debt. The consumer stands to be hurt by the Second Circuit's tolerance of "endeavoring" the consumer, since the failure of the consumer to comply with the collector, who has now become an inquisitor and arbiter, (given the Second Circuit's condemnation of Huebner) will be taken as allowing a dispute to be disregarded and the debt actionable for: a claim for account stated, involuntary bankruptcy, communicating the debt to third parties without also communicating its dispute, and applying payment to disputed portions of debt all because the consumer has not satisfactorily complied with the collector's "endeavoring."

The consequences of the Second Circuit's decision have far more impact than Levi Huebner, because Midland as a leader in the collection industry sets the standard for all other collectors. If Midland is allowed to press the consumer to furnish a satisfactory reason for disputing a debt, then by extension of that, all other collectors will follow.

II. THE CONTINUOUS CONFLICT AMONG THE CIRCUITS AS TO WHAT MAKES A DISPUTE "KNOWN OR WHICH SHOULD BE KNOWN" TO THE COLLECTOR PRESENTS A STUMBLING BLOCK AS TO WHEN A DEBT MUST BE COMMUNICATED AS DISPUTED.

As outlined above in Second Conflict, there is a three-way split as to how the debt collector obtains knowledge of a dispute to a debt, whether the

consumer must exercise that right in writing, can do so orally, or whether that knowledge can be acquired from a source other than the consumer (i.e. the original creditor, preceding debt collector, or through a third party payor such as an insurance company). In *Jerman*, at 621 the Court documented the conflict without resolving it, leaving consumers and debtors to ponder their statutory rights and obligations without having a consistent answer.

In this case, Huebner disputed the debt in writing twice: when the debt was held by I.C. and Afni, an undisputed fact that Midland knew or should have known. This time, Midland played tone deaf to that well documented dispute, and when Huebner called to inquire what he has to do in order to dispute the debt he was questioned as to why he wants the debt marked as disputed, instead of being informed whether his debt was marked as disputed. A hypothetical consumer, who has no knowledge of the FDCPA's inner workings and had disputed a debt with a prior collector would be uncertain of his or her rights and left with no clear answer. This Court acknowledged the confusion, created by the Circuit conflict, in *Jerman* at 621 when a debt collector mistakenly relied on the Third Circuit precedent and required the consumer to dispute the debt in writing. This case presents a clear example of a consumer who had disputed the debt in writing, but was required to restart the dispute process because collectors like Midland do not honor a dispute made with a predecessor as a "known or which should be

known" dispute to a debt, given the conflict among the Circuits and then impose a duty on the consumer to disclose the basis for the dispute and otherwise forgo that right to dispute.

III. THERE IS A PERSISTENT CONFLICT AMONG THE CIRCUITS AND SEVERAL STATES AS TO WHAT TYPE OF REVIEW IS ACCORDED TO THE CONSUMER AND THIS CONFLICT PRODUCES INCONSISTENT RESULTS WITH THE DEFINITION OF "CONSUMER" DEFINED IN 15 U.S.C. §1692a(3).

The FDPCA § 1692a(3) defines "The term 'consumer' as any natural person obligated or allegedly obligated to pay any debt." The FDCPA does not define the character and intelligence of consumer, and the Circuits conflict in defining the consumer as *least sophisticated consumer*, *hypothetical consumer*, or *unsophisticated consumer*. This Court took the approach that consumer protection looks to protect the "uninformed" consumer; see *Eastman Kodak Co.*, at 475 ("More importantly, if a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed"). The term employed is important but more important is what review should that consumer be accorded.

As outlined above in Third Conflict, the Circuits and several States conflict on whether the hypothetical consumer is a question of law or fact.

Looking at this Court's precedent, the Court took a conflicting approach in evaluating the consumer.

This question is recurring, including in the petitions of *Jones v. Dufek*, 2017 WL 104697 (U.S.), *Ramsay v. Tapper*, 2015 WL 1545077 (U.S.), *Law Offices of Mitchell N. Kay, P.C. v. Lesher*, 2011 WL 5007911 (U.S.), *Javitch, Block & Rathbone, LLP v. Hartman*, 2009 WL 3870834 (U.S.), and *Kay v. Gonzalez*, 2009 WL 3654492 (U.S.). As the First Circuit pointed out, "there is no consensus on this point" as to whether the least sophisticated consumer's understanding is a question of fact or law. *See Pollard* at 103 (the review ought to be the "hypothetical unsophisticated consumer").

The Circuits that have defined the FDCPA consumer as a question of law have never offered a concrete analysis for their approach and as illustrated above have done so under an assumption. The Second Circuit for example reviews as a matter of law, (a17) ("we test . . . by asking how the 'least sophisticated consumer' would interpret it"). To define the FDCPA consumer, the Second Circuit claims to be able as a matter of law to assess a hypothetical person's intelligence as "neither irrational nor a dolt." *Id,* also the *Ellis* at 135 ("does not have 'the astuteness of a 'Philadelphia lawyer'"), *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 363 (2d Cir. 2005) ("the least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world"). But the Eighth Circuit holds that the FDCPA "is 'designed to protect

consumers of below average sophistication or intelligence." *Scheffler v. Gurstel Chargo, P.A.*, 902 F.3d 757, 762 (8th Cir. 2018).

The Seventh Circuit has described the problem with reviewing as law the FDCPA consumer and therefore reviews the consumer as a question of fact:

> [D]istrict judges are not good proxies for the 'unsophisticated consumer' whose interest the statute protects. … even if the lawyers and judge involved thought a letter was not confusing, it would be 'possible to imagine facts' that still would support a conclusion that the letter was confusing, such as survey results suggesting that four out of five high school dropouts found it to be confusing).
>
> Unsophisticated readers may require more explanation than do federal judges; what seems pellucid to a judge, a legally sophisticated reader, may be opaque to someone whose formal education ended after sixth grade. To learn how an unsophisticated reader reacts to a letter, the judge may need to receive evidence. A concurring opinion in *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1259 (7th Cir. 1994) suggested that this evidence might include the kind of surveys used to

measure confusion in trademark cases.

McMillan v. Collection Professionals Inc., 455 F.3d 754, 759 (7th Cir. 2006). In essence, the consumer who faces a collector is in the least sophisticated posture, since the collector is in a superior position of knowing the trade, knowing its own company policies in handling disputes, and knowing how to quiz a consumer to exert payment.

The Seventh Circuit's observation is consistent with the FDCPA, §1692a(3) clearly defines the consumer as "any natural person" without any assessment of intelligence. If a consumer is not on the spectrum of the "least sophisticated" or does not rank well on the "intelligence" spectrum; § 1692a(3) makes clear the consumer is a natural person without any other qualifications. In other words, the FDCPA seeks to protect consumers from shrewd tactics of the trade and ensure honest and fair dealings. How the consumer understands a communication should be assessed by the consumers, a jury of peers, who is a diverse composition of consumers and law-abiding citizens.

In this case the Second Circuit affirmed the District Court's taking the liberty to *sua sponte* interpret the audio recording as a matter of law and in the process charged Huebner and his attorney of conduct that is simply not true (i.e. entrapment, baiting the collector, and attempting to make money). These serious charges later encompassed the disposition of this action. When Huebner attempted to

supplement the record with the background of the alleged debt, he was sanctioned for having a new legal theory. This situation which was affirmed by the Second Circuit is in direct conflict *with the Seventh Circuit w*hich in a FDCPA case held that:

> A judge should not rebuff a litigant's effort to supplement the complaint or provide legal argument in support of the suit. Because complaints need not articulate legal theories … because the skeletal presentation in a notice pleading may be fleshed out later, a decision without giving plaintiff the opportunity to argue or augment his position is premature.

Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1060 (7th Cir. 1999).

This case presents the proper vehicle for addressing the FDCPA definition of consumer because the Second Circuit affirmed, "the least sophisticated consumer would not be an experienced FDCPA lawyer trying to manufacture an FDCPA claim." (a44). In other words, the Second Circuit affirmed the position, since Huebner is a lawyer, who has successfully litigated several FDCPA cases, he is not protected by the FDCPA because "there were no genuine questions of fact as to whether Elliott misled Huebner" (a19) instead of focusing on the consumer. This interpretation squarely conflicts with § 1692a(3), which seeks to protect "any natural person

obligated or allegedly obligated to pay any debt." The basis for this error roots in the conflict in how to review the consumer as a question of law or fact, which the Second Circuit assumed as a matter of law. The Second Circuit's review conflict with the Seventh Circuit review that the unsophisticated consumer "may require more explanation than do federal judges; what seems pellucid to a judge, a legally sophisticated reader, may be opaque to someone whose formal education ended after sixth grade." *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1060 (7th Cir. 1999). The right to dispute a debt is no different, if the collector can be the inquisitor and arbiter to press the consumer for a "why" he or she disputes the debt, the unsophisticated consumer is effectively misled to believe that the dispute was not good enough, although the statute requires nothing more than a notification.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Mt. Pleasant, SC
December 17, 2018

Respectfully submitted,

Lucille A. Roussin, Ph.D., J.D.
Law Office of Lucille A. Roussin

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

September 26, 2018

Mr. Levi Huebner
338 Atlantic Avenue
Suite 202
Brooklyn, NY 11201

Re: Levi Huebner
v. Midland Credit Management, et al.
Application No. 18A315

Dear Mr. Huebner:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on September 26, 2018, extended the time to and including December 17, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,
Scott S. Harris, Clerk

by /s/

Clayton Higgins
Case Analyst

Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Levi Huebner
338 Atlantic Avenue
Suite 202
Brooklyn, NY 11201

United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

16-2363-cv (L)
Huebner, et al. v. Midland Credit Mgmt., et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2017

(Argued: November 9, 2017 Decided: July 19, 2018)

Nos. 16-2363-cv, 16-2367-cv

LEVI HUEBNER, on behalf of himself and all other similarly situated consumers,

Plaintiff-Appellant,

POLTORAK PC, ELIE C. POLTORAK,

Interested Party-Appellants,

- v.-

MIDLAND CREDIT MANAGEMENT, INC., MIDLAND FUNDING, LLC.,

Defendants-Appellees.

Before: LEVAL, LIVINGSTON, and CHIN, *Circuit Judges*.

Levi Huebner, Elie C. Poltorak, and Poltorak PC appeal a final judgment of the United States District Court for the Eastern District of New York (Cogan, *J.*). Huebner sued Midland Credit Management, Inc. and Midland Funding LLC. (collectively "Midland"), alleging that they violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.* Huebner

alleged that when he called Midland to dispute his debt, Midland's representative harassed him by asking about the nature of his dispute. Huebner also alleged that, after his call, Midland did not report the debt as disputed to credit reporting agencies. The district court concluded that Huebner failed to produce any evidence raising a material issue as to either claim. Additionally, the court sanctioned: (1) Poltorak personally for misleading the court during the initial status conference; (2) Huebner for disregarding a protective order; and (3) both Huebner and Poltorak PC for needlessly multiplying the proceedings. Huebner, Poltorak, and Poltorak PC argue on appeal that the court erred in granting summary judgment for Midland and abused its discretion in sanctioning them. We disagree. Accordingly, the judgment of the district court is AFFIRMED.

FOR PLAINTIFF - APPELLANT:	LAWRENCE KATZ, Valley Stream, NY, *for Levi Huebner*.
FOR INTERESTED PARTY - APPELLANTS:	Elie C. Poltorak, Poltorak PC, Brooklyn, NY, *pro se*.
FOR DEFENDANTS - APPELLEES:	ANDREW M. SCHWARTZ, Marshall Dennehey, Warner, Coleman & Goggin, P.C., Philadelphia, PA (Matthew B. Johnson, New York, NY, *on the brief*), *for Midland*

	Credit Management, Inc., Midland Funding LLC.
FOR AMICUS CURIAE:	Brian Melendez, Dykema Gossett PLLC, Minneapolis, MN, *for ACA International.*

DEBRA ANN LIVINGSTON, *Circuit Judge*:

Plaintiff-Appellant Levi Huebner ("Huebner") is an attorney who has litigated several cases under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, which, among other things, prohibits debt collectors from using "false, deceptive, or misleading representation[s] . . . in connection with the collection of any debt," *id.* § 1692e. In October 2013, Huebner called Defendant-Appellee Midland Credit Management, Inc. ("Midland") to dispute a $131 debt that it had tried to collect from him.[1] Huebner surreptitiously recorded the call. Asked why he disputed the debt, Huebner would say only that the debt was "nonexistent." J.A. 371. After repeatedly declining to clarify what he meant, Huebner said he would call Midland back after reviewing his "files." *Id.* at 372. He filed this

[1] The record indicates that Defendant-Appellee Midland Funding LLC purchased the debt and placed it with Midland Credit Management, Inc. for servicing. Huebner purported to contest this fact below but, as the district court correctly noted, he raised no material issue as to the point. In any event, it is immaterial which of the two affiliated defendants technically owned the debt. For simplicity's sake, we will refer to both defendants collectively as "Midland."

lawsuit instead.

Huebner's first amended complaint alleged that the Midland representative told him he could dispute his debt only in writing and then only if he gave cause for his dispute. Huebner's then-attorney, Interested Party-Appellant Elie C. Poltorak ("Poltorak"), repeated this allegation in a January 28, 2015 letter to the district court. During an initial status conference, Poltorak further assured the district court that Huebner's recording would show that Midland had told him that he could not dispute his debt orally. But upon listening to the recording of Huebner's call, Judge Cogan of the United States District Court for the Eastern District of New York learned that this allegation was false. The court sanctioned Poltorak $500 for failure to participate in the initial status conference in good faith.

To keep his case alive, Huebner amended his complaint twice more. His third amended complaint ultimately alleged that Midland had made multiple false or misleading representations in violation of 15 U.S.C. § 1692e. Concluding that Huebner had not raised a material issue of fact as to any of his claims, the court granted summary judgment for Midland. It also ordered Huebner and Poltorak's law firm, Interested Party-Appellant Poltorak PC, to pay some of Midland's legal fees because, the court determined, Huebner had tried to trick Midland into violating the FDCPA during his initial call; his claim was meritless and prosecuted in bad faith; and both he and Poltorak PC had needlessly multiplied the proceedings with, among other things, a baseless motion for recusal and a pretrial motion filed in flagrant disregard of the terms of the parties' joint protective

order.

Huebner, Poltorak, and Poltorak PC now appeal the district court's grant of summary judgment and three separate sanctions orders issued over the course of this litigation. For the reasons stated below, we conclude that the district court did not err in granting summary judgment, nor did it abuse its discretion in sanctioning Huebner, Poltorak, and Poltorak PC. The judgment below is therefore AFFIRMED.

BACKGROUND

I. Factual Background[2]

In August 2013, Midland sent a collection letter to Huebner seeking to collect $131.21 from him. Verizon had originally billed Huebner for this sum in connection with work done on Huebner's phone line, but Huebner had refused to pay, advising Verizon that he should not have been charged for the work. Verizon told him that it would remove the charge from his invoice. On October 17, 2013, Huebner called Midland regarding the debt and secretly recorded the phone call. Huebner asked how he could dispute the debt. He was transferred to an employee named Emma Elliott ("Elliott"). The merits of this case turn largely on their conversation.

Huebner began by asking, "[W]hat do I have

[2] Because we are reviewing this case in part on appeal from a grant of summary judgment to Midland, the facts outlined below as to Huebner's substantive claims are either undisputed or viewed in the light most favorable to Huebner. *See, e.g.*, *Raspardo v. Carlone*, 770 F.3d 97, 111 (2d Cir. 2014).

to do if I want to dispute the debt[?]" J.A. 369. "Just advise me what your dispute is[,] and I can see if I can assist you with that," responded Elliott. *Id.* Rather than answer, Huebner pivoted to a different question, "[H]ow do I get it off my credit report?" *Id.* Elliot replied, "Well, we need to . . . work with what your dispute is in order to remove it, sir. So why are you disputing?" *Id.* Huebner repeated his question: "I just can't get it off my credit report[?]" *Id.* "No," replied Elliott. "We just can't delete an account because the consumer wants it deleted. We need to know why [you] want it deleted and what [the] dispute is. I can assist you with your dispute here, sir." *Id.* at 369–70. Huebner tried a third time: "I can't get it off my credit card—my account without paying it?" *Id.* at 370. "That's not what I said, sir," Elliott corrected him. "I need to know what your dispute is before I can just delete it for you. . . . Why is it that you want to dispute it?" *Id.*

At last, Huebner answered her (in a manner of speaking): "Because it is a nonexistent debt." *Id.* Elliott asked what he meant by "nonexistent" and even suggested answers Huebner might give her: "Did you already pay it with Verizon? Did you never have Verizon?" *Id.* Huebner claimed not to understand what she meant and declined to elaborate, eventually telling Elliott he would call her back after he reviewed his "files" to see if he could "find anything." *Id.* at 372. Elliott asked whether Huebner still wanted to dispute the debt. Huebner responded, "I told you I dispute it." *Id.* at 373. "But," Elliott said again, "[y]ou are just saying you are disputing. I need to know what you are disputing." *Id.*

Restating that the debt was "nonexistent"

once more, Huebner then countered, "If you're telling me[] you are not going to take my dispute, that's fine. I'm just going to try to see if I can get more information." *Id.* at 373–74. No, insisted Elliott, "I am trying to help you with your dispute, sir, but you are not really helping me help you." *Id.* at 374. Shortly after, Huebner ended the call, saying that he might call back with "more information." *Id.* He never did.

According to Midland's internal procedures for managing debt disputes, when a consumer calls Midland to challenge a debt, Midland may mark the debt as "disputed" and report it as such to the credit reporting agencies while Midland attempts to confirm its validity. But sometimes resolving a difficult dispute is just not worth it, in which case, Midland will code the disputed account with the number "289." This denotes that Midland has deleted the account, that Midland will cease all collection, and that the credit reporting agencies will be informed of this.

The day Huebner called, Midland marked Huebner's account with "289" and sent advisories to the major credit reporting agencies requesting that Huebner's debt be deleted from his credit reports. Midland wrote Huebner a letter informing him that it had deleted his debt, would no longer collect it, and that Midland had informed the credit reporting agencies that they should delete the debt as well.[3]

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[3] Huebner alleges that Midland never sent him this letter and did not, in fact, inform the credit agencies that they should delete the debt. We agree with the district court that Huebner has failed to create a genuine dispute of material fact concerning this matter. *See* note 5, *infra*.

II. Procedural History

A year later, Huebner sued Midland in the United States District Court for the Eastern District of New York (Cogan, *J.*), alleging that Midland violated the FDCPA. According to Huebner's first amended complaint, Elliott told him "that he could not orally dispute" his debt but must do so in writing and "that he must have a reason to dispute a debt." J.A. 51. Huebner sought to represent all consumers who had undergone similar treatment in a class action.

A

During the court's initial status conference, Poltorak, Huebner's counsel, told the court that Huebner's case was based exclusively on the recorded conversation and on the allegation that Elliott had told Huebner that he must dispute his debt in writing. Judge Cogan listened to the recording and discovered that Elliott had said nothing of the sort. Concluding that Huebner and Poltorak had misrepresented Huebner's call, which had "all the earmarks of a setup," the court ordered Huebner and Poltorak to show cause why the "action should not be dismissed, with fees [and] costs awarded under 15 U.S.C. § 1692k(a)(3), and sanctions issued pursuant to Rule 11." *Huebner v. Midland Credit Mgmt., Inc.*, 85 F. Supp. 3d 672, 675 (E.D.N.Y. 2015).

Huebner and Poltorak moved to disqualify Judge Cogan. As evidence of the judge's purported bias, Huebner and Poltorak pointed primarily to the judge's ownership of a few shares in an exchange-traded fund, which held some shares of Midland's parent company Encore Capital Group, Inc. As to

sanctions, Poltorak claimed that he "ha[d] no recollection" of making the no-verbal-disputes-allowed misrepresentation during the Initial Status Conference. J.A. 192 n.3. Huebner and Poltorak further insisted that dismissal was not proper because they had a new theory for relief: that Huebner never received a letter from Midland informing him that it had stopped collection on his debt.

In a May 1, 2015 decision and order, the district court denied the recusal motion. *Huebner v. Midland Credit Mgmt., Inc.*, No. 14 CIV. 6046 (BMC), 2015 WL 1966280 (E.D.N.Y. May 1, 2015). The judge's purported financial interest, $9 total, did not create a conflict because "ownership in a mutual or common investment fund that holds securities," like the exchange-traded fund at issue, does not create a conflict of interest "unless the judge participates in the management of the fund," according to Canon 3C(3)(c)(i) of the Code of Conduct for United States Judges and the Judicial Conference's Committee on Codes of Conduct Advisory Opinion No. 106 (2014). *Id.* at *2–*3.

Next, the court sanctioned Poltorak $500 under Fed. R. Civ. P. 16(f)(1)(B) for failure to participate in the initial status conference in good faith. Poltorak had initially "raised one claim and one claim only—that the recorded conversation between plaintiff and defendant's agent would show that defendant advised plaintiff that he could only dispute his debt in writing, not orally." *Id.* at *6. But after the status conference, Poltorak raised "new allegations that [were] not recently discovered, [were] relevant, and would have materially changed the posture of this case had they been disclosed at the

proper time," thus frustrating the aim of the conference procedure to help cases proceed expeditiously. *Id.* The court nonetheless did not dismiss the action but instead scheduled a conference to plan discovery on Huebner's new theory. *Id.* at *7.

B

Three months and two amended complaints later, the district court approved the parties' joint protective order, which set out procedures for preserving documents' confidentiality. Any letter or memorandum that cited a protected document was to be filed under seal. A party who wanted to challenge a document's designation as "confidential" was to attempt to resolve the dispute with the other party first. If the parties could not resolve it between themselves, the challenging party could then ask the court to resolve it after ten days.

On November 4, 2015, Huebner's counsel wrote the court to outline contested areas of discovery. This letter, which cited Midland's confidential information, was filed on the court's open docket. The court ordered the letter sealed and warned the parties that it would sanction them if they failed to resolve outstanding discovery disputes. Huebner's counsel later requested, without first consulting with defense counsel, that the court revoke the confidential designations of certain documents. On November 13, 2015, the court imposed a $350 sanction on Huebner under Fed. R. Civ. P. 16(f)(1)(C) for filing a frivolous motion by failing to follow the protective order's procedures for challenging documents' confidential designations.

C

The district court granted Midland's motion for summary judgment after almost a year of discovery. *See Huebner v. Midland Credit Mgmt., Inc.*, No. 14 CIV. 6046 (BMC), 2016 WL 3172789 (E.D.N.Y. June 6, 2016). Although Huebner's third amended complaint had outlined four distinct claims for relief, his claims had essentially boiled down to just two theories by summary judgment. First, he argued that Elliott's questions about the nature of his dispute led him to believe that he could not dispute his debt without cause, in violation of 15 U.S.C. §§ 1692e(8) and 1692e(10). Second, Huebner alleged that Midland reported his debt to credit reporting agencies without mentioning that the debt was disputed, in violation of 15 U.S.C. §§ 1692e(5), 1692e(8), and 1692e(10), and also sent him a letter falsely claiming that Midland notified the credit reporting agencies that the debt was disputed, thereby violating 15 U.S.C. § 1692e(2)(A).

The district court rejected both arguments. The district court explained that the FDCPA does not make it illegal to ask a consumer questions about the nature of his dispute when the consumer calls to lodge one. Requesting that sort of information can help both the collector and the consumer resolve the dispute faster. To be sure, it might be unlawful to badger a consumer with harassing or browbeating questions "to deter him from disputing his debt." *Huebner*, 2016 WL 3172789 at *5. But here, it was Huebner, not Elliott, who was "bobbing and weaving, evading the questions and harassing the collection agent, who was just trying to do her job, find out what the problem was, and perhaps even resolve the

dispute." *Id.* The court then concluded that no material issue of fact had been raised as to whether Midland informed the credit reporting agencies that the debt was deleted, and the record showed that deleted debts are a subset of disputed debts.[4] The court entered final judgment on June 6, 2016.

D

On June 13, 2016, Midland moved for the district court to sanction Huebner and Poltorak PC under 15 U.S.C. § 1692k(a)(3), 28 U.S.C. § 1927, and the court's inherent authority for pursuing this litigation in bad faith. Specifically, Midland sought to recover "all reasonable costs and fees it expended in defending" Huebner's suit. J.A. 1082. On November 10, 2016, the court granted Midland's motion in part. *See Huebner v. Midland Credit Mgmt., Inc.*, No. 14 CIV. 6046 (BMC), 2016 WL 6652722 (E.D.N.Y. Nov. 10, 2016). The court first noted that Poltorak PC's conduct was sanctionable under 28 U.S.C. § 1927 "because it pursued a claim that had no legal basis, and it acted in bad faith." *Id.* at *4. What is more, Poltorak PC had "unnecessarily multiplied the proceedings" with its "baseless motion for recusal," "frivolous motion to remove certain confidentiality designations," and frequent pre-motion conference letters that exceeded the court's page limit, all in disregard of Midland's warnings that it would seek fees and costs if the litigation continued. *Id.* at *4.

The court also ordered Huebner to pay fees

[4] The court separately held that, even if Huebner had not lost on the merits, it would have declined to certify Huebner's proposed class. *Huebner*, 2016 WL 3172789, at *7–10.

under 15 U.S.C. § 1692k(a)(3) and the court's inherent authority to sanction. *Id.* at *5. Not only did Huebner— a lawyer so experienced with the FDCPA that he "whispered virtually every question into his attorney ' s ear" during a deposition, *id.* at *5 n.3—change his legal theory several times, he also "attempt[ed] to entrap [Elliott] into committing an FDCPA violation" for the purpose of pursuing this lawsuit, *id.* at *5. Indeed, Huebner suggested in his opposition to sanctions that he had called Midland not to dispute his debt, but rather to "test[]" its FDCPA compliance. *Id.* at *5.

But Midland also deserved some blame, the court determined, because it "did not take its discovery obligations as seriously as it should have," having delayed document production several times. *Id.* at *6. "Under these circumstances, a substantial sanctions award would only further distort what should have been a minor litigation." *Id.* The court therefore ordered Huebner and Poltorak PC, jointly and severally, to pay only "the attorneys' fees and costs incurred in connection with [Midland's] motion for sanctions and some portion of [its] attorneys' fees and costs incurred in connection with opposing [Huebner's] class certification motion." *Id.* On December 23, 2016, after reviewing Midland's bill of fees, the court further reduced the award to only the fees that Midland incurred in connection with its motion for sanctions. This number was ultimately calculated as $9,850, less than a tenth of the full attorney's fees and costs that Midland incurred over the course of the litigation.

DISCUSSION

On appeal, Huebner—as well as Poltorak, and Poltorak PC, who have joined this case as interested parties—challenge the district court's June 6, 2016 final judgment and its three sanctions orders. For the reasons that follow, we AFFIRM the judgment of the district court and its sanctions orders.

I

We first address the district court's grant of summary judgment to Midland. "We review a grant of summary judgment *de novo*, examining the evidence in the light most favorable to, and drawing all inferences in favor of, the non-movant." *Blackman v. New York City Transit Auth.*, 491 F.3d 95, 98 (2d Cir. 2007) (per curiam) (quoting *Sheppard v. Beerman*, 317 F.3d 351, 354 (2d Cir. 2003)). "Summary judgment is appropriate only if it can be established 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Sheppard*, 317 F.3d at 354–55 (quoting Fed. R. Civ. P. 56(c)). Huebner argues on appeal that the district court erred in granting summary judgment on each of his two principal theories under the FDCPA: (1) that Elliott's questions about the nature of his credit dispute amounted to a "misleading" communication about his debt; and (2) that Midland failed to report to the credit reporting agencies that he had "disputed" the debt. For the following reasons, we disagree.

A

Section 1692e of the FDCPA prohibits all "false, deceptive, or misleading representation[s] or

means in connection with the collection of any debt." Apart from this blanket ban, § 1692e(8) more specifically renders it unlawful for a debt collector knowingly to communicate (or threaten to communicate) false credit information, while § 1692e(10) bars "deceptive means . . . to obtain information concerning a consumer." When interpreting § 1692e, we test whether a communication is "deceptive" by asking how the "least sophisticated consumer" would interpret it. *Eades v. Kennedy, PC Law Offices*, 799 F.3d 161, 173 (2d Cir. 2015) (quoting *Easterling v. Collecto, Inc.*, 692 F.3d 229, 233 (2d Cir. 2012)). This "is an objective standard, designed to protect all consumers, 'the gullible as well as the shrewd.'" *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) (quoting *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 90 (2d Cir. 2008)).

Huebner's first theory of liability is that Midland violated § 1692e when Elliott, responding to Huebner's call, supposedly "overwhelm[ed]" him with "hassl[ing]" questions as to why he wished to dispute his debt. Br. for Pl.- Appellant at 38. This sort of questioning, he contends, misleads consumers into believing that they cannot dispute their debts without explaining the nature of their dispute, deters them from disputing their debts in violation of § 1692e(8), and allows collectors "to improperly extract information concerning the consumer," in violation of § 1692e(10). *Id.* In short, according to Huebner, as soon as he said the words "I want to dispute the debt," Elliott was obligated to record the dispute and end the conversation; she thus violated the FDCPA when she asked any follow-up questions inquiring into the nature of Huebner's dispute. We disagree.

Like the district court, we assume without deciding that at some point, a debt collector's questions about the nature of a consumer's dispute could become sufficiently inquisitorial to violate the FDCPA. But no reasonable jury could conclude that Elliott's questions were misleading or abusive in any way. *See, e.g.*, *Ellis*, 591 F.3d at 135 ("While protecting those consumers most susceptible to abusive debt collection practices, this Court has been careful not to conflate lack of sophistication with unreasonableness."). The "least sophisticated consumer" would have interpreted Elliott not as threatening Huebner, or even conveying false information about his debt, but rather as endeavoring to learn more about Huebner's dispute so that Midland could resolve it. After all, Huebner had asked Elliott how he could "get [the debt] off [his] credit report." J.A. 369. Had she simply accepted his dispute and hung up the phone at that point, the debt would have stayed on his report pending a determination of the validity of the debt, rather than been deleted. And despite Huebner's purported misunderstanding of Elliott's basic questions throughout the call, Elliott remained patient, going so far as to feed him possible answers to her questions. *See Ellis*, 591 F.3d at 135 (explaining that, although a "hypothetical least sophisticated consumer" lacks "the sophistication of the average, everyday, common consumer," he is "neither irrational nor a dolt" (internal quotation marks omitted) (quoting *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996)). Finally, even if Huebner had been at all confused about the status of his credit dispute when he ended the call, Midland sent him a letter that day

telling him that his debt had been deleted.[5]

We thus agree with the district court that Huebner failed to raise a material issue on the theory that Midland violated § 1692e when Elliott politely asked Huebner what he meant when he said that his debt with Verizon was "nonexistent." *See id.* ("[T]he FDCPA does not aid plaintiffs whose claims are based on 'bizarre or idiosyncratic interpretations of collection notices.'" (quoting *Jacobson*, 516 F.3d at 90)); *Jacobson*, 516 F.3d at 90 (noting that our "least sophisticated consumer" objective test "protects debt collectors from unreasonable constructions of their communications"). The district court properly concluded that there were no genuine questions of fact as to whether Elliott misled Huebner with her questions, and was right to grant summary judgment to Midland on this issue.

B

Huebner next argues that Midland violated § 1692e(8), which requires debt collectors "to communicate that a disputed debt is disputed," by failing to so inform the credit reporting agencies. Nothing in the record, however, supports this meritless allegation either. Midland marked Huebner's debt with the code "289" the day he called, meaning that it deleted the account. Midland also sent several messages to the credit reporting agencies telling them to delete the debt, as well as a letter to Huebner

[5] As mentioned earlier, Huebner alleged below that Midland never sent him this letter, but on the evidence in the record, a reasonable jury could only find that Midland sent the letter.

informing him of this. Huebner has not pointed to any record evidence that creates a material question of fact on these issues.[6] As a result, we hold that summary judgment was also properly granted as to Huebner's second claim for relief.[7]

II

We next review the district court's sanctions orders. As discussed above, the district court sanctioned:

(1) Poltorak under Federal Rule of Civil Procedure 16(f)(1)(B) for failing to participate in the initial status conference in good faith;

(2) Huebner under Rule 16(f)(1)(C) for breaching the district court's protective order;

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[6] For the first time in his reply brief, Huebner argues that there is a legally significant difference between informing a credit reporting agency that a debt is "disputed" and instructing the agency to delete the debt. Whatever the merits of Huebner's argument, we need not address it. *See McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005) (declining to consider "arguments not raised in an appellant's opening brief, but only in his reply brief").

[7] We need not consider Huebner's challenge to the district court's denial of class certification because we hold as a matter of law that Huebner did not suffer a legally cognizable injury. See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (internal quotation marks omitted) (quoting East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977))).

(3) Poltorak PC under 28 U.S.C. § 1927 for unreasonably multiplying the district court's proceedings; and

(4) Huebner under 15 U.S.C. § 1692k(a)(3) and the district court's inherent authority for pursuing a frivolous legal claim in bad faith.

We review the imposition of sanctions for abuse of discretion. *See Virginia Properties, LLC v. T-Mobile Ne. LLC*, 865 F.3d 110, 113 (2d Cir. 2017). "An abuse of discretion occurs when a district court bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions." *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 175 (2d Cir. 2012) (quoting *Kiobel v. Millson*, 592 F.3d 78, 81 (2d Cir. 2010) (quotation marks and alterations omitted)). When a lower court sanctions a litigant for bad faith, the court must outline its factual findings with "a high degree of specificity." *Virginia Properties*, 865 F.3d at 113 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir. 1982)). But more often than not, "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard that informs its determination as to whether sanctions are warranted." *Id.* (quoting *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000)).

A

Poltorak first argues that the district court

abused its discretion when it sanctioned him $500 under Rule 16(f)(1)(B). Rule 16(f)(1)(B) allows a district court to sanction a party for failing to participate "in good faith" in a pretrial conference. Rule 16(f)'s "explicit reference to sanctions" reflects the Rule's intention to "encourage forceful judicial management." Fed R. Civ. P. 16(f) advisory committee's note to 1983 amendment. It vests a district court with "discretion to impose whichever sanction it feels is appropriate under the circumstances." *Id.* This sanctioning power accords with a district court's broader "'inherent power' and responsibility to manage [its] docket[] 'so as to achieve the orderly and expeditious disposition of cases.'" *In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483, 487 (2d Cir. 2013) (per curiam) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)). "In deciding whether a sanction is merited, the court need not find that the party acted in bad faith. The fact that a pretrial order was violated is sufficient to allow some sanction." *See* 6A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1531 (3d ed. 2010).

Here, Poltorak had informed the court that the case turned on Elliott's telling Huebner that she would only accept disputes made in writing. Elliott, of course, said no such thing. Ordered to show cause why he should not be sanctioned, Poltorak denied having made the misrepresentation, even though Huebner's first amended complaint and Poltorak's statements in a January 28, 2015 pre-conference letter made the very same allegation. Then Poltorak changed the subject, moving to recuse Judge Cogan and alleging for the first time that Midland failed to

tell credit reporting agencies that the debt was disputed. Because Poltorak's bait-and-switch routine delayed the litigation, the court sanctioned him $500. *See* Fed. R. Civ. P. 16(a) (explaining that pretrial conferences are meant to "expedit[e] disposition of the action," "discourag[e] wasteful pretrial activities," and "facilitate[] settlement"); *see also* 6A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1531 (3d ed. 2010) (describing orders to pay fees or costs under Rule 16(f) as "[l]ess drastic sanctions").

On appeal, Poltorak and Huebner suggest that any references to a "writing" were inadvertent and that, importantly, they never changed positions as to their legal theory. Huebner points out that both his first amended complaint and his third amended complaint allege that Elliott refused to accept his dispute unless he explained it. The third amended complaint, he asserts, is altogether in line with the first, but is just more specific in explaining that Elliott refused to acknowledge his dispute by asking him questions about it. We disagree.

As the district court observed, Poltorak's January 28, 2015 letter "raised one claim and one claim only—that the recorded conversation between plaintiff and defendant's agent would show that defendant advised plaintiff that he could only dispute his debt in writing, not orally." *Huebner*, 2015 WL 1966280, at *6. Poltorak's representation hardly appears inadvertent, since it can also be found in the first amended complaint. *See* J.A. 51 (alleging that Elliott "stated to the Plaintiff that he could not orally dispute the debt"). It does not hint at the theory that simply asking any follow-up questions posed a

problem. Nor, for that matter, does the first amended complaint allege that Midland failed to report his debt as disputed to the credit reporting agencies: Huebner and Poltorak made this argument only after the court learned that their no-verbal-disputes claim was false. We therefore do not believe it was clearly erroneous for the district court to conclude that Poltorak "intentionally misl[ed] the [c]ourt and defendant as to his theory of the case," *Huebner*, 2015 WL 1966280, at *7, and we discern no abuse of discretion in the district court's decision to sanction Poltorak under Rule 16(f)(1)(B).

B

We next address Huebner's contention that the district court erred in sanctioning him on November 13, 2015 under Rule 16(f)(1)(C) for breaching the protective order. *See* Fed. R. Civ. P. 16(f)(1)(C) (authorizing courts to sanction parties who fail to "obey a . . . pretrial order"). Under the district court's August 2015 protective order, the parties were forbidden from quoting from confidential material in documents filed on the open docket. A party who wanted to challenge a document's designation as "confidential" was supposed to try to resolve the dispute with the other party first. If the parties could not resolve the dispute in ten days, the challenging party could ask the court to step in. In November 2015, Huebner filed a letter with the court that sought to challenge a document's confidential designations without first consulting Midland. Concluding that Huebner's letter was frivolous because he had ignored the protective order's procedures, the court sanctioned him $350.

Huebner's argument is not entirely clear, but he seems to believe that because the district court did not give him an opportunity to withdraw the offending submission, he was denied fair "notice of the particular sanctions sought." *Reilly v. Natwest Markets Grp. Inc.*, 181 F.3d 253, 270 (2d Cir. 1999). But attorneys "have no absolute right 'to be warned that they disobey court orders at their peril.'" *Id.* (quoting *Daval Steel Prods. v. M/V Fakredine,* 951 F.2d 1357, 1366 (2d Cir. 1991)); *see also Fonar Corp. v. Magnetic Resonance Plus, Inc.*, 128 F.3d 99, 102 (2d Cir. 1997) ("As a general rule, a court is not obliged to give a formal warning that sanctions might be imposed for violation of the court's orders."). What is more, this was Huebner's second violation of the protective order in eight days: on November 4, he had filed a letter on the court's open docket quoting from confidential documents. That same day, the court sealed Huebner's letter and warned the parties that failure to resolve discovery disputes could lead to sanctions. The district court's November 13 imposition of sanctions consequently "was, or should have been, entirely foreseeable to" Huebner. *Reilly*, 181 F.3d at 270; *see also Koehl v. Bernstein*, 740 F.3d 860, 863 (2d Cir. 2014) (affirming a sanctions order in part because the district court had given the litigant fair warning). We therefore discern no abuse of discretion in the district court's decision.

C

We next address the district court's decision to sanction Poltorak PC under 28 U.S.C. § 1927.[8]

[8] A court may sanction a law firm under § 1927 for the acts of its attorneys. *See Enmon v. Prospect Capital Corp.*, 675

Section 1927 allows a court to require an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." This statute "imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics," and provides courts with a cudgel to use, in their discretion, "to deter unnecessary delays in litigation." *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 948 F.2d 1338, 1345 (2d Cir. 1991) (quoting H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8). "To impose sanctions under [§ 1927], a court must find clear evidence that (1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith—that is, motivated by improper purposes such as harassment or delay." *Kim v. Kimm*, 884 F.3d 98, 106 (2d Cir. 2018) (internal quotation marks omitted) (quoting *Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000)). A court may infer bad faith when a party undertakes frivolous actions that are "completely without merit." *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 116 (2d Cir. 2000) (quoting *Int'l Bhd. of Teamsters*, 948 F.2d at 1345).

Here, the district court cited numerous frivolous and vexatious actions by Poltorak PC attorneys over the course of this litigation. Poltorak himself, for example, had misrepresented to the court that Elliott told Huebner that he could only dispute his debt in writing. After the district court pointed this out, Poltorak moved to recuse Judge Cogan, citing

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F.3d 138, 147–48 (2d Cir. 2012).

the judge's ownership stake in a common investment fund, even though Canon 3C of the Judicial Code of Conduct and Advisory Opinion 106 expressly state that this sort of financial interest does not create a conflict. Poltorak PC also later changed its theory of the case, arguing first that Elliott, by trying to clarify Huebner's bewildering answers to her questions, had somehow misled him, and second that Midland failed to report Huebner's debt properly to the credit reporting agencies. At summary judgment, the district court correctly concluded that the first claim "had no basis in the FDCPA," *Huebner*, 2016 WL 6652722, at *4, and that the second was plainly untrue. It also noted that Poltorak PC time and time again filed letters exceeding the court's page limit and ignored procedures set out in the court's protective order. *See generally Chambers v. NASCO, Inc.*, 501 U.S. 32, 52–53 (1991) (upholding "the assessment of attorney's fees as a sanction for . . . disobedience of the court's orders and the attempt to defraud the court itself"). The district court thus had good reason to conclude that Poltorak PC "unreasonably and vexatiously" multiplied the proceedings in this case under 28 U.S.C. § 1927. *Kim*, 884 F.3d at 106.

Poltorak PC and Huebner raise two principal challenges to the district court's § 1927 fee award, neither of which we find convincing. First, they both argue that their principal claim for relief—that asking any questions about the nature of a consumer's dispute is a "misleading" statement under the FDCPA— was not frivolous because it turns on a question of law that was previously "undecided in this Circuit." *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 97 (2d Cir. 2010). But a legal theory may

be frivolous even if we have never said so before. *See, e.g.*, *Gollomp v. Spitzer*, 568 F.3d 355, 372 (2d Cir. 2009) (upholding a district court's conclusion that a plaintiff's argument was frivolous when the plaintiff failed to cite any "on point" cases in support of his legal theory). And the district court found that "any reasonable reading of [Huebner]'s recorded call" with Midland would show that he was specifically "trying to trick [Midland] into *not* complying with the FDCPA." *Huebner*, 2016 WL 3172789, at *3 (emphasis in original). We see nothing clearly erroneous about this finding, and thus nothing clearly erroneous about the district court's conclusion that Poltorak PC knew or should have known that Huebner's suit was devoid of merit. *See, e.g.*, *Enmon*, 675 F.3d at 143 ("[A] claim is entirely without color when it lacks any legal or factual basis." (internal quotation marks omitted) (quoting *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 337 (2d Cir. 1999))). But even if this claim were not frivolous, it would not have been an abuse of discretion to award fees in light of Poltorak PC's "oppressive tactics" at the initial status conference and "willful violations of court orders." *Dow Chem. Pac. Ltd. v. Rascator Mar. S.A.*, 782 F.2d 329, 345 (2d Cir. 1986).

Second, because the district court did not fully grant Midland's motion for sanctions, which requested that the court award its total fees and costs, Huebner argues that this motion was meritless. And so, he contends, it was an abuse of discretion to impose a fee award that reimbursed Midland for preparing this motion. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (holding that courts should not award fees under 42 U.S.C. § 1988 to plaintiffs'

lawyers who achieve "only partial or limited success"). But Midland's motion was not meritless. The court agreed with Midland that Poltorak PC should be sanctioned for their bad faith conduct; it just declined to give Midland as large a sanction as it requested. *See Enmon,* 675 F.3d at 148 (upholding a sanctions award for the cost of litigating a sanctions motion because the motion was "well founded," even though the district court "denied [it] in part"). We therefore conclude that the district court did not abuse its discretion in sanctioning Poltorak PC under 28 U.S.C. § 1927.

D

Finally, we examine the district court's decision to sanction Huebner under 15 U.S.C. § 1692k(a)(3) and its inherent authority. Section 1692k(a)(3) allows a district court to sanction a litigant for bringing an FDCPA suit "in bad faith and for the purpose of harassment." A court may also sanction a litigant pursuant to its inherent authority "if there is clear evidence that the [litigant's] conduct" was "(1) entirely without color and (2) motivated by improper purposes." *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 114 (2d Cir. 2009); *see also Chambers*, 501 U.S. at 46 (holding that such sanctions "vindicat[e] judicial authority without resort to the more drastic sanctions available for contempt of court" (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)).

Here, the court sanctioned Huebner under § 1692k(a)(3) and its inherent authority for the same reasons as Poltorak PC, noting that, as an attorney experienced in FDCPA litigation, Huebner played a

substantial role in crafting his case's litigation strategy. Huebner has not denied, for example, that at one point he fed his attorney all the questions he asked at a deposition. Huebner also suggested in his opposition to sanctions that he had called Elliott to "test" Midland's FDCPA compliance. The district court interpreted this as an admission that Huebner had been purposefully evasive during the call in an effort to provoke an FDCPA violation, and we see no clear error in this determination. The district court thus did not abuse its discretion in determining that Huebner's decision to initiate this lawsuit "was meritless and brought for improper purposes," and that a fee award was therefore appropriate. *Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 195 (2d Cir. 2000). Huebner's arguments to the contrary are virtually identical to Poltorak PC's outlined above, and we reject them for the same reasons.

In sum, we conclude that the district court set forth sufficiently detailed factual findings establishing that Huebner, Poltorak, and Poltorak PC brought a frivolous case and filed several frivolous motions in bad faith. The district court was therefore well within its discretion to sanction them.

CONCLUSION

We have considered Huebner, Poltorak, and Poltorak PC's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEVI HUEBNER on behalf of himself and all others similarly situated,	:	MEMORANDUM DECISION & ORDER
Plaintiff,	:	
- against -	:	14 Civ. 6046 (BMC)
MIDLAND CREDIT MANAGEMENT, INC. and MIDLAND FUNDING LLC,	:	
Defendant.	:	

COGAN, District Judge.

Before me is the motion of Midland Credit Management, Inc. ("MCM") and Midland Funding, LLC's ("MF") (collectively, "defendant") for summary judgment, as well as plaintiff's motion for class certification. Plaintiff alleges that defendant violated the Fair Debt Collection Practices Act ("FDCPA") by attempting to collect a $131 debt plaintiff allegedly owed Verizon. Plaintiff argues that defendant's attempt to seek an explanation from him when it marked his debt as disputed, as well as its failure to report his debt as disputed, were both illegal. However, the undisputed facts show defendant did nothing wrong in attempting to collect this debt, even though, as I have explained in a prior decision, plaintiff attempted to entrap it into committing an FDCPA violation, and that defendant did report the debt as disputed. For those reasons, defendant's motion for summary judgment is granted. Moreover,

even if there were issues of fact, I would deny class certification.

BACKGROUND

In 2010, plaintiff switched his phone service to Verizon. He previously had Verizon service but had changed to another carrier. As a result of his reversion to Verizon, it performed some work on plaintiff's phone line to ensure he had adequate service. Verizon billed him a $131 fee for that work. Plaintiff advised Verizon that he should not have been charged this fee and he never paid the bill.

MCM and MF acquired the debt from Verizon in July 2013. MF purchased the debt and placed it with MCM for servicing.[1] The account reflected that plaintiff owed Verizon $131.21.

Defendant's records prove that it sent plaintiff an initial collection letter, dated August 9, 2013, demanding payment for the debt, which was not returned as undeliverable. Plaintiff asserts that he never received this letter until it was produced in discovery, but although there is a factual dispute as to whether plaintiff received the letter, plaintiff cannot genuinely dispute that it was sent.

MCM uses a set of codes to determine how the company will handle an account when a consumer declines or fails to pay. Code 050 is used to document verbal disputes on an account; code 261

[1] Plaintiff purports to contest this fact but there is no evidence on which a reasonable jury could find otherwise. Nor is it material which of the two affiliated defendants owned the debt.

indicates a refusal to pay; and code 289 deletes the account, removes it from collection activity, and sends an update to each of the three major Credit Reporting Agencies –TransUnion, Experian, and Equifax (collectively, the "CRAs"). It was also MCM's procedure to label all disputes for accounts located in New York with a 050 code.

On October 17, 2013, plaintiff called MCM. Plaintiff set up a tape recorder before making the call and recorded the entire call. The call is set forth *in haec verba* and discussed at length in an earlier decision that I wrote in this case, Huebner v. Midland Credit Management, Inc., 85 F. Supp. 3d 672, 675-76 (E.D.N.Y. 2015), imposing a sanction on plaintiff, and I will not detail that call again. But to summarize, plaintiff asked what he had to do to dispute the debt; the agent asked him what the dispute was; and plaintiff repeatedly refused to describe it. However, plaintiff's refusals were sufficiently indirect and oblique that each one caused the collection agent to ask another question in an effort to find out what the problem was with the debt.[2] Plaintiff consistently evaded the questions.

Defendant's records of plaintiff's account contain the agent's notes of the call, and show

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[2] For example, after plaintiff answered that the debt was "non-existent," the agent asked him "did you already pay it with Verizon? Did you never have Verizon?," to which he responded, "Do you have a contact information?," and went on to continue to evade the agent's efforts to ascertain the problem.

that she marked the account as "deleted" following the call. Defendant's records also establish that on the same day, following the call, it sent plaintiff a letter advising him that it had ceased collection efforts and had instructed the CRAs to delete the information MCM had reported regarding the account. The letter stated, in part:

> Based on the information provided to us, we have instructed the three major credit reporting agencies to delete the above-referenced MCM account from your credit file. Please be advised, our credit reporting does not affect any credit reporting of this account by the original creditor.
>
> If you have questions regarding your credit report being updated, you may contact the credit reporting agencies in writing or by calling:

Equifax/CBI PO Box 740241 Atlanta GA 30374-0241 (800) 685 - 1111 www.equifax.com	Experian PO Box 2002 Allen, TX 75013 (888) 397 - 3742 www.experian.com/reportaccess	Trans Union PO Box 2000 Chester, PA 19022 (800) 916 - 8800 www.transunion.com

> Please feel free to contact us at (800) 825-8131 extension 32980, should you have any questions.

Defendant's internal procedures recognize the options allowed under the FDCPA when it determines that a debt is disputed. Defendant can simply mark and report the debt to the CRAs

as disputed, and either leave it in that category or attempt to confirm the validity of the debt and, if it can confirm validity, proceed with collection efforts. Alternatively, upon marking the debt as disputed, defendant can simply delete it, which it will presumably do if it determines that the debt is not worth the trouble of pursuing.

The records show that following the call, defendant coded the account as "289," which, as explained above, meant that the account was disputed and deleted. There is no genuine dispute that within six days after the call, defendant sent multiple requests to Experian, TransUnion, and Equifax, starting on October 23, 2013, asking them to delete the item in question. These requests were reiterated on a monthly basis three times thereafter pursuant to defendant's policy of issuing repeated requests to the CRAs to increase the likelihood that the agencies will comply with requests for deletion.

Plaintiff has failed to produce a credit report from any of the three CRAs showing that, following his telephone call with defendant, his Verizon debt continued to appear, even though those companies are required to produce his credit reports to him on demand. In their place, he has proffered a report from a company called "CreditCheck Total," which is apparently a subsidiary of Experian. This is a commercial subscription service made available to consumers which purports to summarize the reports of the three CRAs, and additionally provide a putative FICO score, all for a fee. Although plaintiff's report from CreditCheck Total continues to show

the Verizon debt, it also contains a disclaimer making it clear that it is not to be relied upon as a report from the three recognized CRAs:

> [T]he credit report you are requesting from [CreditCheck] is not intended to constitute the disclosure of Experian information required by the [Fair Credit Reporting Act] or similar laws. Experian's National Consumer Assistance Center provides a proprietary consumer disclosure that is different from the consumer credit report provided by [CreditCheck] Although comprehensive, the credit reports from each of the three national credit reporting companies that are available from [CreditCheck] may not have the same information as a credit report obtained directly from the three national [CRAs].

DISCUSSION

I. SUMMARY JUDGMENT

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), and when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York, 593 F.3d 196, 200 (2d Cir. 2010) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986)). On a motion for summary judgment, it is not for the court to weigh the evidence, assess the credibility of the witnesses, or resolve issues of fact, but only to de-

termine whether there are issues to be tried. See United States v. Rem, 38 F.3d 634, 644 (2d Cir. 1994). The record must be construed in the light most favorable to plaintiff, Mihalik v. Credit Agricole Cheuvreux North America, Inc., 715 F.3d 102 (2d Cir. 2013), but "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to defeat the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505 (1986). Further, "conclusory statements, conjecture, and inadmissible evidence are insufficient to defeat summary judgment." ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 151 (2d Cir. 2007).

Plaintiff claims defendant committed four overlapping violations of the FDCPA, all of which stem from a statutory provision that prohibits the use of false or misleading representations in connection with the collection of a debt. First, he contends that defendant violated 15 U.S.C. § 1692e(8) by failing to report to the CRAs that his debt was disputed. Second, he argues that defendant violated § 1692e(10), by falsely representing that he needed to give a reason for his dispute and attempting to obtain more information from him. Third, he contends that the deletion letter, which stated the CRAs had been notified and told to delete the debt, violated § 1692e(2)(A), which prohibits false representations of the character or legal status of a debt, and § 1692e(5), because defendant had not properly notified the CRAs that the debt was disputed. Included in this third claim is also an allegation that by representing that the debt had been reported as disputed, de-

fendant violated § 1692e(10). Finally, plaintiff asserts that defendant violated § 1692e(2)(A) because it falsely represented to him that he had a valid debt owed to Verizon and then it attempted to collect upon that debt by making false representations about the validity of that debt under §§ 1692e(8),(10).

Even construing the facts most favorably to him (like assuming he never received either of the two mailings that defendant sent him), and applying the "least sophisticated consumer" standard (although plaintiff is a lawyer and anything but an unsophisticated consumer), see, e.g., Clomon v. Jackson, 988 F.2d 1314, 1318-19 (2d Cir. 1993), I cannot see a genuine issue of fact as to any of them. Defendant did exactly what it was supposed to do under the FDCPA. Indeed, defendant undertook this action even though any reasonable reading of plaintiff's recorded call shows that he was trying to trick defendant into *not* complying with the FDCPA. Defendant failed to take the bait and allowed him to dispute his debt; it then stopped collecting on the debt and notified the CRAs.

A. Violation of 15 U.S.C. § 1692e(8)

It is a violation of the FDCPA to communicate "credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." 15 U.S.C. § 1692e(8). There is insufficient evidence in this record upon which a reasonable jury could find that, once plaintiff gave it notice of the dispute, defendant failed to communicate that to the CRAs. Defendant's regular-

ly-kept business records clearly show that within six days of plaintiff's telephone call, it contacted each of the three agencies and reported the debt as disputed. Indeed, defendant repeated the notice three times. That is more than the law required it to do. In addition, despite plaintiff's denial of receipt, the records indicate clearly that defendant notified plaintiff of its communication with the CRAs, whether plaintiff received it or not.[3]

Plaintiff's answer to this is to speculate that defendant's records are not what they purport to be, or that the records do not reflect what actually occurred. There are two main pillars upon which this argument rests. The first is the CreditCheck Total report, which continues to list the debt. But it specifically disclaims accuracy in the manner required under the FDCPA. In addition, nothing in the FDCPA required defendant to report the dispute to CreditCheck Total.[4] Nor has plaintiff produced any evidence showing that Experian, TransUnion, or Equifax continued to report his Verizon debt.

More fundamentally, even if the CRAs had

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[3] Plaintiff points to a record from MCM that reflects the "last ltr" was on 8/9/2013, but that same record contains a notation stating that the deletion letter was sent 10/17/2013.

[4] Under the FDCPA, if defendant continued to report plaintiff's debt to the CRAs, it would have been required to report that debt as disputed. Defendant, instead, asked the CRAs to delete their account. Because CreditCheck is not a credit reporting agency – it is a data compilation service – defendant had no independent reporting obligation to it.

continued to report the debt, it would not prove that defendant failed to communicate the dispute. Defendant is not a guarantor of the CRAs' compliance with its request, and it obviously has no control over the CRAs. Thus, if a jury were to conclude that defendant did not mark the debt as disputed because CreditCheck Total continued to list it, I would have to set that verdict aside as speculative and unreasonable.

Plaintiff also contends that there is an issue of fact as to whether defendant really advised the CRAs to delete the account, because the request for deletion also notes that there is a "current balance" and "past due amount" of $131. Apparently, plaintiff believes that when a consumer disputes an account, it exonerates him from the liability, and therefore defendant should have advised the CRAs that there was a zero balance on this account.

That would be a fine kettle of fish indeed. It would obviate the need for the bankruptcy courts, as it would allow a debtor to eliminate debts simply by demanding their deletion by creditors and collection companies. It would obviously turn the consumer credit markets upside down. But that is not the intent of the FDCPA. Rather, the purpose of the FDCPA, *inter alia*, is to place a halt, whether temporary or permanent, on collection efforts once a debtor alleges that a debt is not valid. It is not a device whereby a debtor can force a collection company to write down his debt to zero. It does not wipe out the debt. The collection company has to maintain the ability to, at least, file a proof of claim in bank-

ruptcy if the debtor later seeks bankruptcy protection, as some do.

The second pillar of plaintiff's argument is to mischaracterize defendant's records and record keeping procedures in several respects. Plaintiff asserts that because his account, following his call, was marked "289" instead of "050," defendant did not, in fact, mark the debt as disputed. That argument ignores the unrebutted testimony of defendant's Rule 30(b)(6) witness, who testified quite clearly that the 050 code is merely a subset of the 289 code. In other words, a 050 code leaves defendant free to investigate the debt and, depending on the results of the investigation, to restore the account to undisputed status. A 289 code, in contrast, identifies a disputed account as to which no further action is going to be taken. As the witness testified, and as the documents confirm, a 289 code is the next step beyond a 050 code, and can be used to signify that no further collection activity should be taken. Defendant in this instance simply skipped the 050-code stage, probably because it was so obvious from the evasive responses that plaintiff gave to the collection agent in his telephone call, that this $131 account was going to be more trouble than it was worth. Defendant's actions following the call – contacting plaintiff and the CRAs and notifying them that the debt was deleted – were completely consistent with the unrebutted testimony.[5]

[5] Plaintiff raises two other points that are immaterial and therefore warrant little comment. He first complains

No matter how plaintiff tries to torture it, the undisputed record shows that following his telephone call, defendant took no further action to collect his debt; it notified him that it was deleting it; and it notified the CRAs to the same effect. That is all that the law required it to do.

B. Violation of 15 U.S.C. § 1692e(10)

Plaintiff argues that defendant violated section 1692e(10) of the FDCPA by asking too many questions of him when he called to dispute his debt. Section 1692e(10) prohibits a debt collector from using "any false representation or deceptive means to collect or attempt to collect any debt." 15 U.S.C. § 1692e(10). The right to dispute a debt is one of the most fundamental rights set forth under the provision of the FDCPA addressing the validation of debts. See 15 U.S.C. § 1692g(a); Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282, 286 (2d Cir. 2013). Plaintiff's argument appears to be that by asking these questions, the least sophisticated consumer could have been deceived into believing that he had to

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that prior to his call, his account was coded "261" – refusal to pay – even though he had not refused. Defendant had attempted to contact him at least six times without success, so there seems to have been a basis for a "refusal to pay" code, but, in any event, it is immaterial how defendant classified his account before he contacted them.

Second, plaintiff contends that one of defendant's documents showed his account as "open." He nowhere explains the provenance or even the date of this document. In any event, defendant's Rule 30(b)(6) witness made it clear that in defendant's internal terminology, "open" does not mean "undeleted" and "closed" does not mean "deleted."

provide defendant with a valid reason to dispute his debt.

Defendant's policies instruct its employees to ask follow-up questions when a consumer advises that he is disputing his debt. I see no problem with that under the law at all. There is nothing unreasonable about allowing a debt collector to ask an individual to explain why he is disputing his debt, as long as it does not interfere with an individual's ability to dispute that debt.

Asking follow-up questions enables the debt collector to focus its investigation on what the problem is with the debt, rather than shooting in the dark. It might even allow the collection agency to resolve the dispute on the spot. If the consumer answers the question by saying, "I only owe $120, not $131," the collection agent might well say, "fine, we'll take it." Problem solved.

There may come a point in a verbal exchange where a debt collector is intentionally browbeating a consumer to deter him from disputing his debt. It also might arguably be the case that if a consumer states, "I want to dispute the debt, and I decline to tell you why," the collector might have to stop asking questions and just mark the debt as disputed (although plaintiff has cited no case so holding). But nothing resembling either of those scenarios happened here.

Rather, the transcript is quite clear that it was plaintiff who was bobbing and weaving, evading the questions and harassing the collection agent, who was just trying to do her job, find out what the problem was, and perhaps even re-

solve the dispute. Plaintiff's evasiveness, his cat-and- mouse approach, virtually begged for follow-up questions because instead of just refusing to state what the problem was, plaintiff answered with non-sequiturs and put his own questions to her, all in a very obvious attempt to get her to say something improper. I commend the transcript, see Huebner, 85 F. Supp. 3d at 675-79, to anyone who wants to form their own judgment as to who was the victim and who was the victimizer in this exchange.

What plaintiff did is not what the least sophisticated consumer would do, because the least sophisticated consumer would not be an experienced FDCPA lawyer trying to manufacture an FDCPA claim.[6] He would not say that he is disputing the debt "because the debt is non-existent," leaving the agent clueless. Rather, when asked why he wanted to dispute the claim, the least sophisticated consumer would simply say, "Verizon didn't tell me they were going to charge me reinstituting service, and when they charged me, I refused to pay." The truth seldom requires any sophistication.

Nothing in MCM's policies, or the phone

[6] Plaintiff served as plaintiff's counsel in Setton v. Cohen Hurkin Ehrenfeld Pomerantz & Tenenbum, LLP, No. 12 Civ. 4102, 2014 WL 4724704 (E.D.N.Y. Sept. 22, 2014). In that case, the plaintiffs alleged that the defendant never sent the notice at issue. However, the defendant provided ample evidence of service, including an affidavit reflecting that a process server left two copies of the notice at issue at the plaintiffs' residence and two certified mail receipts mailed on the same day to plaintiffs' address.

call with plaintiff, prevented plaintiff from disputing the debt. As I held in an earlier opinion in this case, "[t]he fact that defendant's representative wanted a smidgen of detail about the dispute, when plaintiff was being obviously and intentionally vague, does not amount to a statutory violation." Huebner, 85 F. Supp. 3d at 675. Defendant still marked the account as deleted and requested that the CRAs delete its reported information. Defendant's representative did not say she would not accept plaintiff's debt dispute. Her questions to plaintiff did not violate the FDCPA.

Finally, and relatedly, plaintiff contends that the October 17, 2013 letter, in which defendant advised him that it was ceasing collection efforts and reporting the debt as deleted to the CRAs, was a false representation under §§ 1692e(2)(A) and 1692e(10) because, in fact, it did not cease collection efforts and did not advise the CRAs to delete the debt. Since, as discussed above, the record demonstrates that defendant properly notified the CRAs that plaintiff's debt was disputed and ceased collection activities, this claim fails.[7]

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[7] Defendant argues that the deletion letter was not a "communication in connection with the collection of a debt" as defined by § 1692e of the FDCPA. The Second Circuit has not taken a position on whether a communication "in connection with a debt" must be designed to induce the consumer's payment in order for the communication to be covered. See Hart v. FCI Lender Servs., Inc., 797 F.3d 219, 225-26 (2d Cir. 2015). Instead, it has held that courts should apply an objective standard "with an eye towards a consumer's understanding" of the communication. Id. At 225. I need not reach this issue because I find that, even assum-

C. Collection of a Non-Existent & Non-Validated Deb

It is a violation of the FDCPA to falsely represent the legal status of a debt. See 15 U.S.C. § 1692e(2)(a). The FDCPA also sets forth a detailed procedure for disputing the validity of a debt. See 15 U.S.C. § 1692g(a). As long as a debt collector has included appropriate language notifying an individual about the debt validation procedure under the FDCPA, the allegation that a debt is invalid cannot alone constitute the basis for an FDCPA claim. See Bleich v. Revenue Maximization Grp., Inc., 233 F. Supp. 2d 496, 500 (E.D.N.Y. 2002).

Additionally, the FDCPA does not impose a duty upon a debt collector to independently investigate the validity of a debt. See Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1174 (9th Cir. 2006). A plaintiff's self-serving statements about the validity of his debt, without direct or circumstantial evidence to support them, cannot defeat a motion for summary judgment. See Llewellyn v. Asset Acceptance, LLC, No. 14 Civ. 411, 2015 WL 6503893, at *2 (S.D.N.Y. Oct. 26, 2015) (internal citations omitted).

Plaintiff's final claim is that defendant violated the FDCPA because it represented that plaintiff had a valid outstanding debt with Verizon and it attempted to collect upon that debt be-

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ing this letter was a communication in connection with the collection of a debt (as the second page of the letter states it is), it does not violate any provision of § 1692e.

fore verifying it was valid. Plaintiff further argues that because he had disputed the debt with debt collectors retained by Verizon prior to the sale of his debt to defendant, which I assume he did, knowledge of that dispute should be imputed to it.

Defendant did not violate the FDCPA by attempting to collect on the debt prior to verifying it. Defendant bought the debt from Verizon which represented that plaintiff owed it $131.21. Defendant's initial letter to plaintiff, even assuming plaintiff never received it, provided adequate notice of how to dispute his debt; that is all defendant had to do. And once plaintiff disputed the debt, defendant was placed on notice that it either needed to cease collection or verify the debt. Defendant had no obligation to independently investigate the debt prior to beginning collection, and there is no reason that plaintiff's prior dispute of the debt with Verizon's debt collectors should have been known to it.

II. CLASS CERTIFICATION

Even if I were not granting defendant's motion for summary judgment, I would deny plaintiff's motion for class certification because he has failed to satisfy the requirements of Rule 23. Rule 23(a) of the Federal Rules of Civil Procedure requires that any proposed class action: "(1) be sufficiently numerous, (2) involve questions of law or fact common to the class, (3) involve class plaintiffs whose claims are typical of those of the class, and (4) involve a class representative or representatives who adequately represent the interests of the class." Myers v. Hertz Corp., 624

F.2d 537, 547 (2d Cir. 2010). In addition, Rule 23(a) contains an implied requirement that the class must be ascertainable. Vu v. Diversified Collection Servs., Inc., 293 F.R.D. 343, 355 (E.D.N.Y. 2013).

In addition to satisfying each of the four prerequisites listed in Rule 23(a), a party seeking class certification must satisfy one of the subsections of Rule 23(b). Plaintiff seeks to certify a class pursuant to subsection 23(b)(3) and therefore must show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods," for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

Plaintiff has proposed either a nationwide or New York-only class which he defines as follows: "All persons who, according to Defendants' records (a) have a United States mailing address; (b) within one year before the filing of this action; (c) verbally disputed the debt; and (d) were *asked probing questions* regarding the reason for the dispute." (Emphasis added). The definition raises numerous problems under Rule 23, but it suffices to note two glaring ones.

A. Ascertainability

The touchstone of ascertainability "is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." Brecher v. Republic of Arg., 806 F.3d 22, 24 (2d Cir. 2008) (internal citations omitted). "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case." Charron v. Pinnacle Grp. N.Y. LLC, 269 F.R.D. 221, 229 (S.D.N.Y. 2010).

Plaintiff's proposed class definition would require a two-step process to identify class members. The first step is to cull those consumers to whom defendant assigned a 050 or 261 code within a one year reach-back period.[8] That is easy enough. But note that it excludes any consumers who were only assigned a 289 code, which also reflects disputes. Let's put that aside.

The second step requires a determination of which of these "050/261" consumers were

[8] Plaintiff's Reply Brief argues that its proposed class definitions do not contemplate using defendant's account coding system. This is preposterous and in bad faith. Without the use of a coding system there would be absolutely no mechanism by which to identify who has been subject to probing questions when disputing their debt. Further, plaintiff's Motion in Support of Class Certification states that "[m]oreover, Defendants use a coding system to mark consumers . . . such that a list of consumers who were treated exactly the same way by Defendants already exists, at least partially."

asked "probing questions." How does plaintiff intend to determine that? I note at the outset that the adjective "probing" is qualitative in nature. One dictionary defines it as "a careful examination or investigation of something." Merriam-Webster, Online Edition, available at http://www.merriam-webster.com/dictionary/probe. Plaintiff apparently intends for someone, I suppose me, to examine each conversation with each "050/261" consumer on a case-by-case basis and determine whether the questions were sufficiently inquisitive to constitute "probing." I do not think Rule 23 permits me to do that.

Defendant itself uses the word "probing" in its procedures manual to give examples of the kinds of questions that a collection agent should ask under certain verbal dispute scenarios, which further illustrates how subjective any determination of the class would be. For example, if a consumer advises the agent that the debt is the product of fraud, one of the suggested "probing" questions for the agent is, "When was the alleged fraud committed?" That hardly seems probing to me, but apparently it does to defendant. Similarly, if a consumer advises the agent that the debt was previously paid, a suggested "probing" question is, "How much did you pay?" Even if one determines that these questions are "probing" within plaintiff's class definition, we encounter the problem that there is nothing illegal about them under the FDCPA; the class definition thus picks up some conduct that might be illegal as deterring the least sophisticated consumer from dis-

puting his debt, and other conduct that plainly would not.

It is apparent what plaintiff is attempting to do by limiting the class to those who were asked "probing" questions. Obviously, he cannot expressly admit that he is seeking a class of those consumers who were asked *any* questions, as the FDCPA clearly does not prohibit that. So what he really means is to define the class as those who were asked questions "sufficient to deter the least sophisticated consumer from disputing their debt." But he cannot do that either, because it is so obviously qualitative and would so clearly require a case-by-case determination. Therefore, he has seized upon the word used in defendant's procedures manual – "probing" – in the hope of making the inquiry seem less qualitative. But as defendant's procedures manual shows, that inquiry is not less qualitative. It still requires a case-by-case inquiry to determine which questions have an improper deterrent effect and which do not.

Moreover, although defendant's procedures manual gives a few sample questions, the nature of conversation, as plaintiff's exchange with the agent shows, is dynamic. Whether and how topics are covered by a collection agent depends on what she hears from the consumer. A few sample questions may be a starting point, but until artificial intelligence technology increases substantially beyond its current level (at which point collection companies may replace their agents with computers), the particular questions asked will depend on the particular statements

that the consumer makes. And yet it is the agent's particular questions that have to be tested under the FDCPA.

But there is more. Despite discovery, plaintiff has given no indication of how we are to ascertain what questions any particular consumer was asked. There is no indication that defendant maintains any recordings of those conversations (unlike plaintiff), and even if it did, as demonstrated above, they would have to be reviewed conversation by conversation. Plaintiff has submitted no written records of any contact between defendant and any consumer, save one – his own. And even that one does not fully disclose what questions he was asked.

Defendant's record of plaintiff's account has a section memorializing contacts with him. One part of that section is a column entitled "Notes," in which the agent summarized the call. In its entirety, she typed in the following:

> RECVD CALL FROM: LEVI HUEBNER VERIFIED ADDRESS REASON: CU ASKING FOR MY CONTACT INFO; GAVE CU ALL INFO NEEDED. ASKING CU HOW CAN HELP. CU STS WANTS TO DISPUTE. ASKED CU WHAT HIS DISPUTE IS. CU STS ITS A NON EXISTANT [sic] ACCT. ADV CU WHAT THAT MEANS. IF HES DISPUTING FRAUD, PAID PRIOR, OR IF HE EVER HAD VERIZON. CU CLAIMIMING [sic] HE DIDNT UNDERSTAND MY QUESTIONS. ASKED CU IF HES EVER

> HAD VERIZON. CU REPEATED. CU STS WILL CALL BACK ONCE GETS HIS PAPERWORK TOGETHER. ALTHOUGH UNCLEAR OF DISPUTE, WILL UPDATE TO DLT PER NYC ZIP CODE.

Because we have the transcript, we know exactly what questions were asked. Without it, we could infer some of them from this note, but not all of them. We would also be misled, because we know from the transcript that the agent did not ask about whether there was fraud; he did not let her get that far. Thus, even putting aside the need to review each of these notes individually to ascertain class membership, I do not see how we can rely on these notes to ascertain whether any particular class member was asked "probing" questions.

Ultimately, although he does not expressly admit it, plaintiff's argument devolves into effectively eliminating the word "probing" from the class definition. His point is that since defendant's policies require the asking of questions, it doesn't matter what questions were asked. But I think any meaningful class would have to distinguish between reasonable, legitimate questions, and questions having an undue, deterrent effect, else we would have class members with no claims under the FDCPA. Plaintiff offers no way to make that distinction because there is none. The class he proposes is utterly unascertainable.

B. Adequacy of the Representative

The other glaring defect is that plaintiff is

an inadequate representative of his class. Adequacy of representation focuses on the fitness of a purported class representative to competently discharge the responsibility of litigating for the class on behalf of absent class members. Under this prong of Rule 23(a), a court must ensure that the putative representative "possess[es] the same interests and suffer[s] the same injur[y] as the class members." In re Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249 (2d Cir. 2011) (internal citations omitted). The named plaintiff must show that "there is no conflict of interest between the named plaintiff[] and other members of the plaintiff class." Marisol A. v. Giuliani, 126 F.3d 372, 378 (2d Cir. 1997).

Whether a plaintiff faces unique defenses is an appropriate factor for the court to consider under the adequacy prong. See Lapin v. Goldman Sachs & Co., 254 F.R.D. 168, 179 (S.D.N.Y. 2008). "Class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 59-60 (2d Cir. 2000). "Regardless of whether the issue is framed in terms of the typicality of the representative's claims ... or the adequacy of [their] representation ... there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to [him]." Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, 903 F.2d 176, 180 (2d Cir. 1990).

Plaintiff faces a defense that is undoubtedly unique to him – it certainly wouldn't be one to

which the least sophisticated consumer would be subjected – and which will make it very risky for him to adequately represent the entire class. Plaintiff will be subject to the argument that his FDCPA claims should be rejected because by attempting to entrap the collection agent into violating the statute he will be unable to allege a material violation of the FDCPA.[9]

In D'Avanzo v. Global Credit & Collection Corp., No. 10 Civ. 1572, 2011 WL 2297697, at *4 (D. Colo. April 18, 2011), the district court denied plaintiff's summary judgment motion after noting that plaintiff initiated the telephone conversation at issue and asked very pointed questions. The court noted that, "a trier of fact might well conclude that a debt collector's false statements were not material and would not support liability if the consumer initiated the telephone call at the direction of his or her counsel and with the objective to elicit and tape- record potentially incriminating statements by the debt collector." Id.; see also Biggs v. Credit Collections, Inc., No. 07 Civ. 53, 2007 WL 4034997, at *3 (W.D. Okla. Nov. 15, 2007) (whether the plaintiffs entrapped the defendant with respect to certain statements is a

[9] The Second Circuit has not yet ruled on whether a statement must be a material misrepresentation in order to state a claim under section 1692e of the FDCPA. However, at least one district court in this Circuit has adopted this standard. See Fritz v. Resurgent Capital Servs., LP, 955 F. Supp. 2d 163, 170 (E.D.N.Y. 2013). Additionally, the Second Circuit has approvingly cited cases from other circuits enforcing a materiality requirement. See Gabriele v. Am. Home Mortg. Servicing, Inc., 503 F. App'x 89, 94 (2d Cir.2012).

disputed circumstance relevant to assessing if an FDCPA violation occurred).

Plaintiff certainly directed his case in a similar fashion. At any trial, plaintiff would be extensively and effectively cross-examined on his attempt to entrap defendant into violating the FDCPA. Specifically, it would be pointed out to the jury that instead of just answering the question of why he was disputing his debt, he engaged in a game of cat-and-mouse. His experience as an FDCPA lawyer would be used to show that he knew exactly what he was doing, and that experience would further differentiate him from the class. It is entirely possible that even if other members of the class had valid claims, plaintiff's behavior would undermine his claim, and would cause him, and therefore the entire class, to suffer an adverse verdict.

CONCLUSION

Defendant's motion for summary judgment is therefore granted, and the Third Amended Complaint is dismissed. Plaintiff's motion for class certification is denied. The Clerk is directed to enter judgment accordingly.

SO ORDERED.

_____

U.S.D.J.

Dated: Brooklyn, New York
June 3, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEVI HUEBNER on behalf of himself and all others similarly situated, Plaintiff, - against - MIDLAND CREDIT MANAGEMENT, INC., Defendant.	X : : : : : : : X	MEMORANDUM OPINION AND ORDER TO SHOW CAUSE 14-cv-6046 (BMC)

COGAN, District Judge.

Congress passed the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, for the salutary purpose of preventing the harassment of consumer debtors by professional debt collectors. The legislative history abounds with examples of the kind of abuse that occurred; from midnight calls, to calls occurring as frequently as fifty times in a single day, to calls to the debtor's children or employers for the sole purpose of embarrassing and pressuring the debtor. It continues to serve its important purpose in a number of cases. See, e.g., Rivera v. Nat'l Check Processing, LLC, No. 10-CA-605, 2011 WL 996340 (W.D. Tex. March 17, 2011).

In this Court, however, and I suspect in many others, the use of the statute has evolved into something quite different than its original purpose would suggest. The majority of cases that I see under the statute are brought by a handful of the same lawyers, based on complaints that read much more like legal briefs than complaints. Frequently,

these cases are brought on behalf of the same debtor-plaintiffs, who seize on the most technical alleged defects in collection notices or telephone communications, often raising claims of "confusion" or "deception" regarding practices as to which no one, not even the least sophisticated consumer, could reasonably be confused or misled. These cases are often brought for the non-salutary purpose of squeezing a nuisance settlement and a pittance of attorneys' fees out of a collection company, which it will often find cheaper to pay than to litigate. A cottage industry among limited players – plaintiffs' lawyers, debtors, and even defendants' lawyers – appears to be the primary progeny of the statute. Still, a technical violation of the statute is a violation, and although the social utility of this industry may be questioned, this technical use of the statute for economic gain violates no law or ethical precept.

Thus, despite misgivings as to what this statute has become, this Court has applied the statute, to the best of its ability, according to its language and the controlling case law that construes it, leaving it to Congress or higher courts to correct any excess application of the statute. The instant case, however, goes beyond anything that the Court has seen. It represents a deliberate and transparent attempt by a sophisticated debtor to entrap a collection company into a technical violation. Even more problematically, plaintiff chose to bring this action even though there is a tape recording showing that the attempt at entrapment utterly failed. The collection company in this case did everything by the book, and yet has still found itself a defendant in an FDCPA action. There are substantial questions

about whether this action should be allowed to proceed and whether defendant is entitled to recover attorneys' fees for having had to defend it.

BACKGROUND

Plaintiff's complaint asserts that defendant violated the FDCPA during a phone conversation that took place on October 17, 2013 regarding a debt obligation originally owed to Verizon. (In the cases before me, unpaid cellular phone bills seem to be the most frequently used basis for claims by debtors and their lawyers who are regular players in this industry.) It is important to note that it was plaintiff who initiated the call, and for reasons that now seem obvious, he chose to record it. His complaint alleges that defendant "wrongfully stated to the Plaintiff that he could not orally dispute the debt" and that "he must have a reason to dispute a debt." The complaint states that defendant "made the above false statements in violation of 15 U.S.C. §§ 1692e(8) and 1692e(10)."

The parties appeared before the Court for an Initial Status Conference. At that conference, defense counsel explained that plaintiff had, in fact, been allowed to dispute his debt verbally. Indeed, according to defense counsel, immediately after the phone call between the parties, defendant issued a letter to plaintiff advising him that defendant was ceasing its collection efforts and was requesting the deletion of the item from plaintiff's credit reports. Thus, defendant argued that plaintiff was on notice that his verbal dispute – the one he alleges defendant refused to accept – resulted in an actual cessation of collection activity.

The parties agreed that if, in fact, a violation had occurred during the recorded telephone call, then even prompt dispatch of the cessation notice following the call would not absolve defendant of the technical violation. Plaintiff's counsel assured me that a violation had occurred because defendant had told plaintiff that the debt could only be disputed in writing, and that the tape recording would show it. I directed plaintiff's counsel to submit a copy of that recording to Chambers and defense counsel, which he did. A transcript of the phone call is annexed to this Memorandum Opinion and Order to Show Cause as Appendix A.

The recording is fifteen minutes long and consists of two calls. In the first, plaintiff simply leaves a voicemail. In the second, plaintiff asks a representative how he can dispute his debt. The representative transfers plaintiff to the consumer support department. Plaintiff asks the same question to the consumer support department representative, who responds that all he needs to do to dispute the debt is advise her of the dispute. When asked what he was disputing, plaintiff steadfastly declined to say any more than that the debt is "non-existent." The representative said she was not clear about what that meant and asked a few questions to find out. Principal among these was whether plaintiff ever had an account with Verizon. As can be seen from the transcript, plaintiff would not tell her whether he ever had a Verizon account.

Moreover, his baiting of the representative is very apparent from the transcript. At one point, he asks her, "I don't understand, I can't take it off my credit card, my account without paying it?" The

representative declined the bait: "That's not what I said, sir, I need to know what your dispute is before I can just delete it for you. So you're saying you want to dispute it, why is it that you want to dispute it?" Plaintiff then reverted to his refrain that the debt is "non- existent." For the third time, the representative asked, "Did you ever have Verizon, sir?" And plaintiff would only answer "I don't understand the question you ask me, this is a non-existent debt." She responds, "[i]t's a very straightforward question. Did you ever have Verizon service?" Plaintiff again evaded the question: "Okay, but I told you, you ask me, I told you, if you tell me, you're not going to take my dispute, that's fine. I'm just going to try to see if I can get more information." The substantive discussion in the call ended with the representative saying, "I'm trying to help you with your dispute, sir, but you're not really helping me help you."

It is notable that despite the representation in the complaint that plaintiff was told he could only dispute the debt in writing, which was reaffirmed by plaintiff's counsel at the Initial Status Conference, the word "writing" is never mentioned in the call. Again, it is undisputed that following this call, defendant immediately dispatched a cessation letter and no effort was made at collection.

DISCUSSION

The FDCPA establishes a general prohibition against the use of "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The various subsections of § 1692e, sixteen in total, provide a non-exhaustive list of practices that fall

within this ban. Plaintiff maintains that defendant's conduct violated two of these subsections, 1692e(8) and 1692e(10). The former prohibits communicating or threatening to communicate "credit information which is known, or should be known, to be false, including the failure to communicate that a debt is disputed." The latter prohibits the use of "any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

Plaintiff alleges that defendant violated these two subsections by "[d]enying the Plaintiff the right to dispute the debt verbally"; "[r]equiring the Plaintiff to provide a valid reason to dispute the alleged debt"; "[f]ailing to communicate that a disputed debt is disputed; and "mak[ing] the above false statements in violation of" these two subsections. The recording does not support plaintiff's version of the events and there does not appear to be any good faith basis for this suit.

First, defendant's employee told plaintiff that all he needed to do to dispute his debt was to advise her of the dispute. There were no qualifications on that statement. The word "writing" was never mentioned. Second, immediately after the call, defendant sent plaintiff a letter telling him that it was ceasing its collection efforts. Far from denying plaintiff the right to dispute his debt, the phone conversation and follow-up letter make clear that plaintiff disputed his debt, and did so successfully. The phone conversation lacks any discernible false or deceptive statement or representation. The fact that defendant's representative wanted a smidgen of detail about the dispute, when plaintiff was being

obviously and intentionally vague, does not amount to a statutory violation.

This case has all the earmarks of a setup. Plaintiff and his lawyer decided they were going to outsmart the collection company and make a little money while at it. But this statute is not a game, and its purpose is not to provide a business opportunity. There are still consumers who are in fact harassed by debt collectors, albeit less often than prior to the statute's enactment. Those genuinely aggrieved parties are entitled to the protection of the statute. It should not be diluted to become a plaything for fast talking plaintiffs and their lawyers.

I am inclined to award defendant attorneys' fees and costs in connection with having to defend this action. See 15 U.S.C. § 1692k(a)(3). I am also inclined to award further sanctions under Federal Rule of Civil Procedure 11(b) and 11(c)(3). See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393, 110 S.Ct. 2447, 2454 (1990). Plaintiff and his attorney are therefore Ordered to Show Cause by February 18, 2015 why this action should not be dismissed, with fees costs awarded under 15 U.S.C. § 1692k(a)(3), and sanctions issued pursuant to Rule 11.

SO ORDERED.

Digitally signed by
Brian M. Cogan
U.S.D.J.

Dated: Brooklyn, New York
February 11, 2015

APPENDIX A

Automated:

Thank you for calling Midland Credit Management, a debt collection company. To continue in English, press 1. If you know your party's five digit extension, enter it now. Your call may be monitored or recorded, if you do not wish for this to happen, please advise the person who answers your call.

This is an attempt to collect a debt. Any information obtained will be used for that purpose. Please leave a voice message for David Strimson. At the tone please record your message, when you are finished recording, hang up and press # for more options.

****

Hello, this is Mr. Huebner, I'd like to speak to Mr. Strimson, if you could kindly give me a call, I would appreciate it, 917-701-5432, 917-701-5432. Thank you.

****

Automated:

Thank you for calling Midland Credit, a debt collection company. To continue in English, press

1. If you know your party's five digit extension, enter it now, if you do not know your party's extension, press 6 to search by last name or for further assistance, press 0 now. Your call may be monitored or recorded, if you do not wish for this to happen, please advise the person who answers your call.

****

MCM Representative: Thank you for calling MCM. You are talking to Josh Gables, may I have the MCM account number please?

Mr. Huebner: I really don't know the acct number but I got a thing on my credit report that said that I have something on there by Midland Funding.

MCM Representative: Okay, so your first and last name please.

Mr. Huebner: Levi, last name Huebner. H-U-E-B-N-E-R.

MCM Representative: Okay, so this is the first time you're calling us you and you didn't receive any calls and not even a single letter from us.

Mr. Huebner: I never received a letter from you, I just found out about this cause I had a, I got something on a credit report.

MCM Representative: Alright, can you confirm for me the [inaudible] please?

Mr. Huebner: It has an account number here, I can give you the account number that it says. MCM Representative: Is it with 10 digits?

Mr. Huebner: Hold on.

MCM Representative: Sure sir. Mr. Huebner: It starts off 855965.

MCM Representative: 855965, that's not the complete number sir.

Mr. Huebner: Well, I'm looking at the account number that I could associate this with. You know, I don't know where you got that acct number, the

account number I have a different acct number let me see here, it's 7187569815.

MCM Representative: 7187569815 Mr. Huebner: Yea.

MCM Representative: Let me check. Okay, that's the original account number sir, actually that's the telephone number that you had with Verizon. That's a telephone number, it's a home telephone line that was activated by Verizon back in 2010 till 2011.

Mr. Huebner: Okay.

MCM Representative: Okay, and I'll give you the account number with our company, so write it down.

Mr. Huebner: Okay. Just a minute. MCM Representative: It is-

Mr. Huebner: Just a minute, I'm getting a pen and paper if you don't mind. MCM Representative: Sure sure.

Mr. Huebner: Okay, so the account, this is your account number.

MCM Representative: Yes, I'm going to give you our account number.

Mr. Huebner: Yeah go ahead.

MCM Representative: So 855 Mr. Huebner: 855

MCM Representative: 965

Mr. Huebner: 965

MCM Representative: 9948

Mr. Huebner: 9948. That's a Midland account

number.

MCM Representative: Yes, yes that is right, so the bill amount is for $131.21.

Mr. Huebner: Did Midland send me a letter about this account?

MCM Representative: Sir, I will verify the letter that was sent to you. I think we also, the address which we mailed the letter to, it was in August, 478 Melbourne Street, first floor. That's the address which we have for in Brooklyn, NY. That's the only address we have.

Mr. Huebner: And you sent the letter there?

MCM Representative: Yes we sent the letter in the month of August when Verizon sold your account to us.

Mr. Huebner: Okay, that's wonderful to hear that, and I want to know, if want to dispute the debt, what do I have to do?

MCM Representative: Give me one minute, one minute sir. Okay, the account number which I gave you, I'm going to connect your call with one of my departments, okay the dispute department, give that account number to them, and they will go ahead and explain to you the procedure how to dispute the account and how the account will be taken care of. Okay, one minute, I'll transfer you to them.

****

Automated:

[Please continue to hold for just a moment longer,

we will on the line shortly to answer your call. Thank you for calling Midland Credit Management, a debt collection company. Your call may be monitored or recorded. If you do not wish for this to happen, please advise the person who answers your call. This is an attempt to collect a debt. Any information obtained will be used for that purpose. To continue in English, press 1.]

[Thank you for your continued patience, please hold for the next available agent.]

****

MCM Representative: Thank you for calling Midland Credit Management, my name is Emma Elliott, may I have the account number please?

Mr. Huebner: Hi, how are you?

MCM Representative: I'm good, thank you, how are you today?

Mr. Huebner: Very good, the account number is 8559659948.

MCM Representative: 9948?

Mr. Huebner: Correct

MCM Representative: And what is your name please?

Mr. Huebner: Levi Huebener, and may I ask your name?

MCM Representative: My name is Emma.

Mr. Huebner: E. How do you spell that?

MCM Representative: E-M-M-A.

Mr. Huebner: Okay.

MCM Representative: That's 478 Melbourne Street your current address sir?

Mr. Huebner: That's correct.

MCM Representative: Okay. How can I assist you on this Verizon NY account?

Mr. Huebner: What I want to know, what do I have to do if I want to dispute the debt?

MCM Representative: Just advise me what your dispute is, and I can see if I can assist you with that.

Mr. Huebner: And, how do I get it off my credit report?

MCM Representative: Well we would need to work with what your dispute is in order to remove it sir, so why are you disputing?

Mr. Huebner: I don't understand, I just can't get it off my credit report?

MCM Representative: No sir, we can't just delete an account because the consumer wants it deleted. We need to know why they want it deleted and what their dispute is. I can assist you with your dispute here sir.

Mr. Huebner: I don't understand, I can't take get it off my credit card, my account without paying it?

MCM Representative: That's not what I said sir, I need to know what your dispute is before I can just delete it for you. So you're saying that you want to dispute it, why is it you want to dispute it?

Mr. Huebner: Because it's a non-existent debt.

MCM Representative: Okay, can you elaborate as

to what that means, did you already pay it with Verizon, did you never have Verizon?

Mr. Huebner: Do you have a contact information?

MCM Representative: What do you mean sir?

Mr. Huebner: I don't understand what the questions you're asking me.

MCM Representative: Sir you called in to dispute the debt, I need to know why you're disputing. So I'm asking you questions about what your dispute is.

Mr. Huebner: I'm telling you it's a non-existent debt

MCM Representative: Okay, sir, but I don't know what that means, it is existing, cause its here in our system so why are you stating its non-existent?

Mr. Huebner: Because it is non-existent. How am I supposed to tell you, I can't prove a negative, its non-existent.

MCM Representative: Okay sir, but I don't know what that means, I need you to elaborate so I can assist you with your dispute. Did you ever have Verizon?

Mr. Huebner: Okay, so can I ask you a question?

MCM Representative: Sure.

Mr. Huebner: So, I don't understand what you're saying, do you have a contact number?

MCM Representative: Yes sir, but my contact number is not going to assist you with your dispute.

Mr. Huebner: Well, I don't understand, I want to

kind of want to look into my files and see if I find anything, but I'm going to have to call you back.

MCM Representative: Okay, our extension here is 32980.

Mr. Huebner: I don't know, you mean the same number?

MCM Representative: Yes sir.

Mr. Huebner: 800-265-8825. Extension

MCM Representative: 32980

Mr. Huebner: 32980. Okay, thank you Emma.

MCM Representative: You're welcome sir. So did you want to move forward with your dispute?

Mr. Huebner: I told you I dispute it, because it's a non-existent debt.

MCM Representative: I understand sir, but you haven't given me why you're disputing, you're just saying you're disputing, I need to know what you're disputing.

Mr. Huebner: It's a non-existent debt.

MCM Representative: Okay sir, but that's not a dispute.

Mr. Huebner: Okay.

MCM Representative: Did you ever have Verizon sir?

Mr. Huebner: I don't understand the question you ask me, this is a non-existent debt.

MCM Representative: It's a very straightforward question. Did you ever have Verizon service?

Mr. Huebner: Okay, but I told you, you ask me, I told you, if you tell me, you're not going to take my dispute, that's fine. I'm just going to try to see if I can get more information.

MCM Representative: I'm trying to tell help you with your dispute, sir, but you're not really helping me help you.

Mr. Huebner: Okay, so if I call back that number, if I have more information. If I call back that number, then I can reach you?

MCM Representative: You'll get someone in my department, sir, yes.

Mr. Huebner: I'll get someone in your department?

MCM Representative: We don't have direct extensions.

Mr. Huebner: Okay. So what department is this I'm speaking to?

MCM Representative: Consumer support.

Mr. Huebner: Okay, thank you very much.

MCM Representative: You're welcome sir.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEVI HUEBNER on behalf of himself and all others similarly situated, Plaintiff, - against - MIDLAND CREDIT MANAGEMENT, INC., Defendant.	X : : : : : : : X	MEMORANDUM DECISION AND ORDER 14- Civ. 6046 (BMC)

COGAN, District Judge.

On February 11, 2015, I issued a Memorandum Opinion and Order to Show Cause ("Order to Show Cause") directing plaintiff to show cause why this action under the Fair Debt Collection Practices Act ("FDCPA") should not be dismissed, with costs awarded and sanctions issued, for having been brought in bad faith. See Huebner v. Midland Credit Mgmt., Inc., No. 14 Civ. 6046, _____F. Supp. 3d__, 2015 WL 569194 (E.D.N.Y. Feb. 11, 2015). Familiarity with the Order to Show Cause is assumed, but to summarize, a transcript of the recorded conversation that plaintiff, an attorney, had initiated with defendant debt collection agency strongly suggested that plaintiff had deliberately, but unsuccessfully, sought to entrap defendant into an FDCPA violation. Plaintiff then brought this action despite his failed effort at manipulation.

Plaintiff's attorney told me at the Initial Status Conference that his client's claim was based

exclusively on the recorded conversation. He assured me that once I listened to the recording, I would see that defendant had told plaintiff that he could only dispute his debt in writing, which would violate the FDCPA. I issued the Order to Show Cause because, in fact, after the conference, when he produced the recording to me, the recorded conversation showed just the opposite of what counsel had represented. Moreover, the record showed that immediately following the recorded conversation, defendant instructed the three major credit reporting agencies to delete plaintiff's account with defendant from his credit file.

In responding to the Order to Show Cause, plaintiff does not deny that he attempted to trick defendant into a violation of the FDCPA.[1] Instead, he makes essentially two arguments. First, he claims that if I had a more complete record, which he has now supplied, I would have seen that defendant did, in fact, violate the FDCPA, for reasons to which he did not refer at the Initial Status Conference. Second, he alleges that because the Order to Show Cause criticized abuses of the FDCPA by some attorneys and plaintiffs, and because of the manner in which I have managed this case, I have demonstrated bias that mandates

[1] Plaintiff, for the first time in his reply, suggests that "there is simply no evidence whatsoever" of inducement or entrapment. If anything, he says, the insistence that defendant was induced by plaintiff to violate the FDCPA "is a genuine issue of fact". Notably, this argument does not deny that plaintiff called defendant with the intent to manufacture this claim. Plaintiff's intent is readily apparent from the transcript of the phone conversation between the parties. See Huebner, 2015 WL 569194, at Appendix A

my recusal. As part of this argument, he contends that I have a financial interest in defendant, and therefore should not be hearing this case. Based on these allegations, he moves to vacate the Order to Show Cause, to have me recuse myself, and to certify for appeal my ruling on these motions in the event I deny them. Defendant has opposed plaintiff's motion, urging that there is neither merit to his case nor to his motion for recusal.

As shown below, plaintiff's motion for recusal is in part frivolous and entirely without merit. Had plaintiff done his research, he would have learned that I have no financial interest, as that term is defined in the Code of Conduct for United States Judges, in defendant, and that nothing in the Order to Show Cause, or in my management of this case, approaches the level necessary to warrant disqualification. With respect to the merits of plaintiff's case, to the extent that the Order to Show Cause was based on only a partial view of the facts (and it appears now that it was), it was because plaintiff's counsel, in violation of his obligations under Federal Rule of Civil Procedure 16, failed to give me any of the facts behind his claim other than his reliance on the recorded conversation, which proved nothing except plaintiff's failed attempt to entrap defendant.

Accordingly, for the reasons set forth below, plaintiff's motion for recusal and related relief is denied.[2] The case shall proceed in the normal

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[2] As mentioned above, plaintiff also moves, pursuant to Federal Rule of Civil Procedure 60(b), to vacate the Order

course to determine if the new version of the claim that plaintiff has now set forth has any merit. However, I am sanctioning plaintiff's attorney for failing to participate in the Initial Status Conference in good faith as required by Rule 16.

I. The Recusal Motion

In preparing his motion for recusal, plaintiff obtained copies of my publicly-available Financial Disclosure Reports ("FDRs") for the 2012 and 2013 calendar years. The FDRs disclose that I own shares in a substantial number of large, publicly traded mutual funds and exchange-traded funds ("ETFs"). Plaintiff apparently went through the trouble of looking up the holdings for each of these funds, and found that one of them, Ishares Russell 2000 Growth ETF, holds shares in Encore Capital Group, Inc., which plaintiff asserts is the parent company of defendant. Plaintiff also references my ownership of a portfolio in The Vanguard Group,

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to Show Cause. However, "[b]y its terms, Rule 60(b) applies only to 'a final judgment, order, or proceeding.'" Johnson v. Askin Capital Mgmt., L.P., 202 F.R.D. 112, 113 (S.D.N.Y. 2001). Since the Order to Show Cause is not a final judgment, order, or proceeding, Rule 60(b) is not the proper vehicle to challenge it. To the extent plaintiff is making any motion beyond his recusal motion – and I doubt he is – it would properly be a motion for reconsideration pursuant to Local Civil Rule 6.3. Nevertheless, other than mentioning Rule 60(b) on the first and last pages of his memorandum of law, plaintiff does not provide any legal basis, let alone a sufficient legal basis, for why this relief should be granted.

In the alternative, plaintiff moves for leave to appeal pursuant to 28 U.S.C. § 1292 if any portion of his application is denied. Plaintiff does not offer any legal basis in support of this motion.

Inc. under its 529 College Access portfolios, which, plaintiff alleges, also owns shares in Encore.[3] Plaintiff therefore asserts that I have a financial interest in defendant, and must recuse myself from hearing this case.

Defendant points out that the ETF's investment in Encore constitutes 0.0603% of its holdings, and considering the amount of my investment in this ETF, my alleged "interest" in Encore comes to about $9, but this is beside the point. If I owned even $9 in shares of defendant's parent company, I would have to recuse myself. However, the law is quite clear that a judge who owns shares in a mutual fund or ETF does not thereby own the securities held by those mutual funds or ETFs.[4]

Canon 3C(1)(c) of the Code of Conduct for United States Judges provides that a judge must disqualify himself in a proceeding where he "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding." However, it also states that "ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the

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[3] Plaintiff asserts that "The Vanguard Group" owns "over 10%" of Encore, but that is misleading. The exhibits he annexes show that several different Vanguard funds own shares in Encore, but not all of those Vanguard funds are held by the 529 plan.

[4] The 529 plan is the same as a mutual fund for these purposes. It is actually a diversified portfolio invested in 15 different mutual funds.

judge participates in the management of the fund." Code of Conduct for United States Judges Canon 3C(3)(c)(i). The Committee on Codes of Conduct has elaborated on this Canon in a published opinion:

> We approach our analysis with the following principle firmly in mind: that the Code should be interpreted to the extent reasonably possible to enable judges to invest in funds without transgressing the Code or engaging in a conflict of interest.
>
> Canon 3C(1)(c) requires a judge to disqualify himself or herself when the judge knows that he or she "has a financial interest in the subject matter in controversy or in a party to the proceeding," or when the judge has "any other interest that could be affected substantially by the outcome of the proceeding." However, "ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund." Canon 3C(3)(c)(i). These Code provisions, read together, provide that investments in a mutual fund will normally avoid triggering recusal concerns with respect to the securities that the fund holds. Consistent with the "safe harbor" concept, the Committee has advised that investment in a mutual fund does not convey an ownership interest in the companies whose stock

> the fund holds. We also have advised that a judge who invests in a mutual fund has no duty to affirmatively monitor the underlying investments of the fund for recusal purposes.

Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion No. 106 (2014). The opinion expressly states that ETFs are the same as mutual funds for these purposes. And while there are limited exceptions to this rule, such as when the judge's interest in the fund could be materially affected by a particular litigation, none of them is even arguably applicable here. The point is thus not that my interest in defendant's parent corporation is *de minimis*; it is that under the rules, it is not a financial interest at all.

It is a serious matter for a party to accuse a judge of holding an undisclosed financial interest in a case before him. It is particularly serious here since plaintiff is not alleging an unknowing or technical violation.[5] Instead, he expressly alleges that I am hostile to his case because of this alleged financial interest. Yet in making this accusation, plaintiff did not research the relevant law with the same diligence he used to scrutinize the funds listed in my FDRs. His suggestion that I have a disqualifying interest in this case is frivolous.

The other grounds offered by plaintiff in support of his motion for recusal are similarly

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[5] In fact, I had no knowledge that these securities were held by the ETF fund or the Vanguard portfolio until this motion.

without merit. He first argues that the Order to Show Cause shows that I am biased against FDCPA cases in general. It is true that the Order to Show Cause noted that the statute is frequently abused. However, judges have to be free to be able to relate those kinds of observations without triggering recusal. The public, and indeed Congress, are entitled to have the perspective of judges who witness litigation abuse, and who are in a unique position to identify such abuses for the public. See LoCascio v. United States, 473 F.3d 493, 495-96 (2d Cir. 2007) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. Furthermore, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.") (citations and quotation marks omitted); see also Caldwell v. Pesce, No. 14 Civ. 4196, 2015 WL 430382 (E.D.N.Y. Feb. 3, 2015) (recognizing that a motion for recusal may not be made upon a court's rulings or conduct); In re Holocaust Victim Assets Litig., No. 09 Civ. 3215, 2014 WL 3670998 (E.D.N.Y. July 23, 2014).

In fact, I am not the only Judge to comment on the frequent misuse of the FDCPA in this district. As Judge Dearie recently held:

> The statute . . . has evolved into something dramatically different than its original purpose would suggest. Enterprising and imaginative advocates

> have extended its protections to a wide variety of communications that, like the content in question here, do not on their face reflect obvious deception or dissembling . . . In this Court's view, no reasonable assessment of the correspondence in question here – as in a growing number of cases before this Court – could be found to violate the letter or spirit of the Act.

Avila v. Riexinger & Assocs., LLC, No. 13 Civ. 4349, 2015 WL 1731542, at *12 (E.D.N.Y. Apr. 14, 2015).

Nevertheless, the Order to Show Cause clearly pointed out that despite the abuses that I, and others, have observed in cases under the FDCPA, I fully acknowledge and adhere to the obligation to review each case individually and to apply the law impartially, according to its language and the case law construing it. No reasonable observer could conclude that I am required to recuse myself in FDCPA cases on the basis of such statements.

Plaintiff also argues that the way I have managed this case demonstrates my bias. His argument compiles trivial complaints. For example, he points that out I set the Initial Status Conference in this case for a date six weeks after he filed his amended complaint, even though he has 120 days to effect service under Federal Rule of Civil Procedure 4(m).[6] However, all of my Initial

[6] Rule 4(m) is likely to be amended, as of December 15, 2015, reducing the 120 day period to 90 days, thus

Status Conferences are set on this timetable, whether they are FDCPA cases or not (except in social security and habeas corpus cases). If a plaintiff requires more time to effect service, he tells me, and the conference is almost always adjourned. (In fact, it is usually defendants, not plaintiffs, who ask for more time before the Initial Status Conference, as most plaintiffs recognize their interest in prosecuting a case promptly.) Plaintiff's general complaints about my management of this case are even more unfounded since I granted all three of his requests to adjourn the Initial Status Conference as well as a fourth request to allow him to attend by telephone instead of in person.[7]

Plaintiff also points out that upon initial review of the case, I directed him to either file an amended complaint or show cause why the one initially filed should not be dismissed. The initial complaint constituted a teaching exercise in how not to draft a pleading. It contained pages and pages of case citations and discussion of case law along with other allegations that have no place in any complaint. An objective observer would recognize that I directed the filing of an amended complaint not because of any prejudice against plaintiff, but because his complaint very clearly failed to comply with the "short and plain statement of the claim" requirement of Federal

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emphasizing the need to accelerate the resolution of cases.

[7] Plaintiff's counsel goes so far as to accuse me of bias against the disabled because he is in a wheelchair. Of course, I did not know he was in a wheelchair until he told me in his request to appear by telephone, which I immediately granted.

Rule of Civil Procedure 8(a).

Federal Rule of Civil Procedure 1 provides that the Rules should be applied to achieve the "just, speedy, and inexpensive determination" of cases, and the Rule is likely to be amended as of this December to emphasize the Court's and the parties' need to be actively involved in achieving those goals.[8] By directing plaintiff to file an amended complaint or show cause why he should not have had to, I eliminated weeks or months of unnecessary motion practice that would have likely resulted in the dismissal of his complaint with leave to amend and, ultimately, the amended complaint that we have now. Again, getting plaintiff closer to his presumed goal of resolving this case quickly is hardly evidence of bias.

Finally, plaintiff contends that since he submitted an affidavit in support of his motion, I am required by 28 U.S.C. § 144 to reassign his motion for recusal to another judge.[9] Again, plaintiff misreads the law. Section 144 requires a party to file an affidavit stating the reasons why the Court has a "personal bias or prejudice either against him or in favor of an adverse party."

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[8] See Judicial Conference of the United States Committee on Rules of Practice and Procedure, Proposed Amendments to the Federal Rules of Civil Procedure, Rule 1 (Sept. 2014) (available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf).

[9] It is worth noting that plaintiff also mentions 28 U.S.C. § 455 as a basis for his recusal motion. However, plaintiff never discusses this statute (or any of its subsections) at any point in his memorandum of law. For that reason, I can only address his argument pursuant to 28 U.S.C. § 144.

Although plaintiff has filed an affidavit, it does not meet the explicit requirements set by the statute because it does not offer any meaningful allegations about this Court's bias or prejudice either in favor of, or against, any party. See e.g., Manko v. Steinhardt, No. 12 Civ. 2964, 2012 WL 3779913, at *1 (E.D.N.Y. Aug. 30, 2012) (finding the "plaintiff's affidavit in support of her recusal motion legally insufficient because it does not allege, must less provide facts supporting a claim, that this court has a personal bias or prejudice either against [her] or in favor of any adverse party.") (internal quotation marks omitted).

Even if plaintiff had submitted a proper affidavit under the statute, "[t]he mere filing of an affidavit of prejudice does not require a judge to recuse himself." See Nat'l Auto Brokers Corp. v. Gen. Motors Corp., 572 F.2d 953, 958 (2d Cir. 1978). "Rather, the trial judge must review the facts included in the affidavit for their legal sufficiency and not recuse himself . . . unnecessarily." Hoffenberg v. United States, 333 F.Supp.2d 166, 171 (S.D.N.Y. 2004) (internal quotation marks omitted). As discussed above, an objective observer would not believe that I have any bias towards defendants in FDCPA cases, or against plaintiff in this particular case.

In any event, none of the prejudices that plaintiff perceives are extrajudicial in nature. See e.g., LoCascio, 473 F.3d at 495-96. Plaintiff has not demonstrated any basis for recusal.

II. Sanctions

Federal Rule of Civil Procedure 16 sets forth

the goals to be accomplished at the Initial Status Conference. It explains that the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: (1) expediting disposition of the action; establishing early and continuing control so that the case will not be protracted because of lack of management; discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation; and (5) facilitating settlement.

Fed. R. Civ. P. 16(a). In addition, Rule 16(c)(2) provides that a court may consider the following matters at pretrial conferences:

> (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses; (B) amending the pleadings if necessary or desirable; (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof . . . and (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

Rule 16(f)(1) provides that, "[o]n motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney . . . is substantially unprepared to participate – or does not participate in good faith – in the [pretrial] conference." Fed. R. Civ. P. 16(f)(1)(B).

Consistent with Rule 16, my Individual

Practices require the parties, in advance of the Initial Status Conference, to submit a detailed letter setting forth their versions of the facts that they expect the evidence to show. This assists in the structuring of discovery by identifying the material issues, whether legal or factual, and expedites the case.

In both the joint letter and his statements at the Initial Status Conference, plaintiff raised one claim and one claim only – that the recorded conversation between plaintiff and defendant's agent would show that defendant advised plaintiff that he could only dispute his debt in writing, not orally.[10] I issued the Order to Show Cause because the recording showed exactly the opposite.

In responding to the Order to Show Cause, however, plaintiff has come up with a whole new theory of the case that is at odds with the one he set forth in the joint letter and described at the Initial Status Conference. He now asserts, for the first time, that when he subscribed to Verizon service, Verizon billed him for $131.21, purportedly for rewiring his house. He maintains that the bill is improper because there was no work done inside his home. Plaintiff asserts that he disputed the bill with Verizon, which allegedly failed to process

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[10] In his response to the Order to Show Cause, plaintiff now states, in a footnote, that "neither the complaint nor the amended complaint makes any reference to a cause of action that Midland required its disputes to be in 'writing'," and that to the extent that his submissions are construed as such, the Court should disregard all errors as the "mistake does not affect any party's substantial rights, and can easily be corrected by further amending the complaint."

cancellation of the bill. Plaintiff then recounts the conversations he had with defendant, and which were described in the Order to Show Cause, in which he deliberately refused to tell defendant's employee any of these facts. In addition, plaintiff now contends that he never received the cessation letter sent by defendant.

Notably, as mentioned above, plaintiff nowhere denies that he deliberately refrained from disclosing any of these facts when asked point blank by defendant's agent why he was disputing the debt, or even if he had ever had a Verizon account. Nor does plaintiff deny that he refused to answer the agent's simple questions in order to manufacture an FDCPA claim.

Defendant has disputed all of these new allegations, but that is not the point. None of these allegations were disclosed either prior to or at the Initial Status Conference. Plaintiff's accusation of bias based on my prejudging the case is thus particularly ironic since the Order to Show Cause was premised on an entirely different description of his claim than he now asserts. It was, in fact, plaintiff's counsel who violated Rule 16 by not participating in good faith, apparently seeking to hold back his theory of the case for some later date.

The history of this case demonstrates that plaintiff's counsel did not participate in the Initial Status Conference in good faith. First, he raised only one claim, that plaintiff could not dispute the debt verbally. In support of that claim, he relied on the recorded conversation, which debunked his claim entirely. Nevertheless, plaintiff now comes

forward with new allegations that are not recently discovered, are relevant, and would have materially changed the posture of this case had they been disclosed at the proper time, in the joint letter, or even at the Initial Status Conference.

That is not the good faith cooperation required by Rule 16. It is, rather, an attempt to mislead defendant and the Court, just as plaintiff himself attempted to trick defendant into committing an FDCPA violation. Based on plaintiff's failure to participate in the Initial Status Conference in good faith and his intentionally misleading the Court and defendant as to his theory of the case, plaintiff's counsel violated Rule 16(f)(1)(B). He is sanctioned in the amount of $500, payable to the Clerk within one week, with proof of payment filed in this action.[11]

The case will proceed in the normal course based on plaintiff's new theory of the case. By separate order, the Court will schedule a Status Conference to set a discovery plan.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

[11] It is also arguable that plaintiff's frivolous recusal motion is sanctionable under Fed. R. Civ. P. 11(c). I have determined not to impose a sanction under that Rule. The prior decision and this decision are publicly available documents and are sufficient to illustrate the nature of plaintiff and his attorney's conduct.

Dated: Brooklyn, New York
May 1, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEVI HUEBNER on behalf of himself and all others similarly situated, Plaintiff, - against - MIDLAND CREDIT MANAGEMENT, INC. and MIDLAND FUNDING LLC, Defendant.	X : : : : : : : : : : X	ORDER 14 Civ. 6046 (BMC)

COGAN, District Judge.

Before me is the motion of defendants Midland Credit Management, Inc. and Midland Funding LLC (collectively, "defendant") for attorneys' fees, costs, and sanctions. If there was ever a mountain made out of a mole hill, it is this case. Plaintiff, an attorney experienced with the Fair Debt Collections Practice Act ("FDCPA"), 15 U.S.C. § 1692, sought to parlay his $131 debt into a technical violation so that he could serve as a class representative in a case where there was no FDCPA violation, for a class that could never have been ascertained, and where he would have been the most atypical of representatives if a class could have been ascertained. My preliminary rulings and the facts uncovered in discovery made these problems clear, but he did not give up, doubling down on his efforts to make something out of next to nothing. For its part, defendant, perceiving the vulnerability of plaintiff's position, responded in kind by throwing every im-

pediment and all of its resources in plaintiff's way. In the process, common sense departed and huge amounts of attorneys' time and fees accrued. Plaintiff has already been nominally sanctioned twice for his conduct, prior to my decision granting defendant's motion for summary judgment, in an effort to reorient plaintiff's perspective. That was ineffective, and I am compelled to grant defendant's motion in part, although considering defendant's approach to the case, the sanction will not be nearly what it seeks.

BACKGROUND

The factual background of this case is set out in detail in this Court's June 6, 2016 Memorandum Decision & Order, granting defendant's motion for summary judgment and denying plaintiff's motion for class certification. See Huebner v. Midland Credit Mgmt., Inc., No. 14 Civ. 6046, 2016 WL 3172879 (E.D.N.Y. June 6, 2016). To summarize, plaintiff allegedly had an outstanding debt of $131 that he owed Verizon for work it had done on his home telephone line. Defendant eventually purchased that debt.

After defendant attempted to contact plaintiff several times, plaintiff called defendant and recorded this call. Plaintiff stated that he wanted to dispute the debt. When defendant's representative asked him why, plaintiff repeatedly gave ambiguous and non-responsive answers. Notwithstanding that, as a result of the call, defendant marked plaintiff's debt as disputed; defendant requested multiple times that the three recognized credit reporting agencies (Experian, Transunion, and Equifax, the

"CRAs") delete the debt from plaintiff's credit report; it sent notice to plaintiff in writing that it was stopping collection efforts and that it had notified the CRAs to not list the debt; and it did, indeed, cease collection efforts.

Plaintiff filed this suit alleging a number of violations of the FDCPA. Shortly after plaintiff filed his complaint, I ordered plaintiff to show cause why the complaint should not be dismissed with leave to amend for failing to provide a short and plain statement of the case.[1] In response, plaintiff filed his First Amended Complaint. The initial status conference was adjourned twice at plaintiff's request. At the initial status conference, in explaining his theory of the case, plaintiff's attorney represented that defendant told plaintiff that he could only dispute his debt in writing. I asked for a copy of the recording of the call. When I listened to it after the conference, it was clear that defendant had not imposed any sort of writing requirement on plaintiff. I therefore ordered plaintiff to explain why the case should not be dismissed with fees and costs awarded and Rule 11 sanctions imposed. Huebner v. Midland Credit Mgmt., Inc., 85 F. Supp. 3d 672 (E.D.N.Y. 2015).

Plaintiff sought, and was granted, two extensions prior to responding. Plaintiff's response asserted new theories of the case and also frivolously sought my recusal. I chastised plaintiff for mak-

[1] The complaint was more like a brief. It cited 28 reported and unreported decisions from various courts, each with parenthetical discussions, some of which were over one paragraph long.

ing representations that were "an attempt to mislead defendant and the Court, just as plaintiff himself attempted to trick defendant into committing an FDCPA violation." Huebner v. Midland Credit Mgmt., Inc., 14 Civ. 6046, 2015 WL 1966280, at *7 (E.D.N.Y. May 1, 2015). I also imposed a sanction of $500 on plaintiff's counsel.

Plaintiff pressed onward, subsequently filing both a second and third amended complaint. Extensive discovery ensued. Both parties came to the Court several times during discovery, seeking extensions or asking me to resolve various disputes.[2] Defendant was slow to provide plaintiff with all of the discovery that the Court ordered it to produce, and plaintiff was forced to approach the Court multiple times to seek its intervention. In response, defendant untimely argued that certain discovery requests were unduly burdensome and that it did not have access to specific documents that the Court had ordered it to produce. On four separate occasions, I was forced to explain defendant's discovery obligations to it and reprimand it for failing to comply with these obligations in a timely fashion. Plaintiff's counsel, for his part, moved to revoke certain "confidential" designations applied to defendant's documents. I held that this motion was frivolous because the parties' jointly-stipulated protective order addressed precisely how to address the situation for which plaintiff was requesting relief. I

[2] To the extent that defendant's motion seeks sanctions based on these disputes, such as plaintiff's interference during the deposition of defendant's corporate representative, I am not considering it. Defendant should have sought sanctions when the disputes arose.

sanctioned plaintiff $350 for delaying resolution of this action by filing this motion.

At the close of the extended discovery period, defendant moved for summary judgment and plaintiff moved for class certification. Plaintiff retained new counsel, Pomerantz LLP ("Pomerantz"), prior to opposing defendant's motion for summary judgment. Pomerantz did not replace plaintiff's previous counsel, Poltorak P.C. ("Poltorak"); rather, Pomerantz took on a co- counsel role. I issued a decision granting defendant's motion for summary judgment and denying plaintiff's motion for class certification. Shortly thereafter, defendant moved for attorneys' fees, costs, and sanctions. Pomerantz moved to withdraw as plaintiff's counsel; I granted its motion because it had a potential conflict of interest with plaintiff and his other counsel in defending against the sanctions motion.

Finally, it is also worth noting that during the course of the litigation, defendant repeatedly warned plaintiff and Poltorak, that it intended to seek attorneys' fees and costs from plaintiff if he and his attorneys continued to pursue his claims.

DISCUSSION

I. Legal Standard

A. Motion for Fees and Costs Pursuant to 15 U.S.C. § 1692k(a)(3)

The FDCPA includes a fee shifting provision that states that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purposes of harassment, the court may award to the defendant attorneys' fees reasonable in relation to the work expended and costs." 15

U.S.C. § 1692k(a)(3). "Defendant must provide evidence of plaintiff's bad faith (as opposed to counsel's bad faith) and proof that the suit was instituted for the purpose of harassment." Hasbrouck v. Arrow Fin. Servs. LLC, No. 09 Civ. 748, 2011 WL 1899250, at *7 (N.D.N.Y. May 19, 2011) (internal citation omitted); see also Puglisi v. Debt Recovery Solutions, LLC, 822 F. Supp. 2d 218, 233 (E.D.N.Y. 2011) (same).

B. Motion for Fees and Costs Pursuant to 28 U.S.C. § 1927

A separate statutory provision provides for the recovery of fees and costs from "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously [that he] may be required by the court to satisfy personally" those costs "reasonably incurred because of such conduct." 28 U.S.C. § 1927. To impose sanctions under § 1927, a court must find clear evidence that "(1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith – that is, 'motivated by improper purposes such as harassment or delay.'" Eisemann v. Greene, 204 F.3d 393, 396 (2d Cir. 2000) (quoting Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 336 (2d Cir. 1999)). A claim is without color when it lacks any basis in law or fact. Schlaifer, 194 F.3d at 337. The inquiry is "whether a reasonable attorney . . . could have concluded that facts supporting the claim might be established, not whether such facts actually had been established." Id. The ability to make a judgment as a matter of law on the claim at issue is "a necessary, but not a sufficient, condition for a finding of a total lack of a colorable basis." Id.

A claim is brought in bad faith "only if the actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." Id. at 336.

As one leading treatise notes, sanctions under Section 1927 are "designed primarily to punish the offending attorney and to deter the repetition of the sanctionable conduct." James William Moore et al., Moore's Federal Practice, Judicial Code Title 28 U.S.C. § 1927.2[3] (2012). In addition, sanctions may include "an award of the attorney's fees and expenses 'incurred' by the party, so that a sanction clearly has a compensatory element as well." Id. (quoting Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1205-06 (10th Cir. 2008)). A court must make factual findings supported by a high degree of specificity in order to impose sanctions pursuant to this provision. See Wolters Kluwer Fin. Servs., Inc. v. Scivantage, 564 F.3d 110, 114 (2d Cir. 2009). Sanctions under this provision, as well as those imposed under the Court's inherent power, can be directed against individual attorneys or a law firm as a whole. See Enmon v. Prospect Capital Corp., 674 F.3d 138, 147 (2d Cir. 2012).

C. Motion for Sanctions Pursuant to the Court's Inherent Power

The Court also has broad power to fashion sanctions against an attorney, party, or a non- party for a wide variety of poor behavior, including bad faith and wanton or oppressive conduct. See Chambers v. NASCO, Inc., 501 U.S. 32, 44-50, 111 S. Ct. 2123, 2132-35 (1991); Ransmeirer v. Mariani, 718 F.3d 68 (2d Cir. 2013). At the same time, sanctions

should be imposed cautiously and thoughtfully. See Knipe v. Skinner, 19 F.3d 72, 78 (2d Cir. 1994).

Sanctions imposed pursuant to the Court's inherent power, like those under § 1927, can only be ordered where there is both bad faith and a lack of a colorable claim, and the court makes detailed factual findings to support the sanctions. See Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd., 483 F. App'x 634, 635 (2d Cir. 2012).

II. Analysis

I am not going to impose sanctions against Pomerantz because it had a limited role in this case. Pomerantz was plaintiff's attorney for a brief time. During that time it conducted a supplemental deposition, opposed defendant's motion for summary judgment, and moved for class certification. Keeping in mind my obligation to strictly construe § 1927, Pomerantz's conduct does not rise to the level of bad faith because it did not act in a manner directed to harass or delay the litigation. See United Realty Advisors v. Verschleiser, 14 Civ. 5903, 2015 WL 3498652, at *2 (S.D.N.Y. June 3, 2015). Even defendant has conceded that Pomerantz acted expeditiously once it was retained as counsel.

Defendant argues that Pomerantz multiplied the litigation by moving for class certification and by opposing its summary judgment motion. First, "even unreasonable and vexatious conduct [] is not sanctionable unless it results in proceedings that would not have been conducted otherwise." Id. Deadlines in the case had already been in place for some time before Pomerantz was retained, and based on what I have observed of plaintiff, it is vir-

tually certain that plaintiff would have persisted with the case even if Pomerantz had not agreed to represent him.

Second, defendant's argument seems to reduce down to "because plaintiff lost his motions, his attorneys should have to pay defendant's fees." That is not the law, and treating it as such could discourage lawyers from taking on certain cases where they believe it is a close case. See Schlaifer, 194 F.3d at 337. Pomerantz was wrong – it was not a close case – but it chose to represent plaintiff after evaluating his claim and deciding that there was a potentially viable claim. In addition, plaintiff and his other counsel concealed defendant's warnings and intent to seek fees and costs from Pomerantz. Failure to disclose this information may have impacted Pomerantz's assessment of the case.

Defendant has not articulated any actual bad faith conduct by Pomerantz. Moreover, Pomerantz has already suffered significant consequences for its brief role in this lawsuit. It has agreed to forego its fees for the substantial work it did on the case, and it also had to fully brief both a motion to withdraw and this sanctions motion – both of which it undoubtedly did without compensation. If a sanction is due against Pomerantz, that is sanction enough for its limited involvement.

Poltorak is in a different position. It was plaintiff's original counsel on this case and it utilized a number of different attorneys throughout this litigation, including Leopold Gross, Steven Goldman, and Elie Poltorak, none of whom took responsibility for putting an end to this case. Polto-

rak's conduct is sanctionable under 28 U.S.C. § 1927 because it pursued a claim that had no legal basis, and it acted in bad faith. Its conduct multiplied the proceedings in this case unreasonably. It will be jointly and severally liable with plaintiff for the sanctions detailed at the conclusion of this Order.

First, Poltorak represented to the Court that defendant had required plaintiff to dispute his debt in writing. That was simply false. When I so ruled based on the recording, which Poltorak had in its possession, Poltorak advanced a new theory of the case. The new theory – that defendant violated the FDCPA because it asked him questions that plaintiff himself had instigated – had no basis in the FDCPA. As I discussed in detail in my prior Order, it was absurd to argue that the FDCPA prohibited defendant's representative from asking plaintiff what he meant when he responded to her question by saying that his debt was "non-existent." It's hard to imagine any person who would not have asked plaintiff what he meant by "non-existent." Plaintiff's statement practically begged for a follow-up question because it was so strange. I am sure plaintiff knew that, and that is why he said it.

In addition, once defendant's internal documents, which were produced in discovery, proved that it had marked the debt as disputed, reported it to the three recognized CRAs as disputed on multiple occasions and asked them to mark the debt as disputed, sent plaintiff a letter advising him of such, and stopped all collection efforts, Poltorak's failure to recognize that the case was devoid of merit was simply beyond the pale.

On top of this, defendant repeatedly warned Poltorak that if it continued to pursue the case, defendant intended to seek fees and costs. These warnings should have made counsel think hard about pursuing the case, but if they had any effect, they only caused Poltorak to intensify its efforts.

Throughout the case, Poltorak engaged in other misconduct that unnecessarily multiplied the proceedings. It filed a baseless motion for recusal; it repeatedly filed pre-motion conference letters that were well beyond the three-page limit in my Individual Practices (on one occasion, for example, a 22-page letter, and on another, a 14-page letter), thus defeating the efficiency purpose behind a premotion conference; and it filed a frivolous motion to remove certain confidentiality designations.

Poltorak had an obligation to review plaintiff's claim and evaluate whether there was any merit to it. Poltorak clearly did not take this obligation seriously, even after receiving repeated warnings and sanctions from this Court and defendant. In continuing to prosecute the case, it harassed defendant and caused it to spend a substantial sum to defend the case.

For the same reasons that Poltarak engaged in sanctionable conduct, plaintiff, who the record shows is an attorney and worked hand-in-hand with his lawyers throughout the case,[3] will also be sanctioned pursuant to the fee-shifting provision con-

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[3] Defendant asserts, for example, that at the deposition of defendant's corporate representative, plaintiff whispered virtually every question into his attorney's ear, who would then put the question to the witness. Plaintiff has not denied this.

tained in § 1692k(a)(3), as well as my inherent power to sanction. Plaintiff's claim was without legal support and was prosecuted in bad faith. He acted in a manner designed to harass defendant and to try to force it into settling his claim.

Plaintiff pursued his FDCPA claim against defendant long after it was clear that he did not have a viable claim. Plaintiff initially argued that defendant required him to submit a writing before it would allow him to dispute his debt, even though his very own recording of the phone call proved that was not true. Plaintiff responded to this point by alleging that the debt was invalid and that he had not received certain documents, like the cancellation notice, from defendant even though they were mailed to his address. By the time the case reached the class certification stage, plaintiff was alleging a new theory based on the operative third complaint – namely that the FDCPA had been violated in part because defendant did not mark his debt as disputed, did not inform the CRAs to mark the debt as disputed, and because he was asked questions when he sought to dispute his debt. All of these positions were either factually without basis or legally wrong.

As plaintiff sought to defend his pursuit of this action, he only made it worse. He sought to demonstrate that, in fact, even though defendant's records showed that it had marked his debt as disputed as a result of his telephone call and had reported it as such to the three recognized CRAs, defendant's records were false. But instead of offering his credit report from one of the three recognized CRAs, which would have been simple for him to ob-

tain, to show that the debt was still listed, he put forward a report from a credit aggregator that contained an express caveat that it was not purporting to accurately reflect his credit report. By not producing his credit report, he did nothing to refute the inference that the debt had actually been removed. Moreover, not producing a report from the CRAs, and producing a qualified report from an aggregator instead, certainly looked like an effort to further mislead the Court.

Similarly, he attempted to excuse his attempt to entrap defendant's employee into committing an FDCPA violation by portraying himself as a "tester" who was merely ascertaining defendant's compliance with the FDCPA. The use of "testers" frequently occurs in Fair Housing Act and Americans with Disabilities Act litigation, see e.g., Bernstein v. City of New York, 621 F. App'x 56 (2d Cir. 2015); Fair Housing Justice Ctr., Inc. v. Broadway Crescent Realty, Inc., No. 10 Civ. 34, 2011 WL 856095 (S.D.N.Y. March 9, 2011). I am unaware of the use of "testers" in FDCPA litigation, although I suppose there is no reason why testers could not be used to determine compliance with that statute.[4]

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[4] It may be the case that since the Supreme Court's recent decision in Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016), plaintiff does not even have standing to assert one of his later theories that defendant's representative was precluded from asking him any questions when she marked his debt as disputed. See Rod v. Columbia Recovery Grp., LLC, No. C16-0191, 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016); Jackson v. Abendroth & Russell, P.C., _____ F. Supp. 3d____, No. 4:16-cv-00113, 2016 WL 4942074 (S.D. Iowa Sept. 12, 2016) (collecting cases).

But more fundamentally, if one is going to be a "tester" to assess compliance with any statute, it should go without saying that one must administer a test that has at least a semblance of relevance and fairness, or else the test has no probative value. Here, as I pointed out in my June 6th Order, plaintiff's conduct was the antithesis of that which the "least sophisticated consumer" would have undertaken. He deliberately ran the collection agent in circles in an effort to confuse her. The least sophisticated consumer would answer a simple question simply, or at least say that he was declining to answer. He would not seek to embroil a collection agent in an existential discussion of the meaning of the word "non-existent." That is not being a "tester." Rather, in a broad sense, that is what used to be called barratry.

Plaintiff's position is all the more difficult to justify because he insisted that he was an "adequate" class representative; that his claim was "typical;" and that there were common factual questions among the proposed class members even though the conversation he had with the collection agent would be hard to ever replicate with anyone, even him.

Defendant, however, was not without fault. Its conduct extended the duration of the case far beyond what was necessary and made it more difficult for plaintiff to obtain the discovery that could have brought this case to an earlier conclusion. Defendant clearly did not take its discovery obligations as seriously as it should have at the outset of the case, which led it to untimely discover that some of its obligations would be somewhat burden-

some. As I stated in a discovery Order on October 15, 2015, "[d]efendants fail to explain why they did not discover and alert the court to these issues of burden as part of the extensive discovery disputes in this matter and why they waited until only four days before the conclusion of supplemental discovery to raise these issues." Defendant's delay in producing certain documents relevant to plaintiff's motion for class certification forced me to extend plaintiff's deadline to move, thus further delaying the case. It repeatedly attempted to avoid turning over certain documents that were relevant to plaintiff's case, even though I instructed it to do so. Defendant's failure to timely comply with its discovery obligations forced the Court to repeatedly intervene in disputes between the parties that it should never have had to address, thus increasing the cost of the litigation and its duration.

Both sides therefore lost sight of the forest for the trees. It may be that defendant, whose business requires it to regularly defend FDCPA cases, saw an opportunity to use this case, once I pointed out that plaintiff's effort at entrapment had failed, to make its own point to both this plaintiff and future plaintiffs that it won't be pushed around. If so, that is just as bad a misuse of the litigation process as plaintiff's misuse in bringing this case. I am not inclined to impose "a pox on both houses," since plaintiff started and unreasonably pursued this action, but I do hold both sides responsible in different degrees for the expansion of this $131 case beyond all reason.

Under these circumstances, a substantial sanctions award would only further distort what

should have been a minor litigation. Although a sanction on plaintiff and Poltorak, jointly and severally, is appropriate, the sanction will be limited to the attorneys' fees and costs incurred in connection with the motion for sanctions and some portion of the attorneys' fees and costs incurred in connection with opposing the class certification motion, as of the various baseless proceedings in this case, that was the one with the least basis in law or fact. Defendant is ordered to submit proof of its fees and costs related to both its motion for sanctions and its opposition to class certification within 14 days. Alternatively, the parties can have a discussion about this case and resolve this issue themselves.

CONCLUSION

Defendant's motion for attorneys' fees and costs is granted in part and denied in part as set forth above.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
November 10, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEVI HUEBNER on behalf of himself and all others similarly situated, Plaintiff, - against - MIDLAND CREDIT MANAGEMENT, INC. and MIDLAND FUNDING LLC, Defendant.	X : : : : : : : : : : X	ORDER 14 Civ. 6046 (BMC)

COGAN, District Judge.

I granted the motion of Midland Credit Management, Inc. and Midland Funding LLC (collectively, "defendant") for attorneys' fees, costs, and sanctions, in part, by Memorandum Decision and Order dated November 10, 2016, finding that 15 U.S.C. § 1692k(a)(3), 28 U.S.C. § 1927, and the Court's inherent power to fashion sanctions all permit an award of sanctions in this case because both plaintiff and plaintiff's counsel, Poltorak P.C. ("Poltorak"), acted in bad faith and pursued a claim that had no legal basis. I therefore ordered that plaintiff and Poltorak are jointly and severally liable for defendant's attorneys' fees and costs incurred in connection with its motion for sanctions and some portion incurred in connection with its opposition to the motion for class certification. I ordered defendant to submit proof of its fees and costs within 14 days.

Defendant, seeking only to recover attorneys' fees, filed proof of fees in the amount of $10,100 in connection with its opposition to plaintiff's motion for class certification and $15,750 in connection with its motion for sanctions. Seven days later, plaintiff submitted a letter to the Court requesting an extension to file a response to defendant's proof of costs and informing the Court that defense counsel did not consent to an extension because it believes that plaintiff is not entitled to respond to defendant's submission. I granted plaintiff an extension.

In his opposition to defendant's submission of costs, plaintiff attached an email from defense counsel in which defense counsel refused to consent to plaintiff's request for an extension and stated that, "The court's order does not call for a response to our submission regarding fees The opportunity to respond was provided when Midland moved for sanctions . . . If Plaintiff wishes to respond to our submission, plaintiff will have to petition the Court for permission to do so." Defendant's refusal to acknowledge plaintiff's due process right to challenge the reasonableness of the amount of defendant's fees is further confirmation of the unnecessary litigiousness that both sides have demonstrated in this action and the shared responsibility that defendant bares for the amount of its fees.

After reviewing defendant's proof of fees, and considering defendant's recent conduct, I find that a sanction on plaintiff and Poltorak, jointly and severally, for defendant's fees incurred in connection with its motion for sanctions is sufficient; no fees are awarded in connection with defendant's

opposition to the class certification motion. A larger sanctions award encompassing defendant's fees in connection with its opposition to the class certification motion is unwarranted as it would only further distort what should have been a minor litigation.

Plaintiff objects to defendant's fees in connection with its motion for sanctions on various grounds.[1] First, plaintiff objects to defendant's inclusion of fees in connection with its opposition to Pomerantz's motion to withdraw as plaintiff's counsel and its separate reply to Pomerantz's opposition to defendant's motion for sanctions. Plaintiff argues that defendant is not entitled to any fees related to Pomerantz because this Court declined to impose sanctions on Pomerantz. I agree. Based on defendant's submission, defense counsel spent 23.6 hours, equating to $5,900 in attorneys' fees, on its opposition to Pomerantz's motion to withdraw and its reply to Pomerantz's opposition to its motion for sanctions. Defendant's $15,750 fee will therefore be reduced to $9,850.

Plaintiff also argues that defendant should not be awarded fees for: (1) the 1.4 hours defense counsel spent researching whether plaintiff may be required to post a supersedeas bond because plaintiff did not file a motion to stay judgment; (2) the 1.1 hours defense counsel spent analyzing the case law on fee awards pursuant to 15 U.S.C. § 1692k because there is "clear precedent" on this issue; and (3) the 14 hours defense counsel spent drafting a

[1] Because I am not awarding fees related to defendant's opposition to class certification, I do not address plaintiff's objections to these fees.

reply to plaintiff's opposition to its motion for sanctions because there was no basis for a reply. All of these arguments are meritless. Defendant reasonably incurred these fees in order to thoroughly research its basis for sanctions, adequately support and defend its position, and ensure that it would receive any sanctions that it was awarded.

I find that an award of $9,850 is reasonable under the lodestar method for determining attorneys' fees and the relevant factors articulated in Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir.1974).[2] See Prospect Capital Corp. v. Enmon, No. 08 Civ. 3721, 2010 WL 2594633, at *4 (S.D.N.Y. June 23, 2010) (considering both the lodestar method and the Johnson factors in determining a reasonable attorneys' fee on a sanctions motion), remanded on other grounds, 675 F.3d 138 (2d Cir. 2012); see also Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 190 (2d Cir. 2007).

First, after deducting 23.6 hours for work related to Pomerantz, defense counsel only spent 39.4 hours working on the motion for sanctions. That is a reasonable amount of time to: research and draft the motion, which required a detailed review of the lengthy history of the case; analyze plaintiff's opposition, which included fifteen attached exhibits; and research and draft a reply to plaintiff's opposition. Defense counsel's time entries are sufficiently specific to establish that it undertook tasks that were

[2] Many of the Johnson factors are not applicable here because attorneys' fees are only being awarded in connection with one motion as opposed to an entire case.

necessary and that they worked efficiently at those tasks.

Second, defense counsel's attorneys' fees were assessed at a blended rate of $250 per hour for both Mr. Schwartz, a partner, and Mr. Johnson, an associate. A rate of $250 per hour is entirely reasonable in light of both Mr. Schwartz's and Mr. Johnson's twenty years of experience practicing law and their specific experience with defending consumer financial actions.

Third, a rate of $250 per hour is a reasonable hourly rate in this district and is consistent with approved rates in similar cases. See Savino v. Computer Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998) (finding that a rate of $200 per hour in a consumer protection case was reasonable); Larsen v. KBC Legal Group, P.C., 588 F. Supp. 2d 360, 364 (E.D.N.Y. 2008) (finding that a rate of $300 per hour in a consumer protection case was reasonable); Cho v. Koam Med. Servs. P.C., 524 F. Supp. 2d 202 (E.D.N.Y. 2007) ("Overall, hourly rates for attorneys approved in recent Eastern District of New York cases have ranged from $200 to $350 for partners . . . [and] $200 to $250 for senior associates"). Therefore, I find that an award of $9,850 in attorneys' fees, for 39.4 hours' work, is reasonable.

Finally, a sanction in the amount of $9,850 fulfills the purposes of § 1692k(a)(3), § 1927, and the Court's inherent power to sanction because it adequately: (1) punishes Poltorak; (2) deters repetition of sanctionable conduct by plaintiff and Poltorak; and (3) compensates defendant for expenses caused by its opponent's obstinacy.

CONCLUSION

For the reasons given above, it is hereby ordered that defendant is awarded $9,850 in attorneys' fees. The fees are to be paid within seven days, failing which the Clerk shall be directed to enter judgment.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
December 23, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEVI HUEBNER on behalf of himself and all others similarly situated, Plaintiff, - against - MIDLAND CREDIT MANAGEMENT, INC. and MIDLAND FUNDING LLC, Defendant.	X : : : : : : : : : : X	JUDGMENT 14-CV-6046 (BMC)

A Memorandum Decision and Order of Honorable Brian M. Cogan, United States District Judge, having been filed on June 6, 2016, granting Defendants' motion for summary judgment; dismissing the Third Amended Complaint; and denying Plaintiff's motion for class certification; it is

ORDERED and ADJUDGED that Defendants' motion for summary judgment is granted; that the Third Amended Complaint is dismissed; and that Plaintiff's motion for class certification is denied.

Dated: Brooklyn, New York

June 06, 2016

Douglas C. Palmer
Clerk of Court

by: /s/ Janet Hamilton
Deputy Clerk

United States Code Annotated

Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection
Subchapter V. Debt Collection Practices

15 U.S.C.A. § 1692

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws. Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods. Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce. Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes. It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C.A. § 1692a

As used in this subchapter --

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal,

family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

> (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
>
> (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

15 U.S.C.A. § 1692b

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall--

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication

effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

15 U.S.C.A. § 1692c

§ 1692c. Communication in connection with debt collection

(a) Communication with the consumer generally. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt--

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock

postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties. Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined. For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 U.S.C.A. § 1692d

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the

collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

15 U.S.C.A. § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without

limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in

subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C.A. § 1692f

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is

expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

15 U.S.C.A. § 1692g

§ 1692g. Validation of debts

(a) Notice of debt; contents. Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts. If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the

debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability. The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings. A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice provisions. The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by Title 26, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

15 U.S.C.A. § 1692h

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector

with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

15 U.S.C.A. § 1692j

§ 1692j. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

15 U.S.C.A. § 1692k

§ 1692k. Civil liability

(a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of such failure;

(2)

(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court. In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors--

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent. A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction. An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Bureau. No provision of this section imposing any liability shall apply to any act done or omitted in good faith in

conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 U.S.C.A. § 1692l *in part*

§ 1692l. Administrative enforcement

(a) Federal Trade Commission. The Federal Trade Commission shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter, in the same manner as if the violation had been a

violation of a Federal Trade Commission trade regulation rule.

(c) Agency powers. For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d).

(d) Rules and regulations. Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010, the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this subchapter.

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB- 0022

In the Matter of:	CONSENT ORDER
Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc. and Asset Acceptance Capital Corp.,	

I

Overview

The Consumer Financial Protection Bureau ("Bureau") has reviewed the practices of Encore Capital Group, Inc. ("Encore Capital"), Midland Funding, LLC ("Midland"), Midland Credit Management, Inc. ("MCM"), and Asset Acceptance Capital Corp. ("Asset")(collectively "Encore" or "Respondents"), regarding its purchase of charged-off Consumer Debts from original Creditors and other Debt buyers, and its subsequent collection efforts including filing lawsuits against Consumers, and has identified violations of Sections 1031(a) and 1036(a)(1) of the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5531(a) and 5536(a)(1); Sections 805(a)(1), 806, 806(5), 807, 807(2)(A), 807(5), 807(8), and 807(10) of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692c(a)(1), 1692d, 1692d(5), 1692e, 1692e(2)(A), 1692e(5), 1692e(8), and 1692e(10); Sections 623(a)(8)(E) and

623(b) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681s-2(a)(8)(E) and 1681s-2(b). Under sections 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565, the Bureau issues this Consent Order (Consent Order).

II

Jurisdiction

1. The Bureau has jurisdiction over this matter under Sections 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563 and 5565, Section 814(b) of the FDCPA, 15 U.S.C. § 16921(b), and Section 621(b)(1)(H) of the FCRA, 15 U.S.C. § 1681s(b)(1)(H).

III

Stipulation

2. Respondents have executed a "Stipulation and Consent to the Issuance of a Consent Order," (Stipulation), which is incorporated by reference and is accepted by the Bureau. By this Stipulation, Respondents have consented to the issuance of this Consent Order by the Bureau under Sections 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563 and 5565, without admitting or denying any of the findings of fact or conclusions of law, except that Respondents admit the facts necessary to establish the Bureau's jurisdiction over Respondents and the subject matter of this action.

IV

Definitions

The following definitions must apply to this Consent Order:

3. "Board" means the duly elected and acting Boards of Directors of Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc., and Asset Acceptance Capital Corp.

4. "Charge-off" means the treatment of a receivable balance by a Creditor as a loss or expense because payment is unlikely.

5. "Charge-off Balance" means the amount alleged due on an account receivable at the time of Charge-off.

6. "Clearly and prominently" means:

a. as to written information, written in a type size and location sufficient for an ordinary Consumer to read and comprehend it, and disclosed in a manner that would be easily recognizable and understandable in language and syntax to an ordinary Consumer. If the information is contained in a multi-page print document, the disclosure appears on the first page; and

b. as to information presented orally, spoken and disclosed in a volume, cadence and syntax sufficient for an ordinary Consumer to hear and comprehend.

7. "Consumer" means any natural person obligated or allegedly obligated to pay any Debt.

8. "Creditor" means any person who offers or extends credit creating a Debt or to whom a Debt is owed, but such term does not include any person to the extent that that person receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such Debt for another.

9. "Debt" means any obligation or alleged obligation of a Consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

10. "Effective Date" means the date on which this Consent Order is issued.

11. "Enforcement Director" means the Assistant Director of the Office of Enforcement for the Consumer Financial Protection Bureau, or his or her delegee.

12. "Original Account-Level Documentation" means

a. any documentation that a Creditor or that Creditor's agent (such as a servicer) provided to a Consumer about a Debt;

b. a complete transactional history of a Debt, created by a Creditor or that Creditor's agent (such as a servicer); or

c. a copy of a judgment, awarded to a Creditor or entered on or before the Effective Date.

13. "Legal Collection" means any collection efforts made by any internal legal department or a third-party law firm to collect a Debt owed or allegedly owed to Encore, including but not limited to sending letters on law firm letterhead and filing Debt collection lawsuits, but does not include any post-judgment collection efforts.

14. "Encore" means Encore Capital Group, Inc., as well as its current (as of the Effective Date) or former, direct or indirect, affiliates, subsidiaries,

parents, divisions, or branches, and all of their successors and assigns, that are directly or indirectly engaged in the purchase, transfer, or collection of U.S. Consumer receivables, including, but not limited to, Midland Funding, LLC, Midland Credit Management, Inc., and Asset Acceptance Capital Corp.

15. "Related Consumer Action" means a private action by or on behalf of one or more Consumers or an enforcement action by another government agency brought against Encore based on substantially the same facts as set forth in Section V of this Consent Order.

16. "Relevant Time Period" means the period from July 21, 2011 to the Effective Date.

17. "Restitution Eligible Consumer" means any identified Consumer in the population of Consumers identified in Paragraphs 144 and 145 who made a payment, directly or indirectly, to Encore during the Relevant Time Period.

18. "Time-Barred" when used to describe a Debt means any Debt that is beyond an applicable statute of limitations for a Debt collection lawsuit.

V

Bureau Findings and Conclusions

The Bureau finds the following:

19. Midland, MCM, and Asset are wholly-owned subsidiaries of Encore Capital and share common officers and directors with Encore Capital. Midland and MCM operate in concert with one another, and under the direct supervision and control of Encore Capital, to purchase and collect Consumer Debt on a massive scale. Asset was purchased by

Encore in June 2013 and is currently a wholly-owned subsidiary of Encore. Encore is one of the largest Debt buyers and collectors in the United States. From 2009 to 2015, Encore's estimated gross collections totaled over $5 billion, with net income of more than $384 million.

20. At all times relevant to this Consent Order, Encore Capital, Midland, MCM, and Asset have collected Debt related to Consumer financial products or services. Accordingly, each Respondent is a "covered person" as defined by the CFPA, 12 U.S.C. § 5481(6). See also 12 U.S.C. § 5481(5) and (15)(A)(x). Each Respondent is also a "debt collector" as defined in Section 803(6) of the FDCPA. 15 U.S.C. § 1692a(6). Midland, MCM, and Encore Capital are also each a person who "regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies" about Respondents' "transactions or experiences" with Consumers, as described in Section 623(a)(2)(A) of the FCRA, 15 U.S.C. § 1681s-2(a)(2)(A), and are each a "furnisher" as defined in Regulation V, 12 C.F.R. 1022.44(c).

21. Encore sends collection letters by United States mail, calls Consumers from call centers in the United States, India, and Costa Rica, furnishes Consumer information to credit bureaus, and sues Consumers in state courts across the country. The vast majority of the Debt collection lawsuits Encore files go unanswered by Consumers and result in default judgments.

ENCORE'S DEBT BUYING PRACTICES

22. Encore purchases portfolios of old Consumer Debt from some of the nation's largest

Consumer finance and telecommunications companies, and from other Debt buyers, for pennies on the dollar. These Debts primarily consist of charged-off Consumer credit card and telecommunications Debts, purchased at various points in time from the date of default. From 2009 to 2015, Encore paid about $4 billion for approximately 60 million Consumer accounts with a total face value of $128 billion.

23. When Encore purchases Debt portfolios, it has typically received an electronic spreadsheet, sometimes referred to as a "data file," from the seller that includes information about the Consumer, such as name, address, social security number, and information about the Debt, including the purported amount of the Debt, contract interest rate, and dates of origination and default.

Sellers Disclaim the Accuracy and Enforceability of Debt They Sold to Encore

24. Encore's purchase agreements with Debt sellers have typically limited, in varying degrees, the seller's responsibility for the accuracy and validity of the accounts in question. For example, a purchase agreement between Midland Funding and one large credit card issuer informed Encore that the account balance for over 35,000 individual accounts being sold in that transaction was an approximation:

> Current balance means the approximate unpaid balance. [Midland Funding] acknowledges that the figure provided as the current balance for any loan may include interest, accrued or unaccrued, costs, fees, and expenses, and it is possible that

> the figure provided as the current balance for any loan may not reflect credits for payments made by or on behalf of any obligor prior to the cutoff date.

25. Other purchase agreements, such as one between Midland Funding and a large retailer, put Encore on notice that some of the accounts are likely past the applicable statutes of limitations for litigation or were previously disputed by Consumers:

> [Midland Funding] understands that Sellers believe but have not verified, that the statutes of limitations may have run on some but not all of the accounts.
>
> [Midland Funding] acknowledges that some accounts or certain transactions posted to some accounts may be subject to actual or potential claims or disputes by obligors against one or both of the Sellers or their affiliates.

26. In another example, a purchase agreement between Asset and a large finance company informed Encore that:

> [S]ome Accounts, or certain transactions posted to some Accounts, may be subject to actual or potential claims or disputes by Obligors against one or both of the Sellers or their affiliates... [Asset] understands that Sellers believe, but have not verified, that statutes of limitation may have run on some, if not all, of the Accounts.

27. Debt sellers making these types of disclosures typically did not inform Encore which individual accounts in a given portfolio contain an approximate balance, are past the applicable statute of limitations for litigation, past the date of

obsolescence for credit reporting, or were previously disputed by a Consumer.

28. Debt purchase agreements have typically contained recitals that Encore is purchasing Consumer accounts after having conducted an independent evaluation as to the enforceability and collectability of the sold accounts.

29. However, the only investigation typically taken by Encore prior to a Debt portfolio purchase has been to review the data file for facial anomalies such as a default date preceding an account open date or a Social Security number that is obviously a placeholder (e.g., made up of all the same numbers).

30. In numerous instances, Debt sellers have provided data files to Encore containing inaccurate information as to the identity of the Consumer obligated to pay the Debt, the age of the Debt, the amount of the Debt, the interest rate, and other material information about the Debt. Nevertheless, Encore has continued purchasing Consumer Debt from these sellers.

31. For example, from at least February 2010 to June 2013, one large credit card bank sold Encore over 10,000 individual Consumer accounts with data files containing overstated interest rates. To date, Encore has continued to purchase Debt from this bank, knowing that records from this bank have been inaccurate to the detriment of the borrowers, without reviewing any account level documentation to verify that the information being provided by this seller is accurate.

Sellers Disclaim the Availability of Documentation to Evidence the Debt they Sold to Encore

32. Sellers typically have not provided Encore with any Consumer-level documentation about most individual Debts, such as account statements, records of payments, and the underlying contracts signed by the Consumers. Instead, if desired, Encore has had to order these documents from sellers, often at an additional cost to Encore.

33. Further, purchase agreements typically state that sellers will provide documentation to evidence the Debt only "to the extent it is available." Some purchase agreements state that the seller will not provide any account level documents for certain portfolios or that documentation is available for only a percentage of the accounts and that sellers will not be in breach of their agreement with Encore because they cannot provide documentation.

34. When Debt sellers have informed Encore in purchase agreements that documentation is only available for some accounts, they did not inform Encore which individual accounts in a given portfolio cannot be supported by account-level documentation.

35. In numerous instances, sellers have been unable to provide documentation to Encore evidencing Consumers' responsibility for Debt Encore was collecting. Nevertheless, Encore has continued purchasing Consumer Debt from these sellers and collecting on that Debt without first conducting any investigation to determine whether the information in the data files is accurate.

ENCORE'S PRACTICES RELATING TO CONSUMER DISPUTES

36. Encore has received an average of 30,000 written disputes and complaints and 10,000 oral disputes and complaints directly from Consumers in a typical month relating to Encore's Debt collection and credit reporting. Another approximately 100,000 Consumer disputes have come to Encore in a typical month through e-OSCAR, the web-based communications system used by the nationwide Consumer reporting agencies to communicate with data furnishers regarding Consumer disputes.

37. Encore has generally relied on Consumers to inform Encore when it was attempting to collect Debt based on inaccurate or erroneous information. It has required Consumers to report such disputes in writing within 45 days after Encore sends them a notice of Debt under Section 809 of the FDCPA ("Notice of Debt"). According to Encore's written policies and procedures, Encore requests account-level documentation from the seller of the Debt if Encore receives a written dispute from a Consumer within 45 days of sending a Notice of Debt.

38. Encore has considered disputes received outside of 45 days ""untimely" and has directed personnel responsible for handling these disputes not to investigate the disputes by requesting documentation from sellers but rather to "[i]nform the consumer that proof is required to support their claim."

39. Before Encore has investigated "untimely" claims that the Consumer previously paid the Debt, Encore has required the Consumer to produce a copy

of a letter from a previous Debt owner stating that the Debt had been paid or settled, or a copy of the front and back of a canceled check along with a copy of a settlement offer in the same amount.

40. Before Encore has investigated "untimely" claims that Encore was collecting an inaccurate amount, Encore has required the Consumer to produce a letter of investigation from the original Creditor, a copy of correspondence between the Consumer's attorney and the original Creditor, or a copy of account-level documentation, such as a monthly credit card statement dated after the account was charged-off, showing the balance alleged by the Consumer.

41. Before Encore has investigated "untimely" claims that Encore is collecting from the wrong person, Encore has required the Consumer to produce a notarized affidavit swearing that the Consumer is a victim of identity theft, a police report, or a letter from the credit issuer determining that there was a fraud on the account.

42. In numerous instances, Encore has told Consumers submitting "untimely" disputes that under the FDCPA, the Consumer has the burden of proving that he or she does not owe a Debt. Encore has often made this representation while threatening legal action and in response to disputes made under the FCRA.

43. Encore collects disputed Debt itself and also assigns disputed Debt to law firms and third-party Debt collectors. In numerous instances, Encore has assigned disputed Debt to law firms and third-party Debt collectors without informing them that the Debt is disputed and without forwarding

correspondence it has received from Consumers in support of their disputes. As a result, law firms evaluating Encore accounts for litigation did not know which accounts are disputed, and disputing Consumers have been forced to re-start the dispute process each time Encore transfers a Debt.

44. In numerous instances, Encore has instructed its law firms to abide by its dispute policies and only to close accounts with "untimely" disputes if the Consumer provides proof that he or she does not owe the Debt. This is even the case where documentation produced to Encore by a seller indicates that the Consumer does not owe a Debt. For example, Encore instructed one law firm to continue collecting on more than fifty accounts unless the Consumers could provide independent proof that the accounts had been paid, even though the monthly statements provided by the Debt sellers showed a zero balance.

ENCORE COLLECTS DEBT WITHOUT A REASONABLE BASIS

45. Despite the indicators described above regarding the inaccuracy of information produced by Debt sellers, Encore has generally relied upon the summary data files as the sole basis for its collection efforts and has only attempted to obtain account-level documentation evidencing the Debt in certain limited circumstances. Even when Encore has already been in possession of account-level documentation regarding the Debts it has collected, Encore generally did not review the documentation to ensure it was consistent with information in the data file.

46. Encore has made the same claims to Consumers regarding Debt purchased from portfolios Encore has had reason to believe may contain inaccurate information as it did regarding Debt purchased from more reliable sources. Encore has made the same claims to Consumers regarding Debt that Encore knew or had reason to believe cannot be supported by account-level documentation available to Encore as it did regarding Debt that can be supported by such documentation.

47. Consumers being contacted by Encore regarding these Debts did not know that Encore knew or had reason to believe the information forming the basis for the claim may be inaccurate or unsupportable by underlying documentation. Consumers contacted by Encore regarding these Debts did not know when Encore knew or had reason to believe it lacked access to account-level documentation to support the claim.

ENCORE'S LITIGATION PRACTICES

Scattershot Litigation

48. Encore has filed hundreds of thousands of lawsuits to collect Consumer Debt. Most of the Consumers sued by Encore are not represented by counsel. Encore has placed tens of thousands of accounts with law firms staffed by fewer than ten attorneys. For example, Encore placed over 100,000 accounts with Frederick J. Hanna and Associates, while that firm employed 16 attorneys. Encore has encouraged these law firms to file lawsuits on a large percentage of accounts, prohibited them from contacting previous owners of the Debt for account-

level documentation, and discouraged them from requesting account-level documentation Encore did not deem necessary to settle a case or obtain a judgment.

49. Prior to Encore Capital's purchase of Asset, much of Asset's legal collections were handled by a 24 attorney Debt collection law firm that operates in 12 states. This firm collected over $50,000,000 for Asset from October 2011 to October 2012, while suing or threatening to sue approximately half a million Consumers allegedly indebted to Asset.

50. When deciding whether to threaten or file suit, Encore's law firms have not known if a Debt seller has specifically disclaimed the accuracy of information in the data file, has notified Encore that documentation is unavailable or has notified Encore that a number of accounts in a portfolio are disputed or barred by the applicable statute of limitations. Law firms also have not known if the Consumer had disputed the Debt with Encore or provided detailed letters or documentary evidence questioning the validity of Encore's claim.

51. In most states, Encore has threatened and filed suit before verifying that account-level documentation exists to substantiate its claim in court. In numerous instances, Encore has filed suit after requests for account-level documentation have been denied.

52. Even when Encore has been able to obtain account-level documentation, that evidence is sometimes unreliable or inconsistent with information in the data file, or with the facts alleged in Encore's lawsuits.

53. When Consumers have contested Encore's claims and Encore has lacked the account-level documentation necessary to obtain a judgment, Encore has instructed its attorneys to make one final attempt to convince the Consumer to settle before dismissing the claim.

Misleading Affidavits

54. In many jurisdictions, Encore has been able to obtain a settlement or a default judgment against a Consumer using an affidavit as its only evidence. Many of these affidavits contain false or misleading testimony.

55. For example, from at least 2011 to 2014, Encore has obtained tens of thousands of judgments against Consumers by submitting sworn affidavits representing that the Consumer defendants did not file a timely written dispute pursuant to Section 809 of the FDCPA and stating that pursuant to the FDCPA, the Debt is therefore "assumed valid."

56. In fact, Section 809(a)(3) of the FDCPA states that a Debt collector's Notice of Debt must inform a Consumer that Debts will be "assumed to be valid *by the debt collector"* (emphasis added) if they are not disputed pursuant to that section. Section 809(c) of the FDCPA expressly states that "[t]he failure of a consumer to dispute the validity of a debt [after receiving a notice under Section 809 from the collector] may not be construed by any court as an admission of liability by the consumer." 15 U.S.C. § 1692g(c).

57. In thousands of cases, for which Encore possessed no account-level documentation evidencing

the Consumer's responsibility for the Debt, Encore obtained a settlement or judgement based solely on an affidavit referencing the Consumer's failure to dispute the Debt.

58. Encore has routinely submitted affidavits without attaching supporting documentation, in which the affiant swears that he or she has reviewed account-level business records concerning the Consumer's account when that is not the case.

59. However, in most instances, these representations have been made when affiants have merely reviewed a computer screen containing the scant information produced by sellers in data files and not after a review of any account level documents such as account applications, terms and conditions of contracts, payment histories, monthly credit card statements, charge slips, or bills of sale reflecting Encore's ownership of the account.

60. Encore has routinely requested and used affidavits from sellers that contain false or misleading statements regarding the seller's review of unattached records. For example, numerous Encore purchase agreements with credit issuers and other Debt buyers provide that "[i]n the event Seller does not provide any of the account documents on a particular account, [Encore] may request an affidavit" containing the following language: "The statements in this affidavit are based on the computerized and *hard copy records* of the Seller..." (emphasis added).

61. According to an Encore senior manager responsible for negotiating Debt purchase agreements, the ability to request affidavits from sellers that purport to be based on a review of documentation is negotiated by Encore "[a]s a

safeguard, should documentation not exist, [so] we have some form of evidence from the seller." A director of Encore's Debt purchasing department has instructed Encore management to "reinforce that these affidavits are intended to provide documentation when other media is not available."

62. Encore has routinely submitted business records affidavits in which affiants swear that attached documentation relates to individual Consumers' accounts.

63. However, in many instances, the attached documentation, which sometimes included generic credit card agreements created years after the Consumer purportedly defaulted on the agreement, does not in fact relate to the Consumer being sued.

64. Finally, in numerous instances from at least 2009 to 2011, Encore submitted affidavits in which affiants misrepresented that they had personal knowledge of facts contained in affidavits, including that the Consumer owed a Debt.

ENCORE'S COLLECTION OF TIME-BARRED DEBT

65. Encore and its law firms typically have failed to review account-level documents to determine the age of the accounts they collect, relying solely on information in the data file, even if Encore or one of its law firms has been on notice that some of the information in a data file is inaccurate or if Encore has known that some of the Debts in a specific portfolio are barred by the applicable statute of limitations.

66. In numerous instances, Encore has threatened and filed suit on Debt that was past the applicable statute of limitations.

67. Encore has not tracked when Consumers assert limitations defenses or how often any of its third-party law firms file lawsuits outside the applicable statute of limitations.

68. Encore has trained its collectors to "create urgency" when collecting Time-Barred Debt through telephone calls. For example, for one portfolio Encore knew contained a high percentage of Time-Barred Debt, collectors were instructed to "[e]ducate [the] consumer, as to how nonpayment of bill will impact him," by telling him "[i]t is important for me to establish your intentions towards the bill or else it will be taken as your refusal to resolve" after which the account will be "forwarded for further management review" so that "further collection activities will be decided."

69. In numerous instances from at least July 21, 2011 to March 31, 2013, Encore sent thousands of letters containing time-limited "settlement" offers that failed to disclose that the Debt it was collecting was too old for litigation and that implied a legally enforceable obligation to pay the Debt.

ASSET'S HARASSING TELEPHONE CALLS TO CONSUMERS

70. In numerous instances, from 2009 to 2014, Asset has called Consumers repeatedly or continuously. Such calls had the effect of abusing or harassing consumers or other persons at the called numbers. For example, Asset called numerous

Consumers more than 20 times over just one two day period.

71. In numerous instances, from 2009 to 2014, Asset called Consumers at a time it knew or should have known to be inconvenient to the Consumer, such as early in the morning or late at night. For example, Asset made thousands of calls to Consumers before 8:00 a.m. or after 9:00 p.m., in the time zones associated with the addresses on file in Asset's own records.

72. Asset's continuous and inconvenient calls caused, or were likely to cause, Consumers to suffer emotional distress. Some Consumers, including those who disputed the Debt, made, or were likely to have made, payments to Asset solely to temporarily stop the excessive and inconvenient calls. As a result of Asset's excessive and inconvenient calls, Consumers who lacked the ability to repay Asset while meeting their other financial obligations, placed, or were likely to have placed, a higher priority on unsecured old credit card Debt than on expenses for monthly living expenses.

Violations of the Consumer Financial Protection Act

73. Covered persons are prohibited from engaging "in any unfair, deceptive, or abusive act or practice" in violation of the CFPA. 12 U.S.C. §§ 5531 and 5536(a)(1)(B).

74. Encore Capital, Midland, MCM, and Asset are each a "covered person" within the meaning of the CFPA, 12 U.S.C. § 5481(6).

75. Respondents made numerous representations to Consumers in connection with

attempting to collect Debts, a Consumer financial product or service, 12 U.S.C. §§ 5481(5), (15)(x).

76. An act or practice is deceptive under the CFPA if it involves a material representation or omission that misleads, or is likely to mislead, a Consumer acting reasonably under the circumstances.

77. An act or practice is unfair under the CFPA if (1) it causes or is likely to cause substantial injury to Consumers; (2) such injury is not reasonably avoidable by Consumers; and (3) such injury is not outweighed by countervailing benefits to Consumers or to competition.

False or Unsubstantiated Representations About Owing a Debt

78. In numerous instances, in connection with collecting or attempting to collect Debt from Consumers, Encore represented, directly or indirectly, expressly or by implication, that Consumers owed Debts to Encore with certain unpaid balances, interest rates, and payment due dates. Encore further represented to Consumers directly or indirectly, expressly or by implication, that Encore had a reasonable basis for representing that Consumers owed the claimed Debts to Encore.

79. In truth and in fact, in numerous instances the representations set forth in Paragraph 78 were false or were not substantiated at the time the representations were made, including but not limited to where:

a. Consumers disputed, challenged, or questioned the validity or accuracy of the

Debt and Encore failed to review information that would have been necessary to have a reasonable basis to continue collecting on that account; or

b. Encore had knowledge or reason to believe, based on Encore's past course of dealing with the seller or the seller's accounts (including factors such as Consumer disputes, inaccurate or incomplete information in the portfolio, and contractual disclaimers related to the accounts) that a specific portfolio of the seller's accounts might contain unreliable data, but continued to represent that Consumers owed the claimed amount on the accounts in question without obtaining and reviewing additional information that would provide a reasonable basis for such claims.

80. The representations are material because they are likely to affect a Consumer's choice or conduct regarding how to respond to an allegedly outstanding Debt and are likely to mislead Consumers acting reasonably under the circumstances.

81. The representations set forth in Paragraph 78 are false or misleading and constitute deceptive acts or practices in violation of Sections 1031(a) and 1036(a) of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a).

Misrepresenting that Encore Intends to Prove the Debt, If Contested

82. In numerous instances, in connection with collecting or attempting to collect Debt from Consumers through litigation or threats of litigation,

Encore represented, directly or indirectly, expressly or by implication, that Encore intends to prove its claims, if contested.

83. In truth and in fact, in numerous instances, Encore does not intend to prove its claims, if contested.

84. These representations are material because they are likely to affect a Consumer's choice or conduct regarding whether to pay the Debt or contest the lawsuit and are likely to mislead Consumers acting reasonably under the circumstances.

85. The representations set forth in Paragraph 82 are false or misleading and constitute deceptive acts or practices in violation of Sections 1031(a) and 1036(a) of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a).

Filing Misleading Collection Affidavits

86. In numerous instances, in connection with collecting or attempting to collect Debt from Consumers, in affidavits filed in courts across the country, Encore represented directly or indirectly, expressly or by implication, that:

a. Debts not disputed pursuant to Section 809(a)(3) of the FDCPA are presumed valid by a court;

b. Encore affiants had reviewed account-level documentation from the original Creditor corroborating the Consumer's Debt;

c. Debt seller affiants had reviewed hard copy records corroborating the Consumer's Debt;

d. Documents attached to affidavits were specific to the Consumer; or

e. Encore affiants had personal knowledge of the individual Consumer's indebtedness.

87. In truth and in fact:

a. Debts not disputed pursuant to Section 809(a)(3) of the FDCPA are not presumed valid by a court, because pursuant to Section 809(c) of the FDCPA, "[t]he failure of a consumer to dispute the validity of a debt [after receiving a notice under Section 809] may not be construed by any court as an admission of liability by the consumer";

b. In numerous instances, Encore affiants had not reviewed account-level documentation from the original Creditor corroborating the Consumer's Debt;

c. In numerous instances, Debt seller affiants had not reviewed hard copy records corroborating the Consumer's Debt;

d. In numerous instances, documentation attached to affidavits was not specific to the Consumer; and

e. In numerous instances, Encore affiants did not have personal knowledge of the individual Consumer defendant's indebtedness.

88. These representations are material because they are likely to affect a Consumer's choice or conduct regarding how to respond to a lawsuit and are likely to mislead Consumers acting reasonably under the circumstances.

89. The representations set forth in Paragraph 86 are false or misleading and constitute a deceptive act or practice in violation of Sections 1031(a) and 1036(a) of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a).

Misrepresentations Regarding Time-Barred Debt

90. In numerous instances, in connection with collecting or attempting to collect Debt that is beyond the applicable statute of limitations from Consumers, Encore represented, directly or indirectly, expressly or by implication, that Consumers had a legally enforceable obligation to pay the Debt.

91. In truth and in fact, Consumers do not have a legally enforceable obligation to pay Debt that is beyond the applicable statute of limitations.

92. These representations are material because they are likely to affect a Consumer's choice or conduct regarding how to respond to an allegedly outstanding Debt claim and are likely to mislead Consumers acting reasonably under the circumstances.

93. The representations set forth in Paragraph 90 are false or misleading and constitute a deceptive act or practice in violation of Sections 1031(a) and 1036(a) of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a).

Misrepresenting to Consumers That They Have the Burden of Proof in Litigation

94. In numerous instances, in connection with collecting or attempting to collect Debt through litigation or threats of litigation, Encore represented to Consumers, directly or indirectly, expressly or by implication, that under the FDCPA, the failure to dispute a Debt in writing within a certain period of time shifts the legal burden to Consumers to prove in court that they do not owe a Debt to Encore.

95. In truth and in fact, under the FDCPA, the failure to dispute a Debt in writing within a certain

period of time does not shift the legal burden to Consumers to prove in court that they do not owe a Debt.

96. The representations are material because they are likely to affect a Consumer's choice or conduct regarding whether to pay the Debt or contest the lawsuit and are likely to mislead Consumers acting reasonably under the circumstances.

97. The representations set forth in Paragraph 94 are false or misleading and constitute a deceptive act or practice in violation of Sections 1031(a) and 1036(a) of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a).

Excessive and Inconvenient Calls

98. In numerous instances, in connection with collecting or attempting to collect Debt, Asset made an excessive number of telephone calls to Consumers and made calls at times Asset knew or should have known were inconvenient to Consumers.

99. The acts or practices set forth in Paragraph 98 caused or were likely to cause substantial injury that was not reasonably avoidable by Consumers or outweighed by countervailing benefits to Consumers or to competition and constitute unfair acts or practices in violation of Sections 1031(a) and 1036(a) of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a).

Violations of the Fair Debt Collection Practices Act

100. Section 805(a)(1) of the FDCPA, 15 U.S.C. § 1692c(a)(1), prohibits Debt collectors from communicating with Consumers in connection with the collection of any Debt at any unusual time or place

or a time or place known or which should be known to be inconvenient to the Consumer. Section 806 of the FDCPA, 15 U.S.C. § 1692d, prohibits Debt collectors from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a Debt. Section 806(5) of the FDCPA, 15 U.S.C. § 1692d(s), specifically prohibits Debt collectors from causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Section 807 of the FDCPA, 15 U.S.C. § 1692e, prohibits Debt collectors from using any false, deceptive, or misleading representation or means in connection with the collection of any Debt. Section 8o7(2)(A) of the FDCPA, 15 U.S.C. § 1692e(2)(A) specifically prohibits the false representations of the character, amount, or legal status of any Debt. Section 807(5) of the FDCPA, 15 U.S.C. § 1692e(s) specifically prohibits the threat to take any action that cannot legally be taken or that is not intended to be taken. Section 807(8} of the FDCPA, 15 U.S.C. § 1692e(8), prohibits communicating or threatening to communicate to any person credit information that is known or which should be known to be false, including the failure to communicate that a disputed Debt is disputed. Section 807(10) of the FDCPA, 15 U.S.C. § 1692e(10), prohibits using false representations or deceptive means to collect or attempt to collect any Debt or to obtain information concerning a Consumer.

101. Midland, MCM, Asset, and Encore Capital are each a "debt collector" within the meaning of the FDCPA, 15 U.S.C. § 16923(6).

102. Encore made numerous telephone calls and representations to Consumers in connection with attempting to collect Debts arising out of transactions primarily for personal, family, or household purposes.

False or Unsubstantiated Representations About Owing a Debt

103. In numerous instances, in connection with collecting or attempting to collect Debt from Consumers, Encore represented, directly or indirectly, expressly or by implication, that Consumers owed Debts to Encore with certain unpaid balances, interest rates, and payment due dates. Encore further represented to Consumers directly or indirectly, expressly or by implication, that Encore had a reasonable basis for representing that Consumers owed the claimed Debts to Encore.

104. In truth and in fact, in numerous instances the representations set forth in Paragraph 103 were false or were not substantiated at the time the representations were made, including but not limited to where:

a. Consumers disputed, challenged, or questioned the validity or accuracy of the Debt and Encore failed to review information that would have been necessary to have a reasonable basis to continue collecting on that account; or

b. Encore had knowledge or reason to believe, based on Encore's past course of dealing with the seller or the seller's accounts (including factors such as Consumer disputes, inaccurate or incomplete information in the

portfolio, and contractual disclaimers related to the accounts) that a specific portfolio of the seller's accounts might contain unreliable data, but continued to represent that Consumers owed the claimed amount on the accounts in question without obtaining and reviewing additional information that would provide a reasonable basis for such claims.

105. The representations set forth in Paragraph 103 are false or misleading and constitute deceptive acts or practices in violation of Sections 807 and 807(10) of the FDCPA, 15 U.S.C. §§ 1692c 1692e(10).

Misrepresenting that Encore Intends to Prove the Debt, If Contested

106. In numerous instances, in connection with collecting or attempting to collect Debt from Consumers through litigation or threats of litigation, Encore represented, directly or indirectly, expressly or by implication, that Encore intends to prove its claims, if contested.

107. In truth and in fact, in numerous instances, Encore does not intend to prove its claims, if contested.

108. The representations set forth in Paragraph 106 are false or misleading and constitute deceptive acts or practices in violation of Sections 807, 807(5), and 807(10) of the FDCPA, 15 U.S.C. §§ 1692e, 1692e(5), 1692e(10).

Filing Misleading Collection Affidavits

109. In numerous instances, in connection with collecting or attempting to collect Debt from Consumers, in affidavits filed in courts across the country, Encore represented directly or indirectly, expressly or by implication, that:

a. Debts not disputed pursuant to Section 809(a)(3) of the FDCPA are presumed valid by a court;

b. Encore affiants had reviewed account-level documentation from the original Creditor corroborating the Consumer's Debt;

c. Debt seller affiants had reviewed hard copy records corroborating the Consumer's Debt;

d. Documents attached to affidavits were specific to the Consumer; or

e. Encore affiants had personal knowledge of the individual Consumer's indebtedness.

110. In truth and in fact:

a. Debts not disputed pursuant to Section 809(a)(3) of the FDCPA are not presumed valid by a court, because pursuant to Section 809(c) of the FDCPA, "[t]he failure of a consumer to dispute the validity of a debt [after receiving a notice under Section 809] may not be construed by any court as an admission of liability by the consumer";

b. In numerous instances, Encore affiants had not reviewed account-level documentation from the original Creditor corroborating the Consumer's Debt;

c. In numerous instances, Debt seller affiants had not reviewed hard copy records corroborating the Consumer's Debt;

d. In numerous instances, Documentation attached to affidavits was not specific to the Consumer; and

e. In numerous instances, Encore affiants did not have personal knowledge of the individual Consumer defendant's indebtedness.

111. The representations set forth in Paragraph 109 are false or misleading and constitute a deceptive act or practice in violation of Sections 807, and 807(10) of the FDCPA, 15 U.S.C. §§ 1692e, 1692e(10).

Misrepresentations Regarding Time-Barred Debt

112. In numerous instances, in connection with collecting or attempting to collect Debt that is beyond the applicable statute of limitations from Consumers, Encore represented, directly or indirectly, expressly or by implication, that Consumers had a legally enforceable obligation to pay the Debt.

113. In truth and in fact, Consumers do not have a legally enforceable obligation to pay Debt that is beyond the applicable statute of limitations.

114. The representations set forth in Paragraph 112 are false or misleading and constitute a deceptive act or practice in violation of Sections 807, 8*o*7(2)(A), 807(5), and 807(10) of the FDCPA, 15 U.S.C. §§ 1692e, 1692e(2)(A), 1692e(5), 1692e(10).

Misrepresenting to Consumers That They Have the Burden of Proof in Litigation

115. In numerous instances, in connection with collecting or attempting to collect Debt through litigation or threats of litigation, Encore represented to Consumers, directly or indirectly, expressly or by implication, that under the FDCPA, the failure to dispute a Debt in writing within a certain period of time shifts the legal burden to Consumers to prove in court that they do not owe a Debt to Encore.

116. In truth and in fact, under the FDCPA, the failure to dispute a Debt in writing within a certain period of time does not shift the legal burden to Consumers to prove in court that they do not owe a Debt.

117. The representations set forth in Paragraph 115 are false or misleading and constitute a deceptive act or practice in violation in violation of Sections 807 and 807(10) of the FDCPA, 15 U.S.C. §§ 1692e, 1692e(10).

Assigning Disputed Debt to Third Parties Without Communicating that the Debt is Disputed

118. In numerous instances, in connection with collecting or attempting to collect Debt, Encore communicated disputed credit information to third-party collection agencies, including law firms, without communicating that the Debt is disputed.

119. The representations set forth in Paragraph 118 are false or misleading and constitute violations of Sections 807 and 807(8) of the FDCPA, 15 U.S.C. §§ 1692c 1692e(8).

Excessive Calls

120. In numerous instances, in connection with collecting or attempting to collect Debt, Asset made an excessive number of telephone calls and engaged in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a Debt.

121. The acts or practices set forth in Paragraph 120 are harassing or abusive and constitute violations of Sections 806 and 806(5) of the FDCPA, 15 U.S.C. §§ 1692d, 1692d(5).

Calls at Inconvenient Times

122. In numerous instances, in connection with collecting or attempting to collect Debt, Asset called certain Consumers at unusual times or at a time which Asset should have known would be inconvenient.

123. The representations set forth in Paragraph 122 constitute violations of Sections 805(a)(1) of the FDCPA, 15 U.S.C. § 1692c(a)(1).

Violation of the Fair Credit Reporting Act

124. Section 623 (b)(1)(A) of the FCRA makes it unlawful for a furnisher of information to a Consumer reporting agency, upon receiving notice of a Consumer dispute from the Consumer reporting agency, not to conduct a reasonable investigation of the disputed information. 15 U.S.C. § 1681s-2(b). Section 623(a)(8)(E) of the FCRA makes it unlawful for such a furnisher not to conduct a reasonable investigation of a Consumer dispute received directly from the Consumer, in the circumstances specified by

Regulation V. 15 U.S.C. § 1681s-2(a)(8)(E); 12 C.F.R. 1022.43.

125. Midland, MCM, and Encore Capital each "regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies" about the Encore's "transactions or experiences" with Consumers, as described in Section 623(a)(2)(A) of the FCRA, 15 U.S.C. § 1681s-2(a)(2)(A), and are each a "furnisher" as defined in Regulation V, 12 C.F.R. 1022.44(c).

Failing to Adequately Investigate Disputes

126. In numerous instances, Encore failed to conduct reasonable investigations of Consumer disputes under the FCRA for accounts that had not been disputed within 45 days of Encore sending the Consumer a Notice of Debt under Section 809 of the FDCPA.

127. The acts or practices alleged in Paragraph 126 constitute violations of Sections 623(a)(8)(E) and (b)(1)(A) of the FCRA, 15 U.S.C. §§ 1681s-2(a)(8)(E) and (b).

ORDER

VI

Conduct Provisions

IT IS ORDERED, under Sections 1053 and 1055 of the CFPA, that:

128. Respondent and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not violate Sections 1031(a) and

1036(a)(1) of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1); Sections 805(a)(1), 806, 806(5), 807, 807(2)(A), 807(5), 807(8), and 807(10) of the FDCPA, 15 U.S.C. §§ 1692c(a)(1), 1692d, 1692d(5), 1692e, 1692e(2)(A), 1692(5), 1692(8), and 1692(10); Sections 623(a)(8)(E) and 623(b) of the FCRA, 15 U.S.C. §§ 1681s-2(a)(8)(E) and 1681s-2(b).

PROHIBITION AGAINST COLLECTING DEBTS WITHOUT A REASONABLE BASIS

IT IS FURTHER ORDERED that:

129. Encore, Encore's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Consent Order, whether acting directly or indirectly, are permanently restrained and prohibited from making any representation, expressly or by implication, that a Consumer owes a Debt to Encore or as to the amount of a Debt owed or allegedly owed to Encore unless, at the time of making the representation, Encore can substantiate the representation. Without limiting the foregoing, such substantiation must include reviewing Original Account-Level Documentation reflecting the Consumer's name and the claimed amount, excluding any post Charge-off or post-judgment payments (unless the claimed amount is higher than the Charge-off Balance or judgment balance, in which case Encore must review (i) Original Account-Level Documentation reflecting the Charge-off Balance or judgment balance and (ii) an explanation of how the claimed amount was calculated and why such increase is authorized by the agreement

creating the Debt or permitted by law), under any of the following circumstances:

a. The Consumer disputed, orally or in writing, the accuracy or validity of the Debt;

b. The Debt was purchased, after the Effective Date, through a purchase agreement without meaningful and effective representations and warranties as to the accuracy or validity of the Debt;

c. The Debt was purchased, after the Effective Date, through a purchase agreement without meaningful and effective commitments to provide Original Account-Level Documentation during the time period in which Encore is collecting the Debt; or

d. The Debt was purchased in a portfolio, after the Effective Date, which Encore knows contains unsupportable or materially inaccurate information about any Debt, based on either of the following factors:

i. At any time during the preceding twelve months, a Consumer disputed, orally or in writing, the accuracy or validity of a Debt in the portfolio and Encore sought but was unable to obtain Original Account-Level Documentation reflecting the amount of the Debt or the identity of the person responsible for the Debt, unless Encore can establish, based on a documented and thorough review of Original Account-Level Documentation concerning other accounts in the portfolio, that the inability to obtain Original Account-Level Documentation to support the account in

the portfolio was an anomaly; or

ii. Original Account-Level Documentation produced to Encore, by a Debt seller or a Consumer, reflected information about the amount of the Debt or the identity of the person responsible for the Debt that was inconsistent and irreconcilable with information previously provided to Encore by the Debt seller, unless Encore can establish, based on a documented and thorough review of Original Account-Level Documentation concerning other accounts in the portfolio, that the production of inaccurate or inconsistent information concerning the account in the portfolio was an anomaly.

Notwithstanding the foregoing, Encore is not required pursuant to this Paragraph to (i) refuse to accept any payments voluntarily submitted by Consumers; (ii) suspend collections for Consumers who have acknowledged the Debt and agreed to make payments; or (iii) refuse to communicate with a Consumer who affirmatively contacts Encore (or Encore's agents) or requests contact from Encore (or Encore's agents) to discuss the Consumer's account.

PROHIBITION AGAINST SELLING DEBT

IT IS FURTHER ORDERED that:

130. Encore, Encore's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Consent Order, whether acting directly or indirectly, are permanently restrained and prohibited from reselling

Debt to anyone other than (i) the entity that initially sold the Debt to Encore or to the Creditor; (ii) to a subsidiary or affiliate of Encore that is subject to the terms of this Consent Order (either by operation of law or by agreement); (iii) to any entity that is subject to the terms of this Consent Order as part of an acquisition or merger with Encore, or purchase of all or substantially all of Encore's assets; or (iv) Encore's (or its affiliates) creditors or any agent of such creditors (in each case, solely in their capacity as such) in settlement or satisfaction of any claims under, or in connection with the default or remedial provisions of, any relevant loan or lending agreement.

PROHIBITION AGAINST THREATENING OR FILING COLLECTION LAWSUITS WITHOUT AN INTENT TO PROVE THE DEBT, IF CONTESTED

IT IS FURTHER ORDERED that:

131. Encore, Encore's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Consent Order, whether acting directly or indirectly, are permanently restrained and prohibited from:

a. Initiating a Legal Collection lawsuit unless in possession of the following:

   i. Original Account-Level Documentation reflecting, at a minimum, the Consumer's name, the last four digits of the account number associated with the Debt at the time of Charge-off, the claimed amount, excluding any post Charge-off payments (unless the claimed amount is higher that

the Charge-off Balance, in which case Encore must possess (i) Original Account-Level Documentation reflecting the Charge-off Balance and (ii) an explanation of how the claimed amount was calculated and why such increase is authorized by the agreement creating the Debt or permitted by law), and if Encore is suing under a breach of contract theory, the contractual terms and conditions applicable to the Debt;

ii. A chronological listing of the names of all prior owners of the Debt and the date of each transfer of ownership of the Debt, beginning with the name of the Creditor at the time of Charge-off;

iii. A certified or otherwise properly authenticated copy of each bill of sale or other document evidencing the transfer of ownership of the Debt at the time of Charge-off to each successive owner, including Encore, Each of the documents evidencing the transfer of ownership of the Debt must include a specific reference to the particular Debt being collected upon; and

iv. Any one of the following:

1. A document signed by the Consumer evidencing the opening of the account forming the basis for the Debt; or
2. Original Account-Level Documentation reflecting a purchase, payment, or other actual use of the account by the Consumer.

b. Engaging in any Legal Collection without providing the Consumer with certain information about the Debt, unless previously provided, including but not limited to, the following information:

i. the name of the Creditor at the time of Charge-off, including the name under which the Creditor did business with the Consumer;

ii. the last four digits of the account number associated with the Debt at the time of the Consumer's last monthly account statement, or, if not available, at the time of Charge-off;

iii. the Charge-off Balance;

iv. Encore's method of calculating any amount claimed in excess of the Charge-off Balance; and

v. A statement that Encore, or Encore's agent, will, within 30 days of a written request, provide the Consumer with copies of the documentation referenced in Subsection (a) of this Paragraph, at no cost. *Provided that,* Encore has to provide such documentation upon request only once per year and that Encore is not required to provide such documentation in response to a request made more than one year after Encore has ceased collecting the Debt.

PROHIBITION AGAINST FILING FALSE OR MISLEADING AFFIDAVITS

IT IS FURTHER ORDERED that:

132. Encore, Encore's officers, agents, servants, employees, and attorneys, and. all other persons in active concert or participation with any of them, who receive actual notice of this Consent Order, whether acting directly or indirectly, are permanently restrained and prohibited from, in connection with collection of a Debt:

a. Submitting any affidavit in which the affiant represents, expressly or by implication, that the affidavit has been notarized if the affidavit was not executed in the presence of a notary;

b. Submitting any affidavit containing an inaccurate statement, including but not limited to a statement that attached documentation relates to the specific Consumer being sued when that is not the case;

c. Submitting any affidavit in which the affiant represents, expressly or by implication, that any attached or unattached documents or records concerning the Debt forming the basis for the lawsuit have been reviewed by the affiant, when that is not the case;

d. Submitting any affidavit in which the affiant represents, expressly or by implication, that the affiant has personally reviewed the affidavit, when that is not the case;

e. Submitting any affidavit which references a Consumer's failure to dispute a Debt unless the affidavit also contains the following statement:

> Under Federal law, "[t]he failure to dispute a debt under [Section 809(c) of the Fair Debt Collection Practices Act, 15 U.S.C. §1692g(c)] may not be considered by any court as an admission of liability."

PROHIBITION AGAINST DECEPTIVELY COLLECTING TIME-BARRED DEBT

IT IS FURTHER ORDERED that:

133. Encore, Encore's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Consent Order, whether acting directly or indirectly, are permanently restrained and prohibited from:

a. Collecting or attempting to collect any Time-Barred Debt through litigation or arbitration;

b. Collecting or attempting to collect any Time-Barred Debt through any means, including but not limited to telephone calls and written communications, without clearly and prominently disclosing to the Consumer:

i. for those Consumer accounts where the Debt is Time-Barred and generally cannot be included in a Consumer report under the provisions of the FCRA, 15 U.S.C. § 1681c(a), but can be collected through other means pursuant to applicable state law, Encore will include the following statement: "The law limits how long you can be sued on a debt and how long a debt can appear on your credit report. Due to the age of this debt, we will not sue you for

it or report payment or non-payment of it to a credit bureau;" and

ii. for those Consumer accounts where the Debt is Time-Barred but can be collected through other means pursuant to applicable state law, and may be included in a Consumer report under the provisions of the FCRA, 5 U.S.C. § 1681c(a), Encore will include the following statement: "The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it."

Provided, however, that with regard to telephonic communications, Encore is not required to make either disclosure to any individual person more than once per 30 day period.

c. Making any representation or statement, or taking any other action that interferes with, detracts from, contradicts, or otherwise undermines the disclosures required in Paragraph (b) of this Section.

Encore will be deemed to have complied with the disclosure requirements of this Paragraph if it makes a disclosure to Consumers in a specific jurisdiction that (i) is required by the laws or regulations of that jurisdiction, (ii) complies with those laws or regulations, and (iii) is substantially similar to the disclosure required by this Paragraph.

PROHIBITION AGAINST FAILING TO COMMUNICATE DISPUTES

IT IS FURTHER ORDERED that

134. Encore, Encore's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Consent Order, whether acting directly or indirectly, are permanently restrained and prohibited from communicating any information about a Debt that Encore knows or should know is disputed, to any person without informing such person that the Debt is disputed, including but not limited to communications with third-party collection agencies, law firms employed by Encore, or Consumer reporting agencies provided, however, that Encore is not required by this Consent Order to provide oral notification under this Sub-Paragraph to any individual person more than once per 30 day period.

PROHIBITION AGAINST EXCESSIVE AND INCONVENIENT TELEPHONE CALLS

IT IS FURTHER ORDERED that

135. Encore, Encore's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Consent Order, whether acting directly or indirectly, are permanently restrained and prohibited from:

a. Engaging in any conduct the natural consequence of which is to harass, oppress, or abuse a person, including, but not limited to: (1) the use of obscene or profane language or

language the natural consequence of which is to abuse the hearer; (2) causing a telephone to ring, or engaging a person in telephone conversation, repeatedly or continuously with the intent to annoy, abuse, or harass the person at the called number; (3) placing more than one call to any person about a Debt after that person has notified Encore either orally or in writing that the person wishes Respondent to cease further communication with the person; and

b. Communicating with any Consumer at a time or place known by Encore or which should be known by Encore to be inconvenient to the Consumer. In the absence of knowledge of circumstances to the contrary, Encore must assume that the convenient time for communicating with a Consumer is after 8:00 a.m. and before 9:00 p.m., local time at the Consumer's location. In the absence of knowledge of circumstances to the contrary, Encore must assume that the Consumer is located in the local time-zone associated with the United States Postal Service postal code associated with the Consumer's address or in the local time-zone associated with the area code associated with the Consumer's telephone number being dialed. In the event that Encore is in possession of conflicting location information, Encore must assume that it would be inconvenient to contact the Consumer before 8:00 a.m. or after 9:00 p.m., local time in either location.

VII

Compliance Plan

IT IS FURTHER ORDERED that:

136. Within 60 days from the Effective Date, Encore must submit to the Enforcement Director for review and determination of non-objection a comprehensive compliance plan designed to ensure that Encore's Debt collection practices comply with all applicable Federal Consumer financial laws and the terms of this Consent Order (Compliance Plan). The Compliance Plan must include, at a minimum:

a. comprehensive, written policies and procedures designed to prevent violations of Federal Consumer protection laws and prevent associated risks of harm to Consumers;

b. comprehensive, written policies and procedures designed to ensure that Encore conducts due diligence regarding the accuracy of the information it acquires from Creditors or other Debt buyers;

c. comprehensive, written policies and procedures designed to insure that law firms engaged by Encore to collect Debt do not violate any Consumer financial protection laws that must include at a minimum:

i. an analysis to be conducted by Encore, prior to Encore entering into a contract with the law firm, of the ability of the law firm to perform its obligations in compliance with all applicable Federal Consumer financial laws and Encore's related policies and procedures;

ii. for new and renewed contracts, a written contract between Encore and the law firm, which sets forth the responsibilities of each party, including:

1. the law firm's specific performance responsibilities and duty to maintain adequate internal controls;
2. the law firm's duty to provide adequate training on compliance with all applicable Federal Consumer financial laws and Encore's related policies and procedures;
3. the law firm's duty to alert Encore whenever a Consumer submits an oral or written dispute or asserts a defense to a lawsuit, including but not limited to a dispute concerning the accuracy or validity of the Debt or any assertion that the suit was filed outside of the applicable statute of limitations;
4. Encore's authority to conduct periodic onsite reviews of the law firm's controls, performance, and information systems related to Debt collection;
5. Encore's right to terminate the contract if the law firm materially fails to comply with the terms specified in the contract, including the terms required by this Paragraph; and
6. periodic review by Encore of the law firm's controls, performance, and information systems related to Debt collections.

d. an effective training program that includes regular, specific, comprehensive training in

Consumer protection laws commensurate with individual job functions and duties for appropriate employees, including all employees having responsibilities that relate to Consumer protection laws, senior management and members of the Board;

e. an enhanced and well-documented internal CMS monitoring process incorporated into the daily work of Encore's employees that is designed to detect and promptly correct compliance weaknesses of Encore and its service providers, particularly weaknesses that impact Consumers;

f. an effective Consumer complaint monitoring process, including the maintenance of adequate records of all written, oral, or electronic complaints or inquiries, formal or informal, received by Encore and its service providers and the resolution of the complaints and inquiries; and

g. effective independent audit coverage of the Compliance Program and Encore's compliance with all Consumer protection laws and internal policies and procedures

137. The Enforcement Director will have the discretion to make a determination of non-objection to the Compliance Plan or direct Encore to revise it. In the event that the Enforcement Director directs Encore to revise the Compliance Plan, Encore must make the revisions and resubmit the Compliance Plan to the Enforcement Director within 30 days.

138. After receiving notification that the Enforcement Director has made a determination of non-objection to the Compliance Plan, Encore must

implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Compliance Plan.

139. Notwithstanding the foregoing, Encore must take whatever steps necessary to fully implement all of the requirements and restrictions described in Paragraphs 129 and 131 within 180 days of the Effective Date and all of the requirements and restrictions described in Paragraphs 132, 133, and 134 within 90 days of the Effective Date.

VIII

Role of the Board

IT IS FURTHER ORDERED that:

140. The Board must review all submissions (including plans, reports, programs, policies, and procedures) required by this Consent Order prior to submission to the Bureau.

141. Although this Consent Order requires Encore to submit certain documents for the review or non-objection by the Enforcement Director, the Board must have the ultimate responsibility for proper and sound management of Encore and for ensuring that Encore complies with Federal Consumer financial law and this Consent Order.

142. In each instance that this Consent Order requires the Board to ensure adherence to, or undertake to perform certain obligations of Encore, the Board must:

a. Authorize whatever actions are necessary for Encore to fully comply with the Consent Order;

b. Require timely reporting by management to the Board on the status of compliance obligations; and

c. Require timely and appropriate corrective action to remedy any material non-compliance with any failures to comply with Board directives related to this Section.

IX

Order to Pay Redress

IT IS FURTHER ORDERED that:

143. Within 10 days of the Effective Date, Encore must reserve or deposit into a segregated deposit account an amount not less than $34,000,000 or greater than $42,000,000, for the purpose of providing redress to Restitution Eligible Consumers as required by this Consent Order. If the total of payments to Restitution Eligible Consumers is less than $34,000,000, the excess must be deposited into the U.S. Treasury as disgorgement. Except for as provided by Paragraph 147, if the total of payments to Restitution Eligible Consumers would be greater than $42,000,000, the amount that would be paid to each Restitution Eligible Consumer may be reduced pro rata.

144. For the approximately 12,000 identified Consumers who during the Relevant Time Period paid on a Debt within sixty days of being sent a letter that sought payment of a Time-Barred Debt, and that included the word ""settlement," and it was not affirmatively disclosed in that letter that the Consumer would not be sued for nonpayment, Encore must provide full restitution ("Time-Barred Debt

Restitution"), expected to total approximately $5,300,000, of all payments made, directly or indirectly, during the Relevant Time Period within sixty days of the Consumer being sent a letter that sought payment of a Time-Barred Debt that included the word "settlement" and did not include an affirmative disclosure in that letter that the Consumer would not be sued for non-payment.

145. For the approximately 35,600 identified Consumers who paid on a Debt after an affidavit with a representation that the Debt could be assumed valid because the Consumer failed to dispute under the FDCPA was submitted in court, Encore must provide restitution ("Dispute Affidavit Restitution"), expected to total approximately $36,000,000, as follows:

a. For the approximately 6,300 identified Consumers who may have been sued by Encore in a lawsuit in which Encore filed an affidavit with a representation that the Debt could be assumed valid because the Consumer failed to dispute under the FDCPA ("Dispute Affidavit Lawsuit") and for which it does not possess documentation evidencing the Consumer's responsibility for the Debt, Encore must provide full restitution, expected to total approximately $12,600,000, of all payments made, directly or indirectly, to Encore during the Relevant Time Period, after Encore filed the Dispute Affidavit.

b. For the approximately 29,300 identified Consumers who may have been sued by Encore in a Dispute Affidavit Lawsuit and for

which Encore possesses documentation evidencing the Consumer's responsibility for the Debt, Encore must provide full restitution up to $1,000 each, expected to total approximately $23,300,000, of all payments made, directly or indirectly, to Encore during the Relevant Time Period, after Encore filed the Dispute Affidavit.

146. For the Dispute Affidavit Lawsuit Debt that has yet to be collected, expected to total more than $125,000,000, Encore must within 90 days of the Effective Date:

a. Withdraw, dismiss, or terminate all pending Dispute Affidavit Lawsuits;

b. Release or move to vacate all judgments obtained during the Relevant Period regarding Dispute Affidavit Lawsuits;

c. Cease post-judgment enforcement activities and cease accepting settlement payments related to any Dispute Affidavit Lawsuits; and

d. Request that the Consumer reporting agencies amend, delete, or suppress information regarding any Dispute Affidavit Lawsuits, and associated judgments, as applicable.

147. In addition to the Dispute Affidavit Restitution required by this Section, Encore must, within 180 days of the Effective Date, refund any payments made within the 30 days prior to the Effective Date, and any time after the Effective Date, on Debts associated with any Dispute Affidavit

Lawsuit, regardless of whether such refunds would cause Encore to pay more than $42,000,000 in total restitution.

Redress Plan

148. Within 60 days of the Effective Date, Encore must prepare and submit to the Enforcement Director for review and non-objection a comprehensive written plan for providing redress consistent with this Consent Order (Redress Plan). The Enforcement Director must have the discretion to make a determination of non-objection to the Redress Plan or direct Encore to revise it. In the event that the Enforcement Director directs Encore to revise the Redress Plan, Encore must make the revisions and resubmit the Redress Plan to the Enforcement Director within 15 days. Upon notification that the Enforcement Director has made a determination of non-objection to the Redress Plan, Encore must implement and adhere to the steps, recommendations, deadlines, and timeframes set forth in the Redress Plan.

149. With respect to Time-Barred Debt Restitution, the Redress Plan must include: (1) the form of the letter ("Time-Barred Debt Redress Notification Letter") to be sent notifying Restitution Eligible Consumers of the redress; and (2) the form of the envelope that will contain the Time-Barred Debt Redress Notification Letter. The letter must include language explaining the manner in which the amount of redress was calculated; a statement that the provision of refund payment is in accordance with the terms of this Consent Order; and a statement that accepting payment of redress will not subject the Consumer to any new Debt collection or credit

reporting activities for that Debt. Encore must not include in any envelope containing a Time-Barred Debt Redress Notification Letter any materials other than the approved letters and redress checks, unless Encore has obtained written confirmation from the Enforcement Director that the Bureau does not object to the inclusion of such additional materials.

150. With respect to Dispute Affidavit Restitution, the Redress Plan must include: (1) the process by which Encore will conduct the file review of the approximately 35,600 identified Consumers who may have been sued by Encore in a Dispute Affidavit Lawsuit; (2) the form of the letter ("Dispute Affidavit Restitution Notification Letter") to be sent notifying Restitution Eligible Consumers of the redress; and (3) the form of the envelope that will contain the Dispute Affidavit Restitution Notification Letter. The letter must include language explaining the manner in which the amount of redress was calculated; a statement that the related Dispute Affidavit Lawsuit has been withdrawn, dismissed, vacated, terminated, released, or that the enforcement activities on the Dispute Affidavit Lawsuit have ceased, as applicable; a statement that the redress being provided is in accordance with the terms of this Consent Order; and a statement that accepting payment of redress will not subject the Consumer to any new Debt collection or credit reporting activities for that Debt. Encore must not include in any envelope containing a Dispute Affidavit Restitution Notification Letter any materials other than the approved letters and redress checks, unless Encore has obtained written confirmation from the

Enforcement Director that the Bureau does not object to the inclusion of such additional materials.

151. With respect to Dispute Affidavit Lawsuits and associated judgments that did not result in a Consumer making a payment directly or indirectly to Encore, the Redress Plan must include: (1) the form of the letter ("Lawsuit Dismissal/Judgment Non-enforcement Notification Letter") to be sent notifying eligible Consumers of the withdrawal, dismissal, vacation, termination, release of the Dispute Affidavit Lawsuit or the cessation of enforcement activities on the Dispute Affidavit Lawsuit and associated judgment, as applicable; and (2) the form of the envelope that will contain the Lawsuit Dismissal/Judgment Non-enforcement Notification Letter. The letter must include a statement that the Dispute Affidavit Lawsuit has been withdrawn, dismissed, vacated, terminated, released, or that the enforcement activities on the Dispute Affidavit Lawsuit have ceased, as applicable; a statement that the redress is in accordance with the terms of this Consent Order; and a statement that the redress will not subject the Consumer to any new Debt collection or credit reporting activities for that Debt. Encore must not include in any envelope containing a Lawsuit Dismissal/Judgment Non-enforcement Notification Letter any materials other than the approved letter; unless Encore has obtained written confirmation from the Enforcement Director that the Bureau does not object to the inclusion of such additional materials.

152. The Redress Plan must include a description of the following:

a. methods used and the time necessary to compile a list of Restitution Eligible Consumers and the approximately 50,000 identified Consumers who will receive a Lawsuit Dismissal/Judgment Non-enforcement Notification Letter;

b. methods used to calculate the amount of redress to be paid to each Restitution Eligible Consumer as required herein;

c. procedures for issuance and tracking of redress to Restitution Eligible Consumers;

d. methods and procedures used and the time necessary to withdraw, dismiss, move to vacate, terminate, or release the Dispute Affidavit Lawsuits and associated judgments, or to cease enforcement activities on Dispute Affidavit Lawsuit judgments;

e. procedures for monitoring compliance with the Redress Plan;

f. the process for providing restitution for Restitution Eligible Consumers, which must include the following requirements:

   i. Encore must mail a check to any Restitution Eligible Consumer along with a Redress Notification Letter;

   ii. Encore must send the check by United States Postal Service first-class mail, address correction service requested, to the Restitution Eligible Consumer's last address as maintained by Encore's records;

   iii. Encore must make reasonable attempts to obtain a current address for any

Restitution Eligible Consumer whose Redress Notification Letter and restitution check is returned for any reason, using the National Change of Address System, and must promptly re-mail all returned letters and restitution checks to current addresses. If the check for any Restitution Eligible Consumer is returned to Encore after such second mailing by Encore, or if a current mailing address cannot be identified using National Change of Address System, Encore must retain the restitution amount of such Eligible Consumer for a period of three-hundred sixty (360) days from the date the restitution check was originally mailed, during which period such amount may be claimed by such Restitution Eligible Consumer upon appropriate proof of identity. After such time these monies will be deposited into the U.S. Treasury as disgorgement.

153. The Redress Plan will allow for a reduction in the amount of any payments previously refunded to a Restitution Eligible Customer by Encore prior to the Effective Date.

154. If Encore claims to have made any restitution prior to the Effective Date of this Consent Order that complies with the requirements of this Consent Order, Encore must provide appropriate proof of such restitution to the Enforcement Director.

155. Encore must not condition the payment of any redress to any Restitution Eligible Consumer

under this Consent Order on that person's agreement to any condition, such as the waiver of any right.

Assessment of Redress

156. Encore must retain at its own expense the services of an independent certified accounting firm ("Firm"), within 15 days after the Enforcement Director's non-objection pursuant to Paragraph 150, to determine compliance with the Redress Plan. The Firm must determine compliance in accordance with the attestation standards established by the American Institute of Certified Public Accountants for agreed-upon procedures for engagements.

157. Prior to engagement, and no later than 60 days from the Effective Date, Encore must submit the name and qualifications of the Firm, together with the proposed engagement letter with the Firm and the proposed agreed-upon procedures, to the Enforcement Director for non-objection. Within 15 days after submission of the Firm's name, the Enforcement Director must notify Encore in writing of the CFPB's objection or non-objection thereto.

158. The Firm must prepare a detailed written report of its assessment of Encore's compliance with the terms of the Redress Plan ("Restitution Report"). The Restitution Report must include an assessment of the Redress Plan and the methodology used to determine the population of Restitution Eligible Consumers, the amount of redress for each Restitution Eligible Consumer, the procedures used to issue and track redress payments, and the work of any independent consultants that Encore has used to assist and review its execution of the Redress Plan.

159. The Firm must submit the Restitution Report to the Enforcement Director and the Board within 90 days after Encore completes implementation of the Redress Plan.

X

Order to Pay Civil Money Penalties

IT IS FURTHER ORDERED that:

160. Under Section 1055(c) of the CFPA, 12 U.S.C. § 5565(c), by reason of the violations of law described in Section V of this Consent Order, and taking into account the factors set forth in 12 U.S.C. § 5565(c)(3), Encore must pay a civil money penalty of $10,000,000 to the Bureau, as directed by the Bureau and as set forth herein.

161. Within 10 days of the Effective Date, Encore must pay the civil money penalty in the form of a wire transfer to the Bureau or to such agent as the Bureau may direct, and in accordance with wiring instructions to be provided by counsel for the Bureau.

162. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau in accordance with Section 1017(d) of the CFPA, 12 U.S.C. § 5497(d).

163. Encore must treat the civil money penalty as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, Encore must not:

a. Claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for any civil money penalty that Encore pays under this Consent Order; or

b. Seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made pursuant to any insurance policy, with regard to any civil money penalty that Encore pays under this Consent Order.

164. To preserve the deterrent effect of the civil money penalty, in any Related Consumer Action, Encore must not argue that Encore is entitled to, nor must Encore benefit by, any offset or reduction of any monetary remedies imposed in the Related Consumer Action, because of the civil money penalty paid in this action ("Penalty Offset"). If the court in any Related Consumer Action grants such a Penalty Offset, Encore must, within 30 days after entry of a final order granting the Penalty Offset, notify the Bureau and pay the amount of the Penalty Offset to the U.S. Treasury. Such a payment must not be deemed an additional civil money penalty and must not be deemed to change the amount of the civil money penalty imposed in this action.

XI

Additional Monetary Provisions

IT IS FURTHER ORDERED that:

165. In the event of any default on Encore's obligations to make payment under this Consent Order, interest, computed pursuant to 28 U.S.C. § 1961, as amended, must accrue on any outstanding amounts not paid from the date of default to the date of payment, and must immediately become due and payable.

166. Encore must relinquish all dominion, control, and all legal and equitable right, title, and

interest to the funds paid to the fullest extent permitted by law and no part of the funds must be returned to Encore.

167. In accordance with 31 U.S.C. § 7701, Encore, unless it already has done so, must furnish to the Bureau its taxpayer identifying numbers, which may be used for purposes of collecting and reporting on any delinquent amount arising out of this Consent Order.

168. Within 30 days of the entry of a final judgment, consent order, or settlement in a Related Consumer Action, Encore must notify the Enforcement Director of the final judgment, consent order, or settlement in writing. That notification must indicate the amount of redress, if any, that Encore paid or is required to pay to Consumers and should describe the Consumers or classes of Consumers to whom that redress has been or will be paid.

XII

Reporting Requirements

IT IS FURTHER ORDERED that:

169. Encore must notify the Bureau of any development that may affect compliance obligations arising under this Consent Order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Consent Order; any claims made under, or in connection with a default or remedial provision of a loan or lending agreement under Paragraph I30(iv); the filing of any bankruptcy

or insolvency proceeding by or against Encore; or a change in Encore's name or address.

170. Encore must report any change in the information required to be submitted under Paragraph 169 at least 30 days prior to such change. Provided, however, that with respect to any proposed change about which Encore learns less than 30 days prior to the date such action is to take place, Encore must notify the Bureau as soon as is practicable after obtaining such knowledge.

171. Within 180 days of the Effective Date, and again one year after the Effective Date, Encore must submit to the Enforcement Director an accurate written compliance progress report (Compliance Report), which has been approved by the Board, which, at a minimum:

a. Describes in detail the manner and form in which Encore has complied with this Consent Order; and

b. Attaches a copy of each Consent Order acknowledgment obtained under Section XIII of this Consent Order, unless previously submitted to the Bureau.

XIII

Order Distribution and Acknowledgement

IT IS FURTHER ORDERED that:

172. Within 30 days of the Effective Date, Encore must deliver a copy of this Consent Order to each of its board members and executive officers, as well as to any managers, employees, service providers, or other agents and representatives who

have responsibilities related to the subject matter of the Consent Order.

173. For five years from the Effective Date, Encore must deliver a copy of this Consent Order to any business entity resulting from any change in structure as set forth in Section XII, any future board members and executive officers, as well as to any managers, employees, service providers, or other agents and representatives who will have responsibilities related to the subject matter of the Consent Order before they assume their responsibilities.

174. Encore must secure a signed and dated statement acknowledging receipt of a copy of this Consent Order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 et seq., within 30 days of delivery, from all persons receiving a copy of this Consent Order under this Section.

XIV

Reporting Requirements

IT IS FURTHER ORDERED that:

175. Encore must create, for at least 5 years from the Effective Date, the following business records:

a. All documents and records necessary to demonstrate full compliance with each provision of this Consent Order, including all submissions to the Bureau;

b. All documents and records pertaining to the Redress Program, as set forth in Section IX; and

c. Copies of all templates used to collect Debt, including but not limited to dunning letters and affidavits.

176. Encore must retain the documents identified in Paragraph 175 for at least 5 years.

177. Encore must make the documents identified in Paragraph 175 available to the Bureau upon the Bureau's request.

XV

Notices

178. Unless otherwise directed in writing by the Bureau, Encore must provide all submissions, requests, communications, consents, or other documents relating to this Consent Order, in writing with the subject line, *"In Re Encore,* File No. 2015-CFPB- ___.," and send them either:

a. By overnight courier (not the U.S. Postal Service), as follows:

Assistant Director for Enforcement
Consumer Financial Protection Bureau
1625 I Street, NW
Washington, DC 20006; or

b. By first class mail to the below address and contemporaneously sent by email to Enforcement_Compliance@CFPB.gov:

Assistant Director for Enforcement
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

XVI

Compliance Monitoring

IT IS FURTHER ORDERED that, to monitor Encore's compliance with this Consent Order:

179. Within 14 days of receipt of a written request from the Bureau, Encore must submit additional compliance reports or other requested information, which must be made under penalty of perjury; provide sworn testimony; or produce documents.

180. For purposes of this Section, the Bureau may communicate directly with Encore, unless Encore asks the Bureau in writing to communicate through retained counsel.

181. Encore must permit Bureau representatives to interview any employee or other person affiliated with Encore who has agreed to such an interview. The person interviewed may have counsel present.

182. Nothing in this Consent Order will limit the Bureau's lawful use of civil investigative demands under 12 C.F.R. § 1080.6 or other compulsory process.

XVII

Modifications and Extensions of Time

183. Encore may seek a modification to non-material requirements of this Consent Order *(e.g.,* reasonable extensions of time and changes to reporting requirements) by submitting a written request to the Enforcement Director.

184. The Enforcement Director may, in his or her discretion, modify any nonmaterial provisions of

this Consent Order (e.g., reasonable extensions of time and changes to reporting requirements), if he or she determines good cause justifies the modification. Any such modification by the Enforcement Director must be in writing.

185. Upon a written showing of good cause, the Enforcement Director may modify any provision of this Consent Order to the extent that compliance with that provision could cause Encore, its Board, officers, or employees to violate any law, rule, or regulation, including but not limited to any subsequent amendments of the CFPA, FCRA, or FDCPA.

186. In the event that Encore acquires an entity, a line of business from an entity, or an ownership stake in an entity (an "Acquired Entity") in the business of the purchase, transfer, or collection of Debts in the United States, the Acquired Entity will have a transition period of 90 days to comply with the requirements of this Consent Order. Any asset purchase in which Encore acquires and continues to use the operational or servicing systems of a legacy entity not previously owned by Encore will be treated as an Acquired Entity for the purpose of this provision. Any Debt that Encore acquires as a result of its acquisition of an Acquired Entity or an ownership stake in an Acquired Entity will be considered purchased on the date the Acquired Entity purchased the Debt.

XVIII

Administrative Provisions

IT IS FURTHER ORDERED that:

187. The provisions of this Consent Order will not bar, estop, or otherwise prevent the Bureau or any other governmental agency from taking any other action against Encore.

188. The Bureau releases and discharges Encore from all potential liability for violations of law that the Bureau has or might have been asserted based on the practices described in Section V of this Consent Order, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date. The Bureau may use the practices alleged in the Consent Order in future enforcement actions against Encore and its affiliates, including, without limitation, to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release does not preclude or affect any right of the Bureau to determine and ensure compliance with the terms and provisions of the Consent Order, or to seek penalties for any violation thereof.

189. This Consent Order does not form, and may not be construed to form, a contract binding the Bureau or the United States.

190. This Consent Order will terminate 5 years from the Effective Date or 5 years from the most recent date that the Bureau initiates an action alleging any violation of the Consent Order by Encore. If such action is dismissed or the relevant adjudicative body rules that Encore did not violate any provision of the Consent Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Consent Order will terminate as though the action had never been filed. The Consent Order will

remain effective and enforceable until such time, except to the extent that any provisions of this Consent Order have been amended, suspended, waived, or terminated in writing by the Bureau or its designated agent.

191. Calculation of time limitations will run from the Effective Date and be based on calendar days, unless otherwise noted.

192. Should Encore seek to transfer or assign all or part of its operations or assets that are subject to this Consent Order, Encore must, as a condition of sale, obtain the written agreement of the transferee or assignee to comply with all applicable provisions of this Consent Order.

193. The provisions of this Consent Order will be enforceable by the Bureau. For any violation of this Consent Order, the Bureau may impose the maximum amount of civil money penalties allowed under Section 1055(c) of the CFPA, 12 U.S.C. § 5565(c). In connection with any attempt by the Bureau to enforce this Consent Order in federal district court, the Bureau may serve Respondents wherever Respondents may be found and Respondents may not contest that court's personal jurisdiction over Respondents.

194. This Consent Order and the accompanying Stipulation contain the complete agreement between the parties. The parties have made no promises, representations, or warranties other than what is contained in this Consent Order and the accompanying Stipulation. This Consent Order and the accompanying Stipulation supersede any prior oral or written communications, discussions, or understandings.

195. Nothing in this Consent Order may be construed as allowing Encore, its Board, officers, or employees to violate any law, rule, or regulation.

SO ORDERED this 3rd day of September, 2015.

_____

Richard Cordray

Director

Consumer Financial Protection Bureau

Debt collector response sample letter

You're saying: "This is not my debt."

Use the sample letter on the next page if you want to tell a debt collector that you aren't responsible for this debt, and that you don't want to be contacted again.

How to use this sample letter:

1. Read the background below.
2. Fill in your information on the sample letter and edit it as needed to fit your situation.
3. Print and mail the letter. Keep a copy for your records. You should consider sending the letter by certified mail or another method by which you can establish when the letter is received by the intended recipient.

Background

This letter tells the debt collector to stop contacting you unless they can show evidence that you are responsible for this debt. Stopping contact does not cancel the debt. So, if a debt collector still believes you really are responsible for the debt, they could still take other action. For example, you still might be sued or have the status of the debt reported to a credit bureau.

Sample letter begins on the next page

[Your name]
[Your return address]
[Date]

[Debt collector name]
[Debt collector address]

Re: [Account number for the debt, if you have it]

Dear [Debt collector name],

I am responding to your contact about collecting a debt. You contacted me by [*phone/mail*], on [*date*] and identified the debt as [*any information they gave you about the debt*].

I do not have any responsibility for the debt you're trying to collect.

If you have good reason to believe that I am responsible for this debt, mail me the documents that make you believe that. Stop all other communication with me and with this address, and record that I dispute having any obligation for this debt. If you stop your collection of this debt, and forward or return it to another company, please indicate to them that it is disputed. If you report it to a credit bureau (or have already done so), also report that the debt is disputed.

Thank you for your cooperation. Sincerely,

[Your name]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

LEVI HUEBNER on behalf of himself and all other similarly situated consumers

AMENDED COMPLAINT

Plaintiff,

against-

MIDLAND CREDIT MANAGEMENT, INC.

Defendant.

----------x

CLASS ACTION COMPLAINT

INTRODUCTION

1. Plaintiff, Levi Huebner PC brings this action on behalf of himself and all others similarly situated, by way of this Class Action Complaint for the illegal practices of Defendant, Midland Credit Management, Inc. who, inter alia, used false, deceptive, and misleading practices, and other illegal practices, in connection with its attempts to collect an alleged debt from the Plaintiff and others.

PARTIES

2. At all times relevant to this lawsuit, Plaintiff was citizen of the State of New York who resides within this District.

3. Plaintiff is consumer as that term is defined by 15 U.S.C. § 1692(a)(3) of the FDCPA.
4. The alleged debt that Defendant sought to collect from the Plaintiff involves a consumer debt.
5. At all times relevant to this lawsuit, Defendant's principal place of business was located within Westhampton, New Jersey.
6. Defendant is regularly engaged upon, for profit, in the collection of allegedly owed consumer debts.
7. Defendant is a "debt collector" as specifically defined by the FDCPA, 15 U.S.C. § 1692(a)(6).

JURISDICTION & VENUE

8. Jurisdiction of this Court arises under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.
9. Venue is appropriate in this federal district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims of Plaintiff occurred within this federal judicial district.

FACTUAL ALLEGATIONS PARTICULAR TO LEVI HUEBNER

10. Upon information and belief, on a date better known by Defendant, Defendant began to attempt to collect an alleged consumer debt from the Plaintiff.
11. On or about October 17, 2013, Plaintiff called and spoke to Emma, a representative from Midland Credit Management, Inc., regarding an account

with Verizon, purchased by the Defendant, account number: 855-965-9948.

12. The Plaintiff inquired as to how he could go about disputing the alleged debt.

13. The Defendant responded: "Advise me what the dispute is," "why are you disputing (the debt), you need to tell me what you are disputing."

14. The Defendant threatened the failure to communicate that a disputed debt is disputed, in violation of 15 U.S.C. § 1692e(8).

15. The FDCPA does not require the consumer to provide any reason at all in order to dispute a debt.

16. Upon information and belief, Midland Credit Management, Inc. and its employee as a matter of procedural practice and pattern never intend to follow through with the validation rights they purportedly provide in the initial communication.

17. Upon information and belief, Midland Credit Management, Inc. and its employees when receiving written disputes as a matter of procedural practice and pattern do not provide verification of debts since they maintain all disputes in writing must be submitted with a valid reason.

18. Upon information and belief, Midland Credit Management, Inc. and its employee intentionally denied the Plaintiff his dispute rights afforded to him under the FDCPA.

19. Upon information and belief, Midland Credit Management, Inc. and its employee wrongfully

stated to the Plaintiff that he could not orally dispute the debt with Midland Credit Management, Inc.

20. Upon information and belief, Midland Credit Management, Inc. and its employee wrongfully stated to the Plaintiff that he must have a reason to dispute a debt.

21. Upon information and belief, Midland Credit Management, Inc. and its employee by intentionally denying the Plaintiff and any other debtor to dispute the debt orally and without a valid reason unfairly intimidate and force debtors in to paying disputed debts.

22. Upon information and belief, Midland Credit Management, Inc. and its employee threatened the failure to communicate that a disputed debt is disputed.

23. The Midland Credit Management, Inc. employee who spoke with Levi Huebner intended to speak the said words to the Plaintiff.

24. The acts and omissions of Midland Credit Management, Inc. and its employee done in connection with efforts to collect a debt from the Plaintiff were done intentionally and willfully.

25. Upon information and belief, Midland Credit Management, Inc. and its employees intentionally and willfully violated the FDCPA and do so as a matter of pattern and practice by not letting any of the class members orally dispute the debt and by maintaining that the debtors have a valid reason to dispute any debt contrary to the FDCPA and the rights given by

the Defendant purportedly in the validation notice.

26. As an actual and proximate result of the acts and omissions of Midland Credit Management, Inc. and its employees, Plaintiff has suffered actual damages and injury, including but not limited to, fear, stress, mental anguish, emotional stress, acute embarrassment and suffering for which he should be compensated in an amount to be established by a jury at trial.

CLASS ALLEGATIONS

27. This action is brought as a class action. Plaintiff brings this action individually, and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure.

28. The identities of all class members are readily ascertainable from the records of Midland Credit Management, Inc. and those business and governmental entities on whose behalf it attempts to collect debts.

29. Excluded from the Plaintiff's Class is the Defendant and all officers, members, partners, managers, directors, and employees of Midland Credit Management, Inc., and all of their respective immediate families, and legal counsel for all parties to this action and all members of their immediate families.

30. There are questions of law and fact common to the Plaintiff's Class, which common issues predominate over any issues involving only individual class members. The principal issues are whether the Defendant's communications

with the Plaintiff, such as the above stated claims, violate provisions of the Fair Debt Collection Practices Act.

31. The Plaintiff's claims are typical of the class members, as all are based upon the same facts and legal theories.

32. The Plaintiff will fairly and adequately protect the interests of the Plaintiff's Class defined in this complaint. The Plaintiff has retained counsel with experience in handling consumer lawsuits, complex legal issues, and class actions, and neither the Plaintiff nor his attorneys have any interests, which might cause him not to vigorously pursue this action.

33. This action has been brought, and may properly be maintained, as a class action pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure because there is a well-defined community interest in the litigation:

    a) Numerosity: The Plaintiff is informed and believes, and on that basis alleges, that the Plaintiff's Class defined above is so numerous that joinder of all members would be impractical.

    b) Common Questions Predominate: Common questions of law and fact exist as to all members of the Plaintiff's Class and those questions predominate over any questions or issues involving only individual class members. The principal issues are whether the Defendant's communications with the Plaintiff, such as the above stated claims,

violate provisions of the Fair Debt Collection Practices Act.

c) Typicality: The Plaintiff's claims are typical of the claims of the class members. Plaintiff and all members of the Plaintiff's Class defined in this complaint have claims arising out of the Defendant's common uniform course of conduct complained of herein.

d) Adequacy: The Plaintiff will fairly and adequately protect the interests of the class members insofar as Plaintiff has no interests that are adverse to the absent class members. The Plaintiff is committed to vigorously litigating this matter. Plaintiff has also retained counsel experienced in handling consumer lawsuits, complex legal issues, and class actions. Neither the Plaintiff nor his counsel have any interests, which might cause them not to vigorously pursue the instant class action lawsuit.

e) Superiority: A class action is superior to the other available means for the fair and efficient adjudication of this controversy because individual joinder of all members would be impracticable. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum efficiently and without unnecessary duplication of effort and expense that individual actions would engender. Certification of a class under Rule 23(b)(l)(A) of the Federal Rules of Civil Procedure is appropriate because adjudications with respect to individual

members create a risk of inconsistent or varying adjudications which could establish incompatible standards of conduct for Defendant who, on information and belief, collects debts throughout the United States of America.

34. Certification of a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure is also appropriate in that a determination that Defendant's communications with the Plaintiff, such as the above stated claims is tantamount to declaratory relief and any monetary relief under the FDCPA would be merely incidental to that determination.

35. Certification of a class under Rule 23(b)(3) of the Federal Rules of Civil Procedure is also appropriate in that the questions of law and fact common to members of the Plaintiff's Class predominate over any questions affecting an individual member, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

36. Further, Defendant has acted, or failed to act, on grounds generally applicable to the Rule (b)(l)(A) and (b)(2) Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

37. Depending on the outcome of further investigation and discovery, Plaintiff may, at the time of class certification motion, seek to certify one or more classes only as to particular issues pursuant to Fed. R. Civ. P. 23(c)(4).

AND AS FOR A FIRST CAUSE OF ACTION

Violations of the Fair Debt Collection Practices Act brought by Plaintiff on behalf of himself and the members of a class, as against the Defendant.

38. Plaintiff re-states, re-alleges, and incorporates herein by reference, paragraphs one (1) through thirty seven (37) as if set forth fully in this cause of action.

39. Defendant violated the FDCPA. Defendant's violations with respect to the above said messages include, but are not limited to, the following:

    (a) Denying the Plaintiff the right to dispute the debt verbally;

    (b) Requiring the Plaintiff to provide a valid reason to dispute the alleged debt;

    (c) Failing to communicate that a disputed debt is disputed;

    (d) The Defendant made the above false statements in violation of 15 U.S.C. §§ 1692e(8) and 1692e(10).

PRAYER FOR RELIEF

40. The Defendant's actions as set forth above in the within complaint violate the Fair Debt Collection Practices Act.

41. As a direct and proximate result of these violations of the above FDCPA violations, Plaintiff and class members have suffered harm

and are entitled to preliminary and permanent injunctive relief, and to recover actual and statutory damages, costs and attorney's fees.

WHEREFORE, Plaintiff, respectfully requests that this Court enter judgment in Plaintiff's favor and against the Defendant and award damages as follows:

a) Statutory and actual damages provided under the FDCPA, 15 U.S.C. § 1692(k); and

b) Attorney fees, litigation expenses and costs incurred in bringing this action; and

c) An order enjoining and directing Defendant to comply with the FDCPA in its debt collection activities, including without limitation:

d) Directing Defendant to cease engaging in debt collection practices that violate the FDCPA; and

e) Any other relief that this Court deems appropriate and just under the circumstances.

f) Plaintiff respectfully demands a trial by jury of all claims so triable.

Dated: Brooklyn, New York
October 23, 2014

Respectfully submitted,
POLTORAK PC
/ s / Elie C. Poltorak
By: Elie C. Poltorak (EP-8791)
elie@poltoraklaw.com

(718) 943-8815
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEVI HUEBNER on behalf of himself and all other similarly situated consumers, *Plaintiff,* - against - MIDLAND CREDIT MANAGEMENT, INC., and MIDLAND FUNDING LLC, *Defendants.*	Case: 14-cv-6046 (BMC)

CLASS ACTION THIRD AMENDED COMPLAINT

Plaintiff Levi Huebner, by his counsel POLTORAK PC sues, on behalf of himself and all others similarly situated, Defendants Midland Credit Management, Inc, and Midland Funding LLC, and states:

JURISDICTIONAL ALLEGATIONS

1. At all times material to this lawsuit, Levi Huebner ("Plaintiff") is domiciled in the Eastern District of New York.

2. At all times material to this lawsuit, Midland Credit Management, INC. ("Defendant" or "MCM") does business in the State of New York.

3. At all times material to this lawsuit, Midland Funding LLC ("Defendant" or "MFL")

does business in the State of New York.

4. All acts necessary or precedent to brining this lawsuit occurred or accrued in the Eastern District of New York.

5. Federal law governs the facts and questions of law precedent to this suit.

6. This Court has jurisdiction.

NATURE OF ACTION

7. This lawsuit is brought for violations alleged under the Federal Debt Collection Protection Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*

8. The FDCPA affords a consumer the right to dispute a debt. The definition of a consumer is defined as the least sophisticated consumer. The right to dispute a debt only requires notification of a dispute by the consumer. The right to dispute a debt does not hinge on the consumer's reason for the dispute. Under the FDCPA, the right to dispute gives the consumer the absolute and unequivocal right to contest or dispute any debt. This means, that the right of a consumer to dispute a debt, afforded by the FDCPA, is unconditional. The reason the right to dispute is unconditional is (i) to protect the consumer from becoming a victim of a grueling cross-examination by the debt collector, (ii) to protect the debt collector from a violation of 15 U.S.C. § 1692e (10) when inquiring about the nature of the dispute. Without the absolute right to dispute a debt, the consumer would unjustly be subject to a debt collector's self-governing process of harassment, interrogation, deliberation, and determination, which would only defeat the purpose of the FDCPA.

9. When a debt collector chooses to ask the consumer about the nature of the dispute the debt collector has chosen to walk a fine line from the duty to accept and notate a dispute to impermissibly assessing the merits and reason of the dispute. A debt collector may not evaluate the merit of a dispute. The debt collector must make clear to the consumer that the debt collectors questions as to the nature of the dispute (i) are without passing judgment as to the merit of the dispute, and (ii) will not affect the consumer's ability to dispute the debt. In addition, the debt collector must make clear to the debtor that despite its questions about the dispute the debt collector did in fact accept and notate the dispute.

10. In short, on October 17, 2013, Plaintiff attempted to dispute a disputed debt allegedly assigned to MFL. The disputed debt purported to be for a Verizon account. MCM insisted that Plaintiff should provide a reason for the dispute. Upon Plaintiff's response that the debt is "nonexistent," MCM insisted, "that's not a dispute."

11. MCM's statement "that's not a dispute" would lead the least sophisticated consumer to conclude that the Debt Collector did not accept or notate that the debt is disputed. Neither MCM nor MFL communicated the disputed status of the debt when communicating information about the debt to third parties. Thus, the least sophisticated consumer would believe that neither MCM nor MFL accepted the dispute.

PARTIES

12. Plaintiff is a consumer as defined by 15 U.S.C. § 1692a (3) of the FDCPA.

13. The Plaintiff's Class are consumers who are adversely affected by similar situated policies that affected Plaintiff as defined by 15 U.S.C. § 1692k (b) (2) of the FDCPA.

14. Defendants Midland Credit Management, INC and Midland Funding LLC are subsidiaries of Encore Capital Group, Inc.

15. Defendants are engaged in the business of acquiring debt for the purpose of collection.

16. Defendants are debt collectors as defined by 15 U.S.C. § 1692a (6) of the FDCPA.

17. Without waving the right to joinder of individuals and entities party to this suit, upon information and belief, this amended complaint does not join other parties, if any, who cannot be made a party without depriving this court of subject-matter jurisdiction because upon information and belief, the causes of action are attributed directly to the named Defendants.

RELEVANT FACTS PARTICULAR TO LEVI HUEBNER

18. Upon information and belief, on a date better known by Defendants, Defendants began efforts to collect an alleged consumer debt from the Plaintiff.

The Chain of Title of the Alleged Debt as Currently Known to Plaintiff

19. On a date better known to Verizon New York Inc. ("Verizon"), Verizon manufactured a bill (the "Alleged Debt") purporting to be for work done inside Plaintiff's home.

20. Plaintiff disputed the bill, on the basis

that no work was ever done by Verizon inside his home.

21. Plaintiff informed Verizon of his dispute.

22. Verizon noted the dispute on that account.

23. Verizon informed plaintiff by phone that the bill is cancelled.

24. The Alleged Debt is a nonexistent debt (the "Nonexistent Debt" or "Alleged Debt").

25. Verizon on its part made no further contact with Plaintiff regarding the bill.

26. Currently unknown to Plaintiff is whether Verizon failed to process the bill cancelation, or whether Verizon sold the Alleged Debt before cancelation.

27. At some point in 2011, I.C. System, Inc. ("I.C.") began collecting the Alleged Debt.

28. On July 27, 2011, Plaintiff wrote to I.C. disputing the debt and requesting verification of the Alleged Debt.

29. I.C. did not respond to Plaintiff's request for verification.

30. On October 14, 2011, Plaintiff received a collection letter about the Alleged Debt from Afni, Inc. ("Afni").

31. Plaintiff communicated with Afni disputing the Alleged Debt, and requested its verification.

32. Afni did not respond to Plaintiff's dispute or request for verification.

33. Currently unknown to Plaintiff is

whether Afni sold the debt directly to MCM or MFL. Plaintiff reserves the right and demands from MCM and MFL discovery for the chain of title of the Alleged Debt. Plaintiff also reserves the right and demands from MCM and MFL discovery to verify the validity of the Alleged Debt.

Defendants Collections Efforts and Practices

34. On or about October 8, 2013 Plaintiff's wife received a phone call from David Strimson ("Strimson").

35. Upon information and belief, Strimson is an employee of a Defendant.

36. Currently unknown to Plaintiff is whether Strimson is employed by MCM or MFL. Plaintiff reserves the right and demands from MCM and MFL discovery to verify whether Strimson is employed by MCM or MFL.

37. Subsequently, on October 8, 2013, Plaintiff retrieved his credit report through CreditCheck. ("Exhibit A").

38. The credit report produced by CreditCheck showed three current reports of Plaintiff's credit history with the Credit Reporting Agencies known as Experian, Equifax, and TransUnion ("CRA's").

39. With Experian, the Plaintiff's credit report showed a purported $131 debt that MFL assumed as of July 1, 2013 ("Experian 2013 Report").

40. The Experian Report did not include the source of the debt.

41. The Experian Report did not communicate the debt as disputed.

42. With Equifax, the Plaintiff's credit

report did not show a purported $131 debt from either MCM or MFL ("Equifax 2013 Report").

43. With TransUnion, the Plaintiff's credit report did not show a purported $131 debt from MCM or MFL ("TransUnion 2013 Report").

44. After reviewing the 2013 credit reports from CreditCheck, Plaintiff returned Strimson's phone call. ("Exhibit B").

45. Upon contacting the phone number provided by Strimson, Plaintiff was informed that he contacted MCM, "Thank you for calling Midland Credit Management, a debt collection company."

46. Strimson did not answer Plaintiff's phone call, wherein Plaintiff left a message for Strimson.

47. Moreover, Strimson never returned Plaintiff's call.

48. On or about October 17, 2013, Plaintiff contacted MFL by phone.

49. Plaintiff's call was answered by MCM.

50. MCM informed Plaintiff, "Your call may be monitored or recorded. . . . This is an attempt to collect a debt; any information obtained will be used for that purpose."

51. MCM educated Plaintiff for the first time that the alleged $131 debt listed in the Experian 2013 Report was from Verizon.

52. MCM informed Plaintiff that it purchased the alleged $131 debt from Verizon.

53. Plaintiff inquired as to how he could go about disputing the Alleged Debt.

54. MCM informed Plaintiff that he would

have to talk to a specialist in the Dispute Department, who would be able to handle Plaintiff's dispute.

55. MCM introduced the Plaintiff to speak to its representative, Emma Elliot, to handle the dispute ("Emma").

56. Emma introduced herself to Plaintiff as an employee of MCM.

57. Emma stated to Plaintiff, "advise me what your dispute is and I can see if I can assist you with that."

58. Emma queried Plaintiff, "Well, we need to, you know, work with what your dispute is in order to remove it, sir. So why are you disputing?"

59. Emma demanded of Plaintiff, "We need to know why they [Consumer] want it deleted and what their dispute is."

60. Emma told Plaintiff, "I need to know what your dispute is before I can just delete it for you. So you're saying that you want to dispute it, why is it you want to dispute it?"

61. Emma questioned Plaintiff, "Sir, you called in to dispute the debt. I need to know why you are disputing. So I'm asking you questions."

62. Plaintiff informed Emma he is disputing the debt: "*Because it's a Nonexistent Debt,*" wherein Emma responded: "that's not a dispute."

63. Emma insisted that Plaintiff act as a witness against himself and demanded he answer, "Did you ever have Verizon?"

64. Emma further insisted that Plaintiff act as a witness against himself and answer, "It's a very straightforward question. Did you ever have

Verizon service?"

65. Emma continued to insist that Plaintiff act as a witness against himself and answer, "Did you already pay it with Verizon? Did you never have Verizon?"

66. Emma intended to speak said words to the Plaintiff.

67. Emma ended the conversation without informing Plaintiff whether MCM or MFL accepted and notated the dispute.

68. Emma ended the conversation without informing Plaintiff whether MCM or MFL will communicate to third parties the dispute to the disputed debt.

69. MCM and its employee acts and omissions, done in connection with efforts to collect the Alleged Debt from the Plaintiff, were done intentionally and willfully.

70. MFL and its employee acts and omissions, done in connection with efforts to collect the Alleged Debt from the Plaintiff, were done intentionally and willfully.

71. Upon information and belief, MCM never mailed the initial collection letter dated August 9, 2013 (the "Initial Letter") to Plaintiff.

72. Upon information and belief, MFL never mailed the initial collection letter dated August 9, 2013 (the "Initial Letter") to Plaintiff.

73. On or about December 15, 2014, for the first time MCM communicated the Initial Letter to Plaintiff as an attachment to MCM's Answer.

74. December 15, 2014 is the first time that MCM communicated the Initial Letter to

Plaintiff.

75. The Initial Letter reads:

> "Unless you notify MCM within thirty (30) days after receiving this notice that you dispute the validity of the debt, or any portion thereof, MCM will assume this debt to be valid. . . Communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to: 8875 Aero Drive, Suite 200, San Diego, CA 92123; Attn: Consumer Support Services."

76. On or about December 15, 2014, MCM caused a purported cessation letter dated as October 17, 2013 (the "Cessation Letter") to be communicated to Plaintiff.

77. On or about December 15, 2014, for the first time, MCM communicated the Cessation Letter to Plaintiff as an attachment to MCM's Answer.

78. Upon information and belief, MCM never mailed the Cessation Letter to Plaintiff.

79. The Cessation Letter purported that MCM ceased collection efforts regarding the Alleged Debt.

80. Moreover, the Cessation Letter stated the following language:

> "Based on the information you have provided to us, we have instructed the three major credit reporting agencies to delete the above-referenced MCM account from your credit file." Emphasis added.

81. On April 23, 2015, Plaintiff retrieved his credit report through CreditCheck. ("Exhibit

C").

82. The credit report produced by CreditCheck showed three current reports of Plaintiff's credit history with credit reporting agencies, known as Experian, Equifax, and TransUnion (the "CRA's").

83. With Experian, the Plaintiff's credit report showed a purported $131 debt that is allegedly owed to MFL ("Experian 2015 Report").

84. On the Experian 2015 Report, the date is different from that of the Experian 2013 Report.

85. The Experian 2015 Report states "Status Date: September 25, 2013."

86. With Equifax, the Plaintiff's credit report appeared under "New Accounts" that a purported $131 debt that is allegedly owed to MCM ("Equifax 2015 Report").

87. On the Equifax 2015 Report, the balance date with MCM is declared as of July 1, 2013.

88. Upon information and belief, the Nonexistent only began appearing with Equifax at some point after Plaintiff brought the underlying suit. The basis for belief is confirmed by the fact that (i) in 2015, a 2013 account was listed as a New Account with Equifax, and (ii) before bringing the underlying lawsuit, Plaintiff reviewed his most recent Credit Report with all CRAs through CreditCheck, and there was no account of either MCM or MFL listed with Equifax.

89. With TransUnion, the Plaintiff's credit report showed under "New Accounts" a purported $131 debt that is allegedly owed to MFL ("TransUnion 2015 Report").

90. On the TransUnion 2015 Report, the balance date with MFL is declared as of October 8, 2013.

91. Upon information and belief, the Nonexistent Debt only began appearing with TransUnion at some point after Plaintiff brought the underlying suit. The basis for belief is confirmed by the fact that (i) in 2015, a 2013 account was listed as a New Account with TransUnion, and (ii) before bringing the underlying lawsuit, Plaintiff reviewed his most recent Credit Report with all CRAs through CreditCheck, and there was no account of either MCM or MFL listed with TransUnion.

92. As a direct or proximate result of the foregoing, MCM denied Plaintiff the right to dispute an Alleged Debt.

93. As a direct or proximate result of the foregoing, MCM continue to communicate to third parties information about the Alleged Debt without communicating the dispute.

94. As a direct or proximate result of the foregoing, MFL continue to communicate to third parties information about the Alleged Debt without communicating the dispute.

95. As a direct or proximate result of the foregoing, MCM continued to collect the Nonexistent Debt.

96. As a direct or proximate result of the foregoing, MFL continue to pursue Plaintiff a for collection of the Nonexistent Debt.

97. As a direct or proximate result of the foregoing, Defendants caused and Plaintiff suffered actual damages and injury, including but not limited

to, fear, stress, mental anguish, emotional stress, acute embarrassment and suffering for which he should be compensated in an amount to be established by a jury at trial.

RELEVANT FACTS PARTICULAR TO THE CLASS

98. The least sophisticated consumer does not know of the right to dispute a debt.

99. The least sophisticated consumer does not know of the right to dispute a debt without providing a reason.

100. The least sophisticated consumer does not know that the FDCPA provides a procedure for a debt collector's efforts to collect a debt.

101. The FDCPA imposes a duty on debt collectors like MCM to inform the consumer of their rights, including the right to dispute a debt.

102. Upon information and belief, MCM requires that Plaintiff furnish a reason to dispute the Alleged Debt, because, with all consumers who call to dispute the debt, as with Plaintiff, it is MCM's policy to employ the "Reason Requirement."

103. Plaintiff reserves the right and demands from MCM discovery to review the manual of the company policy in operation by MCM.

104. In the same professionalism MCM handled Plaintiff's phone call to dispute a debt, the same professionalism MCM applies to all consumers who call to dispute a debt.

105. Upon information and belief, as MCM required of Plaintiff, MCM applies the Reason Requirement to all consumers who call to dispute a

debt that a reason be furnished to dispute the Alleged Debt.

106. Upon information and belief, as MCM did to Plaintiff, MCM applies the Reason Requirement to all consumers who call to dispute a debt that a *valid* reason be presented to dispute the Alleged Debt.

107. Upon information and belief, as MCM did to Plaintiff, the implementation of the Reason Requirement leads to denying consumers the right to dispute a debt, because the least sophisticated consumer does not know that no reason is required to dispute a debt.

108. Upon information and belief, as MCM required of Plaintiff, the implementation of the Reason Requirement deceives consumers in abandoning the right to dispute a debt.

109. Upon information and belief, as MCM required of—and did to—Plaintiff, MCM directs all consumers that "Communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to: 8875 Aero Drive, Suite 200, San Diego, CA 92123; Attn: Consumer Support Services." Thus, when consumers call to dispute a debt, instead of a written dispute, MCM applies its Reason Requirement policy.

110. Upon information and belief, as MCM required of—and did to—Plaintiff, MCM practices are applied uniformly without distinguishing between the sophisticated and the least sophisticated consumer.

Basis and Intention for Class Certification

111. Plaintiff brings this action

individually, and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure.

112. The identities of all class members are readily ascertainable from the records of MCM.

113. MCM have a log with a record of every consumer who calls to dispute a debt.

114. Plaintiff reserves the right and demands from MCM discovery of its log indicating each consumer who called to dispute a debt between October 17, 2013 and December 15, 2014.

115. Plaintiff's class does not include individuals who are officers, members, partners, managers, directors, and employees of MCM or MFL.

116. The question of law and fact common to the Plaintiff's Class is whether MCM's practice requiring consumers to furnish a reason to dispute a debt, upon the consumer's attempt to dispute a debt, is allowed under the FDCPA.

117. The question of law and fact common to the Plaintiff's Class is whether MCM's practice requiring consumers to furnish a *valid* reason, upon the consumer's attempt to dispute a debt, is allowed under the FDCPA.

118. The question of law and fact common to the Plaintiff's Class is whether MCM's practice of the "Reason Requirement" is allowed under the FDCPA if it causes the least sophisticated consumer to believe that the right to dispute a debt was denied.

119. The question of law and fact common to the Plaintiff's Class is whether MCM's practice of the "Reason Requirement" is allowed under the

FDCPA if it deceives the least sophisticated consumer to believe that there is no such right to dispute a debt.

120. The question of law and fact common to the Plaintiff's Class is whether MCM's and MFL's practice of disclosing the disputed debts to third parties, without communicating that the disputed debt is disputed, is allowed under the FDCPA.

121. The question of law and fact common to the Plaintiff's Class is whether MCM's practice of informing consumers that a reason or valid reason is required to dispute a debt, is a statement materially false pursuant to 15 U.S.C. §§ 1692e(8) and 1692e(10).

122. The question of law and fact common to the Plaintiff's Class is whether MCM is liable for statutory penalties to each member of Plaintiff's Class as it is liable to Plaintiff.

123. The Plaintiff's claims are typical to the class members, as outlined, based upon the same facts and legal theories.

124. The Plaintiff can protect the interests of the Plaintiff's Class fairly and adequately.

125. The Plaintiff has retained experienced counsel in good standing, who will vigorously pursue this action in the best interest of the Plaintiff's Class.

126. This class action will preserve adjudications from inconsistent and varying rulings, including exercising the appeals process.

127. This class action will preserve judicial resources because Plaintiff's Class is so numerous that joinders of all members, the prosecution of all claims individually would be impractical, or that

Plaintiff not pursuing the valid claims common to each member of Plaintiff's Class will constitute a manifest of injustice.

128. This class action will protect class as a practical matter, including the least sophisticated consumer, who would have difficulties commencing an action by themselves to assert his or her rights.

129. Certification of a class under FRCP Rule 23(b)(2) will determine whether MCM's communications with the Plaintiff, riddled by MCM's violations under the FDCPA, is the same as with each member of Plaintiff's Class, where tantamount to declaratory relief and monetary relief under the FDCPA would be merely identical to that determination.

130. Class Certification under FRCP Rule 23(b)(3) will show that the questions of law and fact common to all member of the Plaintiff's Class predominate over any questions affecting an individual member, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

131. Defendants have acted, or failed to act, on grounds generally applicable to the Rule (b)(l)(A) and (b)(2) Classes, thereby making appropriate final injunctive relief with respect to the Class as a whole, to enjoin the Reason Requirement employed by MCM when disputing a debt.

132. Notice is hereby given, depending on the outcome of further investigation and discovery, at the time of class certification motion Plaintiff may seek to certify one or more classes only as to particular issues pursuant to Fed. R. Civ. P. 23(c)(4).

FIRST CLAIM FOR RELIEF

133. Plaintiff incorporates herein all of the allegations stated in paragraphs from 1 to 132, for relief on behalf of himself and all others similarly situated against MCM under 28 U.S.C. §§ 1331, 2201, and 2202, and 15 U.S.C. § 1692e(8).

134. Because MCM communicated to Plaintiff that a reason or valid reason is required to dispute a debt, and MCM communicated that, unless a reason or valid reason is provided, it will fail to communicate that a disputed debt is disputed.

135. Because MCM communicated to Plaintiff that a reason or valid reason is required to dispute a debt, MCM also threatened that, unless a reason or valid reason is provided, it will fail to communicate that a disputed debt is disputed.

136. Because MCM communicated to each member in Plaintiff's Class that a reason or valid reason is required to dispute a debt, MCM also communicated that, unless a reason or valid reason is provided, it will fail to communicate that a disputed debt is disputed.

137. Because MCM communicated to each member in Plaintiff's Class that a reason or valid reason is required to dispute a debt, MCM also threatened that, unless a reason or valid reason is provided, it will fail to communicate that a disputed debt is disputed.

138. A claim for declaratory and injunctive relief arises from MCM's "Reason Requirement" practice, requiring from consumers to provide a reason to dispute a debt.

139. A claim for declaratory and injunctive

relief arises from MCM's practice requiring from consumers a *valid* reason, upon the consumer's attempt to dispute a debt.

140. A claim for declaratory and injunctive relief arises from MCM's "Reason Requirement" practices that communicate to, or threaten, the consumer to fail to communicate that a disputed debt is disputed.

141. The right to dispute a debt is of the most fundamental of those set forth in the FDCPA.

142. A consumer is entitled to dispute the validity of a debt for a good reason, a bad reason, or no reason at all.

143. Because of MCM's "Reason Requirement" practice is communicated to the consumer as a prerequisite to disputing a claim and communicate, or threaten, the consumer to fail to communicate that a disputed debt is disputed; thus, declaratory and injunctive relief is warranted to prohibit and enjoin MCM's "Reason Requirement."

144. Plaintiff has no other adequate remedy at law available to redress and remedy this controversy for relief.

SECOND CLAIM FOR RELIEF

145. Plaintiff incorporates herein all of the allegations stated in paragraphs from 1 to 144, for relief on behalf of himself and all others similarly situated against MCM under 28 U.S.C. §§ 1331 and 15 U.S.C. § 1692e(10).

146. MCM informed Plaintiff "This is an attempt to collect a debt; any information obtained will be used for that purpose."

147. MCM informed consumers in Plaintiff's Class "This is an attempt to collect a debt; any information obtained will be used for that purpose."

148. Because MCM employed on Plaintiff the "Reason Requirement," MCM used a false representation and deceptive means to collect or attempt to collect a debt to use the consumers provided information for that purpose.

149. Because MCM employed on Plaintiff's Class the "Reason Requirement," MCM used a false representation and deceptive means to collect or attempt to collect a debt to use the consumers provided information for that purpose.

150. Because MCM employed on Plaintiff the "Reason Requirement" to inquire whether Plaintiff had Verizon, MCM used a false representation and deceptive means to obtain information concerning a consumer, to use that information to advance the collection efforts against Plaintiff.

151. Because MCM employed on Plaintiff the "Reason Requirement" to inquire whether Plaintiff had already paid Verizon, MCM used a false representation and deceptive means to obtain information concerning a consumer, to use that information to advance the collection efforts against Plaintiff.

152. Because MCM employed on Plaintiff the "Reason Requirement" to inquire whether the consumer in Plaintiff's Class actually had a relationship with the creditor, or whether the consumer in Plaintiffs Class paid the creditor, MCM used a false representation and deceptive means to obtain information concerning a consumer, to advance the collection efforts against that member of Plaintiff's

Class.

153. Plaintiff has no other adequate remedy at law available to redress and remedy this controversy for relief.

THIRD CLAIM FOR RELIEF

154. Plaintiff incorporates herein all of the allegations stated in paragraphs from 1 to 153, for relief on behalf of himself against MCM and MFL under 28 U.S.C. §§ 1331 and 15 U.S.C. § 1692e (2) (A), § 1692e (5) and § 1692e (10)

155. MCM communicated to Plaintiff through the Court, by way of alleging to have mailed a Cessation Letter to Plaintiff, stating that Defendants ceased to collect the Alleged Debt.

156. The Cessation Letter gives the appearance that Defendants deleted the Alleged Debt and the Defendants tradeline. (Exhibit D).

157. The Cessation Letter gives an appearance that on or before October 17, 2013, the Defendants "instructed" the CRAs to delete the Alleged Debt of Defendants tradeline.

158. On October 17, 2013, Defendants, actually, had not instructed the CRAs to delete the Alleged Debt and the Defendants tradeline. (Exhibit E).

159. Moreover, MCM still continues to communicate through CRA's that Plaintiff still owes the Alleged Debt and continue with the Defendants tradeline on the CRA's.

160. Moreover, MFL still continues to communicate through CRA's that Plaintiff still owes the Alleged Debt and continue with the Defendants

tradeline on the CRA's.

161. MCMs Cessation Letter, which is addressed to Plaintiff, was according to MCM issued before Defendants deleted the Alleged Debt from its tradeline.

162. MCM's Cessation Letter, which is addressed to Plaintiff, was according to MCM issued before requesting from the CRAs to delete Defendants communication of the Alleged Debt from Plaintiff's credit report.

163. Because Defendants did not delete the Alleged Debt from its tradeline, and MCM issued the Cessation Letter before requesting the CRA's to delete all communications of the Alleged Debt on Plaintiff's Credit Report, the cessation letter is a false representation and deceptive, and such cessation letter would likely deceive the least sophisticated consumer.

164. Because MCM continues to communicate to CRA's that Plaintiff owes the Alleged Debt, without communicating the dispute; MCM used a false representation to deceive Plaintiff, in order to collect, or attempt to collect, the Alleged Debt without communicating Plaintiff's dispute, and such cessation letter would likely deceive the least sophisticated consumer.

165. Because MFL continues to communicate to CRA's that Plaintiff owes the Alleged Debt, without communicating the dispute; MFL falsely represents the Alleged Debt, in order to collect, or attempt to collect, without communicating Plaintiff's dispute.

166. MCM and MFL knew or should have

known that the Alleged Debt is disputed, yet they each fail to communicate that the Alleged Debt is disputed.

167. Plaintiff has no other adequate remedy at law available to redress and remedy this controversy for relief.

FOURTH CLAIM FOR RELIEF

168. Plaintiff incorporates herein all of the allegations stated in paragraphs from 1 to 167, for relief on behalf of himself against MCM and MFL under 28 U.S.C. §§ 1331 and 15 U.S.C. §§ 1692e (2)(A), 1692e(8), and §1692e(10).

False Representation of the Status of the Alleged Debt

169. Plaintiff attempted to dispute a nonexistent debt.

170. MCM insisted that Plaintiff provide a reason, which he did by stating, "*it's a Nonexistent Debt.*"

171. MCM in response stated to Plaintiff that the Alleged Debt "is existent because it's here in our system."

172. Because MCM represented to Plaintiff that the debt is valid "because it's here in our system," MCM falsely represented to Plaintiff the legal status of a debt.

173. Because Verizon—the original creditor—informed Plaintiff that the bill is cancelled, the character, amount, and legal status of the debt was canceled, and MCM misrepresented the Alleged Debt when stating it is valid "because it's here in our system," MCM falsely represented the legal status

of a debt.

174. Because Plaintiff disputed the Alleged Debt with I.C. and Afni, which neither debt collector could verify the validity of the debt; MCM knew or should have known from the record of the Alleged Debt tradeline that the disputed debt is disputed. MCM violated §1692e(8) and §1692e(10) by stating that the Alleged Debt is valid "because it's here in our system," and falsely representing the legal status of the debt.

175. Because Plaintiff disputed the Alleged Debt with MCM, who knew or should have known from its records that the Alleged Debt is disputed, MCM violated §1692e(2)(A), §1692e(8), and §1692e(10) by communicating the Alleged Debt to Equifax (i) without communicating the dispute, and (ii) misrepresenting the legal status of the Alleged Debt.

176. Because Plaintiff disputed the Alleged Debt with MCM, MFL knew or should have known from its records that the Alleged Debt is disputed, MFL violated §1692e(2)(A), §1692e(8), and §1692e(10) by communicating the Alleged Debt to TransUnion (i) without communicating the dispute, and (ii) misrepresenting the legal status of the Alleged Debt.

177. The least sophisticated consumer would be deceived that the Nonexistent Debt is Existent Debt because the debt collector said the debt exists because it is in our system.

Collecting a Nonexistent Debt

178. Because Plaintiff disputed the Alleged Debt with I.C. and Afni, which neither debt collector

could verify the validity of the debt; MCM knew or should have known from the record of the Alleged Debt tradeline that the Alleged Debt cannot be validated. MCM violated §1692e (8) and §1692e (10) by collecting a Nonexistent Debt.

179. Because Plaintiff disputed the Alleged Debt with I.C. and Afni, which neither debt collector could verify the validity of the debt; MFL knew or should have known from the record of the Alleged Debt tradeline that the Alleged Debt cannot be validated. MFL violated §1692e (8) and §1692e (10) by collecting a Nonexistent Debt.

180. Because MCM supposedly ceased collecting the Alleged Debt, MCM improperly continues to collect a Nonexistent Debt.

181. Because MCM supposedly ceased collecting the Alleged Debt, MFL improperly continues to collect a Nonexistent Debt.

Retaliation for Suit

182. Upon information and belief, to harm the Plaintiff because Plaintiff brought the underlying suit, in retaliation, MCM communicated the Alleged Debt without communicating the dispute, which began appearing with Equifax only after Plaintiff brought the underlying suit.

183. Upon information and belief, to harm the Plaintiff because Plaintiff brought the underlying suit, in retaliation, MFL communicated the Alleged Debt without communicating the dispute, which began appearing with TransUnion only after Plaintiff brought the underlying suit.

184. Plaintiff has no other adequate remedy at law available to redress and remedy this

controversy for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, respectfully requests that this Court enter judgment in Plaintiff's favor and award damages as follows:

a) FOR THE FIRST CLAIM FOR RELIEF against MCM, (i) declaratory and permanent injunctive relief enjoining Defendants "Reason Requirement," (ii) class certification, (iii) recovery of actual damages, (iv) statutory damages for Plaintiff and Plaintiffs Class, and (v) costs with attorney's fees.

b) FOR THE SECOND CLAIM FOR RELIEF against MCM, (i) class certification, (ii) recovery of actual damages, (iii) statutory damages for Plaintiff and Plaintiffs Class, and (iv) costs with attorney's fees.

c) FOR THE THIRD CLAIM FOR RELIEF against MCM and MFL, (i) recovery of actual damages, (ii) statutory damages for Plaintiff and Plaintiffs Class, and (iii) costs with attorney's fees, (iv) as well as such other and further relief in favor of this complaint.

d) FOR THE FOURTH CLAIM FOR RELIEF against MCM and MFL, (i) recovery of actual damages, (ii) statutory damages for Plaintiff and

Plaintiffs Class, and (iii) costs with attorney's fees, (iv) as well as such other and further relief in favor of this complaint.

e) Plaintiff respectfully demands a trial by jury of all claims so triable. Dated: Brooklyn, New York

June 5, 2015

Respectfully submitted,
POLTORAK PC
/s/ Jacob T. Fogel

By: Jacob T. Fogel Esq.
26 Court Street, Suite 908
Brooklyn, NY 11242
(718) 855-4792
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VERIFICATION

I Levi Huebner verify to Rule ll(b) of the Federal Rules of Civil Procedure and under the laws prohibiting perjury, that I conducted a reasonable inquiry to the facts and laws stated in the foregoing pleading, and certify in good faith that under the circumstances:

1. The factual allegations stated in the foregoing related to me are true to the best of my knowledge.
2. The factual allegations stated in the foregoing related to the Defendants is made to the best of my knowledge by familiarity of the facts and statements Defendants or its agents made, while reserving the right to verify its veracity or dispute them.

Dated: Brooklyn, NY
June 5, 2015

Respectfully submitted,

By: Levi Huebner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEVI HUEBNER on behalf of himself and all other similarly situated consumers, *Plaintiff,* - against - MIDLAND CREDIT MANAGEMENT, INC., and MIDLAND FUNDING LLC, *Defendants.*	Case: 14-cv-6046 (BMC)

DECLARATION IN OPPOSITION WITH POINTS OF LAW

Levi Huebner affirms the following under the laws prohibiting perjury and states:

1. I am the Plaintiff in this action.

2. I make the following declaration in opposition, to the motion for sanctions and fees ("Motion") filed by to Midland Credit Management, Inc. ("MCM") and Midland Funding LLC ("MF") (collectively "Midland" or "Defendants"), based upon personal knowledge and familiarity of the history of this case. I respectfully request from the Court to enter an order denying Midland's Motion in its entirety.

3. This lawsuit was brought in good faith to correct Defendants practices that I believe violate the Federal Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* I state the following regarding the purpose of this action.[1]

BACKGROUND

i. Introduction

4. This case involves an alleged debt and its tradeline that was parked among several debt collectors. I disputed the alleged debt with Verizon New York Inc. ("Verizon") upon learning they erroneously charged me $131.21. (ECF PageID #: 840). Verizon purported to bill $131.21 for jerry rigging a wire in the Verizon box that was interfering with my phone line. (ECF PageID #: 840). The Verizon box was located across the street of my home; as such, Verizon could not charge me work for done outside my home. *See* 16

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[1] Associate Supreme Court Justice Kennedy explained, "Attorneys are duty-bound to represent their clients with diligence, creativity, and painstaking care, all within the confines of the law." *Jerman v. Carlisle, McNellie, Rini, Kramer*, 130 S.Ct. 1605, 1634 (2010). "When statutory provisions have not yet been interpreted in a definitive way, principled advocacy is to be prized, not punished." *Id.* "Surely this includes offering interpretations of a statute that are permissible, even if not yet settled." *Id.* The FDCPA "is a complex statute, and its provisions are subject to different interpretations." *Id.*

NYCRRR §609.2(a).[2] Cablevision had confirmed that there is nothing wrong with the wiring inside my home, and that the interference was coming from Verizon's box outside my home. (Exhibit A). Verizon's work log shows that no work was ever conducted inside Plaintiff's home. (Exhibit B). After I disputed the alleged debt, Verizon solicited I.C. Systems ("I.C."), a debt collector. (Exhibit C). I disputed the alleged debt with I.C. and the alleged debt was marked as disputed. (Exhibit C). I.C. requested that Verizon verify the alleged debt, and was unable to do so. (Exhibit C). Verizon recalled the alleged debt and solicited Afni, Inc. ("Afni") debt collectors. (Exhibit D). I disputed the alleged debt with Afni.

5. Having failed to verify the alleged debt with I.C. and Afni, Verizon enlisted the alleged debt with Defendants. (ECF 11-1).

6. MCM records confirm that they called my residence several times and were unsuccessful in reaching me. (ECF 65-3). Upon learning of MCM's call, I investigated my credit report and learned that MFL has listed an alleged debt with Experian without communicating the

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[2] Under New York law, Verizon is not allowed to charge for work done outside my property. *See* 16 NYCRRR §609.2(a) limiting the scope of charges to "Residential service is basic local exchange service furnished in private homes or apartments, including all parts of the subscriber's domestic establishment." (ECF 85-8). The Verizon box located across the street from my residence is not parts of the subscriber's domestic establishment.

dispute. (Exhibit E). The credit report did not attribute the alleged debt to Verizon. (Id). I returned MCM's call to investigate the basis of the alleged debt, and was greeted by Josh Gables ("Gables"). (Exhibit F at 4-5). Gables informed me that the alleged debt is related to Verizon's erroneous charge going back to 2010-2011. (Exhibit F at 5). I immediately informed Gables that I wanted to dispute the debt, and asked for the procedure of doing so. (Exhibit F at 7). Gables never informed that my dispute has been recorded. (Exhibit F at 7-8).

7. MCM records show that Gables had noted on the alleged debt that I called to dispute the debt. (ECF 65-3 at PageID #: 895 "CCI NAME ADD VERIFIED CALLED TO DISPUTE THE A/C ..ADD VERIFIED CALL T/F TO CSS DEPT"). The conversation should have ended right there; MCM conceded in discovery, that any MCM agent who speaks to a consumer can mark an alleged debt as disputed. (Exhibit G at 101-102[3]).

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[3] The Defendants 30(b)(6) testified the following:

Q. In other words, if you wanted to verbally dispute a debt and you call MCM and someone picks up the phone, who's the one that does that? A. If you are disputing, it can be either an account manager or Consumer Support Services.

Q. And the initial person could be either one? A. It depends on which number you called. If you just called the number on the letter, it would go to an account manager first.

8. Instead of informing me that the alleged debt has been marked as disputed, Gables transferred my phone call to an alleged "dispute department," which discovery disclosed is a so called "customer support" department. (Exhibit H at 8). During the transfer of that call, MCM informed me that any information obtained would be used to advance the collection of that debt. (Exhibit H at 8-9).

9. In discovery I learned that it is MCM's policy to transfer all disputes to this so-called "customer support" department, in an effort to grill consumers with "probing questions." (Exhibit H at Midland 297 and Midland 299). MCM calls that process an "effort to resolve the debt" ("effort to resolve the debt" or "effort to resolve a debt"). (Exhibit H at Midland 297).

10. MCM does not explain whether that so-called "effort to resolve a debt" seeks to resolve the debt in the consumer's favor or MCM's favor.

> Q. And then if someone wanted to actually dispute the debt, would the account manager refer them to someone else? A. I'm sorry, I don't understand that question.
>
> Q. The account manager is the first one to pick up if you called the number on the letter, is that correct? A. Yes.
>
> Q. And then would the account manager be able to take the disputed debt and write it down as disputed or would he have to send it to another location? A. No. He could, everyone that speaks to a consumer can mark the account as disputed. For additional help with resolution of the dispute they would transfer it to Consumer Support Services.

What is certain, MCM uses the so-called "effort to resolve the debt" process to "document" information about the consumer and the debt, information which is then available to advance the collection of the debt. (Exhibit H at Midland 298, Exhibit I at Midland 22, Midland 028 Midland 029, and Midland 030 for example, "Ask what language the consumer speaks, document this in the notes").

11. Gables transferred my call to the so-called "customer support" department, to enlist me—without my knowledge—in the so-called "effort to resolve the debt" process. (Exhibit F at 8). Gables did so without informing me of the right to decline this "effort to resolve the debt" process. (Id). In short, MCM successfully *entrapped* me into communicating with the so-called "customer support" department even though I did not request to speak to them. (Id).

12. During the transfer of that call, MCM did inform me that any information obtained would be used to advance the collection of that debt. (Exhibit F at 8-9). Having successfully *entrapped* me into speaking with the so-called "customer support" department, I was queried by MCM's agent, Emma Elliot ("Elliot"). (Exhibit F at 11).

13. Elliot asked me, "How can I assist you on this Verizon New York account?" I answered, "Well, I want to know what do I have to do if I want to dispute the debt." (Exhibit F at 12).

14. Elliot did not inform me that Gables had noted that I called to dispute the alleged debt. (Id). Elliot immediately began fishing, "Just advise me what your dispute is and I can see if I can assist

you with that." (Id). In discovery it was revealed that Elliot uttered those words based on MCM's script requiring its agents to engage with asking "probing questions." (Exhibit H at Midland 300, Exhibit I at: Midland-27 "Responsibility for providing documentation is on the consumer to validate the dispute claim Documentation must be provided to move forward with the dispute," Midland-028, Midland-032).

15. The Third Amended Complaint classified the "probing question" process as a "reason requirement." (ECF 35 ¶ 102).

16. Discovery also confirmed that MCM rejects disputes that are not in "writing." (Exhibit I at Midland-027 "Issuer follow up- invalid disputes: Consumer is sent a letter requesting proof (QCSSL letter) and account is sent back to collections (024 Warning code). If CSS does not receive the dispute in writing within the 45 day validation period, the account will then move back to its original queue").

17. At no point in my conversation with MCM did either Gables or Elliot disclose that the purpose of asking questions is part of the so-called "effort to resolve the debt" process. (Exhibit F).

18. Elliot repeatedly grilled me for intimate details about my reasons for disputing the alleged debt. (Exhibit F and ECF 35-2). "Well, we need to, you know, work with what your dispute is in order to remove it, sir. So why are you disputing?" ECF 35-2 at *12. "I need to know what your dispute is . . . So you are saying you want to dispute it. Why is it that you want to dispute it?"

ECF 35-2 at *13. "Can you elaborate as to what that means. Did you already pay it with Verizon? Did you never have Verizon?" Id. "Sir, you called in to dispute the debt. I need to know why you are disputing. So I'm asking you questions." ECF 35-2 at *14.

19. Thereafter, MCM asked me, "Did you want to move forward on your dispute?" ECF 35-2 at *15. In response, I informed MCM, "I told you I dispute it because it's a nonexistent debt." (ECF). MCM responded, "But you haven't given me why you are disputing. You are just saying you are disputing. I need to know what you are disputing." ECF 35-2 at *16.

20. In response to this action, MCM produced an alleged letter, claiming that this letter confirmed that October 17, 2013 MCM had requested the major credit reporting agencies to delete alleged debt from my credit profile. (ECF 11-2). Later on, MCM revealed that this alleged deletion request to the credit reporting agencies was not made until October 23, 2013. (ECF 21-1).

21. Discovery revealed, in making the alleged communication, MCM communicated to the credit reporting agencies that I owed $131.21 and MCM did not communicate the alleged debt is disputed. (Exhibit J).

22. Defendants purport that the communication in Exhibit J was to delete its report to the credit reporting agencies, the fact still presented that Defendants (1) did not mark the alleged debt as "disputed" and (2) that Defendants communicated to at least one third party that the I

owe $131 without communicating that this amount is "disputed."

ii. Plaintiff's Contention

23. The case focus: Plaintiff asked Defendants to have the alleged debt marked as disputed. In simple terms, marking the alleged debt as disputed would still allow Defendants to continue collection on the alleged debt, and allows Defendants to communicate the alleged debt, so long it is also communicates the alleged debt as disputed.[4] This case alleges:

(i) I had a right to designate the alleged debt as disputed, without being grilled for its reason;

(ii) Defendants were obligated (on October 23, 2013, November 19, 2013, December 17, 2013, and January 16, 2014) to communicate the dispute when communicating the alleged "deletion" from Plaintiff's credit report; and

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[4] This case does not focus on whether the dispute was made within thirty (30) days, known as the "validation period." If a consumer disputes an alleged debt within the validation period, the debt collector must cease collection, verify the debt, and provide the consumer with evidence of the debt. For the sake of clarity, if a consumer disputes a debt outside the validation period, the debt collector is obligated to communicate the dispute when communicating the dispute, no matter the purpose of the communication; except, the debt collector is not obligated to cease collection or verify the alleged debt.

(iii) Defendants should have communicated the disputed (on September 25, 2013) when communicating the alleged debt to the credit reporting agencies, since I.C. previously designated the tradeline as disputed.

24. The purpose, of having the debt collector designated an alleged debt as disputed, serves a benefit to the consumer to have the allege debt excluded from the "credit score."[5] A credit

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[5] The consumer has the unequivocal right to have a debt designated as disputed. "The FDCPA sets forth specific procedures and methods that must be used by debt collectors when attempting to collect outstanding debts: the statute does not give debt collectors the authority to determine unilaterally whether a dispute has merit or whether to comply with the requirements of the FDCPA in a given case." *Semper v. JBC Legal Group*, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005).

Debt collectors use the credit reporting mechanism as a tool to persuade consumers to pay their debts, and "is one of the most commonly taken steps in debt collection efforts." *Koller v. West Bay Acquisitions, L.L.C.*, C 12-00117 CRB, 2012 WL 1189481, at *5 (N.D. Cal. Apr. 9, 2012). The credit reporting system is a reputation tactic that rates a person's financial creditability. There are benefits to consumers with a prestige credit report, which is often used in the financial sector to determine trustworthiness. A consumer with negative markings on its credit report is usually presumed as unreliable. A credit report is also used by insurers, landlords, and employers for the same purposes to determine trustworthiness. The credit reporting system is often abused as a "powerful tool" for debt collection. Quoting *Rivera v. Bank One.*, 145 F.R.D. 614, 623 (D.P.R. 1993).

score is devised by the credit reporting agencies to determine a person's credit status. If the consumer

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There are important policy considerations involving the right to dispute a debt. If Debt collectors were to report erroneous, non-existent or disputed debts then the integrity of credit reporting would be undermined with a free reign to ruin a consumer's reputation. This capability had it existed would no doubt turn credit reporting into an effective tool for debt collector to blackmail consumers regardless of the debts actual validity.

For this reason, Congress has enacted the FDCPA and FCRA to eliminated abuses involved in credit report. Under the FDCPA Debt collectors cannot hijack a debtors credit and they certainly cannot hold a debtors credit hostage if the debt is disputed. The FDCPA consists of obligations on the debt collectors advise the consumers, whose debts they seek to collect, of specified dispute rights which congress instituted with the FDCPA. When a Debt Collector reports to a Credit Reporting Agency that a debt is disputed, that notation of dispute will be reflected in the consumer's credit report. The report will not be so notated simply because the consumer has submitted a dispute with the Credit Reporting Agency. The standard is objective based on the least sophisticated consumer, to achieve the objective of Congress, which is to eliminate abuses involved with credit reporting. . *See* Exhibit O *(FTC and FRB, Report to Congress on the Fair Credit Reporting Act Dispute Resolution Process* 22, n.139 (2006)); also *see Toliver v. Experian Info. Solutions, Inc.*, 973 F. Supp. 2d 707, 711–12 (S.D. Tex. 2013) ("[w]hen the dispute notations were removed, however, Toliver's credit score declined significantly. . . . [w]hen the dispute notation was added back, her credit score increased significantly"); *Saunders v. Branch Bank & Trust Co.*, 526 F.3d 142 (4th Cir. 2008) (when a furnisher reports an ongoing dispute by the consumer, TransUnion does not include the disputed information in assessing the consumer's credit score).

asks the credit-reporting agency to mark an alleged debt as disputed, the consumer will get not benefit to exclude the alleged debt from the credit score.

25. "The fact that plaintiff is an attorney does not alter the application of the objective 'least sophisticated consumer' standard in this case." *Johnson v Equifax Risk Mgt. Services*, 00 CIV.7836(HB), 2004 WL 540459, at *4 [SDNY Mar. 17, 2004]. "As the Second Circuit observed in *Clomon v. Jackson*, "the basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd," and that this standard "carefully preserves the concept of reasonableness." 988 F.2d 1314, 1318, 1319 (2d Cir.1993)." *Johnson v Equifax Risk Mgt. Services*, 00 CIV.7836(HB), 2004 WL 540459, at *4 [SDNY Mar. 17, 2004].

iii. A Call MCM to Mark as Disputed the Alleged Debt

26. As stated above, I called MCM as opposed to writing a dispute letter, to ensure that someone will confirm the basis of the alleged debt, and confirm that the alleged debt—if related to Verizon—was marked as disputed. The reason, I called as opposed to writing a letter, roots in my experience that I wrote a dispute letter to I.C. and Afni and the collection practice continued apparently without communicating the dispute.

27. *Hooks v. Forman, Holt, Eliades & Ravin, L.L.C.*, 717 F.3d 282, 286 (2d Cir. 2013)

afforded me the right to call to dispute the debt. *See Hooks*, specifically rejecting a writing requirement, so the consumer can have "the fact of the dispute reported whenever the debt collector communicates with others about the debt, in accordance with § 1692e(8)." *Id.*

28. As stated above, I recorded the conversation to memorialize that I disputed the alleged debt. MCM also consented to recording the telephone call by stating, "Your call may be monitored or recorded. . . . This is an attempt to collect a debt; any information obtained will be used for that purpose." Exhibit F at *8.

29. As a party to the telephone conversation, in accordance with *Hallmark v. Overton, Russell, Doerr & Donovan, LLP*, 952 F. Supp. 2d 507, 510 (W.D.N.Y. 2013) the FDCPA affords the consumer the right to record his own conversation with a debt collector.

30. At the time when I called MCM to dispute the alleged debt, all I knew was that I have an unequivocal right to dispute the alleged debt; I did not know that it was MCM's company policy to grill consumers for the intimate reason of disputing a debt. There is no foundation to any allegation that I caused MCM to ask intimate details about the alleged debt. There cannot be an entrapment when "Defendant's policies instruct its employees to ask follow-up questions when a consumer advises that he is disputing his debt." *Huebner v. Midland Credit Mgmt., Inc.*, 14 Civ. 6046 (BMC) (June 3, 2016) ECF 95 at ¶ 30. Such policies are subject to judicial review as to whether they are

permissible under the FDCPA, as Associate Supreme Court Justice Kennedy explained, "When statutory provisions have not yet been interpreted in a definitive way, principled advocacy is to be prized, not punished." *Jerman v. Carlisle, McNellie, Rini, Kramer*, 130 S.Ct. 1605, 1634 (2010). "Surely this includes offering interpretations of a statute that are permissible, even if not yet settled." *Id.* The FDCPA "is a complex statute, and its provisions are subject to different interpretations." *Id.*

31. The false accusation that I entrapped Defendants employee is foreclosed by the MCM's testimony, "everyone that speaks to a consumer can mark the account as disputed. For additional help with resolution of the dispute they would transfer it to Consumer Support Services." (Exhibit G, p. 103:3-6). The transcript of my call vividly shows, that when I first returned MCM's call to dispute the debt, Gables answered. (Exhibit F at 5-8, ECF 20-2 PageID 104). After Gables informed me, that the nature of the debt relates to a Verizon home phone service, I asked, "I want to know, if I want to dispute the debt, what do I have to do?" (Exhibit F, p. 107:20-22). Gables instead of disclosing that he marked the alleged debt as disputed (which MCM stated Gables was perfectly capable of doing), Gables *sua sponte* transferred my dispute to "Consumer Support." (Exhibit F, p. 117:24). I had only requested to dispute the alleged debt, because I wanted to ensure that the alleged debt is marked as disputed; I did not request to

resolve the alleged debt. Yet, I was entrapped[6] for a supposed "resolution" of the alleged debt—the so-called "effort to resolve the debt" process—without MCM ever informing me that the purpose of transferring to Consumer Support is for that supposed "resolution." Likewise, MCM never informed me—and does inform any consumer—

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[6] This key fact that anyone in MCM who speaks to a consumer can mark an alleged debt as disputed was unknown to me until examining MCM's 30(b)(6) witness. Regardless, in terms of the FDCPA, the violation is in misleading the consumer about their right to dispute a debt. MCM admits it is their policy to entrap consumers for the so-called "effort to resolve the debt" process with Consumer Support. (Exhibit G, p. 168:12-169:24):

> A. ". . . there are follow-up questions to help us resolve it because that's what Consumer Support Services tries to do is resolve the disputes." Q. "Okay. Do you have to ask the consumer do you want to resolve the dispute before asking further questions or you just get to ask further questions?" A. "No, you don't have to ask them. I would hope people wanted to resolve their dispute, that's why they are letting us know there's an issue. I would hope most people would want to resolve it and keep moving forward." Q. "Let's say a consumer tells you that it's a nondebt, are you supposed to keep on asking him questions as to how to resolve the dispute or are you supposed to stop right there?" A. "I don't know how to answer that question." Q. "Once the consumer disputes the debt, can the specialist keep on asking about the nature of the debt?" A. "I don't know what you mean by keep on, but, yes, they can ask questions regarding what the dispute is. They have already accepted that the person is disputing, but they are just trying to find out information which may help them and the consumer resolve the issue."

that the so-called "effort to resolve the debt" process does not affect the consumer's right to have the alleged debt marked as disputed.

32. A lengthy line of consumer case law forecloses the false accusation that I recorded Defendants employee to manufacture a lawsuit. *See: Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371-73 (1982) established that "testers have standing to sue." A "tester" is an individual who poses "for the purpose of collecting evidence of unlawful steering practices." *Id.* In *Murray v. Gmac Mortg. Corp.*, 434 F.3d 948, 952-54 (7th Cir. 2006) "testers... usually are praised rather than vilified." The cause of action is the "violation of the rights of `testers' to receive `truthful information'," which by itself "supports standing." *Tourgeman v. Collins Financial Services, Inc.,* 755 F. 3d 1109, 115-6, (9th Cir. 2014); *Alston v. Countrywide Financial Corp.*, 585 F.3d 753, 759-62 (3rd Cir. 2009); *In Re Carter*, 553 F.3d 979, 984 (6th Cir. 2009); *Ragin v. Harry MacKlowe Real Estate Co.*, 6 F.3d 898, 903 (2nd Cir 1993).

33. In *Jacobson v. Healthcare Fin. Servs.,* 516 F.3d 85, 91 (2nd Cir. 2008) the Second Circuit held, "the FDCPA enlists the efforts of sophisticated consumers like Jacobson as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others." *Id.* "In order to prevail, it is not necessary for a plaintiff to show that she herself was confused by the communication she

received; it is sufficient for a plaintiff to demonstrate that the least sophisticated consumer would be confused." *Id.* "As explained above, by providing for statutory damages and attorney[] fees for successful plaintiffs, the FDCPA permits and encourages parties who have suffered no loss to bring civil actions for statutory violations. Jacobson's subjective reaction to the letter, therefore, is neither here nor there." *Id.* "A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S.Ct. 1540, 194 L.Ed.2d 635, 650, 84 U.S.L.W. 4263 (2016) (Thomas concurring). In this case, I have shown that MCM interfered with my right to dispute an alleged debt, by grilling me for intimate details about my reason for disputing the alleged debt, a showing that my right to dispute the alleged debt was superseded by MCM's grilling practices. MCM employs this grilling practice against less sophisticated consumers, who are unlikely themselves to sue under the FDCPA.

34. In setting the Case Management Plan, my counsel sought to depose Elliot. The purpose was to evaluate the "intent" of Elliot when uttering the words she uttered because the Court had gone on to accuse me of "entrapment." The Court said, the reason why Elliot uttered the words she did is immaterial, it is a question of whether MCM "violated the law or they didn't violate the law." The following exchange transpired:

THE COURT: All right. I have reviewed the competing case management plans that you have submitted. I just have a couple of questions for the plaintiff.

I mean, the plan is not unreasonable. I'm just wondering, what do you think you're going to get from each of these defense witnesses?

MR. FOGEL: Okay. It's basically regarding the affirmative defenses, your Honor. Each witness had, at a certain part, is the one that wrote the letter that --

THE COURT: Right. I pretty much know who they are, there are a couple that I don't know. But what will they say besides, "I wrote the letter."

MR. FOGEL: For the affirmative defenses are it wasn't intentional.

THE COURT: It wasn't intentional to write the letter?

MR. FOGEL: Well, maybe not -- you know, like when you are speaking on the phone, you could say well, what was your

> intent? I didn't mean that, I didn't mean to say that, whatever it is that they say. So, you know --
>
> THE COURT: But that testimony would be inadmissible. I would never let that testimony in at trial.
>
> MR. FOGEL: Well, I think intent is the issue in trial.
>
> THE COURT: Well, first of all, I'm not sure it is. Is the defendant's intent an issue? Why? Either they violated the law or they didn't violate the law.[7] (Emphasis added).

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[7] "The FDCPA is a strict-liability statute: A plaintiff does not need to prove knowledge or intent." *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 448-49 (6th. Cir. 2014). If the defendant invokes a bona fide defense, "the issue of intent becomes principally a credibility question as to the defendants' subjective intent to violate the FDCPA." *Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006) followed in Jerman v. Carlisle, McNellie, Rini, Kramer, 130 S.Ct. 1605, 1623 n.20 (2010). "[I]n the context of a statute imposing liability for 'intentional violations,' that 'if a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent'." *Jerman v. Carlisle, McNellie, Rini, Kramer*, 130 S.Ct. 1605, 1612 n.6 (2010). "A debtor generally is not required to show an intentional or

35. The literature provided by the Consumer Financial Protection Bureau ("CFPB") provides that all a consumer only needs to state a dispute to the debt, such as "I do not have any responsibility for the debt you're trying to collect." (Exhibit K, a sample letter, from http://files.consumerfinance.gov/f/201307_cfpb_debt-collection-letter_1-not-my-debt.doc). The consumer is not required to state the reason for the dispute. To dispute a debt, one only need to "state simply, 'I dispute the debt.' These four words alone activate all of Cadleway's obligations under the FDCPA." *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 507 (7th Cir. 2008) (Rovner concurring in part and dissenting in part).

36. In *Clark v. Capital Credit & Collection Serv.*, 460 F.3d 1162 (9th Cir. 2006), the debtor directed the debt collector not to call her. Subsequently, Mrs. Clark did not realize that by calling Hasson, she was consenting to a return telephone call from the debt collector. Clark sued. The Ninth Circuit recognized that Clark had raised an issue of first impression. In short, the consumer informed the debt collector to cease calling, later the consumer called for information regarding the debt, triggering a return call from the debt collector, raising a question of first impression of

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knowing violation on the part of the debt collector to recover damages under the FDCPA." *Russell v. Absolute Collection Services, Inc.*, 763 F.3d 385, 389 (2nd Cir. 2014). "The FDCPA `imposes liability without proof of an intentional violation." *Id.*

whether the return call violated the FDCPA. No one accused the consumer of "entrapment" or "harassment."

37. In *Hudspeth v. Capital Management Services, L.P.*, Civil Action No. 11-cv-03148-PAB-MEH (D. Colorado February 25, 2013) the "plaintiff telephoned defendant and recorded the call." *Hudspeth* asked, (i) "what do I have to do to get this off of my credit," (ii) "What do I have to do to dispute this account," (iii) "Does my dispute have to be in writing," (iv) "Do I need to have a reason to dispute it"? *Capital Management* answered, "the best thing to do would be to pay it off in full," and "Yes. You have to send a letter in writing why you don't owe — why you feel you don't owe the bill, yes." *Id.* *Hudspeth* recognized a FDCPA violation and continued onto the question whether the misrepresentation was material. No one accused the consumer of "entrapment" or "harassment" for initiating the call, recording the conversation, or asking the questions that revealed the FDCPA violation.

38. In *Isham v. Gurstel, Staloch & Chargo, P.A.,* 738 F.Supp.2d 986, 990 (D. Arizona 2010) "Isham claims to have recorded most of this call, but no exhibit containing this recording has been filed thus far." No one accused the consumer of "entrapment" or "harassment" for initiating the call and recording the conversation.

iv. General Facts Applicable to All Causes of Action

39. It is undisputed that MCM is a debt collector. ECF 36 at ¶ 15.

40. MCM acts in the name of MF in obtaining portfolios of alleged "debt" for MFL. (ECF 85-2 at 15:23 – 16:23 "MCM would basically, I believe, make those arrangements on behalf of Midland Funding").

41. MCM services purported debts acquired in the name of MF, including purported debts from Verizon. (ECF 85-2 at 38:3-8).

42. Starting August 7, 2013, MCM sought to collect, from me, an alleged consumer debt ("alleged debt") in the name of Verizon. ECF 36 at ¶ 52.

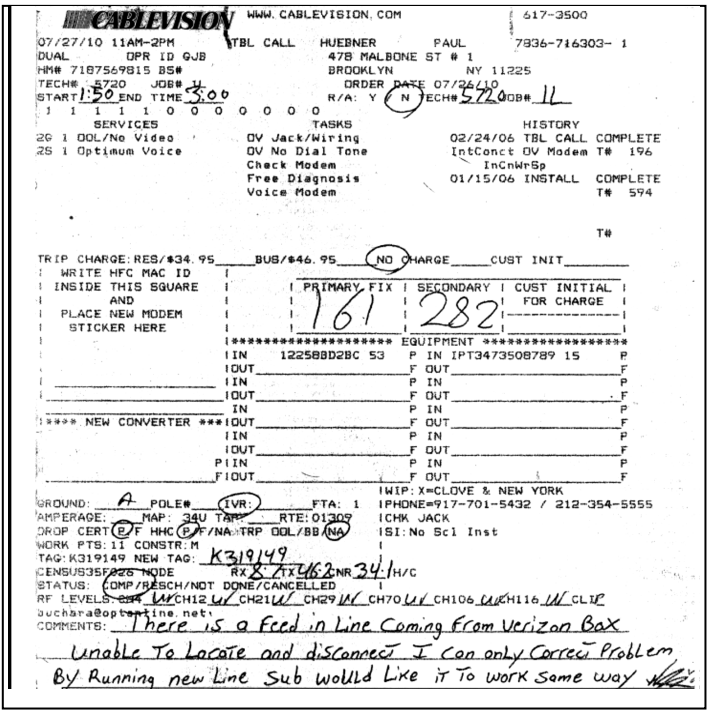
43. MCM assumed the alleged debt without my social security number. ECF 65-3 at PageID #895-896.

44. The alleged debt originated by Verizon, mistakenly issued in violation of 16 NYCRRR §609.2(a).

45. The story began when Verizon interfered with Cablevision's right to provide telephone service without interruption.

46. At some point in 2010, after I became a Cablevision customer Verizon intruded with its competitor-Cablevision right to provided me uninterrupted telephone service, and Verizon disrupted my home phone service.

47. On July 27, 2010, a Cablevision technician inspected the wiring inside and outside my home, and determined (1) that there is nothing wrong with the wiring inside my home, and (2) there is a Feed in the line coming from the "Verizon Box" (outside my residence), which interferes with Cablevision's signal. The Cablevision technician was unable disconnect the Feed. I recall the reason given to me at the time; Cablevision would not trespass into the Verizon Box. The Cablevision technician offered a possible solution to run a new line; the technician could not ensure that such solution would resolve Verizon's interference. (Exhibit A). At my deposition, I testified to that effect. (ECF 85-1). I have also maintained the same position throughout this entire case.



CABLEVISION WWW.CABLEVISION.COM 617-3500

07/27/10 11AM-2PM TBL CALL HUEBNER PAUL 7836-716303- 1
DUAL OPR ID GJB 478 MALBONE ST # 1
HM# 7187569815 BS# BROOKLYN NY 11225
TECH# 5720 JOB# 4 ORDER DATE 07/26/10
START 1:50 END TIME 3:00 R/A: Y (N) TECH# 5720 JOB# 11
1 1 1 1 1 0 0 0 0 0 0 0

SERVICES
2G 1 DOL/No Video
2S 1 Optimum Voice

TASKS
OV Jack/Wiring
OV No Dial Tone
Check Modem
Free Diagnosis
Voice Modem

HISTORY
02/24/06 TBL CALL COMPLETE
IntConct OV Modem T# 196
InCnWrSp
01/15/06 INSTALL COMPLETE
T# 594

T#

TRIP CHARGE: RES/$34.95 BUS/$46.95 NO CHARGE CUST INIT

WRITE HFC MAC ID INSIDE THIS SQUARE AND PLACE NEW MODEM STICKER HERE

PRIMARY FIX	SECONDARY	CUST INITIAL FOR CHARGE
161	282	

********** EQUIPMENT **********

IN 122588D2BC 53 P IN IPT3473508789 15 P
OUT F OUT F
IN P IN P
OUT F OUT F
**** NEW CONVERTER *** IN P IN P
OUT F OUT F
IN P IN P
OUT F OUT F
P IN P IN P
F OUT F OUT F

GROUND: A POLE# IVR: FTA: 1
AMPERAGE: MAP: 34U TAP: RTE: 01309
DROP CERT P/F HHC P/F/NA TRP DOL/BB NA
WORK PTS: 11 CONSTR: M
TAG: K319149 NEW TAG: K319149
CENSUS35F026 NODE RX 8 TX 462 CNR 34 H/C
STATUS: COMP/RESCH/NOT DONE/CANCELLED
RF LEVELS: CH4 W CH12 W CH21 W CH29 W CH70 W CH106 W CH116 W CLIP
buchara@optonline.net
COMMENTS: There is a Feed in Line Coming From Verizon Box Unable To Locate and disconnect I can only Correct Problem By Running new Line Sub would Like it To work Some way

WIP: X=CLOVE & NEW YORK
PHONE=917-701-5432 / 212-354-5555
CHK JACK
SI: No Scl Inst

8

48. I contacted Verizon for a repair of the signal interference. (ECF 85-1 at 25-26). Verizon refused because I was not a Verizon customer. (Id). I was forced to become a Verizon customer hoping that then Verizon would rectify the line interference to my phone line. (Id). On or about

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[8]I testified to the effect of this document and its content; at the time of discovery, I could not locate this document. (ECF 85-1). I located this document after Defendants had filed for summary judgment. I produce them now to confirm that my testimony was truthful in the first place.

August 28, 2010, I opened an account with Verizon. (Id).

49. On a date better known to Verizon, I received a bill wherein Verizon manufactured the alleged debt purporting to be for work done inside my home. (Id). I disputed the alleged debt with Verizon. (Id). Verizon informed me that they marked the alleged debt as disputed. (Id). Ultimately, Verizon informed me that they were not charging me for the alleged debt. (Id).

50. On July 12, 2011, I received a dunning letter from I.C. (Exhibit C).

51. I disputed the alleged debt with I.C. (Exhibit C).

52. I.C. flagged the alleged debt as disputed. (Exhibit C).

53. At I.C.'s request Verizon could not validate the alleged debt. (Exhibit C).

54. Verizon recalled from I.C. the account of the alleged debt. (Exhibit C).

This is in response to the subpoena sent to us regarding Levi Huebner 1C. System, Inc. is a collection agency. Attached are computer screen prints outlining the collection activity on the account. Our records indicate the following:

1. On July 12, 2011 our client, Verizon, placed an account owing by Levi Huebner to Verizon in the amount of S131.21 with I.C System for collection.
2. I.C. System sent its initial notice dated July 14. 2011 to the consumer. A copy of the July 14, 2011 letter is attached for your review. There is no record of a mail return
3. On July 27. 2011 I.C. learned of a dispute surrounding the account. The account was flagged as disputed. 1c suspended collection activity, notified its client of the dispute and requested verification of the account.
4. I.C. System did not receive verification of the account. Subsequently, Verizon recalled the account from our office.

The account has been archived from our system

Sincerely.

Candice Aguilar

Consumer Affairs Representative l.C. System. Inc.

55. In or about October of 2011, I received a collection letter from Afni regarding the alleged debt.

56. I disputed the alleged debt with Afni. (ECF 20-8). Afni ceased collection of the alleged debt.

57. MCM records show that between September 17, 2013 and October 12, 2013, MCM made a minimum of ten phone calls to my residence.[9] ECF 65-3 PageID 895.

58. Upon a review of my credit report, I learned that MF had communicated an alleged debt to Experian. ECF 20-3.

59. On October 17, 2013, I contacted MCM by phone to investigate the alleged debt and was informed, "Your call may be monitored or recorded. . . . This is an attempt to collect a debt; any information obtained will be used for that purpose." ECF 35-2 at *8.

60. This time, I recorded the conversation to (1) investigate the basis of the alleged debt reported to Experian, and (2) if the alleged debt is related to Verizon as I suspected, to memorialize that I informed Defendants of my dispute of the alleged debt. (ECF 20-2).

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[9] For instance, on September 28, 2013, MCM records show they called my home phone twice at 7:22 a.m. and 10:23 a.m., notwithstanding that it is "MCM policy is limited to one contact per day. . ." (Exhibit I at Midland-039). Although not part of the Third Amended Complaint, the calls MCM made at 7:22 a.m., 6:09 a.m., and 6:25 a.m. violate 15 U.S.C. 1692d(a)(1) by making calls to the consumer before 8:00 a.m. local time at the consumer's location.

61. I also called MCM as opposed to writing a dispute letter, to ensure that I can speak to an agent who will confirm that the alleged debt, if involving Verizon, was marked as disputed. (In the prior times when I wrote to I.C. and Afni, the debt was transferred to a different debt collector without my recording of the dispute).

62. On October 17, 2013 at 10:22 a.m., I called MCM and informed Gables that I dispute the alleged debt. MCM records shows, Gables noted that I called to dispute the alleged debt and transferred me to Consumer Support. (ECF 65-3 at PageID 895). A transcript of the phone recording shows that MCM did not inform me to have marked the account as disputed. (Exhibit F).

63. Elliot introduced herself to me as the Consumer Support for MCM. (ECF 20-2 17:24).

64. I asked Elliot, "I want to know what do I have to do if I want to dispute the debt." Elliot did not tell me the account is marked as disputed. Elliot did not inform me how to get the account marked as disputed. Elliot grilled me for the reason I disputed the alleged debt without ever informing me that the alleged debt was marked as disputed. (Exhibit F 13:5-10).

65. I explained to Elliot that the alleged debt is "nonexistent."[10] (Exhibit F 13:13-14).

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[10] According to MCM, a dispute is when a consumer's states "I do not owe this":

Elliot quarreled that the debt is existent because it is in MCM's system. (Exhibit F 14:6-12). Elliot insisted that my dispute is "not a dispute." (Exhibit F 16:10-13).

66. Subsequently I learned Elliot grilled me for a reason because it is MCM's internal policy to demand from consumers to disclose the reason for disputing a purported debt. I also learned that MCM probes consumers for a reason to advance its collection efforts.

67. To me this was an apparent violation of the FDCPA. "The consumer's right to take the position, at least initially, that the debt is disputed does not depend on whether the consumer has a valid reason not to pay." *DeSantis v. Computer Credit, Inc.*, 269 F.3d 159, 162 (2nd Cir. 2001).

68. I was faced with the duty imposed by the FDCPA to vindicate those consumers who are unknowingly confronted with MCM's probing questions that violate the FDCPA. "[A] plaintiff who brings an FDCPA action seeks to vindicate important rights that cannot be valued solely in monetary terms, and congress has determined that the public as a whole has an interest in the

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Q. "If I said to you 'I can't pay it because I don't think I owe this,' how would that be marked?" A. "If they said they didn't think they owed it, then likely there would be a -- probably a follow-up question to determine what they meant by that, but that sounds more like a dispute, so that would be a 050."

(Exhibit B at 41:66-11).

vindication of the statutory rights." *Tolentino v. Friedman*, 46 F.3d 645, 652-49 (7th Cir. 1995) citing *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986)

69. This lawsuit only charges Defendants for FDCPA violations apparent in the foregoing telephone call and subsequent events, namely probing consumers for the intimate reason of disputing the alleged debt, and MCM's failure to communicate the alleged debt as disputed.

v. The Basis for the First Claim for Relief

15 U.S.C. § 1692e states:

> "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."

70. *Part I* of the First Claim for Relief alleges that in violation of 15 U.S.C. § 1692e(8) MCM communicated to me that a reason or valid reason is required to dispute the alleged debt, and MCM communicated that, unless a reason or valid reason is provided, it will fail to communicate that a disputed debt is disputed. (ECF 35 ¶ 134).

71. *Part II* of the First Claim for Relief alleges that in violation of 15 U.S.C. § 1692e(8) MCM communicated to me that a reason or valid reason is required to dispute the alleged debt, MCM also threatened that, unless a reason or valid reason is provided, it will fail to communicate that a disputed debt is disputed. (ECF 35 ¶ 135).

72. I had a factual basis to assert the following claims for relief. MCM understood the nature of my phone call is "CU [Customer] STS [states] WANTS TO DISPUTE." ECF 65-3 at PageID #895 at 10:22:08 a.m. MCM did not inform me that the alleged debt is marked as disputed. (Exhibit F).

73. I asked MCM, "I want to know what do I have to do if I want to dispute the debt." In response, MCM informed me, "advise me what your dispute is, and I can see if I can assist you with that." (Exhibit F at *9).

74. MCM insisted, "I need to know what your dispute is . . . So you are saying you want to dispute it. Why is it that you want to dispute it?" (Exhibit F at *13).

75. MCM unequivocally stated to me, "Sir, you called in to dispute the debt. I need to know why you are disputing. So I'm asking you questions." (Exhibit F at *14).

76. I informed MCM, "It's a nonexistent debt." MCM then responded, "okay, sir, but that's not a dispute." (Exhibit F at *16).

77. Thereafter, MCM asked me, "Did you want to move forward on your dispute?" (Exhibit

F at *15). In response, I informed MCM, "I told you I dispute it because it's a nonexistent debt." MCM responded, "But you haven't given me why you are disputing. You are just saying you are disputing. I need to know what you are disputing." (Exhibit F at *16).

78. Based on the foregoing communications posed by MCM, a hypothetical consumer would understand that MCM will not accept a dispute made verbally unless the consumer submits qualifying answers to the questioning posed by MCM.

79. Based on the foregoing questions posed by MCM, a hypothetical consumer would be threatened—for not submitting to answer the questions posed by MCM—the debt will not be communicated as disputed.

80. My basis for asserting the first claim for relief is founded upon case law. The FDCPA affords consumers the unequivocal right to dispute a debt. *See Hooks v. Forman, Holt, Eliades & Ravin, L.L.C.*, 717 F.3d 282, 286 (2d Cir. 2013) ("The right to dispute a debt is the most fundamental of those set forth in § 1692g(a), and it was reasonable to ensure that it could be exercised by consumer debtors who may have some difficulty with making a timely written challenge"). It is well established, "The consumer's right to take the position, at least initially, that the debt is disputed does not depend on whether the consumer has a valid reason not to pay." *DeSantis v. Computer Credit, Inc.*, 269 F.3d 159, 162 (2nd Cir. 2001).

81. The right to dispute does not hinge on the debtor's reason for the dispute.[11] The general dispute rights afforded by the FDCPA give the debtor an unconditional right to contest or dispute any debt.[12] The reason the right to dispute

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[11] *See Mendez v. M.R.S. Assoc.,* 2005 U.S. Dist. LEXIS 13705 (N.D.ILL. 6-27-2005) ("There is no requirement that the consumer have a valid reason for disputing the debt") along with 2004 U.S. Dist. LEXIS 14901 (8-3-2004) ("A consumer is entitled to dispute the validity of a debt for a good reason, a bad reason, or no reason at all."); *also see Desantis v. Computer Credit, Inc.*, 269 F.3d 159, 162 (2nd Cir. 2001) (The FDCPA "gives the consumer the right to notify the debt collector that the debt 'is disputed'," also "A recipient, especially if unsophisticated, might well have understood that the collector's obligation to obtain verification would arise only if the consumer presented a valid reason for nonpayment. That would be inconsistent with the required message."); *Brady v. The Credit Recovery Company, Inc.*, 160 F.3d 64, 66 (1st Cir. 1998); *Semper v. JBC Legal Group*, 2005 U.S. Dist. LEXIS 33591 (W.D. Wash. 9-6-2005) ("the statute does not give debt collectors the authority to determine unilaterally whether a dispute has merit or whether to comply with the requirements of the FDCPA in a given case . . . 'failure to communicate that a disputed debt is disputed' violated the statute.")

[12] *Jones-Bartley v. McCabe, Weisberg & Conway, P.C .*, 2014 U.S. Dist. LEXIS 157571, 2014 WL 5795564 (S.D.N.Y. 11-6-2014):

> "Plaintiff has stated a claim for an FDCPA violation based on this language. Although Defendant's letter does not request that the recipient indicate a 'valid' reason for the dispute, *DeSantis* did not turn on this fact; instead, it held that a hypothetical least sophisticated consumer 'might well have understood' the notice to

is unconditional is to protect the debtor from becoming the victim of a grueling cross-examination by the debt collector. Otherwise, the consumer would unjustly be subject to a debt collector's self-governing process of harassment, interrogation, deliberation, and determination contrary to the purpose of the FDCPA to protect the consumer from a debt collector's self-governing process.

82. Based on the foregoing facts and case law,[13] I had a colorable basis of fact and law to

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> mean something that 'would be inconsistent with the [statutorily] required message.' *Id.* at 162. It further defined the 'required message' as one notifying the consumer of his or her 'right to notify the debt collector that the debt 'is disputed,' and it held that the consumer may exercise this right 'regardless of the absence of a valid reason for nonpayment.' Id. Because the statute, under *DeSantis*, does not require a 'valid reason,' and because it also just as surely does not require an 'invalid reason,' the clear implication of the Second Circuit's interpretation of the statute is that it requires no reason at all. Therefore, to the extent that Plaintiff alleges that Defendant's letter notifies the recipient that he or she must 'indicate the nature of the dispute,' Plaintiff has stated a claim for an FDCPA violation."

[13] In a nearly identical case, *Gomez v. Portfolio Recovery Assocs., LLC*, No. 15 C 4499 (N.D. Illinois E.D. June 20, 2016) the court concluded (emphasis added):

> "Portfolio argues that Gomez should not be able to pursue a Section 1692e(8) claim, contending that Gomez did not have a valid basis for disputing the Debt. Gomez has shown that she had a good faith basis to dispute the

Debt. In any case, the ultimate validity of the dispute is immaterial. Section 1692e(8) relates to a debt collector's reporting obligations. Gomez informed Portfolio that the Debt was disputed and it was Portfolio's obligation under the FDCPA to report that fact to TransUnion. Portfolio cannot avoid liability for its misconduct by questioning the validity of the dispute in the aftermath of its false statements. The FDCPA did not obligate Portfolio to report the Debt as disputed only if in retrospect Portfolio determined that the dispute was justified. *See Emerson v. Fid. Capital Holdings, Inc.*, 2015 WL 5086458, at *1 (N.D. Ill. 2015)(quoting *DeSantis v. Computer Credit, Inc.*, 269 F.3d 159, 162 (2d Cir. 2001) for the proposition that " [t]he consumer's right to take the position . . . that a debt is disputed does not depend on whether the consumer has a valid reason not to pay"); *Hoffman v. Partners in Collections, Inc.*, 1993 WL 358158, at *4 (N.D. Ill. 1993)(stating that '[t]here is no requirement that any dispute be 'valid' for' the FDCPA 'to apply; only that there be a dispute'). Nor was Portfolio authorized under the FDCPA to demand a reason for the dispute and then judge for itself whether the Debt should be deemed disputed. *See DeKoven [v. Plaza Associates,* 599 F.3d 578 (2010)](indicating that 'the consumer can, without giving a reason, require that the debt collector verify the existence of the debt before making further efforts to collect it'). Thus, Portfolio cannot avoid liability by contesting the validity of the dispute. Portfolio also attempts to present arguments as to whether Gomez instructed her attorney to tell Portfolio that the Debt was disputed. Again, however, the ultimate validity of any dispute is not relevant. Gomez's attorney acted on her behalf and made the determination to indicate that the Debt was disputed. Based on the above, the undisputed facts in this case show that Portfolio did not accurately report to TransUnion that the Debt was disputed. Portfolio has not shown that it made

assert the first claim for relief, because the least sophisticated consumer would understand that MCM would not communicate a dispute unless a reason is provided. The consumer would be bullied into providing a reason for the dispute against his or her will. Likewise, the policy of MCM to endeavor into the reason for the dispute would discourage consumers from exercising the right to dispute a debt.

vi. The Basis for the Second Claim for Relief

15 U.S.C. § 1692e states:

> "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

83. The Second Claim for Relief alleges that in violation of 15 U.S.C. § 1692e(10) MCM probes consumers for intimate detail about a debt,

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a bona fide mistake, and Gomez is entitled under the FDCPA to be compensated for Portfolio's improper credit collection practices. Therefore, Gomez's motion for summary judgment is granted and Portfolio's motion for summary judgment is denied."

improperly obtaining or attempt to obtain information that serves to advance the collection of such debt. The probing of questions in violation § 1692e(8) constitute making to the consumer a false representation of the law, a deceptive means to advance the collection to collect the debt, and is used against the consumer to obtain information for further collection activities.

84. I had a factual basis to assert this claim for relief. MCM informed me, "Your call may be monitored or recorded. . . . This is an attempt to collect a debt; any information obtained will be used for that purpose." (Exhibit F at *8).

85. Afterwards, MCM asked me, "So you are saying you want to dispute it. Why is it that you want to dispute it?" In response, I informed MCM, "Because it is a nonexistent debt." MCM still inquired "elaborate as to what that means. Did you already pay it with Verizon? Did you never have Verizon?" (Exhibit F at *12-13). MCM questioned me, "So I need you to elaborate so I can assist you with your dispute. Did you ever have Verizon?" (Exhibit F at *14).

86. MCM repeated its question, "Did you ever have Verizon, sir?" I replied, "I don't understand the question you are asking me. This is a nonexistent debt." MCM responded, "It's a very straightforward question. Did you ever have Verizon service?" (Exhibit F at *16).

87. These questions are made to elicit information that is either used to intimidate a consumer into paying a disputed debt or used by the debt collector in a civil proceeding to state with

personal knowledge that the consumer owes the disputed debt, based on the "recorded" answer of having had Verizon and not having paid an alleged debt that is disputed.

88. My basis for asserting the first claim for relief is founded upon case law. "An example of such illegal conduct is the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. § 1692e(10)."[14] *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2nd Cir. 1996). The "Act bans debt collection agencies from using any deceptive representation or deceptive means to collect or attempt to collect debts or to obtain information concerning debtors." *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172-72 (11th Cir. 1985). If "terminology was vague or uncertain [this] will not prevent it from being held deceptive under § 1692e(10) of the Act." *Foti v. NCO Financial Systems, Inc.*, 424 F.Supp.2d 643, 659-48 (2006) and *Akalwadi v. Risk Management Alternatives, Inc.*, 336 F.Supp.2d 492, 498-97 (Md. 2004). "15 U.S.C. § 1692e(10) makes it unlawful for a debt

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[14] "The legislative history of the passage of the FDCPA explains that the need for the FDCPA arose because of collection abuses such as use of obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." *Kropelnicki v. Siegel*, 290 F.3d 118, 126-25 (2nd Cir. 2002).

collector to use any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. A single violation of Section 1692e(10) is sufficient to establish liability under the Act." *Rumpler v. Phillips & Cohen Associates, Ltd.*, 219 F.Supp.2d 251, 254-55 (E.D.N.Y. 2002).

89. Based on the foregoing facts and case law, I had a colorable basis of fact and law to assert the second claim for relief, that the least sophisticated consumer would be deceived to reveal intimate details that advance the collection of a debt. The least sophisticated consumer would also be led to believe that the debt collector did not accept the dispute for the failure to provide such intimate details.

vii. The Basis for the Third Claim for Relief

15 U.S.C. § 1692e states:

> "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (2) The false representation of—(A) the character, amount, or legal status of any debt (5) The threat to take any action that cannot legally be taken or that is not intended to be taken. (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

90. The Third Claim for Relief alleges that in violation of 15 U.S.C. § 1692e(2)(A), § 1692e (5) and § 1692e (10) MCM made a false representation that they had deleted the alleged debt tradeline on October 17, 2013, when actually that alleged deletion had not occurred that day.

91. I had a factual basis to assert that this claim for relief. On October 17, 2013, MCM issued a letter stating, "we have instructed the three major credit reporting agencies to delete the above-referenced MCM account from your credit file." (ECF 11-2). Per MCM's admission, the alleged "request to delete the Account from Mr. Huebner's credit file was processed and transmitted to the three major credit reporting agencies on October 23, 2013." (ECF 22 ¶ 9).

92. My basis for asserting the third claim for relief is founded upon case law. "Collectors may not use false or misleading statements." [15] *Hart v.*

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[15] "At the outset, it should be emphasized that the use of any false, deceptive, or misleading representation in a collection letter violates § 1692e — regardless of whether the representation in question violates a particular subsection of that provision." *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2nd Cir 1993). "Because the list in the sixteen subsections is non-exhaustive, a debt collection practice can be a false, deceptive, or misleading practice in violation of § 1692e even if it does not fall within any of the subsections of § 1692e. *Id.* "A single violation of § 1692e is sufficient to establish civil liability under the FDCPA." *Id.* Our "courts have held that collection notices violate the FDCPA if the notices contain language that 'overshadows' or 'contradicts' other language that

FCI Lender Servs., Inc., 797 F.3d 219, 220-22 (2nd Cir 2015). In this case, MCM stated, "we have instructed," when that instruction actually had not happened on that day. Even if "it may be obvious to specialists or the particularly sophisticated that a given statement is false or inaccurate does nothing to diminish that statement's 'power to deceive others less experienced'." *Brown v. Card Service Center*, 464 F.3d 450, 452-53 (3rd Cir. 2006).

93. Based on the foregoing facts and case law, I had a colorable basis of fact and law to assert the third claim for relief, that the least sophisticated consumer would be deceived into a state of no-action to assume falsely that the alleged debt is resolved. MCM had falsely stated, "we have instructed," when that instruction actually had not happened.[16] The deception was intentional, as apparent that Defendants waived any right to a

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informs consumers of their rights." *Id* at 1319-18. Likewise, "courts have held that collection notices can be deceptive if they are open to more than one reasonable interpretation, at least one of which is inaccurate." *Id* at 1319.

[16] *See Burke v. Messerli & Kramer P.A.*, Civil No. 09-1630 ADM/AJB. (U.S. Dis. Minn. August 9, 2010) the debt collector was informed that the debt is disputed. The debt collector issued a March 13 letter to have ceased the collection of the debt. *Burke* held, "the March 13 letter is a communication in connection with the collection of a debt" and the allegation "that Messerli violated the FDCPA by failing to cease collection activities and communications without having first verified the debt after Burke disputed the debt survives summary judgment."

bone fide defense. (ECF 44 "Midland does not assert the bona fide error defense").

viii. The Basis for the Fourth Claims for Relief

15 U.S.C. § 1692e states:

> "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (2) The false representation of—(A) the character, amount, or legal status of any debt. (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed. (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

94. *Part I* of the Fourth Claim for Relief alleges that in violation of 15 U.S.C. § 1692e(2)(A), § 1692e (8) and § 1692e (10) MCM falsely represented the legal status of the Alleged Debt when stating it is valid "because it's here in our system," after Verizon—the original creditor—informed me that the bill is marked as disputed, the character, amount, and legal status of the debt was disputed.

95. *Part II* of the Fourth Claim for Relief alleges that in violation of 15 U.S.C. § 1692e(2)(A), § 1692e (8) and § 1692e (10) that MCM falsely represented the legal status of the Alleged Debt is valid "because it's here in our system." MCM knew or should have known from the record of the Alleged Debt tradeline that the disputed debt is disputed after I disputed the Alleged Debt with I.C. Systems and Afni, as neither debt collector could verify the validity of the debt.

96. *Part III* of the Fourth Claim for Relief alleges that in violation of 15 U.S.C. § 1692e(2)(A), § 1692e (8) and § 1692e (10), after I disputed the debt, MCM communicated the Alleged Debt to third parties—as an amount owed—without communicating the dispute, misrepresenting the legal status of the Alleged Debt.

97. *Part IV* of the Fourth Claim for Relief alleges that in violation of 15 U.S.C. § 1692e(2)(A), § 1692e (8) and § 1692e (10), after I disputed the debt, MFL communicated the Alleged Debt to third parties—as an amount owed—without communicating the dispute, misrepresenting the legal status of the Alleged Debt.

98. *Part V* of the Fourth Claim for Relief alleges that in violation of 15 U.S.C. § 1692e (8) and § 1692e (10), MFL continued collecting the Alleged Debt after I had disputed the Alleged Debt with I.C. and Afni who neither debt collector could verify the validity of the debt.

99. These misrepresentations are material because even though I have disputed the alleged debt separately with Verizon, I.C., and Afni, Defendants continued handling the alleged debt without communicating the alleged debt as being disputed.

100. These misrepresentations are material because they demonstrate that MCM will recklessly disregard a dispute to an alleged debt.

101. I had a factual basis to assert these claims for relief. MCM records show that they knew on October 17, 2013 at 10:22:08 that I "CALLED TO DISPUTE THE A/C." ECF 65-3 at PageID #895. This knowledge was confirmed when MCM's employee asked me, "I need to know what your dispute is . . . So you are saying you want to dispute it. Why is it that you want to dispute it? . . ." MCM also admits that I replied, "Because it's a nonexistent debt." ECF 35-2 at *13; ECF 65-3 at PageID #894-5. MCM confirmed to understand the purpose of the call, "So you are saying you want to dispute it." ECF 35-2 at 13; see also ECF 35-2 at *14 ("Sir, you called in to dispute the debt."). At the minimum, because MCM knew that I called to dispute the Alleged Debt, the legal status of the Alleged Debt is disputed. MCM falsely represented the legal status of a debt the Alleged Debt when stating it is valid "because it's here in our system." A consumer would have been deceived that MCM did not accept the dispute under the aspect of the alleged debt being valid for being in its system.

102. I had a factual basis to assert these claims for relief. On or about July 14, 2011, I received a dunning collection letter from I.C. I responded to I.C. disputing the alleged debt and informing them that they are attempting to collect "a nonexistent debt." I requested from I.C. to verify the Alleged Debt. (Exhibit C). I.C. corroborated the same information, that they marked the alleged debt as disputed, and stated Verizon failed to verify and failed to provide a "validation of the account." (Exhibit C). Thereafter, MCM stated to me that the alleged debt "is existent because it's here in our system." ECF 35-2 at *14. MCM also stated to me "you haven't given me why you are disputing." ECF 35-2 at 16. Plaintiff informed MCM, "It's a nonexistent debt." MCM replied, "Okay, sir, but that's not a dispute." Id. MCM falsely represented the legal status of a debt the Alleged Debt when stating it is valid "because it's here in our system."[17]

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[17] Defendants improperly bicker that the Alleged Debt is valid. At discovery, my counsel requested from Defendants to produce the Contract of Sale. I believe that the Contract of Sale would show that Verizon made no guarantee as to whether the Alleged Debt is valid, and would show that Verizon sold the alleged debt as a questionable. Defendants objected. (ECF 44). "Midland cannot, on the one hand, block any discovery into the question of whether it acted willfully, and then, on the other hand, ask the Court to dismiss this action because Edeh has not discovered any evidence that it acted willfully." *Edeh v. Midland Credit Management, Inc.*,

103. I had a factual basis to assert these claims for relief. MCM has repeatedly represented to the Court that the Cessation Letter represents that MCM has deleted the alleged debt Verizon has attributed to me. *See* ECF 36 ¶ 11 ("on October 17, 2013, MCM marked the debt at issue as disputed and sent a letter to Plaintiff informing him that MCM had requested that the credit bureaus delete the debt from Plaintiff's credit history."); see also ECF 11 ¶ 17 ("MCM decided to cease collections on Plaintiff's valid and delinquent debt obligation as evidenced by the October 17, 2013 MCM deletion letter sent to Plaintiff."). Yet, on four later dates (October 23, 2013, November 19, 2013, December 17, 2013, and January 16, 2014), MCM communicated to at least one third party that my "HDCBAL" is $131.00 and "HDPUE" is $131.00. See Exhibit J (Midland 290 defines "HDCBAL= current balance" and "HDPDUE=past due amount"). In communicating the $131.00 amount of the alleged debt from October 23, 2013 onwards, without communicating the dispute, MCM failed to communicate that the amount is disputed.[18]

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748 F.Supp.2d 1030, 1037-38 (Minn. 2010). In the same vein, Defendants blocked discovery into the contract of sale. Defendants proffered no evidence that the Alleged Debt is valid. At the minimum, I did produce evidence that I disputed the Alleged Debt with I.C.

[18] The focus is on the communication of the amount owed. Because MCM decided to communicate the balance of $131 it was also required to communicate that the amount is disputed.

Indeed, MCM records do *not* show that the alleged debt was marked "HDCOMPLYC" which would otherwise stand for the "compliance code. (1 □clean Z □deleted)."

104. I had a factual basis to assert the following claims for relief. As of April 23, 2015, CreditCheck Total records show that MF communicated that I have an alleged balance of $131.21, and that Defendants did *not* communicate my dispute when they reported information about my alleged account to CreditCheck Total. ECF 35-3 at PageID #453. Defendants conceded, "If MF appears on Plaintiff's CreditCheck Total document, it is because MCM reported that Plaintiff owed a debt owned by MF." (ECF 60 ¶ 3). "Assisted Credit still reported an unpaid debt to CreditCheck Total, knowing that Plaintiff had already paid her remaining balance directly to MCM." *Baeza v. Assisted Credit Servs., Inc.,* Case No. 8:15-cv-01451-ODW (JCG) (C.D. California July 19, 2016) "This reportage failed to mention that Plaintiff's debt had been paid, and is thus inaccurate under the CCRAA." *Id.* "Even if technically accurate, information provided by a furnisher is still inaccurate if the information is misleading or incomplete." *Id* citing *Cisneros v. U.D. Registry, Inc.*, 39 Cal. App. 4th 548, 579 (1995)

105. My basis for asserting the fourth claims for relief is founded upon case law. "A debt collector's false statement is presumptively wrongful under the Fair Debt Collection Practices Act, see 15 U.S.C. § 1692e(2)(A), even if the speaker is ignorant of the truth." *Randolph v.*

Imbs, Inc., 368 F.3d 726, 728 (7th Cir. 2004). "15 U.S.C. § 1692e(8), which makes illegal 'communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.' This standard 'requires no notification by the consumer at all, let alone a written communication. It depends solely on the debt collector's knowledge, regardless of how or when the collector acquires that knowledge." *Fasten v. Zager*, 49 F.Supp.2d 144, 148 (E.D.N.Y 1999). The FCPA "permits a private right of action against a furnisher of information for failing to comply with its duties after a debt is disputed as set forth in 15 USC § 1681 s-2(b)." *Daley v. A & S Collection Assocs., Inc.*, *Daley v. A & S Collection Assocs., Inc.*, 717 F. Supp. 2d 1150, 1155 (D. Or. 2010). *See Midland Funding L.L.C. v. Brent*, 644 F. Supp. 2d 961, 966 (N.D. Ohio 2009) found MCM and MFL liable for relying on its "system" to determine a debt as valid.[19]

106. My basis for asserting the fourth claims for relief is founded upon case law. The FDCPA "mandate that, if a debt collector elects to communicate `credit information' about a consumer, it must not omit a piece of information

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[19] In *Edeh v. Midland Credit Management, Inc.*, 748 F.Supp.2d 1030, 1038 (Minn. 2010), summary judgment was entered in favor of plaintiff on the claim that Midland relied in its "system" to implicit a permission for automatic phone calls.

that is always material, namely, that the consumer has disputed a particular debt." *Plummer v. Atlantic Credit & Finance, Inc.*, 66 F.Supp.3d 484, 490 (SDNY Dec. 8, 2014) (emphasis added). The "reporting a debt to a credit reporting agency can be seen as a communication in connection with the collection of a debt, the reporting of such a debt in violation of the provisions of § 1692e(8) can subject a debt collector to liability under the FDCPA." *Id* at 491-2. Likewise, "debt collectors may not benefit from unlawful collection practices merely by enlisting third party debt collectors to act on their behalf." *Id* at 492. "To allow a creditor to hire a debt collector after receiving actual knowledge that the consumer has retained legal representation for that debt and then withhold knowledge of this representation from the debt collector would blatantly circumvent the intent of the FDCPA. *Id.*

107. My basis for asserting the fourth claims for relief is founded upon case law. *See Jones-Bartley v. McCabe, Weisberg & Conway, P.C .*, 59 F.Supp.3d 617, 646 (S.D.N.Y. Nov. 6, 2014) "the clear implication of the Second Circuit's interpretation of the statute is that it requires no reason at all. Therefore, to the extent that Plaintiff alleges that Defendant's letter notifies the recipient that he or she must 'indicat[e] the nature of the dispute,' Plaintiff has stated a claim for an FDCPA violation." *Id.*

108. My basis for asserting the fourth claims for relief is founded upon case law. The FDCPA "statute requires the debt collector to

notify a consumer of his or her right to dispute a debt." *Id.* A debt collector may not dictate the merit of a dispute to a debt; 15 U.S.C. § 1692e(2)(A) prohibits a debt collector from misrepresenting the legal status of a debt. If the debt collector engaged in acquiring some information about the nature of the dispute, the debt collector must make clear to the consumer that its questions are without passing judgment as to the merit of the dispute.[20] The debt collector must inform that those questions will not affect the consumer's dispute. Here the Defendant admits it "asks for a description and asks the borrower to verbalize the

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[20] "As the Supreme Court has held in the general context of consumer protection--of which the Fair Debt Collection Practices Act is a part—'it does not seem 'unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line'." *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2nd Cir. 1996) (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965). "It is unnecessary to prove the contradiction is threatening." *Id at Russell.* "[B]ecause the FDCPA is a remedial statute aimed at curbing what Congress considered to be an industry-wide pattern of and propensity towards abusing debtors, it is logical for debt collectors repeat players likely to be acquainted with the legal standards governing their industry to bear the brunt of the risk." *Clark v. Capital Credit & Collection Servs.,* 460 F.3d 1162, 1171 (9th Cir. 2006). "The question is whether, from the perspective of the least sophisticated consumer, language contained in the notice overshadowed or contradicted the mandatory validation notice; if so, then the Act is violated. *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2nd Cir. 1996).

dispute is consistent with Plaintiff's allegation that such a request is inconsistent with the statute, which does not require a consumer provide such a 'description' or 'verbalization' when disputing a debt." *Jones-Bartley* at 647. The facts vividly showed that MCM passed judgment as to the validity of the debt, MCM's agent rejected the dispute,[21] and MCM did not inform me that the Alleged Debt has been marked as disputed.

109. My basis for asserting the fourth claims for relief is founded upon case law. In *Irvine v. I.C. System, Inc.*, Civil Action 14-cv-01329-PAB-KMT (U.S. Dis. Col. March 31, 2016) analogue to the fourth claims for relief, summary judgment was entered in favor of Plaintiff. *Irvine* decided, "Other courts have found that disputing the amount of a debt is sufficient to dispute the debt itself." *Irvine v. I.C. System, Inc.*, Civil Action 14-cv-01329-PAB-KMT (Col. March 31, 2016). When disputing the amount charged, "plaintiff's statements were sufficient to communicate to defendant that plaintiff disputed the debt." *Id.* "The instant case involves a debt collector who, in the process of updating information regarding plaintiff's account, updated only some of the information - plaintiff's address - without updating the information regarding the fact that the debt was disputed." *Id.*

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[21] The precise language "You are just saying you are disputing. I need to know what you are disputing. You haven't given me why you are disputing." ECF 35-2 at 16. I replied, "It's a nonexistent debt." *Id.* MCM passed judgment, "that's not a dispute." Id.

A debt collector may not update other account information without also updating 'a piece of information that is always material, namely, that the consumer has disputed a particular debt'." *Id.* Because the facts show, that in the process of its so-called deletion, MCM communicated the amount owed without communicating the dispute; I had a colorable basis for the fourth claims of relief.

ix. Defendants Failed to Act with Diligence As Required Under Rule 11

110. The foregoing facts and law as outlined confirm that I had a colorable basis to assert the claims for relief. If Defendants truly believed that I had no cause of action, they could have moved under FRCP 12(b)(6) with a pre-answer motion to dismiss the Amended Complaint or the Third Amended Complaint. If Defendants truly believed their evidence showed that I had no cause of action, Defendants could have produced such evidence either in its reply to Plaintiff's response to the Court's order to show cause, or in a FRCP 12(b)(6) pre-answer motion to dismiss the Third Amended Complaint. Defendants' did not act under Rule 11(b)(1) to either mitigate a so-called "unnecessary delay" or mitigate its "expense of litigation".

111. The record shows that the Court was "inclined" to dismiss this case from the onset. (Quoting ECF 16). Plaintiff in response provided a "more complete record, which he has now supplied." (ECF 26 at 2). While the Order to show Cause was pending, Defendants failed to put their

best foot forward with either the evidence or a contention that would have assisted the Court in disposing this action. This case survived the Court's sua sponte motion to dismiss. (ECF 26). The Court said, "The case shall proceed in the normal course to determine if the new version of the claim that plaintiff has now set forth has any merit." (ECF 26 at 3). "The case will proceed in the normal course based on plaintiff's new theory of the case." (ECF 26 at 12).

112. Thereafter, I amended the complaint to the Third Amended Complaint to clarify the factual content of this case. Again, Defendants' failed to act under Rule 11(b)(1) to either mitigate unnecessary delay or mitigate its expense of litigation and did not move with a FRCP 12(b)(6) pre-answer motion to dismiss the Third Amended Complaint.[22]

113. The Defendants did not take any course as required under Rule 11 and made a business decision to allow this case to proceed. Defendants failed to provide safe harbor notice to

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[22] Defendants also cite the Joint Mandatory Letter (ECF 13) the parties submitted January 28, 2015 as an outline of why Plaintiff should have dismissed his Amended Complaint. Defendants cannot overcome the inevitable, once "a party is granted leave to replead, the filing of an amended pleading resets the clock for compliance with the safe harbor requirements of Rule 11(c)(2) before a party aggrieved by the new filing can present a sanctions motion based on that pleading to the district court." *Lawrence v. Richman Group of CT LLC*, 620 F.3d 153, 158-57 (2nd Cir. 2010). The Third Amended Complaint was filed June 5, 2015.

specify with particularity the conduct warranting voluntarily dismissing of this case. The Rule 11 notice mandates informing: "... inter alia the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense. Indeed, only conduct explicitly referred to in the instrument providing notice is sanctionable." *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 381-83 (2nd Cir. 2003). "This notice requirement permits the subjects of sanctions motions to confront their accuser and rebut the charges leveled against them in a pointed fashion." *Id.* The Defendants failure to file a pre-answer motion to dismiss or utilizing Rule 11's procedure demonstrate that Defendants always knew that this case had a cognizable basis and is warranted on the facts and the law.

114. Likewise, as Defendants concede with ECF 99-3, on February 10, 2015, my counsel outlined the colorable basis for this action.[23] To

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[23] As the outline reads:

> The consumer wanted to dispute the debt. Pursuant to 1692 a reason is not necessary. Initially, the agent kept asking the same question, and the consumer responded with his answer.
>
> > Question: "Advise me what your dispute is and I can see if I can assist you with that"
> >
> > Collection Agency: "why are you disputing?"
> >
> > Collection Agency: "why is it you want to dispute it?"
> >
> > Consumer: "because it's a non-existent debt"

date, Defendants never answered why the outline is mistaken, unreasonable, or erroneous. As the Court held, "The parties agreed that if, in fact, a

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> The Collection Agency again asked why the consumer is disputing and the consumer responded.
>
> Collection Agency: "you called in to dispute the debt I need to know why you're disputing"
>
> Answer: "it's a non-existent debt"

Furthermore, the Collection Agency informed the Consumer that regardless of the Consumer's dispute the debt is existent and that a contact number will not assist the Consumer with his dispute.

> Collection Agency: "it is existent because it's here in our system"
>
> Consumer: "do you have a contact number?"
>
> Collection Agency: "my contact number is not going to assist you with your dispute"

Ultimately, the Collection Agency informed the Consumer that the Consumer's reason is not a dispute.

> Collection Agency: "did you want to move forward on your dispute?"
>
> Consumer: "I told you I dispute it because it's a nonexistent debt"
>
> Collection Agency: "I understand sir but you haven't given me why you're disputing your just saying what your disputing,
>
> I need to know what you're disputing"
>
> Consumer; "It's a non-existent debt"
>
> Collection Agency: "ok sir but that's not a dispute"

violation occurred during the recorded telephone call, than even prompt dispatch of the cessation notice following the call would not absolve defendant of a technical violation." (ECF 16). Counsel for Plaintiff adequately informed Defendants what Plaintiff believe is the theory of this case showing a colorable violation. (ECF 99-3). In short, if Defendants believed that Plaintiff's theory is mistaken, then Defendants held back the "theory of the case for some later date" in violation of Rule 16(f)(1)(B).[24] (*See* ECF 26).

x. Defendants Have No Basis to Claim Fees under 15 § 1692k or 28 § 1927

115. "In order to impose sanctions pursuant to its inherent power, a district court must find that: (1) the challenged claim was without a colorable basis and (2) the claim was brought in bad faith, i.e., motivated by improper purposes such as harassment or delay." *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 336 (2nd Cir. 1999). It is Circuit law, "bad faith may

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[24] In a separate order, the Court said, Defendants "contend that this will result in a series of 'mini-trials' involving each potential class member because defendants will need to depose each individual who has been contacted. That is up to defendants. If plaintiffs are going to put in the work to prosecute their case, defendants can put in the work to defend it. Regardless of whether defendants' disagree with the merits of plaintiff's approach to class certification, the production of these records is relevant to plaintiff's claim." (ECF 54 at 3)(emphasis added).

be inferred `only if actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 142-41 (2nd Cir. 2012), *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 336 (2nd Cir. 1999). A finding that an "action was brought 'in bad faith and for the purpose of harassment,' 15 U.S.C. § 1692k(a)(3)" does not exist where "the merits turned on a question of law." *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 97 (2nd Cir. 2010). The Court decided summary judgment based on a question of law, a finding of bad faith is therefore foreclosed.

116. "The showing of bad faith required to support sanctions under 28 U.S.C. § 1927 is similar to that necessary to invoke the court's inherent power." *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2nd Cir. 2012). "We have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes." *Star Mark Mgmt. v. Koon Chun Hing Kee Soy & Sauce*, 682 F.3d 170, 179 (2nd Cir. 2012).

117. As outlined above in paragraphs 1 through 114, each claim of relief is based upon facts that are colorable under relevant case law also cited. Defendants Memorandum goes into great length to cite the bad faith standard and still fail to articulate how that standard is invoked for the underlying case. (ECF 98). "Defendant must

provide evidence of plaintiff's bad faith (as opposed to counsel's bad faith)." *Puglisi v. Debt Recovery Solutions, LLC*, 822 F.Supp.2d 218, 23 (E.D.N.Y 2011). "Part of the [due process] function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact." *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). "Due process requires that courts provide notice and opportunity to be heard before imposing any kind of sanctions." *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 334 (2nd Cir. 1999).

118. "At a minimum, the notice requirement mandates that the subject of a sanctions motion be informed of: (1) the source of authority for the sanctions being considered; and (2) the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense." *Id.* "Indeed, only conduct explicitly referred to in the instrument providing notice is sanctionable." Defendants do not articulate the evidence of bad faith. Defendants fail to provide notice of which specific conduct or omission the sanctions are sought. As such, I am unable to respond to a specific conduct or omission, which Defendants are unable and fail to identify.

119. Indeed, "The standard for bad faith is higher than the standard for mere frivolousness" *Sanchez v. United Collection Bureau, Inc.*, 649 F.Supp.2d 1374, 1382 (N.D. Georgia 2009). "[I]n assessing bad faith, the court focuses primarily on Plaintiffs conduct and motives, and not on the

validity of the case." *Id.* "'Bad faith' requires more than a showing that the plaintiff's claim lacked merit; instead, it requires a showing that the plaintiff knew of the claim's lack of merit and nevertheless decided to press that claim." *Marshall v. Portfolio Recovery Associates, Inc.*, 646 F.Supp.2d 770, 776 (E.D. Pennsylvania 2009).

120. In any way, I outlined above the facts for each claim of relief and the evidence upon which they were based upon. I also outlined how the facts are colorable and cognizable under relevant case law. At the same time, throughout this entire case, Defendants failed to cite a single case law upon which it contended that no question of law existed under the facts presented by this case.

121. Defendants entire purported hook for its motion, is that the Court (1) rejected class certification without using defendants account coding system (ECF 98 PageID 1441 n1),(2) "Plaintiff attempted to entrap Midland into violating the FDCPA" (ECF 98 PageID 1439), and (3) Plaintiff is a "improper class representative" for attempting to "entrap the collection agent into violating the FDCPA" (ECF 98 PageID 1439-40). Each of these purported issues fail to state a claim for 15 § 1692k or 28 § 1927, besides having no merit whatsoever. For instance: In terms of the "coding system" there seems to be a clear

misunderstanding here.[25] My former counsels (Pomerantz LLP) sought to clarify to the Court, "Plaintiff's proposed Class definitions do not contemplate [relying exclusively on] Defendants' account coding system [of 050 and 261]." (ECF 94 Page ID 1400). Rather "Defendants' coding lists are important here to show that databases of consumers who would comprise the Class already exist." (Id). Meaning, I as the Plaintiff called to dispute the debt; yet, Defendants failed to mark my purported account with "050" and according to Defendants marked the account as "289."[26] According to Defendants, the reason is that I failed to provide a "valid reason" and evidence for my dispute.[27] Pomerantz took into account that

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[25] I did not draft the class motion papers. I maintain that there is no bad faith present of either Plaintiff's counsels or myself. Defendants fail to "provide evidence of plaintiff's bad faith (as opposed to counsel's bad faith)." *Puglisi v. Debt Recovery Solutions, LLC*, 822 F.Supp.2d 218, 23 (E.D.N.Y 2011).

[26] Q. "If Mr. Huebner's account was marked 050 between the date range October 13th, 2013, through October 15th, 2014, would his name appear on Exhibit Q?" A." Yes." Q. "So is it correct to state Mr. Huebner's account was not marked as 050 between the dates October 11th, 23 2013, and October 15th, 2014?" A. "Yes." (Exhibit M, p. 19:17-23).

[27] "Given Plaintiff's failure to marshal any supporting evidence that the Account is invalid, there is no genuine dispute as to whether the account exists. As such, Plaintiff's claim that the account was 'non-existent' fails." (ECF 66 at PageID 965).

according to Defendants testimony, not all consumers who call to dispute a debt are marked "050"[28], only those whose dispute was recorded.[29] The predominance inquiry allows focusing on the pattern of the violation giving rise to liability, without looking at each individual facts giving rise to the FDCPA violation, even if MCM did not mark the account with the coding system of "050." [30] The

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[28] Q. "Is it Midland's policy to mark it as 289 and not 050 if the customer tells them they are disputing the debt?" A. "That doesn't apply in every situation. If the -- in the course of that conversation it's from our standpoint going to resolution or being closed, then you would use a -- you could use a 289 to signify that it's resolved or, you know, the dispute is -- or the account is being closed at that point." Q. "Isn't it correct that it's Midland's policy for New York residents if they verbally dispute the debt to always mark their account as 050?" A. "No, not if the account is being closed." (Exhibit A p. 32:2-17).

[29] Q. "What does the 050 signify? What does that mean to you?" A. "That means there was a verbal dispute documented on the account." Q. "050 would only be for verbal disputes as opposed to written disputes?" A. "Correct." (Exhibit M, p. 15:17-23).

[30] "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v Bouaphakeo,* 136 S Ct 1036, 1045, 194 L Ed 2d 124 (2016). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.*

predominate issues presented by this case is the FDCPA violation of grilling the consumer for a reason to have a debt designated as disputed. Indeed, on September 2, 2015, the Court noted, "Plaintiff's letter makes it clear that he has grounds to move for class certification known to him." (ECF 09/02/2015).

122. In terms of the "entrapment" allegation Defendants have yet to elucidate this absurd allegation. As cited above in Section ii, Defendants admit that (1) any MCM employee can mark a debt as disputed, (2) it is not MCM's policy to inform the consumer whether the dispute has been marked, and (3) MCM will transfer the consumer to Consumer Support for a grilling of the reason to the dispute, under the so-called rubric of "resolving" the dispute. It is simply impossible to entrap Defendants to ask questions, when company policy is to grill consumers for the reason to dispute a debt.

123. As cited above in paragraph 32, "a tester who 'may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home,' had standing to sue by virtue of his allegation that his statutorily created right to truthful information about the availability of housing was violated." *Ragin v. Harry MacKlowe Real Estate Co.*, 6 F.3d 898, 903 (2nd Cir. 1993). Even if I only called MCM to gather evidence of a FDCPA violation (and never mind that I only called to ensure my debt was marked as disputed),

Defendants argument of entrapment still fails to void the longstanding of testers.

124. Indeed, that very allegation of entrapment was the cornerstone of the order to show cause. (ECF 16). Despite the allegation of "entrapment," the Court allowed this case to "proceed in the normal course to determine if the new version of the claim that plaintiff has now set forth has any merit." By this virtue, the Court allowed the case to proceed as appearing there is a colorable basis for suit.

xi. Defendants Refusal to Comply with Discovery

125. On July 7, 2015, I had completed production to Defendants discovery demands.

126. On July 21, 2015 the Court ordered, "Defendants are to respond to plaintiff's written discovery requests by 8/10/15." (ECF 07/21/2015).

127. On August 17, 2015 the Court denied Defendants motion to stall discovery "To the extent not all written discovery was produced, it must be produced at least 72 hours before the 30(b)(6) deposition or the Court may impose sanctions on defendants." (ECF 08/17/2015).

128. On September 4, 2015, the Court addressed Defendants failure to complete discovery production, "Any supplemental discovery that is ordered must be produced by 10/9/15." (ECF 09/04/2015).

129. On September 22, 2015 the Court ordered, "To the extent that plaintiff has requested

relevant documents, but defendants have not produced them, defendants will be precluded from relying on those documents at summary judgment or trial."

130. On October 15, 2015, Defendants appeared with "new arguments of burden and responsiveness that it had ample opportunity to bring to this Court's attention over the past several months." (ECF 54). "Defendants fail to explain why they did not discover and alert the court to these issues of burden as part of the extensive discovery disputes in this matter and why they waited until only four days before the conclusion of supplemental discovery to raise these issues." *Id.* "This Court previously held that any supplemental discovery must be produced by October 9, 2015. In light of defendants failure to comply with the Court's prior order any supplemental discovery must be produced by October 30, 2015."

131. On November 19, 2015, the Court ordered, "Defendants are required to file a certification by November 23, 2015 that they have produced all such documents in their possession, custody, or control." (ECF 59).

132. On December 6, 2015, the Court had to marshal again Defendants failure to comply with discovery, "Defendants have to produce all calls with EITHER codes 050 or 261 by 12/18/15. That was always the Court's clearly expressed intent." (ECF 12/06/2015).

133. To date Defendants have failed to produce the contract of the alleged debt sale under the unexplained excuse of burdensome.

Defendants also failed to produce a true copy of the actual data Verizon provided regarding Plaintiff. This information is material as the Consumer Financial Protection Bureau found, that Defendants purchase debts knowing that they are disputed or questionable. (Exhibit N).

134. This practice of Defendants dragging discovery until the Court forces compliance, is a vexatious practice that Defendants employed in this case. Defendants' did not act under Rule 11(b)(1) to either mitigate a so-called "unnecessary delay" or mitigate its "expense of litigation".

CONCLUSION

135. Defendants' motion for sanctions is without merit. Defendants cite *Ford v. Principal Recovery Group, Inc.*, No. 09-CV-627-JTC (W.D.N.Y. Sept. 29, 2011) where sanctions and a finding of bad faith were denied even though the Plaintiff posed the questions in the telephone call. Defendants also cite *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006) where sanctioned were reversed on appeal. *See Jacobson v. Healthcare Fin. Servs.*, 516 F.3d 85, 91 (2d Cir. 2008).

136. There is no basis to say that this "action was brought 'in bad faith and for the purpose of harassment,' 15 U.S.C. § 1692k(a)(3)" or sanctions where "the merits turned on a question of law." *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 97 (2nd Cir. 2010). This case was decided on the merits on the question of law as to whether

Defendants may probe consumers when designating a debt as disputed.

137. Defendants have failed to cite a single case or fact illustrating contentions of "bad faith," "unreasonable," "harassment," and "clearly vexatious" against Plaintiff's or Plaintiff's counsels. The little case law Defendants cite show that Defendants know that the mere prevailing in a case is insufficient to trigger a motion for sanctions; "there is a general presumption that an attorney is generally not liable for fees unless that prospect is spelled out." *Hyde v. Midland Credit Management, Inc.*, 567 F.3d 1137, 1140-41 (9th Cir. 2009). Defendants "motion has no legally cognizable basis in law or fact." *Nakash v. U.S. Dept. of Justice*, 708 F.Supp. 1354, 1367 (S.D.N.Y. 1988). By bringing a motion for sanctions against attorneys under 15 U.S.C. § 1692k(a)(3) Defendants "contravened the very standards that they have accused" Plaintiff.

138. Defendants' Motion is based on frivolous arguments, which Defendants have already been forewarned, have no basis in law. *See, Hyde*.

139. I respectfully request from the Court to enter an order denying Midland's Motion in its entirety and awarding Plaintiff costs and attorney's fees for being forced to defend myself against the Defendants' frivolous motion and any other relief which this court deems just and proper.

Dated: Brooklyn, NY
September 30, 2016,

Respectfully submitted,

/s/ Levi Huebner

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