IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MARY MITCHELL, on behalf of herself and the class defined herein,	)	
Plaintiff,	)	
v.	)	No. 2:12-cv-00523-TLS-APR
LVNV FUNDING, LLC; RESURGENT CAPITAL SERVICES, L.P., and ALEGIS GROUP, LLC,	)	
Defendants.	)	

PLAINTIFF'S MOTION TO RECONSIDER PART OF ORDER OF SEPTEMBER 28, 2017 HOLDING THAT LVNV IS NOT AN FDCPA "DEBT COLLECTOR"

Plaintiff Mary Mitchell respectfully requests that this Court to reconsider the portion of its Opinion and Order of September 28, 2017 (Doc# 168) denying, in part, summary judgment to plaintiff and granting summary judgment to defendant LVNV Funding, LLC ("LVNV") on the ground that LVNV is not a debt collector under the Fair Debt Collection Practices Act ("FDCPA").

The grounds for this motion are as follows:

Introduction

1. In reaching its opinion, this Court relied upon the Supreme Court decision in *Henson v. Santander Consumer, USA, Inc.*, 137 S. Ct. 1718 (2017), which, as this Court noted, was issued after briefing was completed.

2. The parties have not had an opportunity to discuss *Henson.*

3. There are two alternative definitions of "debt collector" in 15 U.S.C. §1692a(6),

which defines as a "debt collector" "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." (Emphasis added)

4. *Henson* addresses the question of whether an entity that "regularly" purchases defaulted debts to collect for its own account is a "debt collector" within the ***second*** prong of the definition in 15 U.S.C. §1692a(6), which requires that the debts be "owed or due or asserted to be owed or due another."

5. This Court erroneously applied *Henson* and the "owed or due or asserted to be owed or due another" requirement to the ***first*** prong of the §1692a(6) definition, which does not contain that requirement.

6. The facts of this case show that the principal (indeed only) purpose of LVNV's business is the collection of debts. Accordingly, it is a debt collector under the FDCPA and this Court should reconsider its decision finding that LVNV is not a debt collector.

Relevant facts

7. LVNV has admitted that it is engaged in the business of purchasing or acquiring, or claiming to purchase or acquire, allegedly defaulted debts originally owed to others and incurred for personal, family, or household purposes. [Plaintiff's Amended Statement of Material Facts ("Pl SMF") (Doc #144) ¶7]. It purchases portfolios of both domestic (U.S.) and international consumer debt from credit grantors including banks, finance companies, and other debt buyers. (Pl SMF ¶8). It outsources the management (collection) of purchased debts to Resurgent. (Pl SMF ¶9). Resurgent does not engages in collection on all such accounts.

8. Resurgent and LVNV are both affiliated with Sherman Financial Group. Answer, ¶25. LVNV provides Resurgent with a limited power of attorney to manage and work its inventory (Pl SMF ¶¶11, 12).

9. Defendant Resurgent operates as a collection agency and holds one or more collection agency licenses. Resurgent does not own any debts, but merely acts as a master servicer for debt collection purposes. (Pl. SMF ¶13). However, Resurgent does not engage in collection activity on all accounts for which it acts as a master servicer.

10. Resurgent collects debts on behalf of LVNV directly, or in many cases, will outsource the recovery activities to other specialized, licensed collection agencies. (Pl. SMF ¶14).

11. LVNV was the plaintiff in about 1,000 collection lawsuits filed in Cook County Illinois alone during 2016. (Pl SMF ¶15).

The Court Erroneously Applied *Henson*

12. This Court's Opinion and Order with respect to the liability of LVNV rests on the premise that "LVNV is the owner of the defaulted debt and sought to use Resurgent in order to collect the Plaintiff's debt (and the debts of class members) for the account of itself, not the account of another", (9/28/17 Opinion and Order, p. 17).

13. *Henson* held that an entity that "regularly" purchases defaulted debts to collect for its own account is not an FDCPA "debt collector" under the second prong of the definition, which requires that the collection be of "debts owed or due or asserted to be owed or due another."

14. This Court did not consider LVNV's liability under the first prong of the

§1692a(6) definition, covering "any business the principal purpose of which is the collection of any debts."

15. The Supreme Court expressly noted in *Henson* that "we do not attempt to" address this "principal purpose" prong because "the parties haven't much litigated that alternative definition and "in granting certiorari we didn't agree to address it." 137 S. Ct at 1721.

16. LVNV's sole business, as shown by the facts admitted above, is to purchase portfolios of defaulted consumer debts and then attempt to collect those debts from individual consumers such as plaintiff. Indeed, LVNV has not asserted that it engages in any other business activity.

17. This business model is precisely the type of debt collection activity that the plain language of the "principal purpose" prong covers. This first prong of the alternative definition excludes the "owed or due another" component of the second definition that compelled the result in *Henson*.

Henson Does Not Apply to "Principal Purpose" Debt Collectors

18. In *Henson,* the Supreme Court unanimously held that Santander was not a debt collector under the second, "regularly collects" prong. The Supreme Court explicitly stated that it was not addressing application of the FDCPA's alternative "principal purpose" definition, which was not at issue since it had not been presented by the parties and did not fall within the scope of its grant of review. 137 S. Ct. 1721. 2507342, *3. As the Court of Appeals below had noted, "The complaint does not allege, nor do the plaintiffs argue, that Santander's *principal business* was to collect debt, alleging instead that Santander was a consumer finance company." *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 137 (4th Cir. 2016). The record in

Henson showed that Santander was in fact in the auto finance business and thus its principal business was extending credit. It purchased a portfolio of auto paper from CitiFinancial. A percentage of the $3.55 billion portfolio, consistent with the usual default rates on consumer automobile paper, was in default. The plaintiffs' debts were among those in default. *See* 817 F.3d at 134, 140; *Henson v. Santander Consumer USA, Inc.*, 12cv3519, 2014 WL 1806915, at *4 (D. Md. May 6, 2014).

19. The "owed or due or asserted to be owed or due another" requirement only applies to "regularly collects" debt collectors. Plainly, "[t]he FDCPA establishes two alternative predicates for 'debt collector' status — engaging in such activity as the 'principal purpose' of the entity's business and 'regularly' engaging in such activity. 15 U.S.C. § 1692a(6)." *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56, 61 (2d Cir. 2004); *accord, Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1316 n.8 (11th Cir. 2015); *Schlegel v. Wells Fargo Bank, N.A.*, 720 F.3d 1204, 1208 (9th Cir. 2013) ("The FDCPA defines the phrase 'debt collector' to include: (1) '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,' and (2) any person 'who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.' 15 U.S.C. §1692a(6)."); *Hester v. Graham, Bright & Smith*, 289 Fed. Appx. 35, 41 (5th Cir. 2008); *Little v. World Fin. Network, Inc.*, 89cv346, 1990 WL 516554, *2–4 (D. Conn. July 26, 1990) ("the two prongs of the statutory definition of debt collector are separated by a comma and the word 'or', indicating that there are alternative definitions."). An entity meeting either one of the two definitions qualifies as a debt collector. *See Davidson v. Capital One Bank (USA), N.A.*, *supra.*

20. The *Henson* opinion held that, because Santander owned all legal and equitable rights to the debts in question, it did not qualify under the "regularly collects" part of the definition because the debts that it was collecting were not "owed or due or asserted to be owed or due another." The opinion does not purport to address entities engaged in "any business the principal purpose of which is the collection of any debts," and that portion of the statutory definition was disclaimed in briefs and oral argument. The Supreme Court accordingly limited the focus of its opinion:

> Second, the parties briefly allude to another statutory definition of the term "debt collector"—one that encompasses those engaged "in any business the principal purpose of which is the collection of any debts." §1692a(6). But the parties haven't much litigated that alternative definition and in granting certiorari we didn't agree to address it either. [¶] With these preliminaries by the board, we can turn to the much-narrowed question properly before us. 137 S. Ct. 1721.

"Owed or Due Another" Modifies *Only* the Second, "Regularly Collects" Definition of "Debt Collector"

21. The phrase "debts owed or due or asserted to be owed or due another" that was dispositive in *Henson* is properly read as modifying *only* the second prong of the definition, that is, one "who regularly collects or attempts to collect, directly or indirectly," and not the first prong, "any business the principal purpose of which is the collection of any debts." The principle of statutory construction known as "the rule of the last antecedent" controls here. The Supreme Court has described this rule as follows:

> When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the 'rule of the last antecedent.' See *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). The rule provides that 'a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.' *Ibid.*; see also Black's Law Dictionary 1532–1533 (10th ed. 2014) ('[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary

from the context or the spirit of the entire writing'); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012). *Lockhart v. United States*, 136 S. Ct. 958, 962-63, 194 L. Ed. 2d 48 (2016).

22. In *Lockhart*, the Court held that in a statute enhancing sentences for prior convictions for crimes "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," the limiting phrase "involving a minor or ward" applied only to "abusive sexual conduct" and not the other two crimes, so that a prior conviction for sexual abuse of an adult triggered the enhancement. Applying *Lockhart*, "the rule of the last antecedent" dictates that the phrase"owed or due or asserted to be owed or due another" does not modify the FDCPA's definition of a "principal purpose" debt collector.

23. Lower courts agree that the "owed or due another" language only applies to "regularly collect" debt collectors and that "principal purpose" debt collectors, such as debt buyers, are not subject to that requirement.

24. In *Davidson*, the 11th Circuit specifically stated that under the two-prong definition "'principal purpose' [is] not modified by 'owed or due another.'" 797 F.3d at 1316 n.8. The Ninth Circuit concurs. *Schlegel v. Wells Fargo Bank, N.A.,* 720 F.3d at 1209 ("This argument fails, because it would require us to overlook the word 'another' in the second definition of 'debt collector'").

25. The "last antecedent" principle applies with particular force in the case of the FDCPA definition of "debt collector," because the two prongs distinguish between collecting "debts owed or due or asserted to be owed or due another" and collecting "any debts." It is settled that "the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v.*

Gonzales, 520 U.S. 1, 5 (1997)); *see also HUD v. Rucker*, 535 U.S. 125, 131 (2002); *United States v. Clayton*, 613 F.3d 592, 596 (5th Cir. 2010) ("The CCPA uses the modifier 'any' in describing the tax debts to which it applies, a term we must construe as 'broad' and 'ha[ving] an expansive meaning.'" (quoting *Ali,* 552 U.S. at 219)). The Supreme Court has therefore explained that where, as here, Congress "did not add any language limiting the breadth of [the] word ['any']," it "must" be read "as referring to all" of the type to which it refers. *Gonzales*, 520 U.S. at 5; *see also Merritt v. Dillard Paper Co.,* 120 F.3d 1181, 1186 (11th Cir.1997). "Any" is an all-encompassing term which "contains no hint of an exception." *Hutto v. Finney*, 437 U.S. 678, 694 (1978); *Brooks v. United States*, 337 U.S. 49, 51 (1949); *Duffy v. Landberg*, 133 F.3d 1120, 1122-23 (8th Cir. 1998) (FDCPA's use of "any obligation" is broad). In other words, the word "any" is as expansive as possible.

26. Applied here, "any debts" is facially broader than "debts owed or due or asserted to be owed or due another," since this latter usage defines a subset containing fewer than all debts. *See Davidson v. Capital One Bank (USA), N.A., 7*97 F.3d at 1316 n. 8 ("'Any debts' means 'all debts,' including debts acquired from another, in default, or owed to the collecting entity.") The "owed or due or asserted to be owed or due another" language therefore cannot be applied to "any debts." Thus, the "principal purpose" definition covers all consumer debts, even if they are not owing to another and are instead owned by the debt collector defendant.

Debt Buyers Are Covered As "Principal Purpose" Debt Collectors

27. Post-*Henson* decisions addressing the issue before the Court hold that debt buyers are covered as "principal purpose" debt collectors. For example, in *Schweer v. HOVG, LLC*, 3:16cv1528, 2017 WL 2906504, *5 (M.D.Pa., July 7, 2017), the court held that the plaintiff had a

valid FDCPA claim not only against HOVG, which sent a collection letter on behalf of debt buyer Pendrick, but against its principal, Pendrick:

> Under the FDCPA, a debt collector is defined as "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." 15 U.S.C. § 1692(a)(6). In *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718 (2017), the Supreme Court specifically addressed only whether or not the defendant could be found a debt collector when attempting to collect debts owed to itself as opposed to "another." *Henson,* 137 S.Ct. at 1721. In holding that they could not, the *Henson* Court appears to address circumstances similar to this one, where Pendrick, as owner of the debt, and regardless of the origins of the debt, cannot be considered a debt collector under the Act for attempting to collect a debt that they own. But the *Henson* Court also made clear that its holding in that matter was narrow, and did not address the applicability of "in any business the principal purpose of which is the collection of any debts[.]" *Henson,* 137 S.Ct. at 1721.[2]
>
> It is that unaddressed language that Schweer asks the Court to apply to Pendrick now. As stipulated in the joint case management plan, Pendrick's principal purpose of business "is to buy defaulted debts and thereafter attempt to collect those debts." (Doc. 8, at 4). The Defendants stipulated specifically that Pendrick is indeed a debt collector for the purposes of the Act. (Doc. 9, ¶ 2). Thus, the Court finds that *Henson* does not shield Pendrick from liability, as Pendrick fits in the remainder of the definition of a debt collector unaddressed by *Henson*. Under this definition of debt collector, the unresolved question on the status of the debt at the time of obtaining ownership is irrelevant. Accordingly, Pendrick should not be dismissed from the present action, as it remains a debt collector as defined in the FDCPA. As Pendrick remains a debt collector, *Pollice* remains relevant, as liability may extend due to the actions of a debt collector hired by Pendrick in order to collect debts owed. The Defendants' motion for summary judgment to dismiss Pendrick is hereby DENIED.

28. Similarly, in *Tepper v. Amos Financial, LLC*, 15cv5834, 2017 WL 3446886, *8 (E.D.Pa., Aug. 11, 2017), appeal filed, the court held that "testimony that Defendant's business focuses exclusively on acquiring and servicing non-performing and semi-performing loans" – exactly the same situation as here – establishes that the "principal purpose" of entity is debt collection.

29. The seminal opinion of the 11th Circuit in *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015), the original precedent establishing the rule that the Supreme Court adopted in *Henson*, thoroughly explained how its ruling still preserved the FDCPA's applicability under the "principal purpose" definitional prong to a professional bad debt portfolio buyer such as Defendant. 797 F.3d at 1316 n.8. The Supreme Court's pinpoint citation to *Davidson* when identifying the Circuit conflict precipitating its grant of certiorari expressly referenced the portion of the *Davidson* ruling preserving this distinction. 2017 WL 2507342, *2.

Both "Regular" and "Principal Purpose" Debt Collectors Are Regulated By The FDCPA Because They Can Operate Without Regard to Any Need to Preserve Consumer Good Will

30. One justification for treating third party debt collectors and persons primarily engaged in the purchase and collection of debt as covered by the FDCPA is the fact that such entities do not need to preserve consumer "good will." According to the legislative history of the FDCPA, creditors, "who generally are restrained by the desire to protect their good will when collecting past due accounts," are not covered by the FDCPA, but entities who may have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them," are covered. S. Rep. 95–382, at 2 (1977), 1977 WL 16047, *2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696. *Aubert v. American General Finance, Inc.*, 137 F.3d 976, 978 (7th Cir.1998) ("Because creditors are generally presumed to restrain their abusive collection practices out of a desire to protect their corporate goodwill," creditors who attempt to collect debts "in their own name and whose principal business is not debt collection ... are not subject to the [FDCPA].")

31. Neither third party collectors, nor in particular entities whose principal or sole business is the collection of debts, have "good will" in that sense–they are simply interested in collecting and are not interested in getting business in the future from the consumer. *See, e.g., Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1059 n. 1 (9th Cir. 2011) (referencing "the sizeable growth in the debt buying industry" and documenting "that the average price for purchase of an obsolete debt at $0.045 per dollar"). Their client is not the consumer at all, but the merchant or creditor that hires them or sells debts to them. As one court explained:

> [T]here exists a logical distinction between the two types of entities identified in the alternative segments of the definition. The primary activity of an ordinary retailer (for example) is not the collection of debts, though it may regularly try to collect debts from its own customers. Such a company is constrained naturally in its debt collection activities with its own customers by concern over the effect of generating adversarial relationships. No such natural constraints exist if a company whose primary purpose is not debt collecting, such as a retailer, regularly collects debts for other companies, however, since any adversarial relationships stemming from debt collecting are generated with other companies' customers, and do not affect that company's primary activity.
>
> Furthermore, if a company's primary purpose is debt collection, then the natural constraints also do not apply, since that company's primary purpose is not dependent upon favorable relationships with customers. Thus, there are two situations where natural constraints do not protect against objectionable debt collection practices. The statutory definition of debt collector covered by the Act's prohibitions precisely identifies these two situations.

Little v. World Fin. Network, Inc., *supra,* 1990 WL 516554, *2–4 (D. Conn. July 26, 1990); *accord Davidson v. Capital One Bank (USA), N.A.,* 797 F.3d at 1316 n.8. However, a company like Santander, which is basically a credit grantor but acquires defaulted debts with sufficient frequency to meet the "regularly" test, ***does*** have "good will" concerns and ***does*** want to obtain further business from consumers.

32. LVNV, in contrast, does not have such concerns. Its insulation from such market-

based forces and constraints may explain at least in part the unfortunate history of predatory and unlawful collection misconduct documented by the FTC and the CFPB while enforcing the FDCPA against the defendant's bad debt portfolio buyer industry. See 15 U.S.C. § 1692l (Administrative enforcement). Among those actions is the following sampling that illustrates the critical need for FDCPA coverage of the bad debt portfolio buyer industry: *United States v. Capital Acquisitions & Management Corp.*, 2004 WL 577482 (2004) (FTC News Release, Consent Decree);[1] *In re Encore Capital Group, Inc., Midland Funding, L.L.C., Midland Credit Management, Inc., and Asset Acceptance Capital Corp.*, 2015 WL 5667140 (Sept. 9, 2015) (CFPB Consent Order); *In re Portfolio Recovery Associates*, *L.L.C.,* 2015 WL 5667141 (Sept. 9, 2015) (CFPB Consent Order); *see also* FTC, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010);[2] FTC, The Structure and Practices of the Debt Buying Industry (Jan. 2013).[3]

WHEREFORE, plaintiff requests that this Court reconsider its decision denying plaintiff's motion for summary judgment as to the liability of LVNV and granting LVNV's motion for summary judgment as to its liability and grant plaintiff's motion for summary judgment and deny LVNV's motion for summary judgment as to the liability of LVNV as a debt collector under the FDCPA.

Respectfully submitted,

[1] Available at https://www.ftc.gov/sites/default/files/documents/cases/2004/03/040324cag0223222.pdf.

[2] Available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.

[3] Available at https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

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CERTIFICATE OF SERVICE

I, Daniel A. Edelman, certify that on October 3, 2017, a true and accurate copy of the foregoing document was filed via the Court's CM/ECF system, and notification of such filing was sent to all counsel of record.

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