UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER

Plaintiff Mary Mitchell moved 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 question of the liability of LVNV as a debt collector under the Fair Debt Collection Practices Act ("FDCPA"), relying on *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721, 198 L. Ed. 2d 177 (2017). Plaintiff contends that *Henson* did not address the dispositive issue here –that LVNV is subject to FDCPA coverage under the first prong of the § 1692a(6)'s alternative definition, applicable to an entity engaging "in any business the principal purpose of which is the collection of any debts."

As discussed below, the facts here show that LVNV purchases time-barred debt, places time-barred debt for collection, and authorizes settlement of the debts. LVNV files thousands of collection lawsuits across state lines. LVNV's sole business is the purchase and collection of

debt. Thus, it is a debt collector under the FDCPA and this Court should reconsider its contrary ruling.

I. PLAINTIFF IS NOT FORECLOSED FROM ADVANCING ARGUMENTS ARISING FROM *HENSON*, WHICH WAS DECIDED SUBSEQUENT TO THE SUMMARY JUDGMENT MOTION

This Court's 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") did not resolve all of the matters before the Court. It was thus not a final order subject to either F.R.Civ.P. Rule 59 or Rule 60. Plaintiff's Motion to Reconsider was brought under neither of these sections. Plaintiff asks the Court to reconsider pursuant to its inherent authority to reconsider an interlocutory order at any time. *Atchley v. Heritage Cable Vision Assocs.*, 926 F. Supp. 1381, 1383 (N.D. Ind.), aff'd, 101 F.3d 495 (7th Cir. 1996) citing *Fisher v. National Railroad Passenger Corp.*, 152 F.R.D. 145, 149 (S.D.Ind.1993).

LVNV is incorrect when it argues that there has not been a significant change in the law since the parties briefed the motions for summary judgment. *Henson* expressly overruled the prior law of the Seventh Circuit, *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 501 (7th Cir. 2008), which held that the owner of a debt acquired after default was a debt collector under the FDCPA even if it didn't regularly seek to collect debts "owed ... another". 137 S. Ct. at 1721.

Furthermore, LVNV's assertion that this Court should not consider the Supreme Court's opinion in *Henson* because it was previously litigated is incorrect. Although LVNV cited the Fourth Circuit opinion in *Henson* and the question raised in the cert petition in its summary judgment briefing, neither anticipated the result. The Supreme Court could have followed *McKinney* rather than *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1315–1316

(11th Cir. 2015).

In addition the statement of the issue in the cert petition --whether a company who regularly attempts to collect debts it purchased after the debts had fallen into default is a debt collector subject to the Fair Debt Collection Practices Act-- did not anticipate the Supreme Court's limitation of the ruling to the second prong of the definition of debt collector –"regularly collects debts owed to another"-- while not addressing the first prong –"involved in any business the principal purpose of which is the collection of any debts."

Defendant's arguments to the contrary, basic fairness must allow plaintiff to assert any authority addressing *Henson* and this Court's reliance on it in its ruling granting summary judgment to LVNV, even if they were previously discussed. Plaintiff did not have the benefit of the guidance of the Supreme Court in making her arguments.

II. FDCPA LIABILITY DOES NOT HINGE ON WHETHER LVNV COLLECTS "FOR ANOTHER"

In its Memorandum Opinion and Order, this Court held that Plaintiff provided no facts to support her claim that LVNV is a debt collector because it collects debts "for another". That never was plaintiff's claim. Prior to *Henson*, under *McKinney*, plaintiff did not have to prove this in order to state a claim against LVNV, because the law required her only to show that LVNV bought debts after they were in default and sought to collect them. Plaintiff is entitled to address the new test.

It is not true that "LVNV is not a debt collector because it merely owns the debt and does not collect for another." (LVNV Resp at 2) LVNV's authorities do not support its contention.

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.*, 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.*

The definition distinguishes between (1) entities whose “principal purpose” is the collection of debt and (2) entities which regularly seek to collect debts “owed ... another”. Attaching the "for another" language to the first prong makes the second prong surplusage, since anyone whose principal purpose (more than 50%) is the collection of debts does so regularly. That is not an appropriate way to construe a statute. “Canons of statutory construction discourage an interpretation that would render a statute meaningless.” *Garcia v. Sessions*, No. 16-3234, 2017 WL 4532101, at *3 (7th Cir. Oct. 11, 2017) citing *In re Baker*, 430 F.3d 858, 860 (7th Cir. 2005).

The cases relied upon by LVNV do not help it. *Henson* does not address the first "principal purpose" prong test of 15 U.S.C. § 1692a(6). *Chernyakhovskaya v. Resurgent*, No. 2:16-cv-1235 (JLL), 2017 WL 3593115 (D.N.J. Aug. 18, 2017) also does not discuss the "principal purpose" prong of § 1692a(6), nor did the plaintiff there plead any allegations showing LVNV's principal purpose. In *Baranowski v. Blitt & Gaines, P.C.*, 17 C 2407, 2017 WL 3278322 (N.D.Ill. Aug. 2, 2017), the trial court ruled against plaintiff on the merits. There was no need for the court to reach the question of whether the debt buyer was a debt collector and the opinion does not address what facts were plead on that issue.

A recent decision considers these issues, rejects *Chernyakhovskaya* and follows *Schweer v. HOVG, LLC*, 3:16cv1528, 2017 WL 2906504, *5 (M.D.Pa., July 7, 2017) and *Tepper v. Amos Financial, LLC*, 15cv5834, 2017 WL 3446886, *8 (E.D.Pa.,Aug. 11, 2017), cited in Plaintiff's Motion to Reconsider. *Barbato v. Greystone Alliance*, No. 3:13-2748 (M.D.Penn, Oct. 19, 2017)(Appendix 3). *Barbato* rejected the defendant's contention that since it was a creditor under the second prong of § 1692a(6) (an entity which regularly seeks to collect debts "owed ... another"), it could not be a debt collector under the first prong of § 1692a(6) (an entity whose "principal purpose" was the collection of debts. "[T]he court does not read *Henson* as impacting FDCPA cases beyond those which include a dispute concerning the second definition of 'debt collector' in § 1692a(6)," citing *Tepper*. *Barbato at 22.*

LVNV argues that it is not liable for indirect debt collection, since the "direct or indirect" language appears only in the second prong of the definition of a debt collector. However, many of the actions taken by LVNV are direct debt collection: buying time-barred debts, referring time-barred debts, for collection; authorizing collection of debts pursuant to a power of attorney;

filing suit with LVNV as plaintiff (Appendix B); receiving money collected from debtors; and reporting debts on debtors' credit reports in LVNV's name. Filing lawsuits is debt collection. *Heintz v. Jenkins*, 514 U.S. 291 (1995).

Importantly, the Limited Power of Attorney ties LVNV directly to debt collection activities. (Appendix A) It authorizes "any action that is proper or necessary in asserting, protecting, or realizing the Grantor's (LVNV's) ownership rights in any account or prosecuting the Grantor's ownership duties", including endorsing checks, executing instruments, signing and assigning claims regarding any account.

III. PLAINTIFF HAS SHOWN THAT THE PRINCIPAL BUSINESS OF LVNV IS DEBT COLLECTION

LVNV's sole business, as shown by the statement of material facts submitted in connection with both parties' motions for summary judgment, is to purchase portfolios of defaulted consumer debts at steep discounts for pennies on the dollar and then attempt to collect those debts from individual consumers such as Plaintiff. Critically, LVNV has asserted no facts that it has any other business activity. It certainly cannot show that it has the broad variety of business activity of the consumer finance company, Santander, the entity sued in *Henson*, which originated auto finance paper.

Although it argues that it has no employees and does nothing other than hold debt, purchasing and collecting charged-off debts is a singular business activity that constitutes debt collection under the FDCPA. There is no business purpose in purchasing charged off debts if the ultimate goal is not to collect them. Unless the debts are turned into money their acquisition has no point. An entity cannot collect debts, unless it has debts to collect, either its own debts or those of another.

Debt buyers don't buy debts to use them as wallpaper, but to turn them into money. FTC reports discussing the debt buying industry describe the entire operation of debt buyers, including purchasing and enforcing debts, as a discrete industry. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (January 2013) (https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf)

The owner of the debt has to purchase the time-barred debt, place the time-barred debt for collection, and authorize settlement of the debt. Whether LVNV does this itself or has someone do it under a power of attorney, the problem is not that it hired a debt collector and the debt collector did something wrong independently of the debt owner. *Janetos v. Fulton Friedman & Gullace, LLP*, 825 F.3d 317, 325 (7th Cir. 2016).

A Massachusetts court found that LVNV's business is exactly that which plaintiff has shown here:

> LVNV is a Delaware limited liability company registered to do business in Massachusetts. In its Application for Registration filed with the Secretary of State, LVNV described the general character of its business as "consumer debt collection." In a letter to the Division of Banks dated August 3, 2012, LVNV's attorney described these debts as "previously defaulted consumer account portfolios." Although LVNV acquires these debts in order to collect on them and not for resale to others, it has never been licensed with the Division of Banks as a debt collector pursuant to the MDCPA. LVNV has stipulated that it uses instrumentalities of interstate commerce and the mails in conducting its business in Massachusetts.
>
> Between August 2009 and the present, at least 99 percent of LVNV's gross revenue has been derived from collecting on unpaid consumer debts owned by it. LVNV itself has no employees, however. To perform the tasks necessary to collect the debts that LVNV has acquired, LVNV uses a separate entity, Resurgent Capital Services, LP (Resurgent). Resurgent is licensed with the Division of Banks as a debt collector. LVNV's Servicing Agreement with Resurgent states that Resurgent "shall service and administer the Receivables in accordance with ... The Fair Debt Collection Practices Act of 1977 (as amended) and comparable state statutes ..." The Servicing Agreement also grants

> Resurgent a "Limited Power of Attorney" to take certain actions on LVNV's behalf. That includes contacting the debtors to seek payment. Resurgent has full discretion to hire third parties to assist in the collection efforts and to retain law firms to bring collection actions. . . .
>
> Although Resurgent is the entity that actually contacts debtors and hires counsel to institute litigation, LVNV is the named plaintiff in every collection action or claim made in connection with a defaulted consumer debt that it owns. Because it remains at all times the owner of the debt in question, it would necessarily be the source of all documentation underlying that debt. All proceeds from the collection claims instituted on LVNV's behalf go to LVNV. Between 2010 and 2015, over 18,000 lawsuits were brought against Massachusetts residents in Massachusetts courts seeking judgment on debts owned by LVNV. Judgment entered in over 17,000 of them. During that same time period, approximately 3,500 proofs of claims naming LVNV as the creditor were filed in bankruptcy cases in this Commonwealth where the debtor was a Massachusetts resident. Instructions were also sent to credit bureaus in LVNV's name concerning more than 600,000 distinct debt accounts of Massachusetts residents. There are approximately 6,175 accounts owned by LVNV in which a wage garnishment action was pending against a Massachusetts resident at some time between 2010 and May 2015.

Dorrian v. LVNV Funding, LLC, No. SUCV142684BLS2, 2017 WL 2218773 (Mass. Super. Mar. 30, 2017).

The Illinois Supreme Court held LVNV to be subject to the Illinois Collection Agency Act, governing entities which "receive, by assignment or otherwise accounts, bills or other indebtedness. . . with the purpose of collecting monies due on such account, bill or other indebted ness and engages in collecting the same." 225 ILCS 425/3(b)(d). *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 25, 32 N.E.3d 553, 560, reh'g denied (May 26, 2015). The court specifically rejected LVNV's argument that it was insulated from liability because it hired an attorney to file the lawsuit:

> The argument that the public is protected from the abuses of unscrupulous debt buyers by their utilization of attorneys is equally meritless. It is, after all, the debt buyers who supply the evidence and witnesses to attorneys in the myriad complaints they file. We reject LVNV's argument that debt buyers' lawsuits—with or without the involvement of counsel—pose no danger to the public welfare and are thus not subject to the restrictions and penalties the legislature has seen fit to impose.

32 N.E.3d at 560, reh'g denied (May 26, 2015)

LVNV's 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*, thus eliminating any basis for LVNV to claim that because it is the current owner of the debt it is exempt from Congress's efforts to rein in and regulate LVNV and its fellow professional debt buyers. The fact that LVNV brings thousands of lawsuits in its own name is evidence that debt collection is the sole business of LVNV.

LVNV purports to distinguish *Schweer v. HOVG, LLC*, 3:16cv1528, 2017 WL 2906504, *5 (M.D.Pa., July 7, 2017), because the debt buyer there bought debts and "thereafter attempt(ed) to collect those debts." (LVNV Resp at 6) That is exactly what LVNV did here.

The business of LVNV is to acquire and service defaulted debts. LVNV acquires debts in default (LVNV Resp at 5), files thousands of lawsuits in its name (Appendix B) and gets the money collected (Appendix A).

Entities are liable under FDCPA. 15 U.S.C. §1692l. But an entity has to act through a human. LVNV asserts that it has no employees so it has to act through an agent. It does so by granting a power of attorney to Resurgent to manage and work its inventory (Pl SMF ¶¶11, 12). The acts of Resurgent then are imputed to LVNV. If Resurgent sends a debt collection letter or hires an attorney to file a lawsuit (Pl SMF ¶¶14, 15), the acts of the attorney are imputed to LVNV. Like HOVG, LVNV's business is the acquiring and collecting of debts. The business of Amos Financial in *Tepper v. Amos Financial, LLC*, 15cv5834, 2017 WL 3446886, *8 (E.D.Pa.,Aug. 11, 2017) also cannot be distinguished from that of LVNV.

The fact that none of LVNV's thousands of lawsuits were filed against plaintiff or the class (LVNV Resp Fn 2) is not telling. The "debt collector" question is what is LVNV's "principal purpose", not what was done to plaintiff. *Siwulec v. J.M. Adjustment Services, LLC*, 465 Fed. Appx. 200, 203-204 (3rd Cir. 2010); *Donohue v. Regional Adjustment Bureau*, 12-1460, 2013 WL 607853, (E.D.Pa. 2013).

Finally, plaintiff has shown that LVNV used the instrumentalities of interstate commerce in its business activity. LVNV is headquartered in South Carolina (Pl SMF ¶2), and has an address in Nevada, but filed over 1,000 lawsuits in Illinois (Pl SMF ¶15). LVNV cannot do this without using instrumentalities of interstate commerce. The owner of debt has to purchase time-barred debt, place time-barred debt for collection, and authorize settlement of the debt. All that summary judgment requires is for plaintiff to demonstrate facts showing the use of interstate commerce. Plaintiff has done so.

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,

s/Daniel A. Edelman

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CERTIFICATE OF SERVICE

I, Daniel A. Edelman, certify that on October 23, 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.
s/Daniel A. Edelman
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