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August 14, 2017
VIA ECF
Hon. Vera M. Scanlon
United States Magistrate Judge
225 Cadman Plaza East
Brooklyn, New York 11201

**Re: Plaintiff's letter regarding impact of *Henson v. Santander***
***Bueno v. Mel S. Harris and Associates, LLC, et al.*, Case No. 1:16-cv-04737-WFK-VMS**

Dear Judge Scanlon:

The undersigned, Ahmad Keshavarz, represents Plaintiff Agustina Bueno in this Fair Debt Collection Practices Act ("FDCPA") and General Business Law § 349 case. On July 18, 2017 Your Honor issued an ECF order directing the parties to file a joint letter "addressing the impact, if any, of the Supreme Court's recent decision in *Henson v. Santander Consumer USA Inc.* 137 S. Ct. 1718 (2017), on the claims in this case." Defendants took it upon themselves to file a separate letter, and refused to work jointly to draft a joint letter as ordered.[1]

Plaintiff's view is that the decision has no impact on this case.

The FDCPA, 15 U.S.C. § 1692a(6), defines two types of businesses that qualify as debt collectors. *See generally Goldstein v. Hutton, Ingram, Yuzek, Carroll & Bertolotti*, 374 F. 3d 56, 61 (2d Cir. 2004) (describing distinction).[2] *Henson* held that an entity that "regularly" purchases defaulted debts to collect for its own account is not a "debt collector" pursuant to the second prong of the definition in 15 U.S.C. § 1692a(6) covering a person who "regularly collects or attempts to collect ... debts owed or due ... another." Plaintiff does not seek to hold LRC liable under this second definition.

However, LRC is liable under the first definition of "debt collector" under 1692a(6), which states that "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." (*emphasis added*) The *Henson* decision expressly stated that "we do not attempt to" address this "principal purpose"

[1] Plaintiff circulated a draft of the section he wanted to include in a joint letter, and asked to review a draft of Defendants, so that the parties could adjust their respective sections to make the submission a "joint" submission, as opposed to two separate letters filed together. Defendants refused to circulate a draft of their section in advance and filed a separate letter.

[2] 1692a(6) states, "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."

prong because "the parties haven't much litigated that alternative definition and in granting certiorari we didn't agree to address it." *Henson* at 1721. Therefore, Henson is irrelevant to the case at bar.

LRC contends Henson is not only relevant but dispositive of Plaintiff's claims. First, LRC contends Plaintiff "has not adduced any evidence that LRC uses any instrumentality of interstate commerce or the mails" in the debt collection business. Note, LRC does not dispute it in *fact* uses "any instrumentality of interstate commerce or the mails," just that that Plaintiff has "has not adduced any evidence" of the same. This defect, if any, can be easily remedied through discovery. On August 9, 2017, during the hearing on cross-letters for pre-motion conference to file for summary judgment, Judge Kuntz re-opened discovery. Plaintiff will be issuing discovery demands regarding this issue, the relevance of which LRC cannot reasonably dispute .

LRC filed thousands of collection lawsuits. Those lawsuits contended LRC purchased accounts that were originally issued by banks across the country. Debts ultimately purchased by LRC were from other debt buyers across the country. Payments were made by bank wire transfer. Indeed, *Sykes* held that the allegation that LRC and the related Leucadia entities filed collection lawsuits, prepared non-military affidavits (used to prepare default judgments) and used judgments to freeze the bank accounts of consumers are all sufficient to show, as a matter of law, that they are debt collectors under the "principal purpose" test. *Sykes v. Mel Harris & Assocs., LLC*, 757 F. Supp. 2d 413, 423 (S.D.N.Y. 2010). LRC is certainly free to tenaciously litigate on what appears to be the most tenuous of points. However, such conduct will be a relevant factor at the fee petition stage. "Defendant cannot litigate tenaciously and then be heard to complain about the time necessarily spent by Plaintiff in response." *Samms v. Abrams*, 198 F.Supp.3d 311, 313 (S.D.N.Y. 2016) (internal quotations omitted) (*citing Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) (en banc)).

Second, LRC contends "*Henson* clearly undermines Plaintiff's ill-fated attempt to hold LRC vicariously liable" for the debt collection violations taken on LRC's behalf by Mel Harris and Samserv. LRC bases this contention on the unremarkable holding in *Henson* that where the text of a statute is clear, courts are governed by the clear text, and should not contravene the clear text based on an assertion that a different interpretation would allegedly further the statute's public policy goals. In *Henson*, the Justices merely held that the phrase "due… another" means exactly that, and that the plain text cannot be contorted to mean "due… itself."

LRC points to no text of the FDCPA that absolves LRC of liability for actions taken by it either directly as a party to the collection lawsuit, or by its agents—MSH and Samserv—acting within the scope of their agency. Rather, LRC argues that LRC can only be held vicariously liable if it asserted actual control over its agents at the time they engaged in the relevant misconduct. Yet, all three circuits that have considered the issue, along with four recent well-reasoned SDNY decisions, have not imposed a requirement of control and have all held that a debt collector principal is liable for the acts of its debt collection agent operating within the course and scope of agency.[3]

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[3] *See, e.g., Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 508, 517 (S.D.N.Y. 2013) ("We do not agree with a requirement that an FDCPA plaintiff show "control" because claims that a principal is liable for an agent's actions normally do not require such allegations. Rather, "traditional vicarious liability rules" ordinarily make principals liable for acts of their agents merely when the agents act "in the scope of their authority."") *quoting Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003).

Respectfully submitted,

/s/

Ahmad Keshavarz

cc: Opposing counsel via ECF