Notify

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-01469-BLS2

CATARINA GOMES, DIANE HURLEBAUS, LORI LIBERTI and ROBERT WALLIS, on behalf of themselves and others similarly situated,
Plaintiffs,

vs.

MIDLAND FUNDING, LLC,
Defendant.

Notice Sent
09.19.12
EAR
JJR
BTG LLP
WTB
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PBA
WE LLP
JCC
C.L.P.C.
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MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

In this putative class action, plaintiffs Catarina Gomes, Diane Hurlebaus, Lori Liberti, and Robert Wallis assert claims against Midland Funding, LLC (Midland) for unfair and deceptive debt collection practices, including engaging in the business of a debt collector in the Commonwealth without first having obtained a license from the commissioner of banks. According to the Second Amended Class Action Complaint, Midland's principal business is the high-volume purchase of defaulted consumer debt which it then seeks to collect by filing thousands of lawsuits in the courts of the Commonwealth. Midland now moves to dismiss the complaint for failure to state a claim upon which relief can be granted. Mass.R.Civ.P. 12(b)(6). After careful review of the parties' submissions, this Court concludes that Midland has failed to prove that the complaint does not plausibly suggest that plaintiffs are entitled to the relief that they seek. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). Accordingly, the motion must be **Denied**.

The principal challenge that Midland makes is to those claims for relief predicated upon alleged violations of G.L. . 93, § 24A. That statute requires that any entity engaged in the business of "debt collector" obtain a license from the commissioner of banks; failure to do so constitutes an unfair and deceptive business practice in violation of Chapter 93A. G.L.c. 93 §28. Although Midland agrees that it is not licensed, it argues that it is not a "debt collector" as that term is used in the statute. " Debt collector" is defined in relevant part to encompass anyone who "regularly collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another." G. L. c. 93, § 24.[1] Midland acknowledges that it regularly hires attorneys to institute litigation against defaulting debtors in order to collect the debts it has purchased. It contends, however, that this activity is not for the purpose of collecting the debt "of another," as the statute states. Rather, the attorneys are acting to collect debts now owed to Midland itself, as the debts' owner.

There is no Massachusetts case law on this issue, but the statute is modeled on the federal Fair Debt Collection Practices Act (FDCPA) and so this Court looks to federal precedent. Several federal courts interpreting the identical definition of "debt collector" in the federal statute, 15 U.S.C. § 1692a(6), have rejected the argument that Midland advances. See e.g. Ruth v. Triumph Partnerships, 577 F.3d 790, 797 (7th Cir. 2009); McKinney v. Cadleway Properties, Inc., 548 F.3d 496, 500 (7th Cir. 2008); FTC v. Check Investors, Inc. 502 F.3d 159, 173-174 (3d Cir. 2007). Logically speaking, of course, one can be both a "creditor" and a

[1] The statute also includes within the definition of "debt collector" "any person who uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of a debt." As Midland observes, plaintiffs do not appear to focus their arguments on this part of the definition.

"debt collector," but as these federal decisions have explained, those terms are intended to be mutually exclusive under the FDCPA. Those who maintain an ongoing relationship with the debtor are more likely to behave in a way that protects their good will when collecting past due accounts, whereas those who will have no future contact with the consumer will not be so constrained. Schlosser v. Fairbanks Capital Corp. 323 F.3d 534, 536 (7th Cir. 2003); see also Salvato v. Ocwen Loan Servicing, LLC, 2012 WL 3018051 *4 (S.D.Cal. 2012) Accordingly, the FDCPA exempts from its requirements those who originally extended the credit that resulted in the debt as well as those who purchase debts not in default. In contrast, where one purchases defaulted debts, the federal courts have determined that the purchaser is no less a debt collector simply because the activity at issue is the collection of debts that now belong to it. This interpretation is also consistent with the position taken by the Massachusetts Division of Banks (Division). See Mass. Div. of Banks, Industry Letter Concerning the Massachusetts Debt Collection Statutes, and its Applicability to Debt Buyers, So Called (June 16, 2006) (the "June 16, 2006 Opinion Letter"). Accordingly, Midland as a purchaser of debts in default is no less a debt collector simply because it is the entity to whom the debt is now owed.

Midland argues in the alternative that the complaint fails to state a claim because the only collection activity Midland is stated to have engaged in is the filing and prosecution of lawsuits brought by attorneys who are themselves exempt from any licensing requirements. See G.L.c. 24 §93(g). It points out that the complaint does not allege that Midland itself has had any contact with debtors: it sends no demand letters, does not initiate any telephone calls, nor does it engage in any other direct communications with them. Consequently, Midland contends, the factual allegations show at best that it is a "passive" debt buyer exempt from licensing requirements.

This Court is not persuaded.

Plaintiffs point out that G.L.c. 93 §24 defines a debt collector to include anyone who "collects or attempts to collect, directly or indirectly, a debt owed..." (Emphasis added). That same definition is reflected in 209 C.M.R. 18.02. Moreover, applying parallel provisions of the FDCPA, federal courts have declined to conclude that an entity otherwise covered by the act somehow insulates itself from liability by hiring attorneys to engage in the debt collection activity for them. See e.g. Kimber v. Federal Financial Corp., 668 F.Supp. 1480, 1487 (M.D. Ala. 1987); see also Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1031 (9th Cir. 2010) (holding that state court complaint served on the consumer to facilitate debt collection efforts constitutes a communication that is subject to the requirements of 15 U.S.C. 1692e and 1692f). Finally, the facts alleged against Midland show (at least at this early stage in the case) that it is more than simply an investor in debt portfolios but actively engaged in the debt collection business. Specifically, the Complaint alleges that Midland files thousands of lawsuits against consumers in Massachusetts courts every year and obtains judgments which it seeks to enforce via supplemental process actions, wage garnishments and attachments. Although attorneys engage in this litigation on Midland's behalf, it reasonable to infer that this activity is at the direction (and perhaps even the active participation) of Midland.

In support of its position, Midland relies on a series of opinion letters issued by the Division. This Court concludes that those letters do not justify dismissal before any discovery can be conducted. The first opinion letter cited by Midland (dated February 12, 2002 and attached to its Memorandum of Law as Exhibit 1) was decided before the Massachusetts statute was amended so as to track the definitional sections of the FDCPA. That amendment made it

clear that, if the entity was seeking to collect on a debt in default even though it was the original creditor, a license was required even though it was the original creditor. That then raised the question of whether persons or entities who purchased debts in default were equally subject to licensing requirements. In its June 16, 2006 Opinion Letter (discussed supra at p. 3) and in line with federal court interpretation of the FDCPA, the Commissioner concluded that they were. Subsequent thereto, the Commissioner issued another opinion letter regarding whether a debt buyer that engages "only in the practice of purchasing delinquent consumer debts for investment purposes without undertaking any activity to directly collect on the debt would be considered a debt collector" as defined by the statute. See Opinion O06060, Mass. Div. of Banks, 2006 WL 6659819 (Oct. 13, 2006) (emphasis supplied). The commissioner stated that these so called "passive" investors or debt buyers would not be covered, provided that all collection activity performed on their behalf was by a licensed debt collector or an attorney licensed to practice law in the Commonwealth. The Commissioner did not attempt to define who would be deemed to be a passive investor as opposed to a "debt collector" within the meaning of G.L.c. 93 §24, however. Indeed, that determination would appear to be very fact dependent – a point implied by the Commissioner himself when he concluded the letter by stating that a different fact pattern "may result in a different position statement by the division." [2]

The other ground upon which Midland bases its motion challenges the adequacy of the factual allegations supporting plaintiffs' claims for damages under G. L. c. 93A. For the reasons

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[2]This is not to say Midland necessarily is incorrect in characterizing itself as a "passive" debt buyer. It may be that the circumstances surrounding the collection of the debt Midland has acquired – and specifically the nature of its relationship to the attorneys hired to prosecute the collection litigation – demonstrate that Midland is not in the business of debt collection. However, this is grist for the mill of discovery.

articulated by plaintiffs, this challenge falls short. As plaintiffs point out, Midland insufficiently appreciates that the complaint alleges both that Midland's unlicensed debt collection constituted per se violations of chapter 93A, and also more generally that Midland violated c. 93A through engaging in unfair or deceptive debt collection practices.

Under the Division's regulations, a debt collector may not use "any false, deceptive, or misleading representation or means in connection with the collection of any debt," including specifically the "threat to take any action that cannot legally be taken." 209 Code Mass. Regs. § 18.16(5). Here, the core allegations of the complaint are that Midland has threatened to take, and in fact has taken, illegal action by filing thousands of lawsuits without being properly licensed. There can be no real dispute that such actions, if proven, would constitute unfair or deceptive conduct for purposes of chapter 93A, see Harrington v. CACV of Colorado, LLC, 508 F. Supp. 2d 128, 137-138 (D.Mass. 2007) (discussing violations of Division's regulations as violations of c. 93A); see also Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733 (2008), quoting PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975) (chapter 93A encompasses practices that come within penumbra of some established concept of unfairness). Moreover, contrary to Midland's argument, the complaint adequately alleges facts from which it can be inferred that plaintiffs were injured as a result of Midland's debt collection practices. Plaintiffs claim that they and all the other members of the class have been sued, which itself can result in a damaged credit rating, and also that some class members have had judgments rendered against them, had their wages seized, had liens placed on their homes, or have been arrested on capias warrants -- all as a result of assertedly invalid judgements obtained on defaulted debt Midland acquired.

CONCLUSION AND ORDER

For the reasons set forth above, Midland's Motion to Dismiss is **DENIED**.

Janet L. Sanders
Justice of the Superior Court

DATED: September 19, 2012

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