UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Martha Vassalle, et al.,	Case No. 3:11-cv-0096
Plaintiff,	HON. DAVID A. KATZ
-against-	**OBJECTIONS TO APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT**
Midland Credit Management, Inc., et. al.,	
Defendants.	

NOW COMES Manuela Rivera, who received a Class Action Settlement Notice ("Notice") with Claim Number MCM 1058 7850 from Midland Credit Management and who is a member of the Class, by and through the undersigned counsel, and hereby files these objections to the Proposed Class Settlement Agreement.

INTRODUCTION AND SUMMARY OF OBJECTIONS

The March 4, 2011 proposed Class Settlement Agreement ("Agreement") is not fair, reasonable, or adequate for several reasons, namely: the release is overbroad; the notice is seriously flawed; the injunctive relief is exceedingly weak; and the benefit to class members is miniscule.

I. STATEMENT OF FACTS

Objector Manuela Rivera ("Ms. Rivera") is a twenty-nine-year-old mother who is currently unemployed and who subsists on unemployment insurance benefits. Ms. Rivera is a resident of New York State who was sued by Midland Funding in June 2009. Because she was never served with a summons and never became aware of the lawsuit, a default judgment was entered against her for $5,948.88 on May 18, 2010, using an affidavit from Midland that attested to personal knowledge of the validity of the underlying debt. Ms. Rivera first discovered that she had been sued when she received a Marshal's Notice of Execution in the Mail. As a result of the judgment, Ms. Rivera suffered a great deal of stress and harm to her credit rating. Ms. Rivera received the class action notice in the above-captioned action on or around April 15, 2011, and has decided to object to the Settlement because it is unfair and inadequate. Ms. Rivera is one of approximately 253,247 New Yorkers against whom Midland Funding or its affiliates obtained a judgment using patently improper affidavits who are class members.

The Settlement Agreement pending in the instant class action settles claims among the parties pertaining to Defendants' use of false affidavits in state court collection actions throughout the country. The certified class consists of:

> "All natural persons (a) sued in the name of Encore Capital Group Inc., Midland Funding LLC, Midland Credit Management, Inc., or any other Encore and/or Midland-related entity (collectively, "Midland"), (b) between January 1, 2005 and the date the Order of Preliminary Approval of Class Action Settlement is entered by the Court, (c) in any debt collection lawsuit in any court (d) where an affidavit attesting to facts about the underlying debt was used by Midland in connection with the debt collection lawsuit."

(Agreement at 6.) The Agreement provides for injunctive relief, specifically requiring Midland to "create and implement written procedures for the generation and use of affidavits in debt collection lawsuits" that are "reasonably assured to prevent the use of affidavits in debt collection lawsuits when the affiant does not have personal knowledge of the facts set forth in the affidavit." (*Id.* at 9.) The Agreement does not provide relief from default judgments or summary judgments entered using false affidavits, and lapses after 12 months; it also includes a provision whereby the parties may "seek relief from, or modification of the . . . Injunction based on an unfair burden on the business or a change in the law." Further, the release language of the

Agreement is very broad: class members who do not opt out "release and forever discharge" Midland "from all causes of action, suits, claims and demands, whatsoever, known or unknown, in law or equity, based on state or federal law, which the class now has, ever had or hereafter may have against the Released Parties, arising out of or relating to the Released Parties' use of affidavits in debt collection lawsuits." (*Id.* at 11-12.) The notice, which was purportedly sent to approximately 1.4 million people, states that the recipient may be entitled to money, and may benefit from the class action settlement if the recipient was sued by a Midland entity. It sets forth the recipient's options with regard to submitting a claim form, taking no action, opting out and objecting to the settlement. After explaining what a class action is and why the recipient received the notice, it explains, under a section titled "Your Benefits Under the Settlement" that payments for class members who submit timely claim forms are anticipated to be $10 per class member. Under a subheading titled "What am I giving up to receive these benefits?" the notice explains that class members will be subject to a "release" and explains that a release means that the class member "cannot sue or be part of any other lawsuit against Defendants about the claims or issues in this lawsuit, or any other claims arising out of affidavits attached or executed in support of collection complaints filed against class members by Defendants or any of their subsidiaries or affiliates."

Members of the class who reside in New York City, including Ms. Rivera, have undoubtedly had default judgments entered against them as a result of the false affidavits that are the subject of this class action lawsuit. In New York City, a plaintiff may seek a default judgment by applying to the clerk (not a judge), who, with the requisite proof, will automatically grant the application. *See* N.Y. C.P.L.R. § 3215. The "requisite proof" in a consumer credit transaction includes an affidavit of merit from the plaintiff by someone with personal knowledge of both the underlying claim and the debt being collected. Improper or nonexistent service of process has been a large and well-documented problem in New York. *See* MFY Legal Services, Inc., Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York (June 2008), *available at* www.mfy.org/Justice_Disserved.pdf; *see also* N.Y.C. Bar Ass'n Comms. on N.Y.C. Civil Court & Consumer Affairs, Out of Service: A Call to Fix the Broken Process Service Industry (April 2010), *available at* http://www.abcny.org/pdf/report/uploads/ProcessServiceReport4-10.pdf. As a result of such "sewer service," large numbers of default judgments are entered against predominantly low-income individuals and often against individuals who live in communities of color. *See* The Legal Aid Society, et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey On Lower-Income New Yorkers (May 2010), *available at* http://www.mfy.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf (finding that debt buyers routinely file lawsuits against people without proof of their claims and obtain high rates of default judgments in New York's lowest income communities and communities of color). When judgments are entered on default as a result of sewer service, the affidavit of merit is the only document a plaintiff is required to provide to support its claim.

Once a judgment is entered against a New York defendant that judgment can be enforced in many ways. Plaintiff's counsel (*without* a court order) can enforce the judgment by: restraining a defendant's bank account; garnishing 10 percent of a defendant's wages; placing a lien on a defendant's property; and seizing a defendant's personal property. *See generally* N.Y. C.P.L.R. Art. 52. The effects of such enforcement are devastating, particularly on elderly, poor, or disabled defendants who often find out for the first time that they have been sued when their bank account is frozen or when they receive a marshal's notice. These judgments can also be reported to the major credit reporting bureaus, which often severely hamper consumers' ability to obtain credit, housing, and employment.

Midland's affidavits of merit, which have been used by Midland and its affiliates in New York to apply for default judgments, routinely "falsely claim[] to be based on the affiant's personal knowledge in an attempt to collect a debt," *Midland Funding v. Andrea Brent*, No. 3:08 CV 1434, 2009 U.S. Dist. LEXIS 87266, at *2 (N.D. Ohio, Sept. 23, 2009). In the affidavit of merit filed in the lawsuit against Ms. Rivera, Midland's affiant, Ivan Jimenez, attests to having personal knowledge "of the recordkeeping systems maintained on [Midland's] behalf, and attests that Midland "was assigned all the rights, title and interest to [Ms. Rivera's] Associates account." He attests that Ms. Rivera owes $3,640.91 plus interest, and goes on to state that Ms. Rivera "agreed to pay monthly installments to the original credit grantor for all goods and/or services and/or cash advances" and that Ms. Rivera "failed to make the payments due pursuant to the agreement." The affidavit is not based on actual personal knowledge, and is pure hearsay. Nonetheless, as a result of Midland's filing this false affidavit, Ms. Rivera had a default judgment entered against her, and suffered harm to her credit rating, as well as stress and anxiety upon receiving a Marshal's Notice of Execution in enforcement of the judgment. As noted above, Ms. Rivera is one of approximately 253,247 class members in New York against whom Midland Funding or its affiliates obtained a judgment using false affidavits. The harm that Ms. Rivera suffered is only one example of the widespread, significant impact of these false affidavits against New Yorkers.

II. ARGUMENT

A. Standard of Review

Unlike settlements involving individual claims, class action settlements must be approved by the court. *See* Fed. R. Civ. P. 23(e). To approve a class action settlement, the court must determine that it is "fair, adequate and reasonable, as well as consistent with the public interest." *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990) (citing *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986)). In making its determination, the district court is directed to consider several factors, including the reaction of absent class members, and the public interest, *see Int'l Union, United Auto., Aerospace, & Agric. Implement Workers v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007), bearing in mind its ultimate obligation to protect class members "whose rights may not have been given due regard by the negotiating parties," *Ficalora v. Lockheed California Co.*, 751 F.2d 995, 996 (9th Cir. 1985); *see also Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970) (noting court's "responsibility to act as guardian of the absent parties"). Reviewing those factors here, the Settlement clearly should not be approved.

B. The Settlement Agreement Should Not Be Approved Because the Release is Incredibly and Unfairly Overbroad and Entirely Unreasonable

The Court should reject the Agreement as unfair because the language of the release is broad, ambiguous and subject to conflicting interpretations; the language could be interpreted to mean that the release waives members' right to defend against the use of Midland affidavits in state court actions, bars class members from asserting claims against Midland involving affidavits that attest to debts other than the debt that was the subject of the collection action, and bars class members from asserting claims against Midland for future violations of law based on false affidavits. In fact, Midland has already made plain its intention to construe the overbroad language as waiving class members' right to contest Midland affidavits in the context of defending state court actions. In its "Post Hearing Brief in Opposition . . . to Motion for Relief from Preliminary Injunction," Midland states that "class members who remain in the class will give up the right to [seek relief from civil judgments obtained by Midland]." *Midland Funding v. Andrea Brent*, 08-CV-1434 (Dkt. No. 150.) Midland's position is uncontested, and raises serious questions as to how the parties, and Midland in particular, will interpret the release in any future litigation.

However the parties may interpret the Agreement, on its face the language could easily be construed as waiving class members' rights in important ways. First, it can be construed as waiving class members' right to contest Midland affidavits in the context of defending a state court action. It states that class members release Midland and its affiliates "from all causes of action, suits, claims and demands, whatsoever, known or unknown, in law or in equity, based on state or federal law, which the class now has, ever had or hereafter may have against their Released Parties, arising out of or relating to the Released Parties' use of affidavits in debt collection lawsuits." (Agreement at 11-12.) It is imperative that defendants who seek to undo the wrongs inflicted on them by Midland be permitted to vacate judgments and not be prohibited from questioning the false affidavits that were used to obtain the judgments to begin with. Indeed, although this Court recently clarified that the Preliminary Injunction entered in this case did not waive defenses of class members (including absent class members), *see Midland Funding, LLC v. Andrea Brent*, No. 08 CV 1434 (J. Katz) (May 17, 2011), the Agreement remains exceedingly broad and, of course, does not reflect the Court's clarification.

Second, the overbroad language of the Agreement also appears to bar class members from asserting claims against Midland (either defensively or affirmatively) related to other affidavits used in state court collection actions that are not affidavits of merit by Midland employees when seeking default judgment or summary judgment. The Agreement merely states that class members release the released parties from claims "arising out of or relating to the Released Parties' use of affidavits in debt collection lawsuits." (Agreement at 12.) This language indicates that *any* affidavits used, including presumably affidavits of service, nonmilitary affidavits, and affidavits attesting to chains of assignment of the debt, may not be contested. As a result, the Agreement vastly expands the universe of what was is at issue in this case and provides what is essentially a full cloak of immunity to Midland for any acts of malfeasance by it or its agents. It effectively would block class members from asserting any defenses in collection actions or bringing any actions against Midland involving affidavits of any kind. In doing so, the Agreement entirely contravenes the purpose of the class action—which is to provide relief to large numbers of affected people who would not otherwise be able to pursue their claims—and instead makes the approximately 1.4 million members of the class considerably worse off.

Finally, the language of the Agreement is so overreaching that it could easily be construed as prohibiting class members from bringing claims against Midland and its affiliates for future abuses involving false affidavits. Although the Agreement only applies to cases where Midland sued a person "between January 1, 2005 and the date of the Order of the Preliminary Approval of Class Action Settlement" (*id.* at 6), the release bars class members from asserting claims "from all causes of action, suits, claims and demands, whatsoever, known or unknown, in law or in equity, based on state or federal law, which the class now has, ever had, *or hereafter* *may have* against the Released Parties, arising out of or relating to the Released Parties' use of affidavits in debt collection lawsuits." (*Id.* at 11-2 (emphasis added).) There is no limiting language in the Agreement regarding the scope of the Released Parties' future claims. This absence, combined with the fact that Midland is specifically permitted to continue "to attempt to collect the debts owed by the other Class Members" (Agreement at 13), means that Midland may continue to engage in unlawful or unfair acts and class members are powerless to combat those acts *forever*.

C. The Settlement Agreement Should Not Be Approved Because the Notice is Seriously Flawed

The class notice is seriously flawed for several reasons, chief among them that it does not indicate that by affirmatively joining the class or doing nothing, class members will lose their right to assert defenses in debt collection cases in state court. Moreover, the notice does not inform class members that they may be able to vacate default judgments entered against them on the basis of Midland's false affidavits. These considerations further militate against approving the Agreement.

Rule 23(c)(2) of the Federal Rules of Civil Procedure sets forth the minimum content required in notice to members of classes certified pursuant to Rule 23(b)(3). The Rule requires that the court "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FRCP 23(c)(2). The notice must "clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." FRCP 23(c)(2); *see also Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 447-48 (6th Cir. 2002) (noting the special notice requirements of Rule 23(b)(3) class actions and the requirement that all potential members of the class be provided reasonable notice and the opportunity to decline to participate in the action.) Moreover, as this Court observed, "[i]t is essential that class members' decisions to participate or to withdraw be made on the basis of independent analysis of their own self interest, and the vehicle for accomplishing this is the class notice." *Midland Funding, LLC v. Andrea Brent*, No. 08 CV 1434 (J. Katz) (May 17, 2011) (quoting *Georgine v. Amchem Products, Inc.*, 160 F.R.D. 478, 490 (E.D. Pa. 1995)).

Here, the class notice is defective and violative of due process because it does not adequately inform class members of valuable rights they are relinquishing and does not fully explain the options available to them. This is particularly troublesome because some class members may not even know that Midland has entered a judgment against them until they receive the notice.

D. The Settlement Agreement Should Not Be Approved Because the Injunctive Relief is Severely Inadequate

The injunctive relief provided for in the Settlement Agreement, which requires Midland to "create and implement written procedures for the generation and use of affidavits in debt collection lawsuits" that are "reasonable assured to prevent the use of affidavits in debt collection lawsuits when the affiant does not have personal knowledge of the facts set forth in the affidavit," (Agreement at 9) is exceedingly weak. After 12 months, Midland may revert to using blatantly improper affidavits in its millions of lawsuits without fear of violating the terms of the Agreement or suffering any consequences. Incredibly, the Agreement also provides a "get out of jail free" card by permitting Midland to violate the injunction if compliance proves too burdensome. The problem with the Midland affidavits is that the affiants lack personal knowledge regarding the underlying debts. Any attempt to make the affidavits legal requires that only affiants with personal knowledge sign affidavits in support of collection lawsuits. If the cost of submitting truthful affidavits from persons with personal knowledge of the facts is too high, Midland should consider another line of business.

Also, the Agreement provides injunctive relief for the named Plaintiffs in the form of vacatur of the underlying judgments, but does nothing for any of the class members who currently have judgments against them. In New York, where unpaid judgments can be enforced for 20 years (*see* N.Y. C.P.L.R. § 5201) class members with unlawfully obtained judgments against them will suffer long-term consequences as a result of Midland's enforcement of those judgments. Those class members will have no recourse to challenge the entry of these improperly entered judgments.

Moreover, though the Agreement states that the named Plaintiffs will have released from their alleged Midland debts, "nothing [in the Agreement] shall prevent [Midland] from continuing to attempt to collect the debts owed by the other Class Members." (Agreement at 13.) Thus the Agreement specifically provides Midland the opportunity to continue to pursue debt collection actions against those class members who have had judgments unlawfully entered against them. Having been provided updated personal and banking information by the unwitting class members themselves (based on the addresses on the returned claim forms and the account information for the deposit of class members' $10 settlement checks), Midland will of course be in a position to enforce the improperly entered judgments against those class members with renewed vigor.

E. The Settlement Agreement Should Not Be Approved Because the Benefit Amount of the Settlement is Extremely Low, Especially As Compared to that of Named Plaintiffs

The Agreement provides for class members to receive at most $10, which is unfair and improper. In overseeing and evaluating the fairness of a class action settlement, the court assumes a fiduciary responsibility to act as the guardian of the rights of absent class members. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973). A *maximum* of $10 is paltry compensation for giving up valuable rights, including claims that would easily be worth more than $10 under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, or New York's deceptive acts and practices statute, which provides for damages of not less than $50 and possible treble damages up to $1,000, *see* NY Gen. Bus. Law § 349. The miniscule sum in and of itself is unfair, and in light of the valuable rights that the class members would give up in return, is shockingly unbalanced and inadequate. Furthermore, in comparison to the $8,000 to be distributed to the named Plaintiffs, who also are entitled to have their underlying judgments vacated—undoubtedly a valuable factor in their decision to accept the settlement's terms and a term not made available to class members—the $10 becomes even less adequate and raises a substantial question regarding whether the named Plaintiffs are adequately representing absent members of the class.

CONCLUSION

The proposed Agreement is unfair, inadequate, and is inconsistent with the public interest and with the interest of its approximately 1.4 million class members. For the foregoing reasons, this Court should reject the Agreement.

Dated: New York, New York
May 27, 2011

Respectfully submitted,

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