13-2742(L)

13-2747(CON), 13-2748(CON)

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MONIQUE SYKES; REA VEERABADREN; KELVIN PEREZ; and CLIFTON ARMOOGAM, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

— v. —

MEL S. HARRIS AND ASSOCIATES LLC; MEL S. HARRIS; MICHAEL YOUNG; DAVID WALDMAN; KERRY LUTZ; TODD FABACHER; LEUCADIA NATIONAL COORPORATION; L-CREDIT, LLC; LR CREDIT, LLC; LR CREDIT 10, LLC; LR CREDIT 14, LLC; LR CREDIT 18, LLC; LR CREDIT 21, LLC; JOSEPH A. ORLANDO; PHILLIP M. CANNELLA; SAMSERV, INC.; WILLIAM MLOTOK; BENJAMIN LAMB; MICHAEL MOSQUERA; and JOHN ANDINO,

Defendants Appellants,

MEL S. HARRIS JOHN/JANE DOES 1-20; LR CREDIT JOHN/JANE DOES 1-20; and SAMSERV JOHN/JANE DOES 1-20,

Defendants.

On Appeal from the United States District Court for the
Southern District of New York

BRIEF OF *AMICUS CURIAE* CONSUMER ADVOCATES IN SUPPORT OF PLAINTIFFS-APELLEES URGING AFFIRMANCE

(Amici listed on next page)

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CORPORATE DISCLOSURE STATEMENT OF THE BROOKLYN BAR ASSOCIATION VOLUNTEER LAWYERS PROJECT

The Brooklyn Bar Association Volunteer Lawyers Project, an organizational amicus curiae, is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

Dated: November 13, 2013
Brooklyn, New York

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CAMBA Legal Services Inc. is related to CAMBA Inc., and the organizations share many of the same board members. CAMBA Inc. has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

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CORPORATE DISCLOSURE STATEMENT OF THE QUEENS VOLUNTEER LAWYERS PROJECT, INC.

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Dated: November 12, 2013
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AMICI'S STATEMENT OF INTEREST

The organizations appearing as *amici curiae* all work to protect consumers' rights and ensure that only lawful means are used to collect legitimate debts. *Amici* are the Brooklyn Bar Association Volunteer Lawyers Project; CAMBA Legal Services, Inc.; the Community Development Project at Urban Justice Center; DC 37 Municipal Employees Legal Services; The Legal Aid Society; Lincoln Square Legal Services, Inc.; the New York Legal Assistance Group; the Queens Volunteer Lawyers Project, Inc.; and the St. Vincent de Paul Legal Program, Inc., Consumer Justice for the Elderly Litigation Clinic at St. John's University Law School.

Amici provide direct legal services to low-income or financially distressed consumers in debt collection cases and participate in legislative, educational and/or other advocacy efforts to benefit consumers; some *amici* also assist clients in bringing affirmative challenges to unlawful debt collection practices individually and through impact litigation. *Amici* are vitally interested in this appeal because the outcome will affect our clients' ability to obtain relief from debt collection litigation abuses, and our ability to protect these clients from such abuses.[1]

[1] No party's counsel authored this brief in whole or in part; and no party or party's counsel or person other than *amici* contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Plaintiffs in this action, a class of individuals sued in the New York City Civil Court to collect alleged consumer debts, challenge widespread fraudulent practices of the Leucadia Defendants, the Mel Harris Defendants, and the Samserv Defendants in those debt collection lawsuits.[2] Among other things, Plaintiffs have alleged that Defendants improperly obtained default judgments against class members by filing false and deceptive affidavits of service and affidavits of merit. Defendants challenge the District Court's (Chin, J.) class certification ruling on the ground that the class members' claims are inappropriate for federal class action resolution. Defendants suggest instead that class members should pursue any claims individually, in the New York City Civil Court. *See, e.g.*, Brief for Mel Harris Defendants at 44, No. 13-2742(L) (2d Cir. Sept. 25, 2013).

Amici are organizations that provide legal services to low-income consumers like those who comprise the class. We have extensive experience representing and advising such consumers, many of whom have been victimized by unlawful practices like those alleged here. We submit this brief to urge the Court to uphold Judge Chin's class certification ruling.

The deck is stacked against consumer litigants who go up against debt

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[2] Except where otherwise defined, all terms have the meaning ascribed to them in the Brief for Plaintiffs-Appellees, No. 13-2742(L) (2nd Cir. Nov. 6, 2013).

buyers like Leucadia. Consumers are almost always unrepresented individuals attempting to navigate an unfamiliar and complex court system, while debt buyers are always represented, generally by experienced counsel who know the ins and outs of civil practice. These unrepresented consumers lack the substantive, procedural, and factual knowledge to effectively defend against debt buyers' claims. They are even less able to take the additional steps required to identify and challenge unlawful practices like those alleged in this suit. Individuals who never received service of process face further obstacles; many do not even know that they have were by debt buyers or that their rights have been violated until the debt buyers garnish their wages or freeze their bank accounts, or they are denied employment, housing, or credit because of a judgment on their credit report. Moreover, the financial pressure on consumers, and the small dollar value of any affirmative claims against debt buyers and their affiliates, ensure that even consumers who counterclaim based on unlawful debt collection practices are likely to drop those challenges when offered the chance be rid of the wrongful suits against them.

The realities of consumers' experiences when they are sued by debt buyers, and the nature of the statutory wrongs alleged in this suit, make it virtually impossible for consumers to obtain redress for the violations individually. Without the ability to participate in class actions like this one, these consumers will be left

without relief for legally cognizable wrongs that subject them to tremendous financial and other hardship. Moreover, unless class actions like this one proceed, countless consumers will remain vulnerable to future abuses, because Defendants and others in the debt buyer industry will have no incentive to end unlawful systematic practices. A class action is therefore not only the "superior" way for consumers like class members here to vindicate their rights; it is the only way.

ARGUMENT

I. VICTIMS OF ABUSIVE DEBT COLLECTION LITIGATION PRACTICES CANNOT VINDICATE THEIR RIGHTS INDIVIDUALLY.

A. Because Most Consumers Are Unrepresented, They Are Particularly Vulnerable To Debt Buyers.

Individual consumers sued in the New York City Civil Court are a highly vulnerable population. In *amici*'s experience, these consumers tend to be low-income, frequently lack stable employment and housing, and have low levels of education.[3] For these individuals, the consequences of a debt judgment can be grave. Many judgments result in forced collection through wage garnishment or

[3] Studies bear out these impressions. *See, e.g.*, Legal Aid et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers*, 10 (May 2010) (finding, based on sample of 365 debt buyer lawsuits filed between 2006 and 2008 in New York City, that 91% of people sued by debt buyers and 95% of people with default judgments entered against them lived in low- or moderate-income communities; in the 12 zip codes with the highest concentration of these lawsuits, one in four families lived below the federal poverty level).

bank account restraint and execution, making it difficult for individuals to pay rent, buy food, or obtain health care.

Judgments also negatively affect individuals' credit histories, limit access to loans and other services, and may impair employment opportunities and the ability to obtain affordable housing. For example, Lucia[4], one of *amici's* clients in the Bronx, had been close to securing a job with the New York City Police Department when the investigator conducting a routine background screening discovered from her credit report that a debt buyer had obtained a judgment against her. The NYPD denied her employment application because of this problem with her credit history. Although Lucia was able to get the judgment overturned after three court appearances in which the debt-buyer never appeared, she had lost her chance to work for the NYPD. Similarly, amici's client Martina, a disabled woman who speaks only Russian, was recently denied an accessible apartment in a subsidized Section 8 development in Brooklyn based upon her credit history. Martina has been struggling to make ends meet, since she must pay $1100 rent out of her monthly $1200 workers' compensation check while waiting for an accessible apartment to become available in a federally subsidized housing development. In July 2013, Martina was devastated to learn that, although she had reached the top of the waiting list, she had been denied an apartment—despite her perfect rent

[4] Client names have been modified throughout this brief to protect clients' privacy.

payment history—because of a consumer judgment against her. Martina had been entirely unaware of this judgment, and even the existence of the lawsuit that resulted in the judgment, because she was never served in the action. Although Martina, with *amici*'s help, went to court immediately and has had the judgment vacated, she must now return to the development's waiting list.

Individuals like these, for whom so much depends on the outcome of the debt collection actions, desperately need the assistance of attorneys. Unfortunately, the overwhelming majority of people sued in the New York City Civil Court are not represented. Statistics for the year 2012, compiled by the Chief Administrative Judge for the New York City Civil Court show that only 2% of defendants sued by creditors in NYC had legal representation.[5]

The cost of hiring a private lawyer is prohibitive for most consumers—generally over two thousand dollars, or more if an adverse judgment has already been entered—and frequently exceeds the amount sought through the suit. The free legal services offered by *amici* and other organizations help some consumers, but there are simply not enough free lawyers available to represent most of these individuals. Despite *amici's* best intentions, we are forced by our limited resources

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[5] This figure is derived from consumer filings statistics provided by the Chief Administrative Judge for the New York City Civil Court to the New York City Bar Association Civil Court Committee by subtracting percentage of cases in which attorney filed an answer. *See* App. A.

and funding restrictions to turn away many consumers seeking help.

The Civil Legal Advice and Resource Office ("CLARO") provides free limited-scope legal advice to pro se individuals sued in collection actions. But since CLARO's walk-in clinics have funding to operate only a few hours each week, many more people seek CLARO's assistance than CLARO volunteers have the capacity to assist. Furthermore, CLARO volunteers can only provide advice—not legal representation—to the limited number of people they do assist.

The lack of representation is so striking that the New York State Office of Court Administration has provided funding to several organizations, including some *amici*, to offer limited legal representation to defendants only for the single day of their court appearances, so-called "Lawyer for a Day" programs. Although these programs provide critical "emergency relief" to many consumers, they cannot provide assistance beyond the single day of the individual's court appearance (and no assistance at all to those who do not appear in court), and thus leave many consumers' needs unmet. Nor can Lawyer for a Day volunteers assist with counterclaims or affirmative litigation under the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*., the New York General Business Law, N.Y. G.B.L. § 349 ("GBL"), or related statutes.

Debt buyers, by contrast, are always represented. *See* N.Y. C.P.L.R. § 321(a) (requiring corporations to appear through counsel). Moreover, these

companies—and their lawyers—are repeat players who are intimately familiar with the Civil Court system. In 2007, Appellant LR Credit alone filed over 30,000 consumer credit cases, and Appellant Mel Harris represented plaintiffs in almost 45,000. Consumer Rights Project, 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* 4 (2008). Debt buyers' familiarity with the system gives them further advantages over unrepresented consumers and makes it even less likely that consumers will succeed in acting affirmatively to protect their rights.

The power imbalance between debt buyers and unrepresented consumers is exacerbated by the courts' overburdened dockets, which leave judges and court personnel unable to offer assistance to pro se litigants. In 2012 alone, 96,460 consumer credit cases were filed in New York City Civil Court. *See* App. A. On any given day in the Bronx Civil Court, for example, only one judge hears consumer cases against unrepresented defendants, and must handle forty or more cases in a three-and-a-half hour morning session. Judges are thus severely limited in their ability to protect consumers from exploitative debt buyers by, for example, helping individuals develop the record or probing debt buyers about the basis for their claims.

B. Unrepresented Consumers Lack Critical Substantive and Procedural Knowledge About Affirmative Claims.

To seek redress for unlawful debt collection practices, consumers would need to be able not only to successfully defend against debt collection claims, but also to assert counterclaims challenging those practices. While lack of representation severely impairs consumers' ability to do the former, it renders the latter virtually impossible.

Few unrepresented consumers understand the theoretical availability of counterclaims or affirmative suits to challenge debt collection practices. Even those who do know that they could counterclaim are unlikely to know which debt collection practices are unlawful and for which of those violations individuals have private rights of action. Notably, the Civil Court's Consumer Answer Form for pro se defendants gives consumers some guidance about possible defenses by listing options that a consumer may check off. For counterclaims, however, the Form provides only blank spaces to identify "counterclaim(s)" and dollar amount, along with a space to provide a generalized "Reason." *See* New York City Civil Court, Written Answer Consumer Credit (2008), *available at* http://www.nycourts.gov /courts/nyc/civil/forms/ CIVGP58B.pdf. Consumers who believe they have been wronged often fill out these forms incorrectly, claiming $500 for "emotional damage," for example, instead of stating an FDCPA violation.

Many FDCPA violations are difficult for a layperson to comprehend. For

example, it is a violation of the FDCPA to knowingly file suit on a debt for which the statute of limitations has expired. *See, e.g., Diaz v. Portfolio Recovery Assocs., LLC*, No. 10 CV 3920, 2012 WL 1882976 (E.D.N.Y. May 24, 2012); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). However, many, if not most, consumers do not understand what a "statute of limitations" is; nor do they know that in New York the statute of limitations on most debts is six years. *See* N.Y. C.P.L.R. § 213. They almost definitely do not understand further complications, such as the fact that a debt incurred with a creditor located in another state may be subject to a shorter statute of limitations. *See* N.Y. C.P.L.R. § 202. Consumers thus cannot effectively determine if they may assert an FDCPA claim based on knowingly suing to collect a time-barred debt. Similar complexities hamper individuals' ability to identify other possible counterclaims, like ones challenging the unlawful practices Plaintiffs have alleged here.

C. Individual Consumers Cannot Perceive Or Redress Abuses Stemming From Bulk Practices.

Another fundamental obstacle to consumers' ability to challenge debt collection practices individually is the fact that many types of actionable misconduct are invisible to consumers who are only aware of their own cases. The violations alleged in this suit are perfect examples of unlawful practices that are difficult to perceive without observing a pattern of cases—something virtually no individual consumer, however well informed, is able to do.

When individuals sued in debt collection actions fail to appear—generally because they did not receive notice of the suit—plaintiffs may seek default judgments under C.P.L.R. § 3215. In support of the application for a default judgment, a debt buyer plaintiff must submit "proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." N.Y. C.P.L.R. § 3215(f). Notably, the affidavit supporting the application must be based on personal knowledge of the debt. *See Joosten v. Gale*, 514 N.Y.S.2d 729, 732 (1st Dept. 1987). Where a party seeks judgment on a claim for a "sum certain," the application goes only to a clerk, not a judge. N.Y. C.P.L.R. § 3215(a). The clerk compares the application to a checklist listing the required elements, including an affidavit of facts "from a person with personal knowledge of the facts" and an affidavit of service. New York City Civil Court, New York State Unified Court System, *Entering Civil Judgments: Judgment Checklist* (2013), *available at* http://www.nycourts.gov/COURTS/nyc/civil/judgments_atty.shtml#checklist. If an application appears on its face to meet the criteria in the checklist, the clerk will enter judgment. Given the overwhelming number of applications, it is *amici*'s experience that clerks do not look behind the face of these materials.

Unfortunately, the filing of false or misleading affidavits, like those Plaintiffs allege Defendants filed, is rampant in the Civil Court. The large majority

of the affidavits submitted in support of debt buyers' default judgment applications are "robo-signed," that is, they are automatically generated in large volumes by computer software, and then signed by people who did not write them and do not possess the professed "personal knowledge." Courts have concluded that such affidavits are insufficient to support debt buyers' claims, since the signatories plainly do not have sufficient knowledge to support the affidavits or prove the debts are owed. In *Midland Funding LLC v. Loreto*, for example, the Civil Court denied a debt buyer's summary judgment motion because it was based on an affidavit that bore hallmarks of robo-signing, a practice that had been found to violate the FDCPA; these indicia "ma[d]e[] the court question the independent basis of the submission." No. 008963/11, 2012 WL 638807, at *6 (Civ. Ct. Richmond Co. Feb. 23, 2012). And in *Capital One Bank USA NA v Joseph*, the court denied a creditor's summary judgment motion that was based on an affidavit that, "on its face, ha[d] the look and feel of a 'robo-signed affidavit' that was prepared in blank, in advance, without knowing the identity of the person who would be asked to sign it." No. CV-008157-13, 2013 WL 5663260 (Dist. Ct. Nassau Cty. Oct. 7, 2013); *see also Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 966-69 (N.D. Ohio, 2009) (finding a similar affidavit false and misleading when affiant signed "200 to 400 per day" with no personal knowledge of each case).

The practice of submitting "robo-signed" affidavits is virtually impossible for individual consumers to detect, because no single consumer, looking only at the affidavit submitted in his own case, could discern the indicia of robo-signing: a high volume of near-identical affidavits signed by a single person or handful of persons. Those patterns emerge only when one can see numerous cases filed by the same plaintiffs.

D. Sewer Service Deprives Consumers Of An Opportunity To Challenge Unlawful Practices.

The rampant practice in New York City of filing false affidavits of service, called "sewer service," has been extensively documented. *See, e.g.*, New York City Bar Association, *Out of Service: A Call to Fix the Broken Process Server Industry* (2010); New York Appleseed, *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases* 12 (2010) ("Appleseed"); The Community Development Project, Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* 22–23 (2007); Press Release, New York State Office of the Attorney General, Attorney General Cuomo Sues to Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation (July 22, 2009). *Amici*'s experience in assisting consumers confirms that flagrantly false affidavits are filed with regularity. For example, the affidavit of service filed against Barbara, one of *amici*'s clients,

falsely claimed to have made personal service on her—but described her as a black female, when she is white. Another of *amici*'s clients, Martin, was purportedly served by substitute service on his non-existent "sister," identified by a woman's first name and Martin's last name. And a process server falsely claimed to have served *amici*'s client Corinna at a private residence during a time she resided in a homeless shelter. All three of these clients had been sued by debt buyers to collect debts they did not owe.

In 2008, the New York Unified Court System, in an attempt to mitigate the detrimental effect of widespread sewer service on New York City consumers, instituted a new requirement for consumer debt cases in the New York City Civil Court. The rule requires that the court clerk, in an envelope supplied by the plaintiff, mail a bare bones notice to individuals who have been sued, informing them of that fact but not providing, for example, a copy of the summons and complaint. *See* N.Y.C. Civ. Ct. Rule 208.6(h). Contrary to Appellants' arguments, these mailings do not provide "supplemental service." *See* Mel Harris Br. at 13, 24, 31 (asserting that to establish lack of service, consumer-plaintiffs would have to establish that they did not receive service from process server and also did not receive supplemental notice from court). These notices are designed to alert defendants of lawsuits, and thereby lessen the harm caused by sewer service, but they do *not* substitute for proper service as defined in the C.P.L.R. Strict

compliance with statutory methods is the only way to effectuate service. *See Macchia v. Russo*, 67 N.Y.2d 592, 595 (1986) (per curium); N.Y. C.P.L.R. § 308 (setting forth proper service methods). Furthermore, as a practical matter, if a debt buyer has not provided the court with an individual's accurate address, papers sent by the court clearly will not reach him or her.

Consumers who were never properly served face additional hurdles when they seek to overturn the judgments in order to defend the lawsuits against them. These obstacles make challenging unlawful practices—including the sewer service that deprived them of a day in court—all but impossible. *Amici*'s client Carla was never served and a default judgment of approximately fifteen thousand dollars was entered against her on the basis of robo-signed, false affidavits like those challenged here. The debt buyer plaintiff garnished roughly ten thousand dollars from Carla's wages before she understood that she could seek to vacate the judgment because she had not been served. The plaintiff opposed her Order to Show Cause to vacate, however, and Carla felt she could not take the risk that it would be denied. Although Carla would probably have won her case eventually, she decided instead to settle for the ten thousand dollars that had already been collected from her wages, so she would not have to take more days off work and risk owing an even higher sum.

Amici have assisted clients who spent months figuring out how to begin the

process of seeking to have a judgment vacated. Once they know what to do, consumers generally must visit the courthouse multiple times simply to have their motions heard—to pick up forms for an Order to Show Cause to vacate a judgment, to file the forms, to ask questions or seek legal advice from volunteers, and on the motion's return date. So many consumers complete the paperwork incorrectly that, if they are able to consult *amici*, we must often advise them to withdraw and refile, requiring more time and effort.

Consumers seeking to disprove false affidavits of service are also hampered by their inability to observe patterns of fraudulent service by the same servers. For example, an attorney at one *amici* organization was recently shown a stack of affidavits in which a single process server reported in approximately 40 consecutive affidavits that he made substituted service on either a "Jane Doe," all with the exact same physical characteristics, or a "John Doe," all with the exact same physical characteristics. Although these affidavits, taken as a group, raise serious concerns, any individual consumer seeing only the affidavit in her case would be unable to perceive or to attack this pattern.

E. Pressures On Consumers, And Debt Buyers' Incentives, Ensure That Challenges To Unlawful Practices Will Never Be Adjudicated.

1. *Severe Risks And Limited Rewards For Pursuing Counterclaims Encourage Consumers To Settle Instead Of Litigating Challenges to Unlawful Practices.*

By the time consumers appear in court, they frequently are in precarious financial circumstances. If forced collection has begun, they may have been without needed wages or assets for months. If they cannot get the judgments lifted, they face serious consequences. Many will be forced to pay on debts they never owed; even for those who do owe something will have to pay more than the amount allegedly owed because the judgment includes various court fees. *See* N.Y. C.P.L.R. § 8101; N.Y. Civ. Ct. Act. § 1901. Judgments also carry collateral consequences for individuals' access to credit, employment, and housing, as described above. For these consumers, the risks of losing their cases are so high that they are anxious to resolve them as quickly as possible, even if they have valid defenses.

Debt buyer plaintiffs exploit these dynamics to extract settlements from consumers. Even when debt buyers know that they cannot prove their claims, they often tell consumers there is no chance the consumers can successfully contest the cases. They draft and present settlements as *faits accomplis*, and pressure consumers into accepting them. Consumers thus routinely enter "settlements of adhesion" that they have not negotiated and do not understand. The consequences

of entering unaffordable settlements are serious: Christiana, one of *amici*'s clients, signed a settlement agreement for 50% of the amount sought, made payments for several years, then was diagnosed with ovarian cancer and defaulted while ill. The plaintiff entered judgment against Christiana for the full amount without further notice, as the settlement allowed, and attempted to garnish her wages after she returned to work.

Consumers who refuse to settle face further barriers. Repeated court appearances cause consumers to lose income and incur additional expenses. Debt buyers' attorneys may exploit this vulnerability by seeking unnecessary adjournments, making motions returnable on days not otherwise scheduled for appearances, or scheduling appearances on days they know the Lawyer for a Day programs do not operate, knowing this will put pressure on individuals to accept unfavorable settlements. *See, e.g.*, Appleseed at 27. In addition, if a consumer misses a subsequent court date, he or she is in default and risks entry of judgment for the full amount sought, with no opportunity to raise defenses or assert counterclaims. For example, Zelda, a pro se consumer that *amici* advised, attended five court appearances over the course of a year and a half because the judge granted plaintiff's repeated requests for adjournments without setting the case for trial. When Zelda missed her sixth appearance because of a medical emergency, she went into default and now risks entry of judgment against her.

Amici have observed debt buyers' counsel engage in other tactics designed to procure defaults or force settlement, even where counsel knows they cannot prove a debt on the merits. Debt collection law firms frequently serve burdensome and improper discovery requests in the hope that the unrepresented consumers will fail to answer them, risking default, or inadvertently make admissions that can be used against them. *Amici*'s client Fiona, who speaks only Spanish, was sued for a debt she did not owe and was never served. Fiona prevailed on her initial motion to vacate the default judgment, but the debt buyer subsequently served voluminous interrogatories and notices to admit that Fiona did not understand. After seeking advice from CLARO, she submitted responses—but one day late. The debt buyer moved to strike Fiona's answer, and Fiona did not object because she did not know that she could do so. The court granted the motion, so Fiona was again in default.

These dynamics virtually ensure that consumers will not be in a position to bring or prosecute counterclaims. Very few consumers even know about the possibility of counterclaims. But even if they do, the potential rewards for prevailing on many typical counterclaims are limited: in addition to actual damages, which may be minimal where no money has yet been collected, the FDCPA provides for $1000 maximum statutory damages, 15 U.S.C. § 1692k(a), and N.Y. Gen. Bus. Law § 349(h) provides for actual damages or $50, with the possibility of trebling only up to $1,000. Moreover, if an individual foregoes

settling the principal claim to pursue a counterclaim, he remains at risk of owing the original amount of the debt plus extra in the form of statutory costs. Even consumers who know that they have meritorious counterclaims routinely make the rational calculation that it is better to give them up in exchange for the debt-buyers' discontinuance of the debt collection claim. Sebastien, an immigrant New Yorker who has worked for dozens of years as a truck driver, recently sought to withdraw money from his bank account to pay an insurance bill, but learned his account had been frozen by a creditor he had never heard of, based on a judgment in an action for which he was never served. He eventually learned that he had been sued for a debt he had already paid in full. Sebastien's pro se motion to vacate was denied, but he filed another motion represented by *amici*. The debt buyer contacted *amici* and offered to settle Sebastien's case in exchange for a mutual release. *Amici* advised Sebastien that he likely had a counterclaim based on sewer service, but Sebastien nonetheless signed the stipulation because he could not afford to take any chances in court—he was falling behind on his bills, and needed immediate access to his bank account.

2. Debt Buyer Plaintiffs Have Strong Incentives To Avoid Adjudication Of Challenges Even If They Must Drop Their Claims.

Debt buyers have overwhelming incentives to ensure that challenges to their practices are never adjudicated. Debt buyers acquire the debts on which they sue at severely discounted prices—4 cents on the dollar, on average. *See* Federal

Trade Commission, *The Structure and Practices of the Debt-Buying Industry* ii (Jan. 2013) ("*Debt-Buying Industry*"). They collect the vast majority of debts on which they sue through default judgments, on the basis of mass-generated complaints and default judgment applications, and thus incur minimal costs. *See generally* Proposed Brief of Amici Curiae AARP et. al, No. 13-2742(L) (2d Cir. Nov. 13).

When the individuals they have sued appear to defend themselves, however, the calculation changes. Debt buyers cannot legally prevail in contested cases without producing some documentation of the debt, but in virtually all debt-buying transactions, debt buyers do not receive that documentation at the time of sale. *See* Debt-Buying Industry at 37, T-11. Many debt buyers are contractually precluded from seeking that documentation, or must pay fees to obtain it, *see id.* at 39–40; these fees are likely not worth paying where the debt they seek to collect is small. Accordingly, *amici* have observed that debt-buyer plaintiffs follow a three-pronged strategy when defendants appear: first, they attempt to force a settlement, even at a discounted amount, to obtain some cash from the consumer; second, they attempt to procure the consumer's default, for example, by filing discovery requests that the consumer likely will not be able to answer or by repeatedly requesting adjourned court dates at which the consumer may fail to appear; and third, if all else fails, they voluntarily discontinue the action on the day of trial—without

prejudice, so the case may be refiled—to avoid an unfavorable determination on the merits.

These dynamics are even more at play in the rare cases where consumers (generally because they have free legal assistance) manage to assert counterclaims under the FDCPA, the GBL, or other statutes. In such cases, debt buyers generally offer to withdraw the collection claims to avoid discovery into, and ultimately, adjudication of, the counterclaims. Debt buyers understand that very few consumers, even where they have counsel, will reject an offer to make the case go away, even if it means the consumer must give up her day in court. The "cherry on top" for some of these debt buyers is to extract, in exchange for a discontinuance or settlement, the consumer's release of all potential claims against the debt buyer, in an attempt to insulate the debt buyer from liability for any unlawful conduct during the suit or otherwise.

These incentives ensure that shockingly few contested cases reach adjudication on the merits of the debt collection claim or any counterclaim. In one study of 90 randomly selected debt buyer lawsuits filed in six regions throughout New York State in 2011, not a single case went to trial or was resolved on the merits. *See* New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* 3 (2013). The current staff of *amici* NYLAG's Consumer Protection Project has seen only a

handful of debt collection actions proceed to trial despite appearing daily on behalf of consumers through the Volunteer Lawyer For A Day program since 2010.

F. Structural Limitations In The Civil Court Make It Impractical To Challenge Abusive Debt Collection Litigation Practices.

Even apart from consumers' practical challenges in navigating the Civil Court system, structural limitations within that Court prevent litigants from effectively addressing systemic violations. These constraints would prevent even the savviest, represented consumer from obtaining relief in the Civil Court comparable to that sought in this action.

First, the New York City Civil Court cannot order injunctive relief. N.Y. City Civ. Ct. Act § 209(b). As a result, litigants seeking to challenge unlawful debt collection practices, even if they prevail, cannot force debt buyers to cease those practices going forward, either with respect to the individuals themselves or anyone else. Nor can the Civil Court issue declaratory relief in such cases, a limitation that likewise limits the efficacy of challenges brought in that forum. *See* N.Y. C.P.L.R. § 3001 (granting exclusive jurisdiction to issue declaratory relief to New York Supreme Court).

Second, although class practice is not forbidden in the Civil Court, class claims may only be brought where the aggregate relief for the class would not exceed the Court's jurisdictional limit of $25,000. *See O'Brien v. Provident Loan Soc. of New York*, 302 N.Y.S.2d 889, 893 (N.Y. Civ. Ct. 1969); N.Y. City Civ. Ct.

Act § 201. This constrains individuals' ability to pool resources to reduce litigation costs, and, like the limitations on injunctive and declaratory relief, prevents them from obtaining meaningful redress for larger numbers of consumers.

Third, discovery tools in the Civil Court are more limited than those available in federal district court or New York Supreme Court. Civil Court litigants cannot as a matter of course obtain discovery from non-parties outside the five boroughs of New York City—including debt buyers' affiliates and attorneys that may possess information critical to proving FDCPA and related violations. *See* N.Y.C. Civ. Ct. Act § 1101(b)(2). To do so, the consumer would have to seek special permission from the Court. *Id*.

II. CLASS ACTIONS ARE THE ONLY MEANS BY WHICH VICTIMS OF ABUSIVE DEBT COLLECTION LITIGATION PRACTICES CAN OBTAIN RELIEF.

Appellants contend that this Court should reverse the class certification ruling below because Plaintiffs' claims are inappropriate to pursue as a class action. This is exactly wrong: a class action is the *only* way that class members injured by the practices alleged here can redress violations of their rights. Without access to class litigation, consumers in the class would be left to protect their statutory rights through individual litigation—which, for all the reasons described above, would mean virtually no litigation at all. By contrast, this class action may compensate these victims for cognizable harms and deter future misconduct by

these Defendants and others, fulfilling the classic purposes of the class action remedy and confirming that a class action is the "superior" means of adjudicating this dispute. *See* Fed. R. Civ. P. 23(b)(3).

A central goal of class actions is to vindicate "'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Advisory Committee Notes on Fed. R. Civ. P. 23). These include individuals who are unaware that they have been injured or deserve compensation, and those whose individual claims are too small to justify litigation. Class members here are both.

First, as described in detail above, most victims of practices like those alleged here are unaware that they have potential statutory remedies, either because they were never served, because they do not know that the tactics used against them were unlawful, or because they do not understand that counterclaims are available to challenge those practices.

Courts regularly find that, where individuals are unlikely to be aware of their claims, a class action is the "superior" means of adjudicating disputes "because it encourages the prosecution of claims en masse that would not be prosecuted individually." *Kalish v. Karp & Kalamotousakis, L.L.P.*, 246 F.R.D. 461, 464 (S.D.N.Y. 2007). In *Kalish*, the court certified a class of plaintiffs challenging

defendant law firms' mailing of approximately 700 false and misleading collection letters. Since each class members was unlikely to be "aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her case," claimants were not "waiting at the courthouse door to assert their FDCPA rights." *Id.* (quotation marks omitted). "The unfortunate reality of this situation is that most of Defendant's approximately 700 FDCPA violations would probably go unnoticed absent this lawsuit." *Id*.

The same was true in *D'Alauro v. GC Services Ltd. Partnership*, where the court emphasized that individuals are particularly unlikely to "possess the initiative to litigate individually" where they are "poor or uninformed." 168 F.R.D. 451, 458 (E.D.N.Y. 1996); *see also Weber v. Goodman*, 9 F. Supp. 2d 163, 169 (E.D.N.Y. 1998) (injured consumers rarely bring individual actions because they "lack the finances to bring a lawsuit and . . . many consumers remain unaware of violations of their rights and therefore, do not consider the option of suing."); *Macarz v. Transworld Sys., Inc.*, 201 F.R.D. 54, 56 (D. Conn. 2001) (finding FDCPA class action superior because majority of class members were unaware that rights were violated and would be unlikely to retain counsel and bring suit). For the same reasons, a class action is "superior" to individual litigation in this case.

Second, most class members' potential affirmative claims are smaller than the cost of litigation. Unless a consumer can prove actual damages of a greater

amount, she is limited to collecting $1,000 in statutory damages under the FDCPA or treble damages up to $1,000 under the New York GBL. Although fee-shifting is available, most consumers are not aware of it, and thus are further discouraged from bringing suit.

"It is well established that class actions are often the superior form of adjudication when the claims of the individual class members are small." *Weber*, 9 F. Supp. 2d at 170 (certifying FDCPA class); *see also* Fed. R. Civ. P. 23, 28 U.S.C.App., p. 142 (1966 Amendment Advisory Committee Notes) (Individuals' interests in conducting their own separate lawsuits "may be theoretic rather than practical" where "the amounts at stake for individuals may be so small that separate suits would be impracticable."). In those circumstances, the alternative to class litigation is no litigation at all. For this reason, "[s]uits brought under the FDCPA . . . regularly satisfy the superiority requirement." *In re Risk Mgmt. Alternatives, Inc.*, 208 F.R.D. 493, 507 (S.D.N.Y. 2002). In *D'Alauro*, for example, plaintiff sued over defendant debt collector's mailing of 7,500 unlawful letters. Because individual recoveries were estimated to be very small, the district court found that it was unlikely that individual consumers would actually bring suit. *D'Alauro*, 168 F.R.D. at 458; *see also Gross v. Washington Mut. Bank, F.A.*, No. 02 Civ. 4135, 2006 WL 318814, at *4 (E.D.N.Y. Feb. 9, 2006) ("Given the relatively small amount of money at stake when considering each claim separately,

it is unlikely that class members would elect to file individual lawsuits against these defendants."). As Judge Richard Posner explained, where individual recovery amounts are low, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Finally, class actions are crucial instruments for deterring misconduct and achieving significant institutional change, especially where, as here, they seek injunctive relief. *See* National Consumer Law Center, *Consumer Class Actions* 698 (8th ed. 2013) (citing H. Newberg & A. Conte, Newberg on Class Actions §§ 5.49 & 5.51 (4th ed. 2002)). Deterring future misconduct is particularly important in the booming debt buying industry. As described above and in greater detail in the proposed brief of *amici curiae* AARP and others, the structure of the debt-buying industry has encouraged rampant use of abusive debt collection litigation practices, which are designed to generate easy profits for debt buyers at the expense of consumers' rights.

No single consumer's claim, even a successful one, can make a dent in this massive operation. One study found that debt buyers suing in New York City between January in 2006 and July 2008 obtained over one *billion* dollars in judgments. *See Debt Deception* at 8. In contrast, available damages under consumer-protection statutes are limited. For debt buyers, the possibility of being

found liable on counterclaims in individual suits is simply not a great enough threat to change their behavior. The class action form is thus "the only way to ensure defendants' compliance with the FDCPA." *Berrios v. Sprint Corp*., No. 97 Civ. 0081, 1998 WL 199842, at *12 (E.D.N.Y. Mar. 16, 1998) (certifying FDCPA class).

Unless unlawful practices of the type challenged in this action can be addressed through class actions, debt buyers and their lawyers will continue violating the rights of consumers with impunity, knowing they face no serious consequences even for obviously unlawful conduct.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm Judge Chin's class certification order.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,811 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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