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Superior Court of Massachusetts,
Suffolk, Business Litigation Session.

Tara DORRIAN, Individually and on Behalf of all Other Persons Similarly Situated
v.
LVNV FUNDING, LLC
Virginia Newton, Individually and on Behalf of all Other Persons Similarly Situated
v.

LVNV Funding, LLC
SUCV142684BLS2
|
SUCV144072BLS2
|
March 30, 2017

Opinion

Janet L. Sanders, Justice of the Superior Court

***1** These two consolidated cases allege unlawful debt collection activity by defendant LVNV Funding, LLC (LVNV). Specifically, plaintiff's claim that LVNV has used courts of this Commonwealth to collect consumer debts and otherwise engaged in collection activities without having obtained the requisite license from the Division of Banks. The Complaints in the two cases allege a violation of the Massachusetts Fair Debt Collection Practices Act, G.L.c. 93, § 24 et seq. (MDCPA) and Chapter 93A.[1] Plaintiffs seek declaratory and injunctive relief together with damages, attorneys fees and costs.

Now before the Court are plaintiffs' Motion for Class Certification and the parties' Cross Motions for Summary Judgment in each of the two cases. Although the underlying facts are not in dispute, the motions raise a host of legal issues which are not easy to resolve. After careful review of the parties' submissions, this Court concludes that the plaintiffs' Motion for Class Certification must be *ALLOWED*. As to the cross motions, LVNV's Motions for Summary Judgment are *ALLOWED* as to Count Three and *DENIED* as to Count One. Plaintiffs' Cross Motions for Summary Judgment are *ALLOWED* as to Count One but *DENIED* as to Count Three. As to the relief appropriate, this Court defers that to another day.

BACKGROUND[2]

A. LVNV's Business

***2** 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. There is no evidence in the summary judgment record that LVNV participates in these decisions. It is also undisputed that it has no direct contact with any debtor.

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

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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.

Lawsuits brought both in this state and elsewhere have targeted LVNV as a debt collector and challenged collection activity undertaken in its behalf. See e.g., *Cunha v. LVNV Funding, LLC*, 2015 WL5737124 (D.Mass. 2015) (unpublished decision) (denying motion to dismiss). The Complaints and Answers filed in two of the out-of state lawsuits is part of the summary judgment record before this Court. *Humes v. LVNV Funding, LLC et al.*, No. 3:11–AP–01016 (U.S. Bankruptcy Court, Eastern District of Arkansas), (*Humes*) attached to Affidavit of Kenneth Quat, Esq. as Exhibit L; *Rosas v. Arrow Financial Services et al.*, No. 14–CV–6462 (U.S.D.C. Eastern District of New York), (*Rosas*) attached to Quat Affidavit as Exhibit K. In a Stipulation filed in the *Rosas* case on November 16, 2015, LVNV (together with other defendants, including Resurgent), admitted to being a "debt collector" under New York law by attempting to collect on consumer debts "directly or indirectly" and also admitted to being in violation of the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 et seq. and the related New York state statute, N.Y. Code, §§ 20–489 et seq. In the *Humes* case, LVNV filed an Answer dated July 16, 2012 where it admitted to being a "debt collector" under the FDCPA and the related Arkansas statute, ACA §§ 17–24–502(5). Both the New York debt collection statute and the Arkansas statute define "debt collector" in much the same way as the Massachusetts statute here at issue.[3]

B. Interpretations of the MDCPA by the Division of Banks

***3** The Division of Banks (the Division) is the state agency responsible for the supervision of state chartered banks and credit unions, as well as the supervision and licensing of other entities, including "debt collectors," as that term is defined in the MDCPA. As part of its business, the Division issues advisory opinions in response to inquiries made from entities and individuals within the industries it regulates. A number of these inquires have concerned whether the entity is a "debt collector" which must obtain a license pursuant to G.L.c. 93, § 24A. Letters from the Division pertinent to this issue are the following.

Advisory Opinion 1–072: In response to an attorney's inquiry, the Division stated in an advisory opinion dated February 26, 2002 that, "based on the information provided" by the inquiry, the attorney's client did not have to obtain a license from the Division because, after having purchased debts from creditors, it had employed licensed collection agencies or collection attorneys to collect the debts. The client was not identified by name.

Industry Letter Posted on Division's Website Dated June 16, 2006: This letter followed an amendment to the MDCPA so as to track the FDCPA, particularly with regard to the statutory definition of "debt collector." The specific question discussed in this letter was whether one who purchases debt from another was a "creditor" who did not require a license or a "debt collector" who did. The letter stated that, if the debt was in default at the time of purchase and the purchaser "otherwise meets the definition of a debt collector" under the MDCPA, it would require a license. It then quoted the language of G.L.c. 93, § 24, which extends to those who either directly or *indirectly* seek to collect on consumer debt.

Advisory Opinion 06–060, effective October 2, 2006: This Advisory Opinion was precipitated by inquiries that followed the Industry Letter described above. Those inquiries asked whether entities who purchased debt for "investment purposes" had to be licensed. This Opinion Letter stated: "It is the position of the Division that a debt buyer who purchases debt in default but is not directly engaged in the collection of these purchased debts is not required to obtain a debt collector license, provided that all collection activity performed on behalf of such debt buyer is done by a properly licensed debt collector in the Commonwealth or an attorney at law licensed to practice law in the Commonwealth."[4]

Advisory Opinion 12–012, dated November 1, 2012: This opinion was issued following correspondence between an attorney representing LVNV and the Division's associate counsel. The attorney, Barbara Sinsley, explained to the Division's counsel in a letter dated August 3, 2012 that her client (not identified in the letter by name) purchased debt in default but then contracted with licensed third-party debt collectors and law firms to service accounts on its behalf, including filing lawsuits to collect on the obligations. Sinsley sought clarification from the

Division as to whether her client required a license. The associate counsel for the Division responded by email in October 2012 that no license was required as long as the purchaser of the debt in default is not "directly engaged in the collection of the debt." The Division then issued Advisory Opinion 12–012 stating that a "buyer of debt in default who is not directly engaged in the collection of those debts is not required to obtain a license so long as collection activity is performed by a licensed debt collector."

***4** *Advisory Opinion Letter 14–013020 dated March 4, 2014*: This opinion was issued in response to an inquiry from the attorney for another debt buyer, MidLand Funding. In that inquiry, the attorney stated that Midland Funding's "only activity is that it is the named plaintiff in suits brought against consumers on debts it has acquired" and that the actual collection activities are undertaken by another entity, which is licensed. The Division responded by stating that Midland Funding would not be a debt collector within the meaning of the MDCPA and thus would not need to get a license from the Division.

During this same time period, there were certain changes in regulations applicable to debt collection activity. One of these changes was made by the Attorney General, who promulgates regulations that define what constitutes "unfair and deceptive collection practices" for purposes of G.L.c. 93A. 940 C.M.R. 7.00 et seq. Those regulations are specifically aimed at and designed to set forth standards for the conduct of "creditors," defined therein to mean those who engaged in the collection of consumer debt.[5] In 2006, the Attorney General specifically included within the definition of "creditor" those who purchase delinquent debt and then hire a third party or attorney collect such debt.[6] 940 C.M.R. 7.03. In other words, the practices of such an entity *would* fall within the purview of the Attorney General's regulations that set forth what would be an unfair debt collection practice.

Mound this same time, there was also an amendment to regulations under the MDCPA. 209 C.M.R. 18.02. That amendment incorporates the definition of a "debt collector" set forth by G.L.c. 93, § 24, but then added a sentence stating that a debt collector "shall also include any person who buys or acquires debt that is in default at the time of purchase or acquisition and who seeks to collect such debt *directly*." (Emphasis added.) The implication thus seemed to be that debt purchasers who *indirectly* seek to collect on those debts are not "debt collectors." Although the amendment did not discuss the licensing requirement in particular, as of the present date, the Division continues to distinguish between what it calls "passive debt buyers" who do not require licenses and "debt collectors" who do. As stated on its official website site today:

> A "passive" debt buyer purchases delinquent debts for investment purposes only and does not take part in any activities to directly collect on the debt. Commonly, the "passive" debt buyer hires either a licensed debt collector or any attorney to directly collect the purchased debts. A "passive" debt buyer is not required to obtain a debt collector license in Massachusetts if the collections are done by a properly licensed debt collector or an attorney licensed to practice law in the Commonwealth.

Division of Banks, *Debt Collections*, Massachusetts Office of Consumer Affairs & Business Regulation (2017), http://www.mass.gov/ocabr/banking-and-finance/credit-and-debt/debt-collections/.

C. Facts Relevant to Individual Plaintiffs

***5** In June 2007, plaintiff Virginia Newton applied for a credit account with Jordan's Furniture. That account allowed her to purchase goods using credit extended by HSBC Bank Nevada, N.A. (HSBC). The first page of the Credit Application contained the following language:

> By completing and signing this application, you are applying for a credit limit in the highest amount we deem appropriate, regardless of any initial sales amount, and you are requesting a Card issued to you by us which will allow you to make purchases under this Account. By a) signing, using or permitting others to use this Card; b) signing or permitting others to sign sales slips; c) making or permitting others to make purchase by telephone, internet, or any other means, you agree to the terms and conditions of Your Credit Card Account, form 6022–465–38–US–07 (1–07) (which includes an arbitration

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> provision), stated on both sides of this combined application and Important Terms of Your Credit Card Account which are incorporated herein by reference, and the Cardholder Agreement and Disclosure Statement which shall be sent to you with the credit card.

See Exhibit C (Affidavit of Tony Henderson), Attachment 2. In four pages of small type following that first page, the terms and conditions that were referred to by this paragraph were set forth. One of those terms was a provision entitled "Arbitration." That provision states that any claims or disputes between the parties may be submitted to arbitration "upon the election of" either Newton or HSBC. Provided that such an election is made, the parties give up their right to litigate their claims in court. That same provision states: "No class actions or private attorney general actions in court or in arbitration ... are permitted without the written consent of you [Newton] or us [HSBC]." Neither the Form 6022 nor the Cardholder Agreement referenced by the Application has been produced by LVNV.

Newton purchased a bedroom set for her home, then defaulted. That debt was then acquired by LVNV. On February 3, 2014, a suit captioned *LVNV Funding, LLC v. Virginia Newton*, No. 1449–CV–0076, was commenced in the Framingham District Court. The law firm which filed that suit, Lustig Glaser & Wilson (LGW), was retained by Resurgent. Judgment entered against Newton and a supplementary process action was instituted, with LVNV as the named plaintiff, in an effort to collect on the judgment. Newton made at least one $25 payment on the underlying judgment. At no time did Newton have any direct contact with LVNV, corresponding only with the law firm.

Plaintiff Dorrian also obtained an extension of credit from HSBC in 2007 and used it to purchase household furniture. LVNV has produced neither her credit card application nor any credit card agreement. Like Newton, Dorrian defaulted on her payments and the HSBC account was eventually acquired by LVNV. She had no contact with LVNV. Ultimately, a small claims action was filed in the Quincy District Court entitled *LVNV Funding, LLC v. Tara Dorrian*, 1356–SC–003619. The law firm that filed that lawsuit was Kream and Kream, P.C. which was retained by Resurgent. The lawsuit resulted in a judgment in Dorrian's favor. In a Memorandum of Decision dated March 30, 2015 [33 Mass. L. Rptr. 157], this Court (Roach, J.) concluded that the fact that Dorrian prevailed in the underlying collection action did not prevent her from acting as a plaintiff in this case.

DISCUSSION

I. Plaintiffs' Motion for Class Certification

***6** The parties jointly requested that this Court rule on the Motion for Class Certification first, presumably so that my rulings on the substantive issues will apply on a class-wide basis. This Court acceded to this request. Plaintiff Dorrian seeks to certify a class defined as:

> [A]ll Massachusetts residents against whom Defendant, on or after August 22, 2010, took any action, directly or indirectly to collect or attempt to collect a consumer debt acquired by Defendant, after default, including but not limited to sending a letter, bill, invoice, notice, demand, statement, or similar document which was not returned as undeliverable; filing a lawsuit; recording or levying an execution; filing or prosecuting a supplementary process action; filing or prosecuting a wage garnishment action, and filing or prosecuting a proof of claim in a bankruptcy case. Excluded from the class are all past and present employees, agents, officers, and directors of Defendant and persons who have released Defendant from liability.

Pls.' Mot. for Class Cert. at 6. The class which Newton seeks to have certified is identical, except that the relevant "collection activity" must have occurred on or after December 31, 2010. *Id.*

To determine whether these consolidated lawsuits can be maintained as a class action, this Court applies the criteria set forth in Mass.R.Civ.P. 23.[7] Subsection (a) of that rule lays out the four threshold requirements of numerosity, commonality, typicality, and adequacy of representation. In addition to those requirements, this Court must find, pursuant to subsection (b) of the rule, that common questions of law or fact predominate over questions

affecting individual members, and that a class action is superior to other available methods for adjudicating the controversy. This Court enjoys "broad discretion whether to grant class status." *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 391 (2004). A party moving for class certification need only provide "information sufficient to enable the motion judge to form a reasonable judgment that certification requirements are met." *Id.* at 392, quoting *Weld v. Glaxo Wellcome, Inc.*, 434 Mass. 81, 85 (2001). Although there may very well be differences among class members in the instant case which must be handled on an individual basis, this Court concludes that certification is appropriate. Proceeding by way of a class action is far superior to the alternatives, and the other requirements of a class action imposed by Rule 23 are met.

A. Numerosity and Commonality

***7** A class must be "so numerous that joinder of all members is impracticable." Mass.R.Civ.P. 23(a)(1). LVNV concedes that it has brought over 18,000 collection lawsuits against Massachusetts residents regarding debts that it owes and is the named claimant in thousands of related actions. As a consequence, LVNV does not challenge the proposed class on grounds of numerosity. As to the requirement that there are questions of law or fact common to the class, that too is satisfied. "It is not essential that the interest of each member of the class be identical in all aspects with that of the [named] plaintiffs" so long as that interest arises "out of a common relationship to a definite wrong." *Spear v. H.V. Greene Co.*, 246 Mass. 259, 266 (1923). If nothing else, all putative class members here share an interest in proving that LVNV operated in violation of the MDCPA.

B. Typicality

The claims of the class representatives must be "typical of the claims or defenses of the class." Mass.R.Civ.P. 23(a)(3). "The inherent logic of the typicality requirement is that a class representative will adequately pursue her own claims, and if those claims are 'typical' of those of the rest of the class, then her pursuit of her own interest will necessarily benefit the class as well." Newberg on Class Actions § 3:28 (5th ed.). LVNV argues that both Dorrian and Newton are atypical representatives, for different reasons. Although these arguments have merit, this Court concludes that the named plaintiffs' claims are sufficiently typical to satisfy this Court that they will adequately pursue their claims so as to benefit absent class members.

As to **Dorrian**, **LVNV** argues that she is atypical because she never made a payment to LVNV, and LVNV was unsuccessful in obtaining a judgment against her. However, Dorrian—like the rest of the putative class—asserts that she was the subject of collection activity engaged in on LVNV's behalf and that LVNV, in violation the G.L.c. 93, § 24A, did not have a license to conduct that activity. That those efforts ultimately did not result in a judgment against her has no bearing on whether that activity was lawful or not. Of course, each plaintiff must eventually prove some individualized injury or loss. But Dorrian plausibly claims that she has at a minimum suffered some financial loss in defending against LVNV's collection activities. She also seeks to recover for a violation of Chapter 93A, which permits damages for non-economic injuries. See *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 241 (1st Cir. 2013); see also *Gathuru v. Credit Control Servs., Inc.*, 623 F.Sup.2d 113, 123 (D.Mass. 2009). That Dorrian's damages may be less than other class members—or that she may have problems in proving any damage does not make her claim so atypical that she would not be considered an adequate class representative. That damages or other relief may differ among class members does not make certification inappropriate so long as those class members share common issues of law and fact that form the nucleus of their liability claims. See *Salvas v. Wal–Mart Stores, Inc.*, 452 Mass. 337, 363 (2008).

Defendant separately argues that Newton is an atypical class representative because her signed Credit Card Application contains an arbitration clause as well as a prohibition (contained in the same clause) against seeking relief by way of a class action. These provisions may indeed be relevant to the question of whether common questions predominate over those questions affecting only certain members of the class (discussed *infra*). It does not make Newton atypical, particularly in light of LVNV's assertion that a large portion of the class is subject to similar arbitration and class action waiver provisions. If true, Newton would have every incentive to litigate the validity of these provisions.

***8** In concluding that Newton's claims (and defenses) are sufficiently typical of the class, this Court need not (and does not) decide whether the class action prohibition contained in her Application is valid. This Court agrees with plaintiffs that the requirement that she arbitrate her claim—arbitration taking place only "upon the election of" either party has been waived by LVNV, which never

sought to compel arbitration. However, the issue concerning the validity of the class action prohibition remains very much a live one. Certainly, there is ample support in the case law for enforcing such a prohibition, see *AT & T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), but there may be circumstances when they are unenforceable. Section 2 of the Federal Arbitration Act (FAA) declares arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, arbitration-related provisions remain subject to invalidation under " 'generally applicable contract defenses) such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Arbitration provisions may also be unenforceable if "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310 (2013).

It should also be noted that, the class action waiver in Newton's case is somewhat unusual: it is tagged on to the end of a provision which purports to address only arbitration, raising the question of whether it can be enforced independently of arbitration or alternatively whether it could be reasonably understood by a person in Newton's position to bar her participation in a class action. In any event, this action may proceed as a class action even without Newton given the fact that there is a second plaintiff, Dorrian. The validity of this provision as to Newton (and other class members with allegedly similar provisions) can be decided on another day.

C. Adequacy

A proposed class representative must show that it will "fairly and adequately protect the interests of the class." Mass.R.Civ.P. 23(a)(4). To satisfy this requirement, the Court must find that "interests of the representative party will not conflict with the interests of any of the class members [and] that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation." *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985). LVNV does not question the qualifications and experience of counsel. It does contend that the named plaintiffs are inadequate representatives, based on its assertion that there were certain inconsistencies in the deposition testimony of Dorrian and Newton. This argument is without merit. Although a named plaintiff's lack of credibility can, in the unusual case, justify a finding of inadequacy, discrepancies in the deposition testimony of these named plaintiffs are not significant enough to suggest that they will fail to protect the interests of absent class members.

D. Predominance

LVNV's strongest argument against class certification is that those questions of law or fact common to class members do not predominate over individual ones. LVNV has produced evidence showing that its debt portfolio originated from 140 different creditors. It asserts that, in a large number of the agreements governing the relationship between creditor and debtor, the debtor waived his or her right to be a member of a class or to contest the debt in court. As already noted, there is nothing *per se* illegal about such provisions, which have (depending on the circumstances) been upheld by the courts. If LVNV can indeed prove that certain class members agreed to such provisions, then (it is argued) this Court will have to separately litigate their enforceability as to each class member and determine in each case whether they constitute a bar to recovery.

There are two fundamental flaws to LVNV's argument, however. *First*, the evidence for the existence of these provisions is far from compelling. The defendant has not produced any actual credit card agreement, relying instead on a single account Application (that pertaining to Newton) which contains the provisions in question. As to whether other putative class members have similar agreements, LVNV relies on a statistical sampling of accounts from two creditor banks (Credit One and Capital One) to suggest that all of those banks' consumer credit card agreements are subject to arbitration provisions. It also relies on evidence presented in other cases to suggest that all Citibank credit agreements—as a general matter—contain arbitration provisions. It produces *no* evidence (beyond Newton's Application) relative to class action waivers. Before this Court would be in a position to even consider that a particular class member had affirmatively relinquished his or her right to litigate rather than arbitrate and to participate in a class recovery, this Court would need much more concrete proof regarding the existence of these provisions.

***9** *Second*, even were LVNV to produce such evidence and thus be in a position to assert certain affirmative defenses against individual class members, this is generally regarded as not sufficient to deny class action

status, given the range of procedural mechanisms available to a court that could be used to deal with these individual differences. Newberg on Class Actions § 4:55 (5th ed.), quoting *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 39 (1st Cir. 2003). In line with this general rule, a number of courts have concluded that the possible existence of arbitration agreements is insufficient to defeat certification. See, e.g., *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 681 (N.D.Cal. 2011) ("The fact that some members of a putative class may have signed arbitration agreements or released claims against a defendant does not bar class certification"); see also *Coleman v. General Motors Acceptance Corp.*, 220 F.R.D. 64, 91 (M.D.Tenn. 2004) (same); *Finnan v. L.P. Rothschild & Co.*, 726 F.Sup. 460, 465 (S.D.N.Y. 1989) (certifying class although some class members had signed arbitration agreements and liability releases). *If* LVNV is able to produce concrete evidence that particular class members agreed to arbitration or to give up their right to participate in a class, then this Court could create a subclass, modify the class definition so as to exclude them, or consider ways to resolve the issues surrounding enforcement of these clauses on an individual basis. These differences are not grounds for denying class certification at this juncture in the case.

B. Superiority

As to this final requirement, these consolidated cases are classic examples of how the policy of judicial efficiency and access to the courts are actually promoted by permitting them to proceed as a class action. They aggregate numerous small claims into a single action. Arbitration and class action waiver issues aside, few factual issues are in dispute. And the resolution of a single question of law could conceivably provide relief to a broad range of consumers. Indeed, if this Court were not to certify the class, the chance that any of the absent class members would elect to bring separate actions is highly unlikely. Particularly given the presence of a Chapter 93A claim, see footnote 7, *supra*, there is a strong need to provide an effective remedy to consumer plaintiffs in the event they are successful. That remedy can realistically be provided only by allowing the case to proceed as a class action.

II. Cross Motions for Summary Judgment

Although the relevant facts are undisputed, these motions raise many difficult legal issues, at least a few of which have no clear appellate court precedent. Principal among these issues is the question of whether an entity that derives virtually all of its income from collecting on defaulted consumer debts but which uses an intermediary to engage in the collection activity that generates such income must still register as a "debt collector" as that term is defined by G.L.c. 93, § 24 of the MDCPA. Within that larger issue lurks the question of how much deference this Court should accord the Division's interpretation of statute. Another major issue concerns whether a failure to be licensed constitutes a violation of Chapter 93A where the Division itself has essentially condoned the conduct in question. Finally, the motions address the type of relief plaintiffs seek and whether there is any legal basis for it. This Court addresses each issue in turn.

A. The Massachusetts Debt Collection Practices Act

The MDCPA is a statute intended to protect consumers from unfair practices in the collection of consumer debt. As a consumer protection statute, it must be liberally construed to effectuate its policy objectives. *Roberts v. Enterprise Rent–A–Car Co. of Boston*, 438 Mass. 187, 192 (2002), citing *Shepard v. Finance Associates of Auburn, Inc.*, 366 Mass. 182, 191 (1974). The MDCPA is modeled after the Federal Fair Debt Collection Practices Act, (FDCPA), 15 U.S.C. §§ 1692–1692p, and tracks much of its language. Both statutes are aimed at "debt collectors"—defined as those who acquire defaulted consumer debt—as distinguished from "creditors," who have themselves extended credit so as to create a debt. See 15 U.S.C. §§ 1692(a)(4) and 1692(a)(6); G.L.c. 93, § 24 (defining "creditor" to exclude anyone who receives an assignment or transfer of a debt in default in order to collect it). That distinction makes some sense. As explained in the legislative history of the FDCPA, debt collectors are more likely than creditors to engage in abusive practices. "Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95–382 at 2 (1977). Where an entity has acquired portfolios of defaulted consumer debt, there is an additional problem: the buyer of such debt receives few if any of the underlying documents relating to the purchased debt, and the seller of such debt generally disclaims all representations and warranties with regard to the accuracy of any of the information they do provide. See Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (2013),

www.ftc.gov/reports/structure-practices-debt-buying-industry. As a consequence, consumers may have great difficulty in verifying the origin of the debt and become subject to collection actions unsupported by adequate documentation.

***10** These lawsuits are notable in that the only conduct alleged to be unlawful here is LVNV's failure to obtain a license from the Division of Banks. That is, these two cases do not claim that LVNV—or any entity acting on its behalf—has harassed any debtor, or made any false misrepresentations in an attempt to collect on a debt. LVNV is not accused of seeking to collect amounts it has no basis to believe that it is owed or using information about a debtor in an improper manner. Instead, the lawsuits focus exclusively on the fact that LVNV is unlicensed.

As to whether such a license is required, that turns on whether LVNV is a "debt collector" within the meaning of the MDCPA. As with any other case involving a question of statutory interpretation, the starting point for the Court's analysis is the language of the statute itself. Where that language is clear and unambiguous, the Court must enforce the statute as written. The MDCPA broadly defines the term "debt collector." It means "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 *or* who regularly collects or attempts to collect, directly, *or indirectly*, a debt owed or due or asserted to be owed or due another." (Emphasis added.) G.L.c. 93, § 24. The statute goes on to provide that "[n]o person shall directly *or indirectly* engage in the commonwealth in the business of a debt collector ... without first obtaining from the Commissioner [of Banks] a license to carry on the business." G.L.c. 93, § 24A(a). (Emphasis added.) This licensing requirement gives the Division of Banks, acting through its Commissioner, some oversight over those who engage in such activity: in order to acquire a license, the applicant must demonstrate to the Commissioner's satisfaction that its "financial responsibility, character, reputation, integrity and general fitness ... are such as to command the confidence of the public and to warrant the belief that the business ... will be operated lawfully, honestly, and fairly." G.L.c. 93, § 24B(a). Licenses must be renewed annually, and may require the submission of additional information to the Commissioner to determine whether the collector has complied with all applicable laws and regulations. G.L.c. 93, § 24B(b). This requirement therefore provides an added layer of protection to consumers who would otherwise have to file separate lawsuits in the event of any substantive violation. That the legislature regarded this requirement is important is further evidenced by the fact that debt collection activity without a license is a criminal offense and constitutes a *per se* violation of G.L.c. 93A. G.L.c. 93, § 28.

Turning then to whether LVNV is a "debt collector" within the meaning of the statute, this Court notes the following undisputed facts. In filings with state authorities, LVNV has described its business as "consumer debt collection." Virtually all of its income is derived from the collection of these consumer debts, all of which are in default status. It does not acquire this defaulted debt for resale to others; that is, its business is to realize as much money as it can through collection activity on the debts it has purchased. LVNV uses the instrumentalities of interstate commerce and the mails in the conduct of its business, and it does business in Massachusetts. Clearly, then, it falls within at least one of the two categories of "debt collector" identified by G.L.c. 93, § 24. See *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996) (discussing identical language in FDCPA, court notes that this language would make an entity a debt collector even if it did not regularly engage in collection activity). LVNV's argument that it is simply a passive "debt buyer" and not a "debt collector" fails in the face of this broad statutory definition.

***11** Focusing on the second part of the definition of debt collector—one who engages in collection activity—LVNV argues that it need not get a license because it does not itself perform the collection activity, delegating that responsibility to others. In support, it relies on the fact that the collection activity on the debts it owns is undertaken by its intermediary Resurgent and that it has no direct communication with the consumer debtors. By its express terms, however, the statute imposes a licensing requirement on any person who "directly *or indirectly*" engages in collection activity within the Commonwealth. G.L.c. 93, § 24A. Although Resurgent is the entity that has direct contact with the consumer debtor, Resurgent is clearly acting as LVNV's agent, in LVNV's name, and strictly for its benefit. Resurgent may hire the lawyers necessary to bring collection actions, but in order to prosecute these claims, Resurgent necessarily relies on LVNV to provide whatever documentation it has regarding the defaulted debt, which LVNV continues to own. Proceeds from all collection activity go directly to LVNV. As plaintiffs point out, LVNV is the named plaintiff or claimant on literally thousands of claims prosecuted in the courts of this Commonwealth: more than 20,000 lawsuits have been instituted on its behalf and over 3,000 claims have been filed in bankruptcy cases of Massachusetts residents. Between 2010 and 2015, 6,175 of LVNV's accounts had generated wage garnishment actions against Massachusetts residents. To conclude that

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LVNV is not a debt collector so as to require a license under these circumstances would be to exalt form over substance.

In opposing this construction of the statute, LVNV relies heavily on Advisory Opinion Letters by the Division of Banks that were issued in response to inquiries from attorneys representing LVNV and others. It is important to note that the Division based those opinions on the limited information provided to it by those who clearly had an interest in obtaining a favorable ruling. The entity as described by its attorney was often not even identified by name. Whether an entity is actually engaged in collection activity is clearly a fact specific question, with any opinion as to that issue limited to the facts provided. Still, as applied to the undisputed facts of the instant case, the Advisory Opinion Letters do support LVNV's position, particularly with regard to those opinions issued in more recent years. Thus, for example, in November 2012, the Division stated in Advisory Opinion 12–012 that a "buyer of debt in default who is not directly engaged in the collection of debts is not required to obtain a license so long as collection activity is performed by a licensed debt collector." In 2014, The Divisions opined that an entity (there, Midland Funding) would not be a debt collector needing a license if its only collection activity was to be the named plaintiff in suits or claims undertaken by others who were licensed. See Advisory Opinion 14–013020. In 2013, this distinction between a "passive debt buyer" and "debt collector" was incorporated into the Division's own regulations, which specifically state that purchasers of defaulted debt are debt collectors only if they "directly" engaged in collection activities. 209 C.M.R. 18.02. The Division continues to adhere to this distinction today.

As a general rule, a court accords substantial deference to the interpretation of a statute by the agency charged with administering and enforcing it. *Commerce Ins. Co. v. Commissioner of Ins.*, 447 Mass. 478, 481 (2006) (*Commerce Insurance*); *Goldberg v. Board of Health of Granby*, 444 Mass. 627 (2005) (*Goldberg*); see also *Peterborough Oil Co., LLC v. Dep't of Environmental Protection*, 474 Mass. 443 (2016). Such deference is particularly appropriate where the statute itself confers broad authority to the agency, which often has special expertise in the area, and where the legislature has not spoken with certainty on the topic in question. For example, in the *Commerce Insurance* case, the Supreme Judicial Court upheld the Commissioner of Insurance's decision to promulgate an assigned risk drivers plan in the complex area of auto insurance, concluding that the decision did not conflict with the statutory requirement that the Commission promulgate a plan that would "fairly and equitably" apportion among insurance companies the losses arising from such insurance. Although a reinsurance plan might more directly apportion those losses, the regulation in question fell within the broad parameters set by the statute and thus was valid. The *Goldberg* case involved another highly technical area—the process for obtaining a facility site assignment for a solid waste landfill. The statutes in question gave the Department of Environmental Protection (DEP) considerable leeway as to what criteria had to be taken into account in that process. Considering the validity of certain DEP regulations governing the modification and expansion of landfills, the Court limited its review to whether the regulations were arbitrary and capricious, there being nothing in the statutes that conflicted with those regulations. See also *Respiratory Hospital v. Dep't of Public Welfare*, 414 Mass. 330, 33 (1993) (where enabling statute permitted agency to promulgate regulations and rules regarding the administration of the Medicaid program, the agency had authority to create a Medicaid claims review board).

***12** Judicial deference is not judicial abdication, however, since the duty of statutory interpretation rests ultimately with the courts. *Town Fair Tire Ctrs., Inc. v. Commissioner of Revenue*, 454 Mass. 601, 605 (2009) (striking down a decision by the Commissioner of Revenue to assess taxes and related penalties against three New Hampshire stores who sold goods to Massachusetts residents where the statute limited such taxes to goods used, sold or consumed in Massachusetts). Where the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a reasonable construction of the statute. *National R.R. Passenger Corp. v. Boston Maine Corp.*, 503 U.S. 407, 417–18 (1992), and cases cited therein. Where the words of the statute are plain and unambiguous in their meaning, however, this is conclusive as to legislative intent, and an agency is powerless to change or modify them. *Id.* Here, G.L.c. 93, § 24 is quite specific in its definition of "debt collector," extending it to include not only those who directly engage in collection activity but also those who *indirectly* engage in such activity. This same definition is contained within G.L.c. 93, § 24A, which specifies which entities have to obtain a license from the division: an entity in the business of consumer debt collection must obtain a license even where the collection activity is undertaken indirectly. Through its Advisory Opinions and ultimately in its regulations, the Division has essentially attempted to create a third category of "passive debt buyer"—that is, one who acquires consumer debt for the purpose of collecting on them but hires others to actually do the work on its behalf. To accept the Division's interpretation of

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the statute would essentially render meaningless the word "indirectly" which the legislature quite deliberately included in both Sections 24 and 24A.

This Court's interpretation of the MDCPA to extend to entities like LVNV is in accord with case law interpreting the reach of the FDCPA, after which the MDCPA was modeled. See e.g., *Police v. Nat'l Tax Funding LP*, 225 F.3d 403–04 (3d Cir. 2000) (that debts were collected by third party is not dispositive of whether the defendant was "debt collector" under the FDCPA); *Rodriguez v. Fulton Friedman & Gullace, LLP*, 2012 WL 3756589 at *5 (S.D.Tex, August 28, 2012) (where defendant held title to debt portfolios and collaborated with servicers to collect the debt, that is at least an indirect attempt to collect a debt owed to another). *Munoz v. Pipestone Financial, LLC*, 397 F.Sup.2d 1129, 1133 (D.Minn. 2005) (debt buyer who did not directly communicate with consumer nevertheless qualified as "debt collector").

This Court's conclusion is also in line with decisions interpreting collection statutes in other states which are similar or even identical to the MDCPA in its definition of "debt collector." For example, in an Arkansas decision, the defendant—like LVNV here—argued that it need not be licensed under the Arkansas debt collection law because it operated through third-party collection agencies, relying on an agency opinion to that effect. *Simpson v. Cavalry SPV 1, LLC*, 2014 Ark. 363, 440 S.W.3d 335 (2014), The court was not persuaded, since the Arkansas statute—like the MDCPA—required licensing of entities engaged in both direct and indirect attempts to collect on delinquent accounts. The same result was reached in a Maryland case, where the defendant relied on an advisory opinion of the Maryland Department of Labor Licensing and Regulation in contending that it was not a "collection agency" under the Maryland debt collection act. *Bradshaw v. Hilco Receivables, LLC*, 765 F.Sup.2d. 719 (D.Md. 2011). That opinion, like the Division's opinions in the instant case, had excluded from the licensing requirement entities that it described as "passive debt buyers," who purchase debts in default but do not directly engage in debt collection. The court determined that this opinion conflicted with the plain language of the Maryland statute—identical to the MDCPA in its definition of "debt collector"—and that a license was required.

Neither the Massachusetts Appeals Court nor the Supreme Judicial Court has weighed in on this question. The Appellate Division of the District Court has, however. *Midland Funding, LLC v. Juba*, No. 16–ADMS–40011 (Mass.App.Div. Southern Dist.) (February 15, 2017). In that case, the court concluded that Midland Funding, a large scale purchaser of defaulted consumer debt, was required to be licensed by the Division, notwithstanding its argument that the collection of these debts was done by another entity, Midland Credit Management, Inc., pursuant to a Servicing Agreement. To support its conclusion, the court relied in part on federal case law interpreting the FDCPA, which the MDCPA tracks. It reasoned that the MDCPA was clear in its intent to reach those who *indirectly* engage in debt collection activities, notwithstanding the Division's Advisory Opinions, which it determined not to be binding.

***13** That is not to say that there is no precedent to the contrary. Not all federal courts have interpreted the FDCPA, for example, as extending to those who hire others to engage in collection activities on its behalf. Nor are courts in other states unanimous in their interpretations of their own debt collection statutes that define "debt collector" in the same way that the MDCPA does, particularly where the agency charged with administering the statute has opined that no license is required if the defendant does not directly engage in the collection activity. See e.g., *Scheetz v. PYOD, LLC*, 2013 WL 5436943 at *6 (N.D.Ind. Sept. 26, 2013). On balance, however, this Court is more persuaded by the reasoning set forth in those decisions that support plaintiffs' position.

B. Violation of Chapter 93A

Even if the Division's Opinion Letters and its 2013 amendment to its regulations are not binding on this Court, do they have some bearing on whether LVNV's failure to get a license is a violation of Chapter 93A? As this Court (Roach, J.) has already noted, "it is difficult to see how a party demonstrating good faith compliance with the Division's interpretation of the statute would be subject to G.L.c. 93A liability." See Memorandum of Decision on Defendant' Motion to Dismiss in ***Dorrian*** *v.* ***LVNV*** *Funding, LLC*, dated March 30, 2015, page 8, fn.3. On the other hand, the legislature has explicitly determined that a violation of the MDCPA is a *per se* violation of Chapter 93A. Under the case law, that means that plaintiffs need not present any additional evidence that the act itself was "unfair or deceptive." *McDermott v. Marcus Errico, Emmer & Brooks, P.C.*, 775 F.23 109, 117–18 (1st Cir. 2014) (where liability under G.L.c. 93A arises from the text of an independent statute, that is a "clear directive by the Legislature that a violation of that particular statute constitutes an automatic violation of Chapter 93A, without the need of showing that the act was otherwise 'unfair or deceptive' or occurred in trade or

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commerce"). LVNV, however, relies on a specific statutory exemption from liability set forth at G.L.c. 93A, § 3. Having considered and weighed the arguments of both parties, this Court concludes that this exemption applies.

Section 3 of Chapter 93A states: "Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States." The burden of proving that this exemption applies lies with the party claiming it. Plaintiffs contend that this exemption does not apply because LVNV has not met its burden of showing that the Division has expressly condoned the conduct at issue in this lawsuit. As already noted herein, however, the only unlawful conduct that is challenged by these lawsuits is LVNV's failure to obtain a license. It is also undisputed that LVNV at all times acted through its agent Resurgent, which was licensed, LVNV itself having no contact with consumer debtors. The Division's Advisory Opinions and its 2013 amendment to its regulations make clear that it was the Division's position, throughout the relevant time period in question, that an entity that does not directly engage in debt collection activity does not need a license so long as the entity that does engage in such activity is itself licensed. LVNV's failure to obtain a license was thus quite clearly condoned by the Division.

Plaintiffs argue that this exemption can apply only if the Division had the statutory authority to take the position that it did; because this Court has determined that it did not have such authority, LVNV (it is argued) cannot take advantage of the shield from liability that Section 3 provides. However, LVNV had no reason to believe that the Division was *not* acting within its statutory authority: over a period of many years, the Division repeatedly stated that entities like LVNV—and LVNV itself[8]—did not need a license under the circumstances presented here, and there was no indication from any Massachusetts court that this was unlawful. Plaintiffs' argument notwithstanding, this Court concludes that this *apparent* authority to act is sufficient for the exemption to apply.

***14** Admittedly there is little case law to guide the Court on this issue. To the extent that it has arisen at the appellate level, the court has determined that the exemption did not apply, without directly addressing whether any underlying regulations that related to the defendant's conduct were valid or not. Thus, the SJC in *Commonwealth v. DeCotis*, 366 Mass. 234, 240 (1974), determined that the defendants had not met their statutory burden of proving that the exemption applied, *without* deciding whether the Peabody Board of Health, the agency which defendants claimed to rely on, had the authority to permit the conduct in question). In *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733 (2008), involving a claim that the defendant had violated Chapter 93A by originating and servicing "subprime" mortgage loans, the SJC rejected the defendant's argument that it was entitled to the statutory exemption because its conduct was otherwise permitted law. The defendant there had dissected its conduct into four components and argued that each one was permitted by some statute or regulatory authority. The Court pointed out, however, that it was the defendant's choice to combine each of these components into a mortgage package that it should have known was "doomed to foreclosure" and that this combination was not expressly permitted by any state or federal authority. *Id.* at 740. In contrast, LVNV has demonstrated that the Division, by its advisory opinions, affirmatively permitted it (or entities like it) to conduct its business without a license, which is the precise conduct that is alleged to be a violation of Chapter 93A.

C. Entitlement to Equitable Relief

LVNV separately argues that Count One of the Complaint should be dismissed insofar as it seeks equitable relief. In Count One, plaintiffs ask for a declaration that all collection-related judgments or actions instituted in LVNV's name be declared void, that all liens and attachments obtained pursuant to such actions be vacated, and that an injunction issue requiring LVNV to cease all collection activities until it is properly licensed. LVNV first argues that Count One asserts only a remedy, not a cause of action. Although it is true that Count One is captioned to indicate precisely that, it incorporates by reference all the preceding allegations of the Complaint, which make it quite clear that it seeks that remedy based on the claimed violation of G.L.c. 93, § 24. The MDCPA expressly permits a private right of action for any violation of its provisions, and the remedy available to anyone who can demonstrate a cognizable injury includes not only damages but injunctive relief together with costs of suit, including reasonable attorneys fees. G.L.c. 93, § 12.

LVNV makes several other arguments as to why equitable relief is not available. One of those arguments is that there is no "actual controversy" since the cases against the named plaintiffs and other putative class members have already concluded. In Dorrian's case, judgment was actually entered in her favor. This issue was raised by

LVNV earlier in the case and decided against it. See *Newton v. LVNV Funding, LLC*, 33 Mass. L. Rptr. 100, 2015 WL 7895106 *2 (Mass.Super. Oct. 27, 2015) (Sanders, J.); see also ***Dorrian*** *v.* ***LVNV*** *Funding*, Civ. No. 14–2084–BLS 2 (Mass.Super. March 30, 2015) (Roach, J.) [33 Mass. L. Rptr. 157]. This Court reasoned that the controversy at issue was not whether the plaintiffs owed the debt on which suit was brought but whether the act of bringing the debt collection suit was itself lawful. Accordingly, an actual controversy existed even as to Dorrian and other class members similarly situated.

As to those class members who had judgments entered against them, the plaintiffs argue that declaratory relief is necessary since, without such relief these judgments would stand. As LVNV acknowledges, a declaratory judgment is appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceedings." *Boston Children's First v. Boston School Comm.*, 183 F.Sup.2. 382, 396 (D.Mass. 2002), quoting 10B Wright, Miller & Kane, 2759 (3d ed. 1998). That is precisely what an order invalidating these judgments would do. Injunctive relief too seems to be appropriate in order to prevent LVNV from engaging in any continuing violations.

The more interesting question, of course, is whether these judgments can indeed be declared void or whether they are merely voidable, in which case each member of the class can obtain relief (if at all) only from the court that entered the original judgment. Like so many other issues in this case, there is no clear Massachusetts precedent on this question. This Court first considered this issue in a case against another debt collector, Midland Funding, and ruled in plaintiffs' favor, notwithstanding the general rule that judgments are impervious to collateral challenge. See Memorandum of Decision and Order dated November 12, 2012 in *Gomes v. Midland Funding, LLC*, and Civ. No. 11–1469–BLS2. In doing so, it relied in part on the reasoning of an Illinois intermediate appellate court which, considering identical facts, concluded that a complaint filed by an unregistered collection agency, in violation of that state's debt collection statute, would be a "nullity." That decision, however, was later overruled by the Illinois Supreme Court. *LVNV Funding, LLC v. Trice*, 2015 Ill. 116129, 2015 WL 847622 (Feb. 27, 2015), overruling 2011 Ill.App.(1st) 092773, 2011 WL 2623304 (June 30, 2011). The issue came up again on a motion to dismiss Newton's claim, and this Court once again ruled in plaintiff's favor. *Newton v. LVNV Funding, LLC*, 33 Mass. L. Rptr. 100, 2015 WL 7895106 (October 27, 2015). In so concluding, this Court reasoned that if the defendant's argument were accepted, many if not all members of the class would be effectively deprived of any relief at all. This Court sees no reason to revisit that conclusion at this juncture in the case. Whether an appellate court will agree with this Court remains to be seen.

CONCLUSION AND ORDER

***15** For all the foregoing reasons, the plaintiffs' Motion for Class Certification is *ALLLOWED*. As to the Cross Motions for Summary Judgment, the Plaintiff's Motion is *ALLOWED* as to liability only on Count One, alleging violations of the G.L.c. 93A, § 24, and the Defendant's Motion as to that Count is *DENIED*. As to Count Three alleging a violation of Chapter 93A, the plaintiffs' Motion is *DENIED*, and the defendant's Motion is *ALLOWED*, with that count dismissed from the case. Count Three of the Complaints have already been voluntarily dismissed for this case. A Rule 16 Conference in this matter is scheduled for May 5, 2017 at 3:00 p.m.

All Citations

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Footnotes

1 The most recent complaints in both cases were filed on August 12, 2016. Count One in both complaints seeks injunctive and declaratory relief, presumably for a violation of the MDCPA based on the facts incorporated therein. Count Three in each complaint alleges a violation of G.L.c. 93A, § 9. Count Two in each Complaint alleges unjust enrichment. That count was voluntarily dismissed from the case by the date of the hearing on these motions.

2 Although each party made the same arguments with respect to each of the summary judgment motions, they nevertheless chose to file separate motions in each of the two cases together with a separate Rule 9A(b)(5) Statement of Undisputed Facts and a separate Joint Appendix for each motion. They then divided up their arguments among the different motions, with one memorandum cross referencing arguments made in another memorandum, incorporating them by reference. To make matters more complicated, each appendix has some of the same material that is

contained in other appendices but under different numbers. Several exhibits in each appendix have multiple attachments. The upshot was that this Court had great difficulty navigating the summary judgment record. Finally, the parties sought to impound some material without demonstrating to the Court why the material should not be part of the public file. Although this Court had initially granted a joint request for impoundment, it became clear to this Court upon further review that this material was important to this Court's reasoning in the instant memorandum and should be a matter of public record. After a hearing on March 4, 2017, this Court vacated its earlier decision impounding these materials, except as to two specific exhibits.

3 The Arkansas statute, A.C.A. § 17–24–502(5)(A) defines "debt collector" as a "person who uses an instrumentality of interstate commerce or the mails in the business whose principal purpose is the collection of debts or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The New York debt collection statute, N.Y. Code § 20–489, defines a "debt collection agency" to include "a buyer of delinquent debt who seeks to collect such debt either directly or through the services of another ..."

4 In an Advisory Opinion released the same day (Opinion No. 06–059), the Division stated that an attorney who did not himself or herself purchase defaulted debt need not obtain a license to collect that debt on behalf of another so long as the attorney was licensed to practice in Massachusetts so as to be bound by the Code of Professional Conduct.

5 The choice to describe these entities as "creditors" is somewhat confusing. As explained at page 18, *infra*, the MDCPA applies to "debt collectors," not "creditors." The Attorney General's definition of "creditor," however, quite clearly embraces a "debt collector" as defined by G.L.c. 93, § 24.

6 An exception is made as to those whose activities are "solely for the purpose of serving legal process on another person in connection with the judicial enforcement of the debt." That exception would not apply to LVNV.

7 The Massachusetts Consumer Protection Act also provides for representative actions if the court finds that "the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated"; the putative class representation "adequately and fairly represents such other persons"; and the putative class representative brings "the action on behalf of himself and such other similarly injured and situated persons." G.L.c. 93A, § 9(2). The Supreme Judicial Court has indicated that these requirements are less stringent than Rule 23 because of the need to provide an effective private remedy to consumers. *Aspinwall*, 442 Mass. at 391–92. "[T]raditional technicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice." *Id.* at 391–92, quoting *Fletcher v. Cape Cod Gas Co.*, 394 Mass. 595, 605 (1985).

8 Advisory Opinion 12–012 followed an inquiry by LVNV's counsel, Barbara Sinsley. Although the opinion did not specifically identity LVNV, associate counsel for the Division had email contact with Sinsley immediately after that inquiry and thus necessarily knew that LVNV was the entity in question.

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