IN THE CIRCUIT COURT OF COOK COUNTY
ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

Michael Cass and Derek Huggins, individually and as the representatives of a class of similarly-situated persons,	)	
Plaintiffs,	)	
v.	)	**No. 01 CH 20350**
	)	**Judge Quinn**
AmeriDebt, Inc., DebtWorks, Inc., Infinity Resources Group, Inc., Debticated Consumer Counseling, Inc., The Ballenger Group, L.L.C., Ballenger Holdings, L.L.C., Andris Pukke, and Eriks Pukke,	)	
Defendants.	)	

INTERVENER FEDERAL TRADE COMMISSION'S MOTION FOR STAY AND RECONSIDERATION OF ORDER PRELIMINARILY APPROVING STIPULATION OF SETTLEMENT AND RELEASE AND CLASS NOTICE

On March 23, 2004, the Court entered an Order Preliminarily Approving Stipulation of Settlement and Release and Class Notice ("Preliminary Approval Order") for a proposed nationwide class action settlement that, if finally approved, will release the claims of some 500,000 class members for, at best, pennies on the dollar. As is typical with proposed class action settlements, the Court entered the Preliminary Approval Order based only on the representations of the parties who have a vested interest in the settlement. Contrary to those representations, however, the proposed settlement is neither fair, nor reasonable, nor adequate for the consumer victims of the defendants' widespread deception. Because the proposed settlement is clearly inadequate, and the proposed notice and questionnaire claim form will cause irreparable

harm if mailed, the Federal Trade Commission ("FTC" or "Commission") moves this Court for a stay of the notice mailing and for reconsideration of its Preliminary Approval Order. *See Odon USA Meats, Inc. v. Ford Motor Credit Corp.*, 1994 WL 529339 (N.D. Ill. 1994) (granting objectors' motions to intervene and withdrawing prior order granting preliminary approval of proposed class action settlement and class notice). As explained below, the FTC has filed a law enforcement action against defendants AmeriDebt, Inc., DebtWorks, Inc., and Andris Pukke, and several state attorneys general and private parties also have filed lawsuits against the defendants in this case.[1]

I. BACKGROUND

A. The FTC's Interest in this Matter

The FTC is an independent law enforcement agency whose mission is to promote the efficient functioning of the marketplace by protecting consumers from unfair or deceptive acts or practices and to increase consumer choice by promoting vigorous competition. The FTC's primary legislative mandate is to enforce the FTC Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45(a). Pursuant to this authority, the FTC routinely brings enforcement actions to further both its

[1] *See People ex re. Madigan v. AmeriDebt, Inc.*, No. 03 CH 0062 (Cir. Ct. Sangamon County); *State of Missouri ex rel. Nixon v. AmeriDebt, Inc. et al.*, No. 03-402378 (St. Louis City Circuit Court, Sept. 11, 2003); *State of Texas v. AmeriDebt, Inc. et al.*, No. GV-304638 (Dist. Ct. Travis County, Texas, Nov. 19, 2003); *State of Minnisota v. AmeriDebt, Inc.*, Case No. MC 03-018388 (Hennepin County Dist. Ct., Nov. 19, 2003); *Polacsek v. Debticated Consumer Counseling, Inc. et al.*, Civ. No. 8:04-cv-00631-PJM (D.Md.); *Crawford et al. v. AmeriDebt, Inc. et al.*, No. CV-03-PT-3100 (N.D. Ala. Nov. 20, 2003); *Adams et al. v. AmeriDebt, Inc. et al.*, No. CIV-2003-265-1 (Cir. Ct. Hempstead County, Arkansas Dec. 1, 2003).

consumer protection and competition (antitrust) missions. The FTC has extensive experience implementing redress programs, including the drafting and mailing of notices, the processing of consumer claims, and the payment of cash refunds to consumers. Since the fall of 1999, the FTC has dispensed more than $100 million to consumers.

Based on the FTC's experience and interest in protecting consumers, the FTC has filed *amicus* briefs objecting to class action settlements that provide inadequate relief for consumers. *See, e.g., Erikson v. Ameritech Corp.*, No. 99 CH 18873 (In the Circuit Court of Cook County, Illinois) (2002).[2] In the instant case, the Commission seeks to intervene and moves for reconsideration of the Court's Preliminary Approval Order because the proposed settlement is inadequate for consumers. The FTC has particular knowledge of the facts related to this matter because late last year the Commission filed its own law enforcement action against defendants AmeriDebt, DebtWorks, and Andris Pukke in the United States District Court for the District of Maryland. The Commission's complaint alleges that the defendants have misrepresented the nature and costs of AmeriDebt's services, and seeks a permanent injunction and other equitable relief, including consumer redress and disgorgement. The proposed settlement in this matter will not operate to preclude the Commission's law enforcement action, but it will operate to the

[2] In *Erikson v. Ameritech*, the plaintiffs alleged that Ameritech failed to disclose that some consumers would incur additional costs over and above the monthly service subscription charge to use its voice mail service. The FTC opposed the settlement because the proposed conduct relief and compensation were inadequate. The settlement did not require Ameritech to disclose adequately, before prospective customers agree to purchase voice mail service, that they would be charged for local calls associated with their use of the service if the calls are billed on a per-call or per-minute basis. The proposed compensation of one free month of speed-dial service was inadequate because it has little or no value, and because class members who signed up for the free service would have been billed for subsequent months of the service unless they canceled the service. The court rejected the settlement.

substantial detriment of consumers. For this reason, the Commission requests that the Court reconsider its Preliminary Approval Order and stop the class notice that will soon be mailed to consumers.

B. Statement of the Case

On December 3, 2001, Cass filed his initial complaint against AmeriDebt, alleging a single violation of the Illinois Consumer Fraud Act, 815 ILCS 505/1-505/12 (2004) ("ICFA"). Cass alleged that AmeriDebt defrauded him through language offering "free solutions" in a television commercial and that the commercial proximately injured him when he sent a check to AmeriDebt "in reliance" on the advertisement.[3] Although Cass styled his complaint as a nationwide class action, the complaint contained no federal causes of action and its chances of being certified on a nationwide basis were slim. *See, e.g., Jenson v. Bayer AG,* 2003 WL 22962431 (Ill. Cir. 2003) (denying class certification on a claim brought under the ICFA on the basis that, *inter alia*, differences in state consumer protection laws were too substantial to make certification appropriate).

On March 28, 2003, AmeriDebt filed its opposition to class certification and moved for summary judgment.[4] Shortly thereafter, Cass filed an amended complaint, adding DebtWorks

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[3] To be successful under the ICFA, Cass must prove: 1) *actual* misrepresentations; 2) *actual* reliance; and 3) *actual* damages. *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 160 (Ill. 2002).

[4] After taking Cass's deposition, AmeriDebt moved for summary judgment on the basis that "[Cass] cannot as a matter of law satisfy the proximate cause element of his claim under the ICFA, as shown by [his] own admissions under oath." *See* AmeriDebt's Motion for Summary Judgment. AmeriDebt also argued the defense of accord and satisfaction, because plaintiff accepted a cash refund check "with the knowledge that AmeriDebt meant to thus settle his dispute." *Id*. AmeriDebt's summary judgment motion is based on the merits of this particular plaintiff's claim, and does not justify a weak settlement for a nationwide class.

and Andris Pukke as defendants. DebtWorks and Pukke moved to dismiss for lack of personal jurisdiction. On November 24, 2003, the Court granted Pukke's motion, leaving AmeriDebt and DebtWorks as the only defendants in the case.

The Court then set a schedule for consideration of plaintiff's motion for class certification. Before the Court could rule on the motion for class certification or on AmeriDebt's motion for summary judgment, the parties reached the proposed nationwide class action settlement. To effectuate the proposed settlement, Cass brought in another named plaintiff, Huggins, who only recently had filed a complaint in the United States District Court for the Northern District of Georgia against Debticated Consumer Counseling, Inc. ("Debticated"), a debt management firm operated by Andris Pukke's brother, Eriks Pukke. In addition, as a condition to the settlement, the plaintiffs moved for leave to file a second amended complaint naming a total of eight defendants, including Andris Pukke (who already had been dismissed for lack of personal jurisdiction) and his loan company, Infinity Resources Group, and Eriks Pukke and his company, Debticated. The second amended complaint also adds new federal claims under the Credit Repair Organizations Act ("CROA"), 15 U.S.C. ¶ 1679-1679j, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-1968.[5]

Thus, prior to the proposed settlement, the Cass action alleged only Illinois state law

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[5] Plaintiffs were not the first putative class action to allege federal claims against defendants. *See Polacsek v. Debticated Consumer Counseling, Debticated Inc., Infinity Resources Group, Inc., DebtWorks, Inc., Eriks Pukke, and Andris Pukke,* Civ. No. 8:04-cv-00631-PJM (D.Md.) (a putative nationwide class action alleging violations of CROA, and other claims, for the same conduct alleged in the instant case). Polacsek's CROA claim has already survived a motion to dismiss based on Debticated's claimed "non-profit" status and on other grounds. In addition, Polacsek had a trial date scheduled for June 2004 before the case was transferred from the federal district court in the Central District of California to the District of Maryland.

claims, named only AmeriDebt and DebtWorks, had not been certified as either a statewide or nationwide class action, and faced the very real possibility of having summary judgment granted against it. The recently filed Huggins action named only Debticated and had not even progressed to the discovery stage. In addition, until the parties negotiated their settlement, it appears that neither Cass nor Huggins took a single deposition in their cases. In connection with the settlement negotiations, the defendants produced the expert reports of Gary Ford and David Painter, and plaintiffs then took "confirmatory" depositions of these experts. In support of the motion for preliminary approval, plaintiffs cite these expert reports, but no experts of their own.

C. Terms of the Settlement

1. Overview

The proposed settlement consists of a claims process whereby consumers will be asked a series of questions, and will be compensated based on their answers. In addition, the amount for which class members are eligible depends on their class category. "Class I" includes class members who paid the full amount of the "voluntary contribution" requested by Debticated at any time, and class members who paid the full amount of the "voluntary contribution" requested by AmeriDebt between January 1, 1998 and July 1, 2001. These class members are eligible for refunds of "up to" $150. "Class II" includes class members who paid the full amount of the contribution requested by AmeriDebt after July 1, 2001. These class members are eligible for refunds of "up to" $30.[6] "Class III" includes class members who paid less than the entire amount

[6] The proposed settlement defines "Voluntary Contribution" as "money paid by a consumer in connection with Covered Services offered by, provided by or expected to be provided by Defendants that was not paid to any creditor of the consumer who paid the money to Defendants." This definition appears to include both initial and monthly "contributions." Therefore, it appears that consumers who are still enrolled in a debt management plan with one

requested by AmeriDebt or Debticated, and "Class IV" consists of everyone else in the class, including class members who enrolled in debt management plans with one of eleven other "non-profit" firms serviced by DebtWorks/Ballenger. "Class III" and "Class IV" members are eligible for $10 with a valid claim form.

Under the settlement, the defendants will pay class members a total of no more than $8 million (less administrative costs), and will pay no less than $2 million. In exchange, class members will release their claims against defendants. Defendants have agreed not to object to class counsel's request for attorneys' fees of up to $800,000.

2. The Settlement Class

The Settlement Class consists of persons who paid "voluntary contributions" to or received "covered services" from the defendants during a six and a half-year period from January 1, 1998 to April 1, 2004 ("Class Period"). Not only does the Settlement Class consist of consumers who paid contributions to or received services from the eight defendants now named in the second amended complaint, but it also includes consumers who enrolled with eleven other debt management firms serviced by Andris Pukke's company, DebtWorks (and now by Ballenger), that are not even named defendants. *See* Plaintiffs' Memorandum of Law in Support of Preliminary Approval ("Plaintiffs' Mem.") at 8. According to Plaintiffs' Motion for Preliminary Approval, there "are more than 400,000 members of the Class." *See* ¶ 5. More recently, class counsel advised FTC counsel that the class is expected to consist of about 500,000

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of the defendants, and consumers who dropped out of the plan prior to its completion, might not be eligible for a "Class I" or "Class II" refund because they have not paid "the full amount of the Voluntary Contribution requested by" defendants Debticated or AmeriDebt. This would substantially reduce the number of class members who are eligible for the larger "Class I" or "Class II" refunds.

consumers.

3. The Settlement Benefits to Class Members

Under the proposed settlement, the defendants' payments to all class members will not exceed a total of $8 million, and could be as little as $2 million, less the administrative costs associated with mailing the class notice, processing and denying claims, and other administrative costs.[7] Although the plaintiffs represent that certain "refunds could equal as much as $150.00," this will not be the case if claims exceed the cap of $8 million (less administrative costs). In that event, the "Class I" members eligible for "up to $150" would receive only a pro rata share of that amount. Other categories of class members would receive, at best, only a share of $30 ("Class II") or $10 ("Class III" and "Class IV"). These shares are far below what consumers paid as a result of the defendants' alleged fraud.

As discussed further below, however, many class members may not receive anything due to the inadequate notice to class members, the confusing questionnaire they are expected to answer, and the defendants' right to challenge claims. Of course, it is in the defendants' interest to make the process ineffectual, because the defendants may pay less than $8 million – indeed, as low as $2 million – depending on the number of valid claim forms.[8]

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[7] Based on the FTC's extensive experience in administering large refund programs, including class action settlements, the administrative costs involved in this program could easily exceed $1 million, thereby substantially lowering the value of the settlement to class members.

[8] The proposed settlement also includes a permanent injunction that is deficient for a number of reasons, including because: 1) it does not address the defendants' misrepresentations of their "non-profit" status and their so-called "counseling" services; 2) absent intervention, it appears that only the named class representatives can seek enforcement of the injunction, and there are no measures to ensure the defendants' compliance; and 3) the injunction is too weak against Andris Pukke, who is a convicted felon and has previously entered into a settlement with the D.C. Corporation Counsel for misrepresentations relating to his company, Infinity.

4. Releases

In exchange for these "settlement benefits," some 500,000 consumers will broadly release claims against a total of eight defendants now named in the second amended complaint. These claims include those "related to, in whole or in part Defendants' provision, offered provision or expected provision of Credit-Counseling Services, Credit-Repair Services, lending services or related services of any kind ("collectively the "Covered Services") to any member of the Settlement Class." *See* Stipulation of Settlement and Release at p. 4-6. As mentioned earlier, the Settlement Class also includes consumers who enrolled with eleven other "non-profit" debt management firms serviced by DebtWorks and Ballenger Group, even though these other firms were never part of plaintiffs' case. Although class members will not release claims against those firms, the releases that class members must sign as to the other defendants effectively shuts off those claims, because these so-called "non-profits" presumably have no money to pay consumers' claims. Thus, any remaining claims against those entities are worthless as a practical matter.

II. ARGUMENT

As discussed further below, the Commission requests that the Court reconsider its Preliminary Approval Order because the proposed settlement is unfair, unreasonable, and inadequate for class members. In addition, the Commission requests that the Court stay the mailing of the class notice immediately, pending reconsideration, because the class notice will serve only to confuse consumers and dissipate assets that should be available for consumer redress. As noted above, mailing and processing class notices could easily cost more than $1 million. Even if the court ultimately were to reject the proposed settlement after the scheduled July 2004 fairness hearing, the substantial funds spent to mail and process the notices already would have been dissipated. Therefore, in light of the Commission's arguments, fairness and equity necessitate maintaining the status quo by staying the mailing of the notices until the Court has a full opportunity to reconsider the Preliminary Approval Order. This will not cause undue delay or prejudice to the parties, since the Stipulation of Settlement (¶ 23) allows up to sixty (60) days from the Preliminary Approval Order for the mailing of the notice.

A. The Settlement Should Not Be Approved in this Case

The proposed settlement does not satisfy the legal criteria for approval of class action settlements. "The standard to be used in evaluating the compromise settlement of a class action is that the agreement must be fair, reasonable and adequate." *Langendorf v. Irving Trust Co.*, 244 Ill.App.3d 70, 78 (1992). "In a class action, the court is the guardian of the interests of the absent class members." *Waters v. City of Chicago*, 95 Ill.App.3d 919, 924 (1981).

Commentators and courts throughout the country have recognized that class actions are extraordinary proceedings with extraordinary potential for abuse. As Judge Posner from the

United States Court of Appeals for the Seventh Circuit has noted:

> Because class actions are rife with potential conflicts of interest between class counsel and class members (citations omitted), district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole.

Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781, 785 (7th Cir. 2004). *See also* RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF LAW 570 (4th ed. 1992).

Thus, in *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002), the Court held that the district court judge abused his discretion in approving a $25 million settlement of consumer-finance class action litigation. The various objectors to the settlement contended that the settlement agreement was the product of a "'reverse auction,' the practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." *Id.* at 282. The Seventh Circuit agreed that "the judge did not give the issue of the settlement's adequacy the care that it deserved." *Id.* at 280. On remand, the district court judge rejected the settlement as collusive and for the reason that the plaintiffs' counsel had not adequately represented the class. *Reynolds v. Beneficial Nat'l Bank*, 260 F.Supp.2d 680 (N.D. Ill. 2003). Among the chief grounds relied upon by the court for this finding was the lack of discovery that the plaintiffs had done prior to agreeing to the settlement, and more specifically that, as in this case, the plaintiffs had not even taken a single deposition of the defendants. As a result, the Court found that the plaintiffs' counsel did not have sufficient information upon which to reasonably evaluate the proposed settlement.

Similarly, in *Odon USA Meats, Inc. v. Ford Motor Credit Corp.*, 1994 WL 529339 (N.D. Ill. 1994), the district court initially granted preliminary approval of a proposed nationwide class action, but upon reconsideration concluded that "the proposed settlement is not within the range of approval and consequently that there is no reason at this time to notify prospective class members of the proposed settlement." In so holding, the court noted that greater scrutiny is required when a settlement is proposed as a class action (and a national class action at that). Moreover,

> [t]he potential problems are exacerbated when class certification is deferred to accommodate settlement negotiations. (Citations omitted.) In those cases, notice of the class action is accompanied by notice of the settlement, lending an air of inevitability to the result. '[T]he danger of a premature, even collusive, settlement is increased when ... the status of the action as a class action is not determined until a settlement has been negotiated, with all the momentum that a settlement agreement generates...." (Citations omitted.)

Id. at *7. In scrutinizing the proposed settlement, the court was troubled by the lack of discovery and investigation conducted by plaintiffs' counsel, and the appearance that "counsel has allowed himself to be lured . . . into a race to settlement that preempts the . . . efforts of counsel in other jurisdiction[s] to advance their clients' interests." *Id*. Thus, the court granted the objectors' motions to intervene and withdrew its prior order granting preliminary approval of the proposed settlement. This is the very relief that the FTC seeks here to protect the interests of consumers.

B. The Settlement Does Not Fairly, Reasonably, or Adequately Compensate Class Members.

1. The Total Settlement Amount Is Inadequate.

The proposed settlement provides wholly inadequate relief to class members for a number

of reasons. First, the maximum amount that class members could recover – $8 million (less administrative costs) – is seriously deficient in light of the consumer injury caused by the defendants' practices. Indeed, based on plaintiffs' own pleadings, consumer injury could total as high as $300 million. Plaintiffs' memorandum indicates that class members have spent an average of $300 on the initial "voluntary contribution" to the defendants; those who paid monthly contributions paid an average of $300 in monthly "contributions." *See* Plaintiffs' Mem. at 11-12.

Assuming that the class will consist of about 500,000 consumers – as represented by plaintiffs' counsel – then consumers paid a total of $150 million in initial contributions and as much as an additional $150 million in monthly contributions.[9] The $8 million cap represents less than 3% of $300 million. If even half of the 500,000 class members made a claim, the average maximum recovery would be a mere $32. Once administrative expenses were deducted, that amount would be even lower.

The plaintiffs defend this paltry settlement by relying on two experts *the defendants hired* regarding the likelihood of consumer confusion or injury from the defendants' practices. Plaintiffs do not appear to have hired their own experts or to have done any other kind of independent analysis to validate or disprove these "expert" opinions. In any event, the defense expert reports are irrelevant because under the CROA, damages are the *greater* of the amount of any actual damages "or any amount paid by the person to the credit repair organization." 15

[9] These contribution amounts do not include other sources of consumer injury, for example injury caused by Andris Pukke's loan company, Infinity Resources Group, and injury caused by the defendants' failure to distribute consumers' first payments to creditors. Under the terms of the settlement, however, consumers will release their claims against the defendants for all claims related to credit counseling services, lending services, and related services, even though consumers will not receive compensation for many of those claims.

U.S.C. § 1679g(a). In short, the CROA provides for fixed damages, and expert opinions about consumer confusion or net benefits to consumers are irrelevant to a determination of damages. Although plaintiffs added a CROA claim to the second amended complaint (as a condition of settlement), it appears that the defendants' exposure under that statute played no role in the settlement amount.[10] Indeed, it appears that the plaintiffs made no effort "to quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate." *Reynolds,* 288 F.3d at 284-85.

In a weak attempt to justify the settlement amount, plaintiffs argue that the defendants *might not* have the ability to pay in the future, because of the number of governmental and other actions pending against them. Plaintiffs concede, however, that at least some of the defendants have the ability to pay a substantial judgment in the future. *See* Plaintiffs' Mem. at 16-17. The decision to accept a weak settlement – on the basis that defendants' revenues might be depleted from having to pay more to consumers in the future – is no justification at all.

2. The Proposed Refund Program is Unfair.

In addition, the proposed settlement is inadequate because it is unfair to the different categories of class members. "A settlement which is unfair to a subclass or fraction of the class should not be sustained." *City of Chicago*, 95 Ill.App.3d at 924. As noted earlier, the settlement

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[10] In *Polacsek v. Debticated*, No. SACV 03-01003 CJC (CTx) (C.D. Cal. August 12, 2003), the plaintiff claimed that Debticated, in concert with DebtWorks, Andris Pukke, and Eriks Pukke, violated the CROA by engaging in a pattern of deception. In a Civil Minutes Order, the court denied Debticated's motion to dismiss on the grounds that the CROA excludes entities with 501(c)(3) tax exempt status. The court ruled that it is "not bound by the IRS' determination" and must instead "make its own independent determination" as to whether the defendant in fact met the requirements for 501(c)(3) status. As noted earlier, the *Polacsek* case was recently transferred to the United States District Court for the District of Maryland.

creates four categories of consumers, and consumers are eligible for "up to" certain amounts based on their category. Categories I - III consist of consumers who paid contributions to either AmeriDebt or Debticated. Depending on the category to which they belong, consumers are eligible for refunds ranging from "up to" $30 to "up to" $150. Curiously, "Class IV" consists of consumers who enrolled with one of the other eleven debt management firms serviced by defendants, but there is absolutely no reason given as to why these consumers are eligible for only $10 if their answers to the questionnaire are the same as those of consumers in other categories.[11] Similarly, there is no basis given for the different amounts available to consumers who give the same answer to question 5 regarding the non-profit issue (which has nothing to do with disclosures). For the very same answer to that question, consumers in "Class I" are eligible for $150, consumers in "Class II" are eligible for $30, and consumers in Classes "III" and "IV" are eligible for $10.

3. The Class Notice and Questionnaire are Deficient.

In addition to providing inadequate compensation for class members, the settlement is flawed because the notice of settlement fails to disclose all the material terms of the settlement so that consumers can make an informed choice as to whether to participate. For example, Section III. A. of the notice lists an "up to" amount for which consumers in Class I and Class II will be eligible ($150 and $30, respectively), but does not explain adequately how the total figure will be determined from their answers, and that they may receive less than the stated "up to" amount if claims exceed $8 million (less administrative costs). In addition, it does not appear that the

[11] An independent basis for rejecting this settlement is that plaintiffs' counsel cannot adequately represent the divergent interests of the various subgroups within the class. *See Odon USA Meats, Inc. v. Ford Motor Credit Corp.*, 1994 WL 529339, *9 (N.D. Ill. 1994).

notice even advises consumers of their category – information that consumers need to know in deciding whether to participate. The class notice and questionnaire are attached (Attachment A).

Similarly, the questionnaire appears designed to make it more difficult for consumers to make a claim. For example, question 1 asks consumers, "Did you enroll in a Debt Management Plan with AmeriDebt, Inc., Debticated Consumer Counseling, Inc., [or one of the eleven other agencies covered by the class definition]?" Question 2 asks, "Did the Agency ask you to make a contribution?"[12] These questions are unnecessary, because defendants' records identify the class of consumers who have enrolled and paid a contribution (and it is defendants' position that *everyone* was asked to make a voluntary contribution).

Similarly, questions 5(a), (b), (c), (f), and (g) apparently do not (and should not) determine consumers' eligibility for a refund, and appear to be included in the questionnaire solely as a means to confuse consumers and discourage them from checking questions 5(d) and

[12] Question 2 is fundamentally ambiguous and could be interpreted in a number of different ways by consumers. For example, a consumer might answer "no" to this question if a counselor told him – rather than "asked" him – to pay a "contribution." Similarly, a consumer might answer "no" if he viewed the payment as a mandatory fee – not a contribution – or if he did not understand that his first payment was kept by the agency rather than distributed to his creditors. Neither the class notice nor the pleadings explain the impact of a "yes" or "no" answer to this question, but it appears that a consumer will not be considered part of the class at all if he does not successfully navigate this and the preceding question.

(e), which do determine consumers' refunds.[13] In addition, question 3 is confusing – for example, it is a compound question that uses the defendants' own terminology "voluntary contributions" – and is insufficient by itself to determine whether consumers were misled by the defendants' practices.[14] The Commission has extensive experience with consumer redress programs, and with consumers' perceptions of forms and disclosures. This questionnaire is the antithesis of a simple and concise form, and appears purposefully designed to make it difficult

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[13] Question 5 reads as follows:

> Place a check before each of the following statements that is true (you may check more than one):
>
> a. ___ I expected the Agency would lower my monthly debt payments.
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> b. ___ I thought that I could pay off my debt faster with the help of the Agency than I could by myself.
>
> c. ___ I learned from other people that the Agency saved them money.
>
> d. ___ I understood that the Agency was a non-profit entity.
>
> e. ___ I thought that the Agency relied only on non-profit service providers to administer my debt management plan.
>
> f. ___ I considered the Agency to be an alternative to bankruptcy.
>
> g. ___ Other: _____

[14] Question 3 asks, "Did you understand that your first payment to the Agency was a voluntary contribution and you were not required to make it in order to receive services from the Agency?" Among other things, terming the "contribution" as "voluntary" will have a biasing effect on consumers' answers.

for consumers to make claims.

Because the notice and questionnaire will only confuse consumers, and dissipate assets otherwise available for consumer redress, it is important that this Court stay the notice mailing pending the court's reconsideration of the Preliminary Approval Order.

4. The Means of Dissemination of the Notice are Inadequate.

The Commission also is concerned that the notice may not reach a substantial number of class members. For example, the defendants are only required to mail the notice to consumers at the last known address in their records. The consumer victims in this case – those with dire financial problems – tend to move frequently and can be difficult to locate, yet the settlement does not require the defendants to update the addresses through the National Change of Address ("NCOA") system or by other means,[15] and defendants are not required to attempt to re-mail notices that come back as undeliverable. There is also no publication notice to supplement the mailed notice. Finally, the defendants are responsible for mailing the notice and receiving claim forms (*see* Stipulation at ¶ 25), a questionable arrangement given that it is in their interests to minimize claims.

5. The Right to Challenge Claims.

In addition to requiring consumers to navigate a confusing questionnaire, the settlement gives the defendants the right to challenge claims. In the event of a challenge, consumers will be notified and "given an opportunity to contest any such challenge." *See* Stipulation at ¶ 27. This

[15] The NCOA is a relatively inexpensive measure that has been required in other settlements to ensure adequate notice to consumers. *See, e.g., USA v. Fairbanks*, Civ. No. 03 12219 DPW (D. Mass. Nov. 21, 2003) (Order Preliminarily Approving Stipulated Final Judgment and Order at p. 25).

appears to be yet another hurdle required of consumers, in an attempt to minimize the total amount that defendants must pay.

C. The Proposed Settlement Cannot Be Approved Because Class Counsel and the Named Class Representatives Have Not Adequately Represented the Class.

The proposed settlement also cannot proceed because it does not meet the various certification criteria of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801 (2004). Section 2-801(3), like Fed. R. Civ. P. 23(a)(4), provides that a class action may be maintained only if "[t]he representative parties will fairly and adequately protect the interest of the class." This provision has been found to constitute a minimum requirement of due process. *Barliant v. Follett Corp.*, 74 Ill. 2d 226, 235-236 (1978); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (explaining the requirements of Fed. R. Civ. P. 23(a)(4)). Critical to a finding of fair and adequate representation is a determination that the representative party is not seeking relief which is potentially antagonistic to the members of the class, for in that situation, due process prohibits a judgment being binding on class members. *Client Follow-Up Co. v. Hynes*, 434 N.E.2d 485 (Ill. App. 1982); *Spirak v. State Farm Mut. Auto. Ins. Co.*, 382 N.E.2d 111 (Ill. App. 1978), *overruled on other grounds*, *Todt v. Ameritech Corp.*, 763 N.E.2d 389 (Ill. App. 2002). Even if the provisions of a class action settlement appear to be substantively fair, moreover, it *cannot* be approved if counsel did not adequately represent the class. *See In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1125 n.24 (7th Cir. 1979) ("No one can tell whether a compromise found to be 'fair' might not have been 'fairer' had the negotiating [attorney] ... been animated by undivided loyalty to the cause of the class."), *cert. denied*, 444 U.S. 870 (1979) .

Here, class counsel and the named class representatives have not adequately represented

the class as a whole. The *Cass* complaint only alleged state law claims, had not been certified, named only two defendants, and was facing a serious summary judgment challenge based on the weak merits of Cass's individual claim. No meaningful discovery had been conducted in the newly filed *Huggins* complaint, which named only Debticated, and neither *Cass* nor *Huggins* had taken any depositions of the defendants. In the meantime, the defendants were facing much stiffer challenges in the *Polacsek* class action in federal court (as well as from the many governmental challenges).

It is clear that the adequacy-of-representation requirement has not been met here. It is self-evident that, when class representatives and class counsel agree to a settlement where they are richly rewarded, and absent class members receive little or nothing, the class has not been adequately represented. Moreover, the proposed refund program clearly favors certain categories of class members over others – without any basis at all. For example, class members in "Class III" and "IV" will receive only $10 regardless of their answers to all the questions. Moreover, the named representatives cannot adequately represent "Class IV," because the named representatives enrolled with AmeriDebt and Debticated, not the other eleven debt management firms included within "Class IV."

D. The Inadequacy and Circumstances of the Proposed Settlement Suggest that It May Be the Product of a "Reverse Auction" or Collusion.

Before a class action settlement is approved, courts should determine that the settlement is not a product of collusion. *Reynolds*, 288 F.3d at 279. Judges should "protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the

class." *Id.*

Moreover, a separate petition to intervene and motion by *Polacsek* raises additional concerns about the possibility of a "reverse auction" leading to the proposed settlement. In a reverse auction, "the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district judge will approve a weak settlement that will preclude other claims against the defendant." *Reynolds* at 282. Under these circumstances, the Commission urges the Court to stay further proceedings in this action pending reconsideration of the Preliminary Approval Order.

Respectfully submitted,

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