

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK**

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**FREDERICK M. SEMBLER,**

**Plaintiff,**

**PLAINTIFF'S OBJECTIONS  
TO REPORT AND  
RECOMMENDATION**

**v.**

**CV-07-2493  
(RJD)(LB)**

**ADVANTA BANK CORP., ATTENTION FUNDING TRUST  
a/k/a ATTENTION FUNDING & TRUST,  
ATTENTION, LLC a/k/a WEST ASSET MANAGEMENT, INC.,  
and SHARINN & LIPSHIE, P.C.,**

**Defendants.**  
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Plaintiff, Frederick M. Sembler ("Plaintiff"), respectfully submits the following objections to those portions identified hereinbelow of the Report and Recommendation of Hon. Lois Bloom, United States Magistrate Judge, dated September 3, 2009 ("Report"), concerning the Motion by West Asset Management, Inc. and Worldwide Asset Purchasing, LLC, to Dismiss Plaintiff's Second Amended Complaint ("West Defendants' Motion") (said entities sometimes referred to herein as "West Defendants"):

1. Objects to the conclusion on page 5-7 of the Report that "the facts alleged against the West Defendants fail to state a claim for violations of the FDCPA," and to the conclusion and recommendation on page 8 of the Report that "plaintiff's Second Amended Complaint against the West defendants for violations of the FDCPA should be dismissed for failure to state a claim upon which relief can be granted"; the Second Amended Complaint already complies with the pleading requirements of the FRCP; for example, contrary to the conclusions in the Report, the Second Amended Complaint contains a "short and plain statement of the claim[s]" as required by FRCP Rule 8(a), already alleges the conduct of Defendants that violated the FDCPA and identifies the facts that give rise to Plaintiff's FDCPA

claims (e.g., Second Am. Compl. ¶¶ 35-77), and already contains allegations that plausibly support Plaintiff's claims (see FRCP 8(a)(2); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1941, 1944 (2009); *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200 (2007); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1974 (2007)); by way of example, the Second Amended Complaint describes the content of the telephone calls and faxes to Plaintiff and to Plaintiff's office that are referenced therein in a manner sufficient to both notify Defendant and the Court of the circumstances given rise to Plaintiff's claims under the FDCPA and to plausibly allege such violations (see Second Am. Compl. ¶¶ 40-42, 45-47; FDCPA §§ 1692c(b), 1692d(5), (6), 1692(e)(5); FRCP 8(a)(2); *Ashcroft v. Iqbal*, 129 S. Ct. at 1944; *Erickson v. Pardus*, 551 U.S. at 93, 127 S. Ct. at 2200); moreover, again contrary to the conclusions in the Report, the allegations in the Second Amended Complaint concerning the faxes sent to Plaintiff's office, Second Am. Compl. ¶¶ 46-47, describe those faxes as disclosing the account number of the Account in question and asserting that a balance was due on the Account, communications that are expressly prohibited by the FDCPA (FDCPA §§ 1692b, 1692c(b), 1692e(2), (8)); Plaintiff submits that the transmission of such communications via fax to Plaintiff's office both makes it plausible that said faxes "in fact were seen and read by one or more persons in Plaintiff's office other than Plaintiff" as alleged in the Second Amended Complaint, and that these circumstances were obvious to, and intended by, Defendants (Second Am. Compl. ¶¶ 45-47).

2. Further objects to said conclusions and recommendations at pages 5-7 thereof in that the Report fails entirely to consider Plaintiff's most serious allegations against West Defendants and Defendant Sharinn & Lipshie, P.C. ("Sharinn & Lipshie") for violations of the FDCPA, concerning the Civil Court Proceeding brought by named Defendant Attention Funding & Trust and described in paragraphs 54-61 of the Second Amended Complaint, and the actions that Defendants took following the illegal "default judgment" entered against Plaintiff in that Proceeding; both the manner in which Defendants prosecuted the Civil Court Proceeding and the conduct in which they engaged thereafter, as alleged in the Second Amended

Complaint, are in violation of FDCPA §§ 1692e(2)(A), (8), (10), and 1692j(a); the Second Amended Complaint alleges that certain of this conduct was engaged in by all Defendants (e.g., Second Am. Compl. ¶¶ 50, 62-66, 78), or, in instances where Defendant Sharinn & Lipshie, the law firm undisputedly retained by Attention Funding & Trust to represent Attention Funding & Trust in the Civil Court Proceeding and in purportedly seeking to collect on the alleged “debt,” is alleged to be the Defendant actually engaging in the proscribed conduct, that this conduct was engaged in with the knowledge of and on behalf of West Defendants (Second Am. Compl. ¶¶ 54-61, 97); further, as it is undisputed that West Defendants and Defendant Sharinn & Lipshie are debt collectors within the meaning of the FDCPA, West Defendants can be held liable for the conduct of the debt collector retained by them that violates the FDCPA (*see Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1516 (9<sup>th</sup> Cir. 1994); *West v. Costen*, 558 F.Supp. 564, 573 (W.D. Va. 1983)); in this regard, Plaintiff respectfully calls to the Court’s attention the fact that Defendant Sharinn & Lipshie is among the numerous law firms named as defendants in a proceeding brought in the New York Supreme Court in July 2009 by the Chief Administrative Judge for the New York State Unified Court System seeking to vacate in excess of 100,000 purported “default judgments” against consumers alleged to have owed a debt, *Pfau v. Forster & Garbus*, Index No. 2009-8236 (Sup. Ct. Erie Co.), and that the process server utilized by Defendant Sharinn & Lipshie in the Civil Court Proceeding herein is the same process server referred to in said case as having engaged in conduct similar to that alleged in the Second Amended Complaint (Second Am. Compl. ¶¶ 54-61; *see Suit Aims to Vacate 100,000 Judgments*, N.Y.L.J., July 23, 2009, at 1, col. 5); Plaintiff respectfully submits that accepting the Report’s recommendation that the Second Amended Complaint containing allegations such as those mentioned above should be dismissed for “fail[ure] to state a claim for violations of the FDCPA” would be in direct contravention of both the letter and the intent of the FDCPA, which was enacted by Congress and signed into law in order to prevent exactly this kind of abusive, and even criminal, collection activity by debt collectors, and would be in violation of this Court’s

duty to construe the Second Amended Complaint so as to do justice (FRCP 8(e)).

3. Further objects to said conclusions and recommendations in that, contrary to the established law that is acknowledged at pages 2-3 of the Report, the Report construes the allegations of the Complaint in a manner that is favorable to West Defendants, not to Plaintiff; by way of example, the Report concludes, Report at 6, that Plaintiff's allegations that Plaintiff objected to communications received from West Defendants but that West Defendants nevertheless continued to communicate with Plaintiff concerning the Account, Second Am. Compl. ¶¶ 43-44, "fails to state a claim that defendants' ongoing communications were unlawful" because Plaintiff did not specify in the Second Amended Complaint that his objections to these communications were in writing, as in fact they were (see Doc. # 1 ¶¶ 112-120 (original Complaint dated June 20, 2007); FDCPA §§ 1692b, 1692c(c), 1692g(b)); Plaintiff respectfully submits that the allegations in the Second Amended Complaint clearly can be read to include written objections to West Defendants' communications, and that construing the allegations in the manner most favorable to Plaintiff mandates that they be read as so alleging (*Erickson v. Pardus*, 551 U.S. at 93, 127 S. Ct. at 2200; *Bildstein v. Mastercard International Inc.*, 2005 U.S. Dist. LEXIS 10763 at 3-4 (S.D.N.Y. Jun. 6, 2005); *Colorado Capital v. Owens*, 2005 U.S. Dist. LEXIS 5219 at 8-9 (E.D.N.Y. Mar. 16, 2005); cf. *Aulicino v. NYC Dep't of Homeless Services*, 2009 U.S. App. LEXIS 20024 at 2, 13, 16-20 (2<sup>nd</sup> Cir. Sept. 8, 2009)) (on summary judgment motion, Court must construe facts in light most favorable to non-moving party and resolve all ambiguities and draw all reasonable inferences against movant) (internal citations and quotation marks omitted); similarly, in conflict with what is actually alleged in the Second Amended Complaint concerning West Defendants' communications to Plaintiff and to Plaintiff's office, the Report attempts to fit these communications within the limited exception contained in the FDCPA for communications to third parties for the purposes of "acquiring location information" and, apparently, construes the allegations in the Second Amended Complaint as possibly describing such communications even though it is evident from these

allegations that the communications described were not for any such purpose and were in violation of the provision in question (Second Am. Compl. ¶¶ 35-47; FDCPA § 1692b); the Report similarly construes the allegations in paragraph 42 of the Second Amended Complaint concerning West Defendant's assertions in its communications that "litigation had been or was about to be commenced against Plaintiff" by assuming that the Civil Court Proceeding ultimately initiated by Defendants against Plaintiff and that is described in the Second Amended Complaint was intended to be commenced by Defendants at the time these communications were issued, and also by apparently overlooking the allegation that these communications informed Plaintiff "that litigation had been . . . commenced against Plaintiff" at a point in time when said assertion was untrue (Second Am. Compl. ¶ 42; FDCPA § 1692e(5); *see also* FDCPA § 1692e(3)).

4. Further objects to the Report's conclusions at page 5 that "Plaintiff's Second Amended Complaint doesn't comply with the Court's Orders" and that "[t]he Court has afforded plaintiff two opportunities to amend his complaint to plead a claim against defendants," and the conclusion and recommendation at pages 7-8 that "[a]ccordingly plaintiff's Second Amended Complaint against the West defendants for violations of the FDCPA should be dismissed for failure to state a claim upon which relief can be granted," in that said conclusions are in violation of both Supreme Court and Second Circuit precedent that is binding on this Court and of the provisions of the FRCP, and are in conflict with the Court's August 20, 2007 Order directing Plaintiff to file the original Amended Complaint; the Report does not specify the "Court's Orders" with which Plaintiff allegedly has failed to comply, and Plaintiff notes that the only aspects of the previous Report and Recommendation dated May 21, 2008 ("Prior Report and Recommendation") with which the Second Amended Complaint did not comply were the recommendations that Plaintiff include numerous details concerning each of the communications described in the Second Amended Complaint and that Plaintiff attach evidence to the Second Amended Complaint in the form of numerous documents mentioned in the Prior

Report and Recommendation; as indicated, both the United States Supreme Court and the Second Circuit have explicitly ruled that the attempt to impose such requirements upon a Plaintiff at the pleading stage is an abuse of discretion and that a Complaint may not be dismissed for failure to meet such requirements (FRCP 8(a)(2); *Erickson v. Pardus*, 551 U.S. at 93, 127 S. Ct. at 2200; *Wynder v. McMahon*, 360 F.3d 73, 76-77 (2<sup>nd</sup> Cir. 2004)); in addition, in recommending that the Second Amended Complaint be dismissed because it does not include details such as the dates and times of communications, the names of the individuals involved, and the specific language used in these communications, the Report is effectively making the entire Second Amended Complaint subject to the special pleading rules of FRCP Rule 9 that only apply in limited circumstances; further, Plaintiff's original Complaint dated June 20, 2007 included allegations containing many of the details that the Report faults the Second Amended Complaint for not explicitly mentioning (Doc. #1); the Court determined that the original Complaint containing these details violated Rule 8 and directed Plaintiff to file an Amended Complaint (Doc. # 17); in effect, after this Court directed Plaintiff to amend the original Complaint by removing much of the detail contained in that Complaint, the Report now recommends that the Second Amended Complaint be dismissed because it does not contain these details.

5. Further objects to the Report's conclusions and recommendation at pages 5-7 thereof in that the Report purports to rely heavily upon the opinion of the United States Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), a case that was decided subsequent to the filing of the Second Amended Complaint and subsequent to the submission of West Defendant's Motion; while, for the reasons described above, Plaintiff believes that the Second Amended Complaint complies with the standards set forth in *Ashcroft v. Iqbal*, in the event that the Court concludes otherwise, Plaintiff respectfully submits that he should be entitled to submit a further Amended Complaint prepared in light of the Supreme Court's decision in that case.

6. Objects to the recommendation on pages 7-8 of the Report that, in the event Plaintiff's FDCPA claims against the West Defendants are dismissed, "the Court should decline to exercise supplemental jurisdiction over plaintiff's state law claims against the West Defendants, as plaintiff's federal claims against these defendants should be dismissed"; the claims alleged against West Defendants and Defendant Sharinn & Lipshie in the Second Amended Complaint arose out of the same factual circumstances and transactions, are part of the same case and controversy, and are intertwined, and the Court therefore should exercise supplemental jurisdiction over these claims even if Plaintiff's FDCPA claims against the West Defendants are otherwise dismissed (see 28 U.S.C. § 1367(a), (c); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 445-448 (2<sup>nd</sup> Cir. 1998); *Chen v. Street Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 276-77 (E.D.N.Y. 2005); *United States Fire Ins. Co. v. United Limousine Service, Inc.*, 328 F. Supp. 2d 450, 452-54 (S.D.N.Y. 2004)); further, particularly as the Second Amended Complaint alleges that the actions of Defendant Sharinn & Lipshie were taken on behalf of West Defendants, and also alleges negligence against West Defendants in the selection of their agents, e.g., Second Am. Compl. ¶¶ 48-50, 97, dismissal of the state law claims against West Defendants would result in piecemeal litigation over the same circumstances and would contradict concerns of judicial economy, convenience and fairness (see *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d at 448 n.2 and n.3); moreover, as noted below, West Defendants have not provided addresses at which they claim to be located, and, indeed, the existence one of the West Defendants may be questionable, meaning that Plaintiff may be unable to obtain jurisdiction over these Defendants in any State Court proceeding that Plaintiff may commence if the Report's recommendation in this regard is accepted, a circumstance that is attributable to the conduct of these Defendants.

7. Objects to the findings contained in the footnotes on page 1 of the Report concerning the identities of West Asset Management, Inc. and Worldwide Asset Purchasing, LLC and the acceptance of how Defendants' counsel have styled the respective relationships of

these entities to named Defendants Attention, LLC and Attention Funding Trust (“Attention Defendants”); the allegations in paragraph 3 and 4 of Plaintiff’s Second Amended Complaint concerning these Defendants must be accepted as true for purposes of determination of West Defendants’ Motion; further, none of these entities has submitted any pleading, declaration under penalty of perjury or other evidence to the Court, other than confusing and contradictory statements of counsel, that would support the Report’s statements in this regard, and it appears that no address for any of these entities has been supplied in this proceeding to Plaintiff or the Court; in this regard, as discussed in Plaintiff’s Memorandum of Law in Opposition to Motion of Defendants West Asset Management, Inc. and Worldwide Asset Purchasing, LLC to Dismiss Second Amended Complaint (“Plaintiff’s Answering Memorandum”), publicly available information stated that Worldwide Asset Purchasing, LLC “cannot be located”; further, an attorney has appeared *pro hac vice* in this action pursuant to the Court’s Order entered on October 25, 2007 granting a motion for permission of such appearance on behalf of an entity identified in the motion as West Asset Purchasing LLC, which also is claimed to be a successor of some kind to one of the Attention Defendants; said entity has neither answered nor moved with respect to the Second Amended Complaint, and a letter from another attorney representing West Defendants that was submitted to the Court following the granting of the *pro hac vice* motion in question asserted that West Asset Purchasing, LLC actually has no interest in this proceeding; in addition, an entity identified as “Attention LLC a/k/a West Asset Management” is listed on the website of the Stockton, California Better Business Bureau (see [www.stockton.bbb.org](http://www.stockton.bbb.org)); Plaintiff notes that the Report makes no mention of any of these issues, and also notes that these circumstances raise questions as to whether West Defendants further violated the FDCPA by using names other than their true names in attempting to collect the purported “debt” at issue in this action (FDCPA § 1692e(14)).

8. Objects to the statement in the Report that “Plaintiff filed the original complaint as well as both amended complaints *pro se*,” Report at 3, as well as to the statement



in the Report that Plaintiff's Second Amended Complaint "reserves the right to seek certification of this action as a class action against [former Defendant] Advanta," Report at 3 n.5, in that said statements are mistaken; Plaintiff's Original Complaint, the Amended Complaint and the Second Amended Complaint all identify Plaintiff as appearing as an attorney in this matter, including by referencing Plaintiff's bar number in this Court and the name and address of Plaintiff's law office, and the Docket in this matter clearly identifies Plaintiff as the "Lead Attorney to be Noticed," with an attorney from Plaintiff's office having also appeared on behalf of Plaintiff in this matter; further, Plaintiff has not sought to have the Second Amended Complaint "liberally construed" as if filed *pro se*, as is described at page 3 of the Report; as to class certification, the Second Amended Complaint reserves the right to seek such certification only against the Defendants named as such in the Second Amended Complaint, not against Advanta, which is no longer named as a Defendant in the Second Amended Complaint (Second Am. Compl. ¶¶ 3-5, 101-02); Plaintiff respectfully submits that, as West Defendants have not yet answered the Second Amended Complaint and discovery in this proceeding has not yet commenced, any such request at this stage of the proceeding would be premature (*see Prado-Steiman ex. rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11<sup>th</sup> Cir. 2000) (class certification should be made prior to close of discovery); *Phillip Morris, Inc. v. National Asbestos Workers Medical Fund*, 214 F.3d 132, 135 (2<sup>nd</sup> Cir. 2000) (decision on class certification would usually be made between end of pleadings and end of discovery) (citation omitted)).

Plaintiff respectfully refers the Court to Plaintiff's Memorandum of Law in Opposition to Motion of Defendants, West Asset Management, Inc., and Worldwide Asset Purchasing, LLC to Dismiss Second Amended Complaint dated October 3, 2008 for a more detailed discussion of most of the foregoing issues and citation to further authorities that support Plaintiff's Objections to the Report.

For all of the foregoing reasons, those portions of the Report identified above should be rejected by the Court, the motion of West Defendants to dismiss the Second

Amended Complaint should be denied, and said Defendants should be required to file their respective answers to Plaintiff's Second Amended Complaint within 10 days of the issuance of such an Order.

Dated: New York, New York  
September 18, 2009

Respectfully submitted,

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