UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: FDCPA Cognate Cases HON. ROBERT J. JONKER

Case Name	Case No.
Steven J. Verburg; Nancy A. Williams v. Weltman, Weinberg & Reis Co., LPA; Midland Funding LLC; Midland Credit Management, Inc.; Encore Capital Group, Inc.; LVNV Funding, LLC	1:13cv1328
Denise Martin v. TenHouten Ringstrom, PLLC; Edward W. TenHouten; Robert Dale Ringstrom; Central Professional Services, Inc.	1:13cv1329
Daniel Pryor v. Law Offices of Timothy E. Baxter & Associates, PC; Midland Funding LLC; Midland Credit Management, Inc.; Encore Capital Group, Inc.	1:13cv1330
Michael Christian v. Law Offices of Michael R. Stillman, PC	1:13cv1331
Bruce Grant v. Shermeta, Adams & Von Allmen, PC	1:13cv1332
John P. Hunter; Brian Hudson v. Mary Jane Elliott, PC; Portfolio Recovery Associates, LLC; LVNX Funding, LLC	1:13cv1338

Joan Frances Kloosterman v. Law Office of Barbara Tsaturova PLLC	1:13cv1340
Andrea Stevens v. Schisler Law, PLC; Scott A. Schisler; Rustin Allen Schisler	1:14cv10
Ethel Walker v. Leikin, Ingber & Winters, PC; George A. Leikin; Paul M. Ingber; Susan L. Winters; LVNV Funding, LLC	1:14cv18
Kathryn Campbell v. Berndt & Associates, PC; Karol A. Berndt; Robert E. Zielinkski; LVNV Funding, LLC	1:14cv34
Maureen Van Hoven v. Buckles & Buckles, PLC; Geraldine C. Buckles; Michael H. R. Buckles	1:14cv60
Mary Yarbrough v. Gray & Gray, PC; Deborah L. Gray; DLG & Associates, Inc.	1:14cv234

Peter Anda; Latricia Bell; Jonathon Elsenbroek; Jacquelyn Johnson; Leslie Penegor; Donald Walstrom; v. Roosen, Varchetti Y Olivier, PLLC; Rochard G. Roosen; Paul E. Varchetti; Lynn M. Olivier; Web Equity Holdings, LLC; Cavalry SPV I, LLC; Main Street Acquisition Corp.	1:14cv295

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

These cognate cases arise under the Fair Debt Collection Practices Act ("FDCPA"). Plaintiffs allege that Defendants included improper costs when applying for writs of garnishment through the Michigan state courts. Specifically, Defendants included costs of the writ of garnishment at issue as part of the total amount due in the request for that writ, plus sometimes included costs from previous garnishment attempts that had not resulted in money changing hands. Plaintiffs allege these costs were improper under the Michigan Court Rules and amounted to misleading statements that violated the FDCPA. Defendants counter that all of the costs were proper as "accrued costs" that, under the Michigan rules, are collectible by prevailing parties. Defendants also raise the issues of the Court's jurisdiction, materiality of the alleged misstatements, the degree of separation between some Defendants and the alleged violations, and the statutory defense for bona fide errors.

The Rooker-Feldman doctrine provides boundaries for federal courts that are asked to review actions of state courts, but Rooker-Feldman does not deprive the Court of jurisdiction here. These

cases do not involve state-court losers complaining of injuries caused by state-court judgments, but instead involve allegations of misstatements by debt collectors that violated the FDCPA. On the substance of the claims, the Michigan garnishment process does not properly allow a judgment creditor to tax garnishment costs until prevailing party status is settled on the garnishment itself. Many of the costs taxed in these cases were therefore prohibited. Claiming costs due that really are not–even in small amounts–is a material misstatement for FDCPA purposes. Additionally, debt collectors who hire lawyers to help them collect on debts can be held responsible for the collection activities of those lawyers, so non-attorney Defendants remain in the cases. Defendants have an opportunity going forward to attempt to establish the good faith defense laid out in § 1692(k) of the FDCPA. Motions filed by all sides are resolved accordingly.

II. BACKGROUND

A. Factual Background

Generally, these cases involve Plaintiffs who were indebted to service providers, banks, or credit card companies. The accounts went into default and the original creditors sold the debts to debt collectors–one group of Defendants in these cases–who engaged attorneys–the other group of Defendants in these cases–to help them collect on the accounts. The attorneys filed cases in state court and received judgments, usually by default. The attorneys then filed requests for writs of garnishment as a mechanism to collect on the judgments. In the applications, Defendants usually included costs of the current application in the total amount due. When previous writs of garnishment had been unsuccessful, those costs were often included in the total due in subsequent applications as well. Plaintiffs have filed these cases to challenge the inclusion of the costs of applications for writs of garnishment as improper under Michigan law and the FDCPA. The factual

background for the individual cases, as well as the pending motions, are described in Appendix A. All of the cases have cross motions for summary judgment, and Plaintiffs in some cases have filed motions to strike affidavits.

B. FDCPA Background

In 1977, Congress saw "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). The abuses contributed to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.* Congress found "[e]xisting laws and procedures for redressing these injuries" to be "inadequate to protect consumers." 15 U.S.C. § 1692(b). Additionally, "[m]eans other than misrepresentation or other abusive debt collection practices" were "available for the effective collection of debts." 15 U.S.C. § 1692(c). In light of these findings, Congress passed the FDCPA as a means of protecting consumers from "a wide array of unfair, harassing, deceptive, and unscrupulous collection practices by debt collectors." *Currier v. First Resolution Investment*, 762 F.3d 529, 532 (6th Cir. 2014). The Act is "extraordinarily broad." *Id.* at 533 (quoting *Barany-Snyder v. Weiner*, 539 F.3d 327, 333 (6th Cir. 2008)). The FDCPA prohibits "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692(e). A non-exhaustive list of prohibited activities includes the "false representation of . . . the character, amount, or legal status of any debt." § 1692(e)(2)(A). The Act also prohibits "[t]he collection of any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law." § 1692(f)(1). The FDCPA "outlaws more than just falsehoods." *Buchanan v. Northland Group, Inc.*, 776 F.3d 393, 396 (6th Cir. 2015) (internal quotes omitted). To determine what conduct is prohibited by the FDCPA, the "conduct is viewed through the eyes of the

'least sophisticated consumer.'" *Currier*, 762 F.3d at 533 (internal quotes omitted). This standard presumes "a basic level of reasonableness and understanding on the part of the debtor," while affording protection to "the gullible and shrewd alike." *Id.* While the FDCPA is broad, the restrictions at issue in these cases apply only to persons and entities that meet the definition of a "debt collector." 15 U.S.C. § 1692a(6) (defining "debt collector" broadly, but including exclusions, such as for the originator of the debt). So while the FDCPA may at times appear broad and restrictive, it is targeted at a specific industry that Congress saw good reason to regulate. *See* 15 U.S.C. § 1692.

C. Michigan Garnishment Law Background

Michigan garnishment law is governed by the Michigan Court Rules. *See* M.C.R. 3.101. The garnishment process is one of the collection methods available to judgment creditors, distinct from the enforcement of judgments and proceedings supplementary to judgments spelled out in the Revised Judicature Act. M.C.L.A. §§ 600.6001 *et seq*. In a garnishment action, a plaintiff–the judgment creditor–files a request and writ for garnishment and a court clerk "shall issue a writ of garnishment if the writ appears to be correct, complies with these rules and the Michigan statutes, and [contains a proper verified statement by plaintiff]." M.C.R. 3.101(D). The garnishment request is served on the garnishee, who must provide a copy to the defendant–the judgment debtor. M.C.R. 3.101(F). A defendant or garnishee can object to the garnishment based on defects in the garnishment proceeding, such as "the garnishment was not properly issued or is otherwise invalid." M.C.R. 3.101(K)(2)(f). The "[p]ayment to the plaintiff may not exceed the amount of the unpaid judgment, interest, and costs stated in the . . . writ of garnishment. If the plaintiff claims to be

entitled to a larger amount, the plaintiff must proceed by motion with notice to the defendant." M.C.R. 3.101(J)(4).

Costs in garnishment actions "are allowed as in civil actions." M.C.R. 2.625(E). In general, this means "[c]osts will be allowed to the prevailing party" in the garnishment action, just as in other civil actions. M.C.R. 2.625(A)(1). There are, however, specific rules that apply in garnishment only. In particular, "[i]f the garnishee is not indebted to the defendant, does not hold any property subject to garnishment, and is not the defendant's employer,"then "the plaintiff is not entitled to recover the costs of that garnishment." M.C.R. 3.101(R).

The rules require the state court administrator to "publish approved forms for use in garnishment proceedings." M.C.R. 3.101(C). The "verified statement, writ, and disclosure filed in garnishment proceedings must be substantially in the form approved by the state court administrator. M.C.R. 3.101(C). The State Court Administrative Office ("SCAO") has created forms MC12 (periodic request and writ for garnishment) and MC13 (non-periodic request and writ for garnishment) to fulfil these requirements. MI SCAO Court Forms: http://courts.mi.gov/Administration/SCAO/Forms/Pages/Garnishment.aspx. The forms have fields in which to fill out the judgment amount, the "judgment interest accrued to date," the "total amount of postjudgment costs accrued to date," and the "total amount of postjudgment payments made and credits to date." *Id.* As described several places in the rules, a garnishment action is a species of civil action and follows the general pattern of other civil actions with plaintiffs initiating proceedings, defendants having a chance to respond, and disputes ultimately subject to judicial resolution, if necessary.

III. DISCUSSION

A. Rooker-Feldman Doctrine

The Court first determines whether it has subject matter jurisdiction over the claims. The Rooker-Feldman doctrine prevents "a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment based on the losing party's claim that the state judgment itself violated the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). Rooker-Feldman is a narrow doctrine, "confined . . . to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 294 (2005). When a claim is based on injuries caused by third parties, and not by the state court judgment itself, then Rooker-Feldman does not apply. *Abbott v. Michigan*, 474 F.3d 324, 328-29 (6th Cir. 2007).

In these cases, the Rooker-Feldman doctrine does not deprive the Court of jurisdiction. Rooker-Feldman prevents federal district courts from serving as appellate courts to state court decisions, but that is not the situation here. The gravamen of these claims is based on actions of third-parties–debt collectors and legal professionals–who allegedly violated the FDCPA by claiming inappropriate costs in requests and writs for garnishment. The requests were reviewed by state-court clerks to see if the writs "appear[ed] to be correct," but that is a far cry from a judgment on the merits in a contested proceeding. The only evidence in the record of a request being rejected by a clerk was for improper spelling of the name of a party–a clerical error. (*See* Case No. 1:13-cv-1340, doc. # 95, PageID.1053). Moreover, in these cases, a garnishment judgment never entered–either by default or after a contest. M.C.R. 3.101(O),(S). So there is no state court judgment or other final

order to which Rooker-Feldman could apply. Rather, in these cases, this Court is reviewing the legal significance of statements made by debt collectors and their lawyers when claiming costs in their requests for garnishment, not reviewing the underlying judgments of the state courts or the validity of the garnishment process employed by the state courts. The injuries thus stem from the actions of third parties, not from the judgments of the state courts. *Todd v. Weltman, Weinberg & Reis Co., LPA*, 434 F.3d 432, 437 (6th Cir. 2006) (holding that Rooker-Feldman does not apply when a plaintiff complains of injuries that were caused by a defendant's false affidavit, even if the false affidavit was inextricably linked to a state court judgment).

The Seventh Circuit has held that an FDCPA claim based on a false representation in a contested state-court garnishment proceeding was barred by Rooker-Feldman, *Harold v. Steel*, 773 F.3d 884 (7th Cir. 2014). Defendants urge the Court to follow that authority. The Court declines to do so because it appears to conflict with Sixth Circuit precedent that, while not exactly on point, indicates that courts in this circuit are to apply Rooker-Feldman more narrowly. *See McCormick v. Braverman*, 451 F.3d 382 (6th Cir. 2006); *Evans v. Cordray*, 424 F. Appx. 537 (6th Cir. 2011). Additionally, the *Harold* case is distinguishable. It involved a contested proceeding in which the state court actually adjudicated factual and legal disputes between parties in the garnishment, and eventually entered judgment on the garnishment. *Harold*, 773 F.3d at 885; *see also Harold v. Steel*, 2014 WL 1316593 (S.D. IN March 31, 2014). Nothing like that happened here, where clerks simply processed garnishment requests that appeared to be in technically correct form, but that never led to entry of a garnishment judgment, contested or otherwise.

Accordingly, Defendants' motions to dismiss or for summary judgment based on the Rooker-Feldman doctrine are denied.

B. Michigan Garnishment Process

The Michigan garnishment process does not properly allow a judgment creditor to tax garnishment costs before prevailing party status is settled on the garnishment itself. Michigan Court Rules award costs "to the prevailing party *in an action*, unless prohibited by statute or by these rules . . ." M.C.R. 2.625(A)(1) (emphasis added). A judgment creditor is the prevailing party in the underlying collection action. M.C.R. 2.625(B)(2). However, garnishment proceedings are governed by a separate set of rules, most notably M.C.R. 3.101. The garnishment action is obviously related to the original action, but it is still a distinct and separate proceeding that may end in a separate judgment. M.C.R. 3.101(O),(S). Costs for this distinct and separate garnishment action "are allowed as in civil actions." M.C.R. 2.625(E).

When a judgment creditor files a request and writ for garnishment, a new action or proceeding begins. In that new action, the creditor becomes "plaintiff"; the debtor becomes "defendant"; and the new target party becomes "garnishee." M.C.R. 3.101(A). Costs in the garnishment are "allowed as in civil actions," M.C.R. 2.625(E), which traditionally means the prevailing party can collect costs, but only after prevailing party status has been determined in that civil action. M.C.R. 2.625(A)(1). Plaintiffs in civil actions may include a generic request for unspecified costs in their original prayers for relief, but they cannot properly establish a right to recover any specific costs until there has been actual "success" in the underlying action. There is no reason for a different rule in the garnishment proceeding that would allow a garnishment plaintiff to front load the right to recover costs merely by having the clerk issue the initial garnishment

process. Instead, the rules provide that garnishment costs "are as provided by law or these rules," indicating that the traditional prevailing party rule is appropriate. M.C.R. 2.625(A)(1).[1]

Under the prevailing party rule of Rule 2.625, garnishment plaintiffs must establish their right to recover costs by first achieving success on the garnishment action itself, just as a plaintiff in an original action establishes a right to recover costs by first winning on the merits of the case. Success on the garnishment is certainly established by actually recovering money. But actual receipt of money is not always necessary to achieve prevailing party status in a garnishment any more than it would be for a successful plaintiff in an original civil action. Establishing that a garnishee defendant actually owes the defendant money, actually holds property belonging to the defendant, or actually employs the defendant is enough, consistent with Rule 3.101(R)(2). A garnishee may not always have to pay over cash to the successful garnishment plaintiff because of set-off rights, other higher priority claims, exempt property laws, or other similar limitations. But a garnishment plaintiff must at least establish a right to recover consistent with M.C.R. 3.101(R)(2) before triggering prevailing party costs on the garnishment action itself.

Under Defendants' reading of the rules, prevailing party status for the garnishment plaintiff would carry over from the action of the underlying judgment, meaning the garnishment plaintiff is automatically entitled up front to prevailing party costs of the garnishment action itself. But this does not result in costs being treated "as in civil actions." M.C.R. 2.625(E). Rather, it allows garnishment plaintiffs to presume prevailing party status before the new contest even begins. Moreover, as these cases demonstrate, it actually allows garnishment plaintiffs to claim entitlement to costs of multiple

[1]There is a special provision at M.C.R. 2.625(E) for collection of costs when there is a dispute between the plaintiff and the garnishee defendant, but that is not applicable in these cases where garnishees did not dispute the writs.

garnishments on which they never achieve success in any form. Defendants' reading of the rule, therefore, reads the "prevailing party" requirement out of the rules, and conflicts with the language and intent of M.C.R. 3.101(R).

Defendants' reading of the rules also would permit a debt collector to unilaterally and unfairly ramp up the pressure on a collection account. For example, a debt collector who is a garnishment plaintiff based on a default judgment could file dozens of garnishments against every financial institution in an area, in a scatter-shot approach at hitting on a garnishment. Under Defendants' reading, the costs of all of those garnishments can be added up front to the claimed amount due, increasing the claim by hundreds of dollars, even if none of the garnishments produce anything. That type of abuse is what led to the limitation in Rule 3.101(R)(2) in the first place, and is exactly the type of abuse that was the basis for Congress' finding of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Under the Court's reading, debt collectors have an incentive to focus on requests and writs for garnishment that have a reasonable chance of success. This incentive to target garnishments where they are most likely to succeed decreases both pressure on defendants and needless burden on third-party garnishees.

The Defendants object to the Court's interpretation of the rule by pointing to the SCAO forms that include a field for "postjudgment costs accrued to date." http://courts.mi.gov/Administration/SCAO/Forms/courtforms/garnishment/mc12.pdf. Defendants argue that surely this indicates that Michigan law permits the inclusion of costs of the current writ in the request. Previous versions of the form explicitly had a field for "costs of this garnishment." (*See* SCAO Form MC12 [1984], Case No. 1:14-cv-60, doc. # 60-2, PageID.713). The Court

disagrees. First, the SCAO forms do not carry the legal heft sufficient to override the plain text of the Michigan Court Rules. Second, the change from forms that previously included an explicit field for "costs of this garnishment" to forms that do not include such a field can be interpreted two ways. It may support Defendants' interpretation. But another interpretation is that the SCAO removed the field to discourage any attempt by debt collectors to claim those costs in the request before establishing prevailing party status on the garnishment. The SCAO forms may play a role in the bona fide error defense discussed below, but they do not require reading the prevailing party requirement out of the rules.

Defendants further object to the Court's interpretation as creating an endless cycle of garnishment requests: if costs cannot be included up front and are only taxable after success, then the plaintiff will have to file a new garnishment request to collect the costs of the previous garnishment requests. But the costs of the second garnishment will require a third garnishment. And the process will continue infinitely. The objection is not persuasive. Defendants equate actual costs with recoverable costs. But that is not true of civil litigation. Even complete winners do not get to recover all their actual costs. This is obviously true of the American rule of attorney fees, which generally leaves the fees on the party that incurred them–winner or loser. Even on the narrower issue of costs themselves, actual out-of-pocket cost is not the measure of recovery. Statutes and rules limit the availability and amount of costs. *See, e.g.,* 28 U.S.C. § 1920 (authorizing only specific cost categories as taxable costs). And, of course, judgment interest is a poor substitute for the actual economic loss of the time value of money. In short, the system builds in some slack, for garnishment plaintiffs and other litigants alike. This slack creates incentives for parties to resolve matters by agreement instead of battling in court for every last penny. Moreover, for a debt collector that really

wants to pursue every last penny of the actual garnishment costs, the Michigan rules provide a finite path:

> Payment to the plaintiff may not exceed the amount of the unpaid judgment, interest, and costs stated in the verified statement requesting the writ of garnishment. If the plaintiff claims to be entitled to a larger amount, the plaintiff must proceed by motion with notice to the defendant.

M.C.R. 3.101(J)(4).

The debt collectors in these cases violated Michigan garnishment law by claiming garnishment costs as due before they established their right to do so as prevailing parties on the garnishments themselves**.** All of the cases involve requests and writs for garnishment that claimed costs associated with that particular garnishment, even though success was obviously not established up front. Many of the requests additionally claimed costs associated with previous garnishment attempts that had not been successful. Even under the Defendants' proposed reading of the Michigan rules, those would violate M.C.R. 3.101(R)(2). Defendants argue, however, that some writs, especially to the Michigan Department of the Treasury, did not result in disclosures disclaiming liability to the garnishment defendant, and that it is therefore impossible to tell whether the garnishments were successful. But this objection does not survive the Court's interpretation of the rule. A garnishment plaintiff does not obtain prevailing party status, and corresponding entitlement to garnishment costs, before receiving either: 1) a disclosure indicating the garnishee owes money to, holds property of, or employs the defendant; or 2) actual payment from the garnishee. Only at that point does the garnishment plaintiff become a prevailing party who can properly claim costs.[2]

[2] As noted earlier, money does not necessarily have to change hands on a writ for the garnishment plaintiff to be considered the prevailing party. A garnishment disclosure that indicates a garnishee defendant is indebted to the defendant, holds property of the defendant, or employs the defendant is enough to make the garnishment plaintiff the prevailing party, consistent with M.C.R.

Defendants' objections about supposed legal uncertainties created when no disclosures are returned mistakenly assumes their strained reading of the rules, which would require a garnishee defendant to prove the absence of the conditions under Rule 3.101(R)(2). The Court's construction avoids the objection by requiring a straight-forward application of the rules that requires the party claiming recoverable costs to prove its entitlement to recover consistent with 3.101(R)(2), just as a prevailing party must do in the original action.

C. Materially False or Misleading for FDCPA

Claiming as presently due a category of costs that are not actually due–even in small amounts–is a material misstatement for FDCPA purposes**.** The Sixth Circuit has held that for a statement to be misleading under § 1692(e), it must, "in addition to being technically false, . . . tend to mislead or confuse the reasonable unsophisticated consumer." *Wallace v. Washington Mut. Bank, F.A.*, 683 F.3d 323, 326-27 (6th Cir. 2012). The same standard is required under § 1692(f). *Clark v. Lender Processing Servs.*, 562 F. Appx. 460 (6th Cir. 2014). The Sixth Circuit has held that when "a debt collector seeks fees to which it is not entitled, it has committed a prima facie violation" of the FDCPA. *Wise v. Zwicker & Assoc., P.C.*, 780 F.3d 710, 713 (6th Cir. 2015). For example, a claim for interest that had previously been waived is a material misstatement. *Stratton v. Portfolio Recovery Assoc., LLC*, 770 F.3d 443 (6th Cir. 2014). Under this authority, claiming as due a

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3.101(R)(2). In those cases, the garnishment plaintiff is in a better position for knowing the status of the relationship between the garnishee and the defendant. Even when no money changes hands under the writ, such as when the defendant is employed by the garnishee but the income is exempt from garnishment, then the garnishment plaintiff has legal evidence of a way to attempt to continue collection efforts as to the defendant. Costs associated with writs that result in disclosures providing this type of information, or with writs that result in partial payment of a debt, could be the proper amounts to include in the "postjudgment costs accrued" field on the SCAO forms.

category of costs not in fact recoverable violates the FDCPA, even if the actual dollar amount at issue in the category of costs is comparably small.

The amount due is at the heart of a collection action, so misstating that amount by claiming costs that are actually not due, even if only by tens of dollars, is materially misleading for FDCPA purposes. Claims for improper costs may also lead to over collection of a debt, as happened here in at least one case.[3] The "least sophisticated consumer" is unlikely to recognize which claimed costs are proper, as indicated by the disagreement between skilled lawyers on that issue in these cases. Congress enacted the FDCPA in order to "eliminate abusive debt collection practices" and "promote consistent State action to protect consumers." 15 U.S.C. § 1692(e). The Sixth Circuit has made clear that those protections should even shield the "least sophisticated consumer." *See Currier*, 762 F.3d at 533. Claiming a category of costs as due, when they really are not, would confuse the least sophisticated consumer, and is a materially misleading or technically false statement for FDCPA purposes.

D. Liability of Debt Collectors

Debt collectors who hire lawyers to help them collect on debts can be held responsible for the collection activities of those lawyers, so non-attorney Defendants remain in these cases. The FDCPA limits its scope to "debt collectors" as defined in 15 U.S.C. § 1692a(6), which is why the group of defendants here includes debt collection agencies and attorneys, but no credit card companies, banks, or medical providers who were the originators of the underlying debts. *See* §

[3]In Case No. 1:13-cv-1328, wages were garnished from Plaintiff Verburg in the amount of $1,857.38, which paid in full the underlying debt plus $73.22 in costs claimed as due that were not yet actually due under the Michigan Court Rules. The costs claimed stemmed from the current garnishment request and three previous unsuccessful garnishment attempts.

1692a(6)(F) (excluding originators of debt when defining debt collector). The question remains whether FDCPA liability extends to parties that had a degree of separation between themselves and the violating activity. In other words, can debt collector clients be held responsible for actions of their debt collector lawyers who violate the FDCPA? The Court holds that, at least in these circumstances, the answer is yes.

A debt collector who hires legal professionals who are also debt collectors under the FDCPA to assist in collection activities has entered a principal-agent relationship with the attorneys. *See Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994). The attorneys were hired to represent the collectors, and when the attorneys sign their names to requests and writs for garnishment, the statements in the requests are taken as those of the collectors. This is true in civil litigation in general, and nothing in the FDCPA creates a special immunity for debt collectors. To the contrary, the FDCPA is intended to curb abusive debt collection practices. A rule that exonerates debt collectors for any actions done through their attorneys would create a loophole that the FDCPA itself does not create, and that would be at odds with the purpose of the statute.

Defendants do not argue for a hard rule that clients are never liable for actions of attorneys, but propose instead that debt collector clients are liable only if they exercise actual control over their lawyers with respect to the offending conduct. Defendants essentially seek a tort law vicarious liability standard rather than a principal / agent rule of liability. But state tort claims are not at issue; instead, this case involves violations of the FDCPA. Congress intended to curb abusive debt collection, and nothing in the FDCPA distinguishes between the actions of the debt collectors themselves, and the actions of the lawyer agents they hire to achieve their goals. Debt collectors and their lawyer agents can, and often do, use engagement letters and other mechanisms to allocate risks

of economic loss that come with collection activities. That is the proper way for debt collectors and their counsel to determine how to allocate that risk between themselves, not through a judicial gloss on statutory text encompassing both groups within the definition of "debt collector."

Defendants point to *Clark v. Capital Credit & Collection Servs., Inc.* for the proposition that "the principal must exercise control over the conduct or activities of the agent" for a debt collector to be held vicariously liable. 460 F.3d 1162, 1173 (9th Cir. 2006)**.** But that case involved an attorney being held liable for actions of her client, and a vicarious liability standard naturally applied. In these cases, the debt collector clients engaged the debt collector attorneys to help collect debts, which creates a traditional principal-agent relationship for a specific purpose. When that purpose is collecting a debt, this relationship is all the control required by the FDCPA for a principal to be accountable for an agent's conduct in pursuing that goal. The attorney Defendants in these cases had actual or apparent authority to file the requests and writs for garnishment on behalf of the debt collector Defendants. Collecting the debt is exactly what the debt collectors hired them to do. Nothing in the text of the FDCPA creates a heightened standard of control beyond traditional agency law and doing so by judicial fiat would undermine the purpose of the FDCPA.

This ruling resolves the issues common to all of the cases on the pending motions. There are some unique arguments, however, that apply only in individual cases.

First, Defendant Allied Business Services, Inc. in Case No. 1:13-cv-1340 stands in a different position from other debt collector defendants. It is undisputed in that case that Allied did not hold Plaintiff's account at the time the requests and writs for garnishment were filed, never engaged the attorney defendants in that case, and was not involved in the garnishment process in any way. In

short, Allied was never a principal or an agent responsible for the garnishments at issue in the case. Accordingly, Defendant Allied's motion for summary judgment in that case is granted.

Second, Defendant Baxter in Case No. 1:13-cv-1330 argues that ten of the twelve writs of garnishment were issued outside the applicable statute of limitations. (*See* doc. # 138, PageID.2432). It appears, however, that stale costs were included in requests and writs for garnishment filed within the limitations period. As at least two writs were filed within the applicable statute of limitations, the Court finds Defendant Baxter is not entitled to summary judgment.

Finally, Defendants Encore and MCM in Case No. 1:13-cv-1330 seek dismissal based on their lack of direct involvement in the garnishments at issue. (*See* doc. # 126, PageID.1835). However, Plaintiffs in that case have submitted findings of the Consumer Protection Financial Bureau that indicate Encore, MCM, and Midland Funding are all debt collectors that are inextricably intertwined in the way they engage in collection activities, including filing writs of garnishment. (*See* doc. # 140-1). There is at least a question of fact on the current record, and so the case must continue beyond summary judgment regarding these Defendants.

E. Bona Fide Error Defense

Defendants should have an opportunity going forward to attempt to establish the good faith defense laid out in 1692(k) of the FDCPA. The FDCPA includes a statutory defense that says: "A debt collector may not be held liable . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c). The bona fide error defense does not shield a debt collector from incorrect interpretations of the FDCPA itself. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 604-05 (2010).

However, "clerical or factual mistakes" can be bona fide errors. *Id.* at 587. The applicability of the bona fide error defense to misinterpretations of state law, which are at issue in this case, has been left open by the Supreme Court. *Id.* at 581, FN4. Although some of the reasoning behind the Supreme Court's ruling in *Jerman* suggests that incorrect interpretations of state law may also be outside the scope of the bona fide error defense, the Court is unwilling to extend the ruling at this time. There is more complexity to the contours of state law compared with the FDCPA itself. The factual record as it stands is inadequate to establish the applicability of the bona fide error defense in these cases, so Defendants will have an opportunity to develop their legal and factual support going forward.

F. Motions to Strike Affidavits

Plaintiffs in several of the cases have moved to strike affidavits, typically from persons who worked at the law firms involved in debt collection. Rule 37 prohibits a party from using information or witnesses that were not properly disclosed unless "the failure was substantially justified or is harmless." FED. R. CIV. P. 37(c)(1). Trial courts have discretion when determining whether to impose sanctions for discovery violations. *Roberts ex rel. Johnson v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir. 2003).

Plaintiffs object to affiants not being disclosed in Rule 26(a) disclosures. (*See, e.g.*, Case No. 1:13-cv-1328, doc. # 120, PageID.1898; Case No. 1:13-cv-1340, doc. # 87, PageID.951). Defendants have responded, some pointing out that affiants were properly disclosed, (Case No. 1:13-cv-1328, doc. # 132, PageID.2154), and others arguing that there was good cause and any error was harmless. (Case No. 1:13-cv-1332, doc. # 85, PageID.909). The Court finds that Plaintiffs had adequate notice of the persons that gave, and topics included in, the affidavits, even if the individuals were not all

specifically included in the Rule 26(a) disclosures by each of the defendants. In some cases, the affiant was disclosed by one defendant, but not others. In other cases, defendants used language like "rep[resentative] of the company" in the disclosure, then used a named party in the case as that representative for the affidavit. The Court does not see sanctions as an appropriate remedy for any of the alleged violations at this time. This is especially true as the Court anticipates more factual development of the bona fide error defense, which was largely the topic of the affidavits, going forward in the cases. The motions to strike affidavits are therefore denied.

G. Other Assorted Pending Motions

These cases have additional outstanding motions that are dismissed as moot. Motions to amend case management orders ("CMO") were rendered moot by other adjustments in the scheduling of the cases, usually under joint motions to amend CMO. Motions to file reply briefs, to supplement the record, and for extensions of time are dismissed as moot because the Court has considered the proposed materials and arrives at the same conclusions expressed in this Order.

In Case No. 1:14-cv-295, Defendants have filed an unopposed motion to dismiss Plaintiff Latricia Bell for failure to prosecute. Seeing good cause, the Court grants that motion.

IV. CONCLUSION

These FDCPA cognate cases involve interpretation of the Michigan Court Rules regarding garnishment. Defendants have moved for summary judgment based on a reading of the rules that the Court finds inconsistent with the text and structure of the rules when read as a whole. The Court finds the Rooker-Feldman doctrine does not deprive the Court of jurisdiction, that misstatements were material, and that debt collectors can be liable for the collection activities of their agents, including counsel. Defendants' motions for summary judgment are therefore DENIED. Under the

Court's construction of the Michigan garnishment rule, and the FDCPA, many of the claimed costs in the requests and writs for garnishment were improper and violated the FDCPA. However, the record is not developed enough to determine whether the bona fide error defense of the FDCPA is applicable in this case. For those reasons, the Plaintiffs' motions for partial summary judgment are GRANTED and Plaintiffs' motions for summary judgment are GRANTED IN PART, and DENIED IN PART.

The Court will convene a status conference to address the next steps in the process.

IT IS THEREFORE ORDERED that:

Case Name	Case No.	Pending Motions
Steven J. Verburg, et al. v. Weltman, Weinberg & Reis Co., LPA, et al.	1:13cv1328	Joint motion to amend CMO (doc. # 106) is DISMISSED AS MOOT; Defendant Encore's motion for summary judgment (doc. # 109) is DENIED; Defendant Weltman's motion for summary judgment (doc. # 111) is DENIED; Defendant LVNV's motion for summary judgment (doc. # 113) is DENIED; Plaintiffs' motion for partial summary judgment (doc. # 115) is GRANTED; Plaintiffs' motion to strike the affidavit of Best (doc. # 120) is DENIED. Plaintiffs' motion to file supplemental brief (doc. # 147) is DISMISSED AS MOOT.
Denise Martin v. TenHouten Ringstrom, PLLC, et al.	1:13cv1329	Defendants' motion for summary judgment (doc. # 58) is DENIED; Plaintiff's motion for partial summary judgment (doc. # 60) is GRANTED.

Daniel Pryor v. Law Offices of Timothy E. Baxter & Associates, PC, et al.	1:13cv1330	Defendant Encore's motion for summary judgment (doc. # 125) is DENIED; Plaintiff's motion for summary judgment (doc. # 127) is GRANTED IN PART and DENIED IN PART; Defendant Baxter's motion to dismiss (doc. # 129) is DENIED. Plaintiff's motion to file supplemental brief (doc. # 149) is DISMISSED AS MOOT.
Michael Christian v. Law Offices of Michael R. Stillman, PC	1:13cv1331	Defendant Stillman's motion for summary judgment (doc. # 74) is DENIED; Plaintiff's motion for summary judgment (doc. # 75) is GRANTED IN PART and DENIED IN PART.
Bruce Grant v. Shermeta, Adams & Von Allmen, PC	1:13cv1332	Defendant's motion for summary judgment (doc. # 73) is DENIED; Plaintiff's motion for summary judgment (doc. # 74) is GRANTED IN PART and DENIED IN PART; Plaintiff's motion to strike Defendant's exhibit (doc. # 82) is DENIED. Plaintiff's motion to file a reply brief (doc. # 88) is DISMISSED AS MOOT.
John P. Hunter, et al. v. Mary Jane Elliott, PC, et al.	1:13cv1338	Defendant Elliott's motion for summary judgment (doc. # 92) is DENIED; Defendant Portfolio's motion for summary judgment (doc. # 93) is DENIED; Defendant LVNV's motion for summary judgment (doc. # 94) is DENIED; Plaintiff's motion for partial summary judgment (doc. # 95) is GRANTED.

Joan Frances Kloosterman v. Law Office of Barbara Tsaturova, PLLC	1:13cv1340	Defendant Allied's motion for summary judgment (doc. # 75) is GRANTED; Defendant Tsaturova's motion for summary judgment (doc. # 77) is DENIED; Plaintiff's motion for partial summary judgment (doc. # 79) is GRANTED; Plaintiff's motion to strike the affidavit of Buckles (doc. # 85) is DENIED; Plaintiff's motion to strike the affidavit of Lewis (doc. # 87) is DENIED.
Andrea Stevens v. Schisler Law, PLC, et al.	1:14cv10	Defendants' motion for summary judgment (doc. # 68) is DENIED; Plaintiff's motion for partial summary judgment (doc. # 70) is GRANTED.
Ethel Walker v. Leikin, Ingber & Winters, PC, et al.	1:14cv18	Defendant Leikin's motion for summary judgment (doc. # 61) is DENIED; Defendant Ingber's motion for summary judgment (doc. # 63) is DENIED; Defendant LVNV's motion for summary judgment (doc. # 65) is DENIED; Plaintiff's motion for partial summary judgment (doc. # 67) is GRANTED.
Kathryn Campbell v. Berndt & Associates, PC, et al.	1:14cv34	Joint motion to amend CMO (doc. # 101) is DISMISSED AS MOOT; Defendant Brendt's motion for summary judgment (doc. # 104) is DISMISSED AS MOOT; Defendant Brendt's corrected motion for summary judgment (doc. # 105) is DENIED; Defendant LVNV's motion for summary judgment (doc. # 106) is DENIED; Plaintiff's motion for summary judgment (doc. # 107) is GRANTED IN PART and DENIED IN PART.

Maureen Van Hoven v. Buckles & Buckles, PLC, et al.	1:14cv60	Joint motion to amend CMO (doc. # 56) is DISMISSED AS MOOT; Defendants' motion for summary judgment (doc. # 59) is DENIED; Plaintiff's motion for partial summary judgment (doc. # 61) is GRANTED; Plaintiff's motion to strike the affidavit of Buckles (doc. # 66) is DENIED.
Mary Yarbrough v. Gray & Gray, PC, et al.	1:14cv234	Defendants' motion for summary judgment (doc. # 66) is DENIED; Plaintiff's motion for partial summary judgment (doc. # 68) is GRANTED.
Peter Anda, et al. v. Roosen, Varchetti & Olivier, PLLC, et al.	1:14cv295	Defendants' unopposed motion to dismiss claims of Latricia Bell (doc. # 100) is GRANTED and Plaintiff Bell's claims are DISMISSED WITH PREJUDICE; Defendant Roosen's motion to dismiss (doc. # 102) is DENIED; Defendant Roosen's motion for summary judgment (doc. # 99) is DENIED; Defendant Cavalry's motion for summary judgment (doc. # 103) is DENIED; Defendants Olivier and Roosen's motion for summary judgment (doc. # 106) is DENIED; Plaintiffs' motion for summary judgment (doc. # 121) is GRANTED IN PART and DENIED IN PART; Plaintiff's motion for extension of time to file (doc. # 111) is DISMISSED AS MOOT.

IT IS SO ORDERED.

Dated: March 28, 2016

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE