UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GILBERTO FRANCO on behalf of himself and all others similarly situated,

13-cv- 4053

Plaintiff,

vs.

ALLIED INTERSTATE LLC f/k/a ALLIED INTERSTATE, INC.,

Defendant.

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DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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Defendant Allied Interstate, LLC ("Defendant" or "Allied"), in accordance with this Court's May 21, 2018 Order (Dkt. 117), respectfully submits the within Supplemental Memorandum of Law in Opposition to the Motion for Class Certification (Dkt. 42).

PRELIMINARY STATEMENT

The issue before the Court on this Motion is not whether Plaintiff's claim is moot as a matter of law, but whether Plaintiff – a party who has received payment far in excess of his maximum claim – is similarly situated with, or has claims typical of, the remaining members of the putative class. For the reasons set forth below, he clearly is not and the requisite elements of class certification – typicality and adequacy – have not been satisfied.

By way of background, Plaintiff's Complaint arises out of a purported violation of the Federal Debt Collection Practices Act ("FDCPA") based on a form letter sent to Massachusetts residents over a one-year period. Plaintiff has filed a Motion for Class Certification seeking to certify a class of consumers who received a similar letter. FDCPA caps statutory damages and Mr. Franco has not sustained, nor does he allege, any actual damages. Accordingly, his maximum potential recovery in this case is limited to $1,000.

Most recently, on May 22, 2018, a check in the amount of $2,750, payable to Gilberto Franco (accounting for the maximum amount of compensation and any interest accrued), was issued and sent to Plaintiff's counsel. This amount is almost triple what Plaintiff could have hoped to recover on his individual claim. Thus, regardless of whether this event moots Plaintiff's claim as a matter of law, the fact remains that Plaintiff claim has been fully compensated.

This economic reality demonstrates that Plaintiff – who has been compensated in excess of the amount of his claim – is neither a typical nor an adequate representative of the putative

class, which may contain members who have not been so compensated. *See* Fed. R. Civ. P. 23(a)(3)-(4). Mr. Franco's unique circumstances as the only member of the putative class to have been compensated for his claim have irreparably compromised his role as lead Plaintiff in this litigation, which will now necessarily focus on Mr. Franco's unique defenses to the detriment of other putative class members.

For these reasons, Plaintiff's Motion for Class Certification should be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff filed this class action against Allied on June 13, 2013. On December 2, 2013, Plaintiff filed its Motion to Amend the Complaint (amending the proposed class definition), simultaneously with a Motion for Class Certification based on the Amended Complaint (Dkt. 42). Plaintiff's only cause of action sounds in the FDCPA and no actual damages are alleged.

Following two rounds of appeals, in its most recent Summary Order of April 9, 2018, the Second Circuit Court of Appeals vacated this Court's November 30, 2015 judgment and remanded the matter for further proceedings. On May 22, 2018, Defendant issued a check in the amount of $2,750, payable to Gilberto Franco, which was sent to Plaintiff's Counsel (Dkt. 118). The check has not been returned and remains in Plaintiff's possession.

In accordance with this Court's Order of May 21, 2018 (Dkt. 117), permitting the parties to supplement their briefing on the Motion for Class Certification (which briefing was previously closed on January 1, 2014), Defendant reiterates its opposition to Mr. Franco's Motion for Class Certification.

ARGUMENT

A. Having Been Compensated For His Individual Claim, Plaintiff Is An Inadequate Class Representative

Having been fully compensated for his individual claim, Plaintiff cannot adequately represent the purported class because, Plaintiff is now "definitionally atypical" and "not an adequate representative." (Dkt. 101); *see Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 n.9 (2d Cir. 2007) (Upon determination that plaintiff is not an adequate class representative, the court "can always alter, or indeed revoke, class certification at any time before final judgment is entered should a change in circumstances render the plaintiffs inadequate class representatives.").

Plaintiff, who has been paid an amount far exceeding the amount to which he may have been entitled under the statute is not a typical or adequate representative of a putative class of individuals who have received no compensation for their potential claims. In fact, having been compensated for this alleged injury, Plaintiff can no longer claim that his injury is similar to that sustained by other putative class members. *See Carroll v. Associated Musicians of Greater New York*, 316 F.2d 574, 576 (2d Cir. 1963) (holding that orchestra leaders, who had been expelled from union, could not maintain a suit to enjoin union from collecting certain taxes and payments which were not demanded of them). In *Carroll*, because plaintiffs were expelled from the union after the commencement of the lawsuit and could no longer seek equitable relief on their own behalf, the court concluded that they could not adequately represent a purported class of orchestra leaders, all of whom were members of the union. See *id*. Similarly, in this case, Plaintiff cannot represent a class of persons who allegedly suffered injuries under the FDCPA for which they have not been compensated when Plaintiff himself has been made whole.

Moreover, a number of additional cases in New York and this Circuit have held that, where a named plaintiff's injuries are absent or different from those of the putative class, certification is not warranted. For example, in *Small v. Lorillard*, the court denied certification following the named plaintiffs' testimony that they were addicted to nicotine and therefore lacked the free will to quit smoking. *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 10, 679 N.Y.S.2d 593, 601 (1998), aff'd, 94 N.Y.2d 43, 720 N.E.2d 892 (1st Dep't 1999). These plaintiffs were thus no longer deemed to be similarly situated to a putative class of people who allegedly would never have begun smoking, or would have ceased immediately, if they had been told that cigarettes were addictive. See *id*. Similarly, in *Pritchard v. Cty. of Erie*, No. 04-CV-534-A, 2018 WL 1036165, at *17 (W.D.N.Y. Feb. 23, 2018), after summary judgment revealed that there was a genuine dispute over whether one of the named plaintiffs was actually strip searched, the Court concluded that he was no longer an adequate representative of the class. In *Eckert v. Equitable Life Assurance Soc'y of U.S.*, 227 F.R.D. 60, 64 (E.D.N.Y. 2005), where plaintiff "settled his individual claim, it [wa]s apparent that he c[ould] no longer adequately represent the interests of the proposed class." In *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 175 (S.D.N.Y. 2009), the court dismissed claims based on purchase of certain notes because none of the named plaintiffs purchased the specific notes and could not be permitted to recover for injuries they did not actually sustain. In *In re SLM Corp. Sec. Litig.*, 258 F.R.D. 112 (S.D.N.Y. 2009), an investment advisor no longer satisfied adequacy or typicality requirements for appointment as lead plaintiff in putative class action, where advisor lacked standing at time he was appointed lead plaintiff and was further barred from curing its lack of standing by obtaining assignments of two of its clients' claims after commencement of litigation. In *Hammond v. The Bank of New York Mellon Corp.*, No. 08 CIV.

6060 RMB RLE, 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010), the court granted a motion to dismiss plaintiffs' claim seeking damages for the loss of personal identification information through accident or theft, where plaintiffs claimed to have suffered little more than an increased risk of future harm from the loss of their personal information. The court agreed and held that, because the named Plaintiffs have suffered no injury,

> it may also undermine plaintiffs' roles as lead plaintiffs, because lead plaintiffs must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.

Id.at n.1; See also *Ross v. AXA Equitable Life Ins. Co*., 115 F. Supp. 3d 424, 432 (S.D.N.Y. 2015), *aff'd*, 680 F. App'x 41 (2d Cir. 2017) (*quoting Lewis v. Casey*, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)).

B. Plaintiff Has Unique Defenses And Is Therefore Atypical

Because Plaintiff, unlike the other members of the putative class, has been compensated for his individual claims, his unique circumstances "subject [him] to unique defenses which threaten to become the focus of the litigation." *Falcon v. Philips Elecs. N. Am. Corp*., 304 F. App'x 896, 897 (2d Cir. 2008) (*quoting Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 903 F.2d 176, 180 (2d Cir. 1990)). Given these unique defenses, Plaintiff cannot serve as a class representative because of "the danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Id.* As this Court held in *Spagnola v. Chubb Corp*., 264 F.R.D. 76, 93 (S.D.N.Y. 2010),

> The typicality requirement is meant to ensure that the class representative is not subject to a unique defense which could potentially become the focus of the litigation. Thus, numerous cases have found that a putative class representative's claims are not typical of those of the putative class if that representative's claims are subject to unique defenses.

Here, Plaintiff's unique defenses as a result of having been compensated for his claims are certain to become the focus of the litigation, to the detriment of other putative class members, making Plaintiff unfit to serve as class representative. *People United for Children, Inc. v. City of New York*, 214 F.R.D. 252, 262 (S.D.N.Y. 2003) (concluding certain plaintiffs were "atypical of the claims of the putative class because they are subject to unique defenses" and denying their status as class representatives).

CONCLUSION

For the foregoing reasons, and those set forth in Defendant's prior submissions to the Court, the court should deny class certification.

Respectfully submitted:

Dated: June 4, 2018

/s/ Nana Boyer (Japaridze)

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