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JAMES N. HAYLEN, Clerk  
By: *Alexander*  
BEBBY Black

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

VITO J. FENELLO, JR. )  
and BEVERLY H. FENELLO )

Plaintiffs, )

v. )

BANK OF AMERICA, N.A., and )  
THE BANK OF NEW YORK MELLON )  
(as Trustee for CWALT, Inc.), )

Defendants. )  
\_\_\_\_\_ )

CIVIL ACTION FILE  
NO. 1:11-cv-04139-WSD

JURY TRIAL DEMANDED

**PLAINTIFFS' RESPONSE TO MOTION TO DISMISS FAC**

Defendants Bank of America, N.A. (BANA) and The Bank of New York Mellon (BONY) have asked this Court to dismiss the Plaintiffs' 1st Amended Complaint (FAC) with prejudice because "(i) the FAC fails to comply with the July 17, 2012 Order of this Court; and (ii) the FAC fails to state a claim for relief pursuant to Fed. R. Civ. P. 8(a) and 12(b)(6).

Plaintiffs show below (i) that they have explicitly followed the Order of this Court, and (ii) that they have properly stated a claim for relief. Plaintiffs further

contend that, in order to dismiss this case **with prejudice**, the Defendants are asking this Court to rule on the merits of this case, before discovery, before the formal presentation of evidence, and before trial, thereby circumventing due process guaranteed to the plaintiffs under the U.S. Constitution.

According to Dees v. Washington Mut. Bank (M.D. Ga., 2010): Dismissal with prejudice is an "extreme sanction" and "is plainly improper unless and until the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct." Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1338-39 (11th Cir.2005).

For these reasons and more, Plaintiffs pray that this Court will DENY this Motion to Dismiss, and allow this case to move forward to resolve these issues at controversy.

#### Complying with Judge's Opinion and Order<sup>1</sup>

1. The July 17, 2012 Opinion and Order<sup>1</sup> gave the Plaintiffs five specific instructions to follow: "The amended complaint shall:
  1. not exceed fifteen pages;
  2. not include any claims that have been dismissed in this action;
  3. explain how each Defendant qualifies as a "debt collector" within the meaning of the Act;

4. specify which section of the FDCPA was violated, how it was violated, when it was violated, and by which Defendant; and
  5. clearly state the relief requested.”
2. Plaintiffs have adhered to all 5 requirements.
  3. While not explicitly included in the Judge’s instructions, Plaintiffs have recently learned that including new causes of action (an act not prohibited by the Judge’s order), requires leave of the Court (Federal Rules of Civil Procedure (FRCP) Rule 15 (a)(2)).
  4. As referenced in Jones v. Washington Mut. Bank (N.D. Ga., 2011): In keeping with the liberal amendment policy of Rule 15(a), “an untimely amended pleading served without judicial permission may be considered as properly introduced when leave to amend would have been granted had it been sought . . . .” Hoover v. Blue Cross & Blue Shield of Ala., 855 F.2d 1538, 1544 (11th Cir. 1988).
  5. As a result, Plaintiffs are filing a Motion for Leave to Amend concurrent with this Response, which according to the FRCP Rule 15 (a)(2), “The court should freely give leave when justice so requires.”

#### Failing to State a Claim

6. According to the Defendants, the Plaintiffs’ failed “to state a claim for relief pursuant to Fed. R. Civ. P. 8(a) and 12(b)(6).”

7. Under FRCP Rule 8. (a) A pleading that states a claim for relief must contain:
  - (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
  - (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
  - (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
8. The Court's jurisdiction is apparently not in dispute.
9. Plaintiffs did provide "a short and plain statement of the claim showing that the pleader is entitled to relief" (FAC ¶'s 56-62)
10. Plaintiffs did provide "a demand for the relief sought" (FAC ¶ 63, the WHEREFORE on page 11, and the WHEREFORE on the bottom of page 14)
11. Defendant's Motion to Dismiss therefore FAILS under FRCP Rule 8(a).
12. When considering a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, a federal court is to accept as true "all facts set forth in the plaintiff's complaint." Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000).
13. Further, the court must draw all reasonable inferences in the light most favorable to the plaintiff. Bryant v. Avado Brands, Inc., 187 Page 8 F.3d 1271, 1273 n.1 (11th Cir. 1999); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007)

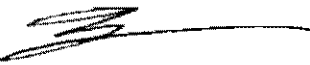
14. Because plaintiffs are acting pro se, "pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).
15. Plaintiffs' evidence has clearly passed the "plausibility standard," having put forward enough facts at the pleading stage to raise a reasonable expectation that discovery will reveal evidence supporting their claims. (Jones v. Washington Mut. Bank (N.D. Ga., 2011))
16. Defendant's Motion to Dismiss therefore FAILS under FRCP 12(b)(6).

#### Defendants' Supplemental Arguments

17. In addition to the Defendants' enumerated reasons asking for dismissal, they have also submitted a Memorandum of Law containing other often spurious reasons why they should not be considered a debt collector, or why even if they are considered a debt collector, the FDCPA should not apply to them.
18. As a result, Plaintiffs are filing a detailed Response to Defendants' Memorandum of Law concurrent with this Response.

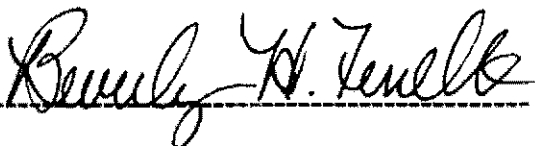
WHEREFORE, as indicated above, the Defendants' Motion to Dismiss is without merit, and Plaintiffs pray that this Court will DENY this Motion to Dismiss, and allow this case to move forward to resolve these issues at controversy.

DATED this 4<sup>th</sup> day of September, 2012.



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