UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MONIQUE SYKES; RUBY COLON; REA VEERABADREN; FATIMA GRAHAM; KELVIN PEREZ; SAUDY RIVERA; PAULA ROBINSON; and ENID ROMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MEL S. HARRIS AND ASSOCIATES, LLC; MEL S. HARRIS; MICHAEL YOUNG; DAVID WALDMAN; KERRY LUTZ; TODD FABACHER; MEL HARRIS JOHN/JANE DOES 1-20; LEUCADIA NATIONAL CORPORATION; L-CREDIT, LLC; LR CREDIT, LLC; LR CREDIT 10, LLC; LR CREDIT 12, LLC; LR CREDIT 18, LLC; LR CREDIT 19, LLC; JOSEPH A. ORLANDO; PHILIP M. CANNELLA; LR CREDIT JOHN/JANE DOES 1-20; WILLIAM MLOTOK; BENJAMIN LAMB; MICHAEL MOSQUERA; JOHN ANDINO; HUSAM AL-ATRASH; ASSMAT ABDELRAHMAN; and SAMSERV JOHN/JANE DOES 1-20,

Defendants.

Civil Action No. 09-8486 (DC)

REPLY MEMORANDUM OF LAW OF IN FURTHER SUPPORT OF THE MOTION BY DEFENDANTS LEUCADIA NATIONAL CORPORATION, L-CREDIT, LLC, LR CREDIT, LLC, LR CREDIT 10, LLC, LR CREDIT 12, LLC, LR CREDIT 18, LLC, LR CREDIT 19, LLC, JOSEPH A. ORLANDO, AND PHILIP M. CANNELLA IN SUPPORT TO DISMISS THE SECOND AMENDED CLASS ACTION COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(1), 12(b)(6) AND 9(b)

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PRELIMINARY STATEMENT

The Leucadia Defendants' submit this brief in further support of their motion to dismiss the Second Amended Complaint (the "SAC") pursuant to Rules 12(b)(1), 12(b)(6) and 9(b).

LEGAL ARGUMENT
POINT I
THE *ROOKER-FELDMAN* DOCTRINE APPLIES

Plaintiffs argue this Court has subject matter jurisdiction because, although "each Plaintiff did 'lose' on default[,]" "[n]one of the[m] 'lost in state court.'" Pls. Br., p.44. Plaintiffs' effort to side-step *Rooker-Feldman* by recasting what they seek here is contradicted by the SAC.

Plaintiffs complain about injuries caused by New York state collection cases in which default judgments were entered against them, *i.e.* their losses. Their injuries are from monetary and speculative damages allegedly sustained as a result of the judgments, *i.e.* complaining about injuries from state-court judgments. *Schuh v. Druckman & Sinel, LLP*, 602 F.Supp.2d 454, 461, (S.D.N.Y. 2009) (rejecting *Rooker-Feldman* because plaintiffs' claims did not complain of an injury caused by state court judgment); *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005). Plaintiffs seek review of how the judgments were obtained, *i.e.* inviting review. Finally, this case was filed after entry of the judgments. That they were vacated, as Plaintiffs argue without citation, is of no moment because, absent the default judgments, we simply would not be here. Thus, this Court should dismiss the SAC pursuant to *Rooker-Feldman*.

POINT II
THE *NOERR-PENNINGTON* DOCTRINE APPLIES

Plaintiffs do not dispute that their alleged instances of fraud and RICO predicate acts are based on actions taken by the Leucadia Defendants in litigation. Plaintiffs argue that *Noerr-Pennington* does not bar their fraud and RICO claims because of the "sham exception." Pls.' Br., p.48. In *Prof'l Real Estate Inv. v. Columbia Pictures Indus., Inc.*, however, the Court held that

"an objectively reasonable effort to litigate cannot be sham regardless of subjective intent. 508 U.S. 49, 57 (1993). A lawsuit is a "sham" only if it is objectively baseless in that "no reasonable litigant could realistically expect success on the merits." *Id.* at 60-61. Only then may a court determine the litigant's subjective motivation in filing the lawsuit. *Id.* The essence of a "sham" lawsuit is not the purpose to harm, but rather the absence of any purpose to actually obtain government action. *Id.*; *California Motor Trans. v. Trucking Unlimited*, 404 U.S. 508 (1972).

The collection cases are not objectively baseless because most Plaintiffs acknowledge the debt. Also, allegations of the Leucadia Defendants' "knowing fraud upon" and "intentional misrepresentations to, the court" – the predicate acts – are belied by Plaintiffs' concession of the debt, the generality with which Plaintiffs plead, and, notably, not having raised the "fraud" with the state courts. Accordingly, *Noerr-Pennington* bars the claims.

POINT III
THE LITIGATION PRIVILEGE APPLIES

Here, Plaintiffs offer no relevant opposition.[1] Case law from this Circuit – and other jurisdictions – confirms that federal statutory tort actions that seek to make legal filings tortious are barred by the privilege. *Walden v. Wishengrad*, 573 F.Supp. 1115, 1116 (W.D.N.Y. 1983), *aff'd*, 745 F.2d 149 (2d Cir. 1984) (applying privilege in §1983 case); *Loigman v. Twp. Comm. of Twp. of Middletown*, 185 N.J. 566, 584 (2006) (applying *Walden* to civil rights claims).

Plaintiffs allege that the Leucadia Defendants committed fraud by filing legal papers. Plaintiffs' position that those filings, because they are allegedly fraudulent, are not governed by

[1] The cases from this District to which Plaintiffs cite are distinguishable. In *Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear, Inc.*, 608 F. Supp. 1187 (S.D.N.Y. 1985), the court dealt ***not*** with a party challenging legal filings, but the defendant claiming that the plaintiff intentionally disseminated a complaint to the press and made statements in letters to the defendant's customers for the purpose of publicly maligning the defendant's products. Here, however, most Plaintiffs acknowledge the debt and, even if the AOMs were untrue, it means only that those certain Leucadia Defendants could not prove their respective damages. In *Schuh v. Druckman & Sinel, LLP*, the court rejected the litigation privilege and found that plaintiffs "make no claim based on any person's testimony in judicial proceedings." 602 F.Supp.2d 454, 469 (S.D.N.Y. 2009). Rather, the plaintiffs alleged a ***letter*** was sent to them by the defendants to collect on a previously entered judgment. *Id.* That, held the court, was "not a step in the 'ascertainment of truth' that requires the protection that immunity from suit affords." *Id.* The court further held that accepting the litigation defense "would mean that the FDCPA would not apply to efforts by debt collectors to collect debts based on judgments." *Id.*

the privilege is indefensible. *See Kelly v. Albarino*, 485 F.3d 664, 665 (2d Cir. 2007) (absolute privilege applicable "is not lost by the presence of actual malice.") Plaintiffs' attempt to turn legal filings into fraud predicates would put every litigant at risk of suit – the very thing that the privilege was designed to eliminate. *Id.* (recognizing New York public policy intended to secure the unembarrassed and efficient administration of justice). Thus, the SAC should be dismissed.

POINT IV
PLAINTIFFS' FDCPA CLAIMS ARE UNTIMELY

A. Plaintiffs' Ongoing or Continuing Violation Theory Is Not Recognized

To extend the FDCPA's statute of limitations, Plaintiffs argue a continuing violation theory, namely that Sykes, Graham and Perez have timely claims because each act of filing an affidavit in the New York state court collection cases constitutes independent acts and is "separately actionable under the FDCPA." Pls.' Br., p.8. Plaintiffs rely on only one case from this jurisdiction, *Schuh*, which is distinguishable. First, the alleged FDCPA violation in *Schuh* was not the filing of an underlying collection case. Second, *Schuh* held that FDCPA claims were not time-barred despite a previously entered foreclosure judgment because of the defendants' subsequent efforts – via correspondence – to collect. *Schuh* further held that each correspondence was a separate violation because each contained new misrepresentations. *Id.* at 466. Thus, *Schuh* has nothing to do with a plaintiff challenging a collection case. *See id.* at 466 (only alleged falsity was in letter, and complaint assumed validity of lawsuit and judgment of foreclosure."). Nor do the cases to which Plaintiffs cite from other jurisdictions within this State.[2]

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[2] *Puglisi v. Debt Recovery Solutions, LLC*, No. 08-cv-5024, 2010 WL 376628, *3 (E.D.N.Y. Jan. 26, 2010) (unlawfully drawing funds, charging for return of insufficient funds, failing to send funds transfer language before withdrawing funds constituted separate and discrete FDCPA violations within limitations period from those without of limitations period); *Ehrich v. RJM Acquisitions, LLC*, No. 09-2696, 2009 WL 4545179, *2 (E.D.N.Y. Dec. 4, 2009) (separate and distinct individual communications from debt collector – letters – can create separate causes of action under FDCPA). Notably, the court in *Ehrich* distinguished *Calka* by finding that, there, the court rejected the claim that each proceeding within a lawsuit amounted to a separate violation for purposes of the FDCPA's statute of limitations. *Ehrich*, 2009 WL 4545179, *2, n.4.

Plaintiffs present this Court with no reason to depart from *Calka v. Kucker, Kraus & Bruh, LLP*, No. 09 Civ. 0990, 1998 WL 437151 (S.D.N.Y. Aug. 3, 1998) and *Sierra v. Foster & Garbus*, 48 F.Supp.2d 393, 395 (S.D.N.Y. 1999). Unlike *Schuh*, Plaintiffs contend that each Affidavit of Merit ("AOMs") filed in support of default judgment motions is a separate violation. *Calka*, *Sierra*, and other courts in this Circuit relying on those cases, however, say otherwise. Moreover, like *Calka*, Plaintiffs do not allege that the Leucadia Defendants made any new misrepresentations. Rather, Plaintiffs allege that certain Leucadia Defendants filed complaints demanding debt due from each Plaintiff, and filed AOMs demanding judgment on that debt set forth in the complaints. *Calka* and other courts in this Circuit reject the very argument that Plaintiffs make here. *See also Egbarin v. Lewis, Lewis & Ferraro, LLC*, 2006 WL 236846 (D. Conn. Jan. 31, 2006) (citing *Calka* and *Sierra* to hold FDCPA claim arises not on filing of false affidavits but on date complaint filed). Thus, the FDCPA's statute of limitations triggers upon filing of the collection cases, and does not re-start each time a document is filed therein.

B. *American Pipe* Does Not Save Plaintiffs' Claims

Plaintiffs rely exclusively on *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) for the proposition that their claims are timely – and the statute of limitations is tolled – because the First Amended Complaint (the "FAC") was filed on December 28, 2009. Plaintiffs either misunderstand *American Pipe* or ask this Court to extend it to cases like this one where no Plaintiff has a timely claim. *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 354, 354 (1983) (Justice Powell noting "the tolling rule of *American Pipe* is a generous one, inviting abuse.")

Because class certification decisions are often in-depth and lengthy proceedings – all while the statutory clock ticks – the statute of limitations applicable to putative class members' claims often expires before courts decide whether to certify classes. *Escott v. Bareris Constr.*

Corp., 340 F.2d 731, 735 (2d Cir. 1965). *American Pipe* resolved those equitable concerns by tolling the running of statutes of limitation for intervenors until after courts have denied class action status. 414 U.S. at 552-53. *American Pipe*, however, does not allow proposed class representatives with already stale and time-barred claims, like Plaintiffs, to prosecute a case.

Plaintiffs seek to abuse and extend *American Pipe* to allow class representatives to circumvent the need to comply with an applicable limitations period by the mere filing of a class action complaint. *American Pipe*, however, has its limits. In addition to standing, proposed class representatives must have the ability to prosecute their own claims to stand in the shoes of the proposed class. *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *In re Colonial Ltd.*, 854 F.Supp. 64, 82 (D.Conn. 1994); *Sperling v. Hoffman-La Roche, Inc.*, 24 F.3d 463 (3d Cir. 1994); *Sperling v. Donovan*, 104 F.R.D. 4, 9 (D.D.C. 1984). Further, Plaintiffs, whose claims are time-barred, may not strategically file a class action complaint to toll the limitations period until they find an appropriate class representative. *See In re Elscint Sec. Litig.*, 674 F.Supp. 374 (D.Mass 1987); *In re Crazy Eddie Sec. Litig.*, 747 F.Supp. 850, 859 (E.D.N.Y. 1990).

Here, a review of the proposed class representatives, mindful of the teachings of *Calka* and *Sierra*, reveals that not one has filed a timely claim and, therefore, tolling is inappropriate:

	NY Debt Case Filed	**SDNY Case Filed**	**1-YEAR FDCPA SOL**
Sykes Complaint (filed Oct. 6, 2009)	June 27, 2008	October 6, 2009	October 6, 2008
FAC (filed Dec. 28, 2009)			
• Colon	May 27, 2007	December 28, 2009	December 28, 2008
• Veerabadren	April 12, 2006	December 28, 2009	December 28, 2008
• Graham	July 30, 2008	December 28, 2009	December 28, 2008
SAC (filed Mar. 31, 2010)			
• Perez	November 5, 2007	March 31, 2010	March 31, 2009
• Rivera	January 9, 2009	March 31, 2010	March 31, 2009
• Robinson	March 2, 2009	March 31, 2010	March 31, 2009
• Roman	March 16, 2009	March 31, 2010	March 31, 2009

C. Equitable Tolling for Fraudulent Concealment is Inapplicable Here

The doctrine of fraudulent concealment should be applied only in "rare and exceptional" cases, which are not present. *Bertin v. U.S.*, 478 F.3d 489, 494 n.3 (2d Cir. 2007); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). In *Somin v. Total Cmty Mgmt Corp.*, 494 F.Supp.2d 153 (E.D.N.Y. 2007), the only case from this State to which Plaintiffs cite, the Eastern District refused to apply equitable tolling to a FDCPA claim and dismissed it as time-barred. The court found that the complaint did not assert fraudulent concealment, and that there was no factual support for any such claim. *Id.* at 160.

Plaintiffs' fraud claims are generally alleged. The only allegations pled with specificity are Plaintiffs' counsels' recitations of the background of sewer service, ***not*** the Leucadia Defendants specific participation in it. Indeed, most of the SAC refers specifically to the alleged harm to other debtors caused by other debt collectors, none of whom are parties here. These allegations do not satisfy Rule 9(b) and equitable tolling.

POINT V
PLAINTIFFS FAIL TO DEMONSTRATE THAT THEY PLAUSIBLY PLEAD FRAUD AND RICO

A. Commencing Collection Cases Without Immediate Proof of Damages – Plaintiffs' Lone Theory Against the Leucadia Defendants – Cannot Provide the Basis of Their Claims

In their opening brief, the Leucadia Defendants argued that the inability to prove damages at the outset of collection cases does not violate FDCPA, RICO or New York statutes, and that whether they can prove damages (*i.e.*, debt owed by Plaintiffs) were matters to be resolved by the New York state courts. Plaintiffs offer no response.

In *Kropelnicki v. Siegel*, which has been abrogated on other grounds, the Second Circuit noted, without disapproval, that the trial court rejected the plaintiff's claim that the defendants violated FDCPA by suing her to collect a debt for which she was not liable. 290 F.3d 118, 125

(2d Cir. 2002). The Second Circuit further approvingly noted the trial court's reasoning, namely that "an allegation that a debt collector cannot prove what [it] claimed is not equivalent to an allegation that [it] made a false, deceptive, or misleading representation." *Id.* Other courts have similarly held that commencing a collection case without the ability to prove the debt cannot violate FDCPA. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 330 (6th Cir. 2006); *Deere v. Javitch, Block & Rathbone, LLP,* 413 F.Supp.2d 886, 891 (S.D. Ohio 2006); *Clark v. Unifund CCR Partners*, 2007 WL 1258113 (W.D. Pa. Apr. 30, 2007); *Duraney v. Wash. Mut. Bank F.A.*, 2008 WL 4204821, *15 (W.D. Pa. Sept. 11, 2008); *Lipa v. Asset Acceptance, LLC*, 572 F.Supp.2d 841, 845, 850-51 (E.D. Mich. 2008); *Krawczyk v. Centurion Capital Corp.*, 2009 WL 395458, *9 (N.D. Ill. Feb. 18, 2009). Moreover, "employing the court system" is not "an abusive tactic under the FDCPA." *Harvey*, 453 F.3d at 330-31. The same is true here.

In their opposition, Plaintiffs attempt to recast their allegations, suggesting that they:

> "do not assert FDCPA violations based solely, or even primarily, on the *filing* of the state court lawsuits. Instead, Plaintiffs allege that Defendants violated the FDCPA, for example, by preparing and filing false affidavits of service, affidavits of merit, and attorney affirmations; seeking and obtaining default judgments on the basis of these false affidavits and affirmations; and actively collecting or attempting to collect the fraudulently obtained default judgments. These acts are independent of the filing of the lawsuits and separately actionable under the FDCPA.

Pls.' Br., p.8 (citing SAC, ¶337) (italics in original). Plaintiffs want it both ways; they acknowledge their FDCPA claims hinge on the filing of the collection cases, yet retreat from controlling law by arguing their claims are really about the AOMs that did not demonstrate the Leucadia Defendants' entitlement to the debt. The argument is a distinction without a difference because their essential claim is that the Leucadia Defendants do not have actual proof of the debt but mere media of it. SAC, ¶48. Thus, Plaintiffs cannot credibly argue that filing ***lawsuits*** for

debt ***does not*** violate FDCPA, but obtaining default judgments via AOMs reiterating the debt referenced in the complaints ***does***. This Court should therefore dismiss the SAC.

B. Plaintiffs' RICO Claim Fails

Plaintiffs argue that they have satisfied Rule 9(b) by relying on the very paragraphs of the SAC that violate the rule because they are based "upon information and belief," inappropriately lump defendants together, and constitute unsupported legal conclusions. The allegations fail the heightened pleading standard, especially where RICO, which has a "stigmatizing effect on those named as defendants" and has been likened to a thermo-nuclear device, is asserted. *Cedar Swamp Holdings, Inc. v. Zaman*, 2007 WL 1451826, *3 (S.D.N.Y. May 17, 2007); *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 924 (7th Cir. 1992).

1. "Upon Information and Belief"

Plaintiffs argue the SAC "identifies exactly where, when, and how defendants submitted false affidavits and affirmations to fraudulently obtain default judgments." Pls.' Br., p.24. Although not every paragraph is pled on information and belief, the critical paragraphs are – the formation of the enterprises and the Leucadia Defendants' involvement in the alleged scheme. SAC, ¶¶342-44. Also, there is no "exact[] where, when and how" regarding Orlando and Cannella. Plaintiffs plead nothing against them other than their executive positions.

To avoid dismissal, Plaintiffs argue that they may so plead if the factual information lies within the defendants' knowledge. Pls.' Br., p.25. Because of situations exactly like this – where plaintiffs fail to plead with particularity and, in opposition to motions to dismiss, simply argue "we failed to properly plead because they have the information" – courts have instructed that, to satisfy the relaxed application of Rule 9(b) where knowledge and information lies within the defendant's control, the pleading party must: (1) allege that the necessary information lies within

the defendant's control, and (2) include a statement of the facts upon which the allegations are based. *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 319 (3d Cir. 1997). "[T]o avoid dismissal in these circumstances, a complaint must delineate at least the nature and scope of plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity." *Weiner*, 129 F.3d at 319 (quoting *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 286 (3d Cir. 1992)). Nowhere in the SAC do Plaintiffs allege their pre-filing efforts to obtain the information necessary to plead with particularity from the Leucadia Defendants.

2. Plaintiffs Fail to Plead Association-In-Fact

Plaintiffs argue that "[a]ny suggestion that the Leucadia and Mel Harris defendants did not participate 'in the conduct of such enterprise's affairs,' ... is ludicrous." Pls.' Br., p.22. Ridiculing the Leucadia Defendants' argument, however, does not satisfy the standard. Plaintiffs must allege specific allegations of an enterprise's continuity and structure, its "hierarchy, organization, and activities," and the specific conduct of each participant. *First Nationwide Bank v. Gelt Funding Corp.*, 820 F.Supp. 89, 98 (2d Cir. 1993); *First Cap. Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159. Conclusory allegations do not suffice. *Crab House of Douglaston, Inc. v. Newsday, Inc.*, 418 F.Supp.2d 193, 205 (E.D.N.Y. 2006).

First, and dispositive, the formation of the enterprises and the Leucadia Defendants' involvement in the entire scheme are inappropriately pled on information and belief. SAC, 342-44. Second, other than suing on debt, Plaintiffs fail to allege how each Leucadia Defendant specifically participated in the vast conspiracy among creditors, lawyers and process servers to obtain defaults against Plaintiffs who owe the debt. In reality, the SAC alleges mere ordinary business relationships. *Egbarin*, 2006 WL 236846, *8; *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2892700, *10 (D.N.J. Sept. 28, 2007).

3. Parent/Subsidiary Enterprise

Plaintiffs rely on *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2d Cir. 1995) to support their argument that parents and subsidiaries can constitute an enterprise. *Securitron*, however, has nothing to do with the issue and resolved whether an association-in-fact could exist among an officer holding 100% of shares of two corporations. *Id.* at 263. Perhaps that would be true as to Orlando and Cannella, but the SAC is silent as to their participation in the scheme. Plaintiffs ask this Court to ignore or otherwise depart from *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *judgment vacated on other grounds*, 525 U.S. 128 (1998), *In re Parmalat Sec. Litig.*, 479 F.Supp.2d 332 (S.D.N.Y. 2007), without any basis.

POINT VI
THE SAC DOES NOT PLAUSIBLY ALLEGE VEIL PIERCING

Aside from two conclusory allegations, none of the factors in *Wm. Passalacqua Bldrs., Inc. v. Resnick Dev. So. Inc.*, 933 F.3d 131, 139 (2d Cir. 1991) are alleged. *Triemer v. Bobsan Corp.*, 70 F.Supp.2d 375, 377 (S.D.N.Y. 1999). Moreover, Plaintiffs' allegations, like many others, are improperly pled on information and belief and, as such, do not allege veil piercing. *Ferreira v. Unirubio Music Publishing*, 2002 WL 1303112 (S.D.N.Y. June 13, 2002). Also Plaintiffs do not allege that the Numerical LR LLCs or LR Credit haven been created to be shams for the purpose of perpetrating fraud and injustice. *Cary Oil Co., Inc. v. MG Refining & Marketing, Inc.*, 230 F.Supp.2d 439, 458 (S.D.N.Y. 2002); *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 267 (D. Del. 1989). Thus, the SAC should be dismissed.

CONCLUSION

For the foregoing reasons, the SAC should be dismissed.

Respectfully submitted,

Dated: June 10, 2010 By: /S/ ADAM R. SCHWARTZ
ADAM R. SCHWARTZ