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

FEDERAL TRADE COMMISSION,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 1:08-CV-01976-BBM-RGV
COMPUCREDIT CORP., ***et al.***,	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT JEFFERSON CAPITAL'S MOTION TO DISMISS

TABLE OF CONTENTS

I. INTRODUCTION. 1

II. STATEMENT OF FACTS. 2

III. THE FTC DOES NOT FACE A ONE-YEAR STATUTE OF LIMITATIONS UNDER THE FDCPA. 5
- A. Under the Plain Words of the FDCPA, No Limitation Period Applies to the FTC's Action.. 6
- B. The FDCPA's Legislative History Demonstrates That Congress Did Not Intend To Limit FTC Enforcement Actions To One Year. 12
- C. The FTC's Interpretation of the FDCPA is Subject to Deference. . . 14

IV . THE FTC AND THIS COURT HAVE JURISDICTION OVER JEFFERSON CAPITAL. 16
- A. The FTC Has Jurisdiction Over Jefferson Capital Pursuant to the FTC Act. 16
- B. There Is No Separate Administrative Action By the FDIC Against Jefferson Capital. 20

V. CONCLUSION. 22

TABLE OF AUTHORITIES

CASES

Capital One Bank (USA), N.A., v. Darrell V. McGraw, Jr.,
2008 U.S. Dist LEXIS 48952 (S.D. W.Va. Jun. 26, 2008). 18, 19

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984). 14, 15

FTC v. Am. Standard Credit Sys.,
874 F. Supp. 1080 (C.D. Cal 1994). 17

FTC v. Capital City Mortgage Corp.,
No. 98-237, slip op. (D.D.C. Oct. 10, 2000). 8

FTC v. Citigroup Inc.,
239 F. Supp. 2d 1302 (N.D. Ga. 2001). 7

FTC v. Evans Products Co.,
775 F.2d 1084 (9th Cir. 1985). 15

FTC v. Gem Merch. Corp.,
87 F.3d 466 (11th Cir. 1996). 7

FTC v. Green Tree Acceptance, Inc.,
1987 U.S. Dist. LEXIS 16750 (N.D. Tex. Sept. 30, 1987). 17

FTC v. Minuteman Press,
53 F. Supp. 2d 248 (E.D.N.Y. 1998).. 8

Hawthorne v. Mac Adjustment, Inc.,
140 F.3d 1367 (11th Cir. 1998). 14

LaGrasta v. First Union Secs., Inc.,
358 F.3d 840 (11th Cir. 2004). 2

Mattox v. FTC,
752 F.2d 116 (5th Cir. 1985). 15

McGregor v. Chierico,
206 F.3d 1378 (11th Cir. 2000). 7

Moore v. Equifax Info. Serv. LLC,
333 F. Supp. 2d 1360 (N.D. Ga. 2004). 8

Stewart v. Slaughter,
165 F.R.D. 696 (M.D. Ga. 1996).. 8

United States v. ACB Sales & Service, Inc.,
No. 80-251, slip op. (D. Ariz. Apr. 11, 1985). 9

United States v. Blake,
751 F. Supp. 951 (W.D. Okla. 1990).. 10

United States v. Building Inspector of Am., Inc.,
894 F. Supp. 507 (D. Mass. 1995).. 8

United States v. Central Adjustment Bureau, Inc.,
No. CA-3-80-1671-R, slip op. (N.D. Tex. Oct. 22, 1981). 9

United States v. Landmark Financial Services, Inc.,
612 F. Supp. 623 (D. Md. 1985). 15

United States v. Payco American Corp.,
No. 93-C-801, slip op. (E.D. Wis. Jan. 14, 1994). 9, 10

United States v. Payco American Corp.,
No. 93-C-801, slip op. (E.D. Wis. Feb. 23, 1994).. . . . . 9, 11

United States v. Prochnow,
2006 U.S. Dist. LEXIS 92895 (N.D. Ga. Dec. 21, 2006). 8

Waller v. Fricks,
2008 U.S. Dist. LEXIS 41664 (M.D. Ga. May 28, 2008). 8

Young v. Community Nutrition Institute,
476 U.S. 974 (1986). 15

STATUTES

12 U.S.C. § 1818(i)(1). 20, 21

12 U.S.C. § 1861 *et seq*. 18

15 U.S.C. § 45(a). 1, 2

15 U.S.C. § 45(a)(2).. 16

15 U.S.C. § 45(m)(1)(A). 10

15 U.S.C. § 53(b). 7, 20

15 U.S.C. § 1601 *et seq*. 10

15 U.S.C. § 1607(c). 11

15 U.S.C. § 1640(e). 11

15 U.S.C. § 1691 *et seq*. 10

15 U.S.C. § 1691c(c). 11

15 U.S.C. § 1691e(f). 11

15 U.S.C. § 1692 *et seq*... 1

15 U.S.C. § 1692d. 3

15 U.S.C. § 1692e(10). 2

15 U.S.C. § 1692k(a). 6

15 U.S.C. § 1692k(d). 6

15 U.S.C. § 1692*l*.. 6

15 U.S.C. § 1692*l*(a). 7

28 U.S.C. § 2462. 10

OTHER

53 Fed. Reg. 50,097 (Dec. 13, 1988). 14

S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699-1700. 13

I. INTRODUCTION

The Federal Trade Commission's ("FTC") Complaint properly states a claim for which monetary and injunctive relief may be granted. The FTC, therefore, opposes Jefferson Capital's motion to dismiss, pursuant to Rule 12(b)(6), all claims seeking monetary relief for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, as alleged in Counts V and VI of the Complaint, that occurred prior to June 10, 2007. The FTC also opposes Jefferson Capital's motion to dismiss, pursuant to Rule 12(b)(1), Count IV of the Complaint.

Counts V and VI of the Complaint properly seek injunctive and equitable monetary relief under the FDCPA for injury to consumers that occurred prior to June 10, 2007. Jefferson Capital incorrectly asserts that the FTC's action is subject to a one-year statute of limitations. In fact, the FTC faces no such time bar.

Count IV of the Complaint also properly seeks injunctive and equitable monetary relief against Jefferson Capital and its co-defendant and parent company CompuCredit Corporation for engaging, separately and as a common enterprise, in deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a). Jefferson Capital's joinder of CompuCredit's motion to dismiss this count, however, strains credulity. CompuCredit's motion asserts that the FTC and this Court lack jurisdiction over

CompuCredit, but Jefferson Capital has provided absolutely no legal or factual basis to support a finding that Jefferson Capital, CompuCredit's debt collection subsidiary, is not subject to the FTC's and this Court's jurisdiction. Thus, for the reasons set forth herein, Jefferson Capital's motion to dismiss should be denied.

II. STATEMENT OF FACTS

The FTC filed its Complaint on June 10, 2008, alleging that CompuCredit and Jefferson Capital engaged in deceptive acts and practices and other law violations in connection with the marketing of, and collection of defaulted debt from, various credit cards.[1] Count IV of the Complaint alleges that Jefferson Capital and CompuCredit engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), in connection with their conduct in marketing credit cards, including the "Majestic" Visa card. (Complaint ¶¶ 92-94.) Count V of the Complaint alleges that Jefferson Capital violated Section 807(10) of the FDCPA, 15 U.S.C. § 1692e(10), by using false, deceptive, or misleading representations or means in the collection of debt on behalf of itself, CompuCredit,

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[1] In considering a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6), the Court must "view the allegations of the complaint in the light most favorable to the plaintiffs, consider the allegations of the complaint as true, and accept all reasonable inferences therefrom." *LaGrasta v. First Union Secs., Inc.*, 358 F.3d 840, 846 (11th Cir. 2004) (internal citations omitted).

and other creditors. (Complaint ¶ 96.) Count VI of the Complaint alleges that Jefferson Capital, in connection with the collection of debts on behalf of itself, CompuCredit, and other creditors, violated Section 806 of the FDCPA, 15 U.S.C. § 1692d, by engaging "in conduct the natural consequence of which is to harass, oppress, or abuse consumers." (Complaint ¶ 97.)

Jefferson Capital is a Georgia limited liability company that is a wholly-owned subsidiary of CompuCredit. (*Id.* ¶ 6.) Since at least 2001, CompuCredit has marketed general purpose Visa credit cards under several brand names, including "Aspire" Visa cards and "Majestic" Visa cards. (*Id.* ¶¶ 14, 16.) Jefferson Capital has marketed the "Majestic" Visa card with CompuCredit since approximately 2004. (*Id.* ¶¶ 59, 62.) CompuCredit has the sole and exclusive right to solicit certain credit card applications, including for "Majestic." (*Id.* ¶¶ 12, 59.) Jefferson Capital and CompuCredit have acted as a common enterprise in connection with the marketing of the "Majestic" Visa cards and the collection of defaulted "Aspire" credit card receivables. (*Id.* ¶ 7.) CompuCredit and Jefferson Capital are incorporated at the same address and at relevant times have shared common officers, and CompuCredit has formulated, directed, controlled or had authority to control, or participate in the acts and practices of Jefferson Capital. (*Id.* ¶ 8.) They have marketed the "Majestic" Visa credit card and other financial

products through unified marketing programs that relied on the interrelationship between them. (*Id.*) Jefferson Capital played an integral role in collecting the charged-off receivables that CompuCredit generated through its “Aspire” Visa cards. (*Id.*)

Jefferson Capital and CompuCredit have led consumers to believe through their marketing of the “Majestic” Visa card that, among other things, “upon acceptance of a consumer’s ‘Pre-Approved’ application, the consumer would immediately receive a Visa Card, the consumer’s old debt balance would be immediately transferred to the card and be reported to consumer reporting agencies as ‘paid in full,’ and the consumer’s formerly charged-off debt would be satisfied and the consumer would build new credit.” (*Id.* ¶¶ 59-69, 92, 93, 96.) Each of these claims, however, appears to have been false and misleading. (*Id.)* Instead, Jefferson Capital has required consumers to pay twenty-five to fifty percent of their old debt balance before any of the actions stated in these claims would come to fruition. (*Id.* ¶¶ 66, 68-69.)

Jefferson Capital has collected from consumers discharged debt it has purchased from CompuCredit and other creditors, and collected debt on behalf of CompuCredit and other creditors, including charged-off debts relating to “Aspire” Visa cards. (*Id.* ¶¶ 8, 79.) In the course of its debt collection business, Jefferson

Capital, among other abusive practices, has made debt collection calls to individual consumers "in excess of twenty times per day," and used abusive language in its debt collection calls. (*Id.* ¶¶ 80-81.)

III. THE FTC DOES NOT FACE A ONE-YEAR STATUTE OF LIMITATIONS UNDER THE FDCPA

In support of its motion, Jefferson Capital mistakenly relies upon a one-year statute of limitations that *applies only to actions by individual consumers* against debt collectors to enforce liability for monetary damages created by the FDCPA.[2] FTC actions under the FDCPA, like the present case against Jefferson Capital,

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[2] Jefferson Capital also incorrectly claims that the Complaint fails to allege sufficient facts regarding the dates and time frames of Defendant's alleged violations of the FDCPA, and asserts that it is unclear whether the FTC is alleging that Jefferson Capital has engaged in violations of the FDCPA since June 10, 2007. The Complaint provides sufficient information regarding the timing of Defendant's violations. The Complaint provides that its allegations relate to Visa credit cards, including the "Aspire" and "Majestic" cards, that have been marketed since "at least 2001." (*Id.* ¶ 14.) The Complaint specifically explains that Defendants' joint marketing of the "Majestic" Visa card, and the corresponding deceptive practices relating thereto, have taken place since "approximately 2004." (*Id.* ¶¶ 59, 62.) As for Jefferson Capital's debt collection practices, while it is too early to ascertain, absent discovery, precisely how far back violations go, a reasonable inference from the Complaint is that the violations span the same time periods otherwise identified in the Complaint. (*See, e.g., id.* ¶¶ 14, 59-69, 79-81, 96-97.) Moreover, at no point does the FTC indicate that Jefferson Capital has ceased engaging in any of the acts and practices that serve as the basis for its allegations, making evident that these are ongoing violations.

however, are governed by provisions of the FTC Act and are not subject to this time bar. Thus, its motion should be dismissed.

A. Under the Plain Words of the FDCPA, No Limitation Period Applies to the FTC's Action

This action is not barred by any statute of limitations, notwithstanding Jefferson Capital's improper assertions. Jefferson Capital argues that the statute of limitations for the FTC's action is one year pursuant to Section 813(d) of the FDCPA, 15 U.S.C. § 1692k(d). (Def. Mem. Supp. Mot. Dismiss at 3.) Although Section 813(d) does impose a one-year limitations period for "[a]n action to enforce any liability created by this title [the FDCPA]," this provision relates to consumers' private right of action under Section 813(a), *id.* § 1692k(a), and has no relevance to law enforcement actions brought by the FTC. Rather, Section 814 of the FDCPA, 15 U.S.C. § 1692*l*, under which the FTC is proceeding here (*See* Complaint ¶ 1), governs law enforcement actions such as this and provides the basis for determining the applicable statute of limitations. Section 814 provides, in relevant part:

> Compliance with this title shall be enforced by the [Federal Trade] Commission.... For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, *a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission*

> *to enforce compliance by any person with this title*, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, *including the power to enforce the provisions of this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule*.

15 U.S.C. § 1692*l*(a) (emphasis added).

Thus, totally apart from any authority granted by Section 813 for private rights of action against debt collectors violating the FDCPA, Section 814 expressly authorizes the FTC to use all of its powers under the FTC Act to pursue violations of the FDCPA. Among those powers is authority to seek injunctive and equitable monetary relief for violations of the FDCPA under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), without time bar.

Section 13(b) "authorizes the FTC to seek, and the district courts to grant, preliminary and permanent injunctions against practices that violate any of the laws enforced by the Commission." 15 U.S.C. § 53(b); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. Citigroup Inc.*, 239 F. Supp. 2d 1302, 1304 (N.D. Ga. 2001). The authority to grant permanent injunctive relief also includes the power to grant any ancillary relief, including equitable monetary relief, necessary to accomplish complete justice. *McGregor v. Chierico*, 206 F.3d 1378, 1387 (11th Cir. 2000); *Gem Merch.,* 87 F.3d at 468-70

Section 13(b) of the FTC Act contains no statute of limitation. *See United States v. Prochnow*, 2006 U.S. Dist. LEXIS 92895, at *24 (N.D. Ga. Dec. 21, 2006) (citing to previous slip opinion dated August 21, 2003 at 5-7 (copy attached as Ex. 1) (holding that three year statute of limitations applicable for rule and administrative cease and desist order violations under Section 19 does not limit the FTC when seeking equitable relief under Section 13(b)); *FTC v. Capital City Mortgage Corp.*, No. 98-237, slip op. at 23-24 (D.D.C. Oct. 10, 2000) (copy attached as Ex. 2); *FTC v. Minuteman Press,* 53 F. Supp. 2d 248, 263 (E.D.N.Y. 1998); *United States v. Building Inspector of Am., Inc.*, 894 F. Supp. 507, 513-14 (D. Mass. 1995). In short, the FTC's action against Jefferson Capital for injunctive and equitable monetary relief under Section 814 of the FDCPA is authorized under Section 13(b) of the FTC Act and is not subject to any statute of limitation.

To support its erroneous position that the FTC's action is subject to a one-year statute of limitations, Jefferson Capital relies on *Waller v. Fricks*, 2008 U.S. Dist. LEXIS 41664 (M.D. Ga. May 28, 2008), *Moore v. Equifax Info. Serv. LLC*, 333 F. Supp. 2d 1360 (N.D. Ga. 2004), and *Stewart v. Slaughter*, 165 F.R.D. 696 (M.D. Ga. 1996). Each of these cases, however, involves *individual consumer* actions that are subject to Section 813 of the FDCPA. As such, those courts' application of the one-year statute of limitations in each of the cases was proper.

The courts had no reason to consider and did not address the limitations period applicable to government actions to enforce the FDCPA under Section 814, and thus these cases bear no relevance here.

Courts that have faced the issue of the *FTC's* (rather than individual consumer's) statute of limitations under the FDCPA have read the plain words of the FDCPA and concluded that the one year limitation period in Section 813(d) is not applicable to FTC actions. For example, in *United States v. Central Adjustment Bureau, Inc.*, No. CA-3-80-1671-R, slip op. at 1 (N.D. Tex. Oct. 22, 1981) (copy attached as Ex. 3), the court rejected the defendants' argument that the statute of limitations contained in Section 813 applied to the government's law enforcement action. Because the government's proceeding was a law enforcement action, the Court held it was governed by Section 814, and thus the five year statute of limitations for civil penalty actions applied. *Id.* Similarly, in *United States v. ACB Sales & Service, Inc.*, No. 80-251, slip op. at 1(D. Ariz. Apr. 11, 1985) (copy attached as Ex. 4), the court "concluded that the five-year statute of limitations applies in this case." Likewise in *United States v. Payco American Corp.*, No. 93-C-801, slip op. at 1-2 (E.D. Wis. Jan. 14, 1994) (copy attached as Ex. 5) and *United States v. Payco American Corp.*, No. 93-C-801, slip op. at 1-5 (E.D. Wis. Feb. 23, 1994) (copy attached as Ex. 6), the court held that 813 applied

"on its face to actions brought by individuals" and "not to civil penalty actions brought by the FTC." Ex. 5 at 1-2. Instead, the five year civil penalty statute of limitations applied to agency actions.[3] *Id.*, at 2.

The Court in *Payco* also rejected the defendant's argument – an argument Jefferson Capital makes in its motion to dismiss – that comparing the statutory construction of the FDCPA with similar statutes supports the conclusion that the one-year limitation period in Section 813(d) is intended to apply to FTC actions. In support of this argument, Jefferson Capital erroneously relies on a comparison of the FDCPA to the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, and the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. Jefferson Capital also mistakenly relies upon *United States v. Blake*, 751 F. Supp. 951 (W.D. Okla. 1990), an ECOA action brought by the United States on behalf of the FTC. The ECOA and the TILA, like the FDCPA, each have one section that authorizes the FTC to use all of its "functions and powers" under the FTC Act to enforce compliance without explicitly mentioning a statute of limitations, 15 U.S.C. §

[3] These cases involved actions by the government for civil penalties under Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), rather than, as here, equitable monetary relief under Section 13(b). Nevertheless, the analysis is relevant as the defendants there (like Jefferson Capital here) were trying to shorten the applicable five year civil penalties statute of limitations, 28 U.S.C. § 2462, to one year.

1691c(c) (ECOA); 15 U.S.C. § 1607(c) (TILA), and another section that provides a limitations period for other kinds of actions, such as suits by consumers to collect monetary damages for statutory violations. 15 U.S.C. § 1691e(f) (ECOA); 15 U.S.C. § 1640(e) (TILA). Jefferson Capital argues that because Section 813 of the FDCPA refers to actions under "this title" rather than using the terms "this section" like the parallel ECOA and TILA provisions, the proper conclusion is that, in contrast to the ECOA and TILA, the limitations period for *all* actions under the FDCPA is one year.

The *Payco* Court rightly observed that this argument "has only limited appeal" and accordingly rejected it. Ex. 6 at 2. The Court concluded that the FTC's interpretation of the statute – that FTC actions under Section 814, unlike consumer's private rights of action under Section 813, are subject to the limitation periods applicable to actions brought pursuant to the FTC Act – is entitled to *Chevron* deference. *Id.* at 3. The Court also stated that it did not believe that the court in *Blake*, if faced with the FDCPA, would necessarily have used the same analysis it used under the ECOA. *Id.* Finally, the Court reasoned that "in requiring the FTC to enforce the FDCPA and conferring on the agency all of its normal powers, Congress did not at the same time constrict so dramatically the time it had to accomplish its obligations." *Id.* at 4.

Thus, consistent with the courts' decisions in *Payco*, *ACB Sales & Service* and *Central Adjustment Bureau*, this Court should reject Jefferson Capital's argument that a one-year statute of limitations applies to FTC actions and deny Jefferson Capital's motion to dismiss.

B. The FDCPA's Legislative History Demonstrates That Congress Did Not Intend To Limit FTC Enforcement Actions To One Year

The application of the unlimited limitations period for enforcement actions pursued by the FTC is in full accord with the legislative history of the FDCPA. In enacting the FDCPA, Congress was careful to distinguish between actions to enforce civil liability under Section 813 of the Act and FTC enforcement actions under Section 814. The Act's legislative history makes clear that Section 813 was designed to afford individual consumers a mechanism whereby they could recover damages for a debt collector's violations of the Act. As the legislative history explains:

> **Civil liability**
>
> The committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance.
>
> A debt collector who violates the act is liable for any actual damages he caused as well as any additional damages the court deems appropriate, not exceeding $1,000....

S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699-1700.

Section 814, on the other hand, deals not with a debt collector's "civil liability" to a consumer for violations of the Act, but rather with the FTC's power to enforce the Act as the agency charged with its administration. As the legislative history explains:

> **Administrative enforcement**
> This legislation is enforced administratively primarily by the Federal Trade Commission....
> All enforcement agencies are authorized to utilize all their functions and powers to enforce compliance. The Federal Trade Commission is authorized to treat violations of the act as violations of a trade regulation rule, which empowers the Commission to obtain restraining orders and seek fines in federal district court.

S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1700.

Thus, if the FDCPA were not clear enough on its face, its legislative history removes any possible doubt that Congress intended the one-year statute of limitations to apply only to private actions by consumers to collect damages. As to FTC actions to enforce the FDCPA, all powers afforded the FTC under the FTC Act apply – including the power to obtain injunctive and equitable monetary relief without time bar.

C. The FTC's Interpretation of the FDCPA is Subject to Deference

The FTC's position is not novel. Rather it is the FTC's long-standing position that the one-year statute of limitations in Section 813 does not apply to enforcement actions under Section 814. In 1988, after notice and public comment, the FTC issued its Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act. 53 Fed. Reg. 50,097 (Dec. 13, 1988). With respect to Section 813, the Commentary states that "[t]he section's one year statute of limitations applies only to private lawsuits, not to actions brought by a government agency." *Id.* at 50,109. The Eleventh Circuit, as it relied on the Official Staff Commentary on the FDCPA, observed that "[a]lthough the FTC's construction of the FDCPA is not binding on the courts, because the FTC is entrusted with administering the FDCPA, its interpretation should be accorded considerable weight." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1372 n.2 (11th Cir. 1998) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

As the Court noted in *Chevron*, "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. The Court further instructed that, in reviewing an agency's interpretation of its

statute, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id*. at 843 n.11. Instead, if the agency's interpretation is "a reasonable one," it is to be followed by the court. *Id*. at 845. *See also Young v. Community Nutrition Institute*, 476 U.S. 974, 981 (1986) (finding that the FDA's interpretation of a statute it administered to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA). Lower courts have consistently applied the *Chevron* standard to FTC interpretations of statutes committed to it. *See, e.g., FTC v. Evans Products Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985); *Mattox v. FTC*, 752 F.2d 116, 123-24 (5th Cir. 1985); *United States v. Landmark Financial Services, Inc.*, 612 F. Supp. 623, 629 (D. Md. 1985).

Applying the principles set out in *Chevron* to the statute of limitations argument raised by Jefferson Capital's motion to dismiss, the inescapable conclusion is that the FTC's construction of the FDCPA – that FTC enforcement actions under the FDCPA are governed by the FTC Act and thus are subject only to any statutes of limitations applicable to that Act – is permissible and should be upheld.

In sum, the FTC's position that there is no limitations period applicable to equitable actions for violations of the FDCPA is, if not compelled by the plain words of the Act and clear legislative intent, at least a reasonable interpretation of a statute committed to the FTC. Therefore, Jefferson Capital's motion to dismiss based upon a contrary reading of the FDCPA should be denied.

IV . THE FTC AND THIS COURT HAVE JURISDICTION OVER JEFFERSON CAPITAL

Jefferson Capital's joinder of CompuCredit's motion to dismiss the FTC's Complaint as to Count IV is utterly without merit. Jefferson Capital has provided absolutely no legal or factual basis to support a finding that Jefferson Capital, a subsidiary of CompuCredit that is engaged in debt collection activities, *and against whom the FDIC has filed no action*, should not be subject to either the FTC's or the Court's jurisdiction.

A. The FTC Has Jurisdiction Over Jefferson Capital Pursuant to the FTC Act

Congress, through Section 5 of the FTC Act, 15 U.S.C. § 45(a)(2), has "empowered and directed" the FTC to prevent "persons, partnerships, or corporations" from engaging in deceptive acts or practices. The FTC Act specifically exempts certain classes of entities, such as banks, from FTC jurisdiction. As set forth in detail in Section III of the FTC's Opposition to

CompuCredit's Motion to Dismiss, contrary to CompuCredit's assertions, the "bank" exemption in the FTC Act applies only to actual banks. (*See* FTC Opp'n CompuCredit Mot. Dismiss at 9-13.) The exemption does *not* extend to all companies that provide services for banks, engage in banking activities, or may be subject to the authority of a bank regulator. This conclusion is supported by the plain language of the statute and the case law. Courts have consistently looked at an entity's status, rather than focusing on the activities of the entity, in applying the FTC Act bank exemption. *See FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1086 (C.D. Cal 1994) (defendant who provided credit card marketing and other services for a bank was not exempt from FTC jurisdiction); *FTC v. Green Tree Acceptance, Inc.*, 1987 U.S. Dist. LEXIS 16750, at *6-7 (N.D. Tex. Sept. 30, 1987) (FTC had jurisdiction to enforce the Fair Credit Reporting Act and Equal Credit Opportunity Act against a wholly-owned subsidiary of a savings and loan that provided services to the savings and loan).

The bank exemption is completely inapplicable to a company like CompuCredit that is not a bank but merely provides services to banks. This exemption is also undeniably inapplicable to a company like Jefferson Capital which, even another step removed, collects debts for a company that provides services to banks. Moreover, Jefferson Capital is not a bank, has not claimed that it is a bank, and has not even claimed, as CompuCredit has, that it engages in

banking activities on behalf of banks that somehow entitle it to “fit” within this exemption. Jefferson Capital is merely a debt collection limited liability company, the type of company against which the FTC regularly enforces the FTC Act.

CompuCredit also wrongly argues that because it performs services for banks, the FTC’s jurisdiction is precluded by the Bank Service Company Act (“BSCA”), 12 U.S.C. § 1861 *et seq*. CompuCredit argues that the BSCA somehow endows federal banking agencies with *exclusive* jurisdiction over non-banks performing services for a bank. This argument is even more misguided when it is applied to Jefferson Capital. Federal banking law should not and does not eliminate all other agencies’ jurisdiction over non-banks contracting with banks. (*See* FTC’s Opp’n CompuCredit Mot. Dismiss at 13-19.)

The absurdity of Jefferson Capital’s argument is further is demonstrated by the Court’s holding in *Capital One Bank (USA), N.A., v. Darrell V. McGraw, Jr.*, 2008 U.S. Dist LEXIS 48952 (S.D. W.Va. Jun. 26, 2008).[4] *Capital One* concerned the West Virginia Attorney General’s attempted investigation of Capital One Bank (USA), N.A., a national bank, and Capital One Services, Inc. (“COSI”), a servicing company that provided services to Capital One, including, among other things, “marketing, advertising, and solicitation of all bank products . . . customer service

[4] Unlike this case, *Capital One* involved federal-state preemption issues, but the underlying analysis is still instructive.

activities and communications [and] . . . collections." *Id*. at *3, *30. Capital One relied on COSI to "carry out its banking functions." *Id*. at* 29. The West Virginia Attorney General sought to serve subpoenas on Capital One and COSI as part of an investigation under West Virginia state law for "'unfair or deceptive acts or practices relating to marketing, advertising, servicing, including debt collection, and issuing of credit cards and related services.'" *Id*. at *3. The Court found that while the West Virginia Attorney General's investigation of Capital One was prohibited by the National Bank Act ("NBA"), the NBA did not extend "to agents of national banks carrying out banking activities at the behest of those banks." *Id*. at *27. Thus, the Court found that the NBA did not apply to COSI, reasoning that "[w]ere I to extend [NBA] protections [sic] third-party corporations such as COSI, the term 'national bank' would not [sic] longer mean 'national bank.' Rather, it would mean 'national bank and any entity that can find a way to graft itself, remora-like, to a national bank.'" *Id*. at *43-44.

CompuCredit's relationship with banks issuing credit cards is similar to COSI's relationship with Capital One. Therefore, *Capital One* supports the conclusion that *CompuCredit*, a non-bank that is purportedly engaging in "banking activities," is subject to FTC jurisdiction. Jefferson Capital is even one step further removed, and provides no factual argument to suggest otherwise.

Thus, because Sections 5 and 13(b) of the FTC Act gives the FTC full jurisdiction to enforce the FTC Act against Jefferson Capital, and the BSCA does not deprive the FTC of that jurisdiction, Jefferson Capital's motion to dismiss should be denied.

B. There Is No Separate Administrative Action By the FDIC Against Jefferson Capital

The FDIC has not instituted any administrative proceeding against Jefferson Capital. Nevertheless, Jefferson Capital, by joining CompuCredit's motion, asserts that 12 U.S.C. § 1818(i)(1) divests this Court of jurisdiction over Jefferson Capital. Such a result is nonsensical.

Even if one accepts CompuCredit's interpretation that Section 1818(i)(1) divests the Court of jurisdiction over it, that interpretation does not support a finding that the Court does not have jurisdiction over Jefferson Capital. The FTC brings this action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which empowers this Court to enter injunctive and other equitable relief against those found violating the FTC Act or any other law enforced by the FTC. As described in Section IV of the FTC's Opposition to CompuCredit's Motion to Dismiss, a plain reading of 12 U.S.C. § 1818(i)(1) demonstrates that it has no effect on the Court's jurisdiction over CompuCredit or any entity facing a parallel federal

banking agency proceeding. (*See* FTC's Opp'n CompuCredit Mot. Dismiss at 27-39.)

When 12 U.S.C. § 1818 is read in its entirety, it is readily apparent that Section 1818(i)(1) is an anti-injunction provision that only limits attacks on federal banking agency administrative proceedings or orders, it does not serve as a complete bar to the exercise of federal district court jurisdiction whenever a parallel FDIC proceeding exists. Now, Jefferson Capital is apparently claiming that Section 1818(i)(1) not only bars federal court jurisdiction when a parallel banking agency proceeding exists against a party, but also bars federal court jurisdiction against a company when a parallel banking agency proceedings exists against that company's parent company. This extension of Section 1818(i)(1) is supported by neither the language of the statute, the case law, nor common sense.[5]

Further, it is difficult to imagine how Jefferson Capital can argue in good faith that there is a risk of a parallel proceeding causing inconsistent results here, when no such parallel proceeding exists. Moreover, applying this argument to Jefferson Capital simply serves to undercut CompuCredit's assertion in it motion

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[5] Moreover, applying Jefferson Capital's argument to its logical conclusion, the FTC could never bring an FDCPA action against any non-bank, third-party debt collector who happens to collect credit card debt, because the bank issuing the credit card may already be, or may one day be, subject to a federal banking agency proceeding. Certainly, Congress would not have intended to create *sub silentio* such an exception to the FDCPA.

that the Court needs to abandon jurisdiction over the FTC's action because the FTC and FDIC are prosecuting identical and duplicative cases. The fact that the FTC's action includes claims against Jefferson Capital while the FDIC's does not is yet another example of how the FDIC and FTC actions are distinct.

In sum, the FTC and this Court undoubtedly have jurisdiction over this case and Jefferson Capital's meritless motion should be denied.

V. CONCLUSION

Accordingly, for the reasons set forth herein, the FTC respectfully requests that this Court deny Jefferson Capital's motion to dismiss.

Dated: September 5, 2008

Respectfully submitted,

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LOCAL RULE 7.1(D) CERTIFICATION

The undersigned hereby certifies, pursuant to Local Rule 7.1(D), that **PLAINTIFF'S OPPOSITION TO DEFENDANT JEFFERSON CAPITAL'S MOTION TO DISMISS** has been prepared using Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2008, I electronically filed **PLAINTIFF'S OPPOSITION TO DEFENDANT JEFFERSON CAPITAL'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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