IN THE CIRCUIT COURT IN THE
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

WILLIAM T. CHAPMAN and ALICE C. MACON, individually and on behalf of all others similarly situated *Plaintiffs*, v. BUTLER & HOSCH, P.A., C. VICTOR BUTLER, JR., and ROBERT H. HOSCH, JR., *Defendants*.	CASE NO. 2000-2879 **OBJECTORS' REPLY BRIEF**

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INTRODUCTION

Objectors have had little more than 48 hours to examine the settling parties' submissions and prepare this reply.[1] Such an accelerated schedule is incommensurate with the seriousness of this matter. Moreover, we did not receive the affidavit of Douglas Lyons concerning the fairness of the settlement, which class counsel have filed with the Court, until literally the eve of the hearing—a fax transmission arrived, unannounced, at counsel's offices in Washington, DC, at 4:59 p.m on Wednesday, December 7—making any detailed response impossible. That affidavit, in any event, gives no indication that Mr. Lyons has ever been recognized by any court as an expert on anything and offers little more than his generalized view that the settlement is fair. And although Mr. Lyons states that he has "reviewed the Affidavits filed by the Objectors," he is conspicuously silent on many of the key issues addressed in those affidavits, including the propriety of the notice program and the scope of the release.

The settling parties' responses fail to carry their burden of demonstrating the propriety of the notice program, the substantive fairness of the settlement, the adequacy of class counsel's representation, and the fairness of class counsel's mammoth fee request. For the reasons given below and in our opening submission, and on the basis of the expert testimony of Stephen Gardner, Alan White, and Todd Hilsee, this Court should decline to give final approval to the proposed

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[1]Although the settling parties' briefs were filed on Thursday, December 1 and Friday, December 2, Counsel for Objectors did not receive copies of these filings until the afternoon of Monday, December 5 via regular mail. Repeated requests for copies of the briefs via email were ignored. Moreover, class counsel mailed their brief without any of its attachments. We therefore did not receive the Affidavit of Mark Patton, which was attached to class counsel's brief, until Tuesday, December 6, and only after we specifically requested it. We have yet to see the remaining attachments to class counsel's brief. By contrast, objectors have served their papers to ensure that the settling parties receive their papers at the same time they were filed with the Court.

settlement.

I. THE INADEQUATE NOTICE PROGRAM VIOLATED BOTH FLORIDA LAW AND THE FEDERAL CONSTITUTION.

Class counsel offer no persuasive response to our objections concerning the content, manner, and reach of the notice program. Nor do they even acknowledge, much less confront, the testimony of Todd Hilsee, a well-recognized expert on class action notice who identified numerous deficiencies and pronounced the notice program in this case among *the least effective he has ever seen*. In fact, with the exception of the issue of the amount of attorneys' fees, class counsel do not even attempt to justify any the following serious defects, each of which alone would be grounds to invalidate the settlement:

- **Failure to disclose the size of the class or expected share of the fund:** Due process requires that a class action notice "contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears*, Roebuck & Co., 153 F.3d 1222, 1227 (11th Cir. 1998). But even in their briefs to this Court, *the settling parties still have not disclosed the size of the class*, making it impossible to estimate the expected recovery for each class member.
- **Failure to disclose the amount of attorneys' fees:** Confronted with an overwhelming body of state and federal appellate case law holding that the failure to notify the class of the amount of attorneys' fees sought ***requires automatic invalidation of the settlement***, class counsel responds that there is no Florida case law discussing the issue. But they offer no reason why Florida's Rule 1.220, whose notice requirements are *even stricter* than the federal requirements, would require anything different, particularly in a case in which the lawyers

seek nearly half of the settlement fund for themselves and the defendants have agreed not to object. Nor do they offer any contrary authority from any jurisdiction.[2] Instead, class counsel rely on the fact that a local federal judge apparently approved a notice that may have been similarly defective. But they do not provide a copy of that notice and, more importantly, do not mention whether anyone even objected to the failure to disclose fee information in that notice and, if so, how the judge addressed the issue. Under these circumstances, approval of the settlement would be an abuse of discretion.

- **Improper and impenetrable notice language:** In the face of Mr. Hilsee's detailed analysis of the flaws in the notice language, class counsel make no attempt to rebut the charge that the notice is inexcusably poorly drafted and is designed to discourage exclusion. These failures independently violate due process. *Twigg*, 153 F.3d at 1227.

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[2]Class counsel cite generally to a 27-page chapter in the Wright & Miller federal practice treatise for the proposition that courts routinely approve notices that do not contain "all of the precise details of the settlement, including the amount of attorneys fees." Pls. Br. at 8 (citing 7B Wright, Miller and Kane, *Federal Practice and Procedure: Civil 3d* § 1796.6 (2005)). None of the cases cited in Wright & Miller (at pages 214-215) remotely support class counsel's position. *See Mendoza v. Tucson School Dist. No. 1*, 623 F.2d 1338 (9th Cir. 1980) (holding notice was adequate where "the total amount of fees to be paid here *was disclosed* . . . While disclosure as to *apportionment* of the negotiated attorneys' fees may have been desirable, we cannot say it was an abuse of discretion to approve the settlement notice without such a provision.") (emphasis added); *Clark v. Experian Information Solutions, Inc.*, 219 F.R.D. 375, 380 (2003) (failure of notice to "expressly state that Class Counsel were seeking a total of fifteen million dollars in attorneys' fees" was excusable because "[t]he notice revealed that there were three Defendants and that counsel would be seeking five million dollars from *each* of them."); *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465, 481 (S.D.N.Y. 1998) (notice was adequate because it stated that class counsel would seek an award "not to exceed 17.5% of the Settlement Fund"); *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 67 (S.D.N.Y. 2003) (notice that did not include amount of fees was found acceptable because "unlike common fund cases, where attorneys' fees can erase a considerable portion of the funds allocated for settlement, the fees were negotiated separately and after the settlement amount had been decided, thus considerably removing the danger that attorneys' fees would unfairly swallow the proceeds that should go to class members"); *see also* Federal Judicial Center, *Manual for Complex Litigation*, 4th § 21.312 at 295 (2004) (explaining that notice should include information on attorneys' fees sought).

- **Substandard publication efforts**. Although class counsel rely heavily on the fact that notice of the settlement was published in Florida newspapers, they offer no response to our showing that, even if publication alone were sufficient to notify an identifiable subset of the class–which, as we explain below, it is not–the publication effort here would still have been woefully inadequate. *See* Hilsee Aff. ¶ 28-35.
- **Onerous opt-out procedure**: As we explained in our initial submission, the requirement that class members handwrite a lengthy passage to exclude themselves is unprecedented and is obviously designed to effectively eliminate opt-out rights. This requirement violates due process, and class counsel's lack of response on this point speaks volumes.
- **Failure to provide for automatic payments**. Class counsel still offer no reason why, given the availability of all the requested information in defendants' files, a claim form was necessary at all. See Hilsee Aff. ¶ 82-83; Gardner Aff. at 13 ("Use of a needless claim form, coupled with the deliberate failure to provide actual notice to known members of the class, smacks of collusion between class counsel and defendant.").

* * *

Of the many serious, independently fatal, failures in the notice program, far and away the most significant is the fact that the settlement agreement itself requires that no effort would be made to provide notice to a large subset of the class: those who had not reinstated or paid off their mortgages. As we have already explained, this failure demonstrates not only the illegality of the notice program, but also the substantive unfairness of the settlement and the inadequacy of class counsel's representation.

In their defense, class counsel first offer a novel interpretation of Rule 1.220. That rule

contains two stringent provisions with respect to notice, both of which apply here. Notice following class certification "shall be given to each member of the class who can be identified and located through reasonable effort," and notice of a settlement "shall be given to all members of the class as the court directs." Fla Civ. P. R. 1.220(d)(2), (e). Class counsel, however, focus narrowly on the qualifier that notice be given "*as the court directs*," and suggest that any notice program, no matter how defective, is somehow immunized from scrutiny so long as it is approved by a court, even at the preliminary approval stage. If class counsel's reading were correct, Florida appellate courts would have no power to review the propriety of a notice program approved by a trial court. But that clearly is not so. *See, e.g., Ves Carpenter Contractors, Inc. v. City of Dania*, 422 So.2d 342 (Fla. 4th DCA 1982) (reversing trial court where notice to class members was inadequate); *Frankel v. City of Miami Beach*, 340 So.2d 463 (Fla. 1976) (same). The more reasonable and obvious reading of the rule is that court approval is a necessary, but not a sufficient, condition of adequate notice.

Both Rule 1.220 and constitutional due process required class counsel to undertake *reasonable efforts to identify and locate class members* and provide them with notice. Instead, the settlement agreement contained an unusual provision discharging class counsel from exactly that responsibility. Stephen Gardner confirms that this provision is virtually unprecedented. *See* Gardner Aff. at 11 ("[T]his is the *only proposed settlement I have seen* that affirmatively provides that the parties will not attempt any form of updating the addresses of class members, such as skip-tracing.") (emphasis added). There is simply "no principled or practical reason for this deliberate disregard of class counsels' duty to represent the interests of absent class members." *Id.* Class counsel do not even offer any excuses. And, indeed, the Settlement Administrator's affidavit indicates that the mailing list was created by culling from a list of class members provided by class counsel only those

"who were subject to a mortgage foreclosure in 2005 and those class members who either reinstated or paid off the mortgage which was the subject of their foreclosure." Affidavit of Mark Patton ¶ 3. The rest of the names, presumably, were simply discarded, even though those names are of class members purportedly bound by the settlement.

Finally, class counsel contend that they somehow cured this overwhelming failure to provide notice to the class by sending emails to legal aid organizations. As an initial matter, class counsel provides no evidence showing how many legal aid lawyers were actually sent such emails, when they were sent, or how many of those lawyers represent clients in foreclosure proceedings. But more importantly, class counsel fail to take into account that most legal aid lawyers in Florida are employed by organizations that, by virtue of their funding by the federal Legal Services Corporation, are subject to restrictions barring them from participating in class action litigation. *See* http://www.floridalegal.org/programs.htm; *see generally Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). Even if they have serious concerns about the settlement, these lawyers are forbidden from expressing them. In other words, class counsel sent notice to the only group of lawyers in Florida who are *legally barred* from objecting to a class action settlement.

The failure to provide notice here is plain. Approval of the settlement under the circumstances would be an abuse of discretion. To the extent that the Court wishes to suggest ways in which the parties can reform the notice program to comply with due process, one reasonable step would a requirement that a copy of the notice of the class action and proposed settlement be filed in every foreclosure file, so that every judge in Florida presiding over a Butler & Hosch foreclosure is on notice of this action and its effect on the pending foreclosure.

II. THE SUBSTANCE OF THE PROPOSED SETTLEMENT MUST BE REJECTED BOTH BECAUSE IT IS UNFAIR AND BECAUSE IT VIOLATES DUE PROCESS

The settling parties separately address some aspects of our substantive objections to the proposed settlement. For the convenience of the Court, we respond to both submissions together.

A. The Relief Under the Proposed Settlement Is Inadequate.

Our opening brief explained that the settlement must be rejected because the meager monetary relief afforded to the class, measured against the settlement's broad releases, renders the settlement unfair. That unfairness is magnified by the lack of notice to the vast majority of the class, whose claims and defenses will be released in exchange for no relief at all. As consumer class action expert Stephen Gardner concluded, "[t]he value of the relief is minimal overall and non-existent for almost all class members." Gardner Aff. ¶ 13. Additionally, given the lack of information provided by the settling parties about the size of the class, it is impossible to estimate each class member's expected share of the settlement, and it is thus impossible for the settling parties to meet their burden of demonstrating the fairness of the settlement.

Even in their responses to the objections, the parties still refuse to pin down the true size of the class. Class counsel's brief states that "Defendants' records show that they filed approximately 28,000 foreclosures during the class period, comprising approximately 45,000 class members." Pls. Br. 9. This admission reveals that there are at least 45,000 class members – *over twice as many as were sent mailed notice of the settlement* – but it still does not resolve the matter, because the settlement appears to cover class members who were sent reinstatement letters but against whom foreclosures were not filed. Settlement Agreement ¶ 1.x. Moreover, the 45,000 figure apparently does not include that portion of the over 18,000 class members to whom notice was actually sent and

who reinstated or paid off their mortgages prior to the filing of a foreclosure action. The fact that the Settlement Agreement contains three different, conflicting class definitions further compounds these problems. *See* Gardner Aff. at 15 ("Each definition sets different parameters; it is impossible to know for certain which one is the real one."). If the class consists of 45,000 people, then each members' share is approximately twenty dollars; if the class is substantially larger, then the share of recovery is substantially lower. But either way, the monetary relief is paltry in relation to the possible individual recovery and in relation to the concessions demanded by the settlement.

The settling parties' central argument in defense of the settlement's monetary relief is that, although it may be minuscule for each individual class member, the total amount is reasonable given the caps on aggregate statutory damages under state and federal law. Class counsel concedes that if the majority of class members "were to opt-out of the class and pursue their claims individually, these class members could potentially recover statutory damages of as much as $1000 under the FCCPA or the FDCPA." Pls. Resp. 14; *see also* White Decl. ¶ 8. But the parties both argue that this fact is "irrelevant" because the FCCPA and the FDCPA cap the total amount of statutory damages in a class action at the lesser of $500,000 or 1% of a debt collector's net worth. Pls. Br. 14-15; Defs. Br. 20; *see* 15 U.S.C. § 1692k(a)(2)(B); Fla. Stat. § 557.77.

That argument has it exactly backwards. If, as class counsel concede, the majority of plaintiffs could recover at least $1,000 each in an individual action but will receive at best only pocket change if the proposed settlement is approved (assuming they even receive notice), that fact tends to show the settlement is *unfair*, not that it is fair. The upshot of this disparity in relief, taken together with the broad releases under the settlement, is that the class members would have been left in a better position if the suit had simply been dropped. It is also significant that, contrary to the

settling parties' suggestion, the cap on aggregate damages applies only to *statutory* damages, not to *actual* damages. 15 U.S.C. § 1692k(a)(2)(B); Fla. Stat. § 557.77. Thus, even in class actions, plaintiffs may recover statutory damages *and* an unlimited amount of actual damages.

Moreover, reading the FCCPA according to its plain text and its pro-consumer purposes, the phrase "$500,000 or 1 percent of the *defendant's* net worth" applies separately to each of the three defendants. That raises the potential statutory damages to a minimum of $1.5 Million, up to a maximum of one percent of each of the defendant's net incomes. Class counsel's argument that the actual damages that would arise in the overwhelming number of foreclosures is approximately $100 requires the court to excuse the conduct of Butler & Hosch attorneys in charging for all of the fees and services that they did not actually provide or earn.

Defendants' contention that they have changed their ways—that the practices about which plaintiffs complain are history—is simply not true, and is not supported by evidence. In fact, a review of the (now vacated) Summary Final Judgment for Foreclosure that defendants obtained against objector James Knapp in June, 2003, and the related affidavits, attached hereto, establish that the defendants are still actively engaged in charging and collecting for the very same fees and charges that are at issue in this class action. The now vacated foreclosure judgment and the related affidavits of court costs and attorney advances show that the judge in the *Knapp* foreclosure took issue with the fees and charges that the judge *sua sponte* crossed out, and reduced the court costs attorneys' fees that defendants sought to charge Mr. Knapp in the judgment. And, the "flat fee" attorney fee issue is present in the Knapp foreclosure record, as evidenced by the two affidavits filed by the defendants in support of their request for attorneys' fees. These affidavits are also attached. The first affidavit is for an hourly fee of $175.00 for 11.70 hours, for a total fee of $2,047.50. This

request was filed in May of 2004. Then, the next month, after Mr. Knapp objected to the foreclosure sale *pro se*, the defendants filed an amended affidavit as to attorneys' fees, claiming an entitlement to a $1,200 flat fee, plus additional fees, all totaling $5,827.50.

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Given the minimal monetary relief for individual class members under the settlement, it is not surprising that the settling parties ask the Court to focus on the prospective relief in evaluating its fairness. But, as we explained in our objections, the nature of the prospective relief under the settlement is ill-defined, leaving issues of compliance and monitoring completely up in the air. In fact, the prospective relief consists of little more than a set of sample disclosure forms, without any guidance or restrictions on how they are to be used. More importantly, "[t]his prospective relief–minimal though it is–is completely worthless to current class members because their wrongs have already occurred. Slightly improved notice in the future to other homeowners does them no good at all." Gardner Aff. at 14.

Defendants accuse Objectors of lacking familiarity with foreclosure litigation and suggest that a large number of class members will find themselves in foreclosure again. Defendants, however, have provided no evidence showing what percentage of class members are likely to find themselves on the opposing end of a foreclosure action in the future, let alone one prosecuted by Butler & Hosch, which is the only future event that is conceivably relevant. And, to the extent that the defendants are correct, that possibility only underscores the need for class members' to preserve defenses that can be used in future foreclosure proceedings, as discussed below.

B. The Scope of the Release Renders the Settlement Both Unlawful and Unfair.

Objectors have raised three independent problems with the broad release of class members' claims and defenses under the proposed settlement. First, the scope of the release renders the settlement both unlawful and unfair–unfair because the release leaves the class members in a worse position than if the litigation had been abandoned and because the release is vague and overbroad, and unlawful because the settling parties are forbidden from releasing claims for which they were never authorized to represent the class. Second, it is unlawful to force class members to relinquish defenses to claims that have yet to accrue. Third, due to the inadequate notice program, if the settlement were approved, most of the class would unknowingly release valuable claims in exchange for nothing. The settling parties for the most part either do not respond to these objections or respond only to mischaracterizations of these objections.

Defendants, for instance, spend several pages arguing that a class release may lawfully release claims that were not asserted in the class complaint. We do not disagree with that general proposition. So long as class members are properly compensated, it may be permissible for a settlement to release claims that were certified for litigation. *See* Robert Hobbs, *Fair Debt Collection* (5th ed. 2004) § 6.6.2 at 281 ("Releases in class settlements should not go beyond the issues certified and should not release class damages unless there is compensation paid"); The National Association of Consumer Advocates, *Standards & Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375 (1998). Given the meager relief provided under the settlement, however, it cannot seriously be contended that the class members have received compensation for the release of these additional claims.

The release provisions violate fundamental principles of due process in several ways. Perhaps

the most obvious due process violation is that the release would extinguish the claims and defenses of a vast majority of the class without any notice or opportunity to opt out. As Stephen Gardner explains, "the likely response rate of filing claim forms is in the range of 5%–meaning that ***95% of the class will get nothing at all*** from the Settlement Fund." Gardner Aff. at 14. In other words, all but 5% of the class are likely to release valuable claims and defenses in exchange for nothing. That fact, standing alone, is sufficient to render this settlement fundamentally unfair.

The release also violates due process because of its overbreadth, extending well beyond the claims for which the class representatives were authorized to represent the class and extending even to claims and defenses that have not yet accrued. *See Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259-61 (2d Cir. 2001) (settlement violated class members' right to due process by purporting to relinquish unaccrued future claims), *aff'd by equally divided Court*, 539 U.S. 111 (2003); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) ("Even if they fully appreciate the significance of class notice, [class members] may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.").

Recognizing the impropriety of releasing future claims, defendants contend that the settlement agreement does *not* release claims or defenses that may be used in future foreclosure proceedings. That concession is an important one, but it would only be meaningful to class members if it were included in the agreement itself instead of in a brief to this Court. This is particularly so because the agreement itself contains language in several places that seems to directly contradict defendants' concession. *See, e.g.*, Settlement ¶ 4 (releasing "all claims which Plaintiffs and the Class have or may have against [Defendants], whether or not based on facts now known or subsequently discovered"); Settlement ¶ 1.r ("'Released Claims' means any and all claims, demands, actions or

causes of action which the Plaintiffs and/or Class have, or formerly had, *or may have in the future*, whether known or unknown, against the Released Parties . . which relates in any way to the Settling Defendants' actions, omissions or other involvement in the Underlying Foreclosures.") (emphasis added). Given the stakes, it is simply not sufficient to hope that future courts will construe this broad language charitably.

Thus, at a minimum, the parties must modify the agreement to make clear either that the release does not extend to future foreclosure proceedings or that the settlement agreement does not bind class members who have not reinstatated or paid off their mortgages. This Court, of course, does not have the authority to reform the settlement agreement itself, *Levenson v. American Laser Corp.*, 438 So.2d 179, 183 (Fla. 2d DCA 1983); *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986), but it certainly has the authority to suggest changes to the parties that would render a revised agreement acceptable. *See Fung v. Florida Joint Underwriters Ass'n*, 840 So.2d 1101 (Fla. 3d DCA 2003); *see also Bowling v. Pfizer*, 143 F.R.D. 138 (S.D. Ohio 1992) (court suggested changes later incorporated in *Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992)).

C. Class Counsel's Fee Request Is Excessive.

The elephant in the room is class counsel's enormous fee request, which, if accepted, would swallow up nearly half of the settlement fund. As Stephen Gardner explains in his affidavit, "class counsel have done a strikingly poor job of representing the class. They agreed that an identifiable subset of the class did not need to get actual notice. They agreed to a release far broader than was appropriate to release the claims before the Court. They agreed to relief that will not be received by the vast majority of the class." Gardner Aff. at 17. Despite demonstrably inadequate representation

of the class and inadequate relief for the class, counsel seek more than adequate compensation for themselves. It is well-established that "[t]he determination of attorneys' fees in class action settlements is fraught with the potential for a conflict of interest between the class and class counsel." *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 307 (3d Cir. 2005). In this case, several factors—the fact that fees come directly at the expense of class recovery, the lack of any declared ceiling on fees, the clear-sailing clause, and the lack of any information on the fee request in the class notice—combine to make the conflict particularly acute. *See* Gardner Aff. at ¶ 13 (describing "relatively unique conflict" in this case).

The Court should take the fee request into account in determining the fairness of the settlement, but the Court need not reach the issue of the amount of fees that would be appropriate because the settlement does not warrant approval. If, however, the Court decides to approve the settlement as it stands, we reserve the right to file additional papers opposing the fee request itself, including the hours claimed by class counsel, the hourly rates, and, most importantly, the propriety of the multiplier requested by class counsel. As Stephen Gardner explains, given the inadequacy of representation and the results obtained in the settlement, it would be appropriate to apply a modest downward multiplier. *See* Gardner Aff. at 15-18. To be sure, *Kuhnlein v. Department of Revenue*, 662 So.2d 309 (Fla. 1995), requires use of the lodestar approach, but it does not require a lodestar-with-multiplier calculation that defies common sense by allowing class counsel to walk away with nearly half of the common fund while leaving crumbs for their clients.

CONCLUSION

For the foregoing reasons, this Court should deny final approval of the proposed class action settlement.

Respectfully submitted,

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April Carrie Charney
(*Counsel of Record*)
Fla Bar No. 310425
Jacksonville Legal Aid
125 W. Adams Street
Jacksonville, FL 32202
(866) 356-8371

Brian Wolfman
(*pro hac vice*)
D.C. Bar No. 427491
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Objectors

Dated: December 8, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on November 28, 2005, I served a true and correct copy of the foregoing Objectors' Reply Brief, in person, on the following counsel of record: Kelly Overstreet Johnson, Counsel for Plaintiffs, and G. Bart Billbrough, Counsel for Defendants.

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April Carrie Charney