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Testimony of Claudia Wilner, Staff Attorney Neighborhood Economic Development Advocacy Project

Before the New York City Department of Consumer Affairs Exploratory Public Hearing on Process Servers in New York City

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Thank you for the opportunity to testify today regarding process servers in New York City. My name is Claudia Wilner, and I am a Staff Attorney at Neighborhood Economic Development Advocacy Project (NEDAP), where I direct its Consumer Law Project. NEDAP is a nonprofit resource and advocacy center that provides legal, technical and policy support to community groups in New York City's low income neighborhoods and communities of color. NEDAP promotes economic justice and works to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty.

We are pleased that the Department of Consumer Affairs has decided to investigate this important issue of process server practices. The right to due process – notice and the opportunity to be heard – is a fundamental constitutional right. Many New Yorkers are deprived of this right every day when a process server fails to deliver them notice that they have been sued. Our consumer law project works primarily with low income New Yorkers who have been sued by debt collectors to collect a debt. In our experience, defendants in consumer credit cases rarely receive service of process as required by law.

Improper service causes great harm to low income New Yorkers. New Yorkers undergo loss of income in the form of frozen bank accounts and wage garnishments that could have been avoided had they received notice of a pending lawsuit. The most vulnerable New Yorkers suffer great hardship when their bank accounts are frozen, leaving them with no access to their income – which is often exempt – and without resources to pay rent and buy food and medicine. Having to take emergency days off to attend multiple court days to file an order to show cause is another hardship, which results in significant loss of income for our working clients. New Yorkers are also harmed by the negative credit reporting that results from having a default judgment entered against them. A blemished credit record can easily prevent someone from securing housing and employment, from obtaining mortgages, car loans, and affordable insurance, and it can trigger adverse actions by existing creditors, such as lowering a credit line or raising an interest rate on a credit card.

NEDAP's consumer hotline, the NYC Financial Justice Hotline, was established in September 2005. Since that time we have logged more than 5,000 calls from low income New Yorkers. In the first half of 2008, we received more than 1,200 calls. Since January, 47% of our callers contacted our hotline because they needed advice and information about a debt collection lawsuit.

A sampling of our database shows that out of the 92 cases involving debt collection lawsuits opened between March and May 2008, we identified improper service in more than half of the cases. The vast majority of callers never received any notice at all that they had been sued. Their first notice of the lawsuit occurred when their wages were garnished or their bank account frozen. In addition, we are not certain that proper service occurred in the other cases. In many of those cases, we did not closely examine service issues because the caller had already appeared in court and waived jurisdictional defenses. Our callers only occasionally report being served in a manner that complies with the CPLR.

In recent months, the civil court has begun requiring debt collectors to provide an envelope so that the court can mail notice of a pending consumer credit lawsuit to the defendant. Clients have begun to call our hotline because they have received that notice from the court. In most cases, that was the only notice they received, and they never received a copy of the summons and complaint.

In our experience, process servers often claim to serve fictitious individuals. For example, our client, Clara S., lives in a NYCHA building in Harlem. Clara is wheelchair-bound due to disability, and is practically homebound. Her only income is SSI. She lives alone with her daughter, who is also disabled and also receives SSI. Last year, Clara was sued by two different debt buyers. She was not served with a summons and complaint in either case, and she had no notice of the lawsuits until her bank account, which contained only SSI benefits, was frozen. In one case, the process server claimed to have served a fictitious individual named "Tonya S." However, on the date of the alleged service, Clara was home all day while NYCHA workers made repairs to her apartment (which included replacing her front door). No process server came. In the other case, the process server reported service on a fictitious individual identified only as "Jane Doe." The physical description of the individual did not match that of our wheelchair-bound client or her eleven-year-old daughter.

We urge DCA to conduct investigations of process servers, perhaps in combination with the courts, and to revoke the licenses of repeat offenders. We also endorse the recommendations of MFY Legal Services in its recent report, *Justice Disserved* (June 2008).

We offer the following additional thoughts and recommendations:

- The current fee structure for payment of process servers may be part of the problem. Currently, process servers charge a flat fee per file. Process server agencies have an incentive to keep the fee low in order to secure business from law firms that have a large volume of cases to send out for collection. The fee that a process server typically charges may not be enough to cover the actual costs of serving the process. Thus, in order to make a profit, the process serving agencies have to take on more files than they can handle. The fee structure encourages false affidavits, because then a process server can be paid for a file without doing any work. This structure also works well for the debt collection law firms. They actually prefer that people not receive notice, because that enables them to secure default judgments and freeze people's bank accounts. DCA should conduct an

examination of the fee structure, and think about mandating minimum fees, or structuring the fees in some way so as to reward proper service

- Similarly, DCA should conduct investigations of debt collectors, including debt collection law firms, which routinely employ process servers who file fraudulent affidavits of service. At a certain point, debt collection law firms must be aware that many defendants are not receiving notice of consumer credit lawsuits. The fact that these debt collectors continue the same policies and practices may be a violation of the Fair Debt Collection Practices Act and state and city debt collection laws.
- The New York Attorney General recently filed a criminal action against a process server in Erie County, who was accused of defrauding the court system by filing false affidavits of service in many cases. Similar cases could and should be brought here in New York City. DCA should work with the local attorney general's office to generate criminal prosecutions of the worst offenders. That would encourage all process servers to perform their duties honestly.
- DCA should also partner with the court system to raise awareness of this problem among judges. Often, when I raise issues of improper service, the judge encourages me to waive this defense. Judges seem to view claims of improper service as a waste of the court's time. As an attorney, I am comfortable explaining to the court the reasons why my client does not wish to waive her personal jurisdiction defenses. Pro se litigants, however, often lack the knowledge and confidence to do this. When a judge advises a pro se litigant to waive her jurisdictional defenses, she often does so. The courts provide tacit encouragement to the current system, which favors improper service. If courts helped pro se litigants enforce their rights to proper service, and places the costs of improper service on plaintiffs instead of pro se defendants, then more people would receive notice of pending legal action. It should not be cheaper to violate the law than it is to comply, but sadly that is the current state of affairs.

Please do not hesitate to contact me with questions or for more information. Thank you very much for the opportunity to submit comments on this important issue.