UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: **CV 2:17-00164-SJO-E** **DATE:** **November 20, 2017**

TITLE: **Normela Upshaw v. United States Department of Education**

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Connie Lee
Courtroom Clerk

Not Present
Court Reporter

COUNSEL PRESENT FOR PLAINTIFF(S):

Not Present

COUNSEL PRESENT FOR DEFENDANT(S):

Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT [Docket No. 40]

This matter comes before the Court on Defendant United States Department of Education's Motion to Dismiss First Amended Complaint ("Motion") filed October 10, 2017. Plaintiff Normela Upshaw filed an Opposition to Defendant's Motion to Dismiss ("Opposition") on October 18, 2017, to which Defendant replied ("Reply") on October 31, 2017. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for November 13, 2017. *See* Fed R. Civ P. 78(b). For the reasons stated below, the Court **GRANTS** Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint.

I. PROCEDURAL BACKGROUND

This action was filed *pro se* by Normela Upshaw on January 9, 2017. The initial complaint was dismissed *sua sponte* by this court for failure to state a claim upon which relief can be granted. A First Amended Complaint ("FAC") was filed on June 2, 2017 and Defendant responded by filing a motion to dismiss.

In the FAC, Plaintiff asserted non-specific violations of the following statutes: (1) Consumer Financial Protection Act ("CFPA") 12 U.S.C. § 5481 *et seq.*; (2) Fair Credit Reporting Act, Regulation V ("FCRA") 15 U.S.C. § 1681 *et seq.*; (3) Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. § 1692 *et seq.*; and (4) "any other provision of Federal Consumer Financial law, as defined by 12 U.S.C. § 5481(14)." (*See generally* FAC.) The Court granted Defendant's Motion to Dismiss with leave to amend on September 18, 2017.

Plaintiff filed a Second Amended Complaint ("SAC", ECF No. 39) on September 26, 2017, to which Defendant responded by filing the current Motion. (ECF No. 40.) The SAC asserts two causes of action: (1) Violation of the Federal Claims Collection Standards - 31 CFR § 901.9(a); and (2) Violation of the Fair Credit Billing Act ("FCBA"), an amendment to the Truth In Lending Act ("TILA") - 15 U.S.C. § 1601 *et seq.* (*See generally* SAC.)

II. FACTUAL BACKGROUND[1]

In 1981-82, Plaintiff received three student loans to attend California State University - Long Beach. (FAC Ex. B) The total amount of these loans was $7,171 with an annual interest rate of 7%. (FAC Ex. B) Approximately ten years later, Plaintiff failed to make payments on these loans, and they were declared in default, the interest was capitalized, and the debt was assigned to the United States Department of Education as of September 9, 1992. (FAC Ex. B) At that time, the total balance was $7,689.47 in unpaid principal. Interest continued to accrue at an annual rate of 7%. (FAC Ex. B)

Beginning in 2000, Plaintiff began making regular payments of approximately $50/month. These along with several Treasury Offsets, resulted in over $12,000 of payments over the course of the next 16 years. (FAC Ex. B) All of these payments were applied to interest and fees and did not reduce the total principal of the loans, which by then totaled over $13,000. (FAC Ex. B)

On October 22, 2014, Plaintiff received a letter from Defendant, apparently in response to her own inquiry. (FAC Ex. H) The letter detailed the current balance of Plaintiff's account along with her payments to date. It notified her that "approximately $45.00 in interest accrues each month" and that payments are applied "first, to collection costs and administrative fees; second, to outstanding interest; and third, to outstanding principal." The letter further stated that Plaintiff had not established an approved repayment agreement and that she therefore did not qualify for a loan rehabilitation program. Finally, it informed Plaintiff that Defendant was required to report to information concerning defaulted student loan debt to credit bureaus for the period of seven years. Since that period had passed, Defendant stated that it would no longer be reporting this debt.

On April 13, 2015, Defendant again wrote a letter to Plaintiff informing her of the outstanding balances and payments to date. (FAC Ex. G) It again noted that she must agree to an approved repayment plan in order to qualify for a loan rehabilitation plan and must then make the agreed payments on time for a certain number of months. This letter also laid out the various available loan repayment plans and stated:

> "To become eligible to consolidate your debt under any of the available repayment plans, you must make regular monthly payments in accordance with a reasonable and affordable repayment plan. The number and amount of payments required depend on the amount owed and your ability to pay."

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[1] Because an amended complaint supersedes the original complaint, it must be complete in and of itself and must not reference a previous complaint or any other pleading, attachment, or document. Local Rule 15-2; *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967.) Nonetheless, for the purpose of providing background, the Court refers to the factual allegations provided in Plaintiff's FAC.

Over the course of 2016, Plaintiff received at least four additional correspondences, dated February 9, 2016, June 22, 2016, August 16, 2016, and October 7, 2016. (FAC Exs. B, C, E, F) In these letters, Defendant again notified Plaintiff that in order to be eligible for a loan rehabilitation program, she must agree to an approved repayment plan and make regular payments under that plan for an agreed upon period of time. Plaintiff submitted her financial information and Defendant calculated a repayment amount of $50/month–the amount she had been repaying for the past 15 years. (FAC Exs. D, E) It provided her with an agreement that would allow her to qualify for a loan rehabilitation program if she consistently made these $50 payments for a period of nine months. (FAC Ex. E) It is unclear from the record whether Plaintiff agreed to these terms.

II. DISCUSSION

A. Legal Standard for Motion to Dismiss

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of the claims asserted in the complaint." *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-200 (9th Cir. 2003). In evaluating a motion to dismiss, a court accepts the plaintiff's factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see Ileto*, 349 F.3d at 1200. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To plead sufficiently, Plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv–Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.1986); *see Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

B. 31 CFR § 901.9(a) (Federal Claims Collection Standards)

Plaintiff's first claim alleges violation of the Federal Claims Collection Standards laid out in 31 CFR § 901.9(a). This regulation states:

> Except as provided in paragraphs (g), (h), and (l) of this section, agencies shall charge interest, penalties, and administrative costs on debts owed to the United States Pursuant to 31 U.S.C. 3717. An agency shall mail or hand-deliver a written notice to the debtor, at the debtor's most recent address available to the agency, explaining the agency's requirements concerning these charges except where these requirements are included in a contractual or repayment agreement. These charges shall continue to accrue until the debt is paid in full or otherwise resolved through compromise, termination, or waiver of the charges.

Plaintiff's claim fails because two separate provisions bar the application of this regulation to the current case. The first is the exception which permits agencies "to impose interest and related charges on debts not subject to 31 U.S.C. 3717, in accordance with the common law." 31 CFR § 901.9(l). Plaintiff's loans are not subject to 31 U.S.C. § 3717, which does not apply: (1) if a statute, regulation required by statute, loan agreement, or contract. . .explicitly fixes the interest or charges; or (2) to claims under a contract executed before October 25, 1982, that is in effect on October 25, 1982. 31 U.S.C. § 3717(g). Both exceptions exist in this case. Ms. Upshaw's loans were in effect prior to October 25, 1982[2] and each of the promissory notes provides a fixed interest rate[3].

Regardless of whether Plaintiff's loans are covered by 31 U.S.C. § 3717, the written notice requirement asserted by Plaintiff is inapplicable when the agency's requirements are "included in a contractual or repayment agreement." 31 CFR § 901.9(a). Defendant notes—and Plaintiff does not dispute—that the promissory note signed by Plaintiff included written notice of interest accrual. Additional written notice is therefore unnecessary.

Accordingly, Defendant's motion to dismiss Plaintiff's claim under 31 CFR § 901.9(a) is **GRANTED**.

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C. <u>15 U.S.C. § 1601 *et seq.* (Truth In Lending Act)</u>

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[2] The three promissory notes were executed on Sept. 11, 1981, March 24, 1982, and October 6, 1982.

[3] The APR on each is 7%.

Plaintiff's second claim asserts that Defendant has violated the Truth In Lending Act.[4] The purpose of TILA is to "assure meaningful disclosure of credit terms." 15 U.S.C. § 1601. Plaintiff's loans, however, are excluded from the scope of TILA by 15 U.S.C. § 1603, which states in relevant part that "[t]his subchapter does not apply to the following: (7) Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965." Because Plaintiff's loans are federally-insured student loans, the provisions of TILA—including those amended by the FCBA—do not apply.

Accordingly, Defendant's motion to dismiss Plaintiff's claim under 15 U.S.C. § 1600 *et seq.* is **GRANTED**.

D. Conclusion

Plaintiff has now been provided three opportunities to state a cognizable claim and has failed to do so. As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv–Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.1986); *see Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Such is the case here. Plaintiff fails to state a claim upon which relief can be granted and the Court has determined that these deficiencies cannot be cured by alleging additional facts. For this reason, Plaintiff's Second Amended Complaint must be **DISMISSED WITHOUT LEAVE TO AMEND**.

III. RULING

For the foregoing reasons, the Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint is **GRANTED** and the SAC is **DISMISSED WITHOUT LEAVE TO AMEND**.

IT IS SO ORDERED.

[4] While the SAC asserts the Fair Credit Billing Act, this is simply an amendment to TILA..