UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 17-20226-WILLIAMS/TORRES

ANA VASQUEZ PIMENTEL,

Plaintiff,

vs.

NATIONWIDE CREDIT, INC.,

Defendant.
_____/

ORDER GRANTING IN PART MOTION TO DISMISS

THIS MATTER is before the Court on Defendant's Motion to Dismiss the Amended Complaint (DE 26), to which Plaintiff has filed a response (DE 29) and Defendant has filed a reply (DE 30). Plaintiff's two count amended complaint alleges four violations of the Fair Debt Collection Practices Act (FDCPA) and a violation of the Florida Consumer Collection Practices Act (FCCPA). The claims arise from two collection letters Defendant sent to Plaintiff in attempts to collect two different debts. Defendant seeks to dismiss both counts pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Defendant's motion to dismiss is granted in part and denied in part.

I. Background

Plaintiff incurred consumer debts on her American Express and her Old Navy credit cards. Under the terms of both credit card agreements, if balances are not timely paid they will accrue interest and fees. Plaintiff did not timely make payments on the debts due under the credit cards and, as a result, Defendant started collection efforts. On August 11, 2016, Defendant sent Plaintiff a collection letter in an attempt to collect the unpaid Old Navy credit card debt. On November 15, 2016, Defendant sent a collection

letter to Plaintiff in an attempt to collect the unpaid debt on Plaintiff's American Express card.

While the two debts are separate and independent consumer debts, the two collection letters sent to Plaintiff as part of Defendant's collection attempts (jointly, the Collection Letters) are nearly identical. Both contain the name of the creditor and the account balance in the upper right side of the letter. Both set out some of the recipient's rights by essentially quoting portions of the FDCPA. Both have messages on the front of the letter that refer the recipient to the back of the letter, which contains a list of eight state-specific disclosures.

Plaintiff filed her first amended complaint on April 26, 2017 alleging four ways in which the Collection Letters violate the FDCPA and a single violation of the FCCPA. Defendant's motion seeks dismissal of all of Plaintiff's claims.

II. Motion To Dismiss Standard

The purpose of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the facial sufficiency of a complaint. The rule permits dismissal of a complaint that fails to state a claim upon which relief can be granted. It should be read alongside Federal Rule of Civil Procedure 8(a)(2), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although a complaint challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and a "formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When a complaint is challenged under Rule 12(b)(6), a court will presume that all well-pleaded allegations are true and view the pleadings in the light most favorable to the plaintiff. *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007). However, once a court "identifies pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," it must determine whether the well-pled facts "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint can only survive a 12(b)(6) motion to dismiss if it contains factual allegations that are "enough to raise a right to relief above the speculative level, *on the assumption that all the [factual] allegations in the complaint are true.*" *Twombly*, 550 U.S. at 555. However, a well-pled complaint survives a motion to dismiss "even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556.

III. Discussion

Defendant seeks to dismiss all counts of the amended complaint. Count I alleges four ways that the Collection Letters violated the FDCPA: (1) Defendant failed to adequately inform Plaintiff of the amounts owed, in violation of 15 U.S.C. § 1692g(a) and §§ 1692e(2) and (10); (2) Defendant misled Plaintiff as to what rights she possessed in violation of 15 U.S.C. § 1692e(10); (3) Defendant failed to adequately inform Plaintiff of her rights and how to exercise those rights in violation of 15 U.S.C. §§ 1692g(a)(3)-(5); and (4) Defendant attempted to collect a debt without the express statutory or contractual right to do so in violation of 15 U.S.C. § 1692f(1). Count II of the amended complaint alleges that Defendant violated Florida Statute, section 559.72(9) by seeking the

collection of consumer debt without the authority necessary to collect the debt. Defendant seeks to dismiss the FDCPA count because the Collection Letters, on their face, do not violate the FDCPA as alleged. Defendant seeks dismissal of Plaintiff's FCCPA claim, Count II, because the FCCPA claim is based solely on Defendant's alleged violation of the FDCPA. In response, Plaintiff argues that she has adequately pled violations of the FDCPA and the FCCPA and that Defendant's motion to dismiss is raising factual issues that are not appropriately raised at this point in the proceedings.

To evaluate claims made pursuant to the FDCPA, courts in the Eleventh Circuit apply the "least sophisticated consumer" standard to determine whether the Act has been violated. *Jeter v. Credit Bureau, Inc.*, 760 F.3d 1168, 1175 (11th Cir. 1985). Under this standard, the inquiry is whether the "least sophisticated consumer" would have been deceived by the debt collector's conduct. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1258 (11th Cir. 2014). This standard

> takes into account that consumer-protection laws are "not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous." [*Jeter*, 760 F.3d] at 1172–73 (quotation marks omitted). "However, the test has an objective component in that while protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *LeBlanc [v. Unifund CCR Partners]*, 601 F.3d [1185,] 1194 [(11th Cir. 2010)] (quotation marks omitted and alterations adopted).

Crawford, 758 F.3d at 1258-59. Under the least sophisticated consumer standard, Plaintiff has failed to allege facts sufficient to state causes of action upon which relief may be granted, except for one adequately alleged violation of the FDCPA.

A. Plaintiff Has Adequately Alleged that Defendant Violated the FDCPA by Failing to Disclose that Interest is Accruing on Plaintiff's Debt

Plaintiff's amended complaint alleges that Defendant violated the FDCPA by failing to explicitly disclose accrued and accruing interest and fees in violation of § 1692g(a)(1), which requires a collection letter to include "the amount of the debt," and § 1692e, which prohibits the use of any false, deceptive, or misleading representation or means in connection with the collection of any debt. Defendant seeks to dismiss this claim. According to Defendant, the Collection Letters complied with the statute by stating that the "Account Balance as if the date of this letter is shown above," which referred to specific dollar amounts set out at the top of each of the Collection Letters. Defendant maintains that there is nothing confusing or misleading about this language. Plaintiff responds that the Letters are confusing because the Collection Letters say nothing about accruing interest or fees. Plaintiff's Amended Complaint alleges that the credit card agreements that gave rise to the debt allow for the amount due to continue to increase by the imposition of additional interest and fees.[1] Thus, the issue is whether under § 1692g(a)(1) and § 1692e a debt collector must disclose in an initial collection letter that the debt may continue to increase due to interest and fees.

Courts that have addressed this issue in the context of § 1692g(a)(1) are split. On the one hand, some courts have found that a collection letter violates the FDCPA unless it states the total amount due as of the date of the letter and states whether the amount of the debt will increase due to interest or fees. *See Marucci v. Cawley & Bergmann, LLP*,

[1] In its response, Defendant maintains that it would not have charged interest or fees on the debt. However, at the motion to dismiss stage, the Court must take Plaintiff's allegations as true.

66 F. Supp. 3d 559, 565-66 (D.N.J. 2014); *Jones v. Midland Funding, LLC*, 755 F. Supp. 2d 393, 397–98 (D. Conn. 2010); *Dragon v. I.C. System, Inc.,* 483 F. Supp. 2d 198, 203 (D. Conn. 2007); *Smith v. Lyons, Dought, & Veldhuius, P.C.*, No. 07–5139, 2008 WL 28885887, at *6 (D.N.J. July 23, 2008); *Ivy v. Nations Recovery Center, Inc.*, No. 2:12–cv–037, 2012 WL 2049387, at *1–2 (E.D. Tenn. June 6, 2012); *Stonecypher v. Finkelstein Kern Steinberg & Cunningham,* No. 2:11 cv–13, 2011 WL 3489685, at *5 (E.D. Tenn. Aug. 9, 2011); *Jackson v. Aman Collection Service, Inc.,* No. IP 01–01000–C–T/K, 2001 WL 1708829, at *3 (S.D. Ind. Dec. 14, 2001). According to these courts, a letter that simply states the balance due as of the date of the letter does not inform the recipient "the effective date as of which this amount would suffice to pay off the debt in full." *See, e.g., Dragon,* 483 F. Supp. 2d at 203.

Other courts have found the opposite, holding that § 1692g(a)(1)'s "amount of the debt" provision does not imply an obligation to include a statement that interest or fees are accruing. *See Bodine v. First National Collection Bureau, Inc.*, No. CIV.A. 10–2472 MLC, 2010 WL 5149847, at *2 (D.N.J. Dec. 13, 2010); *Adlam v. FMS, Inc.*, No. 09 Civ. 9129(SAS), 2010 WL 1328958, at *3 (S.D.N.Y. Apr. 5, 2010); *Pifko v. CCB Credit Services, Inc.,* No. 09–CV–03057 (JS)(WDW), 2010 WL 2771832, at *3–4 (E.D.N.Y. July 7, 2010); *Schaefer v. ARM Receivable Managemnet, Inc.,* No. 09–11666–DJC, 2011 WL 2847768, at *5 (D. Mass. July 19, 2011). The Eleventh Circuit has not addressed this issue and the one court in this district that appears to have addressed it hesitated to set out a bright-line rule. *See Gesten v. Phelan Hallinan PLC*, 57 F. Supp. 3d 1381, 1388-89 (S.D. Fla. 2014) (finding that defendant violated the FDCPA because the amount due in

the notice was 39-days stale at the time the notice was sent and the notice, while notifying the plaintiff that "interest and other items will continue to accrue," did not notify the plaintiff of the interest rate or identify the other items).

In an attempt to distinguish these varying outcomes, at least one court has noted that many of the cases holding that the FDCPA does not impose a duty to inform the consumer that the debt is accruing interest involve credit card debt. *Gill v. Credit Bureau of Carbon County*, No. 14-cv-01888-KMT, 2015 WL 2128465, *6 (D. Colo. May 5, 2015). In those circumstances, "even the most unsophisticated consumer would understand that credit card debt accrues interest." *Gill*, 2015 WL 2128465, *6 (citations omitted). The Second Circuit, in a case involving credit card debt, tried to further clarify the issue by noting that a failure to notify the debtor that interest continues to accrue may not violate the requirements of § 1692g, which requires disclosure of "the amount of the debt," but would violate § 1692e, which prohibits making false, deceptive or misleading representations in connection with the collection of a debt. *Avila v. Riexinger & Associates, LLC*, 817 F.3d 72, 26 (2d Cir. 2016). The *Avila* court explained that a reasonable consumer could read the notice and be misled into believing that she could pay her debt in full by paying the amount listed on the notice when, if interest is accruing daily, a consumer who pays the "current balance" would not know whether the debt has been paid in full. *Id.* at 76.

In the instant case, Plaintiff has alleged that Defendant's failure to disclose accruing interest violates both § 1692g and § 1692e. And it appears that Defendant's Collection Letters create the very issue about which the *Avila* court was concerned.

Based on the wording of the Collection Letters, if Plaintiff were to remit the "account balance" shown on the Letters, she would not know whether she had paid the debt in full. Thus, Plaintiff has adequately alleged a violation of § 1692e. However, given that the Collection Letters clearly set out the balance due, clearly state that the balance set out is accurate as of the date of the letter, and that even the most unsophisticated consumer would understand that credit card debt accrues interest, Defendant has met the requirements of §1692g(a)(1) to set out the "amount of the debt." Consequently, Defendant's motion to dismiss Plaintiff's claim based on Defendant's failure to disclose accruing interest is granted in part and denied in part. The claim is dismissed as to the alleged violation of § 1692g(a)(1), but the motion is denied as to the alleged violation of § 1692e.

B. Defendant's Inclusion of State Specific Notices is Not False or Misleading

The amended complaint next alleges that Defendant violated § 1692e(10) of the FDCPA, which prohibits the use of "any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." On the front of both Collection Letters are bolded statements surrounded by asterisks. The bolded statement on the American Express letter states "Please see the reverse side of this letter for important notices concerning your rights" and the bolded statement on the Old Navy letter states "Please See Reverse Side of This Letter for Important Consumer Information." On the back of the Letters is a list of eight states. After the name of each state is a statement of particular rights. Plaintiff alleges that these bolded statements combined with the state specific information on the back of the Collection Letters are

deceptive because the way the rights are listed leads a consumer to either believe that only residents of the listed states have the rights set out in the state specific notices or that a consumer has all the rights set out in the notices; neither of which is true. Defendant seeks to dismiss this claim because these type of state specific notices do not violate the FDCPA.

It appears that the majority of courts that have addressed the inclusion of state specific notices on collection letters have found that such notices do not violate the FDCPA because the notices would not mislead or deceive the least sophisticated consumer. *See White v. Goodman*, 200 F.3d 1016 (7th Cir. 2000); *Ensminger v. Fair Collections & Outsourcing, Inc.*, No. 2:16-cv-02173-CM-GEB, 2016 WL 6905882 (D. Kan. Nov. 23, 2016); *Morse v. Dun & Bradstreet, Inc.*, 87 F. Supp. 2d 901 (D. Minn. 2000). In *White*, the court stated that it would be "fantastic conjecture" for a collection letter recipient to assume that he does not have any of the rights listed in the state specific notices. 200 F.3d at 1020. In *Jackson v. Immediate Credit Recovery, Inc.*, No. cv-05-5697(SMG), 2006 WL 3453180, *5 (E.D.N.Y. Nov. 28, 2006), the court noted that "it seems unlikely that an unsophisticated consumer would bother to read technical language addressed to residents of another state." Thus, both of Plaintiff's arguments fail. The least sophisticated consumer would not be led to believe that he did not have any of the rights listed in the state specific notices nor would he be led to believe that he has all of the rights listed in the state specific notices because the only realistic response of a non-resident would be to assume that the state specific notices had nothing to do with him. *See White*, 200 F.3d at 1020.

Plaintiff argues that these cases, and others cited by Defendant, differ factually from the instant case because here the Collection Letters specifically referred Plaintiff to the back of the Letters, where the state specific notices were located, and stated that the information on the back of the Collection Letters concerned "your rights." First, only the American Express letter referred to "your rights." Further, contrary to Plaintiff's assertion, in several of the cases relied on by Defendant, the collection letters at issue contained language directing the recipient to a page with the state specific notices. *See Ensminger*, 2016 WL 6905882, *1 (letter included a statement near the bottom of the first page advising recipient to see either the reverse side or an additional page for "important information regarding state and federal laws and your rights"); *Jackson*, 2006 WL 3453180 at *1 (front of letter states "**See Reverse Side For Important Information**"); *Shami v. United Collection Bureau, Inc.*, No. 08 cv 0430(NG)(ALC), 2009 WL 3049203, *1 (E.D.N.Y. Sept. 25, 2009) (letter had language which read "**SEE REVERSE SIDE FOR IMPORTANT INFORMATION**"). None of these cases found that the language directing the recipient to the state specific notices rendered the letters misleading, deceptive, or otherwise violative of the FDCPA. Additionally, Plaintiff has offered no authority to support her position that the combination of the language directing her to the state specific notices and the state specific notices was misleading. Consequently, Defendant's motion to dismiss Plaintiffs FDCPA claim based on § 1692e(10) is granted.

C. Using Statutory Language to Inform a Debtor of Her Rights is Not a Violation of the FDCPA

Third, the amended complaint alleges that Defendant violated § 1692g(a) of the FDCPA. Section 1692g(a) requires that a debt collector provide a consumer with notice

of certain rights. In an attempt to give such notice, the Collection Letters essentially quote §§ 1692g(a)(3)-(5) in order to inform Plaintiff of the rights set out in those subsections of the statute. Plaintiff maintains that merely quoting the statute is insufficient to inform a recipient of these rights because the least sophisticated consumer would likely be confused by the language of the statute.

Courts that have considered whether quoting the statutory language sufficiently complies with the FDCPA have held that "the faithful copying of the statute gives the consumer the notice Congress intended the consumer to receive." *Nasca v. GC Services Limited Partnership*, No. 01cv1012(DLC), 2002 WL 31040647, *7 (S.D.N.Y. Sept. 12, 2002); *see also Valle v. First National Collection Bureau, Inc.*, 252 F. Supp. 3d 1332 1337 (S.D. Fla. 2017) (collection letter did not violate the FDCPA because it tracked the language of the statute); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000) (same); *Amina v. WMC Mortgage Co.*, No. 10-00165 JMS/KSC, 2011 WL 1869835, *13 (D. Haw. May 16, 2011) (letter that tracks much of the statutory language of §§ 1692g(a)(3)-(5) provided least sophisticated debtor with notice of the requirements of those sections). Plaintiff has not provided any authority to the contrary. Furthermore, and equally importantly, Plaintiff's complaint fails to set out how the statutory language used in the Collection Letters failed to adequately inform Plaintiff of her rights or how to exercise such rights. Without more, Plaintiff's allegations are nothing more than conclusions, which are not entitled to the assumption of truth. Consequently, Plaintiff's FDCPA claim alleging a violation of § 1692g(a) is dismissed.

D. Plaintiff Has Not Alleged a Violation of § 1692f(1) of the FDCPA or of the FCCPA

Plaintiff's last FDCPA claim alleges that Defendant violated § 1692f(1) because Defendant did not have the right to seek collection of Plaintiff's debt. Plaintiff maintains that by allegedly violating other sections of the FDCPA Defendant was "stripped of any authority it may have had to lawfully seek the collection of the Consumer Debts." Because Defendant was not lawfully entitled to collect the debt, Plaintiff contends that Defendant violated both § 1692f(1) of the FDCPA and Florida Statute, section 559.72(9). Defendant seeks to dismiss both these claims because an alleged violation of the FDCPA does not make the underlying debt unenforceable and because Defendant did not violate other sections of the FDCPA. Plaintiff has not directly addressed these arguments in her response to the motion to dismiss.[2] Consequently, under Local Rule 7.1(c), the Court may grant the motion by default. *See A1 Procurement, LLC v. Hendry Corp.*, No. 11-23582-civ, 2012 WL 6214546, *3 (S.D. Fla. Dec. 13, 2012). Nonetheless, the Court will address the merits of Defendant's arguments.

Section 1692f(1) prohibits the "collection of any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law." Similarly, Florida Statute, section 559.72(9) prohibits a person from "Claim[ing], attempt[ing], or threaten[ing] to enforce a debt when such person knows that the debt is not legitimate, or assert[ing] the existence of some other legal right when such person knows that the right does not exist." Plaintiff's amended complaint alleges that Defendant violated these sections by unlawfully seeking to collect the debts from Plaintiff.

[2] Plaintiff's sole response to this argument is to state, in a footnote, that Defendant did in fact violate § 1692g(a) of the FDCPA.

According to Plaintiff, the attempts at collection were unlawful because they violated other sections of the FDCPA. Plaintiff, however, provides no authority to support her proposition that violations of the FDCPA negate the right to collect a debt and nothing in the FDCPA, or the FCCPA, negates the right to collect a debt because of a violation of the statute. Plaintiff has made no allegations, other than the alleged FDCPA violations, that Defendant did not have a right to enforce the debts that are the subject of the Collection Letters. Thus, Plaintiff has not alleged a violation of either § 1692f(1) of the FDCPA or of Florida Statute, section 559.72(9). Consequently, these claims are dismissed.

IV. Conclusion

For the reasons set forth above, Defendant's motion is granted in part and denied in part. Count II of the amended complaint is dismissed with prejudice and Count I is dismissed in part with prejudice. The following claims in Count I are dismissed with prejudice: (1) Defendant failed to adequately inform Plaintiff of the amounts owed in violation of 15 U.S.C. § 1692g(a); (2) Defendant misled Plaintiff as to what rights she possessed in violation of 15 U.S.C. § 1692e(10); (3) Defendant failed to adequately inform Plaintiff of her rights and how to exercise those rights in violation of 15 U.S.C. §§ 1692g(a)(3)-(5); and (4) Defendant attempted to collect a debt without the express statutory or contractual right to do so in violation of 15 U.S.C. § 1692f(1). Thus, the only remaining claim is Plaintiff's claim in Count I that Defendant failed to adequately inform Plaintiff of the amounts owed in violation of §§ 1692e(2) and (10).

Accordingly, it is **ORDERED and ADJUDGED** that:

1. Defendant's Motion to Dismiss the Amended Complaint (DE 26) is **GRANTED in part and DENIED in part**. All claims are dismissed with prejudice, except Plaintiff's claim in Count I that Defendant failed to adequately inform Plaintiff of the amounts owed in violation of §§ 1692e(2) and (10).

2. Defendant shall file an answer to the remaining claim within 14 days of the date of this order.

DONE AND ORDERED in chambers in Miami, Florida, this 9th day of November, 2017.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE