UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SHEDRICK D. WRIGHT,

Plaintiff,

v. **Case No: 6:18-cv-263-Orl-22KRS**

SANTANDER CONSUMER USA, INC. and ACE AUTO RECOVERY, INC.,

Defendants.

ORDER

This cause comes before the Court on Defendant Ace Auto Recovery, Inc.'s ("Ace") Motion to Dismiss Count VI (Fair Debt Collection and Practices Act) and Count VIII (negligence) of Plaintiff Shedrick D. Wright's Second Amended Complaint. (Doc. 18.) Plaintiff responded in opposition. (Doc. 29.) Plaintiff voluntarily dismissed his negligence count. (Doc. 30.) The motion is now ripe for review. For the foregoing reasons, the Court will **DENY** Ace's motion as to Count VI and **DENY as moot** Ace's motion as to Count VIII. Further, the Court *sua sponte* declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims and remands them to state court.

I. BACKGROUND

A. FACTUAL BACKGROUND

This action stems from Defendants Santander Consumer USA, Inc., d/b/a Chrysler Capital Corporation ("Santander") and Ace's alleged wrongful repossession of Plaintiff's automobile. On or about April 22, 2016, Plaintiff entered into a finance agreement with Santander for Santander to finance Plaintiff's purchase of a used 2016 Dodge Dart. (Doc. 2 at ¶¶ 7–9.) At the time, Santander was in the business of providing consumer credit for the financing of automobiles in Orange County, Florida. (*Id.* at ¶ 5.)

After purchasing the Dodge Dart, Plaintiff suffered significant financial difficulties as a result of health problems, specifically Plaintiff's diabetes diagnosis. (*Id.* at ¶ 11.) While undergoing treatment for his diabetes, Plaintiff was unable to work for significant periods of time. (*Id.*) Consequently, he fell behind on the installment payments on his Dodge Dart. (*Id.* at ¶ 12.) In July 2017, Plaintiff returned to work and communicated to Santander that he would become current on his payments as soon as possible. (*Id.* at ¶ 13.) Santander agreed to forbear taking any action against the Dodge Dart and Plaintiff agreed to make his next payment in August 2017. (*Id.* at ¶ 14.) Despite this agreement, Santander hired Ace to repossess the Dodge Dart. (*Id.* at ¶ 15.) Ace was a "recovery agency" licensed under Florida Statute § 493.6401. (*Id.* at ¶ 6.)

On July 15, 2017, at about 5:42 a.m., an Ace employee or agent went to Plaintiff's residence, located at 6214 West Harwood Avenue, Orlando, Florida, 32835, to repossess the Dodge Dart. (*Id.* at ¶ 16.) The sound of a truck outside Plaintiff's home woke Plaintiff. (*Id.* at ¶ 17.) When Plaintiff looked out the front window of his home, he saw a black tow truck pulling in under his home's carport. (*Id.* at ¶ 18.) When the tow truck driver exited the truck, the driver saw Plaintiff watching him. (*Id.*) To deter Plaintiff from interfering in the Dodge Dart's repossession, Plaintiff alleges that the driver repositioned a pistol on his belt "to purposefully and conspicuously display [it]." (*Id.* at ¶ 19.) Despite Plaintiff believing that the agent was wrongfully repossessing his Dodge Dart , Plaintiff alleges that he was put in immediate fear and apprehension of being injured by the driver. (*Id.* at ¶ 20.) Consequently, Plaintiff remained in his home and watched the driver tow the Dodge Dart from the carport. (*Id.*) Plaintiff alleges that he would have objected to the repossession if it were not for the driver's pistol. (*Id.*)

After the driver left, Plaintiff exited his home and found that the driver had damaged a Buick owned by his mother, Rosie Wright Harris, and a Chevrolet owned by his sister's boyfriend, Damon Moore, to gain access to the Dodge Dart. (*Id.* at ¶ 21.) The driver moved the Buick and

Chevrolet to obtain access to the Dodge Dart, which was parked behind these vehicles in the carport. (*Id.* at ¶ 22.) Both the Buick and Chevrolet sustained tire damage as a result of being dragged by the tow truck and the Buick had its front bumper ripped off by the tow truck. (*Id.* at ¶ 23.)

B. PROCEDURAL HISTORY

On September 28, 2017, Plaintiff initiated this action in the Ninth Judicial Circuit in and for Orange County, Florida. (Doc. 1-3 at 5–25.) On October 10, 2017, Plaintiff filed an Amended Complaint to name Ace, rather than Ace Auto Recovery of Orlando Corp., as a proper party-defendant. (*Id.* at 32.) On December 20, 2017, Plaintiff moved for leave to file a Second Amended Complaint, because Plaintiff improperly named and served Chrysler Capital Corporation, a Delaware Corporation, which he believed was the legal name of his lender. *Wright v. Chrysler Capital Corp.*, Case No. 2017-CA-008731-O (Fla. Cir. Ct. Dec. 20, 2017.) Plaintiff claimed to have learned that the proper party-defendant was actually a separate entity, Santander, and moved for leave to file the Second Amended Complaint so that the correct party would be named and served. (*Id*.) The motion was granted and on January 9, 2018, Plaintiff filed his Second Amended Complaint against the current defendants in this case, Ace and Santander, (collectively "Defendants"), seeking damages and injunctive relief and demanding a jury trial. *Wright v. Chrysler Capital Corp.*, Case No. 2017-CA-008731-O (Fla. Cir. Ct. Jan. 9, 2018.).

On February 21, 2018, Santander removed the present case to this Court based on federal question jurisdiction. (Doc. 1.) Plaintiff's Second Amended Complaint only consists of one federal claim: Count VI under the Fair Debt Collections Practices Act, § 15 U.S.C. § 1692, *et sequi*, ("FDCPA"), which is only being brought against Ace. (Doc. 2 at 11–13.) The remainder of Plaintiff's claims are state law claims: violations of the UCC only against Santander under Florida Statute § 679.609 and § 679.610(2) (Count I) ; trespass to chattels as to both Defendants (Count

II); equitable relief under the UCC only against Santander under Florida Statute § 679.625 (Count III); equitable relief under common law only against Santander (Count IV); conversion against both Defendants (Count V); replevin only against Santander under Florida Statute § 78.055 (Count VII); negligence only against Ace (Count VIII); and assault as to both Defendants (Count IX). (Doc. 2.) On March 26, 2018, Ace moved to dismiss Plaintiff's FDCPA (Count VI) and negligence claims (Count VIII). (Doc. 18.) On April 19, 2018, Plaintiff responded in opposition. (Doc. 29.) Contemporaneous to Plaintiff's filing the response, Plaintiff also voluntarily dismissed his negligence claim, mooting Ace's Motion to Dismiss as to Plaintiff's negligence claim. (Doc. 30.)

II. LEGAL STANDARD

For purposes of deciding a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court accepts as true the factual allegations in the complaint and draws all reasonable inferences in the light most favorable to the plaintiff. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010). "Generally, under the Federal Rules of Civil Procedure, a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). However, the plaintiff's complaint must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). Thus, the Court is not required to accept as true a legal conclusion merely because it is labeled a "factual allegation" in the complaint; it must also meet the threshold inquiry of facial plausibility. *Id.*

III. ANALYSIS

A. FDCPA Claim

"In order to succeed on a claim under the FDCPA, a [p]laintiff must prove that: (1) the plaintiff has been the object of collection activity arising from consumer debt, (2) the defendant is a debtor [sic] collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA." *Rojas v. Law Offices of Daniel C. Consuegra, P.L.*, 142 F. Supp. 3d 1206, 1211 (M.D. Fla. 2015) (citation and internal quotation marks omitted). Plaintiff and Ace only focus on the second element: whether Ace is a debt collector. Ace moves to dismiss Plaintiff's FDCPA claim because Ace, as a recovery agency, does not fall within the definition of a "debt collector" under the FDCPA. (Doc. 18 at 4.) The Court rejects this argument and finds that Ace is a debt collector under § 1692f(6) of the FDCPA.

The purpose of the FDCPA is to prohibit certain abusive practices by debt collectors. 15 U.S.C. § 1692(e). The statute only applies to debt collectors. *Harris v. Liberty Cmty. Mgmt., Inc.*, 702 F.3d 1298, 1302 (11th Cir. 2012). The FDCPA defines "debt collector" as any person who: (1) "uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts"; or (2) "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). While courts have recognized that repossession agencies are not generally considered to be a "debt collector" under the FDCPA, courts have held that § 1692f(6) of the FDCPA creates an exception for repossession agencies as enforcers of security interests. *See, e.g.*, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720, 198 L. Ed. 2d 177 (2017) ("So perhaps it comes as little surprise that we now face a question about who exactly qualifies as a 'debt collector' subject to the [FDCPA's] rigors. Everyone agrees that the term embraces the repo man—someone hired by a creditor to collect an outstanding debt."); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d

227, 236 (3d Cir. 2005) ("Section 1692a(6) thus recognizes that there are people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts."); *Montgomery v. Huntington Bank*, 346 F.3d 693, 700–01 (6th Cir. 2003) ("In sum, we likewise conclude that except for purposes of § 1692f(6), an enforcer of a security interest, such as a repossession agency, does not meet the statutory definition of a debt collector under the FDCPA."); *Jacobini v. JP Morgan Chase, N.A.*, No. 6:11-CV-231-ORL-31, 2012 WL 252437, at *3 (M.D. Fla. Jan. 26, 2012) ("The statute creates a specific exception for repossession agents in § 1692a(6) . . . ."); *Seibel v. Society Lease, Inc.*, 969 F.Supp. 713, 716–17 (M.D.Fla.1997) (concluding that except for purposes of § 1692f(6), a defendant in the business of repossessing vehicles does not fall within the FDCPA's definition of debt collector);*Fleming-Dudley v. Legal Investigations, Inc.*, No. 05 C 4648, 2007 WL 952026, at *4 (N.D. Ill. Mar. 22, 2007) (holding that a repossession company who repossessed the plaintiff's automobile qualified as a "debt collector" under § 1692f(6)) (citations omitted). 15 U.S.C. § 1692a(6) states: "For the purpose of section 1692f(6) of this title, [debt collector] also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests."

Plaintiff pleads sufficient allegations that Ace is a repossession agency whose principal purpose is the enforcement of security interests. In his Second Amended Complaint, Plaintiff alleges that: "[a]t all times material hereto, Ace Auto Recovery was a 'recovery agency' licensed under Florida Statute §493.6401." (Doc. 2 at ¶ 6.) Florida law defines "recovery agency" as "any person who, for consideration, advertises as providing or is engaged in the business of performing repossessions." Fla. Stat. § 493.6101(21). Plaintiff also alleges that Santander hired Ace to repossess Plaintiff's Dodge Dart and Ace repossessed the automobile. (Doc. 2 at ¶¶ 15 & 20.) Ace highlights the FDCPA's list of six classes of people and entities who are not considered debt

collectors under the FDCPA, implicitly arguing that it is member of two of the classes.[1] *See* 15 U.S.C. § 1692a(6). However, repossession agencies are not specifically named in this list. *Id*.; *Rivera v. Dealer Funding, LLC*, 178 F. Supp. 3d 272, 277 (E.D. Pa. 2016) ("The six classes of excluded debt collectors listed did not specifically state repossession agencies.") (citing 15 U.S.C. § 1692a(6)); *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 656 (D. Del. 1990) (holding the same).

Section 1692f(6) provides that an enforcer of a security interest, such as a repossession agency, violates the FDCPA by: "Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if- there is no present right to possession of the property claimed as collateral through an enforceable security interest. . . . " As a repossession agency, "only Section 1692f(6) of the FDCPA will apply to [Ace],and this section will only apply if [Santander or Ace] did not have a present right in the [automobile]." *Seibel*, 969 F. Supp. at 717. Plaintiff alleges that Ace breached the peace when Ace's employee repossessed the Dodge Dart. (Doc. 2 at ¶ 73.) Plaintiff alleges that Santander hired Ace to repossess the Dodge Dart in July 2017 after Santander agreed to forbear any action against the Dodge Dart as a result of Plaintiff falling behind on his payments and to allow Plaintiff to make his next payment in August 2017. (Doc. 2 at ¶¶ 14–15.) These allegations are sufficient to show that Ace and Santander lacked a present interest to possess the Dodge Dart and thus Ace would qualify as "debt collector" under § 1692f(6) of the FDCPA.

In addressing Plaintiff's breach of the peace allegations, "[c]ourts presented with the issue of determining whether a repossession agency has violated § 1692f(6) look to the applicable state

[1]The two classes highlighted by Ace "are any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor" and "any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts." 15 U.S.C. § 1692a(6)(A)–(B).

self-help repossession statute which identifies the circumstances under which an enforcer of a security interest does not have a present right to the collateral at issue." *Alexander v. Blackhawk Recovery & Investigation, L.L.C.*, 731 F. Supp. 2d 674, 679 (E.D. Mich. 2010) (citing *Purkett v. Key Bank USA, N.A.*, No. 01–C–162, 2001 WL 503050, *2–3 (N.D. Ill. May 10, 2001) and *Fleming–Dudley*, 2007 WL 952026, at *5.) Under Florida's self-help repossession statute, a repossession agency can only repossess collateral, "if it proceeds without breach of the peace." Fla. Stat. § 679.609(2)(b). Therefore, if a repossession agency breaches the peace during a self-help repossession, then it loses its right to present possession of the collateral. *See Vantu v. Echo Recovery, L.L.C.*, 85 F. Supp. 3d 939, 943 (N.D. Ohio 2015) ("In general, a security-interest enforcer loses its right to present possession of the collateral if it breaches the peace.") (interpreting Ohio's self-help repossession statute which is virtually identical to the Florida counterpart).

Under Florida law, "[t]he test to determine whether a breach of the peace has occurred is whether there was entry by the creditor upon the debtor's premises; and whether the debtor or one acting on his behalf consented to the entry and possession." *In re 53 Foot Trawler Pegasus*, No. 608-CV-117-ORL-18DAB, 2008 WL 4938345, at *4 (M.D. Fla. Nov. 18, 2008) (citations omitted). In addressing entry, the Florida Supreme Court has noted:

> [I]n general, the creditor may not enter the debtor's home or garage without permission, but he can probably take a car from the debtor's driveway without incurring liability. . . . We have found no case which holds that the repossession of an automobile from a driveway or a public street (absent other circumstances, such as the debtor's objection) constitutes a breach of the peace, and many cases uphold such a repossession.

Northside Motors of Fla., Inc. v. Brinkley, 282 So. 2d 617, 624 (Fla. 1973) (citation and internal quotation marks omitted). This case did not involve the mere entry of Ace's tow truck driver into Plaintiff's carport to retrieve the Dodge Dart. Plaintiff alleges that Ace's tow truck driver dragged his mother's Buick and sister's boyfriend's Chevrolet to gain access to the Dodge Dart, damaged the tires of these automobiles, ripped off the Buick's front bumper, and displayed a pistol to

Plaintiff so that Plaintiff would not interfere with the repossession. In analyzing consent, "[c]onsent must be freely given to enter the property of a debtor in order to repossess. The debtor may revoke the right to self-help repossession by objecting to the repossession. Entry after consent has been revoked is a breach of the peace." *Seibel*, 969 F. Supp. at 718 (citing *Quest v. Barnett Bank of Pensacola*, 397 So. 2d 1020, 1023 (Fla. 1st DCA 1981)). Here, the allegations show that Plaintiff did not freely consent to the repossession. Plaintiff alleges that Ace's tow truck driver purposefully displayed a pistol at him to dissuade Plaintiff from interfering with the repossession. As a result, Plaintiff was in fear of his life and did not object to the repossession. In considering all of these allegations as a whole, Plaintiff sufficiently pleads that Ace breached the peace during the repossession, and thus lacked a present interest to repossess the Dodge Dart and qualifies as a debt collector under § 1692f(6) of the FDCPA. *See Lee v. Toyota Motor Sales USA Inc*, No. 16-CV-03195-JCS, 2016 WL 4608220, at *4 (N.D. Cal. Sept. 6, 2016) ("Although a repossession agency generally is *not* considered to be a 'debt collector,' 15 U.S.C. § 1692(a) creates a limited exception where the 'principal purpose' of the business is the enforcement of security interests and it violates 15 U.S.C. § 1692f(6) by dispossessing an individual of property where 'there is no present right to possession.'") (emphasis in original) (citations omitted).

Alternatively, the Court also finds that Plaintiff sufficiently pleads that Santander and Ace lacked a present interest to repossess the Dodge Dart based on Plaintiff alleging that Santander and Plaintiff agreed in July 2017 that Santander would forbear taking any action on the Dodge Dart and allow Plaintiff to make his August 2017 payment; however, Santander hired Ace to repossess the automobile and Ace repossessed the Dodge Dart on July 15, 2017. *See Harris v. Americredit Fin. Servs., Inc.,* No. CIV.A.3:05CV00014, 2005 WL 2180477, at *2 (W.D. Va. Sept. 9, 2005) (finding that plaintiff stated a claim under § 1692f(6) by alleging that the repossession agency

repossessed plaintiff's car on January 20, 2005 despite the creditor and plaintiff's agreement to give the plaintiff until January 28, 2005 to cure the late condition of the loan).

Accordingly, the Court finds that Ace is a debt collector under § 1692f(6) of the FDCPA and Plaintiff's FDCPA claim may go forward.

B. Declining Supplemental Jurisdiction

Plaintiff alleges only one federal claim in his Second Amended Complaint, the FDCPA claim in Count VI only against Ace. The Court has federal question jurisdiction over this claim. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Santander seeks to have the Court assert supplemental jurisdiction over the state law claims for violations of the UCC, trespass to chattels, equitable relief under the UCC, equitable relief under common law, conversion, replevin, negligence[2], and assault. (*See* Doc. 1.) "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a).

Despite that neither party raises the issue of supplemental jurisdiction, the Court may examine the issue *sua sponte*. *See Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1997 WL 312583 (9th Cir. June 12, 1997) (*en banc*; recognizing that although district court is not required to *sua sponte* consider whether to accept or decline supplemental jurisdiction, better practice is for it to do so), *supplemented by* 121 F.3d 714 (9th Cir. 1997).

Pursuant to 28 U.S.C. § 1376(c), the Court may decline to exercise jurisdiction over state claims if:

(1) the claim raises a novel or complex issue of State law;

[2]As discussed *supra*, the Court will not address this claim as Plaintiff voluntarily dismissed it.

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;

(3) the district court has dismissed all claims over which it has original jurisdiction; or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

Additional factors a court should consider in exercising its discretion are judicial economy, convenience, fairness, and comity. *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1288 (11th Cir. 2002). "Both comity and economy are served when issues of state law are resolved by state courts." *Id.* Notably, "[a]ny one of the section 1367(c) factors is sufficient to give the district court discretion to dismiss a case's supplemental state law claims." *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006). Whether to dismiss or to retain jurisdiction over supplemental claims, provided there is a basis in § 1367(c) for doing so, is a decision within the court's discretion. *McDuffie v. Broward Cty., Florida*, No. 15-14416, 2016 WL 2997192, at *2 (11th Cir. May 25, 2016).

Courts considering supplemental jurisdiction have declined to exercise jurisdiction in cases in which the state claims require different or foreign elements of proof. *See Ciavaglia v. Gevity H.R. Inc.*, No. 6:07-cv-1206-Orl-22KRS, 2008 WL 782494, at *1 (M.D. Fla. Mar. 20, 2008) (citing *James v. Sunglass Hut of California, Inc.*, 799 F. Supp. 1083, 1085 (D. Colo. 1992) (declining to exercise supplemental jurisdiction over employee's state law claims where they substantially predominated over ADEA claim)). Additionally, courts in this circuit have hesitated to exercise supplemental jurisdiction over state claims which would only serve to introduce jury confusion and delay. *See Morales v. Aldie's Certified Auto Body & Mech., Inc.*, No. 6:07-cv-1470-Orl-22GJK, 2008 WL 782497, at *1 (M.D. Fla. Mar. 20, 2008); *Bennett v. Southern Marine Mgmt.*

Co., 531 F. Supp. 115, 117–118 (M.D. Fla. 1982) (holding that combining Title VII and state tort and contract claims would cause confusion and delay, which is at odds with important federal policies underlying Title VII); *Williams v. Bennett*, 689 F.2d 1370, 1380 (11th Cir. 1982) (affirming trial judge's exercise of discretion not to assert pendent party jurisdiction and deference to state court's resolution of the state law claim of assault and battery), *cert. denied*, 464 U.S. 932, 104 S. Ct. 335, 78 L. Ed. 2d 305 (1983). Finally, courts have pointed to differences in recoverable damages as a basis for refusing to exercise supplemental or pendent jurisdiction. *See James*, 799 F. Supp. at 1085 ("all the state law claims involve damages not available under ADEA"); *Bennett*, 531 F. Supp. at 117 ("[T]hese state claims also support theories of recovery unavailable under Title VII; presentation of additional elements of damages necessarily involves additional discovery and trial time").

In Count VI, Plaintiff alleges a violation of § 1692f(6) of the FDCPA only against Ace for Ace's driver's alleged breach of the peace during the repossession. A purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). " In order to succeed on a claim under the FDCPA, a [p]laintiff must prove that: (1) the plaintiff has been the object of collection activity arising from consumer debt, (2) the defendant is a debtor [sic] collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA." *Rojas v. Law Offices of Daniel C. Consuegra, P.L.*, 142 F. Supp. 3d 1206, 1211 (M.D. Fla. 2015) (citation and internal quotation marks omitted). The FDCPA prohibits, among other things, "a debt collector [from using] unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f.

In contrast, the elements to prove Plaintiff's state law claims are significantly different. Plaintiff asserts a state law claim for conversion against both Defendants based on the repossession and possible selling or disposition of the Dodge Dart. Under Florida law, "[i]t is well settled that

a conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time. Conversion may be demonstrated by a plaintiff's demand and a defendant's refusal." *Mayo v. Allen*, 973 So. 2d 1257, 1259 (Fla. 1st DCA 2008) (citations omitted). Plaintiff also asserts a trespass to chattels claim against Defendants. "Trespass to chattel requires the intentional use of, or interference with, a chattel which is in the possession of another, *without justification*." *Schutt v. Lewis*, No. 6:12-CV-1697-ORL-37, 2014 WL 3908187, at *4 (M.D. Fla. Aug. 11, 2014) (emphasis in original) (citation and internal quotation marks omitted). Further, Plaintiff asserts an assault claim against Defendants. "To prove assault, section 784.011, Florida Statutes, requires proof of the following three elements: "(1) an intentional, unlawful threat; (2) an apparent ability to carry out the threat; and (3) creation of a well-founded fear that the violence is imminent." *Cannon v. Thomas ex rel. Jewett*, 133 So. 3d 634, 639 (Fla. 1st DCA 2014) (citation and internal quotation marks omitted). Plaintiff also asserts a replevin claim under Florida Statute § 78.055 only against Santander. "[R]eplevin is a possessory statutory action at law in which the main issue is the right to immediate possession and the gist of the action is the wrongful detention of the property. . . ." *Ethiopian Zion Coptic Church v. City of Miami Beach*, 376 So. 2d 925, 926 (Fla. 3d DCA 1979); *see* Fla. Stat. § 78.01. Florida Statute § 78.055 sets forth the requirements to state a replevin claim. These requirements include, a complaint for replevin containing "[a] description of the claimed property that is sufficient to make possible its identification and a statement, to the best knowledge, information, and belief of the plaintiff of the value of such property and its location." Fla. Stat. § 78.055(1).

Plaintiff's remaining state law claims are connected. In Count I, Plaintiff alleges violations of the UCC under Florida Statute § 679.609 and § 679.610(2) only against Santander. In Counts III and IV, Plaintiff requests equitable relief under the UCC and common law based on the same UCC violations that form the basis of Count I. Plaintiff's counsel should have included these

requests for equitable relief in Plaintiff's prayer for relief instead of separate counts. In Count I, Plaintiff alleges that Santander violated Florida Statute § 679.609, the self-help statute, by repossessing the Dodge Dart in the absence of a default and the repossession involving a breach of the peace. Florida Statute § 679.609 authorizes a secured party to repossess collateral without court intervention (1) after a default and (2) "if it proceeds without breach of the peace." As addressed *supra*, while an analysis of if Defendants' actions constituted a breach of the peace was necessary to determine if Ace qualified as a debt collector under FDCPA, the elements of a FDCPA and § 679.609 are still significantly different. Besides the debt collector requirement, FDCPA also requires that the plaintiff has been the object of collection activity arising from consumer debt. Whereas, a § 679.609 claim also requires a secured party and a default. In Count I, Plaintiff alleges that Santander violated Florida Statute § 679.610 by repossessing the Dodge Dart in a commercially unreasonable manner[3] and failing to provide notice to Plaintiff of the Dodge Dart's sale or disposition. *See Landmark First Nat. Bank of Fort Lauderdale v. Gepetto's Tale O' The Whale of Fort Lauderdale, Inc.*, 498 So. 2d 920, 922 (Fla. 1986) (Notice is an integral aspect of whether the disposition is "commercially reasonable" under chapter 679."). Under Florida Statute § 679.610(1), "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." However, "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." Fla. Stat. § 679.610(2). The purpose of these rules is, in part, "to protect the debtor, because they help prevent the creditor from acquiring the collateral at less than its true value or unfairly understating its value

[3]From the Court's reading of the statute and case law, the statute requires the post-repossession disposition of collateral to be in a commercially reasonable manner; this same restriction does not appear to apply to the repossession itself. *Spellman v. Indep. Bankers' Bank of Fla.*, 161 So. 3d 505, 507 (Fla. 5th DCA 2014) ("Under . . . section 679.609(1). . . a secured party. . . may take possession of collateral after a debtor's default. The secured party *then* 'may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.'") (emphasis added) (citing Fla. Stat. § 679.609(1)).

so as to obtain an excessive deficiency judgment." *Allen v. Coates*, 661 So.2d 879, 884 (Fla. 1st DCA 1995). If a debtor places the creditor's compliance with the UCC requirements in issue, it becomes the creditor's "burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part." Fla. Stat. § 679.626(2). Moreover, there are differences in recoverable damages for Plaintiff's UCC and FDCPA claims. The FDCPA allows for the recovery of actual damages and statutory damages for up to $1,000. 15 U.S.C. § 1692k . While the UCC allows for actual damages, it does not have a cap on statutory damages, but instead states:

> If the collateral is consumer goods, a person who was a debtor . . . . at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price

Fla. Stat. § 679.625(3)(b). In lieu of actual damages, the UCC also allows a debtor to recover $500 in each case from a person who violates certain provisions. Fla. Stat. § 679.625(5). Since the Court will be declining to take supplemental jurisdiction over Plaintiff's UCC claims under Count I and remanding them to state court, it logically follows that Plaintiff's claims for equitable relief under UCC and common law in Counts III and IV for these violations would have to follow Count I to state court.

Therefore, the Court declines supplemental jurisdiction over Plaintiff's state law claims as all of Plaintiff's state law claims will require "elements of proof distinctly different" from Plaintiff's FDCPA claim. Moreover, the Court is convinced that trying the federal and state claims together would present a substantial risk of jury confusion. Further, the state law claims involve Santander, a defendant that is not a party to the federal claim. In addition, as Santander is a defendant in all of the remaining state law claims, in the interests of avoiding conflicting judicial decisions and unnecessary duplication of judicial resources, it would be best to have all of

Plaintiff's state claims heard in state court. *See Ingram v. Sch. Bd. of Miami-Dade Cty*., 167 F. App'x 107, 108 (11th Cir. 2006) (noting that "[s]tate courts, not federal courts, should be the final arbiters of state law")[4] (quoting *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir.1997)). Further, Plaintiff's FDCPA and UCC claims have differences in recoverable damages.

IV. CONCLUSION

The Court finds that judicial economy and convenience would not be served by retaining jurisdiction over Plaintiff's state law claims. After due consideration, in the exercise of discretion pursuant to 28 U.S.C. § 1367(c)(2), the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims, and will remand them to the state court. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., Fla.*, 402 F.3d 1092, 1123 (11th Cir. 2005) (when action originates in state court proper procedure is to remand to state court the state claims in which the court declines to exercise supplemental jurisdiction).

Based on the foregoing, it is ordered as follows:

1. Defendant Ace Auto Recovery Inc.'s Motion to Dismiss, (Doc. 18), filed on March 26, 2018, is **DENIED** as to Count VI and **DENIED as moot** as to Count VIII.

2. Pursuant to 28 U.S.C. § 1367, the Court in its discretion **DECLINES** to exercise supplemental jurisdiction over Plaintiff Shedrick Wright's state law claims**, Counts I, II, III, IV,V, VII, and IX**.

3. Plaintiff's state law claims, **Counts I, II, III, IV,V, VII, and IX**, are **REMANDED** to the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, Case No. 17-CA 8731 O.

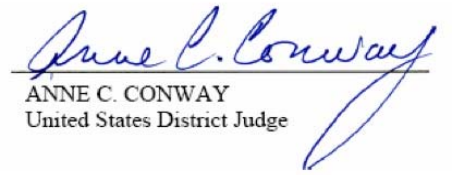
[4]Unpublished opinions of the Eleventh Circuit constitute persuasive, not binding, authority. *See* 11th Cir. R. 36-2 and I.O.P. 6.

4. The case shall proceed on the Fair Debt Collections Practices Act claim asserted in Count VI only against Defendant Ace Auto Recovery, Inc.

5. As Count VI is only asserted against Defendant Ace Auto Recovery, Inc., the Clerk shall **TERMINATE** Defendant Santander Consumer USA, Inc. as a party to this action.[5]

6. Plaintiff shall file a Third Amended Complaint alleging only his FDCPA claim against Ace **within 14 days** of the date of this Order. Failure to comply with this Order shall result in dismissal of this action for lack of prosecution, without further notice.

DONE and **ORDERED** in Chambers, in Orlando, Florida on May 1, 2018.



Copies furnished to:

Counsel of Record
The Clerk of the Circuit Court Ninth Judicial Circuit in and for Orange County, Florida

[5]On March 7, 2018, this Court issued a Show Cause Order, requiring Santander to show why this case should not be remanded for improper removal because Santander removed the case although there were no federal claims against Santander and the "Joinder and Consent to Removal" was signed by Ace's president and not executed by an attorney. (Doc. 11.) On March 20, 2018, Santander responded to the Order. (Doc. 16.) Since the Court is terminating Santander from the case, this issue need not be addressed.