IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HSIAO YIP, Plaintiff, v. DYNAMIC RECOVERY SOLUTIONS LLC, LVNV FUNDING LLC, AND RESURGENT CAPITAL SERVICES, LP, Defendants.	CASE NO. 1:18-CV-02586-TWT-JSA

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant LVNV Funding, LLC ("LVNV") and Defendant Resurgent Capital Services, LP ("Resurgent") (collectively "Defendants"), by counsel and pursuant to Federal Rule of Civil Procedure 12(b)(6), submit this Reply in Support of their Motion to Dismiss (the "Motion") [ECF 20], respectfully showing the Court as follows:

INTRODUCTION

Plaintiff's Response in Opposition to the Motion (the "Response" or "Resp.") [ECF 23] does nothing to bolster her meritless claims against Defendants. She does

not, and cannot, dispute that she never even saw two of the three letters that form the basis of her Complaint. Thus, she suffered no injury-in-fact because of those letters and lacks standing to bring claims regarding them. Even looking to the substance of Plaintiff's claims, they fail as a matter of law. First, Plaintiff willfully ignores the fact that a court in this Circuit has held, as a matter of law, that the exact language used in the letter sent to Plaintiff does not violate the Fair Debt Collection Practices Act ("FDCPA"). Second, adding interest to Plaintiff's debt after it was charged off by the original creditor is expressly permitted by law, and thus, as a matter of law, Plaintiff cannot demonstrate that Defendants "falsely characterized the character and amount of debt" or that Defendants "sought to collect an amount" not permitted by law.

ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff lacks standing to bring claims regarding the Resurgent Letters

As explained in the Motion, Resurgent sent two letters to Plaintiff's counsel responding to his request for verification of the debt. [ECF 20-1, p. 3]. Because the Complaint contains "no allegation that Plaintiff ever saw—much less was confused by—the letters Resurgent sent to her counsel," Defendants argued that she lacked the Constitutional minimum of standing to bring claims regarding those letters. [*Id.* p. 8]. Plaintiff's Response conspicuously ignores the fact that she never even knew

about the Resurgent letters. [*See* ECF 23, pp. 4–7]. Instead, she rests her standing argument on two cases: one that has nothing to do with standing and another where the plaintiff read the letter at issue. Neither is persuasive.

Plaintiff believes Defendants are arguing "that letters sent directly to [Plaintiff's] legal counsel cannot violate the FDCPA." [*Id*. p. 5]. Defendants' take no such position, and so Plaintiff's reliance on *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291 (11th Cir. 2015) is unavailing. [*See* ECF 23, pp. 4–5]. *Miljkovic* simply held that communications with a consumer's attorney are subject to the FDCPA. 791 F.3d at 1302–03. But the case has nothing to do with standing and does not absolve Plaintiff of her burden to allege that the Resurgent letters caused her an injury in fact. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).

The other case primarily relied on by Plaintiff at least involves standing. [ECF 23, pp. 5–6]; *Church v. Accretive Health, Inc.*, 654 F. App'x 990, 992-95 (11th Cir. 2016). But *Church* is so readily distinguishable from the facts at bar that it only serves to illustrate Plaintiff's lack of standing with regard to the Resurgent letters. In *Church*, the plaintiff actually read the letter at issue and alleged that it failed to provide her statutorily required information, made her "very angry," and caused her to "cr[y] a lot." 654 F. App'x at 991. The dispute was over whether these injuries

she allegedly suffered after actually reading the letter were sufficiently concrete and particularized to confer standing. *Id*. at 992-95. Again, there is no allegation that Plaintiff was ever even aware the Resurgent letters existed. [*See* ECF 1].

Plaintiff makes much of her allegations of "actual damages." [ECF 23, pp. 5–6]. But those allegations are beside the point because nothing in the Complaint plausibly connects the supposed damages to the Resurgent letters. To be sure, Plaintiff's shotgun pleading is difficult to decipher.[1] Plaintiff alleges that she suffered "stress, anxiety, and emotional distress," but this cannot have been caused by the Resurgent letters because Plaintiff did not read them. [*See* ECF 1, p. 19, ¶75]. Plaintiff also alleges she "lost time[ ] [and] resources" because she "made use of legal counsel to determine the validity of Defendants' claims," but this cannot have been caused by the Resurgent letters either because she hired her attorney before those letters were sent. [*See id*. p. 20, ¶¶76–78]. The letters were sent to her attorney because he requested documentation from Defendants.

[1] Plaintiff's Complaint is a paradigmatic example of the "most common type" of shotgun pleading—a "complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint." *See Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1322 (11th Cir. 2015). Defendants could have moved to dismiss on this ground but did not because they want this matter disposed of on the merits.

Perhaps recognizing that her alleged damages have nothing to do with the Resurgent letters, Plaintiff tries to rely on a 36-year-old Supreme Court decision for the proposition that she can demonstrate an injury-in-fact "solely by virtue" of a statutory violation. [ECF 23, p. 6]; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S. Ct. 1114, 1121, 71 L. Ed. 2d 214 (1982). As the Supreme Court has repeatedly explained since then, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549; *see also Summers v. Earth Island Institute*, 555 U.S. 488, 497, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (holding that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute"); *Raines v. Byrd,* 521 U.S. 811, 820 n.3, 117 S. Ct. 2312, 2318, 138 L. Ed. 2d 849 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."). Binding Eleventh Circuit precedent likewise holds that a statutory "violation, on its own, may not cause any harm or present a material risk of harm." *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340 (11th Cir. 2017).

Put simply, Plaintiff fails to meet her burden of alleging standing as to the Resurgent letters because the Complaint does not plausibly allege that her supposed damages are fairly traceable to those letters. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a the "factual content" of the complaint must allow "the court to draw the reasonable inference" that plaintiff has established the necessary elements of a claim). Plaintiff simply ignores the fact that this very Court has held that a plaintiff who does not allege she was actually "confused or misled" does not have Constitutional standing. *Stone v. U.S. Sec. Assocs., Inc.*, No. 1:16-CV-0371-MLB-JSA, 2018 WL 3745051, at *13 (N.D. Ga. May 31, 2018). In any event, none of the letters violated the FDCPA.

B. Plaintiff's Complaint fails to state a claim

1. The Statute of Limitations Language

Plaintiff spends four pages of her response discussing statute of limitations language contained in the letter sent to her by Dynamic Recovery Solutions, LLC ("Dynamic"), but not once does she quote the supposedly "deceptive language." [ECF 23, pp. 8–11]. Also absent from Plaintiff's response is any mention of the case from this Circuit, cited by Defendants, holding that the exact language used in the Dynamic letter does not violate the FDCPA—*Valle v. First Nat'l Collection Bureau, Inc.*, 252 F. Supp. 3d 1332, 1339–40 (S.D. Fla. 2017). Plaintiff further neglects to

discuss the fact that the language used in the letter is mandated by two consent decrees with the Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB"). *Id*. Instead, she tries to rely on her conclusory say-so that she "did not understand the deceptive language in the letter." [ECF 23, p. 10].

Defendant agrees that the Eleventh Circuit employs "the 'least-sophisticated consumer' standard" to evaluate whether a "communication violates § 1692e of the FDCPA." *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193–94 (11th Cir. 2010). This standard "prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *Id*. 1194 (quoting *United States v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 136 (4th Cir. 1996)). The question is not how Plaintiff subjectively understood the letter, but how the least sophisticated consumer would perceive the statements. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174–75 (11th Cir. 1985). Even the "'least sophisticated consumer' can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." *LeBlanc*, 601 F.3d at 1194 (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993)).

Plaintiff's *ipse dixit* that she "did not understand" the letter does not state a claim under the FDCPA. The language regarding the statute of limitations was clear and unequivocal: "Because of the age of your debt, LVNV Funding LLC will not

sue you for it . . . .” [ECF 20-2, p. 1]. As Defendants argued, if “such language qualifies as a ‘false representation or deceptive means’ under15 U.S.C. § 1692e(10), it is difficult to conceive what language could ever be used that would be sufficiently clear.” [ECF 20-1, p. 10]. Nowhere in her response does Plaintiff explain what language she believes would have been clear to the least sophisticated consumer. [ECF 23, pp. 8–11].

Again, whether the language is “false, misleading, or deceptive” is not a wholly subjective question, as Plaintiff seems to believe. The language is viewed from the perspective of the least sophisticated consumer, not Plaintiff’s. *Jeter*, 760 F.2d 1174–75. Nothing prevents this Court from holding, as another court in this Circuit already has, that the language does not violate the FDCPA as a matter of law. *Valle*, 252 F. Supp. 3d at 1339–40. Plaintiff ignores this and suggests the issue is “better left for summary judgment.” [ECF 23, p. 9]. But she never explains—because she cannot—how exactly the discovery process could change the import of the actual undisputed language used in the Dynamic letter. The standard at summary judgment, after all, is still whether one of the parties “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56.

Plaintiff next tries to rely on her allegation “that the Dynamic Letter intentionally and purposefully hid [the] disclosure text regarding the state [*sic*] of

limitations." [ECF 23, pp. 9–10]. Of course, she ignores the fact that the statute of limitations disclosure is on the very first page of the letter and "actually appears in a slightly larger typeface than the allegedly offending language suggesting various payment options." [ECF 20-1, p. 9; ECF 20-2, p. 1]. Plaintiff does not address the binding Eleventh Circuit authority holding that even the least sophisticated consumer must possess "a willingness to read a collection notice with some care." *LeBlanc*, 601 F.3d at 1194.

While Plaintiff discusses the language in the Dynamic letter regarding whether "the debt was barred by the applicable statute of limitations," she never addresses Defendants' argument that the Dynamic letter's language regarding partial payments did not violate the FDCPA, and thus appears to be conceding this argument. [*See* ECF 20-1, pp. 10–12; ECF 23, pp. 8–10]. She does argue that Defendants "concede" that she "sufficiently stated a claim regarding the Resurgent Letters and their statute of limitations language." [ECF 23, pp. 10–11]. Defendants concede no such thing.

First, the Resurgent Letters do not contain any allegedly offending "partial payment options" or settlement offers and thus, unsurprisingly, do not discuss what effect partial payments might have. [ECF 20-3; ECF 20-4]. The letters were sent, again at the behest of Plaintiff's counsel, to provide verification of the debt [ECF

20-3] and a privacy notice [ECF 20-4]. Second, Plaintiff cites no authority for the absurd proposition that such letters are "deceptive" unless they contain notices about what would happen if Plaintiff made a partial payment, especially when the effect of a partial payment was already adequately explained to Plaintiff. [*See* ECF 20-2, p. 1].

Third, as Defendants explained in their Motion, a partial payment alone is not sufficient to revive a debt under Georgia law. [ECF 20-1, p. 11 (citing *Bingham v. Advance Indus. Sec., Inc.*, 138 Ga. App. 875, 875, 228 S.E.2d 1, 2 (1976))]. "No case has determined that a debt collector must warn of a potential revival of a time-barred claim, and the relevant administrative agency has explicitly declined to require such a warning, precisely because of the danger of consumer confusion." *Boedicker v. Midland Credit Mgmt., Inc.*, 227 F. Supp. 3d 1235, 1241 (D. Kan. 2016); *see also Olsen v. Cavalry Portfolio Servs., LLC*, No. 8:15-CV-2520-T-23AAS, 2016 WL 4248009, at *2 (M.D. Fla. Aug. 11, 2016) (holding that "the FDCPA imposes on [a debt collector] no duty to advise [a consumer] of . . . the consequence of partial payment"); *Ehrich v. Convergent Outsourcing, Inc.*, No. 1:15-CV-22796-KMM, 2015 WL 6470453, at *2 (S.D. Fla. Oct. 27, 2015) (holding that, even under the least sophisticated consumer standard, "a debt collector is not required to advise a consumer of any potential defenses to a legal action").

2. Post-Charge-Off Interest

Plaintiff never even attempts to explain what portion of the FDCPA Defendants allegedly violated by adding post-charge-off interest to her debt. [*See* ECF 23, pp. 11–16]. Doing the work for her, Plaintiff appears to contend that Defendants sought to collect an amount "not permitted by law, in violation of 15 U.S.C. § 1692f(1)." [ECF 1, p. 24, ¶94]. By doing this, Defendants allegedly "falsely characterized the character and amounts of debt, in violation of 15 U.S.C. § 1692e(2)(A)." [*Id*. p. 23, ¶91]. This was also supposedly false and misleading, deceptive, unconscionable, false credit information, etc. [*Id*. pp. 23–25, ¶¶89–99]. Thus, the question is: Were Defendants permitted by law to add post-charge-off interest to Plaintiff's debt? If so, they did not seek to collect an amount "not permitted by law," they did not "falsely characterize[ ]" the debt," the letters were not false or misleading, etc.

Plaintiff asserts that her complaint outlines "the many reasons why application of *any* post-charge-off interest to her account would violate the FDCPA," and thus the Court cannot grant the Motion to Dismiss. [ECF 23, p. 12]. But Defendants thoroughly refuted her argument, based on Kentucky law, that Defendants could not apply prejudgment interest to a charged off debt. [ECF 20-1, pp. 12–15]. Plaintiff contends that "Georgia's statutory interest law only applies to accounts where the

interest is not otherwise set by contract," which is true but does not support her argument that Defendants could not add post-charge-off interest. [*See* ECF 23, p. 12]. Plaintiff's entire argument is that the contractual interest rate was waived. Thus, the interest rate on her debt was no longer "established by written contract." *See* O.C.G.A. § 7-4-2. As Defendants explained, Georgia's statute is like the Kansas, Missouri, and Oklahoma prejudgment interest statutes, and Courts in each of those states "have held those prejudgment interest states apply even when a previously agreed upon contractual interest rate was waived because the debt was charged off." [ECF 20-1, pp. 14–15]. Plaintiff does not dispute this.

Plaintiff also relies on the bald legal assertion from her Complaint that "federal law prohibits imposing finance charges without periodic statements." [ECF 23, p. 12]. Conveniently, she ignores Defendants explanation for why this regulation does nothing to prevent the addition of post-charge-off interest. It has nothing to do with the FDCPA or the Georgia Fair Business Practices Act ("GFBPA"). [*See* ECF 20-1, p. 15]. The regulation—12 C.F.R. § 226.5(b)(2)(i)—comes from the Truth in Lending Act ("TILA"), and Plaintiff has brought no claim under that statute. Even if she had brought such a claim, her argument is legally incorrect. As the Eighth Circuit held, the regulation relied on by Plaintiff is "concerned with adequately communicating contractual terms addressing interest and finance charges." *Haney*

v. Portfolio Recovery Assocs., LLC, 895 F.3d 974, 985 (8th Cir. 2016). It does not apply to prejudgment interest. *Id.*

Finally, Plaintiff tries to argue that Defendants could not apply post-charge-off interest because the original creditor waived such interest. [ECF 23, pp. 14–16]. For this, she bases her argument entirely on a decision from the Eastern District of Michigan that was **vacated in its entirety**. *McDonald v. Asset Acceptance LLC*, 296 F.R.D. 513, 518 (E.D. Mich. 2013), *vacated*, No. 11-11122, 2016 WL 7325655 (E.D. Mich. June 23, 2016). What's more, that case has nothing to do with this one. *McDonald* dealt with a situation where the purchaser of the debt tried to "retroactively impose interest for the period in which it did not own the accounts." 296 F.R.D. at 526. Plaintiff does not allege that Defendants added interest for a period before the account was charged off; she alleges "Defendants have added and continue to charge and attempt to collect **post-charge-off** interest." [ECF 1, p. 18, ¶70] (emphasis added).

Defendants are statutorily entitled—i.e. entitled as a matter of law—to impose interest on Plaintiff's debt. *See* O.C.G.A. § 7-4-2(a)(1)(A). Nothing in Plaintiff's response refutes this. The only Georgia authority she cites is *Houghton v. Sacor Fin., Inc.*, 337 Ga. App. 254, 786 S.E.2d 903 (2016), which stands for the proposition that an assignee stands in the shoes of the assignor. [ECF 23, pp. 11–16]. Plaintiff does

not cite a single legal authority demonstrating that "application of *any* post-charge-off interest to her account would violate the FDCPA." [*See id*.] (emphasis in original). Defendants were entitled as a matter of law to add post-charge-off, prejudgment interest. [*See* ECF 20-1, pp. 12–15]. Thus, Plaintiff fails to state a claim that Defendants sought to collect an amount "not permitted by law," "falsely characterized" the amount of the debt," made false or misleading statements about the amount of the debt, etc. Count 2 fails as a matter of law.

3. Plaintiff's GFBPA Claims

Lastly, Plaintiff implicitly concedes that the only way she attempts to plead a claim under the GFBPA is by asserting "one of more claims against Defendants for violations of the FDCPA." [ECF 23, p. 16]. Because the FDCPA claims fail for the reasons discussed above, her GFBPA claims fail as well.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss [ECF 20].

This 9th day of October 2018.

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CERTIFICATE OF SERVICE, FONT AND MARGINS

I certify that I have on this day filed within the foregoing ***Memorandum in Support of their Motion to Dismiss*** and all attachments thereto by using the Court's ECF system, which will automatically send notice of such filing to all counsel of record. I further certify that I prepared this document in 14 point Times New Roman font and complied with the margin and type requirements of this Court.

This 9th day of October 2018.

/s/ Mark J. Windham
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