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

HSIAO YIP, Plaintiff, v. DYNAMIC RECOVERY SOLUTIONS, LLC, *et al.*, Defendants.	:	CIVIL ACTION NO. 1:18-CV-2586-WMR-JSA **ORDER AND FINAL REPORT AND RECOMMENDATION ON A MOTION TO DISMISS AND A MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Hsiao Yip filed the above-captioned action on May 25, 2018. Plaintiff alleges in the Complaint that Defendants Dynamic Recovery Solutions LLC ("Dynamic Recovery"), LVNV Funding, LLC ("LVNV"), and Resurgent Capital Services, LP ("Resurgent") unlawfully attempted to collect a debt from her in violation of the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et seq.*, and the Georgia Fair Business Practices Act ("FBPA"), O.C.G.A. §§ 10-1-390, *et seq*.

The action is now before the Court on the Motion to Dismiss [20] filed by Defendants LVNV and Resurgent, the Motion for Judgment on the Pleadings [26] filed by Defendant Dynamic Recovery, and Plaintiff's Motion for Leave to Amend Complaint [36] ("Motion to Amend"). In the Motion to Amend [36], Plaintiff requests leave to amend the Complaint to voluntarily dismiss some of her claims—

but not all—arising under the FDCPA. For good cause shown, the Plaintiff's Motion to Amend [36] is **GRANTED**. Nevertheless, because the undersigned agrees with the Defendants that the Complaint [1] and Amended Complaint [36-3] fail to state a claim on which relief can be granted, the undersigned **RECOMMENDS** that the Motion to Dismiss [20] and Motion for Judgment on the Pleadings [26] be **GRANTED** and that all of Plaintiff's claims be **DISMISSED** for failure to state a claim for relief.

I. BACKGROUND

The following allegations are taken from Plaintiff's "Complaint for Violations of the Fair Debt Collection Practices Act ("FDCPA") and Georgia's Fair Business Practices Act ("FBPA")" [1] ("Complaint") and are assumed to be true for the purpose of resolving the pending motions. Plaintiff alleges in the Complaint that Defendants LVNV, Dynamic Recovery, and Resurgent are all debt collectors as they use instrumentalities of interstate commerce or the mails in a business the principal purpose of which is the collection of any debts. Comp. [1] at ¶¶ 11, 17, 22.

Plaintiff further alleges that Defendant Dynamic Recovery sent a letter dated February 2, 2018 to her (the "Dynamic Letter"), claiming that she had a past-due account with Defendant LVNV Funding LLC. *Id.* at ¶ 40. The Dynamic Letter claimed that Plaintiff's account had a "Current Balance" of $3,715.56 (the "Alleged Debt"), and it offered Plaintiff four options to "resolve [the] account." *Id.* at

¶¶ 41-42. The four options were: to pay a one-time lump-sum amount of $1,486.22; to make two payments of $836.00; to make four payments of $464.45; or to call and discuss the matter with Dynamic Recovery. *Id*. at ¶¶ 42-46.

The Dynamic Letter stated that because of the age of the Alleged Debt, "LVNV Funding LLC will not sure you for it [sic] and LVNV Funding LLC will not report it to any credit reporting agency." *Id*. at ¶ 47. The Dynamic Letter also stated that, "[i]f you make a partial payment on this account it may restart the statute of limitations on this account." *Id*. at ¶ 48. Plaintiff alleges that the two statements are made below the required 15 U.S.C. § 1692g notices, in normal text, after the letter claimed Plaintiff owed a past due account, after the recitation of multiple offers to pay on the alleged past due account, and "are not immediately obvious or noticeable to the least sophisticated consumer." *Id*. at ¶ 49. The bottom of the Dynamic Letter included a payment coupon which, Plaintiff alleges, "is designed to result in a consumer, such as Plaintiff, reaffirming the Alleged Debt in writing and restarting the statute of limitation." *Id*. at ¶ 50.

Plaintiff alleges that she sent both Dynamic Recovery and LVNV ante-litem letters pursuant to Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-399. *Id*. at ¶ 51. Defendant Resurgent responded to Plaintiff's ante-litem letter sent to Defendant LVNV with two letters dated April 30, 2018, that were sent to Plaintiff's counsel. *Id*. at ¶ 52. Both letters contained the following details about the Alleged

Debt in an information box on the top right under the Resurgent Capital Services logo: the "Account Number," the "Original Creditor," the "Current Owner," a "Reference ID," an alleged "Balance," and the "Accountholder Name." *Id*. at ¶ 53. Both letters contain the statement that "[t]his is an attempt to collect a debt and any information obtained will be used for that purpose. This communication is from a debt collector." *Id*. at ¶ 54. Both letters contain the statement "[t]he law limits how long you can be sued on a debt. Because of the age of the debt, LVNV Funding LLC will not sue you for it, and LVNV Funding LLC will not report it to any credit reporting agency." *Id*. at ¶ 55. Neither letter included a statement indicating that a partial payment on the Alleged Debt might restart the statute of limitations. *Id*. at ¶ 56.

One letter from Defendant Resurgent provided a copy of Resurgent's privacy notice (the "Resurgent Privacy Notice Letter"). *Id*. at ¶ 57. The second letter claimed to provide "verification of debt" (the "Resurgent Verification Letter"). *Id*. at ¶ 58. The Resurgent Verification Letter included the sentence "to make a payment, please contact us at the toll free number provided." *Id*. at ¶ 59. The alleged "verification of debt" in the "Resurgent Verification Letter was an 'ACCOUNT SUMMARY REPORT' that appears to have been generated at 4/3/2018 at 10:56:36 AM." *Id*. at ¶ 60 (emphasis in original). The Account Summary Report states that the Alleged Debt was charged off by the original creditor on November 30, 2009. *Id*. at ¶ 61. The

Account Summary Report also states that the Alleged Debt had a "charge-off amount" of $2,833.99, that the "account balance at time of acquisition" was $2,833.99, and that the "Current Balance Due" for the Alleged Debt is $3,715.56. *Id*. at ¶¶ 62-63. Thus, the "Current Balance Due" is more than the "charge-off amount" and the "account balance at time of acquisition" of the Alleged Debt according to the Account Summary Report. *Id*. at ¶ 64.

Plaintiff further alleges that the Account Summary Report "makes it clear that Defendants are charging post-charge-off interest on the Alleged Debt." *Id*. at ¶ 65. Plaintiff alleges that she has not received periodic statements for each month that a finance charge was imposed on the Alleged Debt, but that regulations issued pursuant to the Credit Card Accountability Responsibility and Disclosure Act ("Credit CARD Act") require credit card issuers to send periodic statements for each month that a finance charge is imposed. *Id*. at ¶ 67 (citing 12 C.F.R. § 226.5(b)(2)(i)). Plaintiff contends that "a bank can avoid the obligation of sending periodic statements on charged off accounts by waiving any right to additional fees and interest on the account." *Id*. at ¶ 68 (citing 12 C.F.R. § 226.5(b)(2)(i)).

Plaintiff further alleges that, "[u]pon information and belief, the Original Creditor for the Alleged Debt and the alleged account has a policy of waiving post-charge-off interest order to avoid the obligation of sending periodic statements on charged-off accounts." *Id*. at ¶ 69. Despite the alleged Original Creditor waiving

contractual interest, and no interest being permitted to be charged in the absence of periodic statements, however, she alleges that the "Defendants have added and continue to charge and attempt to collect post-charge-off interest on the purported charge-off balance." *Id*. at ¶ 70.

Plaintiff alleges that "Defendants know that their conduct—attempting to collect post-charge-off interest after contractual interest is waived, and without sending periodic statements—is illegal, yet Defendants continue to seek this interest." *Id*. at ¶ 71. She contends that "Defendants have no legal right to retroactively add interest that was waived by the Original Creditor." *Id*. at ¶ 72 (citing *McDonald v. Asset Acceptance LLC*, 296 F.R.D. 513 (E.D.Mich. 2013)). She also contends that "Defendants have no right to impose statutory interest when contractual interest was waived." *Id*. at ¶ 73 (citing *Stratton v. Portfolio Recovery Associates, LLC*, 770 F. 3d 443 (6th Cir. 2014)). Further, she contends, "Defendants have no legal right to charge any interest for the period between the time the Alleged Debt was purchased and the time it began sending Plaintiff collection letters without sending periodic statements pursuant to 12 C.F.R. § 226.5(b)(2)(i)." *Id*. at ¶ 74.

Plaintiff alleges that the Defendants' actions in sending these letters to her caused her to "suffer damages in the form of stress, anxiety, and emotional distress." *Id*. at ¶ 75. She alleges that she "did not understand the deceptive language in the letter to mean that the debt was barred by the applicable statute of limitations, and

therefore made use of legal counsel to determine the validity of Defendants' claims." *Id*. at ¶ 76. Further, she alleges that the Defendants' actions caused her "to incur damages in the forms of costs and resources expended in the research of the false, deceptive, and misleading collection letters," and that "Defendants' actions have caused Plaintiff to suffer actual damages in the form of lost time, resources, increased anxiety, increased stress, and mental and emotional distress." *Id*. at ¶¶ 77-78.

In the original Complaint, Plaintiff asserts four counts against the Defendants. In Count 1, she alleges that the Defendants violated the FDCPA by sending "false, misleading, and deceptive collection letters" to her. *Id*. at ¶¶ 81-88. She alleges that "the Dynamic Letter intentionally and purposefully hid disclosure text regarding the statute of limitations within the letter in a manner that would lead to the least sophisticated consumer to be confused, misled, or even to miss the disclosures." *Id*. at ¶ 83. She also contends that the "Resurgent Verification Letter did not disclose that a partial payment of the Alleged Debt might restart the statute of limitations, yet demanded payment on a time-barred debt." *Id*. at ¶ 84. She claims that the Defendants' actions have violated 15 U.S.C. § 1692e by "using false, deceptive, or misleading representations or means in connection with the collection of any debt."

Id. at ¶ 85. She also claims that the Defendants' actions have violated "15 U.S.C. § 1962f"[1] by "using unfair and unconscionable means to collect a debt." *Id*. at ¶ 86.

In Count 2 of the Complaint, Plaintiff alleges that the Defendants violated the FDCPA by "attempting to collect a false and improper amount." *Id*. at ¶¶ 89-99. She alleges that "Defendants have attempted to collect an Alleged Debt from Plaintiff that includes improperly applied post-charge-off interest," and "used false, deceptive or misleading representations or means to collect or attempt to collect any debt, in violation of 15 U.S.C. § 1692e and e(10)." *Id*. at ¶¶ 89-90. She further alleges that the Defendants "falsely characterized the character and amounts of debt, in violation of 15 U.S.C. § 1692e(2)(A)," and "communicated credit information to Plaintiff that they knew was false, or should have known to be false, in violation of 15 U.S.C. § 1692e(8)." *Id*. at ¶¶ 91-92. She alleges that Defendants also "used unfair or unconscionable means to collect or attempt to collect any debt, in violation of 15 U.S.C. § 1692f," and "sought to collect an amount not expressly permitted by the agreement creating the debt or permitted by law, in violation of 15 U.S.C. § 1692f(1)." *Id*. at ¶¶ 93-94.

[1] Plaintiff's reference to "15 U.S.C. § 1962f" appears to be a typographical error, as it appears that Plaintiff intended to assert a claim that Defendants violated 15 U.S.C. § 1692f. *See* Comp. [1] at ¶ 86.

In Count 3 of the Complaint, Plaintiff alleges that Defendants Dynamic Recovery and LVNV violated the Georgia Fair Business Practices Act ("FBPA"). *Id*. at ¶¶ 101-07. She alleges that "Defendants [sic] actions in charging post-charge-off interest in violation of the law and pursuing time-barred claims using false, misleading, deceptive, unfair, and unconscionable means constitute unfair or deceptive acts or practices in the conduct of consumer transactions in trade or commerce and therefore violate Georgia's Fair Business Practices Act ('FBPA'), O.C.G.A. § 10-1-390 *et seq*." *Id*. at ¶ 102. She alleges that "Defendants' actions in violation of the FDCPA, and therefore in violation of Georgia's FBPA, were intentional in nature and part of a business model designed to collect debts based on false, misleading, deceptive, unfair, unconscionable, abusive, harassing, and oppressive collection practices." *Id*. at ¶ 104.

In "Count 5" of the Complaint (which is the Plaintiff's fourth count), Plaintiff alleges that Defendants Dynamic Recovery and LVNV violated the Georgia FBPA, and she requests an equitable remedy and injunction pursuant to O.C.G.A. § 10-1-399(a), and attorney's fees pursuant to O.C.G.A. § 10-1-399(d). *Id*. at ¶¶ 108-09.

II. DISCUSSION

A. *Plaintiff's Motion to Amend*

On April 16, 2019, after the Defendants had already filed the Motion to Dismiss [20] and the Motion for Judgment on the Pleadings [26] and those motions were fully briefed, the Plaintiff filed a Motion to Amend [36], requesting leave to file an amended complaint. Plaintiff attached to the Motion to Amend as Exhibit B the proposed "Amended Complaint for Violations of the Fair Debt Collection Practices Act ("FDCPA") and Georgia's Fair Business Practices Act ("FBPA")" [36-3] ("Amended Complaint").

In the Motion to Amend, Plaintiff argues that the recent Eleventh Circuit decision in *Holzman v. Malcolm S. Gerald & Assocs., Inc.*, No. 16-16511, 2019 WL 1495642, at *6 (11th Cir. Apr. 5, 2019), "directly addresses whether the language contained in the letter sent by Defendant Dynamic Recovery to Plaintiff violates the FDCPA." Pl. Br. [36-1] at 2. Plaintiff contends that the *Holzman* decision "effectively rejects the broad claim relating to the Defendants' collection letters in this case under 15 U.S.C. § 1692f." *Id*. at 3. As a result, the Plaintiff requests leave to file the Amended Complaint which dismisses her claim in Count 1 that the Defendants violated 15 U.S.C. § 1692f, and also dismisses her claim in Count 1 that Defendant Dynamic Recovery violated 15 U.S.C. § 1692e. *Id*. at 3-4.

In response, Defendants LVNV and Resurgent argue that, although they agree with Plaintiff that the *Holzman* decision implicates the Plaintiff's claims in this case, the parties' supplemental briefs on the Motion to Dismiss and Motion for Judgment on the Pleadings are sufficient to address the issues presented by *Holzman*, and the Plaintiff's Motion to Amend "is completely unnecessary and serves only to drive up litigation costs." Def. Br. [39] at 2; *see* supplemental briefs [35-1][38]. Defendants argue that the Motion to Amend should be denied "as unnecessary and futile." Def. Br. [39] at 2. In the event that the Court grants the Plaintiff's Motion to Amend, Defendants request that the Court rule on their pending Motion to Dismiss [20] because the Plaintiff's proposed amendment is "only subtractive in nature." *Id*. at 3.

Defendant Dynamic Recovery has also filed a brief opposing Plaintiff's Motion to Amend. *See* Def. Br. [40]. Dynamic Recovery states that it consents to Plaintiff dropping portions of her claims, but "disagrees that amending her complaint is the best way to do so." *Id*. at 2. Dynamic Recovery argues that, "if Plaintiff is permitted to amend her complaint, all defendants will be required to respond anew." *Id*. According to Dynamic Recovery, a motion to withdraw the specific claims the Plaintiff seeks to dismiss would be a "far more efficient method to reach the same outcome." *Id*.

In the Plaintiff's reply brief she argues that, contrary to the Defendants' arguments, a Motion to Amend pursuant to Rule 15 is the proper procedure for a

plaintiff who seeks to dismiss certain claims against a defendant, but not all claims. Pl. Reply Br. [41] at 1-2. Plaintiff states that she agrees with the Defendants, however, that her Amended Complaint is "subtractive, not additive." *Id*. at 4. Thus, she "agrees that this Court should not force the parties to restart the motion's process as to Defendants' motions to dismiss and for judgment on the pleadings." *Id*. at 4-5. Plaintiff states that she "would consent and agree to the pending motions to dismiss and for judgment on the pleadings also applying to her Amended Complaint, and that any order of this Court on said motions would also apply to the Amended Complaint." *Id*. at 5.

Rule 15(a) of the Federal Rules of Civil Procedure governs the amendments of pleadings before trial. Rule 15(a) states that a party "may amend its pleading once as a matter of course" within 21 days after serving the pleading, or, if the pleading is one in which a responsive pleading is required, within 21 days after service of a responsive pleading or a motion under Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

In this case, the Plaintiff filed the Motion to Amend [36] well past the 21-day period after service of the Motion to Dismiss [20] filed by Defendants LVNV and Resurgent. Furthermore, the Defendants have not consented in writing to allowing

the Plaintiff's proposed Amended Complaint. All the Defendants have filed briefs opposing the Plaintiff's Motion to Amend. Thus, the Court must determine whether justice requires that Plaintiff be granted leave to file the proposed amendment.

The Eleventh Circuit has elaborated on the meaning of the phrase "when justice so requires," summarizing the rule as follows:

> In the absence of any apparent or declared reason–such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.–the leave sought should, as the rules require, be "freely given."

Rosen v. TRW, Inc., 979 F.2d 191, 194 (11th Cir. 1992) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The decision whether to grant leave to amend is within the sound discretion of the trial court, but, in denying leave to amend, the court should state a specific reason justifying denial. *Foman*, 371 U.S. at 182 (1962); *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993); *see also Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 493 (11th Cir. 1993); *Hester v. International Union of Operating Engineers*, AFL-CIO, 941 F.2d 1574, 1578 (11th Cir. 1991). Leave to amend may properly be denied when amending the complaint would be futile, as when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant. *See Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007).

In this case, the Plaintiff has requested leave to amend the Complaint only to dismiss certain claims, not to add any new claims or new defendants. The Defendants argue that the Motion to Amend should nevertheless be denied as futile, because the proposed Amended Complaint would still be subject to dismissal on the same grounds as the Plaintiff's original Complaint, for the reasons argued in the Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings.

The Court agrees with Plaintiff, however, that amending the Complaint under Rule 15 is the proper mechanism for a plaintiff who seeks to drop some claims, but not all, against the defendants. *See Perry v. Schumacher Grp. of Louisiana*, 891 F.3d 954, 958 (11th Cir. 2018) ("There are multiple ways to dismiss a single claim without dismissing an entire action. The easiest and most obvious is to seek and obtain leave to amend the complaint to eliminate the remaining claim, pursuant to Rule 15."); *S.E.C. v. Mannion*, 28 F. Supp. 3d 1304, 1307 (N.D. Ga. 2014) ("As many authorities have explained, the proper way for a plaintiff to remove a single claim is to move to amend the complaint under Rule 15." (citing 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2362, at 413–14 (3d ed. 2008)).

Furthermore, the Court finds that it would be a waste of judicial resources to resolve the parties' arguments in the supplemental briefs regarding the application of the *Holzman* decision on the Plaintiff's claims in this case, when the Plaintiff

states that she intends to dismiss certain claims as a result of the *Holzman* case, and seeks to dismiss those claims by filing the Amended Complaint. Plaintiff essentially agrees with the Defendants that, pursuant to *Holzman*, her claim in Count 1 that the Defendants violated 15 U.S.C. § 1692f, and that the Dynamic Letter violated 15 U.S.C. § 1692e, are not viable. Thus, the Court finds that justice requires that Plaintiff be allowed to amend the Complaint to dismiss certain claims. Accordingly, for good cause shown, the Plaintiff's Motion to Amend [36] is **GRANTED**. The Clerk is **DIRECTED** to file the Plaintiff's Amended Complaint [36-3], attached as Exhibit B to the Plaintiff's Motion to Amend [36].

Because Plaintiff's original Complaint [1] has now been replaced by the Amended Complaint [36-3], the original Complaint is no longer the operative pleading. *See Pintando v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007) (*per curiam*) (an "amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary") (quoting *Dresdner Bank AG, Dresdner Bank AG in Hamburg v. M/V OLYMPIA VOYAGER*, 463 F.3d 1210, 1215 (11th Cir. 2006)); *Fritz v. Standard Sec. Life Ins. Co.*, 676 F.2d 1356, 1358 (11th Cir. 1982) ("Under the Federal Rules, an amended complaint supersedes the original complaint.").

Ordinarily, the Plaintiff's filing of the Amended Complaint would require the Defendants to respond to the Amended Complaint separately. *See* Fed. R. Civ. P. 15(a)(3). As discussed, however, because the Plaintiff has not added any new claims, merely dismissed certain parts of her claims, all the parties in this case agree that the Defendants' Motion to Dismiss [20] and Motion for Judgment on the Pleadings [26] should be considered by the Court to apply to the Plaintiff's Amended Complaint [36-3] as well as the Plaintiff's original Complaint. Plaintiff expressly states in her Reply Brief to her Motion to Amend that she "agrees that this Court should not force the parties to restart the motion's process as to Defendants' motions to dismiss and for judgment on the pleadings." Pl. Reply Br. [41] at 4-5. Plaintiff states that she "would consent and agree to the pending motions to dismiss and for judgment on the pleadings also applying to her Amended Complaint, and that any order of this Court on said motions would also apply to the Amended Complaint." *Id*. at 5.

Accordingly, the Court will construe the Defendants' Motion to Dismiss [20] and Motion for Judgment on the Pleadings [26] to apply to the Plaintiff's Amended Complaint [36-3], rather than the Plaintiff's original Complaint [1], which is no longer the operative pleading. The deadline for the Defendants to file an answer or other response to the Plaintiff's Amended Complaint [36-3] is **STAYED** pending a final order by the District Court on the Defendants' Motion to Dismiss [20] and

Motion for Judgment on the Pleadings [26]. In the event that the District Court's final order is not dispositive of all claims in this action, the Defendants are **ORDERED** to file an answer or other response to the Plaintiff's Amended Complaint [36-3] within **fourteen (14) days** after service of the Court's order. *See* Fed. R. Civ. P. 12(a)(4)(A).

Because the Plaintiff's Amended Complaint [36-3] is now the operative pleading, the Court relies on the relevant allegations in the Amended Complaint [36-3], which are assumed to be true for the purpose of resolving the pending motions. Because most of the factual allegations in the Amended Complaint essentially restate the Plaintiff's factual allegations from the original Complaint verbatim, the Court will not repeat them.

In the Amended Complaint [36-3], Plaintiff again asserts four counts against the Defendants. In Count 1, she alleges that Defendants Resurgent and LVNV (but not Dynamic Recovery) violated the FDCPA by sending "false, misleading, and deceptive collection letters" to her. Am. Comp. [36-3] at ¶¶ 81-86. She alleges that the "Resurgent Verification Letter did not disclose that a partial payment of the Alleged Debt might restart the statute of limitations, yet demanded payment on a time-barred debt." *Id*. at ¶ 82. She claims that the Defendants' actions have violated 15 U.S.C. § 1692e by "using false, deceptive, or misleading representations or means in connection with the collection of any debt." *Id*. at ¶ 83. She also claims

that the Defendants' actions have violated 15 U.S.C. § 1692f by "using unfair and unconscionable means to collect a debt." *Id*. at ¶ 84.

In Count 2 of the Amended Complaint, Plaintiff alleges that all of the Defendants violated the FDCPA by "attempting to collect a false and improper amount." *Id*. at ¶¶ 87-97. She alleges that "Defendants have attempted to collect an Alleged Debt from Plaintiff that includes improperly applied post-charge-off interest," and "used false, deceptive or misleading representations or means to collect or attempt to collect any debt, in violation of 15 U.S.C. § 1692e and e(10)." *Id*. at ¶¶ 87-88. She further alleges that the Defendants "falsely characterized the character and amounts of debt, in violation of 15 U.S.C. § 1692e(2)(A)," and "communicated credit information to Plaintiff that they knew was false, or should have known to be false, in violation of 15 U.S.C. § 1692e(8)." *Id*. at ¶¶ 89-90. She alleges that Defendants also "used unfair or unconscionable means to collect or attempt to collect any debt, in violation of 15 U.S.C. § 1692f," and "sought to collect an amount not expressly permitted by the agreement creating the debt or permitted by law, in violation of 15 U.S.C. § 1692f(1)." *Id*. at ¶¶ 91-92.

In Count 3, Plaintiff alleges that Defendants Dynamic Recovery and LVNV, but not Defendant Resurgent, violated the Georgia Fair Business Practices Act ("FBPA"). *Id*. at ¶¶ 99-105. She alleges that "Defendants [sic] actions in charging post-charge-off interest in violation of the law and pursuing time-barred claims using

false, misleading, deceptive, unfair, and unconscionable means constitute unfair or deceptive acts or practices in the conduct of consumer transactions in trade or commerce and therefore violate Georgia's Fair Business Practices Act ('FBPA'), O.C.G.A. § 10-1-390 *et seq*." *Id*. at ¶ 100. She alleges that "Defendants' actions in violation of the FDCPA, and therefore in violation of Georgia's FBPA, were intentional in nature and part of a business model designed to collect debts based on false, misleading, deceptive, unfair, unconscionable, abusive, harassing, and oppressive collection practices." *Id*. at ¶ 102.

Finally, in Count 4, Plaintiff again alleges that Defendants Dynamic Recovery and LVNV violated the Georgia FBPA, and she requests an equitable remedy and injunction pursuant to O.C.G.A. § 10-1-399(a), and attorney's fees pursuant to O.C.G.A. § 10-1-399(d). *Id*. at ¶¶ 106-07.

B. *Defendants' Motion to Dismiss*

Defendants LVNV and Resurgent have jointly filed a Motion to Dismiss [20], arguing that all of the Plaintiff's claims must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for relief.

1. Standard on a Motion to Dismiss

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim

is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Defendants LVNV and Resurgent have moved to dismiss all of Plaintiff's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for relief. *See* Fed. R. Civ. P. 12(b)(6). When evaluating a motion to dismiss under Rule 12(b)(6), the Court cannot consider matters outside of the pleadings, and must accept the allegations of the non-movant's pleadings as true, but "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Moreover, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted).

Iqbal went on to instruct that, while a court must accept all factual allegations in a complaint as true, it need not accept as true legal conclusions recited in a complaint. Repeating that "only a complaint that states a plausible claim for relief survives a motion to dismiss" the Supreme Court advised that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common

sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not 'shown'–'that the pleader is entitled to relief.'" *Iqbal,* 556 U.S. at 679 (*quoting* Fed. R. Civ. P. 8(a)(2)) (other citations omitted).

As noted, a court ordinarily cannot consider matters outside the pleadings when evaluating a motion to dismiss under Rule 12(b)(6) without converting the motion to a motion for summary judgment. *See Redding v. Tuggle*, No. 1:05-CV-2899-WSD, 2006 WL 2166726, at *5 (N.D. Ga. July 31, 2006). However, "conversion is not always required." *Chesnut v. Ethan Allen Retail, Inc.*, 971 F. Supp. 2d 1223, 1228 (N.D. Ga. 2013); *Patterson v. WMW, Inc.*, No. 1:11-CV-3172-WSD-SSC, 2012 WL 3261290, at *3 (N.D. Ga. June 15, 2012), *adopted by* 2012 WL 3260619 (N.D. Ga. Aug. 8, 2012). When a plaintiff has referred to documents in the complaint and such documents are central to the plaintiff's claims, a court may consider those documents as part of the pleadings in the case and may consider them in resolving a Motion to Dismiss. *See Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the court may consider the documents part of the pleadings for the purposes of Rule 12(b)(6) dismissal").

Thus, when a court is considering a motion to dismiss under Rule 12(b)(6), documents attached to the motion to dismiss may be considered without converting the motion into a motion for summary judgment if the document is both central to the plaintiff's claim and its contents are undisputed. *See SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010); *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002); *see also Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("[A] document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, we may consider such a document provided it meets the centrality requirement imposed in *Horsley*." (citing *Horsley*, 304 F.3d at 1134); *Chesnut*, 971 F. Supp.2d at 1228-29 (considering EEOC document without converting motion to dismiss to motion for summary judgment, stating "a document central to the complaint that the defense appends to its motion to dismiss is also properly considered, provided that its contents are not in dispute"). "'Undisputed' means that the authenticity of the document is not challenged." *Day*, 400 F.3d at 1276.

In this case, Defendants LVNV and Resurgent have attached copies of the letters referenced in the Plaintiff's Complaint and Amended Complaint as exhibits to their Motion to Dismiss [20]. *See* Defs. Ex. 1 [20-2] (the "Dynamic Letter" from Dynamic Recovery to Plaintiff dated February 2, 2018); Defs. Ex. 2 [20-3] (letter

from Resurgent to Plaintiff's counsel dated April 3, 2018, which appears to be the "Resurgent Verification Letter" and includes the "Account Summary Report"), Defs. Ex. 3 [20-4] (letter from Resurgent to Plaintiff's counsel dated April 3, 2018, which appears to be the "Resurgent Privacy Notice Letter"). Defendants LVNV and Resurgent have also attached a copy of a "Demand Letter" from Plaintiff's counsel to LVNV dated March 15, 2018, which states that it is being sent in compliance with O.C.G.A. § 10-1-399 and a demand for relief under the FBPA and FDCPA, and appears to be the "ante-litem letter" that Plaintiff references in the Amended Complaint. *See* Defs. Ex. 4 [20-5]; Am. Comp. at ¶ 51. Because these documents are referenced in the Plaintiff's Amended Complaint and appear to be undisputed, the Court may consider them in resolving the Defendants' Motion to Dismiss.

2. Plaintiff's FDCPA Claims

In the Amended Complaint, Plaintiff asserts two separate counts under the FDCPA. In Count 1 of the Amended Complaint, Plaintiff alleges that Defendants Resurgent and LVNV violated the FDCPA by "Sending a False, Misleading, and Deceptive Collection Letters [sic] to Plaintiff." Am. Comp. [36-3] at 21. In Count 2, she alleges that all Defendants violated the FDCPA "in Attempting to Collect a False and Improper Amount." *Id*. at 23.

The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive

debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e); *see LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010); *Brown v. Budget Rent–A–Car Sys., Inc.*, 119 F.3d 922, 924 (11th Cir. 1997) (*per curiam*); *see also Frazier v. Absolute Collection Serv., Inc.*, 767 F. Supp. 2d 1354, 1363 (N.D. Ga. 2011) ("The FDCPA seeks to remedy abusive, deceptive, and unfair debt collection practices by debt collectors against consumers."). Specifically, the FDCPA "prohibits unfair or unconscionable collection methods, conduct which harasses, oppresses or abuses any debtor, and the making of any false, misleading, or deceptive statements in connection with a debt, and it requires that collectors make certain disclosures." *Acosta v. Campbell*, 309 F. App'x 315, 319 (11th Cir. 2009) (citing 15 U.S.C. §§ 1692d, 1692e, 1692f).

The FDCPA defines a "debt collector" as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . [T]he term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third party is collecting or attempting to collect such debts. For the purpose of section 1692f(6) . . . , such term also includes any person who uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

15 U.S.C. § 1692a(6).

"To prevail on an FDCPA claim, a plaintiff must establish that: (1) she has been the object of collection activity arising from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a debt collector under the Act; and (3) the defendant has engaged in a prohibited act or has failed to perform a requirement imposed by the FDCPA." *Frazier*, 767 F. Supp. 2d at 1363 (internal quotation marks and citations omitted). It is well-established that the FDCPA applies only to "debt collectors" and not to creditors or servicers. *See* 15 U.S.C. § 1692a(6); *see also Correa v. BAC Home Loans Servicing LP*, No. 6:11-cv-1197-Orl-22DAB, 2012 WL 1176701, at *11 (M.D. Fla. April 9, 2012) (the "critical element is whether the defendant is a debt collector" as defined under the statute).

The FDCPA does not ordinarily require proof of intentional violation and, as a result, is often described as a strict liability statute. *See* 15 U.S.C. § 1692k; *LeBlanc*, 601 F.3d at 1190; *Ellis v. Solomon and Solomon, P.C.*, 591 F.3d 130, 135 (2nd Cir. 2010); *see also Edwards v. Niagra Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1357 (N.D. Ga. 2008) (the FDCPA is a strict liability statute and "thus does not require a showing of intentional conduct on the part of a debt collector; furthermore, a single violation of the statute is sufficient to establish civil liability").

a. False, Misleading, or Deceptive Collection Letters

In Count 1 of the Amended Complaint, Plaintiff alleges that Defendants Resurgent and LVNV violated the FDCPA by sending "false, misleading, and

deceptive collection letters" to her. Am. Comp. [36-3] at ¶¶ 81-86. In particular, she alleges that the "Resurgent Verification Letter did not disclose that a partial payment of the Alleged Debt might restart the statute of limitations, yet demanded payment on a time-barred debt." *Id*. at ¶ 82. She claims that the actions of Defendants Resurgent and LVNV violated 15 U.S.C. § 1692e by "using false, deceptive, or misleading representations or means in connection with the collection of any debt." *Id*. at ¶ 83. She claims that the actions of Defendants Resurgent and LVNV have also violated 15 U.S.C. § 1692f by "using unfair and unconscionable means to collect a debt." *Id*. at ¶ 84. She requests statutory damages up to the maximum of $1,000, plus actual damages, costs, and attorney's fees. *Id*. at ¶ 86.

"[T]o state a plausible claim under § 1692e, a plaintiff must allege, among other things, (1) that the defendant is a 'debt collector' [under the Act] and (2) that the challenged conduct is related to debt collection." *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216 (11th Cir. 2012). That section of the FDCPA prohibits "false, deceptive, or misleading representation" as follows:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> > (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of–

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to–

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United

> States or any State, or which creates a false impression as to its source, authorization, or approval.
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
>
> (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.
>
> (12) The false representation or implication that accounts have been turned over to innocent purchasers for value.
>
> (13) The false representation or implication that documents are legal process.
>
> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.
>
> (15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
>
> (16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692e.

In this case, the Defendants LVNV and Resurgent do not appear to dispute the Plaintiff's allegations in the Amended Complaint that they are both debt collectors under the FCPA, and that they were attempting to collect a consumer debt

from Plaintiff when they sent the letters at issue. Thus, the Court must focus on whether Resurgent and LVNV engaged in any practice prohibited by the FDCPA. In particular, the Court must focus on whether the Plaintiff has alleged sufficient facts to state a plausible claim that the Resurgent Verification Letter was a false, misleading, or deceptive collection letter under the FDCPA, in violation of 15 U.S.C. § 1692e(10).

As a general matter, courts use a "least-sophisticated consumer" standard to consider whether a debt collector's communications violate § 1692e. *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193–94 (11th Cir. 2010); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175-77 (11th Cir. 1985). The "least-sophisticated consumer" standard is consistent with basic consumer-protection principles. *LeBlanc*, 601 F.3d at 1194; *Jeter*, 760 F.2d at 1172; *see also Clomon v. Jackson*, 988 F.2d 1314, 1318 (2nd Cir. 1993) ("The basic purpose of the 'least-sophisticated consumer' standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd.").

Thus, the standard that courts must apply is "whether a hypothetical least sophisticated consumer would be deceived or misled by the debt collector's practices." *Ferguson v. Credit Mgmt. Control, Inc.*, 140 F. Supp. 2d 1293, 1298 (M.D. Fla. 2001). In applying this standard, 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*, 988 F.2d at 1319)); *see also Hepsen v. Resurgent Capital Srvcs., LP*, 383 F. App'x 877, 881 (11th Cir. 2010). The standard, however, also has an objective component in that "[w]hile protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *LeBlanc*, 601 F.3d at 1194 (quoting *United States v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 136 (4th Cir. 1996)); *see also Barany-Snyder v. Weiner*, 539 F.3d 327, 333 (6th Cir. 2008) ("least-sophisticated consumer" standard is an objective test). This approach "protects debt collectors against liability for unreasonable misinterpretations of collection notices." *Colmon*, 988 F.2d at 1319. The least sophisticated consumer standard generally does not apply to FDCPA claims, however, if the consumer's sophistication is irrelevant to the claim. *See Jeter*, 760 F.2d at 1175.

In the Amended Complaint, Plaintiff alleges that Defendants Resurgent and LVNV violated Section 1692e of the FDCPA by sending "false, misleading, and deceptive collection letters" to her. Am. Comp. [36-3] at ¶¶ 81-86. She claims that the "Resurgent Verification Letter did not disclose that a partial payment of the Alleged Debt might restart the statute of limitations, yet demanded payment on a time-barred debt." *Id*. at ¶ 82. In the Motion to Dismiss, Defendants Resurgent and LVNV first argue that the Plaintiff has failed to allege sufficient facts to state a

plausible claim because she does not even allege that she ever saw the Resurgent Verification Letter, and thus, she does not have standing to bring this claim. Def. Br. [20-1] at 7-8. Second, they argue that the Resurgent Verification Letter's failure to mention the possible effect of a partial payment on the statute of limitations does not make the letter false, misleading, or deceptive under the FDCPA, particularly because the letter was sent directly to Plaintiff's counsel only in response to a request for verification of the debt. *See* Defs. Reply Br. [24] at 9-10.

Upon a review of the Plaintiff's factual allegations in the Amended Complaint and the information contained in the Resurgent Verification Letter, the undersigned finds that Plaintiff has failed to state a plausible claim that the letter was a "false, deceptive, or misleading representation" that violated 15 U.S.C. § 1692e. As discussed above, the Court must apply the "least sophisticated consumer" standard, which still presumes that the consumer possesses "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. The standard has an objective component "by preserving a quotient of reasonableness." *Id*. This approach "protects debt collectors against liability for unreasonable misinterpretations of collection notices." *Colmon*, 988 F.2d at 1319.

In particular, the Court notes that, although Plaintiff has withdrawn her claim in Count 1 that the Dynamic Letter was a false, misleading, or deceptive

communication under the FDCPA, she continues to allege in the Amended Complaint that she received the Dynamic Letter as the first communication from the Defendants regarding the Alleged Debt. Plaintiff alleges in the Amended Complaint that Defendant Dynamic Recovery sent the Dynamic Letter dated February 2, 2018 to her, claiming that she had a past-due account with Defendant LVNV Funding LLC. Am. Comp. at ¶ 40. Plaintiff admits that the Dynamic Letter expressly stated that because of the age of the Alleged Debt, "LVNV Funding LLC will not sure [sic] you for it and LVNV Funding LLC will not report it to any credit reporting agency." *Id*. at ¶ 47. The Dynamic Letter also stated that, "[i]f you make a partial payment on this account it may restart the statute of limitations on this account." *Id*. at ¶ 48.

After Plaintiff received the Dynamic Letter, she alleges that she sent both Dynamic Recovery and LVNV "ante-litem letters" pursuant to Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-399. *Id*. at ¶ 51. As noted above, Defendants LVNV and Resurgent have attached a copy of a "Demand Letter" from Plaintiff's counsel to LVNV dated March 15, 2018, which states that it is being sent in compliance with O.C.G.A. § 10-1-399 and a demand for relief under the FBPA and FDCPA, and this letter appears to be the "ante-litem letter" that Plaintiff references in the Amended Complaint. *See* Defs. Ex. 4 [20-5]. In that letter addressed to LVNV, Plaintiff's counsel wrote:

> Your agent, Dynamic Recovery Solutions LLC, sent Ms. Yip a letter dated February 2, 2018 (the "February Letter") attempting to collect a debt . . . . However, your attempts to collect this Alleged Debt are time-barred. Further, we have reason to believe the amount of the Alleged Debt is false, misleading, and deceptive.

Id.

Plaintiff alleges in the Amended Complaint that it was only after her counsel sent that letter to LVNV that Defendant Resurgent responded with two letters dated April 30, 2018, that were sent to Plaintiff's counsel, including the letter that she identifies as the Resurgent Verification Letter. Am. Comp. at ¶ 52. She further alleges that both letters from Resurgent contain the statement "[t]he law limits how long you can be sued on a debt. Because of the age of the debt, LVNV Funding LLC will not sue you for it, and LVNV Funding LLC will not report it to any credit reporting agency." *Id*. at ¶ 55. Plaintiff does not allege that any specific statement in the Resurgent Verification Letter was actually false or misleading, in violation of § 1692e. Instead, the Plaintiff claims that the Resurgent Verification Letter violated § 1692e because the letter failed to include a statement affirmatively advising her that a partial payment on the Alleged Debt might restart the statute of limitations. *Id*. at ¶ 56.

As the Defendants argue, under Georgia law, however, a partial payment alone is not sufficient to revive a debt. *Bingham v. Advance Indus. Sec., Inc.*, 228 S.E.2d 1, 2 (Ga. Ct. App. 1976). In *Bingham*, the Georgia Court of Appeals held that

"a new promise to pay or a written acknowledgment of liability may revive or extend the original debt. But the payment here did not constitute either a revivor or new promise. Mere partial payment in the absence of a writing is not sufficient." *Id*. (internal citations omitted)). Thus, under Georgia law, a partial payment alone does not "restart the statute of limitations" on an alleged debt.

Furthermore, it is undisputed that the Dynamic Letter, which had previously been sent to the Plaintiff on behalf of LVNV, included the statement that "[i]f you make a partial payment on this account it may restart the statute of limitations on this account." Am. Comp. at ¶ 48. Plaintiff has cited to no authority that, under the FDCPA, the Defendants were required to repeat that statement in every piece of correspondence that was sent to her regarding the Alleged Debt, particularly when the letters were being sent to Plaintiff's counsel, not Plaintiff, in response to a letter demanding verification of the debt after having received the initial Dynamic Letter. To the contrary, Plaintiff is presumed to have read, with some care, the full contents of the collection notices she received, which in this context included the immediately preceding notice to which the April 30, 2018 letters were responding, which specifically provided the advice to which Plaintiff argues she was entitled.

Finally, and most basically, Plaintiff provides no authority to show that the Defendants were obliged to furnish Plaintiff with affirmative legal advice as to the potential consequences of a "partial payment." The Eleventh Circuit explained in

Holzman that its decision does not "require debt collectors to give legal advice to debtors." *Holzman v. Malcolm S. Gerald & Assocs., Inc.*, No. 16-16511, 2019 WL 1495642, at *6 (11th Cir. Apr. 5, 2019). Other district courts have specifically rejected the same argument Plaintiff makes in this case. *See Boedicker v. Midland Credit Mgmt., Inc.*, 227 F. Supp. 3d 1235, 1241 (D. Kan. 2016) ("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."); *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) ("the FDCPA imposes on [a debt collector] no duty to advise [a debtor] of potential defenses, including the expired limitation or 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) ("a debt collector is not required to advise a consumer of any potential defenses to a legal action"). The Court finds the reasoning of these cases to be persuasive. The Court thus finds that Plaintiff has failed to allege sufficient facts to state a plausible claim that Resurgent and LVNV violated the FDCPA by sending "false, misleading, and deceptive collection letters" to her in violation of 15 U.S.C. § 1692e.

In the Amended Complaint, Plaintiff also claims in Count 1 that Defendants Resurgent and LVNV violated § 1692f. She claims that the actions of Defendants Resurgent and LVNV in sending the Resurgent Verification Letter violated 15 U.S.C. § 1692f by "using unfair and unconscionable means to collect a debt." Am. Comp. at ¶ 84. In the Plaintiff's brief in support of her Motion to Amend, she states that the *Holzman* decision "effectively rejects the broad claim relating to the Defendants' collection letters in this case under 15 U.S.C. § 1692f." Pl. Br. [36-1] at 3. Thus, Plaintiff expressly states that "Plaintiff's Amended Complaint drops the claim that the collection letters sent by Defendants violated 15 U.S.C. § 1692f." *Id*. Confusingly, however, in the Amended Complaint, Plaintiff continues to assert a claim in Count 1 against Defendants Resurgent and LVNV under 15 U.S.C. § 1692f. Am. Comp. at ¶ 84.

In any event, the Court finds that Plaintiff has failed to allege sufficient facts to state a plausible claim that Defendants Resurgent and LVNV violated 15 U.S.C. 1692f in sending the Resurgent Verification Letter. That section of the FDCPA provides that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. Plaintiff's only argument in Count 1 regarding the Resurgent Verification Letter is that it was "misleading" because it failed to include a statement indicating that a partial payment on the Alleged Debt might restart the statute of limitations. The Court has already found

that the Defendants' failure to include such a statement does not violate § 1692e, and it further finds that it also does not violate § 1692f. Plaintiff has cited to no authority holding that the FDCPA requires a debt collector to include such a statement in letter to debtors or their counsel, because under Georgia law, a partial payment does not by itself restart the statute of limitations, or for the other reasons discussed above. Thus, the failure to include a statement regarding the statute of limitations cannot be viewed as an "unfair or unconscionable means" to collect a debt under § 1692f.

In sum, for all of these reasons, the Court finds that Plaintiff has failed to state a plausible claim for relief under the FDPCA against Defendants Resurgent or LVNV in Count 1 of the Amended Complaint.[2] Accordingly, the undersigned **RECOMMENDS** that the Motion to Dismiss [20] filed by Defendants LVNV and Resurgent be **GRANTED** as to Count 1 of the Amended Complaint, and that her claims in Count 1 be **DISMISSED** for failure to state a claim.

b. Collecting a False or Improper Amount

In Count 2 of the Amended Complaint, Plaintiff alleges that all of the Defendants violated the FDCPA by "attempting to collect a false and improper

[2] Because the Court finds that Plaintiff has failed to state a plausible claim under the FDCPA in Count 1 against Defendants Resurgent and LVNV based on the Resurgent Verification Letter, the Court declines to address the Defendants' arguments regarding whether Plaintiff has standing to assert this particular claim under the FDCPA.

amount." Am. Comp. at ¶¶ 87-97. Plaintiff alleges that the Account Summary Report included in the Resurgent Verification Letter states that, although the "charge-off amount" and the "account balance at the time of acquisition" was $2,833.99, the "current balance due" on the Alleged Debt is $3,715.56. *Id*. at ¶¶ 62-63. Plaintiff alleges that the Account Summary Report "makes it clear that Defendants are charging post-charge-off interest on the Alleged Debt." *Id*. at ¶ 65.

Plaintiff also alleges that she has not received periodic statements for each month that a finance charge was imposed on the Alleged Debt, but that regulations issued pursuant to the Credit Card Accountability Responsibility and Disclosure Act ("Credit CARD Act") require credit card issuers to send periodic statements for each month that a finance charge is imposed. *Id*. at ¶¶ 66-67 (citing 12 C.F.R. § 226.5(b)(2)(i)). Plaintiff contends that "a bank can avoid the obligation of sending periodic statements on charged off accounts by waiving any right to additional fees and interest on the account." *Id*. at ¶ 68 (citing 12 C.F.R. § 226.5(b)(2)(i)).

Plaintiff further alleges that, "[u]pon information and belief, the Original Creditor for the Alleged Debt and the alleged account has a policy of waiving post-charge-off interest order to avoid the obligation of sending periodic statements on charged-off accounts." *Id*. at ¶ 69. Despite the alleged Original Creditor waiving contractual interest, and no interest being permitted to be charged in the absence of periodic statements, however, she alleges that the "Defendants have added and

continue to charge and attempt to collect post-charge-off interest on the purported charge-off balance." *Id*. at ¶ 70.

Plaintiff alleges that "Defendants know that their conduct—attempting to collect post-charge-off interest after contractual interest is waived, and without sending periodic statements—is illegal, yet Defendants continue to seek this interest." *Id*. at ¶ 71. She contends that "Defendants have no legal right to retroactively add interest that was waived by the Original Creditor." *Id*. at ¶ 72 (citing *McDonald v. Asset Acceptance LLC*, 296 F.R.D. 513 (E.D.Mich. 2013)). She also contends that "Defendants have no right to impose statutory interest when contractual interest was waived." *Id*. at ¶ 73 (citing *Stratton v. Portfolio Recovery Associates, LLC*, 770 F. 3d 443 (6th Cir. 2014)). Further, she contends, "Defendants have no legal right to charge any interest for the period between the time the Alleged Debt was purchased and the time it began sending Plaintiff collection letters without sending periodic statements pursuant to 12 C.F.R. § 226.5(b)(2)(i)." *Id*. at ¶ 74.

In Count 2, she alleges that "Defendants have attempted to collect an Alleged Debt from Plaintiff that includes improperly applied post-charge-off interest," and "used false, deceptive or misleading representations or means to collect or attempt to collect any debt, in violation of 15 U.S.C. § 1692e and e(10)." *Id*. at ¶¶ 87-88. She further alleges that the Defendants "falsely characterized the character and amounts of debt, in violation of 15 U.S.C. § 1692e(2)(A)," and "communicated credit

information to Plaintiff that they knew was false, or should have known to be false, in violation of 15 U.S.C. § 1692e(8)." *Id*. at ¶¶ 89-90.

Plaintiff alleges further that Defendants also "used unfair or unconscionable means to collect or attempt to collect any debt, in violation of 15 U.S.C. § 1692f," and "sought to collect an amount not expressly permitted by the agreement creating the debt or permitted by law, in violation of 15 U.S.C. § 1692f(1)." *Id*. at ¶¶ 91-92. She requests statutory damages up to the maximum of $1,000, plus actual damages, costs, and attorney's fees. *Id*. at ¶ 97.

Defendants Resurgent and LVNV argue that the Plaintiff's claim against them in Count 2 must be dismissed because the Plaintiff has failed to state a plausible claim against them under the FDCPA. In particular, Defendants argue that Plaintiff has failed to state a claim because, under Georgia law, it is not improper or unlawful to collect post-charge-off interest, even when contractual interest has been waived by the original creditor. Def. Br. [20-1] at 12-15. Thus, according to Defendants, "the question is whether under Georgia law Defendants can collect statutory prejudgment interest on a debt that was charged off by the original creditor. Since this issue presents a purely legal question, and does not turn on the consumer's sophistication, the least sophisticated consumer standard does not apply." *Id*. at 12 (citing *Jeter*, 760 F.2d at 1175).

As noted above, Plaintiff alleges in the Amended Complaint that "Defendants have no right to impose statutory interest when contractual interest was waived." Am. Comp. at ¶ 73 (citing *Stratton v. Portfolio Recovery Associates, LLC*, 770 F.3d 443 (6th Cir. 2014)). Defendants Resurgent and LVNV argue that this is simply a mis-statement of the law, because under Georgia law, the Defendants are entitled to impose statutory interest even if the original creditor waived contractual interest. According to Defendants, the *Stratton* case cited by Plaintiff relies "on a unique feature of the Kentucky interest statute." Def. Br. [20-1] at 13 (citing *Bunce v. Portfolio Recovery Assocs., LLC*, 2014 WL 5849252, at *4 (D. Kan. Nov. 12, 2014)). Kentucky's statute provides that parties to a written contract of indebtedness "shall be bound . . . for the rate of interest as is expressed in the contract" and that "no law of this state prescribing or limiting interest rates shall apply to the agreement." *Id*. (citing K.R.S. § 360.010(2)).

Defendants contend that "[e]very other court to have considered the issue has held that statutory prejudgment interest is not, *ipso facto*, waived simply because the debt was charged off by the original creditor." *Id*. (citing *Haney v. Portfolio Recovery Assocs.*, LLC, 895 F.3d 974, 982–87 (8th Cir. 2016); *Walkabout v. Midland Funding LLC*, 2016 WL 1169540, at *4 (W.D. Okla. Mar. 22, 2016); *Bunce*, 2014 WL 5849252, at *3; *Grochowski v. Daniel N. Gordon, P.C.*, 2014 WL 1516586, at *3 n.2 (W.D.Wash. Apr. 17, 2014); *cf. Cavalry SPV I, LLC v.*

Desrosiers, No. TTDCV095004477, 2010 WL 4227033, at *1 (Conn. Super. Ct. Sept. 20, 2010) (awarding statutory "prejudgment interest from the charge-off date" until the date of the judgment)).

While Defendants acknowledge that no court in the Eleventh Circuit has directly addressed this issue, the Eleventh Circuit held in a case involving a claim under the FDCPA that a plaintiff "was unable to produce any evidence in support of his claim that the credit card debt (balance or interest rate) was incorrect" even though the balance included "interest [that] had been accruing since the account was charged off." *Id*. at 14 (quoting *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1188-1200 (11th Cir. 2010)). Further, Defendants argue, unlike Kentucky's prejudgment interest statute, Georgia law does not explicitly prevent the application of statutory prejudgment interest simply because the parties previously agreed to a different, contractual interest rate. *Id*. at 14 (citing O.C.G.A § 7-4-2). Instead, Georgia law provides that "the legal rate of interest shall be 7 percent per annum simple interest where the rate percent is not established by written contract." *Id*. (citing O.C.G.A. § 7-4-2).

Thus, Defendants Resurgent and LVNV argue, Georgia's statute is similar to the Kansas, Missouri, and Oklahoma prejudgment interest statutes. *Id*. (citing K.S.A. 16-201 ("Creditors shall be allowed to receive interest at the rate of ten percent per annum, when no other rate of interest is agreed upon . . . ."); Mo. Rev.

Stat. § 408.020 ("Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon . . . ."); Okla. Stat. tit. 15, § 266 ("The legal rate of interest shall be six percent (6%) in the absence of any contract as to the rate of interest . . . .")). According to the Defendants, courts in those states have held that those prejudgment interest statutes apply even when a previously agreed upon contractual interest rate was waived because the debt was charged off. *Id*. at 14-15 (citing *Haney*, 895 F.3d at 982–87 (applying Missouri law); *Walkabout*, 2016 WL 1169540, at *4 (applying Oklahoma law); *Bunce*, 2014 WL 5849252, at *3 (applying Kansas law)).

Defendants argue further that Plaintiff is also incorrect when she states in the Amended Complaint that Defendants could not charge any interest "without sending periodic statements pursuant to 12 C.F.R. § 226.5(b)(2)(i)." *See* Am. Comp. at ¶ 74. According to the Defendants, this regulation is not based on anything in the FDCPA or the Georgia FBPA. Instead, it is based on a requirement of the Truth in Lending Act ("TILA") and Regulation Z, but Plaintiff brought no claim under TILA or its regulations, so the regulation she cites is irrelevant. Def. Br. [20-1] at 15.

Moreover, the Defendants contend, even if the Plaintiff's cited regulation applied to a claim brought under the FDCPA, the Plaintiff's argument is legally incorrect. *Id*. As the Eighth Circuit held in *Haney*, the regulation relied on by Plaintiff is "concerned with adequately communicating contractual terms addressing

interest and finance charges." *Id*. (quoting *Haney*, 895 F.3d at 985). It does not apply to "the general communication of state law," such as a state's prejudgment interest statute. *Id*. (quoting *Haney*, 895 F.3d at 985). In sum, the Defendants argue, because the amount Defendants sought to collect is permitted by Georgia's prejudgment interest statute, Count 2 fails as a matter of law and must be dismissed.

In response to the Defendants' arguments, Plaintiff argues that "Defendants, standing in the shoes of the Original Creditor, would be bound by any waiver of post-charge-off interest the Original Creditor made during the time the Original Creditor owned the account." Pl. Br. [23] at 11 (citing *Houghton v. Sacor Fin., Inc.*, 337 Ga. App. 254, 258, 786 S.E.2d 903, 906 (2016)). Plaintiff contends further that, regardless of whether the Defendants were imposing contractual interest or statutory interest under Georgia law, adding *any* interest to the Alleged Debt after it was charged-off by the original creditor would be a violation of the FDCPA:

> Ms. Yip alleges that Defendant's [sic] improperly applied interest to her account, but does not specifically allege that this was statutory interest under Georgia law. Rather, Ms. Yip's claims merely outline the many reasons why application of *any* post-charge-off interest to her account would violate the FDCPA—because it could not be applied under contract theory, because federal law prohibits imposing finance charges without periodic statements, and because Georgia's statutory interest law only applies to accounts where the interest is not otherwise set by contract.

Id. at 12 (emphasis in original).

Plaintiff argues that the Defendants' Motion to Dismiss must be denied because "Defendants do not claim, and provide no evidence, that the post-charge-off interest applied to Ms. Yip's account was at Georgia's statutory interest rate. Neither Ms. Yip nor this Court at this time in the lawsuit knows how Defendants applied post-charge-off interest to Ms. Yip's account. Instead, all that is clear is that post-charge-off interest was applied, and that Ms. Yip has alleged it was applied improperly." *Id*. at 13. Moreover, Plaintiff argues that at least one case, the Eastern District of Michigan's decision in *McDonald v. Asset Acceptance LLC*, 296 F.R.D. 513 (E.D. Mich. 2013), provides support for her argument, because that case held that a creditor could not retroactively impose interest for the period in which it did not own the account, if the original creditor had waived post-charge-off interest. *Id*. at 14-15 (citing *McDonald*, 296 F.R.D. at 526).

In their Reply Brief, Defendants Resurgent and LVNV note that the *McDonald* case cited by Plaintiff was vacated in its entirety. Def. Reply Br. [24] at 13 (citing *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)). Further, Defendants argue, that case is factually distinguishable from the Plaintiff's claims in this case because in *McDonald*, the purchaser of the debt tried to "retroactively impose interest for the period in which it did not own the accounts." *Id*. (citing *McDonald*, 296 F.R.D. at 526). In this case, the Defendants contend, the

Plaintiff does not allege that Defendants added interest for a period before the account was charged off; instead, she alleges only that "Defendants have added and continue to charge and attempt to collect post-charge-off interest." *Id*.

Upon a review of the Plaintiff's allegations in the Amended Complaint and the parties' arguments in their briefs and supplemental briefs, the Court agrees with Defendants Resurgent and LVNV that the Plaintiff has failed to allege sufficient facts to state a plausible claim against Resurgent and LVNV under the FDCPA in Count 2 of the Amended Complaint. As set forth at length above, Plaintiff's claim in Count 2 is based primarily on her allegation that the Account Summary Report included in the Resurgent Verification Letter states that, although the "charge-off amount" and the "account balance at the time of acquisition" was $2,833.99, the "current balance due" on the Alleged Debt is $3,715.56. Am. Comp. at ¶¶ 62-63. Plaintiff alleges that the Account Summary Report "makes it clear that Defendants are charging post-charge-off interest on the Alleged Debt." *Id*. at ¶ 65.

Plaintiff claims that, because the Defendants "improperly" charged post-charge-off interest to her Alleged Debt, they violated the FDCPA by attempting to collect that "improper" amount. But as Defendants argue, regardless of whether the original creditor waived any imposition of contractual post-charge-off interest, the Defendants were entitled to collect statutory interest pursuant to Georgia law. *See* O.C.G.A. § 7-4-2. Plaintiff in response argues that "*any* post-charge-off interest

to her account would violate the FDCPA—because it could not be applied under contract theory, because federal law prohibits imposing finance charges without periodic statements, and because Georgia's statutory interest law only applies to accounts where the interest is not otherwise set by contract." Pl. Br. at 12.

While the Defendants do not dispute that contract theory may prohibit the imposition of contractual post-charge-off interest (assuming that the original creditor waived contractual interest), the Defendants argue that statutory interest was not prohibited, and Plaintiff's other two arguments are simply incorrect as a matter of law. Although Plaintiff contends that "federal law" prohibits imposing finance charges without periodic statements, the Defendants have shown that the regulation cited by Plaintiff does not apply to the Plaintiff's claims.

Plaintiff alleges in the Amended Complaint that she has not received periodic statements for each month that a finance charge was imposed on the Alleged Debt, but that regulations issued pursuant to the Credit CARD Act require "credit card issuers" to send periodic statements for each month that a finance charge is imposed. Am. Comp. at ¶¶ 66-67 (citing 12 C.F.R. § 226.5(b)(2)(i)). Plaintiff further alleges in the Amended Complaint that Defendants "have no legal right to charge any interest for the period between the time the Alleged Debt was purchased and the time it began sending Plaintiff collection letters without sending periodic statements pursuant to 12 C.F.R. § 226.5(b)(2)(i)." *Id*. at ¶ 74.

Although the Plaintiff's reference to "federal law" appears to rely on this regulation cited in the Amended Complaint, the Defendants are correct that the regulation cited by Plaintiff is not based on any requirements of the FDCPA or the Georgia FBPA. Instead, the regulation is based on a requirement of the Truth in Lending Act ("TILA"), and provides as follows:

> (2) Periodic statements—
>
> > (i) Statement required. The creditor shall mail or deliver a periodic statement as required by § 226.7 for each billing cycle at the end of which an account has a debit or credit balance of more than $1 or on which a finance charge has been imposed. A periodic statement need not be sent for an account if the creditor deems it uncollectible, *if delinquency collection proceedings have been instituted*, if the creditor has charged off the account in accordance with loan-loss provisions and will not charge any additional fees or interest on the account, or if furnishing the statement would violate federal law.

12 C.F.R. § 226.5(b)(2)(i) (emphasis added).

Significantly, the Plaintiff fails to note that this regulation applies only to "creditors" under TILA, and she has failed to cite to any authority showing that either Defendant Resurgent or LVNV would be considered a "creditor" as that term is defined by TILA, such that the regulation would even apply to them. *See* 12 C.F.R. § 226.5(b)(2)(i). Instead, the Plaintiff alleges in the Amended Complaint that both Defendant Resurgent and Defendant LVNV are "debt collectors" under the FDCPA,

which generally excludes the Defendants from also being "creditors" under TILA. *See* 15 U.S.C. § 1692a(6).

Moreover, even if the regulation otherwise applied to Defendants Resurgent and LVNV, the regulation expressly provides that a periodic statement is not required to be sent for an account "if delinquency collection proceedings have been instituted." 12 C.F.R. § 226.5(b)(2)(i). The Plaintiff's allegations in the Amended Complaint are based entirely on her central premise that the Defendants are debt collectors engaged in an attempt to collect on an alleged delinquent debt. Moreover, the Court is also persuaded by the Defendants' cited authority that the regulation relied on by Plaintiff is "concerned with adequately communicating contractual terms addressing interest and finance charges." *Haney*, 895 F.3d at 985. It does not apply to "the general communication of state law," such as a state's prejudgment interest statute. *Id*. In sum, the Court rejects the Plaintiff's argument that "federal law prohibits imposing finance charges without periodic statements."

Further, Plaintiff argues, "Georgia's statutory interest law only applies to accounts where the interest is not otherwise set by contract." Pl. Br. at 12. To the extent that the Plaintiff relies on this argument to mean that the Defendants were bound by the original creditor's alleged agreement to waive post-charge-off contractual interest, the Court also rejects this argument. As the Defendants have shown, the Georgia statute regarding interest is similar to those in other states in

which courts have held that statutory interest is not waived simply because the debt was charged off by the original creditor. *See, e.g.*, *Haney v. Portfolio Recovery Assocs.*, LLC, 895 F.3d 974, 982–87 (8th Cir. 2016) ("we conclude Missouri statutory prejudgment interest remains available following the charge-off of a credit-card debt"); *Walkabout v. Midland Funding LLC*, 2016 WL 1169540, at *4 (W.D. Okla. Mar. 22, 2016); *Bunce v. Portfolio Recovery Assocs., LLC*, 2014 WL 5849252, at *3 (D. Kan. Nov. 12, 2014)). The Court finds these decisions persuasive, and thus concludes that under Georgia law, the Defendants were entitled to impose statutory interest on the Alleged Debt, notwithstanding any waiver of contractual interest that may have been made by the original creditor after the debt was charged-off.

The Court also finds unpersuasive the Plaintiff's reliance on the Eastern District of Michigan's decision in *McDonald v. Asset Acceptance LLC*, 296 F.R.D. 513 (E.D. Mich. 2013). As the Defendants correctly note, the decision was later vacated. Def. Reply Br. [24] at 13 (citing *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)). In her supplemental brief, Plaintiff argues that *McDonald* was not vacated on the merits, but was vacated only because the parties reached a settlement. Pl. Supp. Br. [25-1] at 4-6. Nevertheless, even if the case had not been vacated, the Court finds it unpersuasive and factually distinguishable.

In *McDonald*, the court held that a creditor could not retroactively impose interest for the period in which it did not own the account, if the original creditor had waived post-charge-off interest. *Id*. at 6 (citing *McDonald*, 296 F.R.D. at 526). The Defendants correctly observe that Plaintiff in this case does not allege in the Complaint that the Defendants retroactively imposed interest for the period in which they did not own the account. Plaintiff argues in her supplemental brief that "Plaintiff's Complaint does allege these claims both implicitly and explicitly. Paragraph 72 of Plaintiff's Complaint specifically alleges Defendants retroactively added post-charge off interest and cites to *McDonald*." *Id*.

A review of Plaintiff's allegation in paragraph 72 of the original Complaint shows that the Defendants are correct, as Plaintiff alleges only that: "Defendants have no legal right to retroactively add interest that was waived by the Original Creditor. *See McDonald v. Asset Acceptance LLC*, 296 F.R.D. 513 (E.D. Mich. 2013))." Comp. [1] at ¶ 72. Alleging that Defendants "have no legal right to retroactively add interest" is merely a conclusory assertion of a legal principle and does not constitute any allegation of fact pertinent to this case. It appears that Plaintiff fails to allege anywhere in the original Complaint that the Defendants retroactively imposed interest for the period in which they did not own the account.

More importantly, the Plaintiff has now been given an opportunity to amend the Complaint, and in the Amended Complaint, she still fails to allege that the Defendants retroactively imposed interest for the period in which they did not own the account. *See* Am. Comp. [36-3]. Although the Defendants had previously advised Plaintiff, correctly, that she had failed to allege this fact in the Complaint, the Plaintiff makes the same conclusory legal allegation in her Amended Complaint that she made in her original Complaint: "Defendants have no legal right to retroactively add interest that was waived by the Original Creditor. *See McDonald v. Asset Acceptance LLC,* 296 F.R.D. 513 (E.D.Mich. 2013))." Am. Comp. [36-3] at ¶ 72. Plaintiff again fails to allege, as a factual matter, that Defendants retroactively imposed interest on her account for the time period before they owned the account.

Moreover, even if Plaintiff had alleged that Defendants retroactively imposed interest on her account for the time period before they owned the account, the Court does not find the *McDonald* case persuasive to the extent it held that statutory interest could not be applied during that time period after the debt was charged-off by the original creditor but before the assignment of the debt was made to the assignees. The Court finds more persuasive the Eighth Circuit's reasoning in *Haney v. Portfolio Recovery Assocs., L.L.C.*, 895 F.3d 974, 985–86 (8th Cir. 2016), one of the cases cited by Defendants, which expressly rejected a plaintiff's argument

that the original creditor's decision to waive contractual interest serves as a binding waiver of any future ability to collect statutory interest, even for assignees:

> [The plaintiff] appears to argue that, even if statutory interest might otherwise be available to [the assignee], it is not available for the period of time following charge-off and preceding assignment. . . . we find [the plaintiff's] position . . . without merit. Regarding the timing of assignments, [the assignee] obtained the same rights as held by the original creditors. *See Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 128 (Mo. 2010) (*en banc*) ("The only rights or interests an assignee acquires are those the assignor had at the time the assignment was made. Because an assignee merely steps into the shoes of the assignor, an assignee must allege facts showing that the assignor would be entitled to relief." (citation omitted)); *Cordry v. Vanderbilt Mortg. & Fin., Inc.*, 445 F.3d 1106, 1111 (8th Cir. 2006) (Missouri assignee "steps into the shoes"). Because we hold the original creditors' acts of charging off the debts did not effectuate waivers of statutory interest, the assignments of the debt to [the assignee] did not "create" the entitlement to statutory prejudgment interest. The assignments merely transferred any entitlement to such interest that otherwise existed. *See Renaissance Leasing, LLC*, 322 S.W.3d at 128.

Haney, 895 F.3d at 985-86.

Finally, the Court also rejects the Plaintiff's argument that the Defendants' Motion to Dismiss must be denied because "Defendants do not claim, and provide no evidence, that the post-charge-off interest applied to Ms. Yip's account was at Georgia's statutory interest rate. Neither Ms. Yip nor this Court at this time in the lawsuit knows how Defendants applied post-charge-off interest to Ms. Yip's account. Instead, all that is clear is that post-charge-off interest was applied, and that Ms. Yip has alleged it was applied improperly." Pl. Br. [23] at 13. Plaintiff cites to

no authority supporting her argument that the Defendants are required to "provide evidence" that the post-charge-off interest applied to Plaintiff's account was at Georgia's statutory interest rate.

As discussed, to survive the Defendant's Motion to Dismiss, it is Plaintiff's burden to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). It is not the Defendants' burden to prove that the statutory interest was applied correctly and at the correct rate. Instead, it is Plaintiff's burden to allege sufficient facts to state a plausible claim that the Defendants improperly applied interest to the Plaintiff's account, such that the Resurgent Verification Letter was "false" or "misleading" under the FDCPA. Plaintiff alleges in the Amended Complaint only that the Defendants improperly applied interest to Plaintiff's account because the original creditor waived its right to contractual interest. Plaintiff does not allege in the Complaint or the Amended Complaint that the Defendants applied the wrong statutory interest rate, or that they calculated the statutory interest improperly. She alleges only that it was illegal to impose post-charge-off interest at all. Contrary to the Plaintiff's argument, however, the Defendants have established that it is legal under Georgia law to apply statutory interest under such circumstances.

In sum, for all of these reasons, the Court finds that Plaintiff has failed to state a plausible claim for relief under the FDPCA against Defendants Resurgent or LVNV in Count 2 of the Amended Complaint. Accordingly, the undersigned **RECOMMENDS** that the Motion to Dismiss [20] filed by Defendants LVNV and Resurgent be **GRANTED** as to Count 2 of the Amended Complaint, and that her claim against them in Count 2 be **DISMISSED** for failure to state a claim.

3. Plaintiff's FBPA Claims

Plaintiff has also asserted two separate claims against the Defendants under the Georgia Fair Business Practices Act ("FBPA"), O.C.G.A. §§ 10-1-390, *et seq*. In Count 3 of the Amended Complaint, Plaintiff alleges that Defendants Dynamic Recovery and LVNV (but not Defendant Resurgent) violated the Georgia Fair Business Practices Act ("FBPA"). Am. Comp. [36-3] at ¶¶ 99-105. She alleges that "Defendants [sic] actions in charging post-charge-off interest in violation of the law and pursuing time-barred claims using false, misleading, deceptive, unfair, and unconscionable means constitute unfair or deceptive acts or practices in the conduct of consumer transactions in trade or commerce and therefore violate Georgia's Fair Business Practices Act ('FBPA'), O.C.G.A. § 10-1-390 *et seq*." *Id*. at ¶ 100. She alleges that "Defendants' actions in violation of the FDCPA, and therefore in violation of Georgia's FBPA, were intentional in nature and part of a business model designed to collect debts based on false, misleading, deceptive, unfair,

unconscionable, abusive, harassing, and oppressive collection practices." *Id*. at ¶ 102. In Count 4 of the Amended Complaint, Plaintiff alleges that Defendants Dynamic Recovery and LVNV violated the Georgia FBPA, and she requests an equitable remedy and injunction pursuant to O.C.G.A. § 10-1-399(a), and attorney's fees pursuant to O.C.G.A. § 10-1-399(d). *Id*. at ¶¶ 106-07.

Under Eleventh Circuit precedent, "a violation of the FDCPA constitutes a violation of the GFBPA." *Harris v. Liberty Cmty. Mgmt., Inc.*, 702 F.3d 1298, 1303 (11th Cir. 2012). In the Plaintiff's brief, she contends that her "Georgia FBPA claims depend upon her claims that Defendants violated the FDCPA." Pl. Br. [23] at 18. Because the undersigned finds that the Plaintiff has failed to state a plausible claim for relief against Defendants Resurgent and LVNV under the FDCPA, it follows that the Plaintiff has also failed to state a plausible claim for relief against LVNV under the FBPA. Accordingly, the undersigned **RECOMMENDS** that the Motion to Dismiss [20] filed by Defendants LVNV and Resurgent be **GRANTED** as to Counts 3 and 4 of the Amended Complaint, and that her FBPA claims against Defendant LVNV be **DISMISSED** for failure to state a claim.

C. *Dynamic Recovery's Motion for Judgment on the Pleadings*

1. Standard on a Motion for Judgment on the Pleadings

Defendant Dynamic Recovery has filed a Motion for Judgment on the Pleadings [26], requesting judgment on the pleadings pursuant to Rule 12(c) of the

Federal Rules of Civil Procedure. Under Rule 12(c), a party may move for judgment as a matter of law after the pleadings are closed. Fed. R. Civ. P. 12(c). While the proper time for filing the motions differs, "[a] motion for judgment on the pleadings is subject to the same standard as is a Rule 12(b)(6) motion to dismiss." *Roma Outdoor Creations, Inc. v. City of Cumming, Ga.*, 558 F. Supp. 2d 1283, 1284 (N.D. Ga. 2008) (quoting *Provident Mut. Life Ins. Co. of Philadelphia v. City of Atlanta*, 864 F. Supp. 1274, 1278 (N.D. Ga. 1994)). Accordingly, the Court considers the arguments made in Dynamic Recovery's Motion for Judgment on the Pleadings [26] under the same standard set forth above in connection with the Motion to Dismiss filed by Defendants LVNV and Resurgent.

2. Plaintiff's FDCPA Claims

As set forth above, in Count 1 of the Amended Complaint [36-3], Plaintiff alleges that Defendants Resurgent and LVNV, but not Dynamic Recovery, violated the FDCPA by sending "false, misleading, and deceptive collection letters" to her. Am. Comp. at ¶¶ 81-86. Thus, Count 1 is not asserted against Defendant Dynamic Recovery. In Count 2 of the Amended Complaint, Plaintiff alleges that all of the Defendants, including Dynamic Recovery, violated the FDCPA by "attempting to collect a false and improper amount." *Id*. at ¶¶ 87-97. She alleges that "Defendants have attempted to collect an Alleged Debt from Plaintiff that includes improperly applied post-charge-off interest," and "used false, deceptive or misleading

representations or means to collect or attempt to collect any debt, in violation of 15 U.S.C. § 1692e and e(10)." *Id*. at ¶¶ 87-88.

As discussed, the Court rejects the Plaintiff's argument that the Defendants improperly imposed post-charge-off interest to the Plaintiff's account. Thus, the Plaintiff has failed to state a plausible claim for relief on Count 2 of the Amended Complaint. Accordingly, the undersigned **RECOMMENDS** that the Motion for Judgment on the Pleadings [26] filed by Defendant Dynamic Recovery be **GRANTED** as to Count 2 of the Amended Complaint, and that her FDCPA claim against Dynamic Recovery in Count 2 be **DISMISSED** for failure to state a claim.

3. Plaintiff's FBPA Claims

In Count 3 of the Amended Complaint, Plaintiff alleges that Defendants Dynamic Recovery and LVNV violated the Georgia FBPA. Am. Comp. at ¶¶ 99-105. In Count 4 of the Amended Complaint, Plaintiff again alleges that Defendants Dynamic Recovery and LVNV violated the Georgia FBPA, and she requests an equitable remedy and injunction pursuant to O.C.G.A. § 10-1-399(a), and attorney's fees pursuant to O.C.G.A. § 10-1-399(d). *Id*. at ¶¶ 106-07.

Because the undersigned finds that the Plaintiff has failed to state a plausible claim for relief against Defendant Dynamic Recovery under the FDCPA, it follows that the Plaintiff has also failed to state a plausible claim for relief against Defendant Dynamic Recovery under the FBPA. Accordingly, the undersigned

RECOMMENDS that the Dynamic Recovery's Motion for Judgment on the Pleadings [26] be **GRANTED** as to Counts 3 and 4 of the Amended Complaint, and that her FBPA claims be **DISMISSED** for failure to state a claim.

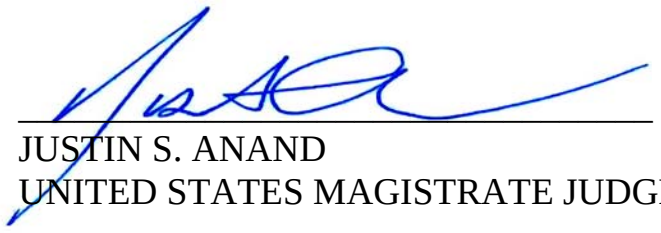
III. CONCLUSION AND RECOMMENDATION

The Plaintiff's Motion to Amend [36] is **GRANTED**. The Court has considered the Plaintiff's Amended Complaint [36-3] to be the operative pleading for the purpose of resolving the Defendants' Motion to Dismiss [20] and Motion for Judgment on the Pleadings [26].

For the reasons discussed above, **IT IS RECOMMENDED** that the Motion to Dismiss [20] filed by Defendants LVNV and Resurgent and the Motion for Judgment on the Pleadings [26] filed by Defendant Dynamic Recovery be **GRANTED** and that all of Plaintiff's claims in the Amended Complaint [36-3] be **DISMISSED** for failure to state a claim for relief.

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

IT IS SO ORDERED and RECOMMENDED this 18th day of June, 2019.



JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE