UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| WILFRIDO PARDO individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br><br>vs.<br><br>ALLIED INTERSTATE, LLC a Minnesota limited liability company, LVNV FUNDING, LLC a Delaware limited liability company, RESURGENT CAPITAL SERVICES, L.P. a Delaware limited partnership,<br><br>Defendants. | ) | 1:14-cv-01104-SEB-DML |

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

Plaintiff Wilfrido Pardo has brought this action against Defendants Allied Interstate, LLC ("Allied Interstate"), LVNV Funding, LLC ("LVNV"), and Resurgent Capital Services, L.P. ("Resurgent Capital"), claiming violations of the Federal Debt Collection Practices Acts, 15 U.S.C. § 1692 *et seq.* ("FDCPA"). Currently pending before the Court is Defendants' Motion to Dismiss [Docket No. 23], filed September 3, 2014. For the reasons detailed in this order, we **DENY** Defendants' motion. [1]

[1] The Court recognizes that both a Motion to Dismiss and a Motion to Certify Class currently pend before us; thus, we must determine the appropriate order in which to rule on these motions. Federal Rule of Civil Procedure 23(c)(1) directs district courts to grant or deny class certification "early" in the litigation, and the Seventh Circuit has held that generally speaking the issue of class certification should be addressed prior to a decision on the merits of the case, particularly before a ruling on summary judgment. *Larson v. JPMorgan Chase & Co.,* 530 F.3d 578, 581 (7th Cir. 2008); *Weismuller v. Kosobucki,* 513 F.3d 784, 784 (7th Cir. 2008).

**Factual Background**

On January 24, 2014, Mr. Pardo received a collection letter regarding a debt he owed to Plains Commerce Bank, which account had become delinquent after he fell behind in making payments. Dkt. 1 at ¶ 10. The letter was sent from Allied Interstate and written on Allied Interstate letterhead. The heading of the letter stated as follows:

> Re: Plains Commerce Bank Account No. *** [redacted]
> Amount Owed: $1185.54
> Current Creditor: LVNV Funding LLC Account No. *** [redacted]
> Reference No. [redacted]

Dkt. 1, Ex. C. The first sentence of the body of the collection letter states: "We are a debt collection company and our client, Resurgent Capital Services LP, has retained us to collect the debt noted above." *Id.* The paragraph following states: "Our client is willing to accept payment in the amount of $948.43 in settlement of this debt." *Id.* The letter is signed: "*Allied Interstate LLC*." *Id.* These are the only references in the collection letter to Allied Interstate, Plains Commerce Bank, LVNV, and Resurgent Capital.

On July 1, 2014, Mr. Pardo filed a putative class action alleging that the collection letter he received violated section 1692(g) of the FDCPA because it failed to correctly identify "the name of the creditor to whom the debt is owed." 15 U.S.C. § 1692(g)(a)(2).

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However, the court retains discretion to decide a Rule 12(b)(6) motion before determining whether to certify a putative class. *McReynolds v. Merrill Lynch & Co., Inc.,* 694 F.3d 873, 879 n. 4 (7th Cir. 2012) ("there is no fixed requirement that the court must *always* defer a decision on a Rule 12(b)(6) motion until after the court addresses class certification."). Here, Defendants have requested that we first rule on the Motion to Dismiss. The interest of judicial economy is best served by doing so, in our opinion. *See Haehl v. Washington Mut. Bank, F.A.*, 277 F. Supp. 2d 933, 934 (S.D. Ind. 2003).

On September 3, 2014, Defendants moved to dismiss the Complaint, arguing that, as a matter of law, the letter is not confusing with respect to the identity of the creditor to whom the debt is owed. Dkt. 23.

**Legal Standards**

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of claims for "failure to state a claim upon which relief may be granted." In determining the sufficiency of the claim, the Court construes the complaint in the light most favorable to Plaintiff, accepting as true all well-pleaded facts and drawing reasonable inferences in his favor. *McReynolds v. Merrill Lynch & Co.,* 694 F.3d 873, 879 (7th Cir. 2012).

A complaint containing claims against debt collectors under the section 1692 of the FDCPA are to be viewed through the eyes of the unsophisticated consumer. *Zemeckis v. Global Credit & Collection Corp.,* 679 F.3d 632, 635 (7th Cir. 2012). The unsophisticated consumer is considered "uninformed, naive, [and] trusting," but nonetheless possesses "rudimentary knowledge about the financial world and is capable of making basic logical deductions and inferences." *Fields v. Wilber Law Firm, P. C.,* 383 F.3d 562, 564 (7th Cir. 2004) (internal quotations omitted). Under the objective 'unsophisticated consumer' standard, collection letters are not confusing or misleading unless a "significant fraction of the population would be similarly misled." *Chuway v. Nat'l Action Fin. Servs.,* 362 F.3d 944, 949 (7th Cir. 2004).

However, "when a complaint alleges that a dunning letter is confusing, and thus a violation of § 1692(g), the plaintiff has stated a recognizable legal claim; no more is necessary to survive a Rule 12(b)(6) motion." *McMillan v. Collection Professionals Inc.*, 455 F.3d 754, 761 (7th Cir. 2006); *see also Marshall-Mosby v. Corporate Receivables, Inc.,* 205 F.3d 323, 326–27 (7th Cir.2000) ("[A] FDCPA complaint survives a motion to dismiss under Rule 12(b)(6) simply by alleging that a dunning letter was confusing."). This is because question of whether an unsophisticated debtor would be confused by a dunning letter is fact-based and cannot be decided at the pleading stage. *Walker v. Nat'l Recovery, Inc.*, 200 F.3d 500, 501 (7th Cir. 1999); *McMillan*, 455 F.3d at 760 ("dismissal is typically not available under 12(b)(6), which is appropriate only when there is no set of facts consistent with the pleadings under which the plaintiff could obtain relief.")

This general rule does not mean that the unsophisticated consumer test can never be resolved at the pleading stage; there are cases when the court is required to hold that no reasonable person, however unsophisticated, could construe the wording of the communication in a manner that will violate the statutory provision. In those situations, it is appropriate for the court to dismiss the case on a Rule 12(b)(6) motion. *See Zemeckis v. Global Credit & Collection Corp.*, 679 F.3d 632, 636 (7th Cir. 2012) ( "[A] plaintiff fails to state a claim and dismissal is appropriate as a matter of law when it is 'apparent from a reading of the letter that not even a significant fraction of the population would be misled by it."). However, the Seventh Circuit has cautioned that the district court must tread carefully before holding that a letter is not confusing as a matter of law when ruling on a

Rule 12(b)(6) motion because "district judges are not good proxies for the 'unsophisticated consumer' whose interest the statute protects." *McMillan,* 455 F.3d at 759 (quoting *Walker v. Nat'l Recovery, Inc.,* 200 F.3d 500, 501–03 (7th Cir. 1999)). In most instances, a proper application of the rule will require a denial of a Rule 12(b)(6) motion so that the plaintiff may be given an opportunity to demonstrate that his allegations are supported by a factual basis. *McMillan,* 455 F.3d at 760.

## I. Mr. Pardo's Section 1692(g)(a)(2) Claim

Section 1692(g) of the FDCPA governs a debt collector's initial communication with a consumer and requires, among other things, that the debt collector provide identification of "the creditor to whom the debt is owed." 15 U.S.C. § 1692(g)(a)(2). This requirement is considered material under the statute because if it is missing or presented in an arguably confusing manner, it could influence the consumer's decision. For example, it could cause an unsophisticated consumer to worry about being defrauded or paying the incorrect creditor and continuing to have an outstanding debt. *Walls v. United Collection Bureau, Inc.*, 2012 WL 1755751, at *2 (N.D. Ill. May 16, 2012). Thus, if the identity of the creditor to whom the debt is owed is not communicated to the debtor, or if it is provided in a manner that is arguably confusion, section 1692(g)(a)(2) has been violated. *McMillan v. Collection Prof'ls, Inc.,* 455 F.3d 754, 758 (7th Cir. 2006).

Mr. Pardo alleges that the letter he received from Allied Interstate on January 24, 2014 violated 15 U.S.C. § 1692(g)(a)(2) because the letter's heading stated that "LVNV Funding, LLC" was the "Current Creditor," but the letter's body referred to "Resurgent

Capital Services LP" as Allied's "Client" and offered no explanation of the relationship between LVNV and Resurgent Capital or why/how Resurgent Capital was involved with the debt at all. Dkt. 1 at ¶ 10.

In support of their Motion to Dismiss, Defendants contend that "Allied's letter clearly and effectively identifies LVNV as the 'current creditor.'" Dkt. 24 at 4. Defendants stress that "Allied's letter identifies only one entity—LVNV—as the 'current creditor.'" Dkt. 24 at 9. Accordingly, they believe that "[n]o unsophisticated consumer could reasonably interpret the letter to say the debt is owed to any entity other than LVNV." *Id.*

We view this case as markedly similar to *Walls v. United Collection Bureau, Inc.*, 2012 WL 1755751, at *1 (N.D. Ill. May 16, 2012), in which the district court denied the defendants' motion to dismiss on virtually the same grounds. The letter in *Walls* identified Resurgent Capital as the "Client" and LVNV as the "Current Owner," but did not give an explanation of the relationship between Resurgent and LVNV and did not identify either business as the "creditor to whom the debt is owed." *Walls,* 2012 WL 1755751, at *1. While the two letters are not identical—our letter labels LVNV as "Current Creditor" rather than "Current Owner"—the minor difference is immaterial. "The key consideration is that the unsophisticated consumer is to be protected against confusion whatever form it takes." *Marshall-Mosby v. Corporate Receivables, Inc.,* 205 F.3d 323, 326 (7th Cir. 2000) (internal quotations omitted).

Allied's letter in this case states that LVNV is the "Current Creditor." If that were the only statement regarding the identity of the creditor to whom the debt is owed, we might indeed conclude that as a matter of law the dunning letter was not confusing. However, the letter also identifies the debt as belonging to Allied Interstate's client, Resurgent Capital. Mr. Pardo alleges that the identification of Resurgent Capital as the "Client" who retained Allied Interstate to collect the debt and who is "willing to accept payment" for the debt conflicts with Defendants' identification of LVNV as the "Current Creditor" and that the conflict causes confusion in violation of § 1692(g)(a)(2).

We agree with Mr. Pardo that the identification of LVNV as the "Current Creditor" in the letter's heading and the identification of Resurgent Capital as the "Client…[who] is willing to accept payment" in the letter's body, absent any explanation of the two companies' relationship, may violate the FDCPA's "implied duty to avoid confusing the unsophisticated consumer." *Bartlett v. Heibl,* 128 F.3d 497, 500 (7th Cir. 1997). For instance, the inclusion of two entities who are willing to accept payment on the debt might lead an unsophisticated consumer to conclude that his debt was now owed to two separate companies (LVNV and Resurgent Capital).

Discovery may reveal that the unsophisticated consumer may not be confused by the dunning letter's identification of two potential creditors, but that is a question of fact not suitable for resolution at this stage of the litigation. And at this time, we draw all reasonable inferences in favor of the plaintiff. *Opp v. Office of State's Attorney of Cook County,* 630 F.3d 616, 619 (7th Cir. 2010). Thus, because it is possible to imagine

evidence that would support Mr. Pardo's Complaint and establish a violation of § 1692(g)(a)(2), Defendants' Motion to Dismiss is denied. *See McMillan,* 455 F.3d at 760.

**Conclusion**

For the foregoing reasons, we **DENY** Defendants' Motion to Dismiss. Docket No. 23.

IT IS SO ORDERED.

09/21/2015

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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