UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLAND DIVISION

RANDY SCHWARZ,

Plaintiff,

v. Case No: 6:15-cv-1691-Orl-37GJK

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Defendant.

ORDER

This cause is before the Court on the following matters:

(1) Defendant's Motion to Dismiss Complaint [DE 2] (Doc. 4), filed October 19, 2015; and

(2) Plaintiff's Response to Defendant's Motion to Dismiss Complaint (Doc. 5), filed October 29, 2015.

BACKGROUND

On October 8, 2015, Plaintiff Randy Schwarz filed a one-count Complaint, alleging that Defendant Portfolio Recovery Associates, LLC violated the Fair Debt Collection Practices Act ("**FDCPA**"), 15 U.S.C. §§ 1692-1692p. (Doc. 2, ¶¶ 23–25.) According to the factual allegations in the Complaint, Plaintiff incurred debt ("**Debt**"), which was "transferred to Defendant for collection."[1] (*See id.* ¶¶ 12–13.) Defendant's collection

[1] For purposes of the FDCPA, "debt" is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). Plaintiff has alleged that the debt at issue was "primarily for personal, family, or household purposes." (Doc. 2 ¶ 12.)

efforts included correspondence to Plaintiff dated January 30, 2015 ("**Initial Letter**"), which included a request for payment of the Debt. (*Id.* ¶¶ 16-17; Doc. 3-1 at 1.) On or about February 11, 2015, Plaintiff mailed the Initial Letter back to Defendant with a handwritten note "that Plaintiff disputed the alleged [D]ebt and refused to make payment on same" ("**Notification Letter**"). (Doc. 2 ¶¶ 18-19; Doc. 3-1 at 1-2.) Plaintiff then allegedly received two more letters in return ("**Subsequent Letters**"). (Doc. 2 ¶¶ 20-21; Doc. 3-2; Doc. 3-3.)

Plaintiff alleges that Defendant violated § 1692c(c) of the FDCPA by sending the Subsequent Letters because both "request[ed] payment on the same alleged [D]ebt" that was addressed in the Initial Letter and in the Notification Letter.[2] (Doc. 2, ¶ 25.) On their face, the Subsequent Letters: (1) offer $91.43 off the Debt balance and settlement of the Debt if Plaintiff pays $368.00 to Defendant; (2) reference the potential availability of other payment options "[i]f paying off this debt in a lump sum is difficult . . . ."; and (3) invite Plaintiff to call a listed number to determine the potentially available payment plan options. (*See* Docs. 3-2, 3-3.)

Arguing that the Subsequent Letters plainly fall into the "notice of remedy" exception specified in § 1692c(c)(2) ("**Exception**"), Defendant moves to dismiss the

[2] Both parties filed copies of the Initial, Subsequent, and Notification Letters (Docs. 2-1, 3, 3-1, 3-2, 3-3), and both parties cite to and discuss the Letters in their briefing concerning the Rule 12 Motion (*see* Docs. 4, 5). The Court has considered these materials because they are central, undisputed, and otherwise appropriate to consider for purposes of resolving the Rule 12 Motion. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (citing *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.").

Complaint in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure ("**Rule 12 Motion**"). (Doc. 4.) Plaintiff responded. (Doc. 5.) For the reasons set forth below, the Court finds that the Rule 12 Motion is due to be denied.

STANDARDS

I. Rule 12(b)(6)

To avoid dismissal under Rule 12(b)(6), a complaint must include factual allegations that "state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In making this plausibility determination, the Court must accept the factual allegations as true; however, this "tenet . . . is inapplicable to legal conclusions." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Labels, conclusions, formulaic recitations of the elements of a cause of action, and mere naked assertions are insufficient. *Twombly,* 550 U.S. at 555. The Court must dismiss a cause of action when, "on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas. Dist.*, 992 F. 2d 1171, 1174 (11th Cir. 1993).

II. FDCPA

To prevail on a FDCPA claim, a plaintiff must adequately plead and ultimately prove three elements: (1) the plaintiff has been "the object of collection activity arising from consumer debt"; (2) "the defendant is a debt collector as defined by the FDCPA"; and (3) "the defendant has engaged in an act or omission prohibited by the FDCPA." *Kennedy v. Nat'l Asset & Risk Mgmt., LLC*, No. 3:13-CV-101-J-12MCR, 2013 WL 5487022, at *2 (M.D. Fla. Sept. 30, 2013). Unless one of three exceptions applies, the FDCPA prohibits debt collectors from communicating with a consumer concerning a debt

after the "consumer notifies [the] debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer." 15 U.S.C. §§ 1692c(c). The three exceptions are for communications sent:

> (1) to advise the consumer that the debt collector's further efforts are being terminated;
>
> (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
>
> (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

Id.

DISCUSSION

Defendant contends that Plaintiff's FDCPA claim fails as a matter of law because the Subsequent Letters plainly fall under the "notice of remedies" exception specified in § 1692c(c)(2) ("**Exception**"). (*See* Doc. 4, p. 3.) Defendant relies on *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389 (6th Cir. 1998), which construed correspondence from a debt collector identifying possible payment options as subject to the Exception. *See id*. at 399. *Lewis* was decided after a trial—not at the pleading stage—thus, its analysis was informed by a fully-developed record concerning the context of the communications between plaintiff and defendant. *Id*. (noting that the Exception appeared inapplicable "at first glance" and construing letter "as a type of settlement offer" after additional analysis). As such, *Lewis* is not persuasive authority for dismissal of a FDCPA claim at the pleading stage. Further, construed in the light most favorable to Plaintiff, the Court finds that the Complaint includes sufficient factual allegations to state a plausible

claim against Defendant for violating § 1692c(c) of the FDCPA. *See Smith v. ARS Nat'l Servs. Inc.*, 102 F. Supp. 3d 1276, 1280 (M.D. Fla. 2015) (denying motion to dismiss § 1692c(c) based on similar Exception argument).

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

(1) Defendant's Motion to Dismiss Complaint (Doc. 4) is **DENIED**.

(2) Defendant is directed to file an Answer to the Complaint on or before **April 8, 2016**.

DONE AND ORDERED in Chambers in Orlando, Florida, on March 24, 2016.

ROY B. DALTON JR.
United States District Judge

Copies:

Counsel of Record