UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ELIZABETH BRYAN, on behalf of plaintiff and a class,

Plaintiff,

-against-

I.C. SYSTEM, INC.,

Defendant.

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REPORT AND RECOMMENDATION
CV 15-6984 (SJF) (GRB)

GARY R. BROWN, United States Magistrate Judge:

Plaintiff Elizabeth Bryan ("plaintiff" or "Bryan"), individually and on behalf of a putative class, commenced the instant action against defendant I.C. System, Inc. ("defendant" or "I.C. System") alleging violations arising under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* The sole basis for the action is the allegation that I.C. System misrepresented its rating with the Better Business Bureau ("BBB") in a debt collection letter.

Presently before the Court, on referral from the Honorable Sandra J. Feuerstein, are (1) defendant's motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure ("Rule") 12(c) and to dismiss the Complaint for lack of standing,[1] *see* Docket Entry ("DE") 22,

[1] Notably, defendant did not invoke Rule 12(b)(1) in its motion to dismiss for lack of standing. Nevertheless, Rule 12(b)(1) is the "proper procedural route" for defendant's challenge to plaintiff's standing to bring this action. Defendant argues that, assuming *arguendo*, that there is a violation of the FDCPA, she has failed to allege a concrete and particularized harm sufficient to establish an injury-in-fact. *See Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 87 n.6 (2d Cir. 2006). There is, however, at least some authority that the Court has jurisdiction in similar situations. *See Bautz v. ARS Nat'l Services, Inc.*, 226 F. Supp. 3d 131(E.D.N.Y. 2016). Accordingly, on this record, the undersigned has assumed *arguendo* that the allegations of the complaint are sufficient to establish jurisdiction.

and (2) plaintiff's motion to amend the Complaint pursuant to Rule 15(a), *see* DE 18. For the reasons set forth below, the undersigned respectfully recommends that defendant's motion to dismiss pursuant to Rule 12(c) for failure to state a claim be granted and plaintiff's motion to amend the complaint pursuant to Rule 15(a) be denied.

FACTUAL BACKGROUND

Unless otherwise stated, as discussed more fully below, the following facts are taken from plaintiff's proposed Amended Complaint,[2] are assumed to be true for purposes of deciding the within motions and are construed in plaintiff's favor. *See Shuriz Hishmeh M.D. v. Empire Healthchoice HMO, Inc.*, No. 16-cv-2780 (ADS) (ARL), 2017 WL 663543, at *1 (E.D.N.Y. Feb. 17, 2017).

Plaintiff, an individual residing in the State of New York, is a consumer as that term is defined by the FDCPA since she is allegedly obligated to pay a credit card debt.[3] *See* Proposed Amend. Compl., ¶¶ 5,14, DE 18-1. Defendant, a corporation with its principal place of business in St. Paul, Minnesota, is a debt collector within the meaning of the FDCPA since it is a debt collection agency. [4] *Id.* at ¶¶ 9-13. At some point prior to the commencement of this action,

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[2] Because an analysis of the defendant's motion for judgment on the pleadings is intertwined with an analysis of plaintiff's motion to amend to add factual allegations, the undersigned will construe the pending motion for judgment on the pleadings as if it were directed to plaintiff's proposed amended complaint. *See Schwartzco Enters. LLC v. TMH Mgt., LLC*, 60 F. Supp. 3d 331, 338 (E.D.N.Y. 2014) (considering the merits of the pending motion to dismiss in light of the proposed amended complaint and explaining the "if the proposed amended complaint cannot survive the motion to dismiss, then plaintiff['s] cross-motion to amend will be denied as futile") (collecting cases); *see also Leonard v. Abbott Labs., Inc.*, No. 10-CV-4676 (ADS)(WDW), 2012 WL 764199, at *4 (E.D.N.Y. Mar. 5, 2012).

[3] The FDCPA defines a consumer as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3).

[4] 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 debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).

plaintiff allegedly incurred a credit card debt that was for "personal, family or household purposes." *Id.* at ¶ 14. In an effort to collect the outstanding debt, defendant sent plaintiff a letter on January 11, 2015 which stated:

> Dear Elizabeth Bryan:
>
> Your delinquent account has been turned over to this collection agency.
>
> Tear off the bottom portion of this letter and return it with your payment.
>
> If you will be receiving a tax refund and would like to use it to pay your account, please call us to make payment arrangements.
>
> Sincerely,
>
> Beth Brown
> Manager

Id. at ¶ 15; *see* Compl., Ex. A, DE 1.[5]

In addition to the statutorily required validation of debt notice, the letter dated January 11, 2015 contained a prominent BBB logo next to the author's signature with the statement: "I.C. System has a Better Business Bureau Rating of A+." *See* Proposed Amend. Compl., ¶ 16, DE 18-1; *see also* Compl., Ex. A, DE 1. Plaintiff avers, however, I.C. System falsely published in its collection letter that it had a BBB rating of "A+," when in fact it had a rating of "B" at the time defendant mailed the letter. *See* Proposed Amend. Compl., ¶¶ 17-20, DE 18-1; *see also* Compl., Ex. B, DE 1. According to plaintiff, the BBB rated I.C. System with a "B" after receiving approximately 700 complaints in three years. *Id.* Plaintiff alleges that defendant was aware of the complaints, was in continual contact with the BBB, knew or should have known what its rating was at any given time, but failed to correct the misrepresentation. *See* Proposed Amend.

[5] Although in her proposed Amended Complaint, plaintiff makes references to two exhibits, no documents are attached to her submission. DE 18-1. Thus, the undersigned refers to the exhibits attached to Bryan's original Complaint wherein she identifies the same documents. DE 1, Exs. A, B.

Compl., ¶¶ 18-20, 27, DE 18-1. As a result, plaintiff maintains that defendant's collection letter violated Section 1692e of the FDCPA by misrepresenting that I.C. Systems had a BBB rating of A+ when it in fact did not. *Id.* at ¶ 29. In addition, the plaintiff asserts that she brings this action as a purported class action on behalf of persons with New York addresses who were sent a collection letter by I.C. System that falsely stated that it had an A+ rating from the BBB. *Id.* at ¶¶ 31-36.

PROCEDURAL HISTORY

Plaintiff, individually and on behalf of a class, commenced this action against defendant by filing a Complaint on December 11, 2015. *See* Compl., DE 1. On the same day, plaintiff filed a motion for class certification pursuant to Fed. R. Civ. P. 23, *see* DE 5, and a motion to "continue and enter" plaintiff's motion for class certification, *see* DE 7. On April 20, 2016, the district court granted the motion to continue and enter plaintiff's motion for class certification. *See* DE 13. On May 24, 2016, the district court denied the Rule 23 motion for class certification without prejudice to renewal at the close of discovery. *See* DE 14. On August 9, 2016, defendant served, but did not file, a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). *See* DE 17. In response, on August 19, 2016, plaintiff filed a letter motion for leave to file an amended complaint pursuant to Rule 15(a) to add factual allegations. *See* DE 18. Defendant opposed the motion. *See* DE 19.

On September 19, 2016, defendant filed a motion for judgment on the pleadings pursuant to Rule 12(c), which plaintiff opposed. *See* DE 22, 24. On February 14, 2017, the district court referred defendant's motion for judgment on the pleadings. *See* Order, dated February 14, 2017. The undersigned reviewed the plaintiff's motion to amend the complaint and defendant's motion for judgment on the pleadings, and having concluded that resolution to the motion to amend was

inextricably intertwined with defendant's motion, consolidated the two motions. *See* Order dated February 15, 2017.

DISCUSSION

Plaintiff moves to amend the Complaint pursuant to Rule15(a) to supplement the same factual circumstances that form the basis of her original pleadings alleging a violation of Section 1692e of the FDCPA on the grounds that the collection letter defendant mailed to Bryan contained a false BBB rating.[6] *See* DE 18. By way of the proposed amendments, plaintiff states that she seeks to address the materiality of the BBB ratings and asserts that she "suffered an injury in fact." *Id.* In its opposition letter, defendant argues *inter alia* that the proposed amendments are futile for the reasons set forth in its motion for judgment on the pleadings. *See* DE 19.

In its motion for judgment on the pleadings pursuant to Rule 12(c), defendant principally argues that the collection notice at issue does not constitute a violation of the FDCPA because the error contained in the notice was not materially false or misleading nor would it affect a consumer's decision to pay the debt or question the amount owed. *See* Def.'s Mem. in Supp. of Mot. for Judgment on the Pleadings, at 8-18, DE 23.

A. Motions Pursuant to Rule 15(a) and Rule 12(c)

It is well-settled that where the [p]laintiff seeks to amend [her] complaint while a motion to dismiss is pending, the Court has a variety of ways in which it may deal with the pending motion to dismiss, from denying the motion [to dismiss] as moot to considering the merits of the

[6]In her letter motion to the undersigned, plaintiff states that "[i]n lieu of responding to defendant's motion for judgment on the pleadings," she seeks leave to file an amended complaint. DE 18.

motion in light of the amended complaint." *Schwartzco Enters. LLC*, 60 F. Supp. 3d at 338 (internal quotation marks and citation omitted). Courts have previously reasoned that, where, as here, "if the proposed amended complaint does not seek to add new claims or parties, and the [d]efendants have had sufficient opportunity to respond to the new pleading, then, for the purposes of procedural efficiency, the merits of the pending motion to dismiss ought to be considered in light of the proposed amended complaint." *Kilpakis v. JPMorgan Chase Fin'l Co., LLC*, 16-cv-2690 (ADS)(AKT), 2017 WL 112518, at *3 (E.D.N.Y. Jan. 10, 2017) (citations omitted) (construing the pending motion to dismiss as if it were addressed to the proposed amended complaint such that if the proposed amended complaint "cannot survive Rule 12(b) scrutiny, the plaintiff's motion to amend will be denied as futile"). Because (i) plaintiff does not seek to add new defendants or claims, (ii) defendant has responded to the proposed Amended Complaint, and (iii) an analysis of defendant's motion for judgment on the pleadings is inextricably intertwined with an analysis of plaintiff's motion to amend, the Court will frame its analysis around plaintiff's motion to amend.

1. Legal Standard on a Motion to Amend

Rule 15 of the Federal Rules of Civil Procedure applies to motions to amend the pleadings once the time for amending a pleading as of right has expired and provides that leave to amend a complaint should be "freely given when justice so requires." Fed. R. Civ. P. 15(a). In general, amendments are favored because they "tend to facilitate a determination on the merits." *Zucker v. Porteck Global Servs. Inc.*, No. 13-CV-2674 (JS)(AKT), 2015 WL 6442414, at *4 (E.D.N.Y. Oct. 23, 2015) (citations omitted). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see*

Gesualdi v. Baywood Concrete Corp., No. 11 CV 4080 (DRH) (AKT), 2014 WL 4659265, at *2 (E.D.N.Y Sept. 17, 2014). Leave to amend is within the discretion of the district court. *See Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2489 (2010) (Rule 15(a) gives a district court discretion to decide whether to grant a motion to amend before trial").

Despite the liberal construction generally afforded Rule 15 which requires only that the movant provide "colorable grounds for the relief sought," *UMG Recordings, Inc. v. Lindor*, No. CV-05-1095 (DGT), 2006 WL 3335048, at *2 (E.D.N.Y. Nov. 9, 2006), "[w]here it appears that granting leave to amend is unlikely to be productive . . . it is not an abuse of discretion to deny leave to amend," *Lucente v. IBM Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (internal quotation marks and citation omitted). "One appropriate basis for denying leave to amend is that the proposed amendment is futile." *Id.* at 258. A proposed amendment to a pleading is futile when it "could not withstand a motion to dismiss." *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 164-65 (2d Cir. 2015); *see Lucente*, 310 F.3d at 258; *see also Zucker*, 2015 WL 6442414, at *4 ("A proposed amendment may be denied as futile where it has no merit or fails to demonstrate a cognizable or sufficient claim"). Hence, "the standard for futility with respect to a motion to amend under Rule 15 is identical to the standard for a Rule 12(b)(6) motion to dismiss." *Gesualdi*, 2014 WL 4659265, at *3 (internal quotation marks and citation omitted); *see Schwartzco Enters. LLC*, 60 F. Supp. 3d at 338 ("Indeed, if the proposed amended complaint cannot survive the motion to dismiss, then plaintiffs' cross-motion to amend will be denied as futile") (internal quotation marks and citation omitted).

2. Legal Standard on a Motion for Judgment on the Pleadings

In general, "the standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim."

Cleveland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir. 2006). As with a Rule 12(c) motion, as set forth *supra*, a proposed amendment is futile if the proposed claim could not withstand a Rule 12(b)(6) motion to dismiss. Thus, the Court applies the Rule 12(b)(6) standard in deciding defendant's motion for judgment on the pleadings and in assessing the futility of the proposed amended complaint.

In order to survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the proposed amended pleading must supply "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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt LLC*, 595 F.3d 86, 91 (2d Cir. 2010). A claim is plausible when the plaintiff sets forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. In applying this standard, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the non-moving party, *see Warren v. Colvin*, 744 F.3d 841, 843 (2d Cir.2014) ; *see also Ruston v. Town Bd. for Skaneateles*, 610 F.3d 55, 59 (2d Cir.2010) ("[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief"), but should not credit "[t]hreadbare recitals of the elements of a cause of action" or "mere conclusory statements," *Iqbal*, 556 U.S. at 678. Ultimately, the plaintiff's allegations of fact "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545.

Applying these legal standards to the present case, the Court construes the pending motion for judgment on the pleadings as if it were directed at the proposed Amended Complaint,

such that if the proposed Amended Complaint cannot survive Rule 12(c) scrutiny, the plaintiff's motion to amend will be denied as futile.

B. The FDCPA

Section 1692e of the FDCPA proscribes the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt," and provides a non-exhaustive list of violations.[7] *See* 15 U.S.C. § 1692e. Congress enacted the FDCPA "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." *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 363 (2d Cir. 2005) (internal quotation marks and citation omitted); *see Benzemann v. Citibank, N.A.*, 806 F.3d 98, 100 (2d Cir. 2015) (same); *see also Moukengeschaie v. Eltman, Eltman & Cooper, P.C.*, No. 14-CV-7539 (MKB), 2016 WL 1274541, at *3 (E.D.N.Y. Mar. 31, 2016) ("The FDCPA was enacted to protect consumers from abusive debt collection practices by third-party debt collectors, to create parity in the debt collection industry and to standardize governmental intervention in the debt collection market"). In order to achieve these objectives, "the FDCPA creates a private right of action for

[7] The non-exhaustive list of categories of conduct that fall within the ambit of false or misleading representations include making the false representation that the debt collector is affiliated with the United States or is an attorney, making false representations about the amount or legal status of any debt, threatening that nonpayment may result in arrest or garnishment, threatening to take any action that cannot legally be taken or that the debt collector does not intend to take, using any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer, threatening to communicate credit information to another person which is known to be false, making false representation that accounts have been turned over to innocent purchasers for value, making false representation that documents are legal process or conversely are not legal process forms and do not require action, using a business name other than the true name of the debt collector's business. *See* 15 U.S.C. § 1692e; *see also Clomon v. Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993) ("The sixteen subsections of § 1692e set forth a non-exhaustive list of practices that fall within [the ban on false, deceptive, or misleading representations or means in connection with the collection of any debt]"),

debtors who have been harmed by abusive debt collection practices." *Benzemann*, 806 F.3d at 100 (citation omitted).

The FDCPA "is a strict liability statute and a single violation is sufficient to establish liability." *Gonzalez v. Healthcare Recovery Mgmt. Inc.*, No. 13-CV-1002 (JG), 2013 WL 4851709, at *2 (E.D.N.Y. Sept. 10, 2013); *see Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 133-35 (2d Cir. 2010). To establish a violation of the FDCPA, a plaintiff must show that: "(1) the plaintiff is a consumer within the meaning of the act; (2) the defendant is a debt collector; and (3) the defendant must have engaged in conduct in violation of the statute." *Coburn v. P.N. Fin.*, No. 13-CV-1006 (ADS) (SIL), 2015 WL 520346, at *3 (E.D.N.Y. Feb. 9, 2015) (internal quotation marks and citation omitted).

To determine whether a debt collector's notice violates the statute, the court considers the collection communication objectively from the perspective of the "least sophisticated consumer." *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 90 (2d Cir. 2008); *see Gabriele v. Am. Home Mortg. Serv., Inc.*, 503 F. A'ppx 89, 94 (2d Cir. 2012). The purpose of this objective standard is "to protect all consumers, the gullible as well as the shrewd, while at the same time protecting debt collectors from liability for bizarre or idiosyncratic interpretations of collection notices." *Maguire v. Citicorp Retail Servs., Inc.*, 147 F.3d 232, 236 (2d Cir. 1998) (internal quotation marks and citation omitted); *see Jacobson*, 516 F.3d at 90 ("in addition to protecting consumers against deceptive debt collection practices, the objective test . . . protects debt collectors from unreasonable constructions of their communications") (internal quotation marks and citation omitted); *see also Clomon*, 988 F.2d at 1318 (holding that "in crafting a norm that protects the naïve and the credulous the courts have carefully preserved the concept of reasonableness"). Moreover, the Second Circuit has emphasized that even the least sophisticated

consumer possesses a "rudimentary amount of information about the world and a willingness to read a collection notice with some care." *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) (quoting *Clomon*, 988 F.2d at 1319)).

The critical question is "whether the notice fails to convey the required information clearly and effectively and thereby makes the least sophisticated consumer uncertain as to the meaning of the message." *Chavez v. MCS Claim Servs., Inc.*, No. 15-CV-3160 (JMA) (AKT), 2016 WL 1171586, at *2 (E.D.N.Y. Mar. 23, 2016) (internal quotation marks and citation omitted). Because the least sophisticated consumer standard is objective, the determination of whether a statement is false or misleading is a "question of law;" thus a court "can resolve whether a communication violates §1692e on a motion to dismiss." *Corcia v. Asset Acceptance, LLC*, No. 13-CV-6404 (JFB) (GRB), 2014 WL 3656049, at *4 (E.D.N.Y. July 22, 2014); *see Quinteros v. MBI Assocs., Inc.*, 999 F. Supp. 2d 434, 437 (E.D.N.Y. 2014).

As discussed, the FDCPA provides a general prohibition of "the use of any false, deceptive or misleading representation" in a debt collection letter. *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72, 75 (2d Cir. 2016) (internal quotation marks and citation omitted). However, "not every technically false representation by a debt collector amounts to a violation of the FDCPA." *Gabriele*, 503 F. A'ppx at 94. A collection letter may violate the FDCPA if it "could mislead a putative-debtor as to the nature and legal status of the underlying debt, or that could impede a consumer's ability to respond to or dispute collection." *Id*. This includes communications that are "contradictory, vague or threatening." *Id.* at 96 (citations omitted). In addition, a collection notice may violate the FDCPA when the language is "open to more than one reasonable interpretation, at least one of which is inaccurate." *Easterling v. Collecto, Inc.*,

692 F.3d 229, 232 (2d Cir. 2012) (internal quotation marks and citation omitted); *see Avila*, 817 F.3d at 75.

Although the Second Circuit has not explicitly established that a false or misleading statement be material in order to violate § 1692e, the Court has cited with apparent approval decisions by other circuit courts and numerous district courts within this Circuit reading a materiality requirement into § 1692e. *See Gabriele*, 503 F. A'ppx at 94 (citing cases); *see Miles v. Retrieval-Masters Creditor's Bureau, Inc.*, No. 14-CV-6607 (RRM) (RER), 2016 WL 1258481, at *3 (E.D.N.Y. Mar. 29, 2016) (observing "[c]ourts within the Second Circuit have read a materiality requirement into the FDCPA's prohibition of false, deceptive, or misleading practices in the collection of debt"); *Fritz v. Resurgent Capital Servs., LP*, 955 F. Supp. 2d 163, 170 (E.D.N.Y. 2013) (agreeing with courts that "only material misrepresentations are actionable under the FDCPA"); *see also Kagan v. Selene Finance L.P.*, No. 15-CV-5936 (KMK), 2016 WL 5660255, at *8 (S.D.N.Y. Sept. 28, 2016) (observing that while "the Second Circuit has not clearly established that violations . . . must be material to be enforceable, it has cited other circuits (even if in a summary order) so holding with apparent approval"); *Plummer v. Atlantic Credit & Finance, Inc.*, 66 F. Supp. 3d 484, 490 n.2 (S.D.N.Y. 2014) (adopting "the generally accepted view that only material omissions or those expressly prohibited under the statute are actionable"). "Statements are material if they influence a consumer's decision to pay a debt or if they would impair the consumer's ability to challenge a debt." *Kagan*, 2016 WL 5660255, at *8.

Applying the least sophisticated consumer standard here, the undersigned finds that plaintiff fails to state an actionable claim under § 1692e. The gravamen of plaintiff's claim is that she was provided with material false information concerning the collection of a debt because the notice she received from defendant falsely stated that I.C. System had a BBB rating of "A+"

when in fact it had a "B" rating at the time defendant mailed the collection letter. *See* Proposed Amend. Compl., ¶¶ 17, 20, 26. Plaintiff maintains she was entitled to truthful information, but because she was misled, she was required to investigate (directly and through counsel) to determine the truth. *See id.* at ¶ 26. Nowhere in the proposed Amended Complaint does plaintiff allege that defendant's inclusion of a BBB rating in the notice misled her regarding the nature or legal status of her debt or her ability to pay or challenge the debt. *See Gabriele,* 503 F. A'ppx at 94.

Moreover, although the FDCPA enumerates the information required to be set forth in a collection letter, *viz.*, the amount of the debt and the name of the creditor, *see* 15 U.S.C. § 1692g(a), there is no requirement that a collection agency post a BBB rating and accreditation. As one Court in this District found, a BBB rating in a debt collector's communication with a debtor "carries no connotation regarding the character, amount, or legal status of any debt or [p]laintiff's rights regarding any such debt." *Strobel v. RJM Acquisitions LLC,* No. 13-CV-2467 (JS) (AKT), 2014 WL 507510, at *3 (E.D.N.Y. Feb. 6, 2014). In *Strobel,* the Court found that plaintiff failed to plead a materially false or misleading statement where the debt collection notice included a statement of a BBB accreditation rating in its collection letter. *Id.* at *2. The Court questioned the materiality of the statement stating:

> The Court fails to see how a BBB accreditation and rating suggests any relevant meaning whatsoever. To the extent that it does, however, it is not material. *See Walsh v. Law Offices of Howard Lee Schiff, P.C.*, No. 11-CV-1111, 2012 WL 4372251, at *4 (D. Conn. Sept. 24, 2012) ("[I]mmaterial statements, by definition, do not affect a consumer's ability to make intelligent decisions concerning an alleged debt.") (internal quotation marks and citation omitted)).

Id. at *3.

Similarly, the "A+" rating from the BBB, instead of a "B" in the instant collection letter "carries no connotation regarding the character, amount, or legal status of any debt or

[p]laintiff's rights regarding any such debt." *Id.* at *3. Hence, the undersigned finds that the erroneous representation of a BBB rating of "A+" instead of "B" in defendant's collection notice would not deceive or mislead the least sophisticated consumer because it does not affect a consumer's ability to make intelligent decisions to respond to the collection notice or impair a consumer's decision to pay or challenge the debt.[8] As such, none of the allegations in Bryan's proposed Amended Complaint, even if proven, would amount to material misrepresentations in violation of Section 1692e. That is to say, accepting the allegations set forth in the complaint and proposed Amended Complaint as true, and viewing them in the light most favorable to plaintiffs, Bryan has failed to state a viable claim under the FDCPA.

Accordingly, inasmuch plaintiff has failed to plead sufficient allegations to establish defendant's liability, the undersigned respectfully recommends that defendant's motion for judgment on the pleadings be granted and plaintiff's motion to amend the Complaint to add factual allegations be denied as futile.

CONCLUSION

Based on the foregoing, the Court respectfully recommends that defendant's motion for judgment on the pleadings pursuant to Rule 12(c), considered as directed to the proposed Amended Complaint, be granted, and that plaintiff's motion to amend the Complaint pursuant to Rule 15(a) be denied.

OBJECTIONS

A copy of this Report and Recommendation is being electronically served on counsel for the parties. Any written objections to the Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28 U.S.C. § 636(b)(1)

[8] Notably, plaintiff fails to allege or even suggest the manner in which the BBB accreditation and rating would affect a consumer's decision regarding the debt.

(2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court of Court of Appeals.** *See Thomas v. Arn*, 474 U.S. 140, 145 (1985) ("[A] party shall file objections with the district court or else waive right to appeal."); *see also Caidor v. Onondaga County*, 517 F.3d 601, 604 (2d Cir.2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision.").

Dated: Central Islip, New York
August 28, 2017

/s/ Gary R. Brown
Gary R. Brown
United States Magistrate Judge