United States District Court,
E.D. Virginia.

Alisha S. TURNER, Plaintiff,
v.
SHENANDOAH LEGAL GROUP, P.C., et al., Defendants.

No. 3:06CV045.
June 12, 2006.

Dale W. Pittman of Petersburg, VA, Craig M. Shapiro and O. Randolph Bragg, Horwitz, Horwitz & Associates, Ltd, Chicago, IL., for Plaintiff.
Paige Levy of McLean, VA., for Defendants.

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

DOHNAL, Magistrate J.

*1 This matter is before the court pursuant to 28 U.S.C. § 636(b)(1)(B) for a report and recommendation on the Defendant Shenandoah Legal Group, P.C.'s (SLG) Motion to Dismiss the Complaint, or, in the Alternative, for Summary Judgment. Order, Apr. 19, 2006. [FN1] The Plaintiff alleges violations of the Federal Fair Debt Collection Practices Act (FDCPA) based on a letter (the SLG Letter), dated March 30, 2005, that was sent to and received by the Plaintiff, Alisha S. Turner (Turner), in which SLG demanded payment of a credit account debt on behalf of a client of SLG. SLG and Holub move to dismiss the Complaint for failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment. Fed.R.Civ.P. 12(b)(6), 56. Upon consideration of the pleadings and relevant authority, the court recommends that both of the Defendants' alternative motions for dispositive relief be DENIED.

FN1. The remaining defendant, Robert J. Holub, Jr. (Holub), who was initially identified in the Complaint as John Doe I, has since been joined as a named party and has adopted SLG's motion. (Def. Robert J. Holub's Mot. Dism. Compl. or Alt. for Summ. J. (docket entry nos. 22, 23)).

Undisputed Facts and Reasonable Inferences

The court deems the following to be the undisputed facts, as alleged or otherwise established, and the reasonable inferences drawn therefrom that are relevant to the resolution of the pending motions:

1. By date of March 30, 2005, SLG sent Turner the SLG Letter which she received "a few days thereafter." (Compl. ¶¶ 7-8 and ex. A to Compl. (ex. A)). The SLG Letter concerned a credit account belonging to Turner which originated with Gateway computers and was in default. (ex. A ¶ 1).

2. The SLG Letter contained as a heading the following notation: "Re: Asset Acceptance LLC v. Alisha S. Turner ... SLG File No.: 22690.001." (ex. A).

3. In pertinent part, the letter stated:

Please be advised that this firm represents Asset Acceptance LLC, the assignee of an account that originated with Gateway. As the current owner and holder of the account, Asset Acceptance LLC alleges a debt or claim due and owing from you.... Demand is hereby made upon you for payment of this claim or debt within thirty (30) days of the date of this letter.
...
PURSUANT TO FEDERAL LAW, WE ADVISE YOU THIS FIRM IS A DEBT COLLECTOR ATTEMPTING TO COLLECT THE INDEBTEDNESS REFERRED TO HEREIN, AND ANY INFORMATION WE OBTAIN WILL BE USED FOR THAT PURPOSE. PLEASE NOTIFY U.S. IN WRITING WITHIN 30 DAYS AFTER RECEIPT OF THIS LETTER IF YOU DISPUTE THE VALIDITY OF THIS DEBT, OR ANY PORTION OF IT, OTHERWISE, WE WILL ASSUME THAT THE DEBT IS VALID. IF YOU DO NOTIFY U.S. OF A DISPUTE, WE WILL MAIL VERIFICATION OF THE DEBT TO YOU. UPON YOUR WRITTEN REQUEST WITHIN 30 DAYS, WE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR IF DIFFERENT FROM THE CURRENT CREDITOR.

The law does not require this firm to wait until the end of the thirty-day period before continuing actions to collect this debt. However, if you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law does require this firm to suspend our efforts (through litigation or otherwise) to collect the debt until this firm mails the requested information to you. (ex. A ¶¶ 1-3).

*2 4. The SLG letter was signed by Holub, an SLG attorney. (Holub's Answ. ¶ 9).

5. A letter was previously sent from the assignee of the account, Asset Acceptance, LLC (Asset Acceptance), [FN2] to Turner in regard to the same delinquent account. (Mem. Supp. Def.'s Mot. Dism. Compl. or Alt. Summ. J. (Def.'s Mem.) ex. A ¶ 5 (aff. of Kenneth Proctor) (docket entry no. 13)).

FN2. Asset Acceptance is not a party to this litigation.

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6. The Asset Acceptance letter contained the following relevant language:

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice, this office will: obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor. Id.

Standards of Review

12(b)(6) Dismissal Standard

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is properly granted when, accepting as true all non-conclusory factual allegations in the complaint and drawing all reasonable inferences in favor of the non-moving party, the non-moving party can prove no set of facts upon which relief may be granted. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Johnson v. Mueller, 415 F.2d 354, 354 (4th Cir.1969). At the same time, competing allegations of material fact are an insufficient basis for resolution on a motion to dismiss. See Trulock v. Freeh, 275 F.3d 391, 405 (4th Cir.2001). Because a motion to dismiss is an attack on the pleadings, in order to grant the Defendants' motion, the court must find as a matter of law that the facts alleged by the plaintiff do not state a claim upon which relief can be granted.

Summary Judgment Standard

Summary judgment is only to be granted when there is no genuine dispute as to any issue of material fact when all justifiable inferences are drawn in favor of the non-moving party and the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, unsupported conclusory allegations by the non-moving party are not sufficient to create a genuine dispute of material fact so as to withstand the granting of relief. Celotex Corp., 477 U.S. at 328 (White, J., concurring). In essence, the court must decide if the evidence when viewed in the light most favorable to the non-moving party "presents a sufficient disagreement to require submission to the [factfinder] or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

Analysis

Fair Debt Collection Practices Act Claims

In addressing claims under the FDCPA, the Fourth Circuit has held that the conduct or language alleged to violate the statute must be evaluated from the perspective of the "least sophisticated debtor." U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 135-36 (4th Cir.1996). The purpose of this standard is to ensure that both the gullible and the shrewd receive equivalent protection from the predatory debt collection practices prohibited by the FDCPA. Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir.1993). However, the parameters of what constitutes the "least sophisticated consumer" are not boundless. The boundary is crossed, for example, when a consumer assigns a bizarre or idiosyncratic interpretation to a collection notice in violation of "a quotient of reasonableness" whereby the consumer must be viewed as possessing a basic level of understanding that includes reading and/or listening to the communication with care. U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 136.

*3 The purpose of the FDCPA, as set forth by statutory mandate, is "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. Such a purpose is applicable whether or not a valid debt exists where abusive practices are prohibited in

either case. Baker v. G.C. Servs. Corp., 677 F.2d 775, 777 (9th Cir.1982). Furthermore, the FDCPA, like other public welfare legislation, is a strict liability statute. U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139. It is enough that a practice or statement has the potential to mislead the consumer because "evidence of actual deception is unnecessary." U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139.

Turner alleges that the SLG Letter violates the FDCPA by requiring that a dispute be made in writing, [FN3] that a portion of the communication overshadows and contradicts the validation notice also contained in the letter, [FN4] and that its language is otherwise confusing and misleading. [FN5] (Compl.¶¶ 13-15). The first and second assertions allege violations of 15 U.S.C. § 1692g, which requires a debt collector to provide in its initial communication with a consumer (or within five days of that communication) a debt validation notice that informs the consumer of the consumer's right to dispute the validity of the debt. The validation notice must also set forth the essential components for disputing the indebtedness, including a statement that unless the consumer disputes the validity of the debt within thirty days of receipt of the validation notice, the debt will be assumed to be valid by the debt collector. Turner's final claim alleges a violation of 15 U.S.C. § 1692e(10) which generally prohibits "the use of any false representation or deceptive means" in a debt collector's attempts to collect the consumer's debt.

FN3. 15 U.S.C. § 1692g(a)(3).

FN4. 15 U.S.C. § 1692g.

FN5. 15 U.S.C § 1692e(10).

A. Whether Notice of Dispute Must Be Made in Writing

Whether the FDCPA requires that a dispute by a consumer concerning the subject indebtedness must be made in writing has not yet been resolved in this circuit. Other circuits have addressed the issue, but they have reached opposite conclusions. The Third Circuit in Graziano v. Harrison, 950 F.2d 107, 112 (3d Cir.1991), held that a writing requirement must be read into the statutory scheme, while the Ninth Circuit in Camacho v. Bridgeport Fin., Inc., 430 F.3d 1078, 1082 (9th Cir.2005), reasoned that courts must give effect to the plain meaning of the statute and where there is no explicit requirement in the statute for the dispute to be made in writing, a collection notice that requires any dispute to be written does not comply with 15 U.S.C. § 1692g.

In Graziano, a lawyer operating as a debt collector, sent a "dunning" letter to the consumer who then sued for violation of 15 U.S.C. § 1692g on the basis that the collection notice stated that a dispute must be made in writing. The debt collector argued that while § 1692g(a)(3) [FN6] does not, in plain language, require that a dispute be made in writing, both §§ 1692g(a)(4) [FN7] and 1692g(a)(5), [FN8] require that a debtor communicate any request to the debt collector in writing in order to trigger the protections provided for within those sections. Graziano, 950 F.2d at 112. The Third Circuit found the apparent inconsistency troubling, reasoning that:

FN6. 15 U.S.C. § 1692g(a)(3) requires inclusion of "a statement that unless the consumer, within

thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector."

FN7. 15 U.S.C. § 1692g(a)(4) requires inclusion of "a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector."

FN8. 15 U.S.C § 1692g(a)(5) requires inclusion of "a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor."
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*4 [u]pon the debtor's non-written dispute, the debt collector would be without any statutory ground for assuming that the debt was valid, but nevertheless would not be required to verify the debt or to advise the debtor of the identity of the original creditor and would be permitted to continue debt collection efforts. Id. at 112.

The court noted as an additional reason to require that a dispute be made in written form that future conflicts would be more likely prevented. Id. Based on such logic, the Third Circuit concluded that a writing requirement should be read into § 1692g(a)(3), and that a validation notice requiring written notice of dispute therefore conforms with the FDCPA. Id.

In contrast, the Ninth Circuit, in Camacho, relied on the plain wording of the statute to determine that a validation notice requiring written notice of dispute is non-compliant with the FDCPA in the absence of specific statutory language imposing such a requirement. Camacho, 430 F.3d at 1080. The court noted the example of statutory interpretation set forth in Lamie v. United States Trustee, 540 U.S. 526, 526 (2004), in which the Supreme Court reasoned that absent sufficient indication to the contrary, it would refrain from grafting language onto a statute, even if it suspected that Congress inadvertently omitted such language, as long as the plain language of the statutory scheme did not lead to an absurd result. The Ninth Circuit then found that the plain meaning of § 1692g is that consumer debtors can invoke their rights under subsection (a)(3) by either oral or written communication of a dispute, while the following two subsections, (a)(4) and (a)(5), are only triggered by a written communication of a dispute. Camacho, 430 F.3d at 1081. While the court noted the apparent inconsistency in such an analysis, it also took note of Russello v. United States, 464 U.S. 16, 23 (1983), in which the Supreme Court had held earlier that where Congress uses language within the same statute in one section, but not another, such an omission is presumed to be an intentional legislative act of inclusion or exclusion.

The Ninth Circuit observed as well in Camacho that certain rights are invoked by an oral dispute, although there may not be as many rights that are invoked as are triggered by written dispute. Camacho, 430 F.3d at 1081-82. One right a consumer asserts when an oral dispute is made of a debt is the right to prevent the debt collector from communicating the debtor's credit information to others without also conveying the fact that the debt is disputed. [FN9] Id. at 1082. Another right exercised by a consumer making an oral dispute is to prohibit the debt collector from

applying payments made to an aggregated account to the particular debt in dispute. [FN10] Id. at 1082. A third right activated by an oral dispute is the opportunity for the consumer to provide information about inconvenient contact times or locations in order to prevent a debt collector from contacting the consumer during those times or at those locations. [FN11] The exercise of any of these rights also entitles the consumer to relief if the debt collector disregards the consumer's information. Id. at 1082. The Ninth Circuit also found that giving effect to the plain meaning of the statute as concerns whether a dispute must be in writing is also consistent with the primary purpose of the statutory scheme, which is to eliminate abusive debt collection practices without consumers being misled or becoming unduly confused. Id. at 1082; see also Jang v. A.M. Miller & Assoc., 122 F.3d 480, 484 (7th Cir.1997) (collection notices that contain verbatim statutory language are not confusing as a matter of law). [FN12]

FN9. 15 U.S.C. § 1692e(8) prohibits transmitting information about the alleged debt when the debt collector knows or should know the consumer has notified the debt collector of dispute.

FN10. 15 U.S.C. § 1692h prohibits application of payment to any debt which is disputed by the consumer.

FN11. 15 U.S.C. § 1692c(a)(1) prohibits a debt collector from communicating with a consumer in connection with the collection of any debt at a time or place known or which should be known to be inconvenient to the consumer.

FN12. The Defendants' reference to Withers v. Eveland, 988 F.Supp. 942, 947 (E.D.Va.1997), for the supposed proposition that a court in this district has found that a dispute must be in writing is inapposite because the issue in the case involved the language demanding payment as opposed to the validity of the notice. (Def.'s Mem. at 10).

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*5 The Defendants also contend that the "safe harbor" letter discussed in Bartlett v. Heibl, 128 F.3d 497, 501-502 (7th Cir.1997), that are utilized in Continuing Legal Education materials sanctioned by the Virginia State Bar, contains just such a writing requirement and, therefore, by holding that a validation notice requiring written notice of a dispute is violative of the statutory scheme results in a condemnation, if not criminalization of procedures relied upon by many scrupulous attorneys. (Defs.' Reply Mem. at 11- 12; ex. A ¶ 3). However, the Defendants fail to note that neither the safe harbor language in Bartlett, nor that contained in the educational materials, contain a requirement that a consumer dispute be made in writing. See Bartlett, 128 F.3d at 501-502; (Defs.' Reply Mem. at 11-12; ex. A ¶ 3).

Bartlett stands for the proposition that the least sophisticated consumer may be confused when presented with one time period in the portion of the letter that demands payment, and a conflicting time period in the portion of the letter that gives the validation notice. Id., 128 F.3d at 499. The court in Bartlett suggests a solution to this problem by creating "safe harbor" language that explains the difference between the distinctive time periods. Id., 128 F.3d at 501-502. The subject language also correctly states in the portion of the letter that gives the validation notice that "Federal law gives you 30 days after you receive this letter to dispute the validity of the debt or any part of it. If you don't dispute it within that period, I'll assume that it's valid." Id., 128 F.3d

at 501-502 (emphasis added). This portion of the validation notice, which notifies consumers of their rights under § 1692g(a)(3), does not contain a requirement that the dispute be made in writing. Id., 128 F.3d at 501-502. Therefore, Bartlett simply does not address the issue of whether requiring written notice of the initial dispute is acceptable, and it does not set forth language that inadvertently imposes such a requirement. Id., 128 F.3d at 501-502. Instead, the third sentence of the validation notice clarifies that a written notice of dispute, while not required to initially dispute the debt, will trigger additional rights. Id., 128 F.3d at 501-502. Those additional rights are the right to request and obtain proof of the debt and the right to request and obtain creditor information--rights conferred by 15 U.S.C. §§ 1692g(a)(4) and 1692g(a)(5). Id., 128 F.3d at 501-502. [FN13] Letters using the "safe harbor" language are therefore correctly worded to describe the rights of the consumer found in the FDCPA. Virginia lawyers following this example are, in fact, thereby complying with the law, and they need not worry about criminalization of their practices as suggested by SGL. SLG did not use such language in the SLG letter and did so to their detriment.

FN13. The "safe harbor" validation notice language provides, in full: "Federal law gives you 30 days after you receive this letter to dispute the validity of the debt or any part of it. If you don't dispute it within that period, I'll assume that it's valid. If you do dispute it--by notifying me in writing to that effect--I will, as required by the law, obtain and mail to you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor ..., I will furnish you with that information too." The first two references to any "dispute" do not specify that the dispute must be in writing, while the latter references have such a requirement. Id. at 501-502 (emphasis and notation added).

The reasoning of the Ninth Circuit's opinion is more persuasive as it reinforces the FDCPA's imperative to address abusive debt collection practices, while continuing to allow those debt collectors who comply with the rules to rely on the "safe harbor" language of the statutory scheme. Such an interpretation of the statutory scheme is also a proper application of the least sophisticated consumer standard dictated by U.S. v. Nat'l Fin. Servs., Inc., where an unsophisticated consumer, or one with minimal English literacy skills, might only be able to invoke their rights via oral communication. U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139. Moreover, the fact that the protections that may be afforded through oral communication are fewer than those accessed with a written dispute does not signify that an oral dispute notice is invalid.

B. Overshadowing or Contradiction of a Validation Notice

*6 Whether a so-called dunning letter violates § 1692g in not providing an adequate validation notice is a question of fact, not law. U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 137. To be sufficient, a validation notice must be conveyed effectively to the consumer. Miller v. Payco-General American Credits, Inc., 943 F.2d 482, 484 (4th Cir.1991). It must also be easily readable and prominent enough to be readily noted by an unsophisticated consumer. U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139. A validation notice cannot be overshadowed or contradicted by other statements within the same letter. Id. at 139. A dunning letter is "overshadowing" when its

manner of presentation, including, but not limited to, differences in typeface, font size, ink color, or location of the validation notice, tends to mislead the consumer into disregarding the notice. See Miller, 943 F.2d at 484. A dunning letter is also contradictory when one part of the letter contradicts information contained in another segment, including the validation notice, a circumstance that also tends to mislead the least sophisticated consumer into disregarding the notice. [FN14] Id. at 484.

FN14. Neither this district nor this circuit has adopted the "threatening contradiction" standard which provides that for overshadowing or contradiction to be found, there must be both an explicit contradiction and an explicit or implied threat to the consumer. Swanson v. Southern Oregon Credit Service, Inc. 869 F.2d 1222, 1226 (9th Cir.1988).

Turner contends that two elements of the SLG letter overshadow and contradict information in the validation notice. (Compl. at ¶¶ 16-19). First, it is contended that SLG's demand for payment within thirty days of the date of the letter flatly contradicts the information in the validation notice that would allow thirty days from the date the letter was received to dispute the validity of the debt. (ex. A ¶¶ 1-2). In support of her position, Turner cites Chauncey v. JDR Recovery Corp., 118 F.3d 516, 519 (7th Cir.1997), which appears to hold that any demand for payment within the validation period violates the FDCPA because the consumer would be confused by the stated ability to also contest the debt within the same time frame. As noted in Bartlett: "[T]he letter both demands payment within thirty days and explains the consumer's right to demand verification within thirty days ..., [while] these rights are not inconsistent, ... by failing to explain how they fit together, the letter confuses." Bartlett, 128 F.3d at 500. The SLG letter, by including the following language in the closing paragraph, does not reconcile the otherwise confusing segments:

The law does not require this firm to wait until the end of the thirty-day period before continuing actions to collect this debt. However, if you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law does require this firm to suspend our efforts (through litigation or otherwise) to collect the debt until this firm mails the requested information to you.
(ex. A) (emphasis added). [FN15]

FN15. SLG responds to the claim that the discrepancy itself is a violation of 15 U.S.C. § 1692g by citing Stojanovski v. Strobl and Manoogian, P.C., 783 F.Supp. 319, 323 (E.D.Mich.1992), for the proposition that the variation between the time periods given in the demand for payment and the validation notice is a de minimis variation that cannot be construed as an abusive debt collection practice. However, the issue in Stojanovski involved a validation notice that simply misstated the time period in which the consumer had to dispute the debt as opposed to using inconsistent dates within the same letter. Id. at 323.

The letter contains two thirty-day periods: (1) payment is demanded within thirty days from the letter's draft, and (2) dispute of the debt is also allowed within thirty days from the letter's receipt. The first sentence of the closing paragraph does not specify which thirty-day period it is

referencing. That the payment period and the dispute period are both thirty days long, but from different starting dates, may confuse and mislead the least sophisticated consumer.

*7 Turner also contends that the "re:" line of the SLG letter overshadows the validation notice by implying that the matter at issue is already in the litigation stage such that it was too late to effectively dispute the matter. (ex. A). SLG responds by arguing that even the least sophisticated consumer would construe the "re:" line to mean only that suit may be brought, but that it had not yet been brought, nor was it in the process of being brought. (Mem. Reply Pl.'s Opp. Defs.' Mot. Dism. at 8-9). In support of its position, SLG cites Brown v. Card Service Center, 2005 WL 1527707, at *7-8 (E.D. Pa. June 28, 2005), for its holding that a letter stating that legal action and referral to an attorney could result from plaintiff's non-cooperation cannot be read as implying that a suit had been or was being brought. However, the precise wording in Brown of: "Refusal to cooperate could result in a legal suit being filed ... failure on your part to cooperate could result in our forwarding this account to our attorney ..." is clearly distinguishable from the SLG header reference. Brown, 2005 WL 1527707, at *1.

When there are dramatic differences in type size, font, color, or format; or when the validation notice is located in a place the consumer is unlikely to notice, such circumstances have been found to constitute overshadowing. See Miller, 943 F.2d at 484 (finding contradiction and overshadowing in a dunning letter that made immediate demands for payment in white letters on a red background, while the validation notice appeared on the back of the letter), U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139 (finding contradiction and overshadowing in a dunning letter that made immediate demands for payment in bold letters, while the validation notice was printed in small, gray type on the back of the letter). The concept of overshadowing, while it encompasses typesetting and location, includes any element of the communication that tends to cause the least sophisticated consumer to disregard the validation notice. Miller, 943 F.2d at 484, U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139.

In Miller, the court observed that "there are numerous and ingenious ways of circumventing § 1692g under a cover of a technical compliance." Miller, 943 F.2d at 485. Whether SLG's techniques would tend to cause the least sophisticated consumer to disregard the validation notice is a question of fact for a jury, at least given the circumstances of this case. [FN16] The potentially confusing elements--the header and the inconsistent thirty-day payment and dispute periods--preclude granting dispositive relief to the Defendants because of the deference that must be given to the allegations of the Complaint and/or the existence of disputed material facts as to whether the validation notice was overshadowed or contradicted by other contents of the communication.

FN16. The trial court in U.S. v. Nat'l Fin. Servs., Inc. held, as a matter of law, that the contents of the dunning notices violated the proscription against overshadowing; however, the contents of the notices in the case constituted such egregious violations of the FDCPA that the court concluded that no rational factfinder could find otherwise. The court of appeals agreed, based on the particular circumstances of the case, and, therefore, the case does not stand for the proposition that the issue is a question of law in every instance. U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 137.

C. False, deceptive, or misleading representation

*8 The Fourth Circuit has found that to prove a violation of § 1692e(10), a statement must have the capacity to mislead. U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139. However, proof of subjective deception of the consumer, or an intent to deceive by the debt collector, is not a necessary element. Id. Turner argues that any § 1692g violation is a per se violation of § 1692e(10), and that, therefore, the § 1692g violations here constitute substantive § 1692e(10) violations as well. (Pl.'s Mem. at 20). The Defendants respond with Talbott v. GC Servs., 53 F.Supp.2d 846 (W.D.Va.1999), in which the court held that while § 1692g violations often violate § 1692e(10), a violation of the former does not necessarily constitute a per se violation of the latter.

Whether or not a violation of § 1692g also constitutes a per se violation of § 1692(10), disputed material factual allegations in the instant case preclude dispositive relief whereby it must be resolved by the factfinder whether the SLG letter constitutes a substantive violation of § 1692e(10) in that it had the capacity to mislead the consumer by making false representations and/or whether it utilized deceptive means in attempting to collect a debt. U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 135-36. The factfinder may find, for example, that the reference in the SLG letter involving the "re:" line at least implied that there was a lawsuit pending against the consumer, [FN17] or it may not. The factfinder may also conclude that the validation notice misstates the consumer's rights by requiring written notice of dispute so as to make the notice confusing and/or misleading, or it may not. The debt collector in U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139, issued false threats that legal action would be taken, which was found to violate § 1692e(10). [FN18] A false implication that legal action has already been brought is perhaps even more likely to "unjustifiably frighten an unsophisticated consumer into paying a debt that he or she does not owe." U.S. v. Nat'l Fin. Servs., Inc., 98 F.3d at 139. Similar to the issue of whether the language of the notice is "overshadowed" by other language in the communication, a rational factfinder could find that the same language is false, deceptive, or misleading. Accordingly, the issue cannot be resolved on dispositive motion, given the strength of the allegations of the Complaint and the possible interpretations of the contents of the letter.
FN17. To this date, SLG has not filed a lawsuit on behalf of Asset Acceptance against Ms. Turner; thus any statement stating or suggesting that a lawsuit had been filed is misleading. Whether or not a statement is false is directly applicable to a violation of 15 U.S.C. § 1692e.

FN18. This also violated 15 U.S.C. § 1692e(5), which directly addresses the issue of false threats of litigation. The Plaintiff here has not brought a claim under 15 U.S.C. § 1692e(5).

Initial Communication

The Defendants also argue in support of their motion for summary judgment that the FDCPA does not apply to the SLG letter because it was not the "initial communication" by a debt collector to Turner as is necessary to invoke its proscriptions. (Defs.' Mem. at 16-17). In order to determine if the statute applies to Defendants and the letter, it must be determined: (1) which entities are covered by the statute; and (2) what constitutes an "initial communication." [FN19]

FN19. The initial communication requirement applies only to violations of 15 U.S.C. § 1692g. Violations of 15 U.S.C. § 1692e are not confined to the contents of the initial communication.

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*9 The FDCPA applies to actions by debt collectors who as defined as: "[A]ny 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." 15 U.S.C. § 1692(a)(6). The Federal Trade Commission (FTC) has issued commentary on the scope of the statute's coverage, stating that "attorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but those whose practice is limited to legal activities are not covered." FTC Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097-02, 50100-02 (December 13, 1988). In Heintz v. Jenkins, 514 U.S. 291, 298 (1995), the Supreme Court held that the FDCPA applies to attorneys who regularly engage in debt collection activities, including litigation. In doing so, the Court found that the scope of coverage was greater than that suggested by the FTC, not less. Heintz, 514 U.S. at 298. The Defendants are clearly debt collectors within the meaning of the FDCPA where they engage in all phases of debt collection.

Defendants argue that even in the role of debt collectors, the SLG letter did not need to include a validation notice because it was not the initial communication with the consumer concerning the same debt. (Defs.' Mem. at 16). Instead, the Defendants claim that the earlier letter from Asset Acceptance, also a debt collector as defined in 15 U.S.C. § 1692a(6), constituted the initial communication to Turner, and as a subsequent debt collector in regard to the same debt, SLG was not obligated to provide a redundant notice. (Defs.' Mem. at 16). The controlling statutory language provides that: "Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written [validation] notice...." 15 U.S.C. § 1692g(a). The language does not specify whether each subsequent debt collector on each separate debt must provide a validation notice.

The FTC has issued commentary stating that "an attorney who regularly attempts to collect debts ... must provide the required notice, even if a previous debt collector (or creditor) has given such notice." FTC Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097-02, 50108-02 (December 13, 1988). The Supreme Court held in U.S. v. Ron Pair Enter., Inc., 489 U.S. 235, 242 (1988), that the plain language of a statute should be conclusive except in that unusual case in which a literal application would produce a result "demonstrably at odds with the intentions of its drafters." U.S. v. Ron Pair Enter., Inc., 489 U.S. 235, 242 (1989). Here, the plain language meaning is perhaps discerned by the articles preceding each term: "the initial communication with a consumer in connection with the collection of any debt...." 15 U.S.C. § 1692g(a). Such language implies that one initial communication with proper validation notice is all that is required for each debtor when contacted by the first debt collector, no matter how long the line of debt collectors to follow, and that such notice is required only in regard to the first debt of potentially many debts.

*10 Turner cites Sutton v. Law Offices of Alexander L. Lawrence, 1992 U.S. Dist. LEXIS 22761 at *8 (D. Del. June 17, 1992), in which a debt collector referred the consumer's account to the defendant debt collection firm which then sent a dunning letter to the consumer without a validation notice. The debt collector defendant argued that the dunning letter was merely a follow-up letter to the earlier collection letter of the referring debt collector which included an adequate validation notice. Id. at *8. The court in Sutton reasoned that although the two letters were interrelated, they were clearly from two separate entities, and a validation notice was required at each initial contact by each new entity. Id . at *8-9. ("In light of [the FTC commentary], I cannot conclude other than that defendants are required to provide the necessary validation.")

In another case, Griswold v. J & R Anderson Bus. Servs., 1983 U.S. Dist. LEXIS 20365 at *2 (D.Or. Oct. 21, 1983), another district court analyzed the issue of whether an assignee debt collector was required under the FDCPA to include a validation notice if one was previously provided by the original creditor or debt collector. The court examined the legislative history of the FDCPA, concluding that § 1692g was viewed as an important tool that would ameliorate the problem of debt collectors dunning the wrong consumer or attempting to collect debts that consumers had already paid so that by making no distinction between an initial debt collector and a subsequent debt collector, and requiring a validation notice with the initial communication from each separate entity, the statutory purposes would be promoted. Id. at * 3. ("The provision which provides for validation information ... must apply to each debt collector in order to afford the consumer the protection intended by Congress."). S.Rep. No. 95-382, 95th Congr. 1st Sess. 4, reprinted in 1977 U.S.Code Cong. & Ad. News 1695, 1699. Also in Griswold, the court held that each subsequent debt collector or assignee must include a validation notification with its initial communication with the consumer, a holding that is logical where, otherwise, a subsequent or assignee debt collector who had incorrect or incomplete information could contact an unsophisticated consumer after the consumer had successfully contested or paid the debt and attempt to collect again without the consumer being aware of their rights to dispute the indebtedness. Id. The court found such an interpretation to be consistent with judicial economy because it would relieve courts of the task of determining: (1) which debt collector sent the original notice; (2) whether the debt remains unchanged; and (3) whether the original notice was adequate. Griswold, 1983 U.S. Dist LEXIS 20365, at *4.
Conversely, the court in Ditty v. CheckRite, 973 F.Supp. 1320, 1329 (D.Utah 1997), held, without explanation, that § 1692g does not require a subsequent debt collector that undertakes collection efforts after a first validation notice has been timely sent to provide additional notice and another thirty-day validation period. Likewise, the court in Senftle v. Landau, 390 F.Supp.2d 463, 474 (D.Md.2005), found that a letter from a previous debt collector which contained an adequate validation notice constituted the required initial notice. [FN20]

FN20. In Weinstein v. Fink, 2001 WL 185194, at *6-7 (N.D.Ill. Feb. 26, 2001), plaintiffs argued that the FDCPA was violated when a validation notice (that was enclosed with a summons from an attorney operating as a subsequent debt collector) referred to a letter attached to the notice that described the debt and identified the original creditor, but it did not also include the original dunning letters of the initial debt collector. The court, noting that the Supreme Court in Heintz had not addressed the concept of what constitutes a "communication," and that the parties in

Weinstein had agreed that the "initial communication" occurred when the initial debt collector first contacted the consumer, did not reach the issue of whether subsequent communication by a different debt collector required the notice.

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*11 In Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 916-17 (7th Cir.2004), the Seventh Circuit discussed what constitutes an "initial communication," focusing on what is defined as a "communication," rather than what is meant by "initial." In Thomas, the issue was whether a letter from a creditor [FN21] served as the "initial communication" which would alleviate the debt collector from any obligation under § 1692g. The court found that debt collectors, and not creditors, were the target of the FDCPA and that Congress made debt collectors, not creditors, responsible for notifying debtors of their debt validation rights. Thomas, 392 F.3d at 917. Thus, by definition (in effect), a creditor could not send an "initial communication." Id. [FN22]

FN21. The district court in the case relied on the definition of "creditor" set forth in 15 U.S.C. § 1692a(4) as any person who offers or extends credit creating a debt or to whom a debt is owed.

FN22. Relying heavily on Heintz, the Seventh Circuit, held in finding that a summons and complaint from a debt collector was the "initial communication" for purposes of the FDCPA ("our interpretation of the statute furthers [the FDCPA's] objective because it helps ensure that debtors will be informed about their validation rights and that debt collectors, knowing that they are obliged to advise debtors of these rights, will investigate claims before initiating litigation to collect debts.") Thomas, 392 F.3d at 917-18.

The overall purpose of the FDCPA is for the protection of consumers as well as the protection of debt collectors that utilize fair methods. 15 U.S.C. § 1692. The purpose of § 1692g is to eliminate the problem of debt collectors dunning the wrong person or trying to collect debts the consumer has already paid. Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir.1999) (citing S.Rep. No. 95-382, 95th Congr. 1st Sess. 4, reprinted in 1977 U.S.Code Cong. & Ad. News 1695, 1699). Such purposes can be best promoted by the interpretation of "initial communication" as set forth in such authority as Griswold in which the court cited judicial economy and conformity with congressional intent as logical and compelling reasons for its interpretation.

Such an interpretation of the statutory scheme to require separate notice by each debt collector does not subvert the law-abiding debt collector's attempts to collect a debt as it is the debt collector's decision to accept a new account with knowledge of the requirement, or to refer an existing account to another debt collection entity who should maintain the same awareness. The debt collector is assumed to be a sophisticated business entity familiar with the law, whereas the least sophisticated consumer is anything but, by definition. It is not unreasonable to conclude that the least sophisticated consumer might well need a reminder of one's rights and/or clarification of what and who they are dealing with when contact is initiated by a second, or third, or subsequent entity. To do otherwise, to not require such notice by a separate entity, would create a loophole, an "end-run around the validation notice requirement ... [that is] inconsistent with the

drafters' intention of protecting debtors from 'unfair, harassing, and deceptive' collection tactics,...." Thomas, 392 F.3d at 918.

Conclusion

Where material facts remain disputed, it is recommended that the Defendants' alternative motions to dismiss or for summary judgment be DENIED.

Let the Clerk forward a copy of this report and recommendation to the Honorable Robert E. Payne and to all counsel.
It is so Ordered.

Notice to Parties
Failure to file written objections to the proposed findings, conclusions and recommendations of the Magistrate Judge contained in the foregoing report within ten (10) days after being served with a copy of this report shall bar you from attacking on appeal the findings and conclusions accepted and adopted by the District Judge except upon grounds of plain error.

E.D.Va.,2006.
Turner v. Shenandoah Legal Group, P.C.
Not Reported in F.Supp.2d, 2006 WL 1685698 (E.D.Va.)