UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ISRAEL POLAK,	:	
	:	**REPORT AND RECOMMENDATION**
Plaintiff,	:	
	:	
-against-	:	17-CV-1795 (MKB)(PK)
	:	
KIRSCHENBAUM & PHILLIPS, P.C.,	:	
	:	
Defendants.	:	

Peggy Kuo, United States Magistrate Judge:

Plaintiff Israel Polak brings this action against Defendant Kirschenbaum & Phillips, P.C. pursuant to the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.* Specifically, Plaintiff alleges that Defendant's debt collection letter, which states that the balance due "may vary from day to day, due to interest or other charges," is deceptive and misleading, and violates Sections 1692e, 1692f, and 1692g. (*See* Compl. at ¶¶ 13-20, 25, Dkt. 1.) Defendant moved to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c). The Honorable Margo K. Brodie has referred Defendant's motion to dismiss ("Motion") to the undersigned for a report and recommendation. (*See* October 7, 2017.) For the reasons stated herein, the undersigned respectfully recommends that the Motion be granted as to Section 1692f, and denied as to Sections 1692e and 1692g.

BACKGROUND

Plaintiff incurred alleged credit card debt to Barclays Bank Delaware ("Creditor"), which hired Defendant law firm to collect the debt. (*See* Compl. ¶ 9; Defendant's Memorandum of Law ("Def.'s Mem.") at 2, Dkt 12.) Defendant sent Plaintiff a letter, dated September 15, 2016 ("Collection Letter"). (*See* Def.'s Mem. Ex. C.) The Collection Letter identifies "The Total Amount of the Debt Due as of Charge-Off" as $5,578.01, with a "Balance Due" of the same amount. (*Id.*)

The amounts for "Interest Accrued since Charge-Off," "Non-Interest Charges or Fees accrued since Charge-Off," and "Payments and Credits made on the debt since the Charge-Off" are listed as $0. (*Id.*) The Collection Letter also contains the following statement:

> The amount reflected above is the amount you owe as of the date of this letter. This amount may vary from day to day, due to interest or other charges added to your account after the date of this letter. Hence if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection.

(*Id.*) It further provides a phone number where the consumer could call an account representative for "an exact amount owed" and other information. (*Id.*)

The parties do not dispute that, based on the credit card agreement, "contractual or statutory interest is automatically accruing," but the Creditor is "electing not to collect interest at this time." (Compl. ¶ 20; Def.'s Mem. at 3.) Nonetheless, Plaintiff contends that the Collection Letter is "confusing" because it is unclear whether interest is currently accruing, and misleading because a debtor could not ascertain whether paying the account balance would satisfy the debt in full. (*See* Compl. ¶¶ 14, 19.) Plaintiff alleges that Defendant should have disclosed that "interest was accruing," or in the alternative, that "the creditor/and or [sic] Defendant has made the decision to waive the accruing interest." (*See id.* ¶ 21.) Plaintiff also alleges that the "threat of a balance increase" was coercive and constituted a "deceptive collection tactic," because Defendant was aware that the debt balance would, in fact, not vary at all during the collection of the debt. (*Id.* ¶¶ 15-16.)

Defendant argues that the Collection Letter conforms to the safe harbor language approved in *Avila v. Riexinger & Assoc., LLC,* 817 F.3d 72 (2d Cir. 2016). (*See* Def.'s Mem. at 5.) Defendant further argues that the Collection Letter is accurate because, while the Creditor is choosing not to collect interest on Plaintiff's debt at this time, it could, in the future, charge interest and other fees. (*See id.* at 3-5.) Lastly, Defendant contends that general disclosure regarding potential interest and

fees was appropriate in this case, because it could not have ascertained the exact amounts which might be added to the debt in the future. (*See* Kohl Aff. at 2, Dkt. 14.)

DISCUSSION

I. Standard of Review

In its Notice of Motion and under "Preliminary Statement" in the Memorandum of Law, Defendant states that it is moving to dismiss this action under Rule 12(c). (*See* Notice of Motion, Dkt. 12; Def.'s Mem. at 1.) However, in the caption and under "Legal Standard" in the Memorandum of Law, Defendant states that it is moving to dismiss the Complaint pursuant to Rule 12(b)(6), without addressing Rule 12(c). (*See* Def.'s Mem. at 2.) In opposition, Plaintiff discusses both Rule 12(b)(6) and Rule 12(c). (*See* Plaintiff's Memorandum of Law ("Pl.'s Mem.") at 3-4, Dkt. 15.) The undersigned, therefore, considers both standards in this Report and Recommendation.

"The same standard applicable to Fed. R. Civ. P. 12(b)(6) motions to dismiss applies to Fed. R. Civ. P. 12(c) motions for judgment on the pleadings." *Johnson v. St. Barnabas Nursing Home*, 368 F. App'x 246, 247 (2d Cir. 2010) (citing *Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir. 1994)). To survive a Rule 12(b)(6) or Rule 12(c) motion, a plaintiff's allegations must be supported by "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 also Johnson*, 368 F. App'x at 248. The court accepts as true "all allegations in the complaint" and "draw[s] all inferences in the non-moving party's favor." *LaFaro v. New York Cardiothoracic Group, PLLC*, 570 F.3d 471, 475 (2d Cir. 2009) (internal citation omitted). Nonetheless, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, 556 U.S. at 678. The court considers the plausibility of plaintiff's allegations in context by "draw[ing] on its judicial experience and common sense." *Id.* at 679. A complaint should not be dismissed "unless [the court] is satisfied that the

complaint cannot state any set of facts that would entitle [plaintiff] to relief." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (internal citation omitted).

II. The FDCPA

The FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Because the FDCPA is "remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated." *Vincent v. The Money Store*, 736 F.3d 88, 98 (2d Cir. 2013) (internal quotation marks and citation omitted). To ensure that the statute protects "the gullible as well as the shrewd," the Second Circuit has adopted an objective standard based on the "least sophisticated consumer" when determining whether a communication violated the FDCPA. *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 90 (2d Cir. 2008). In addition to protecting consumers against deceptive debt collection practices, the least sophisticated consumer test also "protects debt collectors from unreasonable constructions of their communications." *Id.* (internal citation omitted). Determination of how the least sophisticated consumer would interpret language in a collection letter is a question of law. *See Quinteros v. MBI Assocs., Inc.,* 999 F. Supp. 2d 434, 437 (E.D.N.Y. 2014).

III. Failure to State a Claim under the FDCPA

To state a claim under the FDCPA, a plaintiff must allege that "(1) he is a natural person who has been harmed; (2) the debt arises out of a transaction entered into primarily for personal, family, or household purposes; (3) defendant is a "debt collector"; and (4) defendant violated the FDCPA." *Ceban v. Capital Mgmt. Serv., L.P.,* No. 17-CV-4554 (ARR) (CLP), 2018 WL 451637, at *4 (E.D.N.Y. Jan. 17, 2018) (citing *Kaff v. Nationwide Credit, Inc.,* No. 13-CV-5413, 2015 WL 12660327, at *5 (E.D.N.Y. Mar. 31, 2015)). Plaintiff alleges and Defendant does not dispute that (1) Plaintiff is

an individual residing in Brooklyn, New York, (2) the debt at issue was "incurred as a financial obligation that was primarily for personal, family or household purposes," and (3) Defendant is a "debt collector." (Compl. ¶¶ 2-3, 8.) Thus, the only dispute is whether, as a matter of law, the Collection Letter violates Sections 1692e, 1692g, and 1962f of the FDCPA.

A. Section 1692e

Section 1692e prohibits, *inter alia,* the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. It sets forth a non-exhaustive list of practices that are prohibited by this provision, including a catch-all provision which broadly prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. § 1692e(10). The Second Circuit held that

> a debt collector will not be subject to liability under Section 1692e for failing to disclose that the consumer's balance may increase due to interest and fees if the collection notice either [1] accurately informs the consumer that the amount of the debt stated in the letter will increase over time, or [2] clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date.

Avila, 817 F.3d at 77.

Defendant argues that the Collection Letter contains the "*Avila* safe harbor language," relying on the holding in *Avila* that "the FDCPA requires debt collectors, when they notify consumers of their account balance, to disclose that the balance may increase due to interest and fees." *Id.* at 76; (Def.'s Mem. at 5.) However, the language the Second Circuit seems to bless in *Avila*, as reflected in the Collection Letter—that the "amount may vary from day to day due to interest and other charges"—constitutes a safe harbor only when considered in the context of the entire Collection Letter and the facts of the case. An important qualifier to safe harbor protection still exists: "'provided, of course, that the information [the debt collector] furnishes is accurate and

[the debt collector] does not obscure it by adding confusing other information (or misinformation).'" *Avila*, 817 F.3d at at 77 (quoting *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, 214 F.3d 872, 876 (7th Cir. 2000)). A general disclosure that the balance *may* increase due to interest does not automatically shield a debt collector from liability under Section 1692e when a different part of the Collection Letter provides inaccurate information, which makes the communication "false, deceptive, or misleading." 15 U.S.C. § 1692e.

The Collection Letter states that "The Total Amount of Interest Accrued since Charge-Off" is zero, when in fact, as Defendant concedes, interest is "accru[ing] on a day to day basis."[1] (Def.'s Mem. Ex. C; *id.* at 3.) Based on this factual contradiction, the Collection Letter could be found to contain "confusing other information (or misinformation)." *Avila,* 817 F.3d at 77. Defendant adds that the Creditor "is electing not to collect interest at this time." (Def.'s Mem. at 3.) However, this does not change the reality that interest is *accruing* even during the collection process, and that at some future date, according to Defendant, either the Creditor or its assignee could choose to collect all accrued interest. *Id.* In the context of the statement that no interest has accrued since charge-off, the statement that the "amount may vary from day to day due to interest and other charges" could mislead the least sophisticated consumer to believe that interest has stopped accruing. Defendant is not helped by its contention that this statement is true in that the characterization of "may" accurately conveys the two different scenarios: that interest is accruing and could be collected in the future, and that the Creditor is choosing not to collect interest at this time. "[E]ven if a debt collector accurately conveys the required information, a consumer may state a claim if she successfully alleges that the least sophisticated consumer would inaccurately interpret the message." *Carlin v. Davidson Fink, LLP*, 852 F.3d 207, 216 (2d Cir. 2017). Read together with the representation that no interest has accrued since charge-off, the statement that the "amount may

[1] It is also unclear what the date of "Charge-Off" is.

vary from day to day due to interest and other charges" does not provide a safe harbor from liability under Section 1692e.

Furthermore, the Collection Letter contains neither of the two alternatives set forth in *Avila*. It neither "accurately informs the consumer that the amount of the debt stated in the letter *will* increase over time," nor does it "clearly state[] that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date." *Avila*, 817 F.3d at 77 (emphasis added).

The undersigned finds that Plaintiff has stated a claim under Section 1692e and accordingly recommends that the Motion be denied on that basis.

B. Section 1692g

Section 1692g provides, "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 notice containing – (1) the amount of the debt…." 15 U.S.C. § 1692g(a). The parties do not dispute that the Collection Letter is an "initial communication" within the meaning of Section 1692g and that it was "in connection with the collection of any debt." *Id.* The only dispute is whether the Collection Letter adequately stated "the amount of the debt." *Id.*

In *Carlin*, the Second Circuit considered whether there was a violation of Section 1692g when a payoff statement included a "Total Amount Due," but that amount may have included unspecified fees and costs that were not yet due at the time the statement was issued. *Carlin*, 852 F.3d at 215. It expressed a concern that the least sophisticated consumer might not be able to accurately interpret the payoff statement without information about what the accrued fees are or how they are calculated. *See id.* at 216. While stating that the Court is not "hold[ing] that a debt collector may never satisfy its obligations under § 1692g by providing a payoff statement that

provides an amount due, including expected fees and costs," it concluded that a statement is incomplete without "[1] information allowing the least sophisticated consumer to determine the minimum amount she owes at the time of the notice, [2] what she will need to pay to resolve the debt at any given moment in the future, and [3] an explanation of any fees and interest that will cause the balance to increase." *Id.*

The Collection Letter here shows "The Total Amount of the Debt Due as of Charge-Off" as $5,578.01, a "Balance Due" of the same amount, and the statement: "The amount reflected above is the amount you owe as of the date of this letter." (*See* Def.'s Mem. Ex. C.) However, it fails to inform Plaintiff what he may need to pay to resolve the debt at any moment after the date of the letter, or provide an explanation of any fees and interest that will cause the balance to increase. It states generally that the amount due "may vary . . . due to interest or other charges," but rather than providing information for the debtor to calculate the amount needed to resolve the debt in the future, the debtor is directed to call the debt collector to obtain the "exact amount owed." (*See id.*) Pursuant to the holding in *Carlin*, this is not enough to satisfy Section 1692g's requirement that the written notice contain the amount of the debt.

Defendant seeks to distinguish *Carlin* because that case involved a payoff letter in a foreclosure action, which "has certain specified milestones that have certain specified costs." (Kohl Aff. at 1.) Defendant contends that, in this case, unlike in a foreclosure action, it "has NO WAY OF KNOWING whether or not this [debt collection effort] will actually proceed to suit incurring extra fees, whether or not the defendant will file an answer which has the potential of incurring additional fees or whether or not the [Creditor] will choose to start charging interest or sell the debt which will create the potential of the charging of interest." *Id.* at 2 (capitals in original). Defendant argues essentially that, given all these variables, it would have been impossible to calculate future interest or fees.

The standard set forth by the Second Circuit in *Carlin* does not require the impossible. Despite Defendant's protestations, it could have provided the required information. For example, the rate of interest was known. Defendant concedes that the Creditor "is electing not to collect interest at this time. The interest is in fact still accruing by law. Should Barclays Bank assign the account or change its policy that interest would then become due and owing." (Def.'s Mem. at 3.) Based on this information, Defendant could have provided the rate of interest that was "accru[ing] on a day to day basis." (Def.'s Mem. at 3.) In *Carlin*, the Second Circuit pointed to *Jones v. Midland Funding* for an example of safe harbor language, for satisfaction of Section 1692g: "As of today, [date], you owe $___. . . . This balance will continue to accrue interest . . . at a rate of $___ per [date/week/month/year]." *Carlin,* 852 F.3d at 216 n.3. In addition, Defendant could have indicated that, while no interest is being collected at this time, as of a known date or some future event such as change of policy or assignment, any accrued interest could or would become due and owing. Providing this information allows Plaintiff to determine "what [he] will need to pay to resolve the debt at any given moment in the future," and provides "an explanation of any fees and interest that will cause the balance to increase." *Id.* at 216.

Imposing *Carlin*'s requirements in this case also would not alter the balance struck in *Avila.* In adopting the safe harbor approach, the Second Circuit in *Avila* recognized the district court's concern that "requiring debt collectors to disclose [ ] information [about accruing interest and fees] could lead to more abusive practices." *Avila,* 817 F.3d at 76. However, *Carlin* only requires that the debt collector provide enough information so that the least sophisticated consumer may accurately interpret the balance due. *Carlin* does not require Defendant to overwhelm debtors with unnecessary information by advising them of all possible future events, such as a lawsuit, which could cause the balance to increase. For example, courts have found that a collection letter satisfied the requirements of Section 1692g(a) when it failed to state that interest was accruing and the

defendant later sued for prejudgment interest under N.Y. C.P.L.R. § 5001, because defendant "had not yet commenced any legal action" at the time of the letter. *See Bird v. Pressler & Pressler, L.L.P.*, No. 12-CV-3007 (JS) (ETB), 2013 WL 2316601, at *2 (E.D.N.Y. May 28, 2013); *see also Altieri v. Overton, Russell, Doerr, & Donovan, LLP*, No. 1:17-CV-303, 2017 WL 5508372, at *7 (N.D.N.Y. Nov. 15, 2017) (no requirement to disclose that amount due could increase, when only basis for assessing interest is N.Y. C.P.L.R. § 5001).

Because Defendant failed to provide the information required by *Carlin*, the undersigned finds that Plaintiff has stated a claim under Section 1692g and accordingly recommends that Defendant's Motion be denied on that basis.

C. Section 1692f

Section 1692f broadly prohibits the use of any "unfair or unconscionable means to collect or attempt to collect any debt" and, like Section 1692e, provides a non-exhaustive list of unfair practices. 15 U.S.C. § 1692f. The Second Circuit has held that the term "unfair or unconscionable means" refers to practices that are "shockingly unjust or unfair, or affronting the sense of justice, decency, or reasonableness." *Arias v. Gutman, Mintz, Baker & Sonnenfeldt LLP*, 875 F.3d 128, 135 (2d Cir. 2017) (internal quotation marks and citations omitted). In *Arias*, the Second Circuit found that Section 1692f is violated when a debt collector "in bad faith unduly prolongs legal proceedings or requires a consumer to appear at an unnecessary hearing." *Id* at 138. Violations have also been found when money has been removed from a debtor's bank account in violation of a court order, an invalid lien has been maintained against a debtor's home, and when a writ of garnishment was sought when a debtor was not behind in making payments. *Sutton v. Fin. Recovery Serv., Inc.,* 121 F. Supp. 3d 309, 315 (E.D.N.Y. 2015) (collecting cases). The District Court in *Sutton* concluded that viable claims under Section 1692f are "generally defined by either (1) the unauthorized taking of

money or property . . . , or (2) communicating with a consumer in a manner that will cause their *public* embarrassment or invasion of privacy." *Id.* at 315 (emphasis in original).

Plaintiff fails to allege how Defendant used "unfair or unconscionable means" to collect Plaintiff's debt. *See* 15 U.S.C. §1692f. Plaintiff argues that "it is certainly unfair and unconscionable for Defendant to send a Collection Letter is [sic] open to more than one reasonable interpretation, at least one of which is inaccurate." (Pl.'s Mem. at 15.) Plaintiff also states that the Collection Letter is "confusing and misleading on its face" because it provides incomplete and inaccurate information as to "Balance Due" and the continuing accrual of interest and fees. (*See id.*) Plaintiff does not allege that Defendant violated any specific subsection of Section 1692f, or that it attempted to take his money or property illegally or caused him public embarrassment. (*See id.*)

Sending a collection letter that is confusing, misleading, inaccurate or incomplete, without more, does not rise to the level of a Section 1692f violation. As the District Court held in *Sutton*, "inappropriately worded" and "confusing" communications do not violate Section 1692f. *Sutton*, 121 F. Supp. 3d at 316. Even a communication that is "false, deceptive or misleading" under Section 1692e might not constitute "unfair or unconscionable means" under Section 1692f. The Second Circuit explained that Section 1692e "mainly targets practices that take advantage of a debtor's naivete or lack of legal acumen," while Section 1692f "is aimed at practices that give the debt collector an unfair advantage over the debtor or are inherently abusive." *Arias*, 875 F.3d at 136. While the same conduct could be both deceptive and unfair, deceptive conduct is not always unfair under Section 1692f. To constitute a violation of Section 1692f, such conduct must be "shockingly unjust or unfair." *Id.* at 135. The statement in the Collection Letter is neither shockingly unfair, nor does it "affront[ ] the sense of justice, decency, or reasonableness." *See, e.g.*, *Ceban,* 2018 WL 451637, at *8 (to find cause of action based on statement "This settlement may have tax consequences" would render the terms "unfair" and "unconscionable" meaningless).

Accordingly, the undersigned recommends that Plaintiff's claim under Section 1692f be dismissed.

CONCLUSION

Based on the foregoing, the undersigned respectfully recommends that the Motion to Dismiss be granted as to Section 1692f, and that the Motion be denied as to Sections 1692e and 1692g.

Any objection to this Report must be filed in writing with the Clerk of Court within fourteen (14) days of service. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Failure to timely file any such objection waives the right to appeal the District Court's Order. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

SO ORDERED:

Peggy Kuo

PEGGY KUO
United States Magistrate Judge

Dated: Brooklyn, New York
February 16, 2018