UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RAY PALMER, JR., on behalf of himself and all others similarly situated,

Plaintiff,

v. Case No: 6:15-cv-59-Orl-40KRS

DYNAMIC RECOVERY SOLUTIONS, LLC and CASCADE CAPITAL, LLC,

Defendants.

ORDER

Plaintiff, Ray Palmer, Jr., initiated this putative class action against Defendants, Dynamic Recovery Solutions, LLC ("Dynamic") and Cascade Capital, LLC ("Cascade"), to vindicate his rights and the rights of other similarly situated consumers under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692–1692p. Plaintiff claims that 1,181 consumers received dunning letters from Defendants which violate the FDCPA's proscriptions against false, misleading, and unfair debt collection practices. Both Dynamic and Cascade deny any wrongdoing. The parties advise that they have resolved their dispute and now move the Court to certify a settlement class and to preliminarily approve their settlement agreement. For the following reasons, and with the benefit of a preliminary fairness hearing, the Court finds that certification and preliminary approval are inappropriate at this time.

I. BACKGROUND

A. The Allegations

Plaintiff alleges in his Complaint that he and the putative class members incurred and subsequently defaulted on credit card obligations owed to Bank of America. After the statute

of limitations had passed to legally enforce these defaulted obligations, Bank of America sold them to Cascade. Cascade then contracted with Dynamic to collect on the debts.

In furtherance of its collection efforts, Dynamic mailed dunning letters to Plaintiff and the putative class members seeking payment of the defaulted credit card obligations. Each letter informed the recipient that he or she owed a debt, that the original creditor was Bank of America, and that Cascade currently owns the right to collect on the obligation. Each letter further outlined a number of payment plans through which the recipient could "settle" his or her account. Upon completion of a payment plan, each letter promised that the account would be considered "satisfied and closed" and that "a settlement letter [would] be issued." The letters never disclosed that the underlying credit card obligations were no longer legally enforceable.

By couching its collection efforts in terms of "settlement" and offering payment plans without disclosing the fact that the underlying credit card obligations were no longer legally enforceable, Plaintiff claims that the dunning letters misrepresent the character or legal status of the obligations and, as a result, constitute a false, misleading, and unfair debt collection practice. Both Dynamic and Cascade deny that the letters violate the FDCPA and maintain that, even if they do, any violation was the result of a bona fide error. Cascade additionally denies liability on the grounds that it cannot be held vicariously liable under the FDCPA for any misconduct by Dynamic.

B. The Proposed Settlement

The parties represent that, through their counsel, they have engaged in arms-length negotiations which have resulted in settlement. The terms of that settlement include the following:

- Dynamic will pay $12,000 to the class as statutory damages under the FDCPA, which will be distributed evenly among the 1,181 class members for a pro rata award of $10.16 per class member.

- Dynamic will pay Plaintiff $2,000 in recognition for his service as class representative and $1,000 in statutory damages as permitted by the FDCPA, for a total award to Plaintiff of $3,000, which shall be paid separately from the class settlement fund.

- Plaintiff will be deemed the prevailing party and Dynamic will pay Plaintiff's reasonable attorney's fees and costs.

- Dynamic will pay the costs of class notice, distribution, and administration.

- The class will release Defendants from all known and unknown claims which could have been brought in this lawsuit.

- Defendants deny liability and retain the right to collect on the defaulted obligations.

- Class members may opt out of the class and the settlement or may enter an appearance to object to the settlement's fairness.

- Any unclaimed amount from the $12,000 class settlement fund will be divided equally between the National Consumer Law Center and the National Association of Consumer Advocates as a cy pres remedy.

II. DISCUSSION

A. Class Certification

"For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the [four] requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009) (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1250 (11th Cir. 2004)). The Court assumes for the purposes of this Order only that all class certification requirements are satisfied. *But see* note 6, *infra*. The Court therefore turns directly to the question of whether the parties' proposed settlement should receive preliminary approval.

B. Preliminary Approval of the Settlement

A class action may not be settled, dismissed, or otherwise compromised without the district court's approval. Fed. R. Civ. P. 23(e). A district court should only approve a class action settlement if it is "fair, adequate and reasonable and is not the product of collusion between the parties." *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 691 (S.D. Fla. 2014) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). The Eleventh Circuit has enumerated six factors a district court should consider in evaluating the fairness, adequacy, and reasonableness of a class action settlement: (1) the plaintiff's likelihood of success on the merits, (2) the range of the plaintiff's possible recovery, (3) the point within the range of possible recovery at which settlement is fair, adequate, and reasonable, (4) the expected complexity, cost, and duration of litigation, (5) any opposition to the proposed settlement, and (6) the stage of the litigation at which settlement was reached. *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011). While these six factors are helpful in answering the fairness inquiry, they are neither determinative nor exhaustive, and the court may consider other relevant factors based on the particular nuances of the case and the settlement proposed. *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). Additional factors warranting consideration may include (7) an unjustifiably burdensome claims procedure, (8) unduly preferential treatment of the class representative, (9) the terms of settlement in similar cases, (10) an unreasonably high award of attorney's fees to prevailing class counsel, and (11) impermissibly broad releases of liability. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011); *In re Prudential Ins. Co.*

Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 317, 323–24 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.62 (2004).[1]

Although class action settlements should be reviewed with deference to the strong judicial policy favoring settlement, the court must not approve a settlement merely because the parties agree to its terms. *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1429 (2015); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1150 (11th Cir. 1983) (finding that reliance on the recommendations of the parties and their counsel "fosters rubber stamping by the court rather than the careful scrutiny which is essential in judicial approval of class action settlements"). This maxim particularly holds true in the context of precertification settlement, where the parties' speedy and seamless resolution of their dispute should prompt the court to consider whether the proposed settlement represents a bona fide end to the adversarial process or the collusive exploitation of the class action mechanism to the detriment of absent class members. *See Lane v.*

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[1] The list of potential factors to consider could go on. On this point, two astute commentators observe:

> [F]actor tests . . . suffer from shortcomings. These tests grow by accretion. They are commodious closets into which the residues of past cases can be deposited—closets that never need to be reorganized or cleaned out because the tests are suggestive only. Appeals courts never need to consider whether a factor test should be overruled. Over time, despite the good intentions that motivated their creation, they become unwieldy and disorganized . . . .
>
> The sheer number of factors is a problem. A trial judge could hardly be blamed for feeling a sense of foreboding when contemplating the nineteen items on the Third Circuit's checklist [in *Prudential*]. Running through them all seems a dreary task. Courts applying these tests often recite the litany and engage in pro forma analyses, but their hearts are not in it.

Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 172 (2009) (footnotes omitted).

Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 8 (2013). In these circumstances, the court must employ "a higher degree of scrutiny in assessing [a settlement's] fairness." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). Ultimately, the proponents of a settlement bear the burden of proving its fairness, adequacy, and reasonableness. *Faught*, 668 F.3d at 1239.

After reviewing the proposed settlement in this case through the prism of the above-listed factors, three reasons counsel against its approval:

1. The Proposed Settlement Does Not Fairly and Adequately Account for Plaintiff's Likelihood of Success Against Defendants

In describing why they believe their proposed settlement is fair, the parties rely heavily on what they perceive to be the uncertainty of Plaintiff's case when weighed against Defendants' defenses. However, upon review of those defenses and the relevant case law, the Court finds that the most significant deficiency in the parties' proposed settlement arises out of the settlement's low value despite Plaintiff's high likelihood of succeeding against Defendants on the merits.

a. Strength of Plaintiff's Case

In order to prevail under the FDCPA, Plaintiff will need to prove that (1) he was the object of collection activity arising out of consumer debt, (2) that Defendants are debt collectors under the FDCPA, and (3) that Defendants committed an act or omission proscribed by the FDCPA. *Pescatrice v. Orovitz*, 539 F. Supp. 2d 1375, 1378 (S.D. Fla. 2008). Defendants do not dispute that they are debt collectors and that Plaintiff was the object of collection activity arising out of consumer debt. Instead, Defendants take the position that the dunning letter in this case does not violate the FDCPA.

Plaintiff alleges that attempting to collect a time-barred debt without disclosing the fact that it is time-barred constitutes the false or misleading representation of the debt's character or legal status in violation of 15 U.S.C. § 1692e(2)(A). Defendants disagree, claiming that the letters are not misleading because they do not misrepresent the character or legal status of the debts to be collected and do not threaten legal action. In determining whether a collection practice is false or misleading under § 1692e, the Eleventh Circuit looks to the "least sophisticated consumer." *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985). "This unsavvy consumer is charged with a basic level of understanding and willingness to read with care, but is of below average sophistication or intelligence, and is uninformed or naïve." *Alborzian v. JPMorgan Chase Bank, N.A.*, 185 Cal. Rptr. 3d 84, 91 (Cal. Ct. App. 2015) (quoting *Gonzalez v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1062 (9th Cir. 2011)) (citations and internal quotation marks omitted); *see also LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1194 (11th Cir. 2010) (per curiam). A debt collection practice which tends to mislead the least sophisticated consumer violates the FDCPA. *Jeter*, 760 F.2d at 1175. Therefore, Plaintiff can only prevail under § 1692e(2)(A) if the dunning letters sent by Dynamic would tend to mislead the least sophisticated consumer as to the character or legal status of the debt to be collected.

The Eleventh Circuit has not yet had the occasion to answer the question of whether a debt collector's failure to disclose that a debt is time-barred constitutes a false or misleading debt collection practice in violation of § 1692e(2)(A). Nevertheless, a plain reading of the statute indicates that it is and that the threat of litigation need not accompany the misrepresentation to impose liability on a debt collector. The Eleventh Circuit has reiterated many times that the FDCPA must be construed "to give full effect to each of its provisions," must be interpreted with regard to its "entire statutory context," must be

understood using the plain and ordinary meaning of the words chosen by Congress, and must be applied so as to achieve its purpose of "eliminate[ing] abusive debt collection practices." *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1312, 1315–16 (11th Cir. 2015) (quoting 15 U.S.C. § 1692(e) and *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999)).

The provision through which Plaintiff premises liability proscribes "[t]he false representation of the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). The conduct prohibited by the plain meaning of this language is the false *representation* of a debt's character, amount, or legal status. Moreover, § 1692e(2)(A) does not contemplate that the threat of litigation must accompany a misrepresentation to be actionable as Defendants suggest. Indeed, had Congress intended to forbid threatening litigation in connection with the false representation of the character or legal status of a debt, it would have narrowed § 1692e(2)(A) accordingly; Congress's omission on this point indicates that it held no such intent. *See Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1217 (11th Cir. 2015) ("Where Congress knows how to say something but chooses not to, its silence is controlling.") (quoting *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995)). Further belying Defendants' position is a subsequent provision which proscribes "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5). This category seems more apt to include the threats of litigation which Defendants contend are tacitly included in § 1692e(2)(A). It would be strange indeed for Congress to forbid certain conduct in one provision of a statute through words and then forbid the exact same conduct in another provision of the same statute through silence. A plain reading of § 1692e(2)(A) therefore leads to the inescapable conclusion that

it prohibits the false representation of a debt's character or legal status regardless of whether litigation is threatened.

Applying the plain language of § 1692e(2)(A) to the dunning letter in this case, Plaintiff's prospects of prevailing against Defendants appear strong. The letter sent by Dynamic seeks repayment of an unenforceable debt without disclosing that fact. Whether a debt is barred by an applicable statute of limitations is fundamental to the debt's character and legal status. *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1260 (11th Cir. 2014) (explaining the significance to debtors of statutes of limitations in determining a debt's legal status), *cert. denied*, 135 S. Ct. 1844 (2015). The failure to disclose that a debt is barred by the statute of limitations would likely mislead the least sophisticated consumer as to the character or legal status of his or her debt, thus violating § 1692e(2)(A). Although this nondisclosure is itself sufficient to violate the FDCPA, the letters go one step further by asking the consumer to "settle" his or her account. Such settlement offers serve only to compound confusion over the debt's true character or legal status, as a consumer researching what "settlement" means would reasonably find the dictionary's definition of the term: "an act of bestowing or giving possession under legal sanction." *Settlement*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/settlement (last visited May 4, 2016); *see also Settlement*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the term to mean "[a]n agreement ending a dispute or lawsuit"). Consequently, the dunning letter in this case is doubly misleading by failing to disclose that the debt it seeks to collect is time-barred and by giving the false impression that Cascade could sue to enforce the debt.

Other circuit courts have reached the same conclusion. In *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir. 2014), the Seventh Circuit faced a situation factually identical to what the parties present here. The plaintiff in *McMahon* incurred and defaulted

on a consumer debt which eventually ended up in the hands of a third party debt collector. *Id.* at 1013. After the statute of limitations had passed to sue on the debt, the debt collector mailed the plaintiff a dunning letter which offered to "settle [his] account in full." *Id.* Like the dunning letter in this case, the letter in *McMahon* failed to disclose that the debt was barred by the applicable statute of limitations. *Id.*

In concluding that failing to disclose that a debt is legally unenforceable constitutes a false or misleading debt collection practice, the Seventh Circuit relied on the plain meaning of the pertinent statutory language:

> The proposition that a debt collector violates the FDCPA when it misleads an unsophisticated consumer to believe a time-barred debt is legally enforceable . . . is straightforward under the statute. Section 1692e(2)(A) specifically prohibits the false representation of the character or legal status of any debt. Whether a debt is legally enforceable is a central fact about the character and legal status of that debt. A misrepresentation about that fact thus violates the FDCPA.

Id. at 1020. In further support of its conclusion, the Seventh Circuit pointed to the fact that unsophisticated consumers[2] would be misled by the inclusion of a "settlement offer" in a dunning letter because "a settlement offer on a timebarred debt implies that the creditor could successfully sue on the debt," thus misrepresenting the debt's character and legal

[2] The Seventh Circuit utilizes the "unsophisticated consumer" standard instead of the "least sophisticated consumer" standard in determining whether a debt collector's conduct is misleading. Many commentators have attempted to differentiate between the two types of consumers, with most concluding either that there is no meaningful distinction or that the unsophisticated consumer standard is marginally more demanding for plaintiffs to satisfy. *See, e.g.*, Jeffrey S. Peters, Note, *Meaningful Involvement in Collections: Should Ethics or the FDCPA Govern?*, 34 PACE L. REV. 1240, 1247–51 (2014) (finding any variation between the two standards "to be more an issue of semantics than of an actual difference in the law"); Christian Stueben, Note, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 FORDHAM L. REV. 3107, 3127–32 (2010) (finding the unsophisticated consumer standard "slightly more stringent"). In any event, whatever subtleties may exist are unimportant for the purposes of this Order.

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