

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

DORIS LOTT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 15-00439-CV-W-DW
	)	
LVNV FUNDING LLC, et al.,	)	
	)	
Defendants.	)	

**ORDER**

Before the Court is Defendants’ Motion to Dismiss (Doc. 10). Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants LVNV Funding, LLC (“LVNV”) and Gamache & Myers, P.C. (“G&M”) move to dismiss Plaintiff Doris Lott’s Petition with prejudice for failure to state a claim upon which relief can be granted.<sup>1</sup> Plaintiff has filed a Response (Doc. 16) in opposition and a supporting Affidavit (Doc. 20). In turn, Defendants have filed a Reply (Doc. 17). Upon review, the Court concludes that the Motion to Dismiss should be granted.

Plaintiff originally filed her Petition in the Circuit Court of Clay County, Missouri. The action concerns a debt (the “debt”) allegedly incurred by Plaintiff to HSBC Bank Nevada, NA, the original lender. LVNV currently owns the debt and G&M was hired by LVNV to collect the debt. Count I of the Petition alleges that Defendants violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq* (“FDCPA”). Count II raises a claim for abuse of process under Missouri state law. Defendants removed the action to this Court based on federal question

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<sup>1</sup> The Court previously entered an order granting the motion to dismiss as unopposed, see Doc. 12. Thereafter, on Plaintiff’s motion, the Court set aside the dismissal for good cause and excusable neglect shown and reopened the action, and now will reconsider the motion to dismiss, see Doc. 21.

jurisdiction as to the FDCPA claims. They now move to dismiss both counts, arguing that Plaintiff's claims are facially implausible, barred by the statute of limitations, and contain insufficient facts in support.

For a pleading to state a claim for relief it must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Horras v. Am. Capital Strategies, Ltd., 729 F.3d 798, 801 (8th Cir. 2013) (citing FED. R. CIV. P. 8(a)(2)). The complaint must contain facts sufficient to state a claim that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A complaint must contain more than labels and conclusions or a formulaic recitation of the elements of a claim. Id. (quoting Twombly, 550 U.S. at 555).

## **I. FDCPA violations**

### **a. 15 U.S.C. §§ 1692e(2)(A), 1692e(10) and 1692f**

In the petition, Plaintiff claims that "Defendants misrepresented the character, amount and/or legal status of the alleged debt, in violation of the FDCPA, 15 U.S.C. § 1692e(2)(A)." Section 1692e(2)(A) prohibits the "false representation of the character, amount, or legal status of any debt." Plaintiff further claims that "Defendants have used false, deceptive, misleading, unfair and unconscionable representations in connection with the alleged debt, in violation of 15 U.S.C. §§ [ ] 1692e(10) and 1692f." Section 1692e(10) prohibits the "use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." Section 1692f generally prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt."

Specifically, Plaintiff claims that Defendants misrepresented to her that the debt was not time-barred from litigation. The petition asserts that on January 27, 2014, Defendants sent a collection letter to Plaintiff stating that they intended to file a lawsuit against her. Then, on January 31, 2014, Defendants filed said lawsuit against her (the “collection action”). Plaintiff alleges, however, that the last payment on the debt was made on February 24, 2007. Furthermore, because the applicable statute of limitations is 5 years from the date of last payment, any lawsuit seeking to collect the debt had to be filed on or before February 24, 2012. Thus, according to Plaintiff, by sending the January 27, 2014 collection letter, Defendants threatened action which could not legally be taken, and by filing the lawsuit, Defendants took action which could not legally be taken. Plaintiff asserts that these actions constitute misrepresentations to her that any lawsuit seeking to collect the debt was not time-barred.

In support of her position, Plaintiff cites to Kimber v. Fed. Fin. Corp., 668 F.Supp. 1480, 1489 (M.D. Al. 1987) for the proposition that “(b)y threatening to sue [plaintiff] on her alleged debt, [defendant] violated § 1692e(2)(A) & (10); by threatening to sue her, [defendant] implicitly represented that it could recover in a lawsuit, when in fact it cannot properly do so.” However,

Kimber limited debt collectors from the filing of lawsuits that appeared to be time-barred when filed rather than filing suits that were later determined to be time-barred. Thus, the relevant inquiry is not whether the statute of limitations barred the collection action but whether the statute of limitations appeared to bar the collection action from the perspective of the debt collector at the time the debt collection action was filed.

Hipps v. LVNV Funding, LLC, No. 12-cv-1297, 2013 WL 6571597 at \*6 (E.D. Mo. Dec. 13, 2013).

Of importance, Plaintiff has attached to her petition a copy of the petition filed on January 31, 2014 by Defendants in the collection action against her. Attached to this earlier petition is an “account summary” from LVNV, which indicates that six payments were made

towards the debt in 2011 and 2012, with the last payment in the amount of \$14.15 made on April 9, 2012. Plaintiff does not allege that this attached record was intentionally falsified, nor does she question its accuracy. See Ashanti v. City of Golden Valley, 666 F.3d 1148, 1151 (8th Cir. 2012) (in ruling on a motion to dismiss, the court may consider documents necessarily embraced by the complaint as not outside the pleadings). Thus, Plaintiff's petition shows that, from Defendants' perspective, the collection action did not appear to be time-barred at the time the collection letter was sent or at the time the lawsuit was filed, and that Defendants indeed appeared to have a valid basis for asserting that the claims against Plaintiff weren't time-barred. Plaintiff does state via affidavit that her bank records do not reflect any such payments to LVNV, nor does she recall making any such payments. However, although these statements certainly could have been presented by Plaintiff in support of an affirmative defense to the collection action, they fail to negate the fact that that, on its face, her petition shows that the collection action did not appear to be time-barred from Defendant's perspective. Based on the foregoing, the Court concludes that the petition fails to state a claim upon which relief can be granted for falsely representing the legal status of the debt under Section 1692e(2)(A), for using false representations under Section 1692e(10), or for using unfair or unconscionable means under Section 1692f.

**b. 15 U.S.C. § 1692e(5)**

Next, Plaintiff claims that "Defendants threatened to take an action and took actions that cannot legally be taken or that was not intended to be taken in violation of the [FDCPA] 15 U.S.C. § 1692e(5)." Section 1692e(5) prohibits the "threat to take any action that cannot legally be taken or that is not intended to be taken." Plaintiff again specifically alleges that Defendants

could not send the collection letter threatening to file the collection action against her, because the collection action was time-barred and therefore could not legally be taken.

As discussed above, however, the petition shows on its face that, from Defendants' perspective, the collection action did not appear to be time-barred when the collection letter was sent or when the action was filed. Accordingly, the petition fails to state a claim upon which relief can be granted for threatening to take an action that cannot legally be taken under Section 1692e(5).

**c. 15 U.S.C. § 1692e(8)**

Plaintiff alleges that “Defendants communicated or threatened to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed, in violation of the [FDCPA] 15 U.S.C. § 1692e(8).” Section 1692e(8) prohibits “(c)ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.”

The petition makes no factual allegations that Defendants either communicated or threatened to communicate Plaintiff's credit information to anyone, nor does the petition set forth any facts showing that Plaintiff disputed the debt. As a result, the Court concludes that Plaintiff has failed to state a claim upon which relief can be granted under Section 1692e(8).

**d. 15 U.S.C. § 1692e**

Lastly, Plaintiff asserts that “Defendants have used false, deceptive, misleading, unfair and unconscionable representations in connection with the alleged debt, in violation of 15 U.S.C. §[] 1692e [].” Section 1692e generally prohibits the use of “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” Plaintiff specifically

alleges that in response to the January 27, 2014 collection letter, she contacted G&M to discuss settlement, agreed to enter into a payment arrangement to resolve the debt, and sent her first payment on February 18, 2014. She claims that she then received paperwork from G&M that included a consent judgment, but that she never agreed to a judgment. She asserts that she did not send any further payments and did not execute the documents. Thus, she claims that Defendants used false representations regarding the terms of settlement in an attempt to collect the debt.

However, under the FDCPA, any false representations “must be material in order to be actionable.” Coleman v. Northland Group, Inc., No. 13-cv-2459, 2014 WL 4205584 at \*2 (E.D. Mo. Aug 21, 2014). Representations are material “if they frustrate a consumer’s ability to intelligently choose his or her response.” Id. (quoting Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1034 (9th Cir. 2010)). Here, regardless of whether Defendants made false representations regarding the terms of settlement, the petition states that Defendants sent the proposed settlement documents to Plaintiff, who then reviewed said documents and decided to not execute the consent judgment or finalize the proposed settlement. As a result, because, she was able to “intelligently choose [] her response” to the proposed settlement, any purportedly false representations during the negotiations were not material. Therefore, the petition fails to state a claim upon which relief can be granted for making false representations regarding the terms of settlement under Section 1692e.

## **II. Abuse of process**

Plaintiff alleges that “Defendants made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process when it filed the lawsuit” against her.

Under Missouri law, a claim of abuse of process requires the following elements: (1) the present defendant made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process; (2) the defendant had an improper purpose in exercising such illegal, perverted or improper use of process; and (3) damage resulted. Ritterbusch v. Holt, 789 S.W.2d 491, 493 (Mo. banc 1990). Significantly, “if the action is confined to its regular and legitimate function in relation to the cause of action at issue, there is no abuse even if the plaintiff had an ulterior motive in bringing the action, or if she knowingly brought the suit upon an unlawful claim.” Duvall v. Lawrence, 86 S.W.3d 74, 85 (Mo. App. 2002).

As discussed previously, the “account summary” attached by Plaintiff to the petition was in the possession of Defendants at the time they filed the collection action against Plaintiff. This document, which is part of the petition, evidences that Defendants filed the collection action for its regular and legitimate function – the collection of an alleged debt – and that, from the Defendant’s perspective, the collection action did not appear to be time-barred. Consequently, the Court concludes that, on its face, the petition fails to state a claim upon which relief can be granted for abuse of process.

For the aforementioned reasons, as well as for the additional reasons set forth by Defendants in their motion and reply, it is ORDERED that:

1. Defendants’ Motion to Dismiss (Doc. 10) is GRANTED; and
2. This action is dismissed with prejudice.

SO ORDERED.

Date: August 2, 2016

/s/ Dean Whipple  
Dean Whipple  
United States District Judge