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United States District Court,
S.D. California.

Mercedes FALU–MAYSOMET, on behalf of
herself and all others similarly situated, Plaintiff,

v.

NATIONAL ENTERPRISE
SYSTEMS, INC., Defendant.

No. 13–cv–02285 JM (NLS).

| Signed March 21, 2014.

Opinion

ORDER GRANTING MOTION TO DISMISS

JEFFREY T. MILLER, District Judge.

*1 On December 3, 2013, Defendant National Enterprise Systems, Inc. (“Defendant”) filed a motion to dismiss the first amended complaint for failure to state a claim. Dkt. No. 9. After the court granted the parties’ request to continue the hearing date on this motion, Plaintiff Falu–Maysomet (“Plaintiff”) filed an opposition to Defendant’s motion, Dkt. No. 12, and Defendant subsequently filed its reply. Dkt. No. 13. For the reasons set forth below, Defendant’s motion to dismiss is granted with prejudice as to Plaintiff’s allegations in Counts I, II, and III as alleged in the amended complaint.¹

¹ As set forth more fully below, Plaintiff withdraws the RFDCPA claim in Count III in her opposition to Defendant’s motion to dismiss.

BACKGROUND

At some point prior to August 2013, Plaintiff incurred federal student loan financial obligations from United Student Aid Fund (“USAF”). After Plaintiff defaulted on this debt, USAF assigned the debt to Defendant in order for Defendant to collect the debt from Plaintiff. Defendant is a corporation operating as a collection agency with its principal place of business in Solon, Ohio.

On August 30, 2013, Defendant sent Plaintiff a “NOTICE PRIOR TO WAGE WITHHOLDING” (“Notice”), which

Plaintiff has attached to the amended complaint as Exhibit A. Plaintiff alleges that the Notice contained false and misleading statements in violation of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*

The first statement within the Notice provided as follows:

You are given notice that **United Student Aid Funds, Inc.**, pursuant to federal law ... will order your employer to immediately withhold money from your earnings (a process known as Administrative Wage Garnishment) for payment of your defaulted student loan(s), unless you take action set forth in this notice.

Am. Compl., Ex. A at 1 (emphasis in original). The Notice further stated:

You must establish a written repayment agreement with National Enterprise Systems, Inc. on or before September 29, 2013. Otherwise, United Student Aid Funds, Inc. will proceed to collect this debt through deductions from your pay. Unless you act by September 29, 2013, your employer will be ordered to deduct from your pay an amount equal to no more than fifteen percent (15%) of your disposable pay for each pay period, or the amount permitted by 15 U.S.C. 1673 ... to repay your student loan(s) held by United Student Aid Funds, Inc.

Id. Beginning on the second page of the Notice, Defendant detailed Plaintiff’s rights regarding the proposed garnishment of wages. Specifically, the letter sets forth Plaintiff’s rights under the FDCPA and the Higher Education Act (“HEA”), including her right to object to the proposed garnishment and to request a hearing on any objections. Pages 4, 5, and 6 of the Notice provide a form for Plaintiff to fill out in order to request a hearing on any objections.

In the amended complaint, Plaintiff alleges the Notice contained false and misleading statements that overshadowed Plaintiff’s actual rights afforded to her under the HEA and FDCPA. Although the Notice included an explanation of the

rights provided by the HEA, Plaintiff contends Defendant's initial statements on the cover page of the Notice contradicted the rights described in subsequent pages. Because the HEA provides a period of thirty days within which Plaintiff could take steps to avoid the garnishment, Plaintiff contends Defendant's statement that Plaintiff's employer will be ordered to "immediately" withhold Plaintiff's wages is patently false, deceptive and misleading, and contrary to the rights afforded to her by law. Similarly, because the HEA provides a borrower with several options to avoid wage garnishment, only one of which is entering into a repayment agreement, Plaintiff argues Defendant's statement that Plaintiff "must" enter into a repayment agreement or her wages "will" be garnished is false and misleading.

*2 Based upon these allegations, the amended complaint contains three claims against Defendant: (1) Violation of 15 U.S.C. § 1692e of the FDCPA by Use of Deception to Collect a Debt; (2) Violation of 15 U.S.C. § 1692f of the FDCPA by Using Unfair or Unconscionable Practices; and (3) Violation of the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ.Code § 1788 *et seq.* Plaintiff asserts these claims individually and as a class action on behalf of other consumers receiving this type of Notice from Defendant.

LEGAL STANDARD

For a plaintiff to overcome a Rule 12(b)(6) motion to dismiss for failure to state a claim, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. 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). Factual pleadings merely consistent with a defendant's liability are insufficient to survive a motion to dismiss because they only establish that the allegations are possible rather than plausible. *See id.* at 678–79. The court should grant 12(b)(6) relief only if the complaint lacks either a "cognizable legal theory" or facts sufficient to support a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990).

In addition, when resolving a motion to dismiss for failure to state a claim, courts may not generally consider materials outside the pleadings. *Schneider v. Cal. Dep't of Corrs.*, 151 F.3d 1194, 1197 n. 1 (9th Cir.1998); *Jacobellis v. State*

Farm Fire & Cas. Co., 120 F.3d 171, 172 (9th Cir.1997); *Allarcom Pay Television Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 385 (9th Cir.1995). "The focus of any Rule 12(b)(6) dismissal ... is the complaint." *Schneider*, 151 F.3d at 1197 n. 1. This precludes consideration of "new" allegations that may be raised in a plaintiff's opposition to a motion to dismiss brought pursuant to Rule 12(b)(6). *Id.* (citing *Harrell v. United States*, 13 F.3d 232, 236 (7th Cir.1993); 2 Moore's Fed. Prac. § 12.34[2] (Matthew Bender 3d ed.)).

However, "[w]hen a plaintiff has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal [i]s proper" *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (citing *Cooper v. Bell*, 628 F.2d 1208, 1210 n. 2 (9th Cir.1980)). The court may also consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading...." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.2005) (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994) *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir.2002)).

*3 When considering alleged violations of sections 1692e and 1692f of the FDCPA, the Ninth Circuit applies the "least sophisticated debtor" standard. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 934 (9th Cir.2007). "If the least sophisticated debtor would 'likely be misled' by a communication from a debt collector, the debt collector has violated the FDCPA." *Id.* (quoting *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir.1988)). "The objective least sophisticated debtor standard is 'lower than simply examining whether particular language would deceive or mislead a reasonable debtor.'" *Terran v. Kaplan*, 109 F.3d 1428, 1431–32 (9th Cir.1997) (quoting *Swanson*, 869 F.2d at 1227)).

DISCUSSION

I. FDCPA Violations in Counts I and II

Under the HEA, eligible lenders make guaranteed loans on favorable terms to students and parents to help finance student education costs. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir.2009). These loans are typically guaranteed by guaranty agencies and are ultimately reinsured by the Department of Education ("DOE"). *Id.* If a borrower becomes delinquent in making his or her student loan payments, the guaranty agency has the ability to conduct an

