UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK VICINAGE

THOMAS C. WILLIAMS, Plaintiff, vs. THE CBE GROUP, INC., Defendant.	Civil Action No. 2:11-cv-03680-FSH -PS

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The Wolf Law Firm, LLC
1520 U.S. Hwy 130 – Suite 101
North Brunswick, NJ 08902
Tel: (732) 545-7900
Fax: (732) 545-1030

On the brief:
Andrew R. Wolf, Esq.
Henry P. Wolfe, Esq.
Elliot M. Gardner, Esq.
Phillip D. Stern, Esq.

Philip D. Stern & Associates, LLC
697 Valley Street, Suite 2d
Maplewood, NJ 07040
Tel: (973) 379-7500
Fax: (973) 532-0866

Attorneys for Plaintiff and the Putative Class

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS .... **I**

II. SUMMARY OF ARGUMENT **1**

III. FACTS RELEVANT TO DEFENDANT'S MOTION **2**

IV. ARGUMENT **3**

A. UNDER THE "LEAST SOPHISTICATED DEBTOR" STANDARD, PLAINTIFF HAS STATED A CLAIM OF DECEPTIVE AND/OR MISLEADING COMMUNICATIONS IN VIOLATION OF 15 U.S.C. §1692E 3

B. THE CASES CITED BY CBE ARE DISTINGUISHABLE AND INAPPOSITE . 6

C. CBE'S SUGGESTION THAT A COMMUNICATION CAN BE "DECEPTIVE AND MISLEADING" UNDER 15 U.S.C. §1692E *ONLY IF* IT IS INCONSISTENT WITH OR OVERSHADOWS THE NOTICE OF RIGHT TO DISPUTE REQUIRED BY §1692G(A) IS INCORRECT AND CONTRARY TO AUTHORITY AND COMMON SENSE. 10

D. CBE MISCONTRUES PLAINTIFF'S "OVERSHADOWING" CLAIM 11

V. CONCLUSION **11**

II. TABLE OF AUTHORITIES

Cases

Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir.2006) 3, 4
Campuzano–Burgos v. Midland Credit Mgmt., 550 F.3d 294 (3d Cir. 2008).................... 4
D'Addario v. Enhanced Recovery Co.. LLC, 2011 U.S. Dist. LEXIS 77682
(D.N.J. July 14, 2011)... 6, 7, 9
Jacobson v. Healthcare Fin. Servs., 516 F.3d 85 (2d Cir. 2008) 6, 7, 9
Lesher v. Law Offices Of Mitchell N. Kay, PC, --- F.3d ----, 2011 WL 2450964
(3rd Cir., June 21, 2011) 10
Rosenau v. Unifund Corp., 539 F.3d 218 (3d Cir. 2008) 4
Wilson v. Quadramed, 225 F.3d 350 (3d Cir. 2000) 6, 7, 8, 9

Statutes

15 U.S.C. §1692... passim

III. SUMMARY OF ARGUMENT

In the initial debt collection letter sent to Plaintiff and other consumer debtors, Defendant CBE Group, Inc. ("CBE") included the following language in the first paragraph:

> To prevent further phone calls and receiving future letters in regards to this matter please bring your account current through one of the payment options below.

This sentence is clearly intended to impart two things to the debtor: (1) a threat by CBE that it will continue a campaign of debt collection phone calls and letters against the debtor, and (2) instructions to the debtor on how to "prevent" further collection calls and letters, specifically by "bring[ing] your account current through…payment."

CBE's letter violates the Fair Debt Collection Practices Act ("FDCPA") at 15 U.S.C. §1692e by falsely implying that making a payment is the *only* way for the debtor to prevent the threatened "further phone calls and…future letters." In fact the FDCPA provides the debtor with at least two other ways to stop phone calls and letters without making a payment, and by failing to mention either of these, CBE's gratuitous instructions to the debtor on how to "prevent further phone calls and… letters" is rendered incomplete and misleading. First, CBE's letter fails to disclose that a debtor can "prevent further calls and… letters" simply by requesting in writing that CBE cease communications, as provided by the FDCPA at 15 U.S.C. §1692c(c). Second, the letter fails to clarify that CBE would be required to cease all collection conduct if the debtor disputes the debt within 30 days under 15 U.S.C. §1692g(b), thus presenting the debtor with yet another means of preventing further calls and letters (unless and until CBE verifies the debt) .

CBE's incomplete instructions could easily lead the "least sophisticated consumer" (the hypothetical consumer through whom FDCPA compliance must be viewed) to believe that making a payment is the *only* way to stop future collection calls or letters from CBE. As such, they are deceptive and misleading, and therefore violate the FDCPA at 15 U.S.C. §1692e, which prohibits "any false, deceptive, or misleading representation or means in connection with the collection of any debt" and 15 U.S.C. §1692e(10), which 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."

Plaintiff seeks statutory damages under the FDCPA from CBE on behalf of himself and similarly situated consumer debtors.

In its brief, CBE attempts to misconstrue Plaintiff's claims as a claim of "overshadowing" of the notice of right to dispute the validity of the debt within 30 days, which debt collectors are required to include in initial collection letters under the FDCAP at 15 U.S.C. §1692g(a). In reality, Plaintiff's complaint does not allege that CBE's letter misleads the debtor regarding the right to *make* a dispute within 30 days, which is all that the §1692g(a) notice pertains to. Rather, Plaintiff's claims are completely based on CBE's threat to continue with collection calls and letters, coupled with its gratuitous instruction to the debtor on how to stop the calls and letters that deceptively included payment as the only option, omitting the debtor's rights under the FDCPA to cessation of calls and letters upon written request as provided by §1692c(c) and upon dispute of the debt as provided by §1692g(b).

IV. FACTS RELEVANT TO DEFENDANT'S MOTION

On June 25, 2010, Defendant, CBE Group, Inc. ("CBE"), a debt collector hired to collect an alleged credit card debt from Plaintiff, Thomas Williams, sent an initial

collection that contains the following instructions to Mr. Williams in the opening paragraph:

> To prevent further phone calls and receiving future letters in regards to this matter please bring your account current through one of the payment options below.

Compl. ¶9-11. The one-page letter does not mention any methods for Plaintiff to "prevent further phone calls [or] future letters" other than making a payment. Compl. ¶10, Exh. 1.

V. ARGUMENT

A. UNDER THE "LEAST SOPHISTICATED DEBTOR" STANDARD, PLAINTIFF HAS STATED A CLAIM OF DECEPTIVE AND/OR MISLEADING COMMUNICATIONS IN VIOLATION OF 15 U.S.C. §1692e

Whether a debt collector's communication is "deceptive or misleading" under §1692e is determined under the "least sophisticated debtor" standard. Brown v. Card Serv. Ctr., 464 F.3d 450, 453-454 (3d Cir.2006). In Brown, the Court explained that

> Because the FDCPA is a remedial statute, we construe its language broadly, so as to effect its purpose. Accordingly… we have held that certain communications from lenders to debtors should be analyzed from the perspective of the "least sophisticated debtor."…
>
> The least sophisticated debtor standard requires more than "simply examining whether particular language would deceive or mislead a reasonable debtor" because a communication that would not deceive or mislead a reasonable debtor might still deceive or mislead the least sophisticated debtor. This lower standard comports with a basic purpose of the FDCPA: as previously stated, to protect "all consumers, the gullible as well as the shrewd," "the trusting as well as the suspicious," from abusive debt collection practices.

Brown, supra, 464 F.3d at 453-454. (internal citations omitted).

The Third Circuit has repeatedly held that under the least sophisticated debtor standard,

> **[a] communication is deceptive for purposes of the Act if "it can be reasonably read to have two or more different meanings, one of which is inaccurate."** Rosenau v. Unifund Corp., 539 F.3d 218, 222 (3d Cir. 2008) (quoting Brown v. Card Serv. Ctr., 464 F.3d 450, 455 (3d Cir.2006)).

Campuzano–Burgos v. Midland Credit Mgmt., 550 F.3d 294, 298 (3d Cir. 2008)(some citations omitted). Under this "two or more meanings" test, and under the least sophisticated debtor standard generally, a creditor's letter can "be reasonably read" to have a particular meaning as long as it is not a "bizarre or idiosyncratic interpretation[]." Id. at 298 - 299.

The language at issue in this case is unquestionably susceptible to at least two meanings, one of which is inaccurate. As noted above, CBE decided to advise debtors in the second sentence of it very short letter as follows:

> To prevent further phone calls and receiving future letters in regards to this matter please bring your account current through one of the payment options below"

What was CBE attempting to convey to debtors with this language? Clearly, by giving instructions on how to "prevent" further collection calls and letters, CBE was threatening an ongoing campaign of collection calls and letters *unless* the debtor takes some action. As to what the debtor must do to prevent further calls and letters, there are at least two reasonable readings of CBE's instructions:

> Meaning #1: *The* way to prevent future calls and letters is to bring your account current.
>
> Meaning #2: *One* way to prevent future calls and letters is to bring your account current.

Both of these are arguably reasonable interpretations of the language, but as discussed in the following paragraph, only #2 is accurate.[1] Thus, under the least sophisticated debtor standard, Plaintiff has stated a claim that CBE's letter was deceptive and/or misleading.

Meaning #1 is inaccurate because there were at least two other ways under the FDCPA for Plaintiff to "prevent further phone calls and… future letters" *without* bringing his account current or making a payment. First, CBE's letter fails to disclose that a debtor can "prevent further calls and… letters" simply by requesting in writing that CBE cease communications, as provided by the FDCPA at 15 U.S.C. §1692c(c). Second, the letter fails to clarify that CBE would be required to cease all collection conduct if the debtor disputes the debt within 30 days under 15 U.S.C. §1692g(b), thus presenting the debtor with yet another means of preventing further calls and letters (unless and until CBE verified the debt).

It is important to note that Plaintiff is not suggesting that the FDCPA *generally* requires debt collectors to notify debtors of their rights to stop communications under §1692c(c) or §1692g(b). Rather, Plaintiff's claim is based on CBE's choice to draft its initial letter to include a threat of specific action (i.e., continued collection calls and letters to the debtor) and to gratuitously instruct the debtor on how to "prevent" the threatened action in an incomplete and misleading manner. By advising debtors about

---

[1] Although not relevant under the least sophisticated consumer standard, Plaintiff respectfully submits that Meaning #1 is obviously the more natural, reasonable meaning of CBE's letter, and the one that CBE most likely intended in furtherance of its objective to secure payment from the debtor. In any event, it is clearly not a "bizarre or idiosyncratic interpretation[]" of CBE's letter and therefore must be included in the "two or more different meanings" analysis described in Campuzano–Burgos, supra, 550 F.3d at 298-299.

making a payment as the only means "to prevent" the threatened ongoing collection calls and letters, CBE engaged in the sort of half-truth that fails under "two or more meanings" test adopted by the Third Circuit to determine whether a communication is misleading and/or deceptive under §1692e.

B. THE CASES CITED BY CBE ARE DISTINGUISHABLE AND INAPPOSITE

CBE relies heavily on Wilson v. Quadramed, 225 F.3d 350 (3d Cir. 2000), Jacobson v. Healthcare Fin. Servs., 516 F.3d 85 (2d Cir. 2008), and D'Addario v. Enhanced Recovery Co.. LLC, 2011 U.S. Dist. LEXIS 77682 (D.N.J. July 14, 2011) to argue that its demand for payment as the sole disclosed means to "prevent" further collection calls and letters was not misleading and/or deceptive under §1692e. These cases are disguisable and inapposite for at least two reasons. First, these cases dealt with entirely different claims, alleging that the debt collector's statements were inconsistent with and/or overshadowed the notice of the debtor's right to dispute the debt within 30 days under §1692g(a). By contrast, Plaintiff in this case does not allege that CBE's statements could mislead a debtor into believing that they did not have a right to dispute the debt within 30 days as provided by §1692g(a), but rather, Plaintiff alleges that CBE's statements could easily mislead a debtor into believing that making a payment is the only way to stop the threatened collection calls and letters, contrary to the debtor's rights to cessation of calls and letters upon written request under §1692c(c) and upon written dispute of the debt under §1692(g)(b).

This distinction is crucial because **Quadramed, Jacobson, and D'Addario all relied on the fact that an actual notice of the debtor's right to dispute the validity of the debt within 30 days was affirmatively included in the collection letter.** Quadramed, supra, 225 F.3d at 356 ("[T[he required notice was set forth on the front

page of the letter immediately following the two paragraphs that Wilson contends overshadow and contradict the validation notice." Jacobson, supra, 516 F.3d at 92 ("The letter sent… to Jacobson, though it demanded payment, adequately explained that the recipient had the right to seek verification of the debt."); D'Addario, supra, 2011 U.S. Dist. LEXIS 77682 at *7 (where letter included request for payment in 15 days and notice of right to dispute the debt within 30 days, "even the least sophisticated debtor could not believe that the letter presented him with an 'either/or' proposition—i.e., either dispute the debt's validity or pay off the debt, but not both.")

By contrast, CBE's letter does not include any notice of the debtor's right to "prevent further calls and… letters" by simply requesting as such in writing pursuant to §1692c(c) or by disputing the debt under §1692g(b). Thus, CBE's letter is deceptive for the very reasons that the courts found the letters in Quadramed, Jacobson, and D'Addario to be acceptable – i.e., CBE's letter threatened action that was potentially inconsistent with Plaintiff's rights under the FDCPA without also notifying him of his rights.

Quadramed is especially instructive on this point. In Quadramend, the collection letter stated,

> [o]ur client has placed your account with us for immediate collection. We shall afford you the opportunity to pay this bill immediately and avoid further action against you.

Id. at 352. Following this language, the notice informed the debtor of his right to dispute the validity of the debt within thirty days. Id. The Third Circuit determined that the letter at issue in that case presented the debtor with two options: "(1) an opportunity to pay the debt immediately and avoid further action, or (2) notify Quadramed within thirty days after receiving the collection letter that he disputes the validity of the debt." See

Quadramed, 225 F.3d at 356. The Court also stated that "[a]s written, the letter does not emphasize one option over the other, or suggest that Wilson forgo the second option in favor of immediate payment." See Id.

In stark contrast to Quadramed, the CBE letter does not offer the debtor any "options" for how "to prevent further phone calls and… letters." Unlike in Quadramed, here, the only "options" offered to the consumer are (1) make a payment, (2) or else suffer the threatened action of continued collection calls and letters. CBE admits as much in its brief when it states,

> **CBE's letter presents Plaintiff with two options**: (I) pay the debt and stop further telephone calls and letters, or (2) notify CBE within thirty days after receiving the collection letter that he disputes the validity of the debt.

Db8 (emphasis added). Thus, even according to CBE its letter leaves the least sophisticated debtor with no "option" to "stop further telephone calls and letters" by writing to CBE and asking it to stop the calls and letters as provided by the FDCPA at 15 U.S.C. 1692c(c). Similarly, CBE's letter does not disclose the "option" to have calls and letters suspended (even if temporarily) by disputing the debt under §1692g(b). By admittedly communicating to the debtor that there are only "two options" regarding the threatened continued collection calls and letters – (1) pay up or (2) get used to them – CBE clearly made a misleading and/or deceptive communication in violation of 15 U.S.C. §1692e.

This case is further distinguishable from Quadramed, Jacobson, and D'Addario because CBE's letter threatens specific action (continued collection calls and letters) whereas the collection letters in the cases cited in CBE's brief did not. In Quadramed, the letter stated, "We shall afford you the opportunity to pay this bill immediately and avoid

further action against you." Quadramed, supra, 225 F.3d 352. The Court noted that this did not amount to a threat of a lawsuit or any other specific action and therefore did not contradict the clear notice of the right to dispute the debt within 30 days that also appeared in the letter. Id. at 356. In Jacobson, the letter included similarly vague language stating that the debt collector would "recommend further action" if the debtor did not pay or dispute the debt within 30 days. Jacobson, supra, 516 F.3d at 88. In D'Addario, the letter merely offered a "repayment opportunity" and the court noted that, "Importantly, the letter contains no threats or demands whatsoever." D'Addario, surpa, 2011 U.S. Dist. LEXIS 77682 at *7.

Unlike the letters considered in Quadramed, Jacobson, and D'Addario, there clearly is a threat of specific action in CBE's letter, namely continued collection calls and letters. It is of no moment that the threat in CBE's letter is not a threat of a lawsuit, because Plaintiff is not claiming that the CBE's letter overshadowed or contradicted his right to dispute the debt within 30 days. Plaintiff is claiming that CBE's threat to continue with collection calls and letters, coupled with its instructions to the debtor to make a payment "to prevent" the calls and letters without disclosing the debtor's other options under the FDCPA "to prevent" the calls and letters was deceptive and "would mislead the least sophisticated consumer into foregoing his statutory right[s]" to cessation of calls and letters upon written demand under §1692c(c) and/or his statutory right to cessation of calls and letters upon disputing the debut under §1692g(b).

C. CBE'S SUGGESTION THAT A COMMUNICATION CAN BE "DECEPTIVE AND MISLEADING" UNDER 15 U.S.C. §1692e *ONLY IF* IT IS INCONSISTENT WITH OR OVERSHADOWS THE NOTICE OF RIGHT TO DISPUTE REQUIRED BY §1692g(a) IS INCORRECT AND CONTRARY TO AUTHORITY AND COMMON SENSE.

15 U.S.C. §1692e broadly prohibits "any false, deceptive, or misleading representation or means in connection with the collection of any debt" and 15 Similarly, U.S.C. §1692e(10) 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." Contrary to this plain and broad language, CBE suggests in its brief, without any authoritative support, that §1692e is essentially the same as §1692g, and that this court should therefore "find either a violation of both sections or neither sections." Db14.

This argument is of course without merit, and would render §1692e largely superfluous. In fact, the Third Circuit has recently discussed the broad scope of §1692e

> [S]ection 1692e of the FDCPA… prohibits the use of "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The sixteen subsections of section 1692e set forth a non-exhaustive list of practices that fall within this ban…. Because the list of the sixteen subsections is non-exhaustive, a debt collection practice can be a "false, deceptive, or misleading" practice in violation of section 1692e even if it does not fall within any of the subsections.

Lesher v. Law Offices Of Mitchell N. Kay, PC, --- F.3d ----, 2011 WL 2450964 at *3 (3rd Cir., June 21, 2011). It is thus quite clear that the scope of §1692e is well beyond that of §1692g, which is concerned specifically with the debtor's right to dispute the validity of the debt and to receive a notice of that right.

CBE's "1692e equals 1692g" argument also relies once again on a misconstruction of Plaintiff's claims as claims under §1692g. In fact, Plaintiff's claim is most accurately characterized as a claim under §1692e, based on misleading and

deceptive statements regarding his rights to cessation of communications under §1692c(c). As discussed in the next section of this brief, Plaintiff's claim under §1692g is an alternative claim, separate from (and admittedly more novel than) his claim under §1692e.

D. CBE MISCONTRUES PLAINTIFF'S "OVERSHADOWING" CLAIM

Essentially all of CBE's motion is dedicated to attacking Plaintiff's complaint as though it primarily alleges that CBE mislead him as to his *ability* to dispute the debt within 30 days (e.g., by threatening initiation of a lawsuit within the 30 day period). In reality, Plaintiff's complaint primarily alleges a misleading and/or deceptive communication in violation of 15 U.S.C. §1692e, based on deceptive statement on how Plaintiff could "prevent" the continued collection calls and letters that CBE threatened in the letter. While Plaintiff pled a violation of 15 U.S.C. §1692g(b) based on "overshadowing," that claim does not allege overshadowing of Plaintiff's *ability* to dispute the debt, but rather of his rights that attach upon disputing the debt (specifically, his right to cessation of communications pending validation of the debt as provided by §1692g(b)). See Compl. ¶15. While this is obvious from the Complaint, CBE unfortunately has attempted to create confusion in its brief by mischaracterizing the claim as one of overshadowing of the notice itself.

VI. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied.

Respectfully Submitted,

Dated: September 19, 2011

s/ Henry P. Wolfe
Henry P. Wolfe, Esq.