UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

MICHAEL KAISER and MARGARET J. LOEWEN, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

CASCADE CAPITAL LLC and GORDON AYLWORTH &TAMI PC,

Defendants.

Case No. 3:16-cv-00744-AC

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

Plaintiff Margaret Loewen ("Loewen") sued Cascade Capital LLC ("Cascade") and Gordon, Aylworth & Tami, PC ("GAT") (collectively, "Defendants") alleging a violation of the Fair Debt Collection Practices Act ("FDCPA"). 15 U.S.C. §§ 1692—1692p (2010). Defendants move to

dismiss Loewen's claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Defendants further move to dismiss Loewen's claims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below the court should deny Defendants' Rule 12(b)(1) motion; and grant in part, and deny in part Defendants' Rule 12(b)(6) motion.

Background

Loewen bought a car from McMullin Chevrolet Pontiac Inc. ("McMullin") on December 6, 2007. (First. Am. Compl. ("FAC"), ECF No. 14, ¶ 16.) Loewen signed a retail installment contract that stated McMullin would sell the contract to Drive Financial Services. (*Id.*) Sometime before January 31, 2010, Loewen defaulted on the contract and the car was repossessed. (*Id.*)

Cascade hired GAT to collect debts Cascade had previously purchased.[1] (FAC ¶ 15.) On August 3, 2015, GAT sent Loewen a collection letter for payment of the remaining $3,325.16 of her retail installment contract. (FAC ¶ 17.) GAT implied Cascade would file a lawsuit if Loewen did not pay her debt. (*Id.*)

On October 29, 2015, Defendants filed a lawsuit against Loewen in state court to collect on the debt. (FAC ¶ 19). Loewen sought the help of a bankruptcy attorney because she feared her government benefits would be taken away. (*Id.*) The bankruptcy lawyer dissuaded Loewen from filing bankruptcy because Loewen was "judgment proof." (*Id.*) The bankruptcy attorney contacted Defendants on December 21, 2015. (*Id.*) On February 25, 2016, Defendants dismissed the lawsuit

[1] There is no evidence in the record as to Cascade's purchase of Loewen's debt. However, for the purposes of this motion the court infers Cascade purchased Loewen's debt as they are engaged in the business of buying or collecting consumer debts. (FAC ¶ 9.)

against Loewen. (*Id.*)

Loewen subsequently sued Defendants claiming that Defendants' filing of a time-barred lawsuit was a violation of the FDCPA. (FAC ¶ 27-28.) Loewen further claims that the filing of the lawsuit caused her anxiety. (FAC ¶ 20). Loewen claims that Defendants production of a "packet of papers" regarding the debt caused her additional anxiety. (FAC ¶ 18.)

Legal Standard

Defendants brought this motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6). The court may dismiss a claim pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, and pursuant to Rule 12(b)(6) for failure to state a claim for which relief can be granted. *Robertson v. Dean Wider Reynolds, Inc.*, 749 F.2d 530, 533–534 (9th Cir. 1984). Courts must construe allegations of a complaint in favor of the non-moving party when considering a motion to dismiss. *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987).

I. Rule 12(b)(1): Subject Matter Jurisdiction

A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the court. *See, e.g.*, *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003). Under Article III of the Constitution, federal judicial power extends only to cases and controversies. U.S. Const., art. III, § 2, cl. 1. Article III standing is a threshold requirement for federal court jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

At a constitutional minimum, standing requires the party invoking federal jurisdiction to establish three elements: (1) injury in the form of an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's conduct; and (3) the likelihood, not mere

speculation, that a favorable decision will redress the injury. *Id.* at 560-61. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231(1990).

Congress may elevate certain concrete, de facto injuries to the status of legally cognizable injuries, even injuries that may previously have been inadequate in law. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016). However, a plaintiff cannot meet the "demands of Article III by alleging a bare procedural [statutory] violation." *Id.* at 1550. "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

II. Rule 12(b)(6): Pleading Requirements

A plaintiff must provide a well-pleaded complaint that contains "a short and plain statement of the claim" demonstrating grounds for relief. FED. R. CIV. P. 8(a)(2)(2017). The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Additionally, a plaintiff must set forth a plausible claim for relief; a possible claim for relief will not do. *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) ("In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.") (quoting *Iqbal*, 556 U.S. at 678).

While the court must assume that all facts alleged in a complaint are true and view them in a light most favorable to the nonmoving party, it need not accept as true any legal conclusion set forth in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered

in evaluating the merits of a Rule 12(b)(6) motion. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

Discussion

Defendants first argue that even if they violated the FDCPA, Loewen lacks standing because she did not assert a legally cognizable harm. (Defs.' Mot. Dismiss, ECF No. 19, at 2.) Second, Defendants argue that Loewen failed to state a claim upon which relief can be granted. (*Id.*) For the reasons stated below, the court should find that Loewen has standing and stated a valid claim upon which relief can be granted.

I. Rule 12(b)(1): Subject Matter Jurisdiction.

Defendants argue that Loewen lacks standing because the harm she alleges is not a legally cognizable harm. (Defs.' Mot. Dismiss at 2.) Defendants state that even if they did violate the FDCPA, the violation alleged here, by itself, does not give Loewen standing because she did not suffer an injury in fact. (*Id.*) Defendants argue that filing of a time-barred lawsuit is not the type of harm that Congress intended to elevate to the status of injury in fact. (*Id.* at 6.) For the reasons stated below, the court should deny Defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

Standing requires the party invoking federal jurisdiction to establish three elements: (1) injury in the form of an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's conduct; and (3) the likelihood, not mere speculation, that a favorable decision will redress the injury. *Lujan*, 504 U.S. at 560-61.

First, to establish an injury in fact the plaintiff must demonstrate that she suffered the

"invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical." *Spokeo*, 135 S. Ct. at 1548. To demonstrate that an injury is particularized, Loewen must show she was affected in an individual way. *Id.* To demonstrate concreteness, Loewen must show that the injury actually exists. *Id.*

An intangible injury can be a concrete injury. *Id.* at 1549. In order to determine whether an intangible injury suffices to prove standing "both history and the judgment of Congress play important roles." *Id.* The standing requirement is grounded in historical practice, but "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto*, injuries that were previously inadequate in law.'" *Id.* (quoting *Lujan*, 504 U.S. at 578).

Article III standing requires a concrete injury even when a statutory violation is alleged. *Id.* If the violation of a procedural right granted by statute is alleged, the violation can be sufficient in certain instances to constitute injury in fact. *Spokeo*, 135 S. Ct. at 1549. In that instance, plaintiff need not "allege any *additional* harm beyond the one Congress has identified." *Id.* (italics in original). However, "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Therefore, courts must address "whether the particular procedural violations alleged . . . entail a degree of risk sufficient to meet the concreteness requirement." *Spokeo*, 135 S. Ct. at 1550.

In this case, Loewen argues that Defendants violated her rights under the FDCPA by sending her collection letters, threatening to sue, and actually filing a lawsuit on a time-barred debt. (Pl.'s Resp. Mot. Dismiss, ECF No. 28, at 2.) This statutory violation, Loewen argues, is sufficient to establish standing as required by Article III. (*Id.* at 6-7.)

A. Tourgeman v. Collins et al.

In cases where statutory rights are involved, the rights conveyed by the particular statute guide the court's determination of standing. *Tourgeman v. Collins Financial Services, Inc.*, 755 F.3d 1109, 1114 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014). In *Tourgeman*, for example, the court held that violation of plaintiff's right not to be the target of misleading debt collection communications under the FDCPA constituted a cognizable injury under Article III. *Id.*

While residing in Mexico, David Tourgeman purchased a Dell computer. *Id.* at 1113. Tourgeman financed the computer, and subsequently paid off the loan, but Dell Financial's records reflected that he had an outstanding debt. *Id.* Dell Financial charged off, then sold, Tourgeman's debt to a debt collector. The debt collector then sent collection letters to Tourgeman's parents' house in California. *Id.* Eventually, the debt collectors hired a law firm, which then filed a complaint in state court to collect the purported debt from Tourgeman. *Id.* Tourgeman retained counsel, and the law firm eventually withdrew the lawsuit. *Id.*

Tourgeman then filed a lawsuit in federal court alleging a violation of the FDCPA and California law because the debt collectors unlawfully collected a debt he never owed. *Id.* Defendants argued that Tourgeman lacked Article III standing and statutory standing because the FDCPA does not provide a consumer in Tourgeman's position with a cause of action. *Id.* Tourgeman argued that violation of the FDCPA "in and of itself confers Article III standing." *Id.*

The Court held that Tourgeman had Article III standing to bring an action against both the debt collector and the attorneys for violation of the FDCPA. *Id.* at 1116. The court reasoned that the FDCPA elevated the "right not to be the target of misleading debt collection communications" to provide standing under Article III. *Id.* Defendants violated that right by mailing Tourgeman

collection letters after he had paid his financed computer in full, thus creating a sufficient "injury" under FDCPA § 1692k(a)(2). Therefore, Tourgeman had constitutional standing. *Id.*

Although the Ninth Circuit in *Tourgeman* relied on *Robins v. Spokeo*, 742 F.3d 409 (9th Cir. 2014), a decision later overturned by the Supreme Court, the Ninth Circuit focused on the aspects of FDCPA liability that the Supreme Court would find support a concrete and particularized injury. The court stated that liability under FDCPA § 1692e would attach only if "a debt collector's false or misleading representation[s] [were] material." *Id.* at 1119. "Materiality" means more than mere technical falsehoods; the FDCPA focuses on whether the misleading statements would "frustrate a consumer's ability to intelligently choose his or her response." *Id.* (citing *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1034 (9th Cir. 2010)). Thus, false but non-material representations are not actionable. *Id.* But, false representations that would "cause the least sophisticated debtor to suffer a disadvantage in charting a course of action in response to a collection effort" are material, and therefore concrete and particularized. *Id.* at 1121.

B. Loewen Has Article III Standing.

Defendants argue that Loewen does not have Article III standing because she has failed to allege a legally cognizable harm. (Defs.' Mot. Dismiss at 2.) Loewen alleges that she has Article III standing because Defendants violated her rights under the FDCPA by unlawfully attempting to collect a time-barred debt, threatening to sue on a time-barred debt, and actually suing on a time-barred debt. (Pl.'s Resp. Mot. Dismiss at 2.)[2]

Loewen has alleged the invasion of a legally protected interest that is concrete,

[2] For the reasons stated in Section II(A), the debt in this case was time-barred by the applicable statute of limitations under U.C.C. Article 2.

particularized, and actual. First, Loewen alleged that on August 3, 2015, "more than four years after the contract went into default," Loewen received a letter from GAT on behalf of Cascade demanding payment of $3,325.16. (FAC ¶ 17.) The letter did not disclose the debt was time-barred. *Id.* Second, Loewen alleged that on October 29, 2015, more than four years after the contract went into default, Defendants filed a lawsuit in state court seeking $3,325.16. (FAC ¶ 17.) Defendants dismissed the lawsuit on February 25, 2016. (FAC ¶ 17.) Loewen alleges the lawsuit was "harassing, unfair, deceptive, . . . and [she felt] she was being taken advantage of because she was unaware of the statute of limitations." (FAC ¶ 20.)

Congress elevated to the status of a legally cognizable injury violation of a consumer's "right not to be the target of misleading debt collection communications." *Tourgeman*, 755 F.3d at 1116. However, the misleading communication must be material. *Id.* at 1119. Materiality pertains to statements that are not mere technical falsehoods, but rather misleading statements that would "frustrate a consumer's ability to intelligently choose his or her response." *Id.*

In this case Defendants sent Loewen two different communications, the August 3, 2015 letter, and the October 29, 2015 lawsuit notice. In both communications Defendants portrayed the debt as timely by failing to disclose that the debt was time-barred. Defendants later dismissed the lawsuit without informing Loewen of their reason for doing so. During the time GAT and Cascade communicated with Loewen they misled her in portraying the debt as timely and collectable. This misrepresentation was not a mere technical falsehood.

The court notes that had Loewen made any payment on the purported debt, the statute of limitations barring this action would have been voluntarily discontinued. OR. REV. STAT. § 72.7250(3)(2017). As such, Defendants materially violated Loewen's "right not to be the target of misleading debt collection communications." *Tourgeman*, 755 F.3d at 1116. Loewen, therefore,

has met her burden in alleging sufficient facts to grant her standing under Article III.

II. Rule 12(b)(6): Pleading Requirements.

Defendants also seek dismissal on the grounds that Loewen has failed to state a claim upon which relief can be granted. (Defs.' Mot. Dismiss at 2.) Loewen argues that Defendants violated FDCPA §§ 1692d, 1692e, 1692e(2), 1692e(5), 1692e(9), 1692e(10), 1692f, and 1692f(1), by collecting on a time-barred debt. (FAC ¶ 27-28.) Loewen states that grounds for relief are warranted under FDCPA § 1692k(a)(2), which makes statutory damages available to prevailing consumers for violations of the FDCPA, and also actual damages for intentional infliction of emotional distress, and reasonable attorney fees. (FAC at 8.)

A. Statute of Limitations.

Defendant argues that whether the four-year statute of limitations under U.C.C. Article 2 or the six-year statute of limitations under U.C.C. Article 9 applies to collection of a debt for a retail-installment contract is an open question of law in Oregon. (Defs.' Mot. Dismiss at 2.) Loewen argues that the shorter four-year statute of limitations under U.C.C. Article 2 applies to debt collection of a retail-installment contract. (Pl.'s Resp. Mot. Dismiss at 7.) Loewen also argues that the collection of a debt where two possible statutes of limitations applies in and of itself violates the FDCPA. (Pl.'s Resp. Mot. Dismiss at 14.) The court agrees with Loewen that the four-year statute of limitations applies in this case, and that even if it did not, filing a lawsuit on a possibly time-barred debt constitutes a violation of the FDCPA.

1. The Four-Year Statute of Limitations under U.C.C. Article 2 Applies in this Case.

Federal courts are not precluded from affording relief to parties whose case is governed by an open question of state law. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1391 (9th Cir. 1994).

In such cases, federal courts are bound by decisions from the highest state court and therefore must determine what result the state supreme court would reach based on appellate court opinions, statutes, and treatises. *Id.* The court finds that the four-year statute of limitations under O.R.S. § 79.0101 applies to collection of debt stemming from a retail installment contract for the purchase of a car.

Oregon adopted U.C.C. Article 2. OR. REV. STAT. §§ 79.1010 — 72a.5310. The applicable statute of limitations in contracts for sale is four years. OR. REV. STAT. § 72.7250. The four-year statute of limitations applies to transactions in goods; it does not "apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction." OR. REV. STAT. § 72.1020.

Similarly, Oregon adopted U.C.C. Article 9. OR. REV. STAT. §§ 79.0101 — 79.8010. Oregon's version of U.C.C. Article 9 covers security interests created by contract, including by assignment. *In re Cohen*, 305 B.R. 886, 902 (B.A.P. 9th Cir. 2004). The applicable statute of limitations for actions covered by U.C.C. Article 9 is a six-year statute of limitations that applies to contracts generally and to statutory causes of action under O.R.S. § 12.080. *Chaney v. Fields Chevrolet Co.*, 264 Or. 21, 25–26 (1972).

The issue in this case is whether collecting on deficiency of a retail installment contract most closely relates to collection on the contractual obligation or the security portion of the transaction. If the collection is most closely related to the contractual obligation, then the four-year statute of limitation applies. However, if the collection is most closely related to the security portion, then the general six-year statute of limitations applies.

Under Oregon law, a retail installment contract means

> An agreement, entered into in this state, pursuant to which the title to, the property in or a lien upon a motor vehicle, which is the subject matter of a retail installment sale, is retained or taken by a motor vehicle dealer from a retail buyer as security, in

whole or in part, for the buyer's obligation.

OR. REV. STAT. § 83.510. Thus, seller retains a security interest in the retail-installment contract so long as the buyer retains the vehicle. Once the seller takes lawful possession of the collateral any security interest dissipates and cannot "be revived and perfect by act of retaking possession." *Bank of Wallowa County v. Gary Mac, Inc.*, 49 Or. App. 403, 411 (1980); *see also Stumbo v. Paul B. Hult Lumber Co.*, 251 Or. 20, 33-34 n.11 (1968) ("[S]ecurity interests may be enforceable apart from the fomalities of the secured transactions article, this is true only so long as the buyer does not obtain possession of the goods.")

Furthermore, deficiency actions are actions for part of the sales price which remain outstanding after the seller exhausts their security interest by selling the collateral. *Chaney*, 264 Or. 21, 24-25 (1972) (relying on *Associates Disct. Corp. v. Palmer*, 47 N.J. 183, 219 (1966)). In that case, the seller is collecting on his right to the full price which is "an essential element of all sales and which exists whether or not the sale is accompanied by a security arrangement." Therefore, the action "relates to and cannot be divorced from the underlying sales transaction," and is therefore subject to the four-year statute of limitations under O.R.S. § 72.7250. *Moorman Mfg. Co. of California v. Hall*, 113 Or. App. 30, 33 (1992).

In this case, Loewen signed a retail installment contract for the sale of a car from McMullin Chevrolet Pontiac Inc. (FAC ¶ 16.) Loewen defaulted on the contract and the car was repossessed. (*Id.*) GAT, acting as Cascade's agent, filed a lawsuit against Loewen to collect the payment of the remaining $3,325.16 of the stipulated purchase price. (FAC ¶ 17.)

Cascade did not file the lawsuit to repossess the car, which is the collateral in this transaction. The car already had been repossessed. The seller's security interest dissipated when it repossessed

the collateral. Defendants' subsequent lawsuit was purely a deficiency action for the remainder of the purchase price. Because the only rights being asserted were for the remainder of the purchase price of the car, a good, the applicable statute of limitations is four years under O.R.S. § 72.7250.

2. Filing a lawsuit on a possibly time-barred debt, without notifying consumer of the status of the debt, constitutes a violation of FDCPA.

Even if the court were to find that the longer, six-year statute of limitations applies, filing of a lawsuit where there are two possible statutes of limitations, without informing the consumer of such conflict, constitutes a violation of the FDCPA. The majority of circuits agree that when the debt collector either threatens to sue or actually sues on a clearly time-barred debt, the debt collector violates the FDCPA. *Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 511 (5th Cir. 2016). However, no court has ruled on whether threatening to sue, or actually suing, on a potentially time-barred debt constitutes a violation of the FDCPA. The court concludes that it does.

The Third and Eighth Circuits have stated that a debt collector violates the FDCPA if the debt collector attempts to collect on a "potentially time-barred debt that is otherwise valid" by threatening litigation, or actually litigating the debt. *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011) (citing *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001.)) The Fifth, Sixth, and Seventh Circuits have held that any collection letter offering to settle potentially time-barred debts without disclosing the status of the debt can be misleading and therefore violates the FDCPA even if they do not expressly threaten litigation. *See Daugherty*, 836 F.3d at 511; *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014).

These cases observe that the FDCPA is meant to protect the least sophisticated consumer from a debt collector's impermissible practices, such as false, deceptive or misleading representations; and

unfair or unconscionable collection methods. 15 U.S.C. §§ 1692d-f. The cases focused on the debt collector's actions and how those actions harm, mislead, or deceive the least sophisticated consumer. *Freyermuth*, 248 F.3d at 771 (internal citations omitted.) That the majority of courts have imposed a heightened standard of care by employing the least sophisticated consumer standard demonstrates that protection of a vulnerable consumer is of utmost importance in FDCPA cases. *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n.2 (9th Cir. 2011).

Moreover, the Seventh Circuit has recently expanded on the reasons why failure to disclose that a debt is time-barred creates unique dangers for the least sophisticated consumer. In *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 686 (7th Cir. 2017), the court held that a debt collector's letter seeking to collect on a potentially time-barred debt was "unlawfully misleading and deceptive." The first danger the court identified was that letters that are silent as to the potentially time-barred status of a debt could lead a unknowing consumer to "waive his otherwise absolute defense under the statute of limitations." *Id.* The FDCPA prohibits "a debt collector from luring debtors away from the shelter of the statute of limitations without providing an unambiguous warning that an unsophisticated consumer would understand." *Id.* at 685. Therefore, debt collectors who know a debt is potentially time-barred, must present that information to the unsophisticated consumer in a "clear, accessible, and unambiguous" way. *Id.*

The second danger the court found was that the collection letters give the unambiguous impression to the least sophisticated consumer that debt collectors can sue on the purported debt. Thus, "such carefully ambiguous language [demonstrates] the expectation that at least some unsophisticated debtors will misunderstand and will choose to pay on the ancient, time-barred debts because they fear the consequences of not doing so." *Id.* That a debt may or may not be time-barred

is material information that a consumer is entitled to such that they can chart their legal course. Without that information, the least sophisticated consumer would have been misled into thinking that there is only one way to avoid a lawsuit: pay the debt. As such, the unsophisticated consumer would unknowingly give up their protection under any statute of limitations. These are the types of misleading and deceptive tactics the FDCPA seeks to curtail.

Defendants argue that "[a] debt collector does not violate the FDCPA by pursuing a claim where the outcome of the claim is governed by an open question of law." (Defs.' Mot. Dismiss at 14.) The court agrees that the FDCPA does not preclude the filing of a lawsuit that may ultimately be unsuccessful. The FDCPA, however, does preclude debt collectors from using "any false, deceptive, or misleading representations or means in connection with the collection of any debt." FDCPA § 1692e. Thus, where the debt collector does not make misleading statements about the status of a debt, the debt collector may file a lawsuit that ultimately turns on an open question of law. The debt collector may not, however, mislead or deceive the consumer regarding the legal status of a debt such that the consumer would unknowingly "risk loss of the otherwise ironclad protection of the statute of limitations." *Pantoja*, 852 F.3d at 684. Using such deceiving and misleading means to collect the debt is the kind of abusive debt collection practices the FDCPA sought to eliminate. 15 U.S.C. § 1692(e) ("It is the purpose of [the FDCPA] 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.")

No court however, has analyzed the more narrow issue of whether a debt collector violates the FDCPA by failing to notify a consumer that under at least one statute of limitations the debt is time-barred. Defendants argue that it is not a violation where under at least one possible statute of

limitations Defendants' collection efforts were timely, and therefore they did not mislead the consumer. (Defs.' Mot. Dismiss at 14.) Loewen argues that a "mistaken interpretation of what the FDCPA requires of them is not a defense." (Pl.'s Resp. Mot. Dismiss at 14.)

The court concludes that failure to notify the consumer that the debt is subject to two possible statute of limitations violates the FDCPA. The FDCPA focuses on the debt collector's actions and how those actions harm, mislead, or deceive the least sophisticated consumer. *Freyermuth*, 248 F.3d at 771; *see also Tourgeman*, 755 F.3d at 1116. The majority of courts find that when a debt is clearly time-barred, debt collectors violate the FDCPA if debt collector attempts to sue or actually sues on the debt. *See Daugherty*, 836 F.3d at 511; *Buchanan*, 776 F.3d at 397; *McMahon*, 744 F.3d 1020; *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011); *Freyermuth*, 248 F.3d at 771.

The danger in misleading a consumer about the applicable statute of limitations is involuntary waiver of the otherwise ironclad protection of the statute of limitations. That danger similarly extends to cases where the statute of limitations is an unresolved question of law. In those cases, such as in this case, there is an equal opportunity for deception and mischief. The plaintiff risks unknowingly waiving her rights under two statutes of limitations. That kind of "careful and deliberate ambiguity" in collection of a debt is precisely the kind of abusive and deceptive practice Congress sought to curtail by enacting the FDCPA. *Pantoja*, 852 F.3d at 687.[3]

The Supreme Court's recent decision in *Midland Funding, LLC v. Johnson*, decided after oral

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[3] During oral argument on April 27, 2017, Defendants argued that notifying a consumer of an affirmative defense, such as a statute of limitations, is in fact giving the consumer legal advice. The court disagrees. Similar notices are required under Federal Rule of Civil Procedure 4(a)(1) ("notify the defendant that failure to appear and defend will result in a default judgement"); and under Oregon Rule of Civil Procedure 45(A) (requiring notice, in a large font, " FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS.").

argument in this case, does not alter the persuasive weight of the cases previously discussed. *See Midland Funding, LLC v. Johnson*, No. 16-348, 2017 WL 2039159 (U.S. May 15, 2017). In *Midland Funding*, the Court considered whether submitting a claim for an obviously time-barred debt in a Chapter 13 bankruptcy proceeding was unfair or unconscionable under the FDCPA. *Id.* at *6. The Court expressly reserved decision on the *Kimber* line of cases. *Id.* The holding in *Midland Funding* — asserting an obviously time-barred debt in a bankruptcy proceeding is not unfair or unconscionable — rested on the differences between ordinary civil proceedings and bankruptcy proceedings. *Id.* at *7–9 ("[The] considerations [supporting *Kimber*] have significantly diminished force in the context of a Chapter 13 bankruptcy."). Because *Midland Funding* was specific to bankruptcy and expressly did not decide whether *Kimber* and its progeny were correct, *Midland Funding* does not suggest any specific conclusion here.

B. Stated Claims Under the FDCPA.

The court now examines whether Loewen has pleaded facts sufficient to support her claims under the various FDCPA sections she cites.

1. FDCPA § 1692d.

Loewen has failed to plead a plausible claim for relief under FDCPA § 1692d. This section prohibits debt collector from engaging in any conduct, the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. *Harvey v. United Adjusters*, 509 F. Supp. 1218, 1221 (D. Or. 1981). Here, Loewen fails to allege any facts that demonstrate harassment, oppression, or abuse. The complaint is devoid of any details regarding predatory behavior. Even construing the complaint liberally, the statement that Loewen suffered anxiety, and felt angry and like she was "being taken advantage of," does not warrant granting relief under this section. (FAC ¶ 17, 18, 20); *Houston v. Elan Fin. Servs.*, 135 F. Supp. 3d 1375, 1382 (S.D. Ga.

2015), *appeal dismissed* (Jan. 15, 2016). Therefore, Loewen failed to allege facts to support a claim for relief under FDCPA § 1692d.

2. FDCPA §1692e.

Loewen alleges Defendants violated FDCPA § 1692e by threatening to sue, and actually suing on a time-barred debt. (FAC ¶ 17.) Defendants argue that Loewen failed to allege facts in support of her contentions. (Defs.' Mot. Dismiss at 15.) For the reasons stated in sections I(A)(1)-(2) the court finds that Loewen alleged sufficient facts to state a plausible claim for relief under FDCPA § 1692e generally.

3. FDCPA § 1692e(2).

Loewen alleges that Defendants violated FDCPA § 1692e(2), which prohibits "the false representation of (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." (FAC ¶ 27, 28.) Defendants argue that Loewen failed to allege "factual or legal basis for claiming that defendants made any false representation to plaintiff at any time in connection with her debt." (Defs.' Mot. Dismiss at 16.)

Loewen alleged that Defendants misrepresented the legal status of the debt when they sent her collection letters, implied that they would sue her, and actually sued her in connection with her debt without providing notice that the debt was time-barred. (FAC ¶ 17.) Without disclosing that the debt is potentially time-barred, the least sophisticated consumer could be misled by Defendants' communication that debt's legal status was not in question. Defendants' failure to disclose that the debt was possibly outside the statute of limitations could mislead the least sophisticated consumer into believing payment on the debt was required under law. Therefore, Loewen alleged sufficient

facts to state a plausible claim for relief under FDCPA § 1692e(2).

4. FDCPA § 1692e(5).

Loewen alleges that Defendants violated FDCPA § 1692e(5), which prohibits "the threat to take any action that cannot legally be taken or that is not intended to be taken." (FAC ¶ 27, 28.) Defendants argue that the FDCPA does not preclude them from filing a lawsuit "pursuant to a good faith argument." (Defs' Reply Supp. Mot. Dismiss, ECF No. 40, at 4.) The court agrees that at the time Defendants filed the lawsuit, the statute of limitations was an unresolved question of Oregon law, and they were therefore not legally precluded from filing the lawsuit.

While the court must assume that all facts alleged in a complaint are true and view them in a light most favorable to the nonmoving party, it need not accept as true any legal conclusion set forth in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Loewen alleged that Defendants "implied" a lawsuit if Loewen did not comply with payment of the debt. Taken in the light most favorable to Loewen, an "implied" lawsuit could be construed as a threat that they intended to file the lawsuit to collect her debt.

First, the FDCPA prohibits debt collectors from threatening to take action that is not intended to be taken. 15 U.S.C. § 1692e(5). Even taking Loewen's allegations in the light most favorable to her, Defendants did in fact file the lawsuit. Therefore, when they threatened Loewen with the lawsuit, they did intend to take action.

Second, the FDCPA prohibits debt collectors from threatening to take action that cannot be legally taken. 15 U.S.C. § 1692e(5). At the time Defendants filed the lawsuit, whether the debt was time-barred was an unresolved question of law. Defendants are not precluded from filing a lawsuit where the question is one unresolved by the courts. Therefore, Loewen failed to allege facts sufficient to form a plausible claim for relief under FDCPA § 1692e(5).

5. FDCPA § 1692e(9).

Loewen alleges that Defendants violated FDCPA § 1692e(9), which prohibits "[t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval." (FAC ¶ 27, 28.) Defendants argue that Loewen failed to allege facts in support of her contentions. (Defs.' Mot. Dismiss at 15.)

Section 1692e(9) of the FDCPA is intended to prevent the reproduction of documents that, for example, suggests the debt collector is a government entity. *See McKenzie v. E.A. Uffman & Assocs., Inc.*, 119 F.3d 358, 362 (5th Cir. 1997) (debt collector sent letters portraying itself to be from the "Collection Department, Credit Bureau of Baton Rouge." The court found violation of the FDCPA because "[t]hough the language of the notice refers to 'this office' and 'this collection agency', neither an 'unsophisticated consumer' nor the 'least sophisticated consumer' would discern from this language that the debt collector is actually a wholly distinct entity from the Credit Bureau.")

Loewen has not alleged that Defendants sent her documents that falsely appeared authorized, issued, or approved by any court, official, or agency of the United States or any state. Therefore, Loewen failed to allege facts sufficient to form a plausible claim for relief under FDCPA § 1692e(9).

6. FDCPA § 1692e(10).

Loewen alleges that Defendants violated FDCPA § 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." Defendants argue that Loewen failed to allege facts in support of her contentions. (Defs.' Mot. Dismiss at 15.)

Defendants misrepresented the status of the debt when they failed to disclose that they may be unable to collect on the debt because of the statute of limitations. (FAC ¶ 17.) Failure to notify Loewen of the accurate legal status of the debt constituted a false representation or a deceptive means to collect the debt. Therefore, Loewen sufficiently alleged facts to support a plausible claim for relief under FDCPA § 1692e(10).

7. FDCPA § 1692f .

Loewen alleges that Defendants violated FDCPA § 1692f, which states that a "debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." (FAC ¶ 27, 28.) Defendants argue that "[t]here is nothing 'unfair or unconscionable' about collecting on a debt consistent with the statute of limitations that may reasonably be applied to the debt." (Defs.' Mot. Dismiss at 15.)

Filing a lawsuit that appeared to be time barred, without informing the consumer of the full status of the debt has been found to be a violation of the FDCPA under § 1692f . *See McCollough v. Johnson, Rodenburg & Lauinger*, LLC, 637 F.3d 939, 947–49 (9th Cir. 2011) (affirming summary judgment in favor of the consumer after the debt collector filed a time-barred lawsuit to recover a debt.); *Kimber*, at 1487 ("Debt collector's filing of lawsuit on debt that appeared to be time barred, without debt collector having first determined after reasonable inquiry that limitations period had been or should have been tolled, was unfair and unconscionable means of collecting debt, within meaning of Fair Debt Collection Practices Act."); *Phillips*, 736 F.3d 1076, 1079 (7th Cir. 2013) (explaining that a debt collector's filing of a time-barred lawsuit to recover a debt violates the FDCPA); *Huertas*, 641 F.3d 28, 32–33 (3d Cir. 2011) (indicating that threatened or actual litigation to collect on a time-barred debt violates the FDCPA, but finding no FDCPA violation because the debt-collector never pursued or threatened litigation); *Freyermuth*, 248 F.3d at 771 (8th Cir. 2001).

Loewen alleged that Defendants threatened to file, and actually filed, a lawsuit in their attempt to collect a debt, without disclosing the true status of the statute of limitations. (FAC ¶ 17.) Loewen sufficiently alleged a plausible claim for relief under FDCPA § 1692f.

8. FDCPA § 1692f(1).

Loewen alleges that Defendants violated FDCPA § 1692f(1) which prohibits "the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." Defendants argue that "[t]his section is directed solely to the amount a debt collector attempts to recover on the debt, and says nothing about the method by which the collection is pursued." (Defs.' Mot. Dismiss at 17.)

The court agrees with Defendants that FDCPA § 1692f(1) is aimed at the amount of the debt and not the legal status of the debt, as other sections of the FDCPA specifically focus on the legal status of the debt. The circuits seem to disagree as to whether debt collectors may seek settlement on a time-barred debt. *Daugherty*, 836 F.3d at 551. However, the circuits generally agree that "a statute of limitations does not eliminate the debt; it merely limits the judicial remedies available." *Id.* at 513 (quoting *Freyermuth*, 248 F.3d at 771.) Therefore, the statute of limitations does not erase the debt, it simply limits the kinds of judicial remedies that debt collectors may seek.

Loewen does not allege that the amount of the debt was expressly unauthorized by the agreement. Similarly Loewen does not allege that the amount of the debt is specifically changed by the law. Therefore, Loewen failed to allege sufficient facts to form a plausible claim for relief under FDCPA § 1692f(1).

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C. Intentional Infliction of Emotional Distress

In addition to the FDCPA allegations, Loewen also seeks damages for emotional distress. Defendants argue that Loewen does not have standing to bring this lawsuit under the theory of intentional infliction of emotional distress ("IIED"). (Defs.' Mot. Dismiss at 9.) However, Defendants' argument exposes Loewen's pleading's failure to allege facts sufficient to state a claim for emotional distress. (Defs.' Mot. Dismiss at 9.) Therefore, the court reviews the IIED claim under the Rule 12(b)(6) standards.

The court agrees with Defendants that Loewen failed to state a claim for IIED. To plead the tort of IIED the plaintiff must allege facts showing that: (1) the "defendant intended to inflict severe mental or emotional distress" or that the distress was certain or substantially certain to result from the defendant's conduct; (2) the defendant's acts "in fact cause[d] the plaintiff severe mental or emotional distress"; and (3) the defendant's acts consisted of "some extraordinary transgression of the bounds of socially tolerable conduct'" or exceeded "any reasonable limit of social toleration." *Patton v. J.C. Penney Co., Inc.*, 301 Or. 117, 122 (1986) (quoting *Hall v. May Dept. Stores Co.*, 292 Or. 131, 135 (1981)); *Schiele v. Montes*, 231 Or. App. 43, 48 (2009) (stating elements of claim), *abrogated on other grounds by McGanty v. Staudenraus*, 321 Or. 532, 549 (1995).

First, Loewen did not allege facts that demonstrate Defendants intended to cause emotional distress. "Intent" for purposes of IIED means that the actor desired to inflict severe emotional distress, and also knew that such distress was a certain, or substantially certain result of the conduct. *McGanty*, 321 Or. at 550. Loewen does not allege that Defendants conduct was in any way abusive or hurtful. In fact, Loewen concedes that Defendants were "nice about suing her for a time barred debt." (Pl.'s Resp. Mot. Dismiss at 6.) Even viewing the facts in the light most favorable to Loewen, the court does not find she has alleged anything more than Defendants intended to collect a debt.

Loewen, however, argues that being sued on a potentially time-barred debt caused her anxiety and made her feel like she was being taken advantage of. (FAC ¶ 17, 20.) Loewen does not provide, however, and this court could not find, an Oregon case that finds that demonstrating anxiety suffices as a severe mental or emotional distress.

Lastly, Loewen's allegations of Defendants' actions are difficult to construe as "some extraordinary transgression of the bounds of socially tolerable conduct" or that they exceeded "any reasonable limit of social toleration." Misrepresenting the true legal status of a debt has been found to be a violation of the FDCPA, but Loewen does not assert Defendants harassed, abused, or otherwise oppressed Loewen. Therefore, the lack of conduct usually present in cases where the court has found IIED, is not present in this case. Loewen has not provided, and this court could not find, a case in which violation of the FDCPA by failing to disclose the legal status of a debt alone was construed as "some extraordinary transgression of the bounds of socially tolerable conduct" or exceeded any "reasonable limit of social toleration." *Patton*, 301 Or. at 122. Therefore, Loewen has failed to allege sufficient facts to establish a plausible claim for IIED.

D. Vagueness.

Defendants argue that if the FDCPA can be interpreted to prohibit debt collectors from filing lawsuits to "collect on debts where the action would be timely filed under only one of two potentially-governing statutes of limitations," the statute is void for vagueness. (Defs.' Mot. Dismiss at 26.) Loewen argues that the FDCPA narrowly restricts Defendants' ability to bring lawsuits that are actually time-barred. (Pl.'s Resp. Mot. Dismiss at 18.) Therefore, Loewen argues, the statute does not impermissibly restrict Defendants' First Amendment right to seek redress. The court agrees that the FDCPA is not unconstitutionally vague.

Criminal statutes and economic regulations have distinguishable characteristics that determine whether they are unconstitutionally vague. Criminal statutes are reviewed for vagueness from the point of view of a "person of ordinary intelligence." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). That is because "vague laws may trap the innocent by not providing fair warning." *Id.* However, economic statutes like the FDCPA may be "subject to a less strict vagueness test because [their] subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

As stated in Section II(A)(1)-(2), a debt collector violates FDCPA § 1692e if without notice, the debt collector attempts to collect a debt by threatening to file or actually filing a law suit that may be time-barred. Defendants, professional debt collectors and their attorneys, were aware that the statute of limitations in this case may or may not have run. The conduct that FDCPA § 1692e prohibits is the "use [of] any false, deceptive, or misleading representation or means in connection with the collection of any debt."

As stated in section II(B)(4), the FDCPA does not prohibit debt collectors from filing lawsuits on unresolved questions of law. The conduct that is prohibited is simply the misrepresentation of a debt from the point of view of the least sophisticated consumer. Defendants agree that they understand courts view debt collector's actions from the perspective of the least sophisticated debtor. (Defs.' Mot. Dismiss at 26.) Defendants were aware that the FDCPA imposes strict liability on debt collectors whose behavior runs afoul the FDCPA. (*Id.*) Defendants knew their communications would be strictly scrutinized and viewed against a lower standard than that of the reasonable person. Because Defendants were aware their conduct might run afoul the FDCPA the FDCPA provided Defendants with objective notice of the prohibited conduct. Therefore, the FDCPA does not infringe

on Defendants' constitutional protections and sufficiently gives notice to debt collectors of the prohibited conduct.

E. Alternative Motions

1. Motion to Strike FAC ¶ 18.

Defendant moves the court to strike FAC ¶ 18 pursuant to Rule 12(f) because it "makes irrelevant and prejudicial allegations." (Defs.' Mot. Dismiss at 29.) The paragraph states "In response, GAT sent her a packet of papers, presumably related to the debt on September 11, 2015, in an attempt to validate the debt. That additional paperwork caused her more anxiety." (FAC ¶ 18.) Loewen denies FAC ¶ 18 is prejudicial within the meaning of Rule 12(f). (Pl.'s Resp. Mot. Dismiss at 20.) The court should deny Defendants' motion to strike FAC ¶ 18 .

Rule 12(f) allows a court to, on its own or on a motion, "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). The purpose of a Rule 12(1) motion is to avoid the costs that arise from litigating spurious issues by dispensing with those issues prior to trial. Motions to strike are generally viewed with disfavor and are not frequently granted. *See Bassiri v. Xerox Corp.*, 292 F.Supp.2d 1212, 1220 (C.D. Cal. 2003), *rev'd on other grounds*, *Bassiri v. Xerox Corp.*, 463 F.3d 927 (9th Cir. 2006). However, a motion to strike "may be proper if it will make the trial less complicated or if allegations being challenged are so unrelated to plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading will be prejudicial to the moving party." *Thornton v. Solutionone Cleaning Concepts, Inc.*, No. CIV F 06–1455 AWI SMS, 2007 WL 210586, at *1 (E.D.Cal. Jan. 26, 2007).

The disputed paragraph states "In response, GAT sent her a packet of papers, presumably related to the debt on September 11, 2015, in an attempt to validated the debt. That additional

paperwork caused her more anxiety." (FAC ¶ 18.) The allegations contained in this paragraph are not irrelevant. The allegations describe a component of Loewen's emotional distress from communicating with Defendants. Furthermore, the allegations are not prejudicial. Defendants state that the paperwork they sent actually demonstrated Defendants' compliance with FDCPA because they "exceeded the minimum requirements of the FDCPA," (Defs.' Mot. Dismiss at 30), but that is the very issue in dispute here. Therefore, the motion to strike FAC ¶ 18 should be denied.

2. Motion to Make More Definite and Certain.

Defendants move the court to "order Ms. Loewen to make her Amended Complaint more definite and certain. Specifically, . . . to file a second amended complaint alleging the factual bases for her allegation that, at the time of defendants' alleged conduct, defendants 'knew or should have known' that the suit . . . was governed by a four-year statute of limitations." Loewen does not object. (Pl.'s Resp. Mot. Dismiss at 20.) Therefore, the court should grant Defendants' motion to make more definite and certain. Loewen should amend her complaint to include a list of facts on which Loewen relies for the allegation that Defendants knew or should have known the statute of limitations applicable in this case was the shorter four-year statute of limitations.

Recommendation

The court should DENY Defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The court should GRANT in part and DENY in part Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim for relief. The court should GRANT Defendants' Rule 12(b)(1) motion as to the following claims: FDCPA § 1692d; FDCPA § 1692e(5); FDCPA § 1692e(9); FDCPA § 1692f(1); and Intentional Infliction of Emotional Distress. The court should DENY Defendants' Rule 12(b)(1) motion as to the following claims: FDCPA § 1692e; FDCPA § 1692e(2); FDCPA § 1692e(10); FDCPA § 1692f. The court should find that 15 U.S.C. §§

1692-1692(p) (2010) is not unconstitutionally vague. The court should DENY Defendants' motion to strike FAC ¶ 18. The court should GRANT Defendants' motion to make more definite and certain.

Scheduling Order

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due June 8, 2017. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 25th day of May, 2017.

/s John V. Acosta
JOHN V. ACOSTA
United States Magistrate Judge