IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DOROTHY RUSSAW, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Case No. 2:19-cv-421-ALB
v.	)	
SCOTT & ASSOCIATES, P.C.,	)	
Defendant.		

MEMORANDUM OPINION AND ORDER

This matter comes before the court on Defendant Scott & Associates, P.C.'s Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Federal Rule 12(b)(6). (Doc. 20). Upon consideration, the motion is GRANTED.

BACKGROUND

Plaintiff Dorothy Russaw filed this suit against Scott & Associates alleging violations of the Fair Debt Collection Practices Act. Russaw notified either the creditor, Barclay's Bank Delaware, or the collector, Scott & Associates in writing to cease and desist further communication. (Doc. 16 ¶32). After Russaw's cease and desist, Scott & Associates sent Russaw the following letter, which is the subject of the present case. (Doc. 16 ¶¶32–54).

SCOTT & ASSOCIATES, PC

LICENSED IN AL, CA, DC, MD, NY, PA, SC, TN, TX, & VA
ATTORNEYS AT LAW
PO Box 115220
Carrollton, Texas 75011-5220

NYC Dept. of Consumer Affairs Lic. Nos 2044998 and 2045102

12/13/2018

Dorothy Russaw
330 Farmer Rd
Midway, AL 36053

Re:	Creditor:	Barclays Bank Delaware
	Product:	Upromise Mastercard
	Original Account Number:	XXXXXXXXXXXX1441
	Amount Owed:	$2,503.53
	Our Account Number:	1362634

Dear Dorothy Russaw,

This law firm represents Barclays Bank Delaware in connection with the above-stated claim (the "Account"). Barclays Bank Delaware is the owner and holder of the Account and as of the writing of this letter, the amount owed on the Account is $2,503.53.

At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due.

You have either sent this Firm or our Client a Cease and Desist notification in writing. Under Section 15 USC 1692c of the FDCPA, this letter will serve the following purposes:

(1) To advise the consumer that the debt collector's further efforts are being terminated;

(2) To notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such a debt collector or creditor

If you have questions about this Account, you may contact us at 866-298-3155 between the hours of 8AM-6PM CST, M-F. Otherwise, the Firm will consider all remedies available to recover the balance due.

Sincerely,

Scott & Associates, PC

* This law firm is a debt collector and this is an attempt to collect a debt. Any information obtained from you will be used by this law firm for that purpose. Unless you dispute the validity of the debt, or any portion thereof, within thirty days after you receive this letter, we will assume that the debt is valid. If, within this thirty-day period, you notify our law firm in writing that you dispute the debt, or any portion of the debt, we will obtain a verification of the debt from our client or obtain a copy of a judgment and a copy of such verification will be mailed to you by the firm. Within 30 days of your receipt of this letter, you may send to us a written request that we provide to you the name and address of the original creditor, if different from the current creditor, and we will do so.

SCOTT & ASSOCIATES, PC
Tel: (866) 298-3155 ● PO Box 115220, Carrollton, Texas 75011 ● Fax: (214) 234-8454

(Doc. 16-1).

Russaw makes claims under the FCPA arising from this letter. Count One asserts that the letter violates 15 U.S.C. §1692c, which prohibits a debt collector from communicating with a debtor after receiving a cease and desist letter. (Doc. 16 ¶¶22–54). Count Two alleges that the letter makes false, deceptive, or misleading representations in connection with the collection of a debt in violation of 15 U.S.C. §1692e. (Doc. 16 ¶¶55–77).

Scott & Associates filed an initial motion to dismiss because Russaw had not alleged to whom she sent her cease and desist letter. (Doc. 14 at 5–8). Russaw amended her complaint in response to the motion, but again failed to allege to whom she sent the letter. (Doc. 16 ¶32). Scott & Associates renewed its motion to dismiss. (Doc. 20).

DISCUSSION

Scott & Associates argues that the Amended Complaint should be dismissed in its entirety. Scott & Association argues that Russaw has not alleged that she sent a cease and desist letter to a "debt collector," which is a necessary precondition to invoke 15 U.S.C. §1692c. It also argues that its letter is consistent with the FCPA because the Act expressly carves out an exception for this type of contact and the letter is not contradictory or confusing. Russaw counters that she should be entitled to an inference that she sent Scott & Associates the letter, that Scott & Associates

was not allowed to contact her after receiving the cease and desist, and that the letter is confusing.

When evaluating a motion to dismiss, the court assumes the factual allegations are true and construes them in the light most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir. 1993). “To avoid dismissal the complaint must contain sufficient factual matter … to state a claim to relief that is plausible on its face.” *Gates v. Khokhar*, 884 F.3d 1290, 1296 (11th Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). Whether a complaint is plausible depends on whether “it contains sufficient facts to support a *reasonable* inference that the defendant is liable for the misconduct alleged.” *Id.* (emphasis added).

A. Count One is due to be dismissed.

Count One of the Amended Complaint arises under 15 U.S.C. §1692c. Under this section of the FDCPA, “[i]f a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt …” except for three specific exceptions. 15 U.S.C. §1692c(c). Scott & Associates argues that this Count is due to be dismissed for two reasons.

1. Russaw Has Not Alleged She Notified a "Debt Collector"

Scott & Associates argues that this count fails to state a claim because the Amended Complaint does not allege that Russaw sent a cease and desist letter to a "debt collector," i.e. Scott & Associates. Indeed, although Russaw's Amended Complaint asserts that she mailed a cease and desist letter to someone, it pointedly does not identify to whom she sent the cease and desist letter.

In response, Russaw points out that the letter she *received* from Scott & Associates indicates that either Scott & Associates or the creditor that hired it received her letter. That allegation is enough to state a claim, she argues, for two reasons.

First, Russaw argues that notifying *either* a debt collector *or* a creditor is enough to invoke the protections of this section of the FDCPA. But that argument is inconsistent with the plain text of the statute. "[U]nlike debt collectors, creditors typically are not subject to the FDCPA." *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1313 (11th Cir. 2015). "Creditor" and "debt collector" are defined terms in the statute. 15 U.S.C. §1692a. And "debt collector" is expressly defined *not* to include a creditor, except in unusual circumstances:

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.... The term does not include—

> (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

15 U.S.C. §1692a(6). "The language of our laws is the law." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1227 (11th Cir. 2001). According to the plain language of the FCPA, a consumer must contact a "debt collector," not a creditor, to invoke the protection of this section of the statute. *See Dahl v. Kohn Law Firm S.C.*, 2019 WL 2230718, at *2 (W.D. Wis. May. 23, 2019) (dismissing claim under Section 1692c(c) when plaintiff failed to allege written notice was provided to collector); *Micare v. Foster Garbus*, 132 F. Supp. 2d 77, 81 (N.D.N.Y. 2001) (same).

Second, Russaw contends that her allegations allow two equally plausible inferences—i.e. that she sent a letter either to Scott & Associates or to the creditor—and that the Court should draw the inference in her favor that she sent her cease and desist letter to Scott & Associates. Russaw is correct that, even when assertions in a complaint are ambiguous, they should be construed in the light most favorable to the plaintiff. *See Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1083–84 (11th Cir. 2002). But plaintiffs in Russaw's position are entitled only to *reasonable* inferences. *Gates*, 884 F.3d at 1296. And the circumstances surrounding Russaw's amended complaint make her suggested inference unreasonable. This information is uniquely within Russaw's possession—she knows where she sent the letter. And, after Scott & Associates filed its first

motion to dismiss that raised this issue, Russaw filed an amended complaint as her response. But Russaw's amended complaint still failed to allege to whom she had sent the letter. It makes very little sense to read into the amended complaint an allegation that Russaw sent her letter to Scott & Associates when Russaw pointedly declined to make that very allegation.[1]

2. Even if Russaw notified a "debt collector," Scott & Associates' Letter Complies with Exceptions in the Act.

In any event, even if Russaw had properly alleged that she contacted Scott & Associates, Scott & Associates would still win on the merits. Once a consumer properly issues a cease and desist notice, the FDCPA prohibits the debt collector from further communication with the consumer while preserving three important carve-outs. 15 U.S.C. §1692(c)(c). The debt collector may (1) advise the consumer that the collector's further efforts are being terminated, (2) notify the consumer that the collector or creditor "may invoke specified remedies" which they ordinarily invoke, or (3) notify the consumer that the collector or creditor "intends to invoke a specified remedy." *Id.* Here, Russaw claims that once the cease and desist notice is sent, the collector cannot communicate further with the debtor. But this argument ignores the express exceptions Congress created. Scott & Associates' letter follows

[1] The Court would normally allow a plaintiff in these circumstances a second, final chance to amend the complaint to resolve this problem. *See Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1014 (11th Cir. 2005). But Russaw did not ask for leave to amend. And, because the Court concludes that the amended complaint fails for other reasons, there is no point in allowing Russaw another amendment.

the Act by advising Russaw that it is terminating further collection efforts and notifying Russaw that the creditor may invoke specified remedies in the future. Russaw's partial reading of the statute is unavailing.

B. Count Two is also due to be dismissed.

Similarly lacking merit is Russaw's claim that Scott & Associates violated Section 1692(e)'s prohibition on false or misleading representations. The FDCPA prohibits collectors from using "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt." 15 U.S.C. §1692(e). Among these prohibited practices are misrepresenting the collector's identity; the status, character, or amount of the debt; or the effects of transferring the debt. 15 U.S.C. §1692(e)(1)–(3), (6), (9), (11)–(12), (16). The Act also prohibits threatening illegal action such as unlawful arrest or seizure of property. 15 U.S.C. §1692(e)(4)–(5).

The letter at issue here is not false, deceptive or misleading. The letter tracks the language of the statute. Shortly after initial contact with a consumer, the FDCPA requires a debt collector to provide a consumer with the identity of the creditor, the amount of the debt, and a statement that the debtor has 30 days to dispute the debt. 15 U.S.C. §1692g(a). There is no allegation that any of these matters were mispresented. Similarly, Scott & Associates notified Russaw that it was ceasing current collection efforts but might pursue legal remedies in the future. This statement is not, as Russaw claims, contradictory. A debt collector—like a law

firm—may well cease collection communications with the debtor while it explores legal remedies, such as wage garnishment. The debtor still owes the debt, even if the debt collector must cease communications about it. Section 1692(c) expressly allows a collector to advise the consumer that further efforts to collect are being terminated, to notify the consumer that specified remedies may be invoked, or to notify the consumer that specified remedies are being invoked. The statute does not limit which exceptions the collector may use, nor does it limit the collector to choosing between the three. A letter that makes accurate statements that are required or allowed by the FDCPA is not false or misleading under that statute.

CONCLUSION

Based on the above reasoning, Scott & Associates' Motion to Dismiss is GRANTED. The Amended Complaint is DISMISSED WITH PREJUDICE.

DONE and **ORDERED** this 24th day of October 2019.

/s/ Andrew L. Brasher
ANDREW L. BRASHER
UNITED STATES DISTRICT JUDGE

A copy of this checklist is available at the website for the USCA, 11th Circuit at www.ca11.uscourts.gov
Effective on December 1, 2013, the fee to file an appeal is $505.00

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:

(a) **Appeals from final orders pursuant to 28 U.S.C. § 1291:** Final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. § 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983) (citing *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. § 636(b); *Perez-Priego v. Alachua County Clerk of Court*, 148 F.3d 1272 (11th Cir. 1998). However, under 28 U.S.C. § 636(c)(3), the Courts of Appeals have jurisdiction over an appeal from a final judgment entered by a magistrate judge, but only if the parties consented to the magistrate's jurisdiction. *McNab v. J & J Marine, Inc.*, 240 F.3d 1326, 1327-28 (11th Cir. 2001).

(b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b). *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201, 108 S.Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 837 (11th Cir. 1998).

(c) **Appeals pursuant to 28 U.S.C. § 1292(a):** Under this section, appeals are permitted from the following types of orders:

i. Orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions; However, interlocutory appeals from orders denying temporary restraining orders are not permitted. *McDougald v. Jenson*, 786 F.2d 1465, 1472-73 (11th Cir. 1986);
ii. Orders appointing receivers or refusing to wind up receiverships; and
iii. Orders determining the rights and liabilities of parties in admiralty cases.

(d) **Appeals pursuant to 28 U.S.C. § 1292(b) and Fed.R.App.P. 5:** The certification specified in 28 U.S.C. § 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

(e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93

L.Ed. 1528 (1949); *Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir. 1989); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 157, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. *Rinaldo v. Corbett*, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P. 4(a) and (c) set the following time limits:

(a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the order or judgment appealed from is entered. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD – no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

(b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

(c) **Fed.R.App.P. 4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P. 4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend or reopen the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time to file an appeal may be reopened if the district court finds, upon motion, that the following conditions are satisfied: the moving party did not receive notice of the entry of the judgment or order within 21 days after entry; the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice, whichever is earlier; and no party would be prejudiced by the reopening.

(e) **Fed.R.App.P. 4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. *See also* Fed.R.App.P. 3(c). A *pro se* notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal:** A district court lacks jurisdiction, *i.e.*, authority, to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).