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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Benjamin L Thompson,

10 Plaintiff,

11 v.

12 Resurgent Capital Services LP, et al.,

13 Defendants.  
14

No. CV-22-00205-TUC-SHR

**Order Granting Defendants’ Motion to Dismiss**

15 Pending before the Court is Defendants’ Motion to Dismiss Plaintiff’s First  
16 Amended Complaint (“FAC”). (Doc. 27.) For the reasons that follow, the Court grants  
17 Defendants’ Motion and dismisses Plaintiff’s FAC with leave to amend.

18 **I. Plaintiff’s FAC**

19 Plaintiff alleges Defendants Resurgent Capital Services, LP (“Resurgent”), LVNV  
20 Funding, LLC (“LVNV”), and Johnson Mark, LLC (“Johnson”), violated the Fair Debt  
21 Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692e(2), e(8), e(10), and 1692f, based  
22 on each Defendant’s “unlawful debt collection practices on a debt that never belonged to  
23 Plaintiff.” (Doc. 26 at 6–14.) Specifically, Plaintiff alleges each Defendant did the  
24 following:

- 25
- Each Defendant “violated § 1692e(2) when it falsely misrepresented the  
26 character, amount, or legal status of the alleged debt. Defendant falsely  
27 reported a debt not owed on Plaintiff’s credit report, thereby creating a false  
28 representation of Plaintiff’s credit worthiness.” (Doc. 26 ¶¶ 39 (Resurgent),

1 65 (LVNV), 91 (Johnson).)

- 2 • Each Defendant “violated § 1692e(8) when it falsely reported a debt not  
3 owed on Plaintiff’s credit report. Defendant knew or should have known that  
4 the information it reported to the credit consumer agency was false. In  
5 addition, Defendant also neglected to update Plaintiff’s Experian Credit  
6 Report as consumer disputed after receiving Plaintiff’s disputes regarding the  
7 subject debt.” (*Id.* ¶¶ 41–42 (Resurgent), 67–68 (LVNV), 93–94 (Johnson).)
- 8 • Each Defendant “violated § 1692e(10) by using false, deceptive, and  
9 misleading representations in connection to collection of the subject debt. In  
10 order to secure payments on the subject debt, Defendant falsely  
11 misrepresented Plaintiff’s legal obligation to pay subject debt despite  
12 Plaintiff not owning [sic] the subject debt and having no legal obligation to  
13 pay.” (*Id.* ¶¶ 43 (Resurgent), ¶ 69 (LVNV), ¶ 95 (Johnson).)
- 14 • Each Defendant “violated § 1692f when it used unfair and unconscionable  
15 means to collect the subject debt. The alleged subject debt was not owed at  
16 the time Defendant demanded payment, but Defendant demanded Plaintiff  
17 make a payment on subject debt even though the subject debt did not belong  
18 to Plaintiff at any point. In addition, Defendant violated § 1692f reporting a  
19 debt not owed on Plaintiff’s credit reports. This conduct was unfair and  
20 unconscionable because it created a false and damaging portrayal of  
21 Plaintiff’s credit history.” (*Id.* ¶¶ 45–46 (Resurgent), 71–72 (LVNV), 97–98  
22 (Johnson).)

23 The following facts are derived from Plaintiff’s FAC. In about March 2022,  
24 Plaintiff received a letter from Resurgent “attempting to collect a past due balance on a  
25 Credit One Bank N.A. credit card owed to [LVNV]” of almost one thousand dollars. (Doc.  
26 ¶ 10.) Plaintiff was confused by the letter because he had never applied for or opened  
27 a line of credit with Credit One Bank N.A., so the subject debt did not belong to him. (*Id.*  
28 ¶¶ 11–12.) Sometime before March 28, 2022, Plaintiff called Resurgent to “inquire more

1 information regarding the subject debt.” (Doc. 26 ¶ 15.) Plaintiff spoke with someone at  
2 Resurgent and explained that the subject debt did not belong to him, as he had never  
3 received services from Credit One Bank N.A. at any point, and Resurgent told him he  
4 would need to send an affidavit to Monarch Recovery Management (“Monarch”). (*Id.*  
5 ¶¶ 16–17.) Plaintiff agreed to send an affidavit to Monarch, but he was “confused why he  
6 would need to send an affidavit to dispute the subject debt to another third party debt  
7 collector that Plaintiff has never communicated with.”<sup>1</sup> (*Id.* ¶ 18.)

8         Around March 26, 2022, Plaintiff received a similar letter from Johnson attempting  
9 to collect the same subject debt owed to LVNV, and this letter “only confused the Plaintiff  
10 further as he was unsure as to whom rightfully was attempting to collect the subject debt,  
11 despite a balance not actually being owed by Plaintiff and the subject debt belonging to a  
12 different person.” (*Id.* ¶¶ 13–14.)

13         On March 28, 2022, Resurgent sent Plaintiff another letter “as a response to  
14 Plaintiff’s disputes from Johnson Mark LLC indicating the dispute would only be  
15 investigated if Plaintiff could submit additional documentation”—specifically, “Plaintiff  
16 would need to send a police report indicating fraud, an affidavit, or other documentation  
17 supporting Plaintiff’s claims” that the subject debt was not his. (Doc. 26 ¶¶ 19–20.)  
18 Because Plaintiff did not believe himself to be a victim of identity theft, he “was further  
19 confused” about why Johnson requested such documentation, as the subject debt “merely  
20 belonged to another person unknown to Plaintiff.” (*Id.* ¶ 21.) Each Defendant “continued  
21 to send dunning letters to Plaintiff despite being put on notice that he was not the intended  
22 recipient of these letters and never had any business relationships with Defendants or their  
23 predecessors.” (*Id.* ¶ 22.) Because of those letters, which Plaintiff describes as “materially  
24 misleading collection attempts of a debt not owed,” Plaintiff “was led to believe  
25 Defendants would not stop contacting him attempting to collect a debt not belonging to  
26 [him].” (*Id.* ¶ 23.)

27         Plaintiff later learned LVNV was reporting the subject debt to TransUnion, Equifax,

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28         <sup>1</sup>Plaintiff does not allege he ever sent the requested affidavit or any other  
documentation to support his assertion that the subject debt did not belong to him.

1 and Experian, and he alleges that reporting “has negatively affected [his] credibility as a  
2 consumer” and he “continues to fear the negative repercussions that could occur from the  
3 negative reporting.” (Doc. 26 ¶¶ 24–25.) Plaintiff alleges he has felt “extremely worried”  
4 about negative consequences if he did not pay the debt, despite not owing it, and  
5 Defendants’ “misleading conduct” has “severely disrupted [his] daily life and general well-  
6 being,” as he “constantly feared serious consequences.” (*Id.* ¶¶ 26–27.) As a result,  
7 Plaintiff sought the assistance of counsel to file this action “to prevent Defendant[s] from  
8 further deception in the future, thus incurring costs and expenses.” (*Id.* ¶ 28.)

## 9 II. Motion to Dismiss Standard

10 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a  
11 claim for relief by asserting “failure to state a claim upon which relief can be granted.”  
12 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
13 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,  
14 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).  
15 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
16 statements, do not suffice.” *Id.* “A claim has facial plausibility when the plaintiff pleads  
17 factual content that allows the court to draw the reasonable inference that the defendant is  
18 liable for the misconduct alleged.” *Id.* The complaint, however, must contain more than  
19 “a statement of facts that merely creates a suspicion [of] a legally cognizable right of  
20 action.” *Twombly*, 550 U.S. at 555 (quoting 5 Fed. Prac. & Proc. Civ. § 1216 (3d ed.)).

21 The Court will “accept factual allegations in the complaint as true and construe the  
22 pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire*  
23 *& Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, the Court will not  
24 accept as true unreasonable inferences or conclusory legal allegations cast in the form of  
25 factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see also*  
26 *Iqbal*, 556 U.S. at 679. In addition, a court “cannot assume any facts necessary to [a  
27 plaintiff’s] . . . claim that they have not alleged.” *Jack Russell Terrier Network of N. Cal.*  
28 *v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005). “Determining whether a

1 complaint states a plausible claim for relief [is] . . . a context-specific task that requires the  
2 reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at  
3 679.

### 4 **III. Defendants’ Motion to Dismiss**

5 Defendants argue Plaintiff has failed to state a claim upon which relief can be  
6 granted because Plaintiff “has alleged no material misrepresentation made in the letters he  
7 received” and “credit reporting is not actionable under the FDCPA, and Defendants  
8 correctly reported the debt [as] ‘disputed.’” (Doc. 27 at 6–8.) Defendants further argue  
9 Plaintiff’s FAC should be dismissed without leave to amend because Plaintiff “has not  
10 identified—and cannot identify—any material misrepresentations relating to the debt at  
11 issue.” (*Id.* at 10.) This is because, according to Defendants, the March 2022 letters  
12 complied with the FDCPA, and the reporting of the debt as “disputed” by LVNV was  
13 accurate. (*Id.*) Lastly, Defendants note Plaintiff has already amended his complaint and  
14 “failed to correct the deficiencies.” (*Id.*)

### 15 **IV. Discussion**

16 Under the FDCPA, “[a] debt collector may not use any false, deceptive, or  
17 misleading representation or means in connection with the collection of any debt.” 15  
18 U.S.C. § 1692e. Prohibited conduct includes falsely representing “the character, amount,  
19 or legal status of any debt,” knowingly communicating false credit information “including  
20 the failure to communicate that a disputed debt is disputed,” and using false representations  
21 or deceptive means to try to collect any debt. §§ 1692e(2), e(8), e(10). Further, a collector  
22 may not use unfair or unconscionable means to collect or attempt to collect any debt. 15  
23 U.S.C. § 1692f.

24 The FDCPA’s goal is to “protect consumers from ‘improper conduct’ and  
25 illegitimate collection practices ‘without imposing unnecessary restrictions on ethical debt  
26 collectors.’” *Clark v. Cap. Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1170 (9th Cir.  
27 2006) (internal citation omitted). Consequently, courts apply the “least sophisticated  
28 debtor” standard to determine if the collector’s actions or information provided were

1 misleading or confusing. *Id.* at 1171. The least-sophisticated-debtor standard asks whether  
2 the least sophisticated debtor is “able to understand, make informed decisions about, and  
3 participate fully and meaningfully in the debt collection process.” *Id.* While the least  
4 sophisticated debtor may be “uninformed, naïve, and gullible,” his interpretation of a  
5 collection letter cannot be “bizarre or unreasonable.” *Tourgeman v. Collins Fin. Servs.,*  
6 *Inc.*, 755 F.3d 1109, 1119 (9th Cir. 2014) (internal citation omitted). When determining  
7 FDCPA liability, courts are “not concerned with mere technical falsehoods that mislead no  
8 one, but instead with genuinely misleading statements that may frustrate a consumer’s  
9 ability to intelligently choose his or her response.” *Id.* (internal citation omitted). That is,  
10 a debt collector’s false or misleading representation must be “material” to be actionable  
11 under the FDCPA. *Id.* In other words, because “false but non-material representations are  
12 not likely to mislead the least sophisticated [debtor],” they are not actionable under the  
13 FDCPA. *Id.*

14 An “allegation that the debt sought to be collected is not owed, standing alone,  
15 cannot form a basis for a ‘false and misleading’ practices claim under the FDCPA.” *Bleich*  
16 *v. Revenue Maximization Grp., Inc.*, 233 F. Supp. 2d 496, 500 (E.D.N.Y. 2002). Similarly,  
17 an allegation that a collector violated the FCDPA by sending letters to the wrong person is  
18 insufficient, on its own, to support a claim. *See, e.g., Campbell v. MBI Associates, Inc.*, 98  
19 F. Supp. 3d 568, 586 (E.D.N.Y. 2015) (rejecting claim that collector violated FCDPA by  
20 sending letters to a person who, according to plaintiff, knew was not responsible for the  
21 debt where collector sent letters to two-year-old son of debtor in attempt to collect debt  
22 incurred for son’s medical treatment); *Richeson v. Javitch, Block & Rathbone, LLP*, 576 F.  
23 Supp. 2d 861, 868 (N.D. Ohio 2008) (dismissing complaint alleging collector violated  
24 FDCPA by sending validation letter regarding debt that plaintiff asserts was the result of  
25 identity theft and was not owed by plaintiff because complaint was “bereft of any facts that  
26 would make it reasonable to infer that [collector] had actual knowledge that the debt did  
27 not belong to [plaintiff]”).

28 Further, debt collector communications with a credit reporting agency do not

1 support a cause of action under the FDCPA unless the communication is unlawful.  
2 *Horvath v. Premium Collection Servs., Inc.*, No. CV-09-2516PHX-GMS, 2010 WL  
3 1945717, at \*2 (D. Ariz. May 13, 2010). The FDCPA does not specify when such  
4 communications are unlawful, but the Fair Credit Reporting Act (“FCRA”) outlines when  
5 these communications are allowed. *Id.* For instance, the FCRA “requires furnishers of  
6 information . . . to consumer reporting agencies to provide accurate information” regarding  
7 a consumer’s debt. *Id.* (internal citations omitted); 15 U.S.C. § 1681s-2(a). However, there  
8 is no private right of action under the FCRA to enforce the obligations of § 1681s-2(a).  
9 *Horvath*, 2010 WL 1945717, at \*2; *see also Nelson v. Chase Manhattan Mortg. Corp.*, 282  
10 F.3d 1057, 1059 (9th Cir. 2002). And, a plaintiff “cannot circumvent the FCRA by raising  
11 his claim pursuant to the FDCPA.” *Horvath*, 2010 WL 1945717, at \*3.

#### 12 **A. Alleged Violations of § 1692e**

13 Plaintiff does not state what language in the letters is false, misleading, or deceptive  
14 or identify any material misrepresentation, nor does he explain what the letters actually  
15 said, beyond calling them “dunning letters.” (Doc. 26 at 4.) Instead, Plaintiff claims the  
16 letters were false, misleading, or deceptive merely because Defendants attempted to collect  
17 from Plaintiff a debt belonging to someone else, and Defendants continued attempts to  
18 collect after Plaintiff verbally informed Resurgent he was not the person who owed the  
19 debt. (Doc. 26 at 4–5.) Plaintiff also does not allege he submitted the additional  
20 documentation confirming he was not in fact the debtor, despite Defendants informing him  
21 “the dispute would only be investigated if Plaintiff could submit additional documentation”  
22 and Plaintiff stating he would submit the documentation. (Doc. 26 at 4.) He does not  
23 explain why he did not follow-through with sending an affidavit to Monarch, despite  
24 alleging he had agreed to do so. Plaintiff merely alleges these communications with  
25 Defendants “confused” him because the debt was not his.

26 These allegations, accepted as true and construed in the light most favorable to  
27 Plaintiff, are insufficient to support his claim. First, Plaintiff fails to identify any materially  
28 false, deceptive, or misleading representation in the letters. As noted, an allegation that the

1 debt sought to be collected is not owed is insufficient to state a claim for false and  
2 misleading practices under the FDCPA. *See Bleich*, 233 F. Supp. 2d at 500. To the extent  
3 Plaintiff appears to assert Defendants sent the letters to the wrong person, the Court notes  
4 such an allegation is also insufficient to state a claim for false and misleading practices  
5 under the FDCPA. *See Campbell*, 98 F. Supp. 3d at 586; *Richeson*, 576 F. Supp. 2d at 868.  
6 Second, Plaintiff's factual allegations do not show the least sophisticated debtor would be  
7 so genuinely misled that he could not intelligently choose his response. *See Tourgeman*,  
8 755 F.3d at 1119; *see also Clark*, 460 F.3d at 1171. Third, to the extent Plaintiff appears  
9 to allege Defendants violated § 1692e(2) when they "falsely reported a debt not owed on  
10 Plaintiff's credit report," Plaintiff's claim fails because the FDCPA does not govern credit  
11 reporting.

#### 12 **B. Alleged Violations of § 1692f**

13 Plaintiff's sole allegations with respect to § 1692f are that Defendants "used unfair  
14 and unconscionable means to collect the subject debt" and "report[ed] a debt not owed on  
15 Plaintiff's credit reports." (Doc. 26 at 8, 11, 13–14.) Plaintiff, however, fails to identify  
16 what means Defendants used that were unfair and unconscionable. And, for the reasons  
17 explained above, Plaintiff's allegations based on Defendants reporting the debt to the credit  
18 reporting agencies are not actionable under the FDCPA. Therefore, Plaintiff has failed to  
19 state a claim upon which relief may be granted.

#### 20 **C. Leave to Amend**

21 Plaintiff requests leave to amend, asserting he "clearly and plainly alleges that  
22 Defendants attempted to collect a debt form [sic] him in his First Amended Complaint."  
23 (Doc. 30 at 11.) He further asserts that although Defendants' Motion to Dismiss is based  
24 primarily on the letters Defendants sent and on their reporting of the debt, "Plaintiff still  
25 alleges conduct beyond the letter and credit reporting that could be found misleading or  
26 unconscionable, namely Defendants directing him to send an affidavit to a third party,  
27 Defendants asking for an identity theft declaration when Plaintiff did not claim identity  
28 theft, and the continuous collection activity from Defendant[s] after they were put on notice



1 the debt was not Plaintiff's." (*Id.*)

2 Given the "liberal pleading standard" employed by courts in the Ninth Circuit, the  
3 Court grants Plaintiff leave to file a second amended complaint to the extent Plaintiff may  
4 clarify his allegations about the content of Defendants' letters. *See AlliedSignal, Inc. v.*  
5 *City of Phoenix*, 182 F.3d 692, 696 (9th Cir. 1999); *DCD Programs, Ltd. v. Leighton*, 833  
6 F.2d 183, 186 (9th Cir. 1987) (in accordance with the Federal Rules' liberal pleading  
7 standards, courts typically apply the policy of free amendment with much liberality).  
8 Specifically, if Plaintiff files a second amended complaint, he must include the language  
9 from the letters he alleges is misleading, false, or deceptive. If he fails to do so, the Court  
10 may dismiss the second amended complaint without leave to amend. For the reasons  
11 explained above, Plaintiff's claims based on Defendants' reporting of the debt fail as a  
12 matter of law, and Plaintiff may not include such claims in his second amended complaint.

13 As to Plaintiff's contention that he has alleged conduct that is misleading or  
14 unconscionable, beyond Defendants' letters and credit reporting, the Court disagrees.  
15 Plaintiff's allegations that Defendants "used unfair and unconscionable means to collect  
16 the subject debt" are thread-bare, as the only thing Plaintiff alleges is Defendants demanded  
17 payment of a debt that was not owed and was not Plaintiff's. It is not until Plaintiff's  
18 response to Defendants' Motion to Dismiss that he alleges that it was "misleading or  
19 unconscionable" for Defendants to direct him to send an affidavit to a third party, ask him  
20 for an identify-theft declaration, and continue collection attempts after Defendants "were  
21 put on notice the debt was not Plaintiff's." (Doc. 30 at 11.) Nonetheless, because of the  
22 liberal pleading standard, the Court will allow Plaintiff to include such allegations in a  
23 second amended complaint. Plaintiff is warned that "[t]hreadbare recitals of the elements  
24 of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556  
25 U.S. at 678.

26 Accordingly,

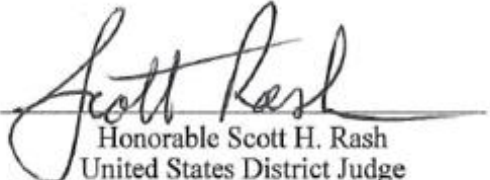
27 **IT IS ORDERED** Defendants' Motion to Dismiss Plaintiff's First Amended  
28 Complaint (Doc. 27) is **GRANTED**, and Plaintiff's First Amended Complaint (Doc. 26)

1 is **DISMISSED**.

2 **IT IS FURTHER ORDERED** Plaintiff is granted to leave to file a second amended  
3 complaint on or before **Thursday, January 26, 2023**. If Plaintiff does not file a second  
4 amended complaint on or before this deadline, the Clerk of Court shall close this action.

5 Dated this 12th day of January, 2023.

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Honorable Scott H. Rash  
United States District Judge