UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RODNEY NEELEY, Individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 1:15-cv-01283-RLY-MJD
PORTFOLIO RECOVERY ASSOCIATES, LLC,	)	
Defendant.	)	

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT

In this action, plaintiffs, Rodney Neeley ("Neeley"), individually and on behalf of all other similarly situated, allege that defendant Portfolio Recovery Associates, LLC's ("PRA's"), attempts to collect a time-barred debt using a form letter violated §§ 1692e and 1692f of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"). On August 2, 2017, over PRA's objection, the court certified a class of similarly-situated individuals who received one or more of the same form letters that Neeley received (collectively, "plaintiffs"). (Filing No. 103). Both parties have moved for summary judgment. (Filing Nos. 115 & 117). For the reasons stated herein, plaintiffs' Motion for Summary Judgment is **GRANTED,** and PRA's Motion for Summary Judgment is **DENIED**.

I. Factual Background

In the year 2000, Neeley opened a Sears National Bank of Omaha credit card. (Neeley Dep. at 25). Neeley's last payment on the card was on November 20, 2000. (*Id.*at 24, 27).

On November 25, 2002, PRA purchased Neeley's Sears credit card account in the amount of $2,729.25, and assigned the file number XXXXXXXXX9440 (the "account"). (Sundgaard Decl. ¶ 12). The date of delinquency on the account is February 25, 2001. (*Id.* ¶ 13). This date was provided to PRA by the seller of the account. (*Id.* ¶ 15). Therefore, in PRA's account notes, the statute of limitations for filing a collection action in relation to the account is February 25, 2007. (*Id.* ¶ 13).

Neeley received a letter from PRA dated August 14, 2014, regarding the account, which he understood to mean that he owed a debt. (Neeley Dep. at 35; Filing No. 118-5, 8/14/14 Letter). The letter, which generally set forth various payment plans for settling the debt at less than the full amount, contained the following language: "Because of the age of your debt, we will not sue you for it and we will not report it to any credit reporting agency." (Filing No. 118-5, 8/14/14 Letter). On November 12, 2014, and February 17, 2015, PRA sent similar form collection letters to Neeley, both of which contained the same language (these letters, collectively with the August 14, 2014, letter, the "Letters"). (Filing Nos. 118-6 & 118-7).

As the court previously discussed in its order certifying the class, this language was discussed at length during Neeley's deposition:

Q: What does that mean?

A: Pretty much the debt is old and pretty much saying they can't sue me.

. . .

Q: Is there any language on this [August 14] letter that you claim as confusing?

A: No.

Q: Is there any language on this [August 14] letter that you claim is misleading?

A: Well that whole line there is – "Because of the age of your debt, we will not sue you . . . ." Why do they keep sending me letters? Kind of makes it a little weird. I mean, if the debt is so old, why do I keep getting letters?

. . .

Q: Was there any language on this [November 12] letter that you claim is confusing?

A: No.

Q: Is there any language on this [November 12] letter that you claim is misleading?

A: Okay. I would claim, maybe, that "Because of the age of your debt, we will not sue . . . ." Why are they still sending that? Is that a little misleading? Or maybe that is just me?

Q: So you're saying it's misleading because the debt is old?

A: And they got that disclosure right there at the bottom.

Q: Is it your contention that because the debt is old no one can collect it?

A: That is the law, right?

. . .

Q: And is there anything on this [February 17] letter that you claim is confusing?

> A: Well, we can go back to the same thing, the little disclosure here.
>
> Q: What's the disclosure that you're referring to?
>
> A: "Because of the age of your debt, we will not sue you for it and we will not report it to any credit reporting agency."
>
> Q: What do you think that means?
>
> A: Well, I'm assuming it means that it's so old they can't collect the debt, but yet they're still sending me letters with all kinds of numbers on them.

(Filing No. 118-3, Neeley Dep. at 36-42).

There is no dispute that at the time PRA sent the Letters to Neeley, no one could file suit to collect the debt because Indiana's six-year statute of limitations had run. *See* Ind. Code § 34-11-2; *Smither v. Asset Acceptance*, 919 N.E.2d 1153, 1158-60 (Ind. Ct. App. 2010). Further, there is no dispute that Neeley's payment or "settlement" of the debt with PRA would not go to any credit bureau, improve his credit score, or otherwise benefit him, other than "peace of mind." (Guevara Dep. at 37-40).

Neeley never made any payment in response to the Letters. (Neeley Dep. at 40).

On August 2, 2017, the court certified the following class:

> All persons similarly situated in the State of Indiana from whom Defendant attempted to collect a debt owed originally to Sears National Bank, by sending a form collection letter similar to the letters Defendant sent to Plaintiff, and as to which, according to Defendant's records, the letter was sent more than six years after the date of last payment, the date of charge off and the date of delinquency, from one year before the date of the Complaint to the present.

PRA sent a letter to 2,566 individuals with addresses in Indiana that is identical in form to at least one of the Letters in an attempt to collect a Sears credit card debt. (Def.'s Supp. Ans. to Interrogs.). Out of the 2,566 class members, 25 people made a payment at

some point in time after receipt of a PRA letter; of these 25 people, only 8 of them made a payment within 90 days of the relevant letter. (*Id.*). Neeley is not seeking actual damages. (Pl.'s Ans. to Interrogs., ¶ 5).

Neeley and the class allege that the Letters were false, misleading and deceptive, in violation of § 1692e of the FDCPA because they failed to state clearly that PRA was legally prohibited from suing to collect the debt or reporting the debt to a credit reporting agency, and failed to explain the consequences of partial payment of the debt. (Compl. ¶¶ 9, 13-16). Plaintiffs also allege that the Letters constitute an unfair or unconscionable means to collect or attempt to collect a time-barred debt in violation of § 1692f of the FDCPA. (*Id.* ¶¶ 17-20).

II. Summary Judgment Standard

Summary judgment serves to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Summary judgment is appropriate if the record "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See also Novoselsky v. Brown*, 822 F.3d 342, 348-49 (7th Cir. 2016). To survive summary judgment, the nonmoving party must present specific facts showing the existence of a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine dispute of fact exists if, based on the evidence presented, a reasonable jury could return a verdict in favor of the non-moving party. *See id.* at 248. When a party asserts that a fact is genuinely disputed or

undisputed, that party must support its assertion either by citing specific materials in the record, or by "showing that the materials cited do not establish the absence or presence of a genuine dispute . . . ." Fed. R. Civ. P. 56(c)(1)(A)–(B). The court views all admissible evidence in the light most favorable to the nonmoving party, but it need not draw unreasonable inferences. *See Tindle v. Polte Home Corp.*, 607 F.3d 494, 496 (7th Cir. 2010).

III. Discussion

A. Section 1692e

Section 1692e of the FDCPA proscribes "false, deceptive, or misleading representations or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Plaintiffs claim that the Letters here were deceptive or misleading because they failed to inform the consumer that PRA could not file suit to collect the debts and they failed to inform the consumer that a payment on the debt could restart the statute of limitations. Compl. ¶¶ 7-9, 12-20. Controlling Seventh Circuit precedent has held that identical language in other letters sent by PRA violates § 1692e. *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 684 (7th Cir. 2017), *cert. denied sub nom* No. 17-255, 2018 WL 410911 (U.S. Jan. 16, 2018). In both pending motions, PRA relies exclusively on its arguments that the Seventh Circuit's decision in *Pantoja* was wrong and that the Supreme Court will grant certiorari and reverse the decision, to defeat plaintiffs' motion for summary judgment. (Filing Nos. 118 & 119). However, on January 16, 2018, the Supreme Court denied certiorari in *Pantoja*, and this court is bound

by the Seventh Circuit's decision. *See Portfolio Recovery Assocs. LLC*, No. 17-255, 2018 WL 410911 (U.S. Jan. 16, 2018).

In *Pantoja*, the Seventh Circuit affirmed a decision in the Northern District of Illinois and ruled that the same language regarding settlement of a time-barred debt was unlawfully misleading and deceptive for two reasons. *Pantoja*, 852 F.3d at 682-83. First, the letter was deceptive and misleading because it failed to warn an unsophisticated consumer that, under Illinois law, he or she risked waiver of the absolute defense under the statute of limitations. *Id.*at 684-86. The *Pantoja* court stated that the warning must be "clear, accessible, and unambiguous to the unsophisticated consumer." *Id.* at 686.

Second, the PRA statement was deceptive and misleading because "it gives the impression that [PRA] has only chosen not to sue, not that it is legally barred from doing so." *Id.* The *Pantoja* court rejected PRA's argument that this made the statement ambiguous, which would require plaintiffs to produce extrinsic evidence that unsophisticated consumers found the challenging statements misleading or deceptive in fact. *Id.* at 686-87. The Seventh Circuit explained that PRA had taken their language from a carefully-worded consent decree in another case, but purposefully left out the unambiguous statement that "[t]he law limits how long you can be sued on a debt." *Id.* at 686. The *Pantoja* court reasoned that PRA's careful and deliberate creation of the ambiguity "is the sort of misleading tactic the FDCPA prohibits." *Id.*at 687.

The *Pantoja* court made clear that either one of the reasons alone was sufficient to affirm summary judgment in favor of the class. *Id.* at 684. Therefore, in the instant case, because there is no material question of fact that PRA purposefully left out the language

stating that "[t]he law limits how long you can be sued on a debt," summary judgment in favor of plaintiffs is appropriate on their § 1692e claim. For this reason, the court will not address plaintiffs' alternative argument that the language is misleading under § 1692e because it fails to warn that a payment may waive a consumer's statute of limitations defense.

B. Section 1692f

Although the *Pantoja* court referenced § 1692f, it decided that case on narrower grounds and addressed only § 1692e. *Pantoja*, 852 F.3d at 684. Section 1692f proscribes the "use of unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. Illustrative examples in the statute include, but are not limited to, "threatening to take action that cannot legally be taken," and failing to disclose "that the debt collector is attempting to collect a debt." *Id.* The statute does not define "unfair or unconscionable," and the Seventh Circuit has suggested that the standard is objective and "'a question for the jury unless reasonable jurors could not find that the practice described rose to that level.'" *Todd v. Collecto, Inc.*, 731 F.3d 734, 739 (7th Cir. 2013) (citing *Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d 991, 997-98 (7th Cir. 2003)). Further, the Letters are assessed "through the perspective of an 'unsophisticated consumer.'" *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1019 (7th Cir. 2014) (quoting *Lox v. CDA, Ltd.*, 689 F.3d 818, 822 (7th Cir. 2012)); *Gruber v. Creditors' Prot. Serv.*, 742 F.3d 271, 273 (7th Cir. 2014).

PRA asserts that Neeley and the class cannot rely on the same arguments to establish a violation of § 1692f as they did to establish liability under § 1692e because it

would make one or the other section redundant, and because a violation of one part of the statute does not necessarily violate another one. (Filing No. 118 at 17-19, citing, *inter alia*, *Turner*, 330 F.3d at 998 (deciding "that a letter simply providing the information required by § 1692g(a) is not an unfair or unconscionable means of debt collection under § 1692f, even when the debt collector may have violated some other provision of the FDCPA"); *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1272 (7th Cir. 1993) (stating that "a court should not construe a statute in a way that makes words or phrases meaningless"); *Rhone v. Med. Bus. Bureau, LLC*, No. 16 C 5215, 2017 WL 4875297, at *3 (N.D. Ill. Oct. 25, 2017) (concluding that receipt of damages under § 1692f for the same harm as that under § 1692e is prohibited as a double recovery) (appeal pending)).

Neeley and the class contend that double recovery is not an issue here, and the same conduct can support a claim under both § 1692e and § 1692f. (Filing No. 121 at 13-14, citing *inter alia*, *McMahon*, 744 F.3d at 1021-22; *Phillips v. Asset Acceptance*, 736 F.3d 1076, 1079 (7th Cir. 2013); *Holt v. LVNV Funding, LLC*, 147 F. Supp. 3d 756, 762-63 (S.D. Ind. 2015); *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 875-76 (N.D. Ill. 2009)). Without getting into details, plaintiffs assert that the Letters violate § 1692f for the same reasons they violate § 1692e as a matter of law. *Id.* at 14.

This court has previously held that questionable language in debt collection letters can violate both § 1692e and § 1692f, and they are not mutually exclusive. *Holt*, 147 F. Supp. 3d at 762-63 (relying on the same analysis to conclude plaintiff stated a claim under both statutes and rejecting defendants' argument that the statutes are mutually exclusive) (citing *McMillan v. Collection Prof'ls, Inc.*, 455 F.3d 754, 760-65 (7th Cir.

2006); *Fields v. Wilber Law Firm, P.C.*, 383 F.3d 562, 565-66 (7th Cir. 2004)). For this reason, the court rejects PRA's contention that the same conduct may violate only a single section of the FDCPA.

PRA cites *Rhone v. Medical Business Bureau, LLC*, for the proposition that plaintiffs' § 1692f claim should be dismissed because they cannot recover twice for the same harm. (Filing No. 118 at 18, citing *inter alia*, *Rhone*, 2017 WL 4875297, at *3). But, the FDCPA's civil remedy statute provides for a single recovery for the actual harm and statutory damages, not damages for each violation of the Act. *See* 15 U.S.C. § 1692k. Further, in deciding damages in the class action context, the court takes into account the frequency, persistence and intentionality of the conduct, not whether the conduct violated more than one section of the Act. 15 U.S.C. § 1692k(b). There is no opportunity for double recovery under this reading. Therefore, the court concludes that PRA's motion for summary judgment on plaintiffs' § 1692f claim because of double recovery must be denied.

Turning to the merits under § 1692f, the court must address whether or not the Letters were an "unfair or unconscionable means to collect or attempt to collect any debt." The problem for PRA under this standard is the *Pantoja* court's conclusion that

> . . . this letter is an example of careful and deliberate ambiguity. . . . The very ambiguity that [PRA] claims should save it from summary judgment convinces us that summary judgment was appropriate. The carefully crafted language, chosen to obscure from the debtor that the law prohibits the collector from suing to collect [the] debt or even from threatening to do so, is the sort of misleading tactic the FDCPA prohibits.

Pantoja, 852 F.3d at 687. There is no other way to characterize PRA's conduct. As described here, to an unsophisticated consumer, PRA's "careful and deliberate" tactic to obscure the law is contrary to any reasonable interpretation of fairness or fair dealing; a jury could not conclude otherwise. *Accord Holt*, 147 F. Supp. 3d at 763 (citing *Phillips*, 736 F.3d at 1079); *Herkert*, 655 F. Supp. 2d at 873, 880-81.

For these reasons, summary judgment in favor of plaintiffs under § 1692f is also appropriate. Having found for plaintiffs on this theory, the court declines to address their alternative argument that the Letters also violate this section because they fail to alert the consumer that a partial payment may restart the statute of limitations.

C. Causation, Damages and/or Standing

PRA also revives its standing argument by asserting plaintiffs cannot prove causation. (Filing No. 118 at 11-12). However, the court addressed this argument in its Entry on Plaintiff's Fifth Amended Motion for Class Certification, and there is no reason to readdress the argument here. Specifically, the court concluded that "Neeley's deposition testimony, taken as a whole, demonstrates that he actually did find the letters confusing, even if he did not want to admit it." (Filing No. 103 at 5). Further, the court implied that Neeley's confusion about whether or not PRA could sue him for the debt is a sufficiently cognizable injury under the FDCPA. (*Id.* at 6). Because this is the law of the case and founded on undisputed facts in the record, the court sees no reason to reconsider this ruling.

IV. Conclusion

For the reasons stated herein, the court **GRANTS** plaintiffs', Rodney Neeley, individually and on behalf of all other similarly situated, Motion for Summary Judgment (Filing No. 115); and **DENIES** defendant Portfolio Recovery Associates, LLC's, Motion for Summary Judgment (Filing No. 117).

SO ORDERED this 22nd day of March 2018.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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