

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

<b>JOSHUA GARCIA,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>2:12-CV-1930 JWS</b>
	)	
<b>vs.</b>	)	<b>ORDER AND OPINION</b>
	)	
<b>GURSTEL CHARGO, P.A.,</b>	)	<b>[Re: Motions at dockets 26 and 31]</b>
	)	
<b>Defendant.</b>	)	
	)	

**I. MOTIONS PRESENTED**

At docket 26, defendant Gurstel Chargo, P.A. ("Gurstel") moves for judgment on the pleadings pursuant to Rule 12(c). Plaintiff Joshua Garcia ("Garcia") responds at docket 30. Gurstel's reply is at docket 33. At docket 31, Garcia moves for summary judgment pursuant to Rule 56. Gurstel responds at docket 34. Garcia's reply is at docket 37. Oral argument was not requested and would not be of aid to the court.

**II. BACKGROUND**

Except as otherwise noted, the facts recited in this section are not disputed.<sup>1</sup> Acting as counsel for HSBC Bank Nevada, N.A. ("Bank"), Gurstel filed a state court

---

<sup>1</sup>Most are facts alleged in Garcia's complaint and admitted in Gurstel's answer.

1 complaint against Garcia dated July 25, 2010. It sought to recover \$3,919.60 plus  
2 interest for credit extended by the Bank.<sup>2</sup> Garcia is a “consumer” as defined in the  
3 FDCPA<sup>3</sup> and Gurstel is a “debt collector” as defined by the FDCPA.<sup>4</sup> On August 2,  
4 2010, Garcia called Gurstel and spoke to Jennifer Wiedle, a Gurstel lawyer. Garcia  
5 disputed the debt and told her there was fraudulent activity relating to another person’s  
6 using his social security number. Gurstel sent a letter dated August 10, 2010, reciting  
7 that Gurstel had been informed Garcia was claiming there was fraud relating to the  
8 credit Gurstel was trying to collect. The letter included an identity theft affidavit and  
9 asked Garcia to complete and return it. Garcia did so. Gurstel received the completed  
10 affidavit on August 21, 2010.  
11

12  
13 On May 11, 2012, Gurstel wrote Garcia offering to settle the Bank’s claim for  
14 50% of the balance. On May 30, Gurstel sent a second letter indicating it might be  
15 possible to settle for less than the outstanding balance and asked Garcia to contact  
16

---

17  
18 <sup>2</sup>The state court complaint appears to have been dismissed for lack of prosecution on  
19 May 6, 2011. See, *HSBC Bank Nevada, N.A. v. Joshua Garcia*, Case No. CC2010-456208,  
Kyrene Justice Court of the State of Arizona in the County of Maricopa.

20 <sup>3</sup>FDCPA defines a “consumer” as a natural person obligated or allegedly obligated to  
21 pay a debt. 15 U.S.C. § 1692a(3). In ¶ 5, the complaint alleges Garcia is a “consumer.” In a  
22 remarkable bit of pettifogging, Gurstel’s answer responds in ¶ 5 that Gurstel lacks sufficient  
23 information to admit or deny Garcia’s “consumer” status. Whether Gurstel is unsure Garcia is a  
person, unsure he is allegedly obligated to pay a debt, or both is unclear. In any case the  
response is ludicrous and of no moment. For purposes of Gurstel’s motion, the allegation of  
consumer status must be accepted as true.

24 <sup>4</sup>FDCPA defines a “debt collector” to be one who uses interstate commerce in a  
25 business whose principal purpose is debt collection, or who regularly attempts to collect debts  
26 for others. 15 U.S.C. § 1692a(6). Paragraph 6 of the complaint alleges Gurstel is a “debt  
27 collector.” Gurstel’s droll response is that “it engages in the use of the mails and telephone in  
attempting to collect a debt from Plaintiff. To the extent that Paragraph 6 states a legal  
conclusion, no admission or denial is required.” Doc. 7 at ¶ 6. Gurstel’s failure to deny that it is  
a debt collector is an admission that it is. Fed. R. Civ. P. 8(b)(6).

1 Gurstel by June 25, 2012, to discuss arrangements. Garcia's complaint alleges that he  
2 called Gurstel on June 4, and said he sent a fraud affidavit to Gurstel in 2010. On July  
3 27, Gurstel sent Garcia a letter with text identical to the August 10, 2010 letter and  
4 enclosed another identity theft affidavit to be completed and returned.  
5

6 Garcia's complaint pleads three Fair Debt Collection Practices Act ("FDCPA")<sup>5</sup>  
7 claims. Count I alleges that Gurstel "violated 15 U.S.C. § 1692c(c) by communicating  
8 with Plaintiff after having received a letter from Plaintiff with a request to cease and  
9 desist all collection contacts or a statement that Plaintiff refuses to pay the alleged  
10 debt."<sup>6</sup> Count II alleges that Gurstel "violated 15 U.S.C. § 1692e(2)(A) by falsely  
11 representing the character, amount, or legal status of Plaintiff's alleged debt."<sup>7</sup> Finally,  
12 Count III alleges that Gurstel "violated 15 U.S.C. § 1692e(10) by using false  
13 representations or deceptive practices in connection with the collection of an alleged  
14 debt from Plaintiff."<sup>8</sup> Garcia seeks to recover statutory damages of \$1,000, actual  
15 damages, reasonable attorney fees and pre-judgment and post-judgment interest  
16 together with any other relief that may be appropriate. Garcia's complaint was filed on  
17 September 11, 2012.  
18  
19  
20  
21  
22

---

23  
24 <sup>5</sup>15 U.S.C. § 1692 *et seq.*

25 <sup>6</sup>Doc. 1, ¶ 39.

26 <sup>7</sup>*Id.* at ¶ 41.

27 <sup>8</sup>*Id.* at ¶ 43.

1 **III. STANDARDS OF REVIEW**

2 **A. Rule 12(c) Standard**

3 “After the pleadings are closed but within such time as not to delay the trial, any  
4 party may move for judgment on the pleadings.”<sup>9</sup> Because “Rules 12(b)(6) and 12(c)  
5 are substantially identical,”<sup>10</sup> a motion for judgment on the pleadings is assessed under  
6 the standard applicable to a motion to dismiss for failure to state a claim upon which  
7 relief may be granted under Rule 12(b)(6).<sup>11</sup>

8 Rule 12(b)(6), tests the legal sufficiency of a plaintiff’s claims. In reviewing such  
9 a motion, “[a]ll allegations of material fact in the complaint are taken as true and  
10 construed in the light most favorable to the nonmoving party.”<sup>12</sup> To be assumed true,  
11 the allegations, “may not simply recite the elements of a cause of action, but must  
12 contain sufficient allegations of underlying facts to give fair notice and to enable the  
13 opposing party to defend itself effectively.”<sup>13</sup> Dismissal for failure to state a claim can be  
14 based on either “the lack of a cognizable legal theory or the absence of sufficient facts  
15 alleged under a cognizable legal theory.”<sup>14</sup> “Conclusory allegations of law . . . are  
16 insufficient to defeat a motion to dismiss.”<sup>15</sup>

17  
18  
19  
20  
21 

---

<sup>9</sup>Fed. R. Civ. P. 12(c).

22 <sup>10</sup>*Strigliabotti v. Franklin Resources, Inc.*, 398 F. Supp. 2d 1094, 1097 (N.D. Cal. 2005).

23 <sup>11</sup>*See Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980).

24 <sup>12</sup>*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

25 <sup>13</sup>*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

26 <sup>14</sup>*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

27 <sup>15</sup>*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

1 To avoid dismissal, a plaintiff must plead facts sufficient to “state a claim to relief  
2 that is plausible on its face.”<sup>16</sup> “A claim has facial plausibility when the plaintiff pleads  
3 factual content that allows the court to draw the reasonable inference that the defendant  
4 is liable for the misconduct alleged.”<sup>17</sup> “The plausibility standard is not akin to a  
5 ‘probability requirement’ but it asks for more than a sheer possibility that a defendant  
6 has acted unlawfully.”<sup>18</sup> “Where a complaint pleads facts that are ‘merely consistent’  
7 with a defendant’s liability, it ‘stops short of the line between possibility and plausibility of  
8 entitlement to relief.’”<sup>19</sup> “In sum, for a complaint to survive a motion to dismiss, the non-  
9 conclusory ‘factual content,’ and reasonable inferences from that content, must be  
10 plausibly suggestive of a claim entitling the plaintiff to relief.”<sup>20</sup>

## 13 **B. Summary Judgment Standard**

14 Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment  
15 should be granted if there is no genuine dispute as to any material fact and the moving  
16 party is entitled to judgment as a matter of law.<sup>21</sup> The moving party has the burden of  
17 showing that there is no genuine dispute as to any material fact.<sup>22</sup> The moving party

---

20 <sup>16</sup>*Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

21 <sup>17</sup>*Id.*

22 <sup>18</sup>*Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

23 <sup>19</sup>*Id.* (quoting *Twombly*, 550 U.S. at 557).

24 <sup>20</sup>*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *see also Starr v. Baca*,  
25 652 F.3d 1202, 1216 (9th Cir. 2011).

26 <sup>21</sup>Fed. R. Civ. P. 56(a).

27 <sup>22</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

1 need not present evidence; it need only point out the lack of any genuine dispute as to  
2 material fact.<sup>23</sup> Once the moving party has met this burden, the non-moving party must  
3 set forth evidence of specific facts showing the existence of a genuine issue for trial.<sup>24</sup>  
4 All evidence presented by the non-movant must be believed for purposes of summary  
5 judgment and all justifiable inferences must be drawn in favor of the non-movant.<sup>25</sup>  
6 However, the non-moving party may not rest upon mere allegations or denials, but must  
7 show that there is sufficient evidence supporting the claimed factual dispute to require a  
8 fact-finder to resolve the parties' differing versions of the truth at trial.<sup>26</sup>  
9

#### 10 **IV. DISCUSSION**

##### 11 **A. Motion at Docket 26**

12  
13 When deciding Gurstel's motion for judgment on the pleadings the court may  
14 consider documents Garcia referenced and relied upon in his complaint even if they  
15 were not exhibits to the complaint, so long as their authenticity is not in question.<sup>27</sup> The  
16 court may also take notice of matters of public record such as the proceedings in  
17 Gurstel's state court suit against Garcia.<sup>28</sup>  
18

19 Gurstel first argues that Garcia's claims are barred by FDCPA's one year statute  
20

---

21  
22 <sup>23</sup>*Id.* at 323-25.

23 <sup>24</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

24 <sup>25</sup>*Id.* at 255.

25 <sup>26</sup>*Id.* at 248-49.

26 <sup>27</sup>*See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

27 <sup>28</sup>*See Lee*, 250 F.3d at 688-89.

1 of limitation.<sup>29</sup> The argument fails because the liability alleged in all three claims would  
2 arise from the letters Gurstel sent to Garcia in May and July of 2012, well within the one  
3 year period prior to the filing of Garcia's complaint on September 11, 2012. Gurstel's  
4 reliance on *Magnum v. Action Collection Service, Inc.*<sup>30</sup> is misplaced, because Garcia  
5 could not have known nor had reason to know that Gurstel would send him letters in  
6 2012 until he received the letters.  
7

8 Next, Gurstel argues that Count I should be dismissed, because Garcia neither  
9 informed it in writing that he refused to pay the debt nor informed Gurstel in writing that  
10 he wanted it to cease communications, a predicate to liability under 15 U.S.C. §  
11 1692c(c). That statute provides as follows:  
12

13 If a consumer notifies a debt collector in writing that the consumer refuses  
14 to pay a debt or that the consumer wishes the debt collector to cease  
15 further communication with the consumer, the debt collector shall not  
16 communicate further with the consumer with respect to such debt, except-  
17 (1) to advise the consumer that the debt collector's further  
18 efforts are being terminated;  
19 (2) to notify the consumer that the debt collector or creditor  
20 may invoke specified remedies which are ordinarily invoked  
21 by such debt collector or creditor; or  
22 (3) where applicable, to notify the consumer that the debt  
23 collector or creditor intends to invoke a specified remedy.  
24

25 The only *written* communication Garcia sent to Gurstel prior to July 2012, was  
26 the fraud affidavit which Gurstel received on August 21, 2010. Gurstel contends that  
27 Garcia's communication is penned on a document it provided which nowhere includes a  
28 statement that Garcia wished Gurstel to cease communications, and nowhere includes

---

29<sup>29</sup>15 U.S.C. § 1692k(d).

30<sup>30</sup>575 F.3d 935, 940 (9th Cir. 2009).

1 a statement that Garcia refused to pay.

2 “Congress enacted [FDCPA] to protect consumers from ‘improper conduct’ and  
3 illegitimate collection practices ‘without imposing unnecessary restrictions on ethical  
4 debt collectors.’”<sup>31</sup> Toward that end courts employ the “least sophisticated debtor”  
5 standard.  
6

7 In judging the actions of a debt collector, we invariably ask whether the  
8 information provided was or its actions were confusing or misleading.  
9 Quite simply, we seek to ensure that even the least sophisticated debtor is  
10 able to understand, make informed decisions about, and participate fully  
11 and meaningfully in the debt collection process. \* \* \* That goal—and,  
12 therefore, the least sophisticated debtor standard—is no less important or  
13 relevant when considering the actions of the debtor than when considering  
14 the actions of a debt collector.<sup>32</sup>

15 With the least sophisticated debtor standard in mind, the court must consider  
16 whether the fraud affidavit should be considered an adequate written notice to Gurstel  
17 that Garcia refused to pay or that Gurstel should cease communications. To begin with,  
18 Gurstel’s own conduct in soliciting the fraud affidavit after having been told verbally that  
19 the debt was disputed and related to fraudulent use of Garcia’s social security number  
20 could easily be confusing or misleading to an unsophisticated debtor. The request for  
21 the affidavit would appear to an unsophisticated debtor to be follow-up paperwork  
22 showing the debt would not be paid by the debtor. Similarly, Garcia’s completion and  
23 return of the fraud affidavit would readily support a least sophisticated debtor’s  
24 expectation that the debt collector understood that the debtor refused to pay the debt.

---

25 <sup>31</sup>*Clark v. Capital Credit & Collection Serv.*, 460 F.3d 1162, 1169-70 (9th Cir. 2006)  
26 (citation omitted).

27 <sup>32</sup>*Id.* at 1171 (citations omitted).





1 exceptions are for communications advising the debtor (1) that the debt collector's  
2 further efforts are terminated, (2) that the debt collector "may invoke specified remedies  
3 which are ordinarily invoked," or (3) that the debt collector "intends to invoke a specified  
4 remedy."<sup>36</sup> Gurstel relies on second exception.<sup>37</sup> Gurstel suggests that the "remedy"  
5 was offering Garcia "an avenue to discuss resolution of the debt if he was interested in  
6 doing so."<sup>38</sup>

8 The second exception applies when a debt collector is giving notice of a specific  
9 remedy it may invoke. Such a remedy might be a demand for arbitration or the filing of  
10 a lawsuit. The May 2012 communications do not refer to any specific remedy that may  
11 be pursued. Rather, they essentially offer to compromise the dispute. At first blush, the  
12 May 2012 letters might appear to fall outside the second exception. However, this court  
13 finds the discussion in a Sixth Circuit decision cited by Gurstel to be instructive. In  
14 *Lewis v. ACB Business Services, Inc.*,<sup>39</sup> the debtor sent the debt collector a written  
15 demand to cease communications. A few weeks later, the debt collector sent the debtor  
16 a communication which in character and tone is indistinguishable from the two May  
17 2012 communications at issue here. Holding that the communication in *Lewis* fell  
18 within the exception established by 15 U.S.C. § 1692c(c)(2), the appellate court  
19 explained:  
20  
21

22 We believe that [debtor's] interpretation of § 1692c(c)(2), which would  
23

---

24 <sup>36</sup>15 U.S.C. § 1692c(c) (1), (2) and (3).

25 <sup>37</sup>Doc. 33 at p. 3.

26 <sup>38</sup>*Id.*

27 <sup>39</sup>135 F.3d 389 (6th Cir. 1998).

1 prohibit collectors from sending noncoercive settlement offers as a  
2 remedy, is 'plainly at variance with the policy of the legislation as a whole.'  
3 To hold that a debt collector cannot offer payment options as part of an  
4 effort to resolve an outstanding debt, possibly without litigation, would  
5 force honest debt collectors seeking a peaceful resolution of the debt to  
6 file suit in order to advance efforts to resolve the debt—something that is  
7 clearly at odds with the language and purpose of the FDCPA.<sup>40</sup>

8 Following the decision in the *Lewis* case the court concludes that the May 2012  
9 communications fall within the second exception. Similarly, the July 2012 solicitation of  
10 a second fraud affidavit represents an effort by Gurstel to help resolve the matter  
11 amicably. Gurstel is entitled to dismissal of Count I.

12 Gurstel contends that Count II should be dismissed, because the 2012  
13 communications did not falsely represent “the character, amount or legal status of any  
14 debt” as required to establish liability under 15 U.S.C. § 1692e(2)(A). Garcia responds  
15 that the 2012 communications “falsely represented that Mr. Garcia owed a debt that did  
16 not belong to him.”<sup>41</sup> The character (type) of the debt and its amount are not disputed.  
17 The only possible basis for Count II is that the 2012 communications falsely represented  
18 the legal status of the debt. While for purposes of the motion at hand, Garcia’s  
19 assertion that he did not owe the debt must be accepted as true, there is nothing in the  
20 2012 communications which actually asserted that the legal status of the debt was that  
21 Garcia was responsible to pay it. Rather, the 2012 communications invited further  
22 dialogue about the debt and even provided a second opportunity for Garcia to contend  
23 that the debt was not Garcia’s debt. Under the least sophisticated debtor standard  
24

---

25  
26 <sup>40</sup>*Lewis*, 135 F.3d at 399 (internal citation omitted).

27 <sup>41</sup>Doc. 30 at p. 10.

1 applied in the context of a Rule 12(c) motion, Garcia’s position is untenable. The 2012  
2 communications cannot reasonably be construed to falsely represent the character,  
3 amount or legal status of the debt. Gurstel is entitled to dismissal of Count II.  
4 Furthermore, to allow Count II to proceed on the basis that the efforts to compromise  
5 the alleged debt amounted to a false representation of legal status would be  
6 inconsistent with the rationale of the appellate court decision in *Lewis* quoted in the text  
7 above.  
8

9 To succeed on Count III, Garcia would need to prove that Gurstel used false  
10 representations or deceptive means to collect the debt or to obtain information from  
11 Garcia.<sup>42</sup> It is Garcia’s position that because he had notified Gurstel that Garcia would  
12 not pay the debt, the May and July 2012 communications constitute false  
13 representations or an attempt to deceive him. As discussed in the preceding  
14 paragraph, the May and July 2012 communications do not constitute false  
15 representations.  
16

17 The question remains whether they were deceptive communications. The Third  
18 Circuit has explained that, “[a] communication is deceptive for purposes of [FDCPA] if it  
19 can be reasonably read to have two or more different meanings, one of which is  
20 inaccurate.”<sup>43</sup> Garcia’s complaint does not ascribe any particular inaccurate meaning to  
21 the 2012 communications. His complaint simply asserts in the most general of terms  
22  
23  
24

---

25  
26 <sup>42</sup>15 U.S.C. § 1692e(10).

27 <sup>43</sup>*Campzano-Burger v. Midland Credit Mgmt.*, 550 F.3d 294, 298 (3d Cir. 2008).

