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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SKY D. SHADOW,

12 Plaintiff,

13 v.

14 MIDLAND CREDIT MANAGEMENT,
15 INC.,

16 Defendant.

Case No.: 3:17-cv-02277-L-BLM

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

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18 In this putative class action alleging deceptive collection of consumer debt,
19 Defendant Midland Credit Management, Inc. ("MCM") filed a motion to dismiss for
20 failure to state a claim. Plaintiff Sky D. Shadow opposed, and MCM replied. The Court
21 decides this matter on the briefs without oral argument. *See* Civ. L. R. 7.1.d.1. For the
22 reasons stated below, MCM's motion is denied.

23 **I. BACKGROUND**

24 According to the operative first amended complaint, Plaintiff received a letter from
25 MCM, dated November 30, 2016, seeking to collect \$1,878.90, originally owing to Chase
26 Bank, USA. (First Am. Compl. ("FAC") & Ex. A ("Letter")). The Letter started with a
27 heading in very large font: "Did you forget something?" It went on to identify the
28 original creditor and debt amount, and encouraged Plaintiff in large, all cap bold letters to

1 "Call us today!" Below the phone number and hours information was another large
2 highlighted section stating, "We can't change the past, but we can help your future." The
3 actual letter started below:

4 Sky D. Shadow, mistakes can happen to anyone. Midland Credit
5 Management believes that anyone deserves a second chance. Call (800)
6 321-3809 or visit us online at www.midlandcreditonline.com by 12-30-2016
7 to accept one of these discounts.

8 **We are offering you 40% OFF your balance to help you eliminate your
9 debt while saving money.**

10 Midland Credit Management will help you put this debt burden behind you.
11 Call us today to pay off your account, and regain your financial freedom!

12 Sincerely,
13 Tim Bolin, Division Manager

14 (Emphasis in original.) To the right of the text set forth above, was another heading set
15 out in much larger bold all caps print: "KNOW YOUR OPTIONS." Below, MCM
16 specified the "discounts." It presented three options, each with a large-print bolded
17 heading. Option 1 was "**40% OFF [¶] Payment Due Date: 12-30-2016;**" Option 2 was
18 "**20% OFF [¶] Over 6 Months;**" and Option 3 was "**Monthly Payments As Low As: \$50
19 per month.**" (Emphases in original.) The last option was set out in larger font than the
20 first two, and did not specify when the amount would be paid in full with \$50 monthly
21 payments, or if any interest would be charged under this option. Below all of the
22 foregoing, in the smallest font on the page, was a disclosure, "The law limits how long
23 you can be sued on a debt. Because of the age of your debt, we will not sue you for it. If
24 you do not pay the debt, we may continue to report it to the credit reporting agencies as
25 unpaid."

26 Plaintiff filed the pending action alleging the Letter violated the Fair Debt
27 Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA") and the Rosenthal Fair
28 Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.* ("Rosenthal Act"). The

1 Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over the FDCPA
2 claims and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the Rosenthal
3 Act claims. MCM filed a motion to dismiss under Federal Rule of Civil Procedure
4 12(b)(6) for failure to state a claim.

5 **II. DISCUSSION**

6 A motion under Rule 12(b)(6) tests the sufficiency of the complaint. *Navarro v.*
7 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted where the complaint
8 lacks a cognizable legal theory. *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d
9 1035, 1041 (9th Cir. 2010) (internal quotation marks and citation omitted). Alternatively,
10 a complaint may be dismissed where it presents a cognizable legal theory, yet fails to
11 plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749
12 F.2d 530, 534 (9th Cir. 1984).

13 In reviewing a Rule 12(b)(6) motion, the Court must assume the truth of all factual
14 allegations and construe them most favorably to the nonmoving party. *Huynh v. Chase*
15 *Manhattan Bank*, 465 F.3d 992, 997, 999 n.3 (9th Cir. 2006). However, legal
16 conclusions need not be taken as true merely because they are couched as factual
17 allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Similarly,
18 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a
19 motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

20 Plaintiff alleges that the Letter was "misleading, confusing, deceptive and unfair"
21 because it attempted to enforce a time-barred debt in violation of the FDCPA, 15 U.S.C.
22 § 1692e(2)(A), (10), § 1692f, as well as the Rosenthal Act, which incorporates these
23 provisions by reference, Cal. Civ. Code § 1788.17. (FAC at 9-13.) Furthermore, the
24 Letter encouraged her to pay the debt without disclosing that "by making even a single
25 partial payment the statute of limitations would potentially be revived which would allow
26 Defendant another four years to sue her for the entire balance." (*Id.* at 9.) Plaintiff
27 contends that the small-print language at the bottom of the Letter, which states that due to
28 the age of her debt MCM would not sue her, was particularly misleading because it led

1 her to believe that she "could accept the options, particularly partial payment options 2 or
2 3, and make partial payments . . . risk free of any future litigation if [she] was unable to
3 continue making the future partial payments." (*Id.*)

4 In analyzing whether a consumer would be misled under 15 U.S.C. §§ 1692e and
5 1692f, "the Court applies the least sophisticated consumer standard. The standard is
6 lower than simply examining whether particular language would deceive or mislead a
7 reasonable debtor." *Gonzales v. Arrow Fin. Services, LLC*, 660 F.3d 1055, 1061 (9th Cir.
8 2011); *see also Wade v. Regl. Credit Ass'n*, 87 F.3d 1098, 1100 (9th Cir. 1996) (applying
9 the least sophisticated consumer standard to §§ 1692e and 1692f). "The standard is
10 designed to protect consumers of below average sophistication or intelligence, or those
11 who are uninformed or naive, particularly when those individuals are targeted by debt
12 collectors." *Gonzales*, 660 F.3d. at 1062 (internal quotation marks omitted). "At the
13 same time, the standard preserv[es] a quotient of reasonableness and presum[es] a basic
14 level of understanding and willingness to read with care . . . The FDCPA does not subject
15 debt collectors to liability for bizarre, idiosyncratic, or peculiar misinterpretations." *Id.*
16 (internal quotation marks and citations omitted).

17 It is apparent on the face of the Letter that it was sent with intent to collect on a
18 time-barred debt. Without a "bizarre, idiosyncratic, or peculiar misinterpretations," the
19 Letter at first blush creates the impression that the debt can be collected. To the extent a
20 "least sophisticated consumer" notices the time-barred debt disclosure in small print at
21 the bottom, when read in the context of the Letter as a whole, the disclaimer creates the
22 impression that partial payments can be made free from the risk of a collection action if
23 the debt is not paid in full. MCM's contentions that the Letter is not a deceptive means of
24 attempting to collect a debt and does not falsely represent the legal status of the debt are
25 rejected. *See* 15 U.S.C. §§ 1692e(2)(A) & (10), 1692f.

26 MCM argues that the letter is not misleading because a partial payment cannot
27 revive a time-barred debt. The parties agree that this legal issue is governed by
28 California Code of Civil Procedure § 360. As relevant here, section 360 provides that a

1 "[p]art payment is deemed to be a sufficient acknowledgment of a 'continuing contract' to
2 take the case out of the statute of limitations." *Eilke v. Rice*, 45 Cal.2d 66, 73 (1955); *see*
3 *also* Cal. Code Civ. Proc. § 360; *Kaichen's Metal Mart, Inc. v. Ferro cast Co.*, 33 Cal.
4 App. 4th 8, 14 (1995); *James de Nicholas Assoc., Inc. v. Heritage Constr. Corp.*, 5
5 Cal.App.3d 421, 426 (1970). However, "[a]ny payment made *after the first four years*
6 *have run* without extension . . . will *not* have the effect of tolling the statute." *Eilke*, 45
7 Cal.2d at 74 (emphases added); *see also* Cal. Code Civ. Proc. § 360 ("no such payment of
8 itself shall revive a cause of action once barred"). What is required to revive a time-
9 barred debt is a written acknowledgment or promise. *Kaichen's Metal Mart*, 33 Cal. App.
10 4th at 14.

11 Plaintiff does not dispute that a written acknowledgment is required. (*See* Opp'n at
12 13.) She argues the Letter was misleading because it encouraged her to make a payment
13 on a time-barred debt. In addition, in accepting one of the "discount" offers, she could
14 unwittingly re-start the statute of limitations. Although partial payment of a time-barred
15 debt does not necessarily revive it, it may, provided there is a written acknowledgment.
16 It is not clear from the Letter, as drafted by Defendant, if a written acknowledgment
17 would be required for the debtor to take advantage of the "discounts." MCM's argument
18 that the complaint should be dismissed because the debt could not be revived is rejected.

19 Alternatively, MCM argues that it is immunized from liability because it included
20 language required by the consent decree it entered into with the Consumer Financial
21 Protection Bureau ("Consent Decree" and "CFPB," respectively). (Def.'s Ex. 1.)¹ The
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24 ¹ MCM requests judicial notice of the consent decree. As a general rule, in ruling on
25 a motion under Rule 12(b)(6), a court may not consider any material beyond the
26 pleadings, or the motion must be treated as a motion for summary judgment and the
27 parties provided an opportunity to present all pertinent material. Fed. R. Civ. Proc. 12(d);
28 *United States v. Corinthian Colleges*, 655 F.3d 984, 998-99 (9th Cir. 2011). However,
material properly subject to judicial notice may be considered without converting the
motion into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.
1994). Pursuant to Federal Rule of Evidence 201, the Court may "take judicial notice of

1 Consent Decree was issued after CFPB determined that MCM and its corporate parent
2 Encore Capital Group, Inc. ("Encore") had engaged in debt collection practices in
3 violation of various consumer protection laws, including FDCPA violations alleged by
4 Plaintiff.² (See Consent Decree at 5-31.) As a part of extensive injunctive relief
5 provision (*id.* at 31-41), MCM and others were subjected to a "Prohibition Against
6 Deceptively Collecting Time-Barred Debt" (*id.* at 38-39.) In pertinent part, the Consent
7 Decree "permanently restrained" MCM from:

8 b. Collecting or attempting to collect any Time-Barred Debt through . . .
9 written communications, without clearly and *prominently* disclosing to the
10 Consumer: [¶]

11 ii. for those Consumer accounts where the Debt is Time-Barred
12 but can be collected through other means pursuant to applicable state law,
13 and may be included in a Consumer report under the provisions of . . . 15
14 U.S.C. § 1681c(a), [MCM] will include the following statement: "*The law
15 limits how long you can be sued on a debt. Because of the age of your debt,
16 we will not sue you for it.*" . . .

17 c. Making any representation or statement, or taking any other action
18 that *interferes with, detracts from, contradicts, or otherwise undermines the
19 disclosures* required in Paragraph (b) of this Section.

20 (*Id.* at 39 (emphases added).)

21 Although MCM included the required language in the Letter, the language was not
22 prominently disclosed as required by the Consent Decree. Furthermore, MCM included
23 other language that detracted from the required disclosure. MCM's argument that
24 inclusion of the required language immunizes it from liability is therefore rejected.

25 'matters of public record,' but not of facts that may be 'subject to reasonable dispute.'
26 *Corinthian Colleges*, 655 F.3d at 999. Accordingly, the Court takes judicial notice of the
27 consent decree.

28 ² MCM, Encore, and other debt collectors were ordered to create a fund of up to \$42
million for restitution to defrauded consumers (Consent Decree at 45-48), and pay
penalties of \$10 million to CFPB (*id.* at 54).

1 MCM also argues that the complaint should be dismissed because it is not
2 obligated and cannot give legal advice to debtors on the potential ramifications of their
3 various possible responses to the Letter. Accepting at face value MCM's contention that
4 it is not obligated to provide legal advice, the argument is rejected. The implication of
5 Plaintiff's claims is not that MCM must provide legal advice, but merely that it must
6 comply with the law by not misleading consumers.

7 Because Plaintiff's FDCPA claims survive MCM's motion, so do her wholly
8 derivative Rosenthal Act claims.

9 **III. CONCLUSION**

10 For the reasons stated above, Defendant's motion to dismiss is denied.

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12 **IT IS SO ORDERED.**

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14 Dated: September 13, 2018

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16 Hon. M. James Lorenz
17 United States District Judge
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