

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONOVAN and JANICE FLECK and the
marital community composed thereof,

Plaintiffs,

v.

CREDIT PROTECTION ASSOCIATION,
L.P., a Texas Limited Partnership,

Defendant.

CASE NO. 3:11-cv-05035RBL

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS [Dkt. #9]

I. INTRODUCTION

THIS MATTER comes before the Court upon Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) [Dkt. #9]. Plaintiffs are debtors and Defendant is a debt collection agency.

Defendant mailed Plaintiffs a letter that stated, "If this account is not settled, your name and account number will be reported to credit bureaus throughout the country."

Plaintiffs claim this single sentence constitutes a violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, the Washington Collection Agency Act (CAA), RCW 19.16, and the Washington Consumer Protection Act (CPA), RCW 19.86. Plaintiffs also claim this sentence establishes that Defendant committed the tort of outrage. Defendant asks the Court to dismiss the Complaint in its entirety. Defendant argues Plaintiffs have failed to state a claim upon which relief can be granted because the sentence is a truthful statement consistent with

1 federal and Washington state law. Plaintiffs ask the Court to treat the Motion as one for summary
2 judgment because Defendant presented matters outside the pleading. Plaintiffs argue there are
3 genuine issues of material fact precluding summary judgment. Because this Court has not relied
4 on matters outside the pleading, and because the Complaint fails to state any claim for which
5 relief can be granted, Defendant's Motion to Dismiss is GRANTED.
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7 **II. FACTS**

8 The Court accepts the facts in Plaintiffs' Complaint as true. Plaintiffs Donovan and
9 Janice Fleck are a married couple from Clark County, Washington. The Flecks fell on hard times
10 and incurred debt on a Comcast account. The Complaint does not disclose the debt amount.
11 Comcast assigned the debt to Defendant Credit Protection Association, a debt collection agency.
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13 On September 13, 2010, "Defendant mailed Plaintiffs a collection letter which stated in
14 pertinent part: 'If this account is not settled, your name and account number will be reported to
15 credit bureaus throughout the country.'" (Compl. at ¶ 4.7, Dkt. #1.)
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17 Two weeks later, Plaintiffs filed this Complaint in Clark County Superior Court, claiming
18 violations of federal and Washington state law. The case was removed and assigned to this Court
19 on January 11, 2011. The Complaint asserts five separate claims. Now, Defendant moves to
20 dismiss the Complaint in its entirety pursuant to Rule 12(b)(6).
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22 **III. DISCUSSION**

23 **A. The Court will treat this Motion as a motion to dismiss under Rule 12(b)(6) 24 because the Court has not relied on matters outside the pleadings.**

25 Without citing any case law, Plaintiffs ask the Court to treat the Motion as one for
26 summary judgment because Defendant presented matters outside the pleadings. According to
27 Plaintiffs, the matters outside the pleading include the following: (1) an unpublished state court
28 case (2) facts concerning Defendant's intent (3) arguments concerning the "least sophisticated

1 consumer” standard, and (4) arguments concerning the veracity of the language in the letter.
2 (Resp. at 4, Dkt. #11.)

3 If, on a motion under Rule 12(b)(6), matters outside the pleadings are presented to and
4 not excluded by the court, the motion must be treated as one for summary judgment. FED. R. CIV.
5 P. 12(d). A motion to dismiss does not automatically convert into a motion for summary
6 judgment if the district court has not relied on matters outside the pleadings. *Swedberg v.*
7 *Marotzke*, 339 F.3d 1139, 1143 (9th Cir. 2003).

9 The Court has not relied on matters outside the Complaint for facts. To the extent
10 Defendant presented facts outside the Complaint, those facts have been excluded from the
11 Court’s analysis. None of the cases or arguments Defendant presented are matters outside the
12 pleadings because these cases and arguments bear directly upon Plaintiffs’ allegations that
13 Defendant violated the FDCPA and CAA. Because the Court has not relied on matters outside
14 the pleadings, it will treat Defendant’s Motion as a motion to dismiss under Rule 12(b)(6).

16 **B. The Motion to Dismiss is GRANTED because Plaintiffs fail to state any claim for
17 which relief can be granted.**

18 **1. 12(b)(6) Standard**

19 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal
20 theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
21 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). Although the Court must accept as
22 true the Complaint’s well-pled facts, conclusory allegations of law and unwarranted inferences
23 will not defeat an otherwise proper [Rule 12(b)(6)] motion. *Vasquez v. L. A. County*, 487 F.3d
24 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.
25 2001). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires
26 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
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1 will not do. Factual allegations must be enough to raise a right to relief above the speculative
2 level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnote omitted).

3 This requires a plaintiff to plead “more than an unadorned, the-defendant-unlawfully-harmed-me
4 accusation.” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*).

5 **2. Plaintiffs fail to state a claim under the FDCPA because the sentence was not**
6 **abusive or misleading.**

7 Plaintiffs’ first claim is that Defendant violated section 1692d of the FDCPA when it
8 wrote the sentence to them because the sentence was abusive. Defendant argues the language
9 was benign. Section 1692d states, “A debt collector may not engage in any conduct the natural
10 consequence of which is to harass, oppress, or abuse any person in connection with the collection
11 of a debt.” As examples of abusive behavior, the section prohibits threatened violence or
12 repeated phone calls. 15 U.S.C. § 1692d(1) & (5). *See also Fox v. Citicorp Credit Serv.*, 15 F.3d
13 1507, 1516 (9th Cir. 1994) (“Threatening and intimidating calls to a consumer at an inconvenient
14 time or place could rationally support a jury finding of harassing conduct.”). Here, Defendant
15 sent one letter to Plaintiffs’ home which included a strongly worded sentence. This conduct is
16 not remotely similar to the examples of conduct section 1692d prohibits. The natural
17 consequence of Defendant’s conduct was not to abuse, but to warn. Debt collectors should be
18 encouraged to make such warnings so that alleged debtors have an opportunity to rectify the
19 situation before being reported to credit bureaus. The section 1692d claim is DISMISSED
20 because the sentence was not abusive.
21

22 Plaintiffs’ second claim is that Defendant violated section 1692e of the FDCPA because
23 the sentence was misleading. Defendant argues the language was truthful and informative.
24 Section 1692e states, “A debt collector may not use any false, deceptive, or misleading
25 representation or means in connection with the collection of any debt,” such as making a “threat
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1 to take any action that cannot legally be taken or that is not intended to be taken.” § 1692e-(5).

2 The test for determining whether a debt collector violated the FDCPA is objective and does not
3 depend on whether the debt collector intended to deceive or mislead the consumer. *Clark v.*
4 *Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006). Instead, the “least
5 sophisticated” debtor standard applies, and the liability analysis turns on whether a debt
6 collector’s communication would mislead an unsophisticated but reasonable consumer. *Id.* Debt
7 collectors are held strictly liable for any violations under the FDCPA. *Donohue v. Quick Collect,*
8 *Inc.*, 592 F.3d 1027, 1030 (9th Cir. 2010).

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10 In *Wade v. Regional Credit Ass’n*, 87 F.3d 1098 (9th Cir. 1996), the Ninth Circuit held
11 the following language did not violate the FDCPA:

12
13 If not paid TODAY, it may STOP YOU FROM OBTAINING credit
14 TOMORROW. PROTECT YOUR CREDIT REPUTATION. SEND PAYMENT
15 TODAY . . . DO NOT DISREGARD THIS NOTICE. YOUR CREDIT MAY BE
16 ADVERSELY AFFECTED.

17 The *Wade* Court found the language to be truthful because the debt collector was not threatening
18 to take action it could not legally take, and the debt collector made no false representation. *Id.* at
19 1100.

20 Here, the sentence was not misleading because it informed Plaintiffs of an action
21 Defendant was entitled to take. Debt collectors in Washington may lawfully report unpaid debts
22 to credit bureaus. RCW 19.16.250(9)(a). Here, Defendant merely “told [Plaintiffs] correctly that
23 [they] had an unpaid debt and properly informed [them] that failure to pay might adversely affect
24 [their] credit reputation. There was no false representation.” *See Wade* at 1100. Presumably,
25 Plaintiffs avoid discussing *Wade* because they cannot distinguish it. The section 1692e claim is
26 DISMISSED because the sentence was not misleading.
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1 **3. Plaintiffs fail to state a claim under the CAA because Defendant was legally**
2 **entitled to contact credit bureaus.**

3 Plaintiffs’ third claim is that Defendant violated the CAA when it wrote the sentence to
4 them because the sentence threatened to impair Plaintiffs’ credit rating. Defendant argues the
5 language is not a threat, and the law expressly entitles it to contact credit bureaus. The CAA
6 prohibits debt collectors from “threat[ening] the debtor with impairment of his credit rating.”
7 RCW 19.16.250(10). Here, the sentence did not mention Plaintiffs’ credit rating. Assuming the
8 sentence constituted an implied threat, it was only a threat to take lawful action. RCW
9 19.16.250(9)(a) expressly permits debt collectors to report unpaid debts to credit bureaus.
10 Plaintiffs fail to explain why the Washington State legislature would expressly permit debt
11 collectors to contact credit bureaus, while simultaneously prohibiting them from warning debtors
12 they intend to contact credit bureaus. The CAA claim is DISMISSED because Defendant had a
13 legal right to contact credit bureaus.
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15 **4. Plaintiffs fail to state a claim under the CPA because Plaintiffs have not**
16 **stated a claim under the FDCPA or CAA.**

17 Plaintiffs’ fourth claim is that Defendant violated the CPA. Plaintiffs’ basis for liability
18 under the CPA is based on the Court finding liability under the FDCPA or CAA. (Compl. at ¶¶
19 9.5-9.7, Dkt. #1.) Because plaintiffs have not stated a claim under the FDCPA or CAA, the CPA
20 claim is DISMISSED.
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22 **5. Plaintiffs fail to state a claim for the tort of outrage because the sentence is**
23 **not outrageous or extreme.**

24 Plaintiffs’ fifth claim is that Defendant committed the tort of outrage by including the
25 sentence in its letter to Plaintiffs. The elements of tort of outrage are (1) extreme and outrageous
26 conduct (2) intentional or reckless infliction of emotional distress, and (3) actual result to the
27 plaintiff of severe emotional distress. *Dicomes v. State*, 113 Wash.2d 612, 630 (1989). The
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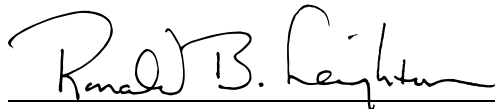
1 conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all
2 possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized
3 community.” *Id.* (quoting *Grimsby v. Samson*, 85 Wash.2d 52, 59 (1975)). Perhaps the sentence
4 was impolite, but it falls far short of being outrageous in character or extreme in degree. The tort
5 claim of outrage is DISMISSED because the sentence is not outrageous or extreme.
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7 **IV. CONCLUSION**

8 Plaintiffs claim a single, strongly-worded sentence gives them the right to pursue a
9 judgment. No judgment is possible because this sentence does not constitute a violation of state
10 or federal law. Because this Court has not relied on matters outside the pleading, and because the
11 Complaint fails to state any claim for which relief can be granted, Defendant’s Motion to
12 Dismiss is GRANTED and this case is DISMISSED with prejudice.
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15 **IT IS SO ORDERED.**

16 DATED this 20th day of June 2011.

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18 RONALD B. LEIGHTON
19 UNITED STATES DISTRICT JUDGE
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