**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF VIRGINIA**
**ROANOKE DIVISION**

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| BRANDY ANDERSON, individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>CAPIO PARTNERS, LLC; CF MEDICAL, LLC; and JOHN DOES 1-25,<br><br>Defendants. | No. 7:20-cv-00298-EKD |

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION**

Defendants, Capio Partners, LLC ("Capio") and CF Medical, LLC ("CFM") (collectively, "Defendants"), by counsel, file this memorandum in support of their Motion for Reconsideration of the Court's January 26, 2021 opinion ("the Opinion") [Dkt. 19], denying, in part, Defendants' Motion to Dismiss ("the Motion").

## I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 59, a Court may reconsider its decision on a motion to dismiss to "correct a clear error of law." *Carter v. United States*, 2020 WL 3883253, *3 (E.D. Va. July 9, 2020). Defendants respectfully submit that the Court should reconsider its decision because: (1) dismissal of Plaintiff's "overshadowing" claim necessitated dismissal of her "misleading" claim; (2) Plaintiff did not allege the conduct that was purportedly misleading in the Complaint; and (3) the Opinion focuses solely on a

particular phrase in the complained-of letter, rather than the letter as a whole, and imposes a level of specificity not required under the Fair Debt Collection Practices Act ("FDCPA").

## II. LAW AND ARGUMENT

The complained-of letter included a settlement offer ("the Offer") that expired within 30 days, explained Plaintiff had 30 days to dispute the debt, and provided the following disclosure:

> This [O]ffer and the deadline for accepting it do not in any way affect your right to dispute this debt and request validation of this debt during the 30 days following your receipt of this letter as described on the reverse side. If you do not accept this [O]ffer you are not giving up any of your rights regarding this debt.

Dkt. 1-1 (hereinafter, "the No-Effect Disclosure") (emphasis added). In the Complaint, Plaintiff asserts two claims. First, Plaintiff asserts that the letter "overshadowed" her right to dispute the debt under § 1692g. Second, Plaintiff asserts the letter was "misleading" as to her right to dispute the debt under § 1692e. Critically, the Complaint's allegations focus *exclusively* on the *deadline* to respond to the Offer and make no mention of the No-Effect Disclosure, except to say that it provides "assurance that the settlement offer does not affect the consumer's 30-day right to dispute." Dkt. 1 at ¶ 37. That is, Plaintiff's theory was that the 30-day deadline would lead a consumer to choose to overlook her rights to take advantage of the Offer, not that the No-Effect Disclosure left her confused about the effect of accepting or rejecting the Offer.

In the Opinion, the Court granted the Motion and dismissed Plaintiff's "overshadowing" claim. Dkt. 19 at p. 9. However, the Court denied the Motion with

respect to Plaintiff's "misleading" claim concluding that, because the Letter says *rejecting* the Offer will *not* affect the consumer's rights, the "the least sophisticated consumer may reasonably believe that she may have no dispute rights if she accepts the settlement because Capio did not describe her dispute rights if she were to accept the settlement." Dkt. 19 at p. 9.

Defendants respectfully submit the Court erred in denying the motion as to Plaintiff's "misleading" claim.

***First, dismissal of Plaintiff's § 1692g "overshadowing" claim should have necessitated dismissal of Plaintiff's § 1692e "misleading" claim.*** FDCPA § 1692g requires a debt collector to explain a consumer's right to dispute a debt and prohibits a debt collector from taking any action that "overshadows" that right. *See* 15 U.S.C. § 1692g. The bar on overshadowing is meant to ensure that a consumer's rights are effectively conveyed, i.e., that the consumer is made aware of her rights and understands those rights. *Cavin v. Smith Debnam Narron Drake Saintsing & Myers, LLP*, 2019 WL 4246673 (M.D.N.C. Sept. 6, 2019). ***Critically, when a plaintiff asserts a letter was confusing or misleading as to her dispute rights for purposes of § 1692g and § 1692e, dismissal of the § 1692g claim is dispositive of the § 1692e claim.*** *See, e.g., Baratta v. Fin. Recovery Servs., Inc.*, 2018 WL 5388057, *4 (N.D. Ill. Oct. 29, 2018) ("[O]ur overshadowing determination is dispositive because the only way in which he claims this language is misleading is that it contradicts and overshadows."); *Caprio v. Healthcare Revenue Recovery Grp., LLC*, 2012 WL 847486, *5 (D.N.J. Mar. 9, 2012), vacated, 709 F.3d 142 (3d Cir. 2013) (same). Plaintiff's § 1692e claim should have been dismissed along with

her § 1692g claim because it is based solely on her theory that the Letter was confusing as to her dispute rights, which is a § 1692g overshadowing issue.

***Second, Plaintiff did not assert in the Complaint that the Letter was misleading due to the No-Effect Disclosure.*** Instead, Plaintiff's allegations focus exclusively on the deadline to respond to the Offer. *See generally* Dkt. 1.

***Third, Defendants respectfully submit that the wrong standard was applied in resolving the Motion.*** Courts in the Fourth Circuit apply the "least sophisticated consumer" standard ("the Standard") in evaluating FDCPA claims. *U.S. v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 138 (4th Cir. 1996). The Standard aims to balance "protecting naïve customers" while "prevent[ing] liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Fariasantos v. Rosenberg & Assocs., LLC*, 2 F. Supp. 3d 813, 818 (E.D. Va. 2014). Under the Standard, a letter qualifies as "false, deceptive, or misleading" only if "it can be *reasonably* read to have two or more meanings, one of which is inaccurate." *Id*. (emphasis added). In resolving this issue, the complained-of letter "must be examined as whole, not sentence-by-sentence." *Id.*

Defendants submit the Standard was not applied here. The Opinion focuses on the second sentence of the No Effect Disclosure rather than the Letter as whole. The second sentence says that *rejecting* the Offer will *not* affect Plaintiff's rights. Were that all the Letter said, a consumer could arguably interpret the Letter to mean that *accepting* the Offer *will* affect her rights. But that is not all the Letter says. The first sentence of the No Effect Disclosure says: ***"This [O]ffer and the deadline for accepting it do not in any way affect***

***your right to dispute this debt*** ***and request validation of this debt during the 30 days following your receipt of this letter."*** Dkt. 1-1 (emphasis added). Given this unequivocal statement, a consumer who read the Letter *as a whole*, and in a *reasonable* way, would not wrongly conclude that *accepting* the Offer *will* result in her waiving her rights.

Relatedly, the Opinion imposes a level of specificity not required by the FDCPA. The Opinion appears to suggest that Defendants needed to explicitly state what, if any, effect accepting the Offer would have on her rights. *See* Dkt. 19 at p. 9 (noting the Letter did not "explicitly describe Anderson's rights if she accepts the settlement offer"). But again, the first sentence of the No-Effect disclosure states that "the Offer and the deadline for accepting it *do not in any way affect your right to dispute this debt*." Dkt. 1-1 (emphasis added). Requiring specifics on the ways Plaintiff's rights are *not* affected threatens to convert FDCPA § 1692e from a provision prohibiting false statements, into one requiring specific, affirmative disclosures.

For these reasons, and as explained in the Motion, three courts have considered nearly identical form letters and concluded the language used is not misleading as to a consumer's right to dispute the debt. *Santora v. Capio Partners, LLC*, 409 F. Supp. 3d 106, 109 (E.D.N.Y. 2017) ("Even the least sophisticated consumer would not read the settlement offer and validation language so carelessly or idiosyncratically as to be misled into disregarding her validation rights."); *Hamilton v. Capio Partners, LLC*, 237 F. Supp. 3d 1109, 1115 (D. Colo. 2017) ("[E]ven the least sophisticated consumer would understand Capio's special settlement offer did not revoke her right to dispute the debt."); *Davidson v.*

*The Law Office of Mitchell D. Bluhm & Assocs., LLC*, No. 1:20-cv-680-LMB (granting defendants' motion to dismiss on the record and without issuing written reasons).

## III. CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court reconsider its Opinion denying, in part, Defendants Motion to Dismiss, conclude the complained-of Letter was not deceptive under the FDCPA, and grant the Motion to Dismiss in its entirety.

CAPIO PARTNERS, LLC and CF MEDICAL, LLC

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 16, 2021, a copy of the foregoing was filed electronically in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to the parties by operation of the court's electronic filing system, at the address of counsel noted below. Parties may access this filing through the court's system.

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