IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TRISHA SPRAYBERRY, on behalf of herself and others similarly situated,

Plaintiff,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Defendant.

Case No. 3:17-cv-00111-SB
Case No. 3:17-cv-00112-SB

AMENDED FINDINGS AND RECOMMENDATION

BECKERMAN, U.S. Magistrate Judge.

Trisha Sprayberry ("Sprayberry") filed class action complaints against Portfolio Recovery Associates, LLC ("PRA") in the above-captioned cases, alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p. Sprayberry alleges that PRA, a debt collector, violated the FDCPA when it attempted to collect Sprayberry's time-barred debts without disclosing that the applicable four-year statute of limitations had already expired. Case No. 3:17-cv-00111-SB relates to Sprayberry's Target credit card, and Case No. 3:17-cv-00112-SB relates to Sprayberry's Walmart credit card. In both actions, Sprayberry seeks to proceed on behalf of a class and requests actual and statutory damages, fees, and costs.

PRA filed a motion for summary judgment in both cases, and Sprayberry filed a motion for partial summary judgment in both cases. For the reasons discussed herein, the Court recommends that the district judge grant PRA's motions for summary judgment and deny Sprayberry's motions for partial summary judgment.

BACKGROUND

The Court adopts Sprayberry's concise statements of material fact (ECF No. 66 in Case No. 3:17-cv-00111-SB and ECF No. 100 in Case No. 3:17-cv-00112-SB), as supplemented by the undisputed facts set forth in PRA's motions for summary judgment.

I. TARGET CREDIT CARD

A. Target Credit Cards Generally

Target is a retailer of goods. (Decl. of Trisha Sprayberry ("Sprayberry Decl.") ¶ 9 (ECF No. 69); Dep. of Susan Wolf ("Wolf Dep.") at 108:16-20 (Decl. of W. Gregory Lockwood ("Lockwood Decl."), Ex. A (ECF No. 72-1)) (Target is a big box retailer that sells merchandise)). Prior to 2013, Target National Bank ("TNB") issued Target store credit cards (referred to herein as the "Target Card"). (Pl.'s Ex. 102 at ECF No. 65-2 (TNB "originates credit cards and service accounts"); Wolf Dep. at 97:21-98:9 (TNB issued the cards)). At that time, Target owned TNB. (Wolf Dep. at 89:19-23.) In October 2012, TNB sold all of its Target credit card accounts to Toronto Dominion ("TD") Bank, and TD Bank became the issuer of Target Cards. (Wolf Dep. at 112:21-24.)

Target employees solicit Target customers to apply for the Target Card, receive customer information for the Target Card application, and send the information to credit bureaus to check against standards set by Target and the issuing bank. (Wolf Dep. at 90:1-91:18.) Target Card cardholders may only use their cards at Target retail stores (Wolf Dep. at 28:10-16), for "personal, family or household purposes." (Credit Card Agreement at 3 ("This Account may be

used only for personal, family, or household purposes."), Wolf Dep. Ex. 1 (ECF No. 72-1 at 48) (the "Credit Card Agreement")). Target Card cardholders can make payments on their accounts at Target stores. (Wolf Dep. at 105:13-106:3.) One of the purposes of the Target Card program is to increase retail sales at Target. (Pl.'s Ex. 105 (ECF No. 68) ("Bank desires to extend credit to its customers to enable them to purchase general retail goods and services normally offered by (Target)"); Wolf Dep. at 114:22-115:1 (goal of credit card program to "increase retail sales of (Target)"); Wolf Dep. at 107:13-21 (Target Card marketing programs encouraged card use)).

B. Sprayberry's Target Credit Card

Sprayberry applied and was approved for a Target Card at a Target store on March 22, 2009. (Wolf Dep. at 11:18-12:24.) Her account had a $200 limit. (Dep. of Trisha Sprayberry ("Sprayberry Dep.") at 52:10-21 (Lockwood Decl., Ex. C).) Sprayberry does not remember seeing the credit card agreement for her Target Card (Sprayberry Dep. at 52:6-21), but the agreement was between Sprayberry and TNB, not Sprayberry and Target. (Credit Card Agreement at 1.) In the agreement, Sprayberry promised to pay TNB any amounts owed on her account. (Credit Card Agreement at 2.) In the event of default, the agreement allowed TNB to: (1) reduce the credit limit; (2) terminate the account; (3) require immediate payment of the entire balance; or (4) bring a collection action. (*Id.* at 5.) TNB reserved the right to sell, assign, or transfer the account. (*Id.*)

Sprayberry's Target Card was a proprietary card, and she could use it only at Target stores. (Wolf Dep. at 27:19-28:16; *see also* Wolf Dep. at 16:5-17:6, 118:5-9.) Sprayberry could also use her Target card at third party businesses that operated inside Target stores, such as Starbucks and optometrists. (Wolf Dep. at 118:5-19:10.)

To the best of her recollection, Sprayberry used her Target Card for "household items," such as food, kids' clothes, or cleaning products. (Sprayberry Dep. at 47:10-18; 50:22-51:8.)

Sprayberry made her last payment on her Target Card account on or about February 10, 2011, before defaulting. (Wolf Dep. at 117:14-22; Sprayberry Dep. at 53:23-54:10.) On June 16, 2011, TNB charged off Sprayberry's account as a loss (Wolf Dep. at 36:18), and the final account balance was $464.76. (Wolf Dep. Ex. 3.) Sprayberry did not dispute that she owed the final $464.76 balance. (Sprayberry Dep. at 64:1-6.)

In February 2013, Target issued a notice to Sprayberry that TD Bank had "purchased the credit card portfolio of Target National Bank, including your Target Credit Card Account," and that her credit card agreement had been modified to reflect that it was now between Sprayberry and TD Bank. (Wolf Dep. at 58, 67-68, 74.) On July 25, 2013, PRA purchased a pool of accounts, including Sprayberry's Target Card account, from TD Bank. (Decl. of W. Gregory Lockwood ("Lockwood Decl."), Ex. B (ECF No. 72-2).)

PRA sent Sprayberry two collection letters, dated January 27, 2016 and April 8, 2016. (Lockwood Decl., Ex. E.) Sprayberry received the collection letters. (Sprayberry Decl. ¶ 11.) The letters offered "Single Payment Savings" if Sprayberry paid $256 within thirty days. (Lockwood Decl., Ex. E.) Each of the letters stated that "[t]he savings will be applied to the balance and your account will be considered 'Settled in Full' after your payment is successfully posted." (*Id.*)

II. WALMART CREDIT CARD

A. Walmart Credit Cards Generally

Walmart is a retailer of goods. (Decl. of Trisha Sprayberry ("Sprayberry Decl.") ¶ 10 (ECF No. 101).) Synchrony Bank ("Synchrony") (formerly GE Money Bank or GE Capital Retail Bank) issues Walmart branded credit cards. (Dep. of Jolene White ("White Dep.") at 16:1-9 (Lockwood Decl. Ex. B, ECF No. 104-2) (Synchrony owns the credit card program for Walmart branded consumer credit cards) and 69:2-9 (Synchrony issued the Walmart cards

pursuant to the program agreement).) Walmart decides which bank issues the Walmart branded credit cards. (White Dep. at 75:2-16.)

Walmart facilitates its customers' applications for Walmart branded credit cards. (White Dep. at 26:14-20 (Sprayberry applied for her card online at Walmart.com); 27:22-28:6 (Walmart shoppers can apply at the store); 28:3-25 (Walmart employee gathers information from customer, sends to the issuing bank, and receives decision); 59:15-20 (GE Capital Retail Bank did not originate the Sprayberry Account); 83:22-24 (customers cannot apply for a Walmart card at a physical Synchrony location). The Walmart private label credit card may be used only at Walmart retail stores (White Dep. at 17:14-18, 78:3-8), for "personal, family or household purposes." (Suppl. Decl. of Joline White ("Suppl. White Decl.") ¶ 6, Ex. 5, ECF No. 36 ("USE OF ACCOUNT (. . .) You may use your Account only for personal, family, or household purposes.").) One of the purposes of the Walmart branded credit card and its incentives is to increase retail sales at Walmart. (White Dep. at 82:1-18.)

On or about December 20, 2011, PRA entered into a purchase agreement to buy a portfolio of defaulted store charge card receivables, and its purchase was finalized on February 29, 2012. (Decl. of Synchrony Bank Representative ("White Decl.") ¶ 10, ECF No. 104-1.)

B. Sprayberry's Walmart Credit Card

Sprayberry applied online for her Walmart credit card on Walmart's website. (White Decl. ¶ 5, Ex. 1; White Dep. at 16:18-17:4, 25:9-23.) Synchrony approved Sprayberry's application and opened her account on January 8, 2009. (White Decl. ¶ 5.) Sprayberry's card was a private label card (White Dep. at 19:4-9), which Walmart refers to as "Walmart cards." (White Dep. at 17:21-23, 18:3-23; Sprayberry Decl. ¶ 4.)

On January 11, 2009, Synchrony mailed a credit card and a copy of the credit card agreement to Sprayberry. (White Decl. ¶ 6; White Dep. at 48:3-8; Suppl. White Decl. ¶ 6, Ex. 5.)

The card agreement provided that the agreement was between Sprayberry and Synchrony (then, GE Money Bank). (Suppl. White Decl. Ex. 5, § 1.) Walmart was not a party to the card agreement. (*Id.*) Sprayberry could use the card "to purchase goods or services" (*id.* § 2) or to obtain "cash loans" at Walmart stores. (*Id.*) Sprayberry promised to pay Synchrony "for all credit that we extend on your Account for Purchases and Cash Advances and all other amounts owed to us under the terms of this Agreement." (*Id.* § 4.) Synchrony "reserve[d] the right to select the method by which payments and credits are allocated to your account in our sole discretion." (*Id.* § 8.D.) Synchrony could declare Sprayberry in default if she failed to make payments, and Synchrony could take the following actions in the event of default: (1) reduce the credit limit; (2) terminate the account; (3) require immediate payment of the entire balance; (4) terminate any special arrangements; and (5) file a collection action. (*Id.* § 13.) Synchrony could "at any time and subject to applicable law, change, add or delete provisions of this Agreement" (*id.* § 12), and Synchrony could "sell, assign or transfer any of our rights or obligations under this Agreement or your Account, including our rights to payments." (*Id.* § 23.)

Sprayberry used her Walmart card to purchase a computer on January 9, 2009. (Sprayberry Decl. ¶ 6.) Sprayberry missed payments due on her account, and made her last payment on the card on February 10, 2011, before defaulting. (White Decl. ¶ 7, Ex. 3; White Dep. at 56:8-58:13.)

On April 11, 2011, Synchrony charged off Sprayberry's account as a loss (White Decl. ¶ 9), and the final statement on that date reflects that the charged off balance was $536.35. (White Decl. ¶ 9; Lockwood Decl. Ex. B, ECF No. 104-2.) Sprayberry does not dispute that she owed the final $536.35 balance on her account. (Sprayberry Dep. at 86:14-21.) PRA sent Sprayberry

two collection letters, dated January 27, 2016 and April 6, 2016.[1] (Lockwood Decl., Ex. G.) Each of the letters offered "Single Payment Savings" if Sprayberry paid $295 within thirty days. (*Id.*) Each of the letters stated that "[t]he savings will be applied to the balance and your account will be considered 'settled in full' after your payment is successfully posted." (*Id.*) Sprayberry received both collection letters. (Sprayberry Decl. ¶ 11.)

DISCUSSION

I. STANDARD OF REVIEW

Summary judgment is appropriate if "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). On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in favor of that party. *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005). The court does not assess the credibility of witnesses, weigh evidence, or determine the truth of matters in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and internal quotation marks omitted).

II. SPRAYBERRY'S FDCPA CLAIMS

A. The FDCPA

The FDCPA prohibits a nonexhaustive list of any "false, deceptive, or misleading representation or means in connection with the collection of any debt," including, as relevant here, the "false representation of—(A) the character, amount, or legal status of any debt"; "[t]he

[1] PRA alleges that it also sent Sprayberry a collection letter on July 23, 2015, for a total of three collection letters. (*See* Lockwood Decl., Ex. G.)

threat to take any action that cannot legally be taken or that is not intended to be taken"; "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt"; and any "unfair or unconscionable means to collect, or attempt to collect, upon the debt." 15 U.S.C. §§ 1692e, 1692e(2)(A), 1692e(5), 1692e(10), 1692f, and 1692f(1).

"The FDCPA 'comprehensively regulates the conduct of debt collectors,' and 'is a strict liability statute.'" *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1119 (9th Cir. 2014) (quoting *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1060-61 (9th Cir. 2011)); *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011) ("[T]he FDCPA is a strict liability statute[.]").

"As a 'broad remedial statute,' the FDCPA must be liberally construed in favor of the consumer in order to effectuate th[e] goal of eliminating abuse." *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1078-79 (9th Cir. 2016) (citations omitted). "[B]ecause the FDCPA is a remedial statute aimed at curbing what Congress considered to be an industry-wide pattern of and propensity towards abusing debtors, it is logical for debt collectors—repeat players likely to be acquainted with the legal standards governing their industry—to bear the brunt of the risk." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006).

B. Time-Barred Debt Collection

Sprayberry alleges in both cases that "PRA's attempt to collect upon a time barred debt by sending Plaintiff the letters . . . , offering to settle the debts, without disclosing that the applicable four year statute of limitations had already run or that she would not be sued for the debt, is a false, deceptive, or misleading representation or means to collect the debt, and a false representation about the legal status of the debt in violation of 15 U.S.C. §§ 1692e, 1692e(2)(A), 1692e(5), and 1692e(10)," and is "an unfair or unconscionable means to collect, or attempt to

collect, upon the debt in violation of 15 U.S.C. §§ 1692f and 1692f(1)." (Compl. ¶¶ 33-34 in Case No. 3:17-cv-00111-SB; Compl. ¶¶ 33-34 in Case No. 3:17-cv-00112-SB.) PRA responds that the applicable statute of limitations for an account stated, open account, or other contract claim is six years under Oregon law, and therefore an action to collect Sprayberry's debts would not have been time-barred.[2] PRA further argues that even if this Court finds that the four-year statute of limitations applies, Oregon law on the applicable statute of limitations was unsettled at the time of the communications at issue, and therefore its attempt to collect the debt either did not violate the FDCPA or is subject to the bona fide error defense.[3]

C. Bona Fide Error Defense

1. Applicable Law

The bona fide error defense is a "narrow exception" to strict liability under the FDCPA. *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008). The defense provides that "[a] debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). "The bona fide error defense is an affirmative defense, for which the debt collector has the burden of proof." *Reichert*, 531 F.3d at

[2] The parties agree that the Court should apply Oregon law here.

[3] In this Court's original Findings and Recommendation on the pending motions for summary judgment, the Court held that PRA's efforts to collect what is only arguably a time-barred debt did not violate the FDCPA. (ECF No. 99.) However, the Ninth Circuit has since reversed the opinion on which this Court relied. *See Kaiser v. Cascade Capital, LLC*, 989 F.3d 1127, 1136 (9th Cir. 2021) (rejecting the defendant debt collector's argument that unless a debt collector "knew or should have known" that the litigation was time-barred, its filing of litigation or threating litigation cannot violate the FDCPA). This Court therefore withdraws its original Findings and Recommendation.

1006 (citing *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1514 (9th Cir. 1994)). To establish the defense, the defendant must prove that: "(1) it violated the FDCPA unintentionally; (2) the violation resulted from a bona fide error; and (3) it maintained procedures reasonably adapted to avoid the violation." *McCollough*, 637 F.3d at 948 (citing 15 U.S.C. § 1692k(c)).

In the Ninth Circuit's recent *Kaiser* opinion, the Ninth Circuit addressed whether a debt collector's mistake about the time-barred status of a debt under state law could qualify as a bona fide error within the meaning of the FDCPA. *See Kaiser*, 989 F.3d at 1137. In *Kaiser*, the plaintiffs alleged that the defendant debt collector violated the FDCPA by communicating with them and filing a debt collection action to collect a debt arising out of a retail installment contract where the statute of limitations precluded collection of the debt. *Id.* at 1131. The parties disagreed as to whether a collection action was time-barred under Oregon law at the time the defendant filed the debt collection suit. *Id.* The Ninth Circuit held that the collection action was time-barred, but nevertheless determined that the debt collector may avoid FDCPA liability by invoking the bona fide error defense. *Id.* at 1137.

Importantly, the Ninth Circuit distinguished between mistakes of law regarding the FDCPA itself, and mistakes regarding state law. The Ninth Circuit acknowledged that, in cases involving a mistake of law about the FDCPA's *own* requirements, such "a mistake about the law is insufficient by itself to raise the bona fide error defense." *Id.* at 1137 (quoting *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 604-05 (2010) ("We therefore hold that the bona fide error defense in § 1692k(c) does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute."). By contrast, the Ninth Circuit noted that "the ignorance-of-the-law maxim does not normally apply where a defendant

has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct." *Id.* at 1138 (quoting *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019)) (simplified). In such cases, "where the defendant is ignorant of an independently determined legal status or condition that is one of the operative facts of the crime . . . the mistake of law is for practical purposes a mistake of fact." *Id.* (quoting *United States v. Fierros*, 692 F.2d 1291, 1294 (9th Cir. 1982)).

As relevant here, the Ninth Circuit noted that the defendant debt collector in *Kaiser* had allegedly violated the FDCPA's prohibition against misrepresenting the legal enforceability of the debt, which "necessarily implicate[s] a legal element entirely collateral to the FDCPA: the time-barred status of the debt under state law." *Id.* at 1139. To that end, the Court held that "a mistake about the time-barred status of a debt is a mistake regarding a collateral legal element of an offense, which we treat as a mistake of fact," and that such mistakes "can be bona fide errors" under the FDCPA. *Id.* at 1139-40.

2. Analysis

PRA argues here that the six-year statute of limitations applies to an action to collect Sprayberry's debts, but even if the Court finds that the four-year statute of limitations applies, its attempt to collect Sprayberry's debts is subject to the bona fide error defense. Sprayberry responded (pre-*Kaiser*) that the bona fide error defense does not apply to errors of law. (Pl.'s Resp. at 30-34 in Case No. 3:17-cv-00111-SB, ECF No. 82; Pl.'s Resp. at 33-37 in Case No. 3:17-cv-00112-SB, ECF No. 112.) Sprayberry also argued that PRA cannot meet the requirements of the bona fide error defense because it did not maintain reasonably adapted procedures to avoid errors to determine the applicable statute of limitations, and its procedures were not reasonably adapted to avoid the FDCPA violations alleged here. (Pl.'s Resp. at 34-38 in Case No. 3:17-cv-00111-SB; Pl.'s Resp. at 37-41 in Case No. 3:17-cv-00112-SB.)

a. Applicable Statute of Limitations

The parties disagree about which statute of limitations applies to an action to collect a debt arising from a retail store's proprietary credit card. Store credit cards are unique from other credit cards because the cardholder is typically restricted to retail purchases at that store. Sprayberry argues that store credit cards operate more like a sale of goods, and therefore the UCC's four-year statute of limitations for a sale of goods applies (i.e., OR. REV. STAT. § 72.7250(1)). PRA asserts that store credit cards such as the ones at issue here are like any other credit card, and Oregon's six-year statute of limitations for account stated, open account, or other claims sounding in contract applies (i.e., OR. REV. STAT. § 12.080).

The Oregon Supreme Court recently recognized in *Portfolio Recovery Associates v. Sanders*, 366 Or. 355, 380 (2020), that a debt collector's account stated claim to collect an outstanding credit card debt is subject to Oregon's six-year statute of limitations for claims sounding in contract. Therefore, if this case involved a typical credit card involving a third party issuer, Oregon's six-year statute of limitations would apply to an account stated claim, an account stated claim would not have been time-barred, and PRA's communications would not have violated the FDCPA. *See Sanders*, 366 Or. at 361-75 (applying Oregon's six-year statute of limitations to PRA's action to collect credit card debt from a Capital One Bank credit cardholder pursuant to an account stated claim); *see also CACV of Colo., LLC v. Stevens*, 248 Or. App. 624, 639-40 (2012) (affirming summary judgment for plaintiff debt collector on breach of contract claim against debtor, and holding that Oregon's six-year statute of limitations relating to contract actions applied to breach of contract claim to collect debt). However, there is no clear guidance from Oregon's courts regarding whether the statute of limitations applicable to retail store credit card debt is distinguishable from other credit card debt.

///

There is conflicting authority from other courts on the issue. PRA correctly points out that courts in Illinois, Kentucky, and Ohio have held that retail store credit cards issued by third party banks are *not* subject to the UCC's four-year statute of limitations for contracts for the sale of goods because credit card agreements are agreements to extend credit, not contracts for the sale of goods. *See, e.g.*, *Midland Funding LLC v. Schellenger*, 127 N.E.3d 1046, 1050 (Ill. Ct. App. 2019) (affirming dismissal of FDCPA claim arising out of debt collector's action to collect on the debtor's store-branded Home Depot credit card, and holding that the determining factor "was not that the credit card was general purpose or usable only at a single establishment, but that a tripartite relationship and a loan of money were involved"); *Fulk v. LVNV Funding LLC*, 55 F. Supp. 3d 967, 971 (E.D. Ky. 2014) (dismissing FDCPA claims relating to a store-branded credit card on ground that the consumer's "attempt to categorize the transaction as a sale of goods fails" because "the creation of a credit card leading to an under[lying] debt is distinct and independent from the sale of goods"); *Asset Acceptance, L.L.C. v. Witten*, No. 90297, 2008 WL 2837304, at *2 n.2 (Ohio Ct. App. July 24, 2008) (affirming summary judgment for debt collector in collection action relating to a store-branded credit card and finding that "where a bank provides financing, but does not sell the goods, an action brought to recover the balance owed is not governed by [the UCC]"); *see also Harris Trust & Sav. Bank v. McCray*, 316 N.E.2d 209, 212 (Ill. Ct. App. 1974) (finding that "a three-party bank-charge-card transaction is in substance a loan of money" and therefore not subject to the UCC).

On the other hand, Sprayberry cites New Jersey cases that applied the UCC's four-year statute of limitations to store-branded credit card collection actions. *See, e.g.*, *Midland Funding LLC v. Thiel*, 144 A.3d 72, 75 (N.J. Super. Ct. App. Div. Aug. 29, 2016) ("[W]e hold that claims arising from a retail customer's use of a store-issued credit card—or one issued by a financial

institution on a store's behalf—when the use of which is restricted to making purchases from the issuing retailer are subject to the four-year statute of limitations set forth in N.J.S.A. 12A:2-725."); *New Century Fin. Servs., Inc. v. McNamara*, A-2556-12T1, 2014 WL 1057076, at *4 (N.J. Super Ct. App. Div. Mar. 20, 2014) (holding that UCC's four-year statute of limitations applied to claim to collect Levitz Furniture Store credit card debt because "the Levitz [store] credit card agreement was a contract for the sale of goods").

The parties' respective briefing makes it clear that whether the four-year or six-year statute of limitations applies to an action to collect store-branded credit card debt is an unsettled question under Oregon law. On the one hand, the Walmart-Synchrony-Sprayberry tripartite relationship is substantially similar to other credit card agreements involving a third-party issuing bank, and the Court anticipates that the Oregon Supreme Court would hold, based on *Sanders*, that the credit card debt arose from a creditor/debtor relationship and not a sale of goods. *See Sanders*, 366 Or. at 376 ("Regardless of the nature of the underlying transaction, 'the crux of an account stated is an agreement . . . that a certain amount is owing and will be paid.'" (quoting *Sunshine Dairy v. Jolly Joan*, 234 Or. 84, 85 (1963))). On the other, the analysis is a closer call with respect to the Target-TNB-Sprayberry relationship, where Target owned TNB, which is arguably more akin to the bipartite relationship for the sale of goods between merchant and consumer. *See Gray v. Suttell & Assocs.*, 123 F. Supp. 3d 1283, 1291 (E.D. Wash. 2015) (holding that the UCC's four-year statute of limitations did not apply to an agreement between a consumer and a bank to finance the sale of goods at issue, but acknowledging that "[i]n limited circumstances where a credit card is obtained from a seller or an entity closely related to the seller, rather than a separate third-party bank, and where the credit card can only be used to buy goods from that seller, the transaction may be deemed a sale of goods such that Article 2

applies"). Although this Court would conclude that the UCC's four-year statute of limitations does *not* apply in either case here because the credit card agreements between the issuing banks and Sprayberry were for an extension of credit, not a sale of goods, the Court cannot predict with any reasonable certainty if the Oregon Supreme Court would agree. In any event, for the reasons discussed below, the Court need not decide which statute of limitations applies here. *Cf. Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361, 1367 (M.D. Ga. 2007) (granting defendant debt collector's motion for summary judgment on FDCPA claim in light of "the uncertainty regarding exactly which statute of limitations applies" and noting that "it is not for this Court to speak in the first instance on what law the [state] courts should be applying").

Having determined that the applicable statute of limitations is indeed an unsettled question under Oregon law, and in light of the Ninth Circuit's recent holding in *Kaiser* that a mistake about the applicable statute of limitations under state law may qualify as a bona fide error under the FDCPA, the Court turns to whether PRA may avoid FDCPA liability under the bona fide error defense here.

b. Bona Fide Error

PRA submitted evidence regarding the procedures it maintains to monitor any potential statute of limitations issues, including evidence of the steps it took to avoid mistakes regarding the limitation period applicable to Sprayberry's accounts. Dale Nordyke ("Nordyke"), PRA's Associate Counsel for Oregon, testified that PRA regularly reviews its compliance with applicable state laws governing the statute of limitations and that PRA's employees receive annual compliance training on the FDCPA and statute of limitations matters to avoid collecting on time-barred accounts. (Dep. of Dale Nordyke ("Nordyke Dep.") at 80:3-24; 123:11-23, ECF No. 72-6; *see also* Def.'s Suppl. Answers to Pl.'s First Set of Interrogatories (Lockwood Decl.

Ex. H, at 8-9); PRA's Training Manual (Lockwood Decl. Ex. G).)[4] Nordyke testified that PRA uses a "conservative approach" and does not file a collection action on any account that is within ninety days of the end of the limitations period. (Nordyke Dep. at 80:7-8.)

PRA also submitted evidence that Nordyke researched Oregon law and determined that Oregon's six-year statute of limitations for breach of contract claims applied to account stated claims. (Nordyke Decl. at 38:19-39:16; 41:8-44:25; 49:12-50:3.) Nordyke determined that the subject accounts were not contracts for the sale of goods, because they were credit card accounts maintained by third-party banks that did not sell any goods. (*Id.* at 73:24-74:4; 77:24-78:3, 81:12-82:6, 84:6-24; 85:18-88:23, 91:8-92:15.) PRA's compliance department and Office of General Counsel reviewed Nordyke's analysis and confirmed its accuracy. (*Id.* at 50:11-21; 53:2-6, 120:20-25.) Based on this due diligence, PRA did not include a time-barred debt disclosure in its letters. (*Id.* at 24:9-12.)

The Court finds that PRA has met its burden of establishing the bona fide error defense here. The relevant facts, which Sprayberry does not dispute, demonstrate that PRA reasonably believed the six-year statute of limitations applied to the claims at issue. This Court agrees with PRA's analysis, but even if the Oregon Supreme Court were to disagree and find that the UCC's

[4] Sprayberry objects to the Court's consideration of PRA's training materials at Exhibit G because PRA did not produce the materials prior to the expiration of the discovery deadline. (Pl.'s Resp. at 2-3 in Case No. 3:17-cv-00111-SB; Pl.'s Resp. at 44-45 in Case No. 3:17-cv-00112-SB.) PRA responds that it produced the materials, which were updated versions of earlier-produced training materials, one month prior to the dispositive motion deadline, Sprayberry did not ask PRA's 30(b)(6) deponent about the originally-produced training materials, Sprayberry did not seek any additional discovery in response to the supplemental production, and Sprayberry did not indicate any need for additional discovery in her motion for summary judgment. (Def.'s Reply at 17-18 in Case No. 3:17-cv-00111-SB.) As such, the Court finds that the timing of PRA's supplemental production was harmless. *See* FED. R. CIV. P. 37(c)(1) ("If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.").

four-year statute of limitations applies instead, any FDCPA violation necessarily resulted from a bona fide error in light of the unsettled question of state law. *See Kaiser*, 989 F.3d at 1130, 1137 (holding that although "the FDCPA prohibitions regarding time-barred debts apply even if it was unclear at the time a debt collector sued or threatened suit whether a lawsuit was time barred under state law[,]" the defendant "may nonetheless be able to avoid liability through the FDCPA's affirmative defense for bona fide errors"); *see also Gray*, 123 F. Supp. 3d at 1289 ("[T]he bona fide error defense may be available in a case alleging defendants filed suit outside the applicable statute of limitations where the applicable limitations period has not been provided by the state legislature or resolved by the state courts.").

PRA's evidence also demonstrates that PRA maintained procedures reasonably adapted to avoid any error in determining the applicable statute of limitations, including: (1) an Oregon-licensed attorney researched the applicable statute of limitations under Oregon law; (2) PRA's compliance department and Office of General Counsel reviewed the attorney's findings; (3) PRA engaged in periodic review of case law on the applicable statute of limitations; (4) PRA implemented systems to verify whether particular accounts owned by PRA fell within the applicable limitations period; and (5) PRA conducted annual FDCPA compliance training. Importantly, the Court cannot point to any additional research or analysis PRA could have performed or any additional resources it could have invested to determine which statute of limitations applied, because it was an open question under state law and therefore unknowable. *See Gray*, 123 F. Supp. 3d at 1294 ("If it is later determined that a four-year statute of limitations applies [to store-branded credit cards], this was not clear to the [Defendants] at the time they filed suit, and understandably so given that it was not clear to the Court in its initial analysis. The [Defendants] believed in good faith that a six-year statute of limitations applied . . . and nothing

in the statutes or case law in Washington, Oregon, or even the case law in other states in 2008, should have alerted the [Defendants] that their understanding was incorrect.").

The undisputed evidence demonstrates that even if the four-year statute of limitations applies to PRA's efforts to collect Sprayberry's debts, any FDCPA violation for collecting on the time-barred debt resulted from a bona fide error. *See, e.g.*, *Klemp v. Columbia Collection Serv., Inc.*, No. 3:13-cv-1577-PK, 2014 WL 5324318, at *7 (D. Or. Oct. 17, 2014) (granting the defendant debt collector's motion for summary judgment based on "find[ing] that [the debt collector] has carried its burden of proving that the violation, if any, was unintentional, the result of a bona fide error, and it maintains procedures reasonably adapted to avoid the type of violation at issue"). Accordingly, the Court recommends that the district judge enter summary judgment in favor of PRA on Sprayberry's FDCPA claims.

CONCLUSION

For the reasons stated, the Court withdraws its original Findings and Recommendation (ECF No. 99), and recommends that the district judge GRANT PRA's motion for summary judgment in Case No. 3:17-cv-00111-SB (ECF No. 71) and Case No. 3:17-cv-00112-SB (ECF No. 103), and DENY Sprayberry's motion for partial summary judgment in Case No. 3:17-cv-00111-SB (ECF No. 65) and Case No. 3:17-cv-00112-SB (ECF No. 99).

///

///

///

///

///

///

///

SCHEDULING ORDER

The Court will refer its Findings and Recommendation to a district judge. Objections, if any, are due within fourteen (14) days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within fourteen (14) days. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 7th day of May, 2021.

Stacie F. Beckerman

HON. STACIE F. BECKERMAN
United States Magistrate Judge