IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Boris Shulman, Plaintiff, vs. Lendmark Financial, Defendant.	)	C/A No.: 3:21-1887-CMC-SVH REPORT AND RECOMMENDATION

Boris Shulman ("Plaintiff"), filed this pro se civil action, asserting Lendmark Financial ("Defendant") violated the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(b) ("FCRA"), by failing to investigate and correct inaccurate information on his credit report. This matter comes before the court on Defendant's motion for summary judgment. [ECF No. 98]. The motion having been fully briefed [ECF Nos. 98, 106, 107], it is ripe for disposition.

All pretrial proceedings in this case were referred to the undersigned pursuant to 28 U.S.C. § 636(b) and Local Civ. Rule 73.02(B)(2)(e) (D.S.C.). Because the motion for summary judgment is dispositive, this report and recommendation is entered for the district judge's consideration. For the reasons that follow, the undersigned recommends Defendant's motion for summary judgment be granted and the case be dismissed with prejudice.

I. Factual and Procedural Background

On September 1, 2016, Plaintiff borrowed $5,024.93 from Defendant under loan number 0089-022036-2 ("Agreement"). [ECF No. 20 at 2, 98-4 at 2, and 106 at 2–3]. The Agreement charged an annual interest rate of 35.968% and a total finance charge of $6,015.07, meaning Plaintiff was expected to pay total payments of $11,040.00 over its term, with 60 monthly installments of $184.00 beginning October 15, 2016 through September 15, 2021. [ECF No. 98-4 at 2 and 106 at 2–3]. Defendant's employee, Sonya Miller ("Ms. Miller"), served as a witness to the Agreement. [ECF No. 98-4 at 2].

Plaintiff paid monthly installment payments of $184.00 in October, November, and December 2016, for a total of $552.00. [ECF No. 98-2 at 3, 98-6 at 2, and 106 at 3]. Plaintiff did not make payments during January and February 2017. [ECF No. 98-1 at 3, 98-2 at 3, and 98-6 at 2]. In February 2017, Defendant reported to credit reporting agencies ("CRAs") that Plaintiff's account was delinquent by at least 30 days. [ECF No. 98-1 at 3].

On or about February 15, 2017, Plaintiff sent a letter to Ms. Miller indicating he had experienced financial difficulty that made it "impossible" for him to honor the Agreement and was working with a third party, InCharge Debt Solutions ("ICDS"), to negotiate new repayment terms. [ECF Nos. 20 at 2, 98-7 at 2, 106-1 at 13]. ICDS subsequently negotiated a loan modification

("Modification") on Plaintiff's behalf with Defendant. [ECF No. 20 at 2]. An undated debt management proposal ("DMP") shows Plaintiff's then-current balance as $10,488.00, a proposed payment of $139.00, a disbursement date of March 28, 2017, and "interest rate lower/higher" as "10.00%/15.00%." [ECF No. 98-9 at 2]. The DMP reflects "No" to "Waive Over Limit Fee," "Waive Late Fee," and "Re-Age Account." *Id.* It bears an "X" in the "ACCEPT" box and an authorized signature. *Id.* Defendant does not dispute that it accepted a Modification. *See* ECF No. 98-2 at 3.

Plaintiff made a $139.00 payment through ICDS that Defendant applied on March 8, 2017 to the January 2017 past-due payment. [ECF Nos. 98-2 at 4, 98-5 at 4, and 98-6 at 2]. In March 2017, Defendant reported to the CRAs that Plaintiff's account was delinquent by at least 30 days. [ECF No. 98-1 at 3]. Plaintiff made a payment of $139.00 through ICDS that Defendant applied on April 3, 2017 to the February 2017 past-due payment. [ECF Nos. 98-2 at 4, 98-5 at 4, and 98-6 at 2]. In April 2017, Defendant reported to the CRAs that Plaintiff's account was delinquent by at least 30 days. [ECF No. 98-1 at 3]. On May 2, 2017, Plaintiff made a payment of $139.00 through ICDS that Defendant applied to the March 2017 past-due payment. [ECF Nos. 98-2 at 4, 98-5 at 4, and 98-6 at 2]. Plaintiff entered into a deferral agreement with

Defendant that resulted in no further reports of late charges.[1] *See* ECF No. 98-2 at 4.

On July 21, 2020, Plaintiff sent a letter to Defendant's local branch requesting a copy of the Modification. [ECF Nos. 20 at 2, 98-10 at 2, and 106-1 at 18]. In this letter, Plaintiff represented that the Modification resulted in his monthly payment being reduced to $139.00 and his repayment period being extended by four months. *Id.* He indicated that his calculation suggested he had 19 payments remaining, which should result in a balance of $2,641.00 instead of the $5,223.80 reflected on his most recent statement from Defendant. *Id.* He stated Defendant had refused to provide him documentation of the Modification and was reporting his balance incorrectly to credit bureaus, resulting in harm to his credit rating. *Id.* He requested Defendant: (1) provide all documentation as to the Modification; (2) provide a summary of his payments over the course of the loan; (3) provide copies of all communication

[1] James Watson ("Mr. Watson"), a branch manager for Defendant, represents Defendant granted Plaintiff a deferral in May 2017 to prevent Plaintiff's account from continuing to be delinquent, ECF No. 98-2 at 4, but neither party has provided a copy of the deferral agreement for the court's review. Mr. Watson indicated that as a result of the deferral agreement, Plaintiff's June 5, 2017 payment through ICDS was applied to the June 2017 balance on Plaintiff's account and subsequent payments were made timely and applied in the months they were received. [ECF Nos. 98-2 at 4, 98-3 at 12–14, and 98-6 at 2–6].

between him and Defendant; (4) correct balances reported to credit bureaus; and (5) provide correct balances on future statements. *Id.*

On July 28 and 29, 2020, Plaintiff filed disputes with CRAs Transunion and Experian, based on Defendant's report of a higher outstanding balance than he believed he owed. [ECF Nos. 20 at 3 and 98-1 at 4]. He disputed the current balance and/or amount past due, stating the loan was modified three-and-a-half years prior, resulting in a reduced balance of about $2,641.00 and claiming the lender had inaccurately reported the balance for a "NUMBER OF MONTHS." [ECF No. 98-11 at 3, 5]. The CRAs contacted Defendant and Defendant investigated the matter and confirmed with the CRAs that the reporting of an updated current balance of $4,674.00 was accurate as of July 27, 2020. [ECF Nos. 20 at 3, 98-1 at 4, and 98-11 at 6].

On August 8, 2020, Plaintiff sent a letter to Defendant's headquarters with a copy of his July 21 letter to the local branch. [ECF Nos. 20 at 2, 98-12 at 2, and 106-1 at 19]. He indicated the local branch had not responded to his letter and requested that Defendant investigate the matter, provide him with the requested information, and take the other requested action by August 31, 2020. [ECF No. 98-12 at 2–3 and 106-1 at 19].

On August 21, 2020, Defendant sent Plaintiff a letter indicating it was unable to accommodate his request because he had "failed to provide a

description of the specific information [he was] disputing or provide an explanation for the basis of [his] dispute." [ECF No. 20 at 2, 98-14 at 2 and 106-1 at 21].

In late-2020 or early-2021, Plaintiff upgraded his credit monitoring service with Experian, allowing him to view details of his credit history. [ECF No. 20 at 3]. He noticed that Defendant reported late payments for three consecutive months in 2017. *Id.* He did not challenge this aspect of the report with Experian when he noticed it, as he did not believe it would be productive, given Defendant's prior response. *Id.*

Plaintiff filed his original complaint in the Magistrate's Court in Richland County, South Carolina, on May 18, 2021. [ECF No. 1-1 at 2–7]. Defendant removed the case to this court on June 21, 2021. [ECF No. 1].

Plaintiff subsequently contacted a CRA on August 9, 2021, to dispute the record of late payments. [ECF Nos. 20 at 3, 98-1 at 5, and 98-13]. On August 19, 2021, the CRA informed Plaintiff that Defendant had verified as accurate the three late payments reflected on his credit report. [ECF No. 20 at 3 and 98-1 at 5–6].

Plaintiff satisfied his obligations pursuant to the Agreement on December 8, 2021. [ECF Nos. 98-2 at 4, 98-3 at 12–14, and 98-6 at 2–6]. The record reflects that Plaintiff paid Defendant a total of $8,768.00 ($552.00

(October, November, and December 2016) + $8,216.00 (payments made between March 2, 2017 and December 30, 2021)), which was $2,272.00 ($11,040.00–$8,768.00) less than the total payments reflected in the Agreement. *See* ECF Nos. 20 at 2, 98-2 at 3, 98-3 at 12–14, 98-4 at 2, 98-6 at 2, and 106 at 3.

II. Discussion

A. Standard on Summary Judgment

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to a material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* At the summary judgment stage, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255.

B. Analysis

1. FCRA Claim

Plaintiff's report to the CRAs and Defendant's duties with respect thereto are addressed under 15 U.S.C. § 1681s-2(b), which has been recognized as creating a private right of action. Upon being notified of a consumer's dispute as to the accuracy of information provided to a CRA, a furnisher must:

> (A) conduct an investigation with respect to the disputed information;
> (B) review all relevant information provided by the CRA pursuant to section 1681i(a)(2) of Title 15;
> (C) report the results of the investigation to the CRA;
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other CRAs to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
> (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete and cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a CRA only, as appropriate, based on the results of the reinvestigation promptly—
> (i) modify that item of information;
> (ii) delete that item of information; or
> (iii) permanently block the reporting of that item of information.

15 U.S.C. § 1681s-2(b)(1). "Thus, FRCA requires furnishers to determine whether the information that they previously reported to a CRA is 'incomplete or inaccurate.'" *Clifton v. Nationstar Mortg., LLC*, C/A No. 3:12-2074-MBS, 2013 WL 789958, at *2 (D.S.C. Mar. 4, 2013) (citing 15 U.S.C. § 1681s-

2(b)(1)(D)). "A violation of section 1681s-2(b) occurs when a furnisher negligently or willfully fails to reasonably investigate a properly lodged consumer dispute as required by 15 U.S.C. § 1681s-2(b)(1)(A)." *Id.* (citing *Johnson v. MBNA Am. Bank, N.A.*, 357 F.3d 426, 431 (4th Cir. 2003)).

"To prevail on a claim under § 1681s-2(b), a plaintiff must demonstrate that (1) she notified a consumer reporting agency of the disputed information, (2) the consumer reporting agency notified the furnisher of the dispute, and (3) the furnisher failed to investigate and modify the inaccurate information." *Wilson v. Wells Fargo Bank, N.A.*, C/A No. 2:20-2780-BHH-MHC, 2021 WL 2003524, at *4 (D.S.C. Apr. 30, 2021) (citing *Alston v. Branch Banking & Tr. Co.*, No. GJH-15-3100, 2016 WL 4521651, at *6 (D. Md. Aug. 26, 2016); *Hoback v. Synchrony Bank*, No. 6:19-cv-18, 2019 WL 2438794, at *2 (W.D. Va. June 11, 2019), report and recommendation adopted by 2021 WL 2003184 (D.S.C. May 19, 2021)). A plaintiff cannot prevail unless the furnisher provides inaccurate or incomplete information.

Claims brought pursuant to the FCRA are subject to a statute of limitations, which provides:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of—
>
> (1) 2 years after the date of discovery by the plaintiff of

> (2) the violation that is the basis for such liability; or
> 5 years after the date on which the violation that is the basis for such liability occurs.

15 U.S.C. § 1681p.

The court's review is limited to consideration of whether Defendant violated the FCRA based on the July 2020 dispute, as any claim Plaintiff might bring with respect to the August 2021 dispute was not yet ripe at the time the action was filed. The 30-day period for Defendant to investigate the August 2021 dispute had not concluded by the time Plaintiff filed the amended complaint on August 23, 2021. [ECF No. 20].

The Fourth Circuit has explained:

> [A] furnisher's duty to investigate is not triggered until it receives notification of a dispute from a consumer reporting agency. *See* 15 U.S.C. § 1681s-2(b)(1); *Stafford v. Cross Country Bank*, 262 F.Supp.2d 776, 784 (W.D. Ky. 2003) ("This means that a furnisher of credit information, such as the Bank, has no responsibility to investigate a credit dispute until after it receives notice from a consumer reporting agency.") (emphasis in original). Once the duty to investigate is triggered, a furnisher breaches that duty if it fails to comply within thirty days.

Mavilla v. Absolute Collection Services, Inc., 539 F. App'x 202, 208 (4th Cir. 2013). As the court previously explained in its report and recommendation, which was adopted by reference in the court's order ruling on the motion to dismiss:

> Plaintiff also alleges he contacted Experian to dispute Defendant's

> reports on August 9, 2021. [ECF No. 20 at 3]. He cannot proceed in this action with respect to the August 9, 2021 inquiry because Defendant had not breached any duty under the FCRA as to that inquiry at the time this action was commenced or at the time Plaintiff filed his amended complaint. *See Mavilla*, 539 F. App'x at 208 ("Here, the undisputed facts demonstrate that ACS received notification of the disputed debt on September 27, 2010 . . . . It is also uncontested that this action was commenced on October 4, 2010, only five days after ACS's duties arose. Thus, at the time of this suit, ACS had not breached any duty under the FCRA.").

[ECF No. 30 at 11]. Plaintiff did not dispute Defendant's 2017 reports of late payments when he notified the CRAs of the disputed information in July 2020. *See* ECF Nos. 20 at 3 and 98-11 at 3, 5. He only disputed the balance owed. *See id.* Therefore, the court can only consider whether the balance Defendant reported the CRAs in July 2020 was incomplete or inaccurate.

The undersigned rejects Defendant's assertion that Plaintiff's claim is time-barred. The parties entered into the Agreement on September 1, 2016. [ECF No. 20 at 2 and 98-4 at 2]. Any violation would have occurred after this date, which was less than five years prior to Plaintiff's filing of the civil action. The two-year statute of limitations "begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist." *Croft v. Bayview Loan Servicing, LLC*, 166 F. Supp. 3d 638, 641 (D.S.C. 2016) (citing *Tidewater Fin. Co. v. Williams*, 498 F.3d 249, 260 n.11 (4th Cir. 2007)). Although it is not entirely clear from Plaintiff's pleadings when he

discovered Defendant had reported a higher balance to the CRAs than he believed he owed, this appears to have occurred "[s]ometime in 2020" when he reviewed his credit report. *See* ECF Nos. 20 at 2 and 106 at 12. Plaintiff could have reviewed his credit report earlier, but, in the absence of any information to suggest a discrepancy, he did not fail to exercise due diligence by not doing so. He filed a complaint in the Richland County Magistrate's Court less than two years after he discovered the perceived discrepancy in the amount Defendant reported to the CRAs. Therefore, the statute of limitations had not run when Plaintiff filed the civil action.

Plaintiff had paid a total of $6,266.00 ($552.00 prior to March 2017 and $5,714.00 through ICDS between March 2017 and July 2020 (reflecting 38 payments of $139.00 per month and three payments of $144.00 per month from March 2, 2017, through June 30, 2020)) to Defendant as of July 2020, when he filed the dispute. *See* ECF No. 98-3 at 13–14. The Loan Agreement was for $5,024.93 financed over 60 months at a rate of 35.968%. Given the interest rate, missed payments for January and February 2017, and reduced payments from March 2017 through June 2020, Defendant's July 2020 representation that the balance on the account was $4,674.00 appears accurate. *See* ECF Nos. 98-4 at 2 98-11 at 6.

Nevertheless, Plaintiff argues the terms of the Agreement were altered

by a Modification. The parties do not dispute that a Modification exists, but they disagree as to its terms. Plaintiff maintains the Modification changed the terms of the Loan Agreement such that his "future projected balance was reduced by approximately $2,500.00" and an "additional 4 months were added to the repayment life span." [ECF No. 20 at 2]. Defendant claims the Modification recognized that Plaintiff owed $10,488.00, but provided for forgiveness of the remaining balance if Plaintiff made 57 timely monthly payments totaling $7,923.00, plus applicable fees. [ECF No. 107-1 at 3]. Thus, whether or not Defendant inaccurately reported the balance due on Plaintiff's account is dependent on whether the Modification provided for the balance due on the loan to be reduced at the time the Modification was made, as Plaintiff argues, or whether the difference was to be forgiven at the end of the term, as Defendant claims. Defendant attached to its motion the DMP, which shows Plaintiff's then-current balance as $10,488.00, a proposed payment of $139.00, a disbursement date of March 28, 2017, and an indication that the account was not to be re-aged. [ECF No. 98-9 at 2]. The DMP generally appears to support the terms of the Modification Defendant indicates, but it does not bear Plaintiff's signature, and Plaintiff indicates he did not receive a copy of it prior to initiating litigation. *Id.*; ECF No. 98-5 at 3; ECF No. 106 at 4 ("It's indisputable fact, that first time Defendant provided 'clarification' that

repayment was meant: to be done for the 57 months with $139 monthly payments during later stage of Discovery in this Court, in its Supplemental Response to my Interrogatory 1, 1st Set [could be seen in ECF No. 65, Exhibit 1, pp. 4–5].”). Because the court must interpret the evidence at the summary judgment stage in the light most favorable to Plaintiff, the undersigned cannot accept Defendant's interpretation of the Modification as representing its terms in the absence of evidence that Plaintiff accepted these terms.[2] It appears the parties had a genuine legal dispute over the interpretation of the Modification.

Though not binding, the undersigned considers persuasive decisions from outside the Fourth Circuit holding that violations under § 1681s-2(b) must be based on factual inaccuracies, not on disputes over the terms of a contract. *See Chiang v. Verizon New England, Inc.*, 595 F.3d 26 (1st Cir. 2010) (“We emphasize that . . . a plaintiff's required showing is *factual* inaccuracy, rather than the existence of disputed legal questions . . . . [F]urnishers are neither qualified nor obligated to resolve matters than turn on questions that can only be resolved by a court of law.” (emphasis in original) (internal quotations omitted)); *Hunt v. J P Morgan Chase Bank Nat'l Ass'n*, 770 F. App'x

[2] The undersigned declines to address whether the Agreement is controlling, whether the Modification serves as a valid contract, or any arrangements between Plaintiff, Defendant, and ICDS, as these issues are not before the court and do not have to be addressed to resolve the issues before the court.

452, 458 (11th Cir. 2019) (finding "[a] plaintiff must show a factual inaccuracy rather than the existence of disputed legal questions to bring suit against a furnisher under § 1681s-2(b)"). A claim does not arise under the FTCA unless the furnisher negligently or willfully provides incomplete or inaccurate information to a CRA, see *Johnson*, 357 F.3d at 431, and the furnisher's action cannot be considered negligent or willful where it provides information based on its interpretation of the contract provision, even if a dispute exists between the furnisher and the plaintiff over the terms of the contract. Therefore, because Plaintiff bases his claim not on a factual inaccuracy, but on a dispute over the terms of his contract with Defendant, he cannot prevail on the FCRA claim.

Furthermore, even if Plaintiff could show that Defendant violated the FCRA by reporting inaccurate or incomplete information, he has failed to demonstrate that he is entitled to damages. A plaintiff must show damages to prevail in a claim based on negligence under § 1681s-2(b). *See Tinsley v. TRW, Inc.*, 879 F. Supp. 550, 552 (D. Md. 1995). ("The absence of any economic damages dooms Plaintiff's venture in this Court."). If a furnisher negligently violates the FCRA, a plaintiff may recover "any actual damages . . . sustained as a result of the failure." 15 U.S.C. § 1681o. However, a plaintiff cannot recover nominal damages for negligent violations under the FTCA. *Wright v.*

TRW, Inc., 872 F.2d 420 (4th Cir. 1989) (Table) (concluding that nominal damages should not be awarded without a showing of actual damages, unless a violation is willful).

In his amended complaint, Plaintiff alleges Defendant's inaccurate reporting caused him "recurrent stress," "damage to his Credit, higher cost of Credit and denied credit." [ECF No. 20 at 4]. Despite his allegations, Plaintiff failed to produce evidence of denied credit or changes to his credit score. *See* ECF Nos. 98-19 at 5, 6 and 106 at 22. Plaintiff claims he has "suffered extensive emotional pain and stress" due to the confrontation with Defendant. [ECF No. 106 at 22]; *see also* ECF No. 98-19 at 6 ("My main basis of damages are coming from stress caused by Lendmark's aggressive, deceptive, dismissive conduct over course of Loan, and plus this aggressive, offensive transferring my lawsuit from US Magistrate Court to US District Court."). However, his failure to produce any evidence to corroborate his claim of emotional distress forecloses this avenue for proving actual damages. *See Doe v. Chao*, 306 F.3d 170, 180 (4th Cir. 2002) ("An award for compensatory emotional distress damages requires evidence 'establish[ing] that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a . . . violation occurred supports an award of compensatory damages.'"

(quoting *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996)). Moreover, Plaintiff appears to assert his emotional distress was caused by his interaction with Defendant prior to and during litigation, not to Defendant's providing of inaccurate or incomplete information to the CRAs. Therefore, even if he had provided proof of demonstrable emotional distress due to these perceived sources, he would not be able to show he sustained compensable damages under the FCRA.

A plaintiff may recover actual or statutory damages and punitive damages for willful violations of the FCRA, even without a showing of "actual damages." *Saunders v. Branch Banking & Trust Co. of VA*, 526 F.3d 142, 152 (4th Cir. 2008). However, to prove a willful violation, Plaintiff must show Defendant "'knowingly and intentionally committed an act in conscious disregard for the rights' of the consumer." *Dalton v. Capital Associated Industries, Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) (quoting *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986)). Here, Plaintiff has presented no evidence to support a finding that Defendant acted willfully in reporting inaccurate or incomplete information to CRAs. Therefore, he cannot recovery statutory or punitive damages.

2. Motion for Attorney's Fees

Defendant requests the court award its attorney's fees pursuant to 15 U.S.C. § 1681n(c), which provides:

> Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

In Thomas v. Santander Consumer USA, C/A No. 1:11-605, 2012 WL 263479 (M.D.N.C. Jan. 30, 2012), the court, addressing a request for attorney fees pursuant to § 1681n(c) explained as follows:

> "Bad faith is not simply 'bad judgment or negligence, but implies the conscious doing of a wrong because of a dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.'" *Shah v. Collecto, Inc.*, No. Civ. A. 2004-4059, 2005 WL 2216242, at *14 (D. Md. Sept. 12, 2005) (unpublished) (quoting *Black's Law Dictionary* 139 (6th ed. 1990)); *see also In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000) (citing same bad faith definition in analysis of sanctions related to criminal complaint filing).
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> Furthermore, this determination must focus on the plaintiff's mental state at the time of filing. *See Rogers v. Johnson-Norman*, 514 F. Supp. 2d 50, 52 (D.D.C. 2007) ("It is not enough to show that the 'pleading, motion, or other paper' in question 'later turned out to be baseless.'" (quoting *Ryan v. Trans Union Corp.*, No. 99-216, 2001 WL 185182, at *6 (N.D. Ill. Feb. 26, 2001) (unpublished)).

The court may award attorney fees to a prevailing defendant . . . upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation,"

but should "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a Plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. *Christiansburg Garment Co. v. Equal Employment Opportunity Commissioner*, 434 U.S. 412, 421–22 (1978).

Defendant argues Plaintiff brought a civil action in bad faith for the purpose of harassment. [ECF No. 98 at 21]. It more specifically maintains Plaintiff was "a serial litigant with a significant credit history," who had "knowledge of the elements of his claim, court proceedings, the rules of civil procedure, and the rights of lenders and borrowers"; knew or should have known his claims were groundless; has "plagued this litigation with frivolous and baseless motions and filings—all of which have been denied"; failed to approach mediation in good faith; and has "threat[ened] to file more groundless and frivolous lawsuits against Lendmark even after this litigation has concluded." *Id.* at 21–22.

Plaintiff represents: "Should Lendmark at any point of time in 2017 (and later in years 2020 and 2021), had provided me with clear information about Loan satisfaction terms—how many monthly $139 payments I had to make to satisfy Loan, controversy and confrontation between Lendmark and me would had ended right away." [ECF No. 106 at 8]. He indicates he repeatedly sought

information from Defendant directly and through an attorney as to "how many months [he] needed to make $139 payments," but was met with "evasion." *Id.* at 11. He claims his "confrontation would have ended right away" if Defendant would have provided the requested information to him or his attorney. *Id.* He admitted he had filed two lawsuits in the district court more than a decade ago, but claimed he had never filed a frivolous lawsuit in any court. *Id.* at 26–31. He represents he has conducted internet research and replicated filings based thereon, has filed motions that were denied due to his insufficient legal knowledge and arguments, and has tried to learn "mainly from [his] mistakes." *Id.* at 27.

As discussed above, the record before the court shows the parties had different understandings as to the terms of the Modification. Although Defendant has produced the DMP, it has produced no evidence that Plaintiff agreed to the terms reflected in the DMP or received notification of it. Plaintiff, on the other hand, has alleged and produced evidence that he made repeated attempts to ascertain the terms of the Modification from Defendant prior to filing suit and had a different understanding of its terms. *See* ECF No. 20 at 2–3 and 106-1 at 14, 15, 18, 19, 22. Because it appears that Plaintiff originally filed this action in the Magistrate's Court in Richland County, South Carolina, for the legitimate purpose of ascertaining information as to how much longer

he was obligated to make payments to Defendant, the undersigned cannot find the action was brought in bad faith or for the purpose of harassment.

To the extent Defendant argues it is entitled to attorney's fees because Plaintiff should have abandoned his claim or accepted a settlement offer after he received a copy of the DMP or after it clarified his obligations under the Modification, the undersigned rejects this argument because the evidence before the court does not prove that Plaintiff agreed to the terms as reflected in the DMP. Thus, upon receiving clarification from Defendant as to its understanding of the Modification and a copy of the DMP, Plaintiff still reasonably believed Defendant violated the FCRA because the terms were inconsistent with his understanding of the agreement.

The undersigned recommends the case be dismissed because a dispute over contract interpretation does not qualify as "inaccurate or incomplete information" under the terms of the FCRA and Plaintiff has not proven actual damages as required for recovery, but these ultimate findings do not mean Plaintiff's actions were frivolous, unreasonable, or without foundation at the time he brought suit or even after he received additional information from Defendant. *See Christiansburg Garment Co.*, 434 U.S. at 421–22.

Although Plaintiff filed several motions throughout this litigation that the undersigned ultimately denied, his filing of these motions do not reflect

bad faith or attempts to harass Defendant. Instead, they reflect Plaintiff's failure to receive a pleading that Defendant's counsel indicated he mailed, his dissatisfaction with Defendant's responses to discovery requests, his legal inexperience, and his unfamiliarity with evidence relevant to an FCRA claim, the Local Civil Rules (D.S.C.), and the Federal Rules of Civil Procedure. *See* ECF Nos. 30, 33, 70, 71, 80, 85, 87, 94, 102, 103.

Finally, the undersigned declines to consider evidence Defendant submitted for the purpose of showing that Plaintiff engaged in bad faith with respect to settlement negotiations. The FCRA only allows for attorney fees where a plaintiff "file[d]" a "pleading, motion, or other paper . . . in connection with an action under this section . . . in bad faith or for purposes of harassment. 15 U.S.C. § 1681n(c). Because settlement negotiations are not "filings," they cannot serve as a basis for an award of attorney fees under the FCRA, even if they are conducted in bad faith. *See Alston v. Branch Banking & Trust Company*, C/A No. GJH-15-3100, 2018 WL 4538538, at *5 (D. Md. Sept. 20, 2018) (citing *Ryan v. Trans Union Corp.*, C/A No. 99-216, 2001 WL 185182, at *6 (N.D. Ill. Feb. 26, 2001) ("The statute requires a showing that a document was filed in bad faith."); *Arutyunyah v. Cavalry Portfolio Services*, C/A No. 12-4122-PSG (AJWx), 2013 WL 500452, at *2 (C.D. Cal. Feb. 11, 2013) (noting that attorneys' fees under FCRA may be awarded when a pleading or other

document is filed in bad faith, but "may not be based on misconduct during the pendency of the action, such as the use of delay tactics or failure to communicate with opposing counsel.")).

In light of the foregoing, the undersigned finds the record before the court does not support Defendant's request for attorney's fees pursuant to § 1681n(c) of the FCRA.

3. Plaintiff's Request for Court to Censure Defendant

In his response in opposition to Defendant's motion for summary judgment, Plaintiff asks the court to "censure Defendant" for the "brazen, frivolous claim" for attorneys' fees. [ECF No. 106 at 31]. The undersigned interprets Plaintiff's motion as one for sanctions pursuant to Fed. R. Civ. P. 11(b), which provides:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
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> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

> (3) the factual contentions have evidentiary support, or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

"If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P 11(c)(1). The party moving for sanctions bears the burden to demonstrate the specific conduct violates Rule 11(b). Fed. R. Civ. P. 11(c).

Plaintiff has not met his burden to demonstrate that Defendant's conduct violates Rule 11(b). Although the undersigned recommends the court deny Defendant's motion for attorney fees, its request under 15 U.S.C. § 1681n(c) does not reflect a violation of Rule 11(b). In addition, evidence Plaintiff submitted as to the parties' settlement negotiations is inadmissible, as it does not meet the exceptions in Fed. R. Evid. 408(b). Therefore, the undersigned recommends the court deny Plaintiff's motion for sanctions.

III. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends the court grant Defendant's motion for summary judgment, deny Defendant's motion for attorney's fees, deny Plaintiff's motion for sanctions, and dismiss the case with prejudice.

IT IS SO RECOMMENDED.

September 6, 2022
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).