IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHRIS D. RISENER and LACRISTA A. BAGLEY, individually and as Representatives of a class of all those similarly situated,	)	
Plaintiffs	)	
v.	)	**Case No. CIV-10-1110-R**
BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A. and BAC HOME LOANS SERVICING, LP,	)	
Defendants.	)	

ORDER

This matter comes before the Court on the Motion to Dismiss, filed by Defendants Bank of America Corporation, Bank of America, N.A., and BAC Home Loans Servicing, LP.[1] Plaintiffs responded in opposition to the motion. Having considered the parties' submissions, the Court finds as follows.

The Court previously dismissed Plaintiffs' claims because Plaintiffs had failed to allege any specific facts or claims against any particular Defendant, instead referring to the three entities collectively as Bank of America, and proceeding without further reference to the role of any particular entity. Plaintiffs filed a Second Amended Complaint, and Defendants seek dismissal thereof, arguing that Plaintiffs continue to fail to allege specific

[1] In the Second Amended Complaint, Plaintiffs utilize one set of abbreviations for the parties, and in the motion to dismiss, Defendants utilize two of the three abbreviations, but substitute the third. In the interest of clarity, unless quoting the parties' the Court will not use abbreviations herein.

actions taken by the Defendant entities individually, and that Plaintiffs fail to allege the relationship among the Defendants so as to permit the Court to find one or more Defendants liable for the actions of another Defendant.[2] Defendants further contend that to the extent there are facts alleged against Defendants Bank of America, N.A. and Bank of America Corporation, that the facts alleged do not support claims against them. Finally, Defendants argue Plaintiffs' claims are insufficiently pled, in part because Plaintiffs have failed to allege facts to support their contention that Defendants were "debt collectors" under the Fair Debt Collection Practices Act ("FDCPA"), and that Section 1681s-2(a) of the Fair Credit Reporting Act ("FCRA") does not provide a private right of action. Plaintiffs contend they have sufficiently pled claims against all Defendants so as to avoid 12(b)(6) dismissal.[3]

Common to all Defendants and all claims, Plaintiffs allege in 2008 they purchased a home utilizing financing provided by mortgage lender, Taylor, Bean and Whitaker Mortgage Corporation ("TBW"). In August 2009, TBW was notified by the United States Department of Housing and Urban Development, Freddie Mac and Ginnie Mae that it was no longer an approved servicer for those agencies. As a result, TBW ceased doing business, and ceased servicing Plaintiffs' loan. Correspondingly, the servicing rights in Plaintiffs' loan was assigned, as set forth below, by Defendant.

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[2] Plaintiffs disavow any attempt to hold any Defendant liable for the actions of another Defendant, i.e. under an alter ego or piercing the corporate veil theory. Accordingly, the Court need not address this aspect of the motion to dismiss, but rather will confine its consideration to the specific allegations against each Defendant, individually.

[3] In every count of the Second Amended Complaint, Plaintiffs' statutory citation is incorrect. Rather than dismiss the counts on this basis, the Court has considered the obviously intended statutory provisions.

Plaintiffs allege (1) that Defendant Bank of America Corporation, along with its co-defendants, received Plaintiff's loan in assignment, and according to Bank of America records, when Bank of America took over the servicing rights, the mortgage was in default (¶4); (2) in September 2009, Plaintiffs contacted the Oklahoma City office of the Bank of America Corporation regarding notices they were receiving from BAC Home Loan Servicing LP and provided proof to Bank of America Corporation that certain payments had been made, although BAC Home Loans Servicing, LP denied the payments were made (¶ 6); (3) that on numerous occasions Plaintiffs went to a Bank of America branch in Oklahoma City regarding BAC Home Loan Servicing LP's contentions that Plaintiffs had not made their mortgage payments (¶ 10); (4) at least ten times Plaintiffs took payments to Bank of America Corporation locations and received receipts for their timely mortgage payments (¶ 13); and (5) Plaintiffs had face-to-face meetings with Bank of America Corporation employees (¶14).[4] Based on these allegations Plaintiffs contend Defendant Bank of America Corporation violated 15 U.S.C. § 1692e by using false, deceptive or misleading representations in the collection of debts, violated § 1692g by failing to provide certain notice within a five day statutory period, and violated the Fair Credit Reporting Act by furnishing false information

[4] In the paragraphs alleging that venue and personal jurisdiction are appropriate in this district Plaintiffs make conclusory allegations that each Defendants' collection communications impacted Plaintiffs and that each of the Defendants is a debt collector for FDCPA purposes and each furnishes information to consumer reporting agencies, making them furnishers of information for purposes of the FCRA. These conclusory, allegations, however, are not sufficient to allege the requisite elements for any of the Plaintiffs' claims.

to consumer reporting agencies, failing to investigate their dispute concerning non-payment of the loan.

With regard to BAC Home Loans Servicing, LP, Plaintiffs allege (1) their loan was assigned to BAC Home Loans Servicing, LP and its co-defendants (¶ 4); (2) they received a notice dated August 23, 2009 from BAC Home Loans Servicing, LP, identifying itself as a "debt collector" and indicating it had taken over servicing of Plaintiffs' mortgage (¶5); (3) BAC Home Loans Servicing, LP sent a letter to Plaintiffs in September 2009, indicating July and August 2009 payments had not been made and continued to send letters to Plaintiffs indicating their loan was in default, when it was not (¶6); (4) BAC Home Loans Servicing, LP did not credit payments made by Plaintiffs to their mortgage[5] (¶ 7); (5) Plaintiffs received letters from BAC Home Loans Servicing, LP threatening foreclosure despite Plaintiffs' efforts to prove they are current on payments (¶8); (6) Plaintiffs have written BAC Home Loans Servicing, LP to inform them that despite BAC Home Loans Servicing, LP's contentions, that they are not in default (¶10); (7) BAC Home Loans Servicing, LP refused to accept payment from Plaintiffs on at least one occasion (¶10); (8) BAC Home Loans Servicing, LP refused to verify that Plaintiffs were in default when Plaintiffs demanded it do so (¶12); (9) BAC Home Loans Servicing, LP made threats of foreclosure even after Plaintiffs spoke with Bank of America Corporation personnel (¶14); (10) BAC Home Loans Servicing, LP gave erroneous information to credit bureaus which disparaged Plaintiffs'

[5] In ¶7, Plaintiffs allege they continued to receive dunning notices, although they do not attribute those notices to any particular Defendant.

credit rating (¶16); (11) BAC Home Loans Servicing, LP refused to correct the erroneous information provided to consumer reporting agency (¶17) and; (12) BAC Home Loans Servicing, LP was merged into Bank of America, N.A. Plaintiffs levy the same claims against BAC Home Loans Servicing, LP as against Bank of America Corporation.

With regard to Defendant Bank of America, N.A., Plaintiffs allege (1) their loan was assigned to Bank of America, N.A., as well as to its co-defendants (¶4); (2) Bank of America, N.A., was the parent company of BAC Home Loans Servicing, LP in August 2009 (¶ 5); (3) Bank of America, N.A., endorsed a check presented by Plaintiffs for payment of their mortgage to Bank of America Corporation (¶13); and (3) that BAC Home Loans Servicing, LP merged into Bank of America, N.A. (¶18) Plaintiffs allege the same claims against Defendant Bank of America, N.A. as against its co-defendants.

With these factual allegations in mind, the Court turns to the issue of whether Plaintiffs' allegations are sufficient to state claims against one or more Defendants under the FDCPA or the FCRA. The Court will not reiterate the standard on a motion to dismiss, the parties are clearly aware of the standard from the Court's prior order, as indicated in their respective filings relevant to the instant motion.

Defendants argue that Plaintiffs have failed to state a claim under the FDCPA, in part because Plaintiffs have not alleged they are "debt collectors," a precursor to liability under the Act. The definition of "debt collector" is set forth in 15 U.S.C. § 1692a(6) as follows:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts or

> who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

The definition creates certain exceptions, and therefore a person or entity that appears to be functioning as a debt collector may avoid liability if they meet the following:

> any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person.

15 U.S.C. § 1692a(6)(F)(iii).

The Court finds that for purposes of their claims under the FDCPA, Plaintiffs have failed to sufficiently allege that any Defendant is a "debt collector," and therefore, Plaintiffs' FDCPA claims are subject to dismissal. Plaintiffs' conclusory allegation that the Defendants are "debt collectors" is insufficient to fulfill their pleading burden, and the fact that Defendant BAC Home Loans Servicing, LP identified itself as a "debt collector" is not dispositive of Plaintiffs' FDCPA claims. Indeed, Plaintiffs' allegations indicate that Defendants could not be debt collectors, because the delineation between debt collectors, who may be held liable, and creditors, who may not, is the status of the debt at the time it was acquired. In this case, Plaintiffs allege, and the Court accepts as true, that their debt was not in default when it was assigned to one or more of the Defendants.

In reaching this conclusion the Court agrees with the very recent decision of the Middle District of Georgia in *Comer v. J.P. Morgan Chase Bank, N.A.*, 2011 WL 5878400 (M.D.Ga. Nov. 23, 2011). Therein, the original loan servicing company believed the plaintiff's mortgage to be in default, sent her letters and reported to a credit bureau that

plaintiff Comer had been delinquent in making payments on the mortgage. The original loan servicing company realized its error, but failed to correct the error prior to defendant Chase acquiring its banking operations assets and liabilities, including the plaintiff's loan. Chase began sending collection letters to plaintiff and made calls about amounts it erroneously believed to be past due. Letters from Chase to the plaintiffs, like the letters from BAC Home Loans Servicing, LP to Plaintiffs herein, indicated it was a "debt collector." The plaintiffs sued under the FDCPA, alleging Chase harassed them with calls and communications.

The court concluded "the debt must be 'in default' *not allegedly in default*, for a company like Chase, which is not in the business of collecting another's debt, to be considered a debt collector." *Id.* at *3. Although the court concluded Chase was not a debt collector based on the plaintiff's allegations, it concluded that the complaint could reasonably be construed to assert alternative claims. However, "[t]he Court emphasize[d] that in order to ultimately prevail on her FDCPA claim, it must be established that [plaintiff] was in default at the time Chase began servicing her loan." *Id.* *See also Trapper v. Credit Collection Services, Inc.*, 2011 WL 5080244 (W.D.N.Y. Aug. 31, 2011) ("Because the plaintiffs' loans from Wachovia were not in default, the FDCPA does not apply to CCS."); *Sullivan v. Ocwen Loan Servicing, LLC*, 2009 WL 2140075, * 2 (D.Colo. 2009) (No FDCPA claim where the plaintiff's obligation to pay note had been discharged in bankruptcy, and attempts by defendant to collect on debt were erroneous but not actionable). In this case, with regard to Plaintiffs' FDCPA claims, the clear allegation is that Plaintiffs' loan was not

in default, and pursuant to the above-cited authority, the Court finds that Plaintiffs have failed to state a FDCPA claim against any of the Defendants.

Plaintiffs rely on *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003) in support of their position. The Court acknowledge *Schlosser*; however, in the Tenth Circuit, if the language of a statute "is clear and unambiguous, the inquiry ends and [the Court] simply give[s] effect to the plain language of the statute." *Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir. 2006)(citations omitted). In this case, the Court finds that the statutory provisions cited above are unambiguous and require that a debt be in default in order for the exception to apply and to support a claim to arise under the FDCPA. Accordingly, the Court declines to adopt the position of the Seventh Circuit Court of Appeals in *Schlosser*.

Furthermore, regardless of whether any Defendant is a "debt collector," Plaintiffs do not allege that with regard to either Defendant Bank of America Corporation or Bank of America, N.A., that those Defendants attempted to collect a debt, or otherwise took any actions that violate any specific provisions of the Act. Plaintiffs do not allege that they submitted a written request for validation of the debt that either Bank of America Corporation or Bank of America, N.A. ignored. Specifically, in Count I, Plaintiffs allege that "BOA, BANA and BAC violated 15 U.S.C. § 1692[g] by failing to validate the debt and ceased (sic) meaningful communications with Risener once Risener disputed the alleged debt." (Second Amended Complaint, ¶28). 15 U.S.C. § 1692g provides that a debt collector must provide certain information to a debtor "within five days after the initial communication

with a consumer in connection with the collection of any debt," including (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer disputes validity of the debt within 30 days the debt will be assumed to be valid. Plaintiffs do not allege any deficiencies in this regard relative to Bank of America Corporation and Bank of America, N.A., and thus regardless of their status, these Defendants are entitled to dismissal of Count I.

In Count II, Plaintiffs allege violation of the FDCPA because Defendants "conduct and communications with Risener in the attempted collection of a debt not owed have been extreme and outrageous and intended by BAC [BAC Home Loans Servicing, LP] to humiliate, embarrass, scare and worry Risener, all in violation of 15 U.S.C. § 1692(d) (sic). (Second Amended Complaint ¶31) 15 U.S.C. § 1692d provides that "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." This section applies only "in connection with the collection of a debt." The Second Amended Complaint is devoid of any allegations that Defendants Bank of America Corporation or Bank of America, N.A., attempted to collect a debt or in any manner acted in connection with the collection of a debt. Accordingly, regardless of their status as "debt collectors" Defendants Bank of America Corporation and Bank of America, N.A. are entitled to dismissal of Count II of Plaintiffs' Second Amended Complaint.

In Count III, Plaintiffs allege that Defendants violated 15 U.S.C. § 1692e by using false, deceptive or misleading representations or means in the collection of debts. Plaintiffs'

allegations in this regard suffer from the same infirmities as their allegations in Counts I and I with regard to Defendants Bank of America Corporation and Bank of America, N.A. Accordingly, those Defendants are entitled to dismissal of this claim regardless of their status as debt collectors.

In Count IV, Plaintiffs allege that Defendants violated 15 U.S.C. § 1692g by failing to provide them with the required Notice of Debt within five days after the initial communication with a consumer in connection with the collection of any debt. Again, this applies only to initial communications with a consumer in connection with collection of any debt, and Plaintiffs' Second Amended Complaint contains no such allegations against Defendants Bank of America Corporation and Bank of America, N.A. Accordingly, Defendants Bank of America and Bank of America, N.A. are entitled to dismissal of Count IV of the Second Amended Complaint regardless of their status.

In Counts V and VI, Plaintiffs allege that Defendants violated the FCRA, specifically 15 U.S.C. § 1681s-2, by allegedly providing false information to consumer reporting agencies and by failing to fully and properly investigate Plaintiffs' dispute to consumer reporting agencies concerning non-payment of the loan originated by Taylor Bean and Whitaker. Under the FCRA there is no cause of action for the act of providing false information, which is prohibited by 15 U.S.C. § 1681s-2(a) and only enforceable by the government. Therefore, to the extent Plaintiffs are attempting to invoke a cause of action pursuant to 15 U.S.C. § 1681s-2(a), their claims fail. *See Pinson v. Equifax Credit Information Services, Inc.*, 316 Fed.Appx. 744, 751 (10th Cir. Mar. 9, 2009).Rather, the

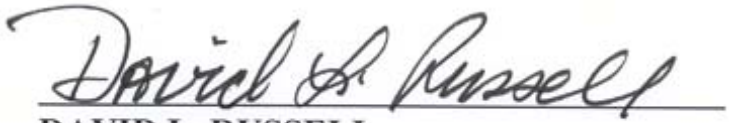
actionable provisions are set forth in § 1681s-2(b), which requires that a furnisher of information conduct an investigation once certain conditions are met. Specifically, "[t]he FCRA obligates furnishers of information [ ] to provide accurate information to consumer reporting agencies, and, upon receiving notice of a dispute from a [consumer reporting agency], to (1) investigate the disputed information; (2) review all relevant information provided by the [consumer reporting agency]; (3) report the results of the investigation to the [consumer reporting agency]; (4) report the results of the investigation to all other [consumer reporting agencies] if the investigation reveals that the information is incomplete or inaccurate; and (5) modify, delete, or permanently block the reporting of the disputed information if it is determined to be inaccurate, incomplete, or unverifiable." *Id* at 750–51.

The only claim under the FCRA supported by the allegations in the Second Amended Complaint are those against BAC Home Loans Servicing, LP for its alleged failure to investigate. In *Ori v. Fifth Third Bank*, 603 F.Supp.2d 1171 (E.D.Wis. 2009), cited by the parties, the court noted that a plaintiff cannot prevail on a case under § 1681s-2(b) unless he establishes both that he provided notice of a dispute to a consumer reporting agency and the consumer reporting agency provided notice to the furnisher. In this case, with regard to Defendant BAC Home Loans Servicing, LP, Plaintiffs allege they contacted the consumer reporting agencies, TransUnion and CSC Credit Services, an affiliate of Equifax, and disputed the information provided to the agencies by BAC Home Loans Servicing, LP. (¶ 17). Plaintiffs further allege that CSC informed them in an August 9, 2010 letter that it had completed its investigation, generally accomplished by contacting the source of the

information directly. *Id.* These allegations are sufficient to allege against Defendant BAC Home Loans Servicing, LP that Plaintiff contacted a consumer reporting agency which in turn gave notice to Defendant BAC Home Loans Servicing, LP. Accordingly, Defendant BAC Home Loans Servicing, LP's motion to dismiss is denied with regard to Plaintiffs' FCRA claim.

For the reasons set forth herein, Defendants' motion to dismiss is granted in part and denied in part. Plaintiffs claims against Defendants Bank of America Corporation and Bank of America, N.A. are dismissed in their entirety. Plaintiff's FDCPA claims against Defendant BAC Home Loans Servicing, LP are dismissed. Plaintiffs may proceed on their FCRA claim against Defendant BAC Home Loans Servicing, LP. Additionally to combat future confusion, the parties are from this point forward precluded from utilizing abbreviations to refer to any of the Defendant entities.

IT IS SO ORDERED this 6th day of January, 2012.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE