IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:17-CV-5-BO

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| YACARA MUNGO-CRAIG,<br><br>Plaintiff,<br><br>v.<br><br>NAVIENT SOLUTIONS, INC.<br>NAVIENT DEPARTMENT OF<br>EDUCATION LOAN SERVICING,<br><br>Defendant. | ) | ORDER |

This cause comes before the Court on plaintiff's motion to remand [DE 8], defendant's motion to dismiss [DE 11], plaintiff's motion for summary judgment [DE 17], as well as defendant's motion for summary judgment, or, in the alternative, to stay the matter pending disposition of the motion to dismiss [DE 18]. The matters have been fully briefed and are ripe for disposition. For the reasons discussed below, the motion to dismiss is granted and the matter will be closed.

## BACKGROUND

Plaintiff commenced this civil action on November 8, 2016, by filing a complaint against defendant[1] in Wake County Court, North Carolina, District Court Division. Plaintiff's complaint asserts claims against defendant under the federal Fair Debt Collection Practices Act ("FDCPA") and the North Carolina's Debt Collection Act ("NCDCA") related to defendant's efforts to

[1] Both the summons and complaint filed by plaintiff indicate that she is asserting claims against a single defendant. In the summons, plaintiff identified defendant as "Navient Solutions, Inc/Navient Department of Education Loan Servicing." [DE 1-1 at 1]. In the complaint, plaintiff identified defendant as "Navient Solutions Inc Navient Department of Education Loan Servicing." *Id.* at 3.

service certain debts. Plaintiff seeks damages in the amount of $20,500. On December 29, 2016, defendant removed the matter to this Court.

DISCUSSION

The Court will first address plaintiff's motion to remand.[2] Removal of a civil action from state court is only proper where the federal district courts would have original jurisdiction, 28 U.S.C. § 1441, and it is the burden of the removing party to show that jurisdiction lies in the federal court. *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (*en banc*). Removal jurisdiction must be construed strictly in light of federalism concerns, and if jurisdiction in the federal district court is determined to be doubtful, remand is required. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994).

Federal district courts have original jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Removal is appropriate on the basis of federal question jurisdiction when the federal interest is apparent on the "face of the Complaint." *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936). Here, plaintiff's complaint specifically asserts that defendant has violated the Fair Debt Collection Practices Act. [DE 1-1 at ¶ 3]. This assertion is repeated throughout the complaint. *Id.* at ¶¶ 1, 3, 4, 7, and 14. This is a clear and explicit invocation of federal jurisdiction, notwithstanding plaintiff's claims that she included the federal cause of action only to "coincide" with the state law cause of action or that she intends to rely only on the state statutes cited in her complaint. [DE 8 at 2]. Because plaintiff's complaint clearly presents a federal question as to plaintiff's FDCPA claim, this court has original jurisdiction over the matter and plaintiff's motion to remand is without merit. Additionally, this Court has supplemental jurisdiction over plaintiff's remaining state law claims

[2] Although plaintiff has titled her filing at [DE 8] as a "Notice to Remand," this filing was construed by the Court as a motion to remand. Defendant responded to the motion accordingly.

because all of plaintiff's claims arise from a common nucleus of operative facts. 28 U.S.C. § 1367(a). For these reasons, plaintiff's motion to remand will be denied.

Having found jurisdiction over this matter, the Court next turns to defendant's motion to dismiss. A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. *Papasan v. Allain*, 478 U.S. 265, 283 (1986). When acting on a motion to dismiss under Rule 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993). A complaint must allege enough facts to state a claim for relief that is facially plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility means that the facts pled "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and mere recitals of the elements of a cause of action supported by conclusory statements do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must be dismissed if the factual allegations do not nudge the plaintiff's claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The complaint must plead sufficient facts to allow a court, drawing on judicial experience and common sense, to infer more than the mere possibility of misconduct. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009). The court need not accept the plaintiff's legal conclusions drawn from the facts, nor need it accept as true unwarranted inferences, unreasonable conclusions, or arguments. *Philips v. Pitt County Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). Although the Court must construe the complaint of a *pro se* plaintiff liberally, such a complaint must still allege "facts sufficient to state all the elements of [her] claim" in order to survive a motion to dismiss. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider documents attached to the complaint, as well as those attached to the motion to dismiss so long as they are integral to the complaint and authentic. Fed. R. Civ. P. 10(c); *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); *Philips v. Pitt County Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). A court ruling on a motion to dismiss under Rule 12(b)(6) may also properly take judicial notice of matters of public record. *Sec'y of State for Defence*, 484 F.3d at 705.

Defendant's first argument for dismissal contends that plaintiff does not allege sufficient supporting facts and ultimately cannot show that defendant is a "debt collector" as defined by the FDCPA and, therefore, cannot state a claim under that Act. The FDCPA prohibits the use of abusive, deceptive and unfair debt collection practices by debt collectors. 15 U.S.C. § 1692, *et seq*. The Act regulates the collection of "debts" by "debt collectors" by regulating the type and number of contacts a collector may make with the debtor. Under 15 U.S.C. § 1692a(6), a "debt collector" includes "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." A "debt collector" does not include

> 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 (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692a(6)(F).

While plaintiff stated in her complaint that defendant is a debt collector, such a conclusory assertion is not sufficient to meet the pleading standards laid out by *Twombly* and *Iqbal*. Instead, plaintiff must allege sufficiently plausible facts which set forth a cognizable claim for this Court to adjudicate. As plaintiff has asserted a claim under the FDCPA, plaintiff therefore must allege such facts sufficient to plausibly demonstrate that defendant is a "debt collector" as defined in that Act, and a failure to do so is fatal to this action. Plaintiff's complaint must also allege plausible facts to show that this is not a case covered by any exceptions listed in the Act. Again, a failure to allege such requisite facts is fatal to the action.

As an initial matter, plaintiff's complaint fails to include any factual assertions to establish that defendant is a debt collector within the meaning of the FDCPA. Plaintiff's complaint is sparse on facts, and fails to demonstrate with a reasonable plausibility that defendant is a debt collector by trade or regularly attempts to collect debts on behalf of third parties. *Heintz v. Jenkins*, 514 U.S. 291, 293 (1995); *see also Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1315–16 (11th Cir. 2015) ("The statutory text is entirely transparent. . . . [A] person must regularly collect or attempt to collect debts for others in order to qualify as a 'debt collector' under the second definition of the term").

The complaint also fails to show that this is not a case covered by any exceptions listed in the Act. Plaintiff has alleged no facts to show that defendant is not attempting to collect the debt pursuant to a bona fide fiduciary obligation[3], of that this case concerns a debt which was not

[3] Defendant argues that it sought to collect student loans from plaintiff on behalf of the Department of Education. It stated that, as a servicer of private and federal student loans, it communicates with customers under the name "Navient Department of Education Loan Servicing," when acting on behalf of the United States Department of Education and directed the Court to the U.S. Department of Education website in support of this fact. *See* "Loan Servicing Contracts," U.S. Department of Education, https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing. While plaintiff's complaint does not allege any facts as to the nature of the debt sought to be collected, the Court notes that entities operating as

originated by defendant, or that the loan was in default during at the time it was obtained by defendant.[4] As to this last point, plaintiff failed to allege any facts as to when defendant began servicing the loan, and many courts have held that a failure to allege that an entity serviced a loan before default is fatal to a claim under the express language of the FDCPA. *See Parker v. BAC Home Loans Servicing LP*, 831 F. Supp. 2d 88, 94 (D.D.C. 2011); *Edmond v. Am. Educ. Servs.*, 2010 WL 4269129, at *5 (D.D.C. Oct.28, 2010) (granting motion to dismiss on plaintiff's FDCPA claims because "[a]bsent an allegation that plaintiff's loan was in default when [the defendant] acquired it, [the defendant] is not a debt collector and this is not subject to the FDCPA") (citing *Brumberger v. Sallie Mae Servicing Corp.*, 84 Fed.Appx. 458, 459 (5th Cir. 2004) (affirming dismissal of FDCPA claim against student loan servicer because "[b]y its plain terms the FDCPA does not apply" absent an allegation that plaintiff "was in default at the time Sallie Mae began servicing his loans")); *Ramirez–Alvarez v. Aurora Loan Servs.*, LLC, 2010 WL 2934473, at *5 (E.D. Va. July 21, 2010) (granting summary judgment for mortgage loan servicer, which was not debt collector for purposes of FDCPA because it "received the debt in question while it was not in default"); *Mondonedo v. Sallie Mae, Inc.*, 2009 WL 801784, at *5

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fiduciaries of the Department of Education in servicing student loans have been held by the courts to not be debt collectors under the FDCPA. *See Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1034 (9th Cir. 2009); *Pelfrey v. Educ. Credit Mgmt. Corp.*, 208 F.3d 945 (11th Cir. 2000) (per curiam), *aff'g* 71 F.Supp.2d 1161 (N.D. Ala. 1999); *Forman v. Texas Guaranteed Student Loan*, No. 5:13-cv-691-D, 2014 WL 6851712 *2 (E.D.N.C. 2014).

[4] Numerous courts have found that student loan servicers, including this very same defendant, that begin servicing prior to default are not debt collectors under the FDCPA. *See, e.g., Brumberger v. Sallie Mae Servicing Corp.*, 84 F. App'x 458, 459 (5th Cir. 2004); *Spyer v. Navient Sols., Inc.*, No. 15-3814 (NLH/JS), 2016 WL 1046789, at *3 (D.N.J. Mar. 15, 2016) (holding that Navient is not a 'debt collector' under the FDCPA . . . because it became the loan servicer (first as Sallie Mae before it changed its name) while plaintiff's loan w[as] not in default."); *Levy-Tatum v. Navient & Sallie Mae Bank*, No. CV 15-3794, 2016 WL 75231, at *7 (E.D. Pa. Jan. 7, 2016); *Edmond v. Am. Educ. Servs.*, No. CIV.A. 10-0578 JDB, 2010 WL 4269129, at *5 (D.D.C. Oct. 28, 2010); *Mondonedo v. Sallie Mae, Inc.*, No. 07-4059-JAR, 2009 WL 801784, at *3 (D. Kan. Mar. 25, 2009); *Valletta v. Navient Corp.*, No. CV-16-01934-PHX-DGC, 2017 WL 1437563, at *3 (D. Ariz. Apr. 24, 2017); *Haysbert v. Navient Sols., Inc., No.*, CV 15-4144 PSG (EX), 2016 WL 890297, at *11 (C.D. Cal. Mar. 8, 2016).

(D. Kan. Mar. 25, 2009) (granting summary judgment for loan servicer that "obtained the loans originated by [a bank] for servicing prior to default and is exempt from liability under the FDCPA"); *Taggart v. Wells Fargo Home Mortg., Inc.*, 2010 WL 3769091, at *11 (E.D. Pa. Sept. 27, 2010) ("Loan servicers are not 'debt collectors' under the FDCPA unless the debt being serviced was in default at the time the servicer obtained it.").

For these reasons, plaintiff has failed to show with facial plausibility that defendant is a debt collector and not an organization within the exceptions listed in 15 U.S.C. § 1692(a)(6)(F). As a result, plaintiff's complaint fails to allege the necessary elements to sustain a claim under the FDCPA, and therefore defendant's motion to dismiss the federal cause of action will be granted.

Defendant next argues that plaintiff cannot state a claim under North Carolina law because such state law claims are related to the collection of federal student loans and are therefore preempted by the Higher Education Act (the "HEA"), 20 U.S.C. § 1070 *et seq.*, and corresponding regulations from the Department of Education. Although the body of plaintiff's complaint does not specifically identify the type of loans sought to be collected in this matter, the caption of plaintiff's complaint identifies defendant as a loan servicer for the Department of Education and indicates, therefore, that defendant is being sued in its capacity as a loan servicer for the Department of Education. It is a matter of public record that defendant services federal student loans on behalf of the Department of Education and does so under the name "Navient Department of Education Loan Servicing."[5] Plaintiff pleads no other facts to identify the specific nature of her debt, or to claim that it was not related to federal student loans owned by the U.S. Department of Education. Accordingly, such claims are preempted by the HEA and

[5] *See* "Loan Servicing Contracts," U.S. Department of Education, https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing.

corresponding regulations, and therefore defendant's motion to dismiss the state law actions will also be granted. *See Forman v. Texas Guaranteed Student Loan*, No. 5:13-CV-691-D, 2014 WL 6851712 *2 (E.D.N.C. 2014).

In sum, plaintiff's complaint fails to allege facts necessary to sustain actions under state and federal law. Because plaintiff's complaint will be dismissed in its entirety, the Court need not reach either motion for summary judgment.

CONCLUSION

For the foregoing reasons, plaintiff's motion to remand [DE 8] is DENIED and defendant's motion to dismiss [DE 11] is GRANTED. Plaintiff's and defendant's motions for summary judgment [DE 17, 18] are DENIED as moot. The Clerk is DIRECTED to close the case.

SO ORDERED, this 17 day of July, 2017.

Terrence Boyle

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE