UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARY E. FREEMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:19-cv-03900-MPB-JMS
	)	
FINANCIAL BUSINESS AND CONSUMER SOLUTIONS, INC.,	)	
	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO DISMISS

Defendant Financial Business and Consumer Solutions, Inc. ("FBCS") has filed a motion to dismiss this Fair Debt Collection Practices Act action pursuant to Fed. R. Civ. P. 12(b)(6). (Docket No. 12; Docket No. 13). Plaintiff Mary Freeman opposes FBCS's motion. (Docket No. 22). The matter is fully briefed. (Docket No. 28). The court **GRANTS** the motion for the reasons that follow.

I. Factual Background

Ms. Freeman fell behind on her payments owed to Cellco partnership d/b/a/ Verizon Wireless, incurring the "debt." (Docket No. 1 at ECF p. 1, ¶ 10). Jefferson Capital Systems, LLC purchased the debt and enlisted FBCS to collect the debt. (*Id.*, ¶¶ 11, 13). On March 14, 2019, FBCS sent Ms. Freeman a letter to collect the debt that read, in pertinent part:

Interested in saving $188.92, read on ...

Our client, JEFFERSON CAPITAL SYSTEMS, LLC, has authorized us to accept a 35% discount off your $539.76 outstanding balance to settle the account in full. The complete details of your account are:

Current Creditor <	JEFFERSON CAPITAL SYSTEMS, LLC
Debt Description<	VERIZON WIRELESS
Account # <	[redacted]0001
Outstanding Balance <	$539.76
FBCS File # <	[redacted]3166
Jefferson Capital Reference #:	[redacted]2865
Original Creditor:	CELLCO PARTNERSHIP

We can accept this reduced amount under your preferred option:

1. Pay the full amount of $350.84 to us in one payment.
2. Pay $70.17 as a down-payment and the remaining balance of $280.67 30 days after your 1st payment is received.
3. You may have an opportunity to split your settlement into 3 payments of $116.95 each. Call our office for details.

(Docket No. 12-1 at ECF p. 2).

Ms. Freeman was confused as to the amounts of the reduced offer and the full balance because FBCS's letter did not specify that $350.85 is "the reduced amount." (Docket No. 1 at ECF p. 3, ¶ 16). One of the three payment options also offered to resolve the subject debt in exchange for three (3) payments of $116.95, which would equal $350.85 and not $350.84, a one cent difference. (*Id.*, ¶ 17). This meant that the "savings" was not $188.92, as stated, if the third option was selected. Ms. Freeman's decision to pay the debt was impacted by FBCS's Letter, which she asserts was patently unclear as to what the settlement amount is because it referred to the "this reduced amount" (settlement amount) immediately after referencing the alleged full balance amount. (*Id.*, ¶¶ 18–19). Ms. Freeman's complaint asserts a singular count: that FBCS's letter violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq* and specifically, Section 1692e and 1692e(10). (Docket No. 1 at ECF pp. 4–5).

II. Motion to Dismiss Standard

The Federal Rules of Civil Procedure require that a complaint provide the defendant with "fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89 (2007) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)). In reviewing the sufficiency of a complaint, the court must accept all well-pled facts as true and draw all permissible inferences in favor of the plaintiff. *See Active Disposal Inc. v. City of Darien*, 635 F.3d 883, 886 (7th Cir. 2011). A Rule 12(b)(6) motion to dismiss asks whether the complaint contains sufficient factual matter to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Dismissal is appropriate only if it appears to a certainty that the plaintiff cannot establish any set of facts that would entitle him to the relief sought. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.

Ct. 2229, 81 L.Ed.2d 59 (1984); *Mosley v. Klincar*, 947 F.2d 1338, 1339 (7th Cir. 1991).

III. Discussion

FBCS moves to dismiss Ms. Freeman's complaint arguing that a *one cent* difference, which resulted from mathematical rounding, between the settlement offer—$350.84—and what Ms. Freeman would have paid had she elected the third payment option—$350.85—is immaterial and that the collection letter expressly and conspicuously identified the account balance, the amount of the proposed reduction, and the reduced account balance with the discount applied. Ms. Freeman responds that the rounding error was material because it made false the amount FBCS told Ms. Freeman she would be paying in acceptance of the settlement offer. Ms. Freeman also argues that by pleading the collection letter was confusing her case must, at least, get past a Rule 12(b)(6) motion.

Congress passed the FDCPA in order to "eliminate the many evils associated with debt collection." *Bentrud v. Bowman*, 794 F.3d 871, 874 (7th Cir. 2015). Specifically, Ms. Freeman alleges that FBCS violated 15 U.S.C. § 1692e. Section 1692e broadly prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 1692e(10) specifically prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." In reviewing Ms. Freeman's claims, the court must view the Letter through the perspective of an "unsophisticated consumer." *Gruber v. Creditors' Prot. Serv.*, 742 F.3d 271, 273 (7th Cir. 2014). The *Gruber* court explained,

> Although the hypothetical unsophisticated consumer is not as learned in commercial matters as are federal judges, he is not completely ignorant either. *Pettit v. Retrieval Masters Creditors Bureau, Inc.*, 211 F.3d 1057, 1060 (7th Cir. 2000). On the one hand, the unsophisticated consumer may be "uninformed, naïve, or trusting," but on the other hand the unsophisticated consumer does

> "possess[] rudimentary knowledge about the financial world, is wise enough to read collection notices with added care, possesses 'reasonable intelligence,' and is capable of making basic logical deductions and inferences." *Id.* (citations omitted). Additionally, while the unsophisticated consumer "may tend to read collection letters literally, he does not interpret them in a bizarre or idiosyncratic fashion." *Id.* . . . In short, the unsophisticated consumer is not the least sophisticated consumer.

Id. at 273–74.

Whether an unsophisticated consumer would be misled by the Letter is a question of fact, and "[d]ismissal is appropriate only when 'it is apparent from a reading of the letter that not even a significant fraction of the population would be misled by it.'" *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (quoting *Zemeckis v. Global Credit & Collection Corp.*, 679 F.3d 632, 636 (7th Cir. 2012)). A statement can only mislead if it is material, "so a false but non-material statement is not actionable." *Hahn v. Triumph Partnerships LLC*, 557 F.3d 755, 758 (7th Cir. 2009) (holding that materiality is an ordinary element of any federal claim based on a false or misleading statement and it should be equally required in an action based on § 1692e). And in assessing materiality, the "misleading statement must have the ability to influence a *consumer's* decision" to be actionable. *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 942 (7th Cir. 2011) (emphasis in original) (citing the materiality requirement set forth in *Hahn*). Put another way, materiality is dependent upon whether the misstatement would mislead the unsophisticated consumer.

"District courts must act with great restraint when asked to rule in this context on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *McMillan v. Collection Profl's Inc.*, 455 F.3d 754, 760 (7th Cir. 2006). "[D]istrict judges are not good proxies for the unsophisticated consumer whose interest the statute protects." *Id.* at 759 (internal citation and quotation marks omitted). That said, "[u]ndoubtedly, there will be occasions when a district

court will be required to hold that no reasonable person, however unsophisticated, could construe the wording of the communication in a manner that will violate the statutory provision." *Id. See also Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 776 (7th Cir. 2007) ("The last question presented by these cases is whether a claim of deception can ever be rejected in this circuit on the pleadings, since we treat issues of deception as ones of fact rather than of law. The answer is yes.").

Ms. Freeman alleges that FBCS violated section 1692e by failing to state the settlement amount in an unambiguous manner, thus making it difficult to determine the full balance of the debt opposed to the proposed reduced amount and by falsely representing that she would save $188.92 when she only saves $188.91 if she chooses to make three (3) payments of $116.95. (Docket No. 1 at ECF p. 4, ¶¶ 26–27).

First, Ms. Freeman argues FBCS violated section 1692e because the letter refers to "this reduced amount" immediately after twice referencing Ms. Freeman's $539.76 total outstanding balance and before listing the $350.85. Ms. Freeman alleges that this was "highly confusing" and "impacted [Ms. Freeman's] decision to pay because it failed to state the settlement amount in an unambiguous manner that would be understood by the unsophisticated consumer." (Docket No. 1 at ECF p. 3, ¶18).

FBCS argues that the unsophisticated consumer reads a letter in its entirety and would understand that the "outstanding balance"—$539.76—is what she owes and would also understand that when the subject letter offers to save her $188.92 with a discount of 35% a simple multiplication ($539.76 x .35 = $188.916) would confirm both the amount owed and the saving. Thus, FBCS argues that to allege that Ms. Freeman was confused what the balance was and what the reduced amount would be with a 35% discount is unreasonable. Ms. Freeman

responds that she need merely assert that the dunning letter was confusing to survive a Rule 12(b)(6) motion. (Docket No. 22 at ECF pp. 6–7, citing *Marshall-Mosby v. Corporate Receivables, Inc.*, 205 F.3d 323, 326–27 (7th Cir. 2000) ("[A] FDCPA complaint survives a motion to dismiss under Rule 12(b)(6) simply by alleging that a dunning letter was confusing.")). Accordingly, Ms. Freeman concludes her claims *must* survive because she has alleged FBCS's letter was confusing. (*Id.* at ECF p. 7).

As to this portion of the claim, Ms. Freeman does not argue that the letter was literally false, but that it was misleading or deceptive in a way that confused her. The court is hard pressed to imagine that even an unsophisticated but reasonable consumer would interpret the Letter in the manner proposed by Ms. Freeman resulting in difficulty determining the amount owed to satisfy the voluntary settlement offer. The unsophisticated but reasonable consumer may tend to read collection letters literally, but he also possesses reasonable intelligence, and is capable of making basic logical deductions and inferences. *Pettit*, 211 F.3d at 1060; accord *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 414 (7th Cir. 2005) (unsophisticated consumer standard is an objective one, and court disregards "unrealistic, peculiar, bizarre, and idiosyncratic interpretations" of collection letters); *Turner v. J.V.D.B. & Assoc., Inc.*, 330 F.3d 991, 995 (7th Cir. 2003) (test under § 1692e is objective, "turning not on the question of what the debt collector knew but on whether the debt collector's communication would deceive or mislead an unsophisticated, but reasonable, consumer").

Plaintiff's assertion that the Letter failed to state the settlement amount in an unambiguous manner, thus causing confusion for the unsophisticated consumer requires an unrealistic interpretation of the Letter. The Letter identifies the amount of the reduction that is being offered in the first sentence. Next, the Letter twice identifies the outstanding account

balance and expressly identifies it as the "outstanding balance." The Letter states that the settlement offer is a 35% discount off of the outstanding balance. Finally, the Letter provides three options to pay the "reduced amount." (Docket No. 12-1). All of this information appears in the first half of the Letter and is not obstructed from view. The conclusion that the settlement amount was not set forth in an unambiguous manner that would be understood by the unsophisticated consumer or that the letter made it difficult to identify the outstanding balance as opposed to the proposed, reduced amount is unrealistic. The Letter explicitly listed the outstanding balance twice and delineated the three options to satisfy the settlement offer.

As acknowledged, whether a letter violates the FDCPA is often a question of fact. *E.g., Walker v. Nat'l Recovery, Inc.*, 200 F.3d 500, 501 (7th Cir. 1999) (reversing dismissal under Rule 12); *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1059–60 (7th Cir. 1999) (reversing dismissal under Rule 12). However, in deciding a motion under Rule 12(b)(6), a court may consider documents attached to a complaint or referenced therein, as the letters were in these cases. *See* Fed. R. Civ. P. 10(c); *188 LLC v. Trinity Industries, Inc.*, 300 F.3d 730, 735 (7th Cir. 2002). In clear cases, the Seventh Circuit has decided as a matter of law that dunning letters were not deceptive or misleading. *E.g., Durkin*, 406 F.3d at 422 (affirming summary judgment); *Gutierrez v. AT&T Broadband, LLC*, 382 F.3d 725, 740 (7th Cir. 2004) (affirming summary judgment); *Pettit*, 211 F.3d at 1061–62 (affirming summary judgment); *Jang v. A.M. Miller & Assocs.*, 122 F.3d 480, 483–84 (7th Cir. 1997) (affirming dismissal under Rule 12). Here, the Letter was not false and is not reasonably susceptible to a deceptive or misleading interpretation. As a matter of law, the Letter did not violate section 1692e in its reference to "this reduced amount."

Second, Ms. Freeman argues FBCS violated section 1692e because the letter falsely

represents that she will save $188.92; when she only saves $188.91 if she chose the third option to make three (3) payments of $116.95. (Docket No. 1 at ECF p. 4, ¶ 27). FBCS argues that the one cent difference, which was a consequence of rounding, is immaterial. FBCS cites several cases addressing similar rounding issues, many of which dismissed the matters on the basis of immateriality. Ms. Freeman argues that these cases are distinguishable because in those cases, the rounding error originated from calculating the percentage of the total amount owed, leaving the total amount of debt intact, while here, the rounding error altered the total amount of money she would ultimately owe. This is crucial, she argues, because the amount FBCS told Ms. Freeman she would be paying in acceptance of the settlement was false and, even though the false statement was minimal, it would still be a factor into her decision as to whether to accept FBCS's settlement. (Docket No. 22 at ECF p. 5). She argues that because section 1692e is a strict liability statute, "debt collectors may not make false claims, period." (*Id.* (quoting *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004)).

Ms. Freeman relies too heavily on the FDCPA's strict liability status. "[W]hile the FDCPA is a strict liability statute . . . the state of mind of the reasonable debtor is *always* relevant. . . . [a plaintiff] can't win simply by showing that [the defendant's Letter] is false in a technical sense; she has to show that it would mislead the unsophisticated consumer." *Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 645–46 (7th Cir. 2009). Hence, the materiality requirement. Ms. Freeman further argues that the rounding cases relied on by FBCS are all distinguishable. This is somewhat true, but not in the sense Ms. Freeman suggests. FBCS's references to out-of-circuit cases are unhelpful given that some other circuits disagree with this circuit and believe that whether a dunning letter is confusing is always a matter of law. *Taylor v. Calvary Inv., L.L.C.*, 365 F.3d 572, 575 (7th Cir. 2004). Similarly, FBCS's references to in-

circuit cases that either dismissed rounding cases at the summary judgment stage or pursuant to Rule 12(b)(1) were not wholly analogous to the instant Rule 12(b)(6) analysis. This leaves the court with two cases that it found instructive.

In *Brown v. Alltran Fin., LP*, 2018 WL 5923772 (W.D. Wis. Nov. 13, 2018), the court dismissed with prejudice a section 1692e claim brought pursuant to a rounding issue on a Rule 12(b)(6) motion. Alltran sent Brown two debt collection letters for debt she owed outlining three payment plan options. *Id.* at *1. The second payment plan option purported to allow Brown to settle his account in 6 monthly payments of $202.03 and the letter also noted Brown would save $519.50 if Brown selected that payment plan. *Id.* Brown alleged the letter was misleading because if he chose this option he would only save $519.49, $0.01 less than the stated total. *Id.* at *2. The court found that no reasonable trier of fact applying the unsophisticated consumer standard could find that a single cent would be material in making a decision to repay or not to repay a debt and dismissed the claim with prejudice. *Id.*

In *Gilmore v. Unlimited Progress Corp.*, 2016 U.S. Dist. LEXIS 191880 (N.D. Ill. Oct. 4, 2016), the court also dismissed with prejudice a section 1692e claim brought pursuant to a rounding issue on a Rule 12(b)(6) motion. Gilmore alleged she called Unlimited Progress Corporation (d/b/a Creditors' Discount and Audit, or CDA) to explore available options regarding her debt. *Id.* During the first call Gilmore was told that the $477 debt could be settled in full for $430, a discount of "about 10%." *Id.* at *2. After this call, she reviewed her notes and observed that $430 was not exactly a 10% discount off the $477. *Id.* She called CDA a second time who confirmed that the offer was for a "10%" discount in the amount of $430. *Id.* Gilmore alleges that the second phone call violated section 1692e because the exact amount of a 10% discount on $477 is $429.30, not the $430 represented to her in the second phone call. *Id.*

Gilmore alleged that the $0.70 discrepancy was inaccurate, false, misleading, and that it was material considering her complete lack of income. *Id.* at *2–3. CDA argued these allegations do not establish a materially false representation under the FDCPA. The court agreed and dismissed the claim with prejudice noting that the $0.70 discrepancy, which was less than 0.15% of the $477 debt, was a "miniscule amount [that] would not make a difference as to whether an unsophisticated consumer was willing or able to accept CDA's settlement offer." *Id.* at *6 (citing *Hahn*, 557 F.3d at 757–58 ("The [FDCPA] is designed to provide information that helps consumers to choose intelligently, and by definition immaterial information neither contributes to that objective (if the statement is correct) nor undermines it (if the statement is incorrect).").

Here, the one cent difference between $350.84 and $350.85 represents less than 0.002% of the $539.76 outstanding balance. Like in *Brown*, whether or not Ms. Freeman would save the additional penny would be immaterial to the unsophisticated consumer's decision of whether or not to accept this settlement option, which was only one of three offered to Ms. Freeman. *See Hahn*, 557 F.3d at 757–58; *Wahl*, 556 F.3d at 645–46 ("If a statement would not mislead the unsophisticated consumer, it does not violate the FDCPA—even if it is false in some technical sense."). Plaintiff argues that "false statements like this could cause an unsophisticated consumer to question the offer's legitimacy." (Docket No. 22 at ECF p. 5). But this hypothetical concern about FBCS's offer's legitimacy is an entirely different point than whether an unsophisticated consumer would be materially misled by the settlement offer.

The Seventh Circuit has specifically contemplated cases where a claim of a false or deceptive statement can be rejected on the pleadings even though this circuit treats issues of deception as ones of fact. *Evory*, 505 F.3d at 777. This includes "a case in which a false or

deceptive statement clearly was immaterial[.]" *Id.* (citing *Gutierrez*, 382 F.3d at 738–40). Not even the most unsophisticated of consumers could be misled by a penny rounding error, given the total amount of the debt and it surely could not affect whether an unsophisticated consumer would accept the settlement offer. A reasonable person with the most basic, rudimentary knowledge of the financial world, but with the ability to make logical deductions and inferences, would recognize the numbers FBCS provided were the result of rounding and were immaterial.

In this case, the Letter was not materially false and was not reasonably susceptible to a deceptive or misleading interpretation. As a matter of law, the Letter did not violate section 1692e. Moreover, it is difficult to see how this Letter presents the "abusive debt collection practices" that the FDCPA seeks to eliminate. 15 U.S.C. § 1692(e). "'The FDCPA . . . was designed to protect against abusive debt collection practices likely to disrupt a debtor's life.'" *Headen v. Asset Acceptance, LLC.*, 383 F. Supp. 2d 1097, 1103 (S.D. Ind. 2005) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 343 (7th Cir. 1997)). Like in *Headen*, it is difficult to see how an offer like FBCS's would disrupt a debtor's life. *Id.* This letter "do[es] not reasonably appear likely to coerce payment from one not in a position to pay. [It] present[s] only carrots, not sticks." *Id.*

Ms. Freeman has not suggested she would even attempt to offer at later stages of litigation any survey evidence supporting her speculative reading of this Letter. Cf. *Johnson v. Revenue Mgmt.*, 169 F.3d 1060–61 (suggesting that survey evidence might support interpretations of collection letters); *see also Walker v. Nat'l Recovery*, 200 F.3d at 503–04 (stating that dismissal could be proper if plaintiffs do not intend to offer evidence beyond text of letters); *Taylor*, 365 F.3d at 572 (holding debtor does not create triable issue just by submitting

an affidavit in which he says that he misunderstood the dunning letter).

IV. Conclusion

An unsophisticated but reasonable consumer would not be deceived by the Letter at issue in a manner contemplated by the statute. Ms. Freeman has not stated a claim under section 1692e of the FDCPA. Accordingly, FBCS's motion to dismiss is **GRANTED**. The dismissal is without prejudice to Ms. Freeman's ability to file an amended complaint no later than May 1, 2020. If no amended complaint is filed, the court will enter judgment of dismissal with prejudice.

SO ORDERED.

Date: 4/17/2020

Matthew P. Brookman
United States Magistrate Judge
Southern District of Indiana

Service will be made electronically on all ECF-registered counsel of record via email generated by the court's ECF system.