UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TERREL M. WATSON, GIUSEPPINA CALARCO and JARRET STRETCH,

Plaintiffs,

-against-

MIDLAND CREDIT MANAGEMENT, INC.,

Defendant.

Docket No. 2:18-cv-02400-DRH-AKT

NOTICE OF MOTION

PLEASE TAKE NOTICE, that Defendant Midland Credit Management, Inc. ("Midland"), upon the accompanying Memorandum of Law in Support of Midland Credit Management, Inc.'s Motion to Dismiss, dated August 8, 2018, will move this Court before the Honorable Denis R. Hurley, United States District Judge for the United States District Court of the Eastern District of New York, 100 Federal Plaza, Central Islip, New York, 11722, at a date and time ordered by the Court, for an Order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), for dismissal of this action, and granting Defendant such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that, opposing papers, if any, shall be served by September 5, 2018 and reply papers in support of Midland's motion shall be served by September 14, 2018, unless otherwise directed by the Court.

Dated: August 8, 2018
New York, New York

HINSHAW & CULBERTSON LLP
Attorneys for Defendant
Midland Credit Management, Inc.

By: */s Han Sheng Beh*
Han Sheng Beh
800 Third Avenue, 13th Floor
New York, New York 10022
Tel: (212) 471-6200
Fax: (212) 935-1166

TO: Barshay Sanders, PLLC
100 Garden City Plaza, Suite 500
Garden City, New York 11530
Attorneys for Plaintiff

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MIDLAND CREDIT MANAGEMENT, INC.,

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MEMORANDUM OF LAW IN SUPPORT OF MIDLAND CREDIT MANAGEMENT, INC.'S MOTION TO DISMISS

HINSHAW

800 Third Avenue
13th Floor
New York, NY 10022
Telephone 212-471-6200
Facsimile 212-935-1166

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PRELIMINARY STATEMENT

Defendant Midland Credit Management, Inc. ("MCM"), by its attorneys, Hinshaw & Culbertson LLP, respectfully submits this Memorandum of Law in support of its Motion for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), for dismissal of this action. Plaintiffs incorrectly claim that MCM's letters violated § 1692e of the Fair Debt Collection Practices Act ("FDCPA") because the letters implied that interest and late fees were accruing on Plaintiffs' debts when, in actuality, no such interest or fees was accruing. Plaintiffs' own complaint concedes that "the respective Letters do no [sic] state that Plaintiffs' respective debts are subject to additional interest and late fees . . ." (DE #1, Compl. ¶ 28). Despite this admission, Plaintiffs argue that the letters implied that interest and fees was accruing because the letters did not explicitly disclose that interest was **not** accruing. The problem for Plaintiffs is that this exact theory was recently rejected by the Second Circuit in *Taylor v. Fin. Recovery Serv.*, 886 F.3d 212 (2d Cir. 2017)—determining that "a collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading within the meaning of Section 1692e." *Id.* at 214.

Similarly meritless, is Plaintiffs' argument that because the letters use the phrase "current balance", that somehow implies that interest and late fees were accruing. Judge Ross rejected this very argument in *Hussain v. Alltran Fin., LP*, 17-cv-3571-ARR-CP, 2018 U.S. Dist. LEXIS 57715, at *5-7 (E.D.N.Y. Apr. 4, 2018), concluding the use of the word "current" does not violate the FDCPA. Indeed, the Second Circuit has also analyzed letters employing the word "current" and did not find a violation of the FDCPA. *See Taylor*, 886 F.3d 212. Moreover, numerous courts in this District have found that the phrase "as of the date of this letter"—a phrase similar to the word "current"—in no way implies that a debt may increase in the future. *See Feldheim v. Fin. Recovery Servs.*, No. 16-cv-3873 (KMK), 2017 U.S. Dist. LEXIS 101290,

at *18-19 (S.D.N.Y. June 28, 2017); *see also Ghulyani v. Stephens & Michaels Assocs.*, No. 15-cv-5191(SAS), 2015 U.S. Dist. LEXIS 145424, at *8 (S.D.N.Y. Oct. 26, 2015).

Finally, even assuming *arguendo* that the letters sent to Plaintiffs could be interpreted as "misleading" (they cannot), Plaintiffs' lawsuit still fails because the *Taylor* court determined that there is no harm to a consumer even if he/she is misled into believing that interest and fees are accruing when, in actuality, they are not. *Taylor*, 886 F.3d at 214-15. For these reasons, Plaintiffs' Complaint should be dismissed in its entirety and with prejudice.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Complaint claims that Plaintiffs, Terrel Watson, Jarret Stretch and Giuseppina Clarco each received a letter (dated April 19, 2017, April 26, 2017, and May 3, 2017, respectively) from MCM regarding possible resolution of debts owed by Plaintiffs (the letters collectively shall be referred to as the "Discount Letters"). The Discount Letters listed the balance of each plaintiff's debt and provided multiple options for each plaintiff to "put this debt behind you" with a percentage discount (i.e a 40% discount). (*See* DE #1-1, Compl. Ex. 1). The Discounts Letters also provided an expiration date for when the discount offers would expire. (*Id.*) In other words, the Discount Letters informed Plaintiffs of the exact amount that Plaintiffs could pay, and the date until which such payment would fully resolve their debts. (*Id.*)

On April 23, 2018, Plaintiffs filed their Complaint against MCM alleging that the Discount Letters violated the FDCPA. (*See* DE #1) On July 3, 2018, MCM filed a pre-motion letter seeking leave to file a motion to dismiss. (*See* DE #7). On July 10, 2018, Plaintiffs filed an opposition to MCM's request for leave to file a motion to dismiss. (*See* DE #8).[1] On July 20,

[1] Plaintiffs' Opposition Letter failed to address any of the arguments raised in MCM's Pre Motion Letter. Instead, Plaintiffs argued that collateral estoppel bars MCM from raising any defense that the Discount Letters did not violate the FDCPA. Plaintiffs argue that Judge Spatt, in *Thomas v. Midland Credit Mgmt., Inc.*, No. 2:17-cv-00523

2018, this Court waived the pre-motion conference requirement and provided a briefing schedule. (*See* DE #9). Accordingly, MCM now moves for the dismissal of this action because the Complaint fails to state a claim.

ARGUMENT

THE DISCOUNT LETTERS DO NOT VIOLATE THE FDCPA

A. The Second Circuit Has Held That A Debt Collector Does Not Have To Advise A Consumer That Interest Is Not Accruing

Plaintiffs' Complaint does not allege that interest is accruing. Instead, it does the opposite and alleges that interest and late fees are not accruing. Based on this allegation, Plaintiffs claim that the Discount Letters violated the FDCPA because they did not explicitly state that interest is **not** accruing. In other words, Plaintiffs argue that unless the least sophisticated consumer is expressly informed that interest is not accruing, that the consumer could believe that interest was accruing. (*See* Compl. ¶ 31). The problem for Plaintiffs is that this theory of liability was considered, and rejected, by the Second Circuit in *Taylor*, 886 F.3d 212, 214 (2d Cir. 2017).

Taylor involved a debt that was not accruing interest. *Id.* at 213. Plaintiff/appellant argued that the "collection notices were misleading within the meaning of Section 1692e because the least sophisticated consumer could have interpreted them to mean either that interest and fees on the debts in question were accruing or that they were not accruing. In effect, they argue that a debt collector commits a per se violation of Section 1692e whenever it fails to disclose whether interest or fees are accruing on a debt"—the exact same theory of recovery Plaintiffs raise here.

(ADS) (ARL), 2017 U.S. Dist. LEXIS 195182, at * 1 (E.D.N.Y. Nov. 27, 2017) previously determined that the Discount Letters violated the FDCPA. This is a blatant misrepresentation as the letter at issue in *Thomas* is not the same as the Discount Letters. Furthermore, *Thomas* was decided before the Second Circuit's controlling decision in *Taylor*. The doctrine of collateral estoppel does not apply.

Id. at 214. The Second Circuit reasoned that its previous decision in *Avila v. Riexinger*, 817 F.3d 72, 77 (2d Cir. 2016) did not apply to the facts of *Taylor* because, in *Taylor*, interest was not accruing and there was no harm to the consumer if the consumer is not informed that interest is not accruing. *Id.* The Second Circuit therefore determined "that a collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading within the meaning of Section 1692e." *Id.* at 215. Post *Taylor*, a number of decisions from this Court, recognizing *Taylor's* holding, have dismissed FDCPA claims where a collection letter is silent to interest and fees and a debt is not accruing interest—facts that Plaintiffs' Complaint readily admits. *See Stewart v. Selip & Stylianou*, 17-cv-2745 (JS)(SIL), 2018 U.S. Dist. LEXIS 126302, *9 (E.D.N.Y. July 26, 2018) (Citing to *Taylor* and holding: "[i]n that case, as in this case, the debt was not accruing interest—a fact on which the collection notice was silent. Applying these standards, the Court concludes that Defendant's omission of costs and disbursements . . . did not violate Section 1692e."); *see also Hussain v. Alltran Fin., LP*, 17-cv-3571-ARR-CP, 2018 U.S. Dist. LEXIS 57715, at *5 (E.D.N.Y. April 4, 2018) (same). As in *Taylor* and the cases from this jurisdiction that have followed, Plaintiffs' claims fail as a matter of law.

B. The Word "Current" Does Not Imply That A Debt May Increase

Similarly meritless is Plaintiffs' claim that the phrase "Current Balance" incorrectly implies that the amount of Plaintiffs' debt may increase. The word "current" means "presently elapsing" or "occurring in or existing at the present time" and thus does not represent what the balance would be in the future. *See* DEFINITION OF "CURRENT", MERRIAM-WEBSTER DICTIONARY (2018). In fact, Judge Ross followed this logic in *Hussain* and recently found nothing misleading with letters that used the word "current" to describe the balance of a debt. *See Hussain*, 2018 U.S. Dist. LEXIS 57715, at *5-7.

In *Hussain*, Judge Ross dismissed a case alleging virtually the same facts and claims that Plaintiffs bring here. Specifically, the plaintiff in *Hussain* claimed that "[b]ecause the letter does not state whether any interest is accruing, plaintiff argues, the least sophisticated consumer would be confused as to whether 'interest or fees will be added.' This confusion is compounded by the fact that the letter lists the 'current amount due,' which suggests that the balance may increase in the future." *Hussain*, 2018 U.S. Dist. LEXIS 57715, at *3 (internal references omitted). Applying the Second Circuit's decision in *Taylor*, Judge Ross reasoned that because *Taylor* held that there is no duty to expressly state when a debt is not accruing interest, a consumer reading a letter with the phrase "current amount due" would correctly understand that paying the amount in the letter would fully satisfy the debt. *Id.* at *5. Judge Ross therefore determined that the use of the word "current" did not violate the FDCPA when interest was not accruing. *Id.* at *8. In fact, although the Second Circuit did not specifically address the word "current" in the *Taylor* decision, the letter at issue in *Taylor*—which the Second Circuit held did not violate the FDCPA—also used the phrase "current balance."

Aside from *Hussain* and *Taylor*, other courts have held that letters using the similar phrase "as of the date of this letter" to describe the balance of a debt do not imply that the balance may increase at a later date. *See Feldheim v. Fin. Recovery Servs.*, No. 16-cv-3873 (KMK), 2017 U.S. Dist. LEXIS 101290, at *18-19 (S.D.N.Y. June 28, 2017) (ruling that the phrase "as of the Date of this Letter" does not "'Imply' or 'purport'—deceptively or otherwise—that the balance Plaintiff owed would increase over time. A plain reading of the notice's quoted language reveals that it was not false, deceptive, or misleading."); *See also Ghulyani v. Stephens & Michaels Assocs.*, No. 15-cv-5191(SAS), 2015 U.S. Dist. LEXIS 145424, at *8 (S.D.N.Y. Oct. 26, 2015) ("[P]retending the clause 'Balance Due as of the Date of this Letter' actually reads

'Balance Due as of the Date of this Letter, as your balance may be subject to increase due to interest' . . . . [is a] farfetched and implausible interpretation.") The phrase "current," similar to "as of the Date of this Letter" in no way implies, absent a bizarre and idiosyncratic interpretation, that interest and late fees are accruing on a debt. Plaintiffs' claim that the phrase "current balance" is misleading is thus meritless and must be dismissed.

C. Even Assuming Arguendo The Discount Letters Misrepresented That The Debt May Increase, Such Misrepresentation is Immaterial

Even assuming *arguendo* that the Discount Letters misrepresented that Plaintiffs' debts were increasing (they do not) such a misrepresentation does not violate § 1692e of the FDCPA because it is immaterial. It is well-settled that claims based on § 1692e require a material misrepresentation. *See Gabriele v. Am. Home Mortg. Servicing*, 503 Fed. Appx. 89, 94 (2d Cir. 2012); *see also Lane v. Fein, Such & Crane LLP*, 767 F. Supp. 2d 382, 389-90 (E.D.N.Y. 2011) ("a statement must be materially false or misleading to violate Section 1692e"); *Jensen v. Pressler & Pressler*, 791 F.3d 413, 416, 422 (3d Cir. 2015); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 374 (4th Cir. 2012). The Second Circuit in *Taylor* explicitly reasoned that there is no harm to the least sophisticated consumer even if he/she is misled into believing that interest is accruing when, in actuality, it is not. Specifically, the *Taylor* court stated:

> Of course, being informed that their debts were not accruing interest or fees could have been advantageous to [Plaintiffs], as it would have alerted them to the fact that they could delay repayment without their debts increasing. The only harm that [plaintiffs] suggest a consumer might suffer by mistakenly believing that interest or fees are accruing on a debt is being led to think that there is a financial benefit to making repayment sooner rather than later. **This supposed harm falls short of the obvious danger facing consumers in *Avila*. It is hard to see how or where the FDCPA imposes a duty on debt collectors to encourage consumers to delay repayment of their debts.** And requiring debt collectors to draw attention to the fact that a previously dynamic debt is now static might even create a perverse incentive for them to continue accruing interest or fees on debts when they might not otherwise do so.

Taylor, 886 F.3d at 214-15.

Here, Plaintiffs allege that their debts were not accruing interest or late fees.[2] Thus, as in *Taylor*, Plaintiffs did not suffer any harm even if they could have been "misled" into believing that interest was accruing. Plaintiffs § 1692e claims thus fail for lack of materiality.

D. Plaintiff Terrel Watson's Claim Is Time Barred

As discussed above, all of Plaintiffs' claims should be dismissed for failure to state a claim. In addition, Plaintiff Terrel Watson's claim may also be dismissed as untimely. The FDCPA is governed by a one year statute of limitations. *See* 15 U.S.C. 1692k(d) ("An action to enforce any liability created by [the FDCPA] may be brought . . . within one year from the date on which the violation occurs."). The letter sent to Plaintiff Terrel Watson is dated April 19, 2017, and the instant action was commenced by all three Plaintiffs on April 23, 2018, more than one year after. April 23, 2018 was not on a weekend or federal holiday. Thus, Mr. Watson's claims are untimely and must be dismissed.

CONCLUSION

Based on the foregoing, MCM respectfully requests that the Court grant MCM's Motion to Dismiss in its entirety and grant such other and further relief as the Court deems just and proper.

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[2] Notably, even if Plaintiffs had alleged that interest was accruing (they do not), such an allegation does not rescue Plaintiffs' claims. It is binding Second Circuit law that a debt collector is not subject to liability under Section 1692e if it "clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date." *See Avila*, 817 F.3d at 77; *see also Kraus v. Prof'l Bureau of Collections*, 281 F. Supp. 3d 312, 319-20 (E.D.N.Y. 2017) (applying *Avila* and dismissing FDCPA lawsuit because the letter contained an offer to resolve a debt for less than the full amount owed and a due date). Here, the Discount Letters explicitly provided a dollar amount with an expiration rate that Plaintiffs could have paid to fully resolve the debts.

Dated: New York, New York
August 8, 2018

HINSHAW & CULBERTSON LLP
Attorneys for Defendant
Midland Credit Management, Inc.

By: */s Han Sheng Beh*
Han Sheng Beh
800 Third Avenue, 13th Floor
New York, New York 10022
Tel: (212) 471-6200
Fax: (212) 935-1166

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TERRELL M. WATSON, GIUSEPPINA CALARCO and JARRET STRETCH, Plaintiffs, vs. MIDLAND CREDIT MANAGEMENT, INC., Defendant.	Docket No. 2:18-CV-02400-DRH-AKT

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

BARSHAY SANDERS, PLLC

David M. Barshay, Esquire
Jonathan M. Cader, Esquire
100 Garden City Plaza, Suite 500
Garden City, New York 11530
Tel: (516) 203-7600
Fax: (516) 706-5055
dbarshay@barshaysanders.com
jcader@sanderslawpllc.com
Attorneys for Plaintiff

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Plaintiffs Terrell M. Watson ("*Watson*"), Giuseppina Calarco ("*Calarco*") and Jarret Stretch ("*Stretch*") (collectively, "*Plaintiffs*") by and through their undersigned counsel submit the instant memorandum in opposition to the motion of Midland Credit Management, Inc. ("*Midland*" or "*Defendant*") for an Order dismissing this case pursuant to Fed. R. Civ. Pro. 12(b)(6).

PRELIMINARY STATEMENT

Plaintiffs commenced this action following their respective receipt of collection letters from Defendant, seeking to collect on debts allegedly owed on credit cards, originating with various underwriting banks. In the Complaint, Plaintiffs allege that the collection letters violate the applicable provisions of the Fair Debt Collection Practices Act (15 U.S.C. §1692, *et seq*.) (the "*FDCPA*") for the same reason. More specifically, the collection letters offer each Plaintiff a "settlement opportunity," calculated upon each Plaintiff's "current balance," but none of the letters state whether the "current" balance of the alleged debt(s) would increase due to the addition of interest, fees, or other charges, as they always had.

Notwithstanding the well-pleaded allegations of the Complaint, Defendant now moves to dismiss this case pursuant to Fed. R. Civ. Pro. 12(b)(6) on the grounds that the Complaint purportedly fails to state a claim upon which relief can be granted. Defendant's motion must be denied for at least three reasons.

First and foremost, Defendant's motion must be denied under the doctrine of collateral estoppel. That is because Midland previously advanced this *exact* argument and lost. *See Thomas v. Midland Credit Mgmt., Inc.*, No. 2:17-CV-00523(ADS)(ARL), 2017 WL 5714722 (E.D.N.Y. Nov. 27, 2017) More specifically, in *Thomas*, Midland argued that sending a letter to a consumer indicating a "current balance" does not offend the FDCPA as a matter of law where

the letter "neither states nor implies that interest or fees are accruing." *Thomas, 2017 WL 5714722 at *4.*

Judge Spatt disagreed with Midland and found that where, as here, the Complaint alleges that interest was accruing during the relevant period, the Complaint has sufficiently stated a claim so as to withstand a motion to dismiss pursuant to Rule 12(b)(6). *Id*.

Second, Defendant avers that the Complaint does not allege that interest and/or fees are accruing on Plaintiffs' accounts. Defendant's statement in this regard is either a misreading of the Complaint or a blatant misrepresentation thereof. To the contrary, the Complaint very specifically alleges that interest and/or fees are accruing on Plaintiffs' accounts. *See discussion, infra*.

Third, Defendant attempts to draw support for its argument from the Second Circuit's recent holding in *Taylor v. Fin. Recovery Servs., Inc.*, 886 F.3d 212 (2d Cir. 2018). Defendant's reliance on *Taylor* is misplaced, both procedurally and substantively. Defendant's reliance is procedurally misplaced because *Taylor* was decided on a motion for summary judgment, at which time the Court had a full record before it to determine whether interest and/or fees were accruing on the alleged debts. Defendant's reliance is substantively misplaced because, in *Taylor*, the letters (plural) stated a "balance," not a "current balance," and the Second Circuit held that a collection letter will not run afoul of the FDCPA where it demands payment of a "balance"—without mention of interest or fees—but ***will*** run afoul of the FDCPA where it states a "current balance" and does not include a statement as to whether such "current balance" will increase. This relates back to the second point noted above, that the Complaint very specifically alleges that interest and/or fees are accruing on Plaintiffs' accounts. For all these reasons, as well as those set forth herein, Defendant's motion to dismiss must be denied.

PROCEDURAL HISTORY

Plaintiffs commenced this action upon the filing of a Complaint with this Court on April 23, 2018. *Dkt. No.* 1, *et seq.* The Court issued a Summons on April 24, 2018. *Dkt. No.* 3. On May 7, 2018, Defendant executed a waiver of service and such waiver was filed with the Court on July 20, 2018. *Dkt. No.* 9. On July 3, 2018, Defendant filed a letter motion requesting a pre-motion conference for purposes of filing the instant motion to dismiss. *Dkt. No.* 7. On July 10, 2018, Plaintiffs filed opposition to Defendant's request for a pre-motion conference. *Dkt. No.* 8. On July 18, 2018, the Court issued an Order waiving the requirement for a pre-motion conference and set a briefing schedule for Defendant's contemplated motion. *Text only entry dated July 18, 2018.* In accordance with the Court's Order and briefing schedule, Defendant served and filed its motion to dismiss on Plaintiff on August 8, 2018. *Dkt. No.* 11, *et seq.* On August 9, 2018, the Court issued an Order terminating Defendant's motion insofar as it had been filed in violation of Your Honor's individual practice rules and the briefing Order, which required the motion to be served, but not filed, until such time as the motion was fully briefed. *Text only entry dated August 9, 2018.* The Court otherwise directed Defendant to re-file the motion in accordance with the Court's individual practice rules once the motion was fully briefed. *Id.*

STATEMENT OF FACTS

The facts of this case are taken from the Complaint filed in this action, which must be accepted as true for purposes of Defendant's motion.

Plaintiffs are each individuals who are citizens of the State of New York. More specifically, Watson is an individual who is a citizen of the State of New York residing in Suffolk County, New York; Calarco is an individual who is a citizen of the State of New York residing in Suffolk County, New York; and Stretch is an individual who is a citizen of the State

of New York residing in Suffolk County, New York. *Dkt. No. 1 at ¶¶ 5-7.* Plaintiffs are each "consumers" as defined by 15 U.S.C. § 1692a(3). *Id.* at ¶ 8.

Midland is a California Corporation with a principal place of business in San Diego County, California. *Id.* at ¶ 9. Midland is regularly engaged, for profit, in the collection of debts allegedly owed by consumers and is a "debt collector" as defined by 15 U.S.C. § 1692a(6). *Id.* at ¶¶ 10-11.

Defendant alleges that each of the individual Plaintiffs owes a debt (the "Debts"). *Id.* at ¶ 12. Each of the Debts were primarily for personal, family or household purposes and are therefore "debts" as that term is defined by 15 U.S.C. § 1692a(5). *Id. at ¶ 13.* In its efforts to collect the Debt(s), Defendant contacted Plaintiff Watson by letter dated April 19, 2017 (the "*Watson Letter*"). *Id.* at ¶ 16, *Dkt. No.* 1-1. In its efforts to collect the Debt(s), Defendant contacted Plaintiff Calarco by letter dated April 27, 2017 (the "*Calarco Letter*"). *Id. at ¶* 17, *Dkt. No.* 1-1. In its efforts to collect the Debt(s), Defendant contacted Plaintiff Stretch by letter dated May 23, 2017 (the "*Stretch Letter*"). *Id. at ¶18, Dkt. No. 1-1.* The Watson Letter, Calarco Letter and Stretch Letter are "communications" as defined by 15 U.S.C. § 1692a(2). *Dkt. No.* 1 at ¶ 19 (the Watson Letter, Calarco Letter and Stretch Letter may be hereinafter referred to collectively as the "*Letters*").

Plaintiffs' respective debts were all incurred on personal credit cards. *Id.* at ¶20. More specifically, Watson's subject credit card was underwritten by Credit One Bank, N.A., Calarco's subject credit card was underwritten by Synchrony Bank, and Stretch's subject credit card was underwritten by Fia Card Services, N.A. *Id.* at ¶¶ 21-23.

Pursuant to Plaintiffs' respective underlying credit agreements, Plaintiffs were each charged interest on any outstanding balances carried on their accounts. *Id.* at ¶ 26. Pursuant to

Plaintiffs' respective underlying credit agreements, Plaintiffs were each charged late fees on any payments due but not timely made. Id. at ¶ 27. Notwithstanding the foregoing, the Letters demanded payment of a "current balance" from each of the Plaintiffs. Id. at ¶ 24. Although the Letters do no state that Plaintiffs' "current balances" are subject to additional interest and late fees, none of the Plaintiffs were ever informed by anyone of any changes to the terms and conditions of their credit card agreements, or a waiver thereof. Id. at ¶ 28. Similarly, although the Letters set forth discounted payment options, none of the Letters state that acceptance of any such offers will fully resolve the Debts. *Id.* at ¶ 29.

As set forth herein, and as now well-settled in this Circuit, statements such as those set forth above are subject to more than one reasonable interpretation (e.g., the Debts are static and will not increase, or, the Debts are dynamic—as they always had been—and *are* subject to increase) whereas only one such interpretation can be correct. To this end, the Letters violate 15 U.S.C. § 1692e as a matter of law.

ARGUMENT

I. DEFENDANT'S MOTION MUST BE DENIED

Defendant's motion to dismiss must be denied for a variety of reasons including, but not limited to, that the motion relies on a sophistry of the facts set forth in the Complaint, a misapprehension and/or misapplication of the law, and that the relief sought is barred by the doctrine of collateral estoppel. Each of these arguments will be addressed *infra*, however, prior to addressing Defendant's arguments on the merits (or lack thereof), we first address the standards of review applicable to the instant motion, *to wit*, the rules governing a motion under Fed. R. Civ. Pro. 12(b)(6) and those governing the application of the "least sophisticated consumer" standard (the "*LSC Standard*") to such a motion and to FDCPA cases in general.

A. Standard of Review – Rule 12(b)(6)

Under Fed. R. Civ. Pro. 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. Pro. 8(a)(2). In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) the Supreme Court explained that in order to survive a motion to dismiss, a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. In this regard, "a claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

The plausibility standard is not akin to a "probability requirement" but, instead, asks for nothing more than a sheer possibility that a defendant has acted unlawfully. *Iqbal*, 556 U.S. at 678. The Second Circuit has made clear that while *Twombly* imposed a "plausibility requirement" on pleadings under Rule 8, it did not change the Rule 8 pleading standard[1].

When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court "must accept as true all of the factual allegations contained in the complaint" (*Twombly*, 550 U.S. at 572), and must "draw all reasonable inferences in Plaintiff's favor." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011). Dismissal of a complaint will be appropriate "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Flagler v. Trainor*, 663 F.3d 543, 546 (2d Cir. 2011) (emphasis added).

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[1] *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2d Cir. 2010); *see also Kamen v. Steven J. Baum, P.C.*, 659 F. Supp. 2d 402, 405 (E.D.N.Y. 2009) (citing *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) ("[S]hortly after its decision in [*Towmbly*], the Court reiterated that the pleading of specific facts in support of a complaint is not necessary. Instead, a complaint need only give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests.').

Here, the factual allegations of the Complaint allege that each of the Plaintiffs' accounts were subject to the assessment of interest and fees and the Letters, while demanding payment of a "current balance," fail to state when and how those current balances will be subject to increase. To this end (and as will be discussed further *infra*) the Complaint clearly states a claim upon which relief can be granted. That is particularly so because Defendant's argument in support of the motion avers that none of Plaintiffs' balances continued to be subject to the assessment of fees and/or interest. Since the question of the status of Plaintiffs' accounts is a question of fact, it cannot possibly be resolved on Defendant's motion to dismiss (particularly insofar as Midland has made this very argument before and has lost).

B. Standard of Review – the Least Sophisticated Consumer

In determining whether a communication violates the FDCPA, the Second Circuit applies the "least sophisticated consumer" standard. *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 90 (2d Cir. 2008). This standard is designed to ensure that the FDCPA protects all consumers, "the gullible as well as the shrewd" (*Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)), as well as the "naive and the credulous." *Quinteros v. MBI Associates, Inc.*, 999 F. Supp. 2d 434, 437 (E.D.N.Y. 2014) (citing *Id.*). "Because the least sophisticated consumer standard is objective, the determination of how the least sophisticated consumer would view language in a defendant's collection letter is a question of law." *Castro v. Green Tree Servicing LLC*, 959 F. Supp. 2d 698, 707 (S.D.N.Y. 2013) (Ramos, J.).

In ensuring that the gullible and naïve are protected by the FDCPA, the law stops short of making actionable every bizarre or idiosyncratic interpretation of debt collection letters. *Quinteros*, 999 F. Supp. 2d at 437 (quoting *Clomon*, 988 F.2d at 1320). That said, to ensure proper application of the LSC Standard, while the LSC is not considered to be "neither irrational nor a dolt" (*Ellis v. Solomon and Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010); *Russell v.*

Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996)) the Court is to be guided by the fact that the LSC possesses little more than "a rudimentary amount of information" about the world around her. *Quinteros*, 999 F.Supp.2d at 437(quoting *Clomon*, 988 F.2d at 1320). The standard of care in crafting a collection letter is, therefore, fairly high, so as to ensure that it may be clearly understood by the LSC. Here, Defendant's Letters fail this standard for the reasons set forth below.

II. DEFENDANT'S MOTION MUST BE DENIED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

The primary reason for which Defendant's motion must be denied in this case is that Midland has made this very argument before (by the same counsel) and lost. More specifically, in *Thomas*, Midland argued (as here) that its collection letter could not be false or misleading within the meaning of 15 U.S.C. §1692e because, although the letter demanded payment of a "current balance," the letter was purportedly otherwise "clear that interest is not accruing." *Thomas*, 2017 WL 5714722 at *4. To this point, it is significant to note that the letter at issue in *Thomas* was more detailed than are the Letters at-bar, to the extent that the letter in *Thomas* had line-items indicating that "post charge-off interest" and "post- charge-off fees" had been accumulated in the amount of $0.00. *Id. at *1.*

Notwithstanding the fact that the letter in *Thomas* contained more information than the Letters at issue in the case herein, Judge Spatt denied Midland's motion to dismiss on those grounds, finding that "[Midland] did not meet the minimum standard set out by *Avila*, because the letter does not state when, if ever, the amount owed by the Plaintiff would increase." *Thomas*, 2017 WL 5714722 at *4 citing *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72, 76–77 (2d Cir. 2016).

Indeed, for purposes of evaluating a Rule 12(b)(6) motion, Judge Spatt rejected Midland's contentions and held "there is nothing to indicate that interest did not accrue once the debt was transferred to [it]." *Id.* Further, Judge Spatt held "[t]he Court is hard pressed to believe that the Defendant would deem the Plaintiff's account satisfied in full if the Plaintiff paid [the "Current Amount"] two years after the letter was sent." *Id.* Accordingly, Judge Spatt found that the cases cited by Midland (most of which are the same as those cited herein) were distinguishable and, therefore, concluded that the Complaint had "alleged sufficient facts to plausibly plead claims for relief." Upon these findings, Judge Spatt held that Midland's motion to dismiss at the Rule 12(b)(6) stage must be denied. *Id. at *5.*

The import of Judge Spatt's decision in *Thomas* cannot be understated, insofar as it is dispositive of this case (or at least of this motion) under the doctrine of collateral estoppel. That is because "[C]ollateral estoppel ... means ... that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *White v. Prof'l Claims Bureau, Inc.*, 284 F. Supp. 3d 351, 358 (E.D.N.Y. 2018) (Bianco, J.) (quoting *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (quoting *Schiro v. Farley*, 510 U.S. 222, 232, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994)). Continuing, Judge Bianco observed in *White*, "Collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Id.* (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (footnote omitted)).

In determining whether the doctrine of collateral estoppel will apply, the Second Circuit has established the following four-part test:

> (1) the issues of both proceedings must be identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgment on the merits.

Leather, 180 F.3d at 425-426 (citing *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995) (citing *Gelb v. Royal Globe Ins. Co*., 798 F.2d 38, 44 (2d Cir. 1986)).

In further explaining the application of this doctrine, Judge Bianco observed that, while collateral estoppel "requires identity of issues, it does not require mutuality of parties." *White*, 284 F. Supp. 3d at 358, citing *Parklane*, 439 U.S. at 326–27, 99 S.Ct. 645. In other words, "a plaintiff can use 'offensive collateral estoppel' to 'estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff'." *Id.* quoting *Parklane*, 439 U.S. at 329–33, 99 S.Ct. 645. That is precisely what Plaintiffs seek to do in this case—save itself and the Court by preventing Midland from relitigating the very issue on which it was heard and lost.

The doctrine of collateral estoppel applies to the case-at-bar, insofar as Midland argued this very point in *Thomas* and Judge Spatt found that Midland's arguments were insufficient to prevail on a motion made pursuant to Rule 12(b)(6). Critically, Midland does not address this issue directly in its brief, despite it having been raised in Plaintiffs' opposition to Midland's request for leave to make the instant motion. Instead, Midland acknowledges the holding of *Thomas* only in a footnote in its brief and, in so doing, attempts to be dismissive of same as having been decided prior to the Second Circuit's holding in *Taylor*. To that end, Midland argues that *Thomas* should not have preclusive effect because *Taylor* would purportedly alter the result reached in *Thomas*. Midland is wrong.

III. THE SECOND CIRCUIT'S DECISION IN *TAYLOR* CANNOT BE USED TO SUPPORT DEFENDANT'S ARGUMENT

In the event that the Court does not deny Defendant's motion solely on the grounds of collateral estoppel (which Plaintiffs aver it should), the Court should reject Midland's attempt to rely on the Second Circuit's holding in *Taylor* for at least two reasons.

The primary reason for which the Court should reject Defendant's reliance on *Taylor* is that *Taylor* does not apply to this case. That is because *Taylor* came before the Second Circuit on an appeal from the grant of a motion for summary judgment. To this end, both the District Court and the Second Circuit had a fully developed record before them to determine the issues before them—those being—whether the debt collector's letter(s) were factually accurate. Here, the case is before the Court on a motion to dismiss pursuant to Rule 12(b)(6). To that end, *Taylor* would be inapplicable to the extent that the cases are procedurally inapposite. That said, to bring this case within the purview of *Taylor*, Midland attempts to discuss the factual accuracy of its Letters (which it does extensively). That argument must fail because the moment that Midland attempts to argue whether the Letters are accurate, it is dehors the record, insofar as the only pleading before the Court is the Complaint which alleges, *inter alia*, that the Letters are not factually accurate. If there is a dispute of fact (whether interest and other charges are or are not accruing on Plaintiffs' debts), that issue cannot be resolved on a pre-answer motion to dismiss. Therefore, Defendant's motion must be denied for this reason as well.

In the event that the Court does find that *Taylor* does apply to this case at this juncture, it must still deny the motion, because *Taylor* supports Plaintiffs' argument(s) in this case—not Defendant's. That is because Defendant's argument relies on a misstatement, misdescription or outright misrepresentation of the allegations of the Complaint, coupled with a misunderstanding of the Second Circuit's holding in *Taylor*.

As to the first point, Defendant's argument relies on a misstatement, misdescription or outright misrepresentation of the allegations of the Complaint insofar as Midland contends that:

> "Plaintiffs' Complaint does not allege that interest is accruing. Instead, it does the opposite and alleges that interest and late fees are not accruing."

Def. Mem. at p. 3.

Critically, Defendant's motion does not cite to any paragraph(s) of the Complaint which support(s) this contention. Instead, this appears to be nothing more than a sophistry of the facts crafted to fit Defendant's legal argument. Indeed, contrary to Defendant's argument, the Complaint very clearly states that:

> "Pursuant to Plaintiffs' respective underlying credit agreements:
>
> - Plaintiffs were each charged interest on any outstanding balances carried on their accounts;
> - Plaintiffs were each charged late fees on any payments due but not timely made;
> - Notwithstanding the foregoing, the Letters demanded payment of a "current balance" from each of the Plaintiffs;
> - Although the Letters do no state that Plaintiffs' "current balances" are subject to additional interest and late fees, none of the Plaintiffs were ever informed by anyone of any changes to the terms and conditions of their credit card agreements, or a waiver thereof."

See, e.g., Dkt. No. 1 at ¶24-28.

Further to this point, it cannot be disputed that the Letters each demand payment of a "current balance." *Dkt. No. 1-1.* To this end, the Second Circuit's holding in *Taylor* mandates a finding against Defendant, not against Plaintiffs. That is because the Second Circuit very specifically stated in *Taylor* that:

> "If the debt collector is trying to collect only the amount due on the date the letter is sent, then he complies with the Act by stating the 'balance' due, stating that the creditor 'has assigned your delinquent account to our agency for collection,' and asking the recipient to remit the balance listed—and

> ***stopping there, without talk of the 'current' balance***" [will not offend the statute].

Taylor, 886 F.3d at n.1 (quoting *Chuway v. Nat'l Action Fin. Serv., Inc*., 362 F.3d 944, 949 (7th Cir. 2004)).

In other words, the Second Circuit held that a collection letter which demands payment of a "balance" or "total due" will not offend the FDCPA if it is silent as to the accrual of interest and/or fees however, where, as here, the letter demands payment of a "current balance" it ***will*** offend the FDCPA where it does not include a statement as to when, if and/or how the balance will increase. This case is that simple.

To this end, Defendant's reliance on the holding in *Hussain v. Alltran Fin., LP*, No. 17-CV-3571-ARR-CP, 2018 WL 1640584 (E.D.N.Y. Apr. 4, 2018) is unavailing. Defendant cites *Hussain* for the premise that "the use of the word "current" does not violate the FDCPA." Def. Mem. at p. 1, 4. Defendant's reliance on *Hussain* is both factually and legally misplaced.

As to the first point, Defendant's reliance on *Hussain* is factually misplaced insofar as, in *Hussain,* the Judge Ross observed that the plaintiff did not allege that interest was accruing on the debt—a failure which Judge Ross found was "fatal to the plaintiff's claim." *Hussain,* 2018 WL 1640584 at*2. Indeed, Judge Ross further observed that she had "identified this as an issue" at the pre-motion conference and "gave plaintiff an opportunity to amend his complaint," which the plaintiff did not do. *Id.* Accordingly, Judge Ross' decision can be analogized to this case ***only if*** the Court were to accept Defendant's false description of the Complaint, which avers that interest and fees were not accruing on the debts. If, however, the Court relies on the actual allegations in the Complaint—as it must—it must come to the conclusion that the Complaint sets forth sufficient factual predicate to withstand Defendant's instant motion to dismiss.

Defendant also cites to *Stewart v. Selip & Stylianou*, 17-cv-2745 (JS)(SIL), 2018 U.S. Dist. LEXIS 126302 (E.D.N.Y. July 26, 2018) in support of the foregoing argument, however, Defendant's citation to *Stewart* is entirely misplaced. That is because there has been no ***decision*** in *Stewart.* Instead, the citation refers only to a report and recommendation issued by the Magistrate Judge, to which opposition has been filed and which, as of the date of this Memorandum, has yet to be adopted by the District Judge. Unless and until the report and recommendation is adopted, it carries no value whatsoever, insofar as District Judge Seybert may just as readily disagree with the Magistrate's construction of *Taylor*, as she should. Even if Judge Locke's Report and Recommendation is to be adopted by Judge Seybert (which it has yet to be), the decision would still not be controlling in this action for the same reason that *Taylor* is not controlling—that is—because *Stewart* is before the Court on a motion for summary judgment, whereas the case-at-bar is before the Court on a motion to dismiss pursuant to Rule 12(b)(6). In other words, unless and until there is evidence presented to the Court as to the alleged factual accuracy of the Letters, Defendant is not entitled to dismissal of this case as a matter of law.

In sum, Defendant's *Taylor* (and *Stewart*) argument(s) should be rejected because it is factually, legally and procedurally defective. The motion is factually defective because it avers that the Complaint does not allege that interest and/or fees were accruing, whereas the Complaint very clearly states so. It is procedurally defective insofar as *Taylor* was decided on summary judgment *after* the creditors (not the defendant debt collector) had submitted affidavits attesting to the accrual of such charges. It is legally defective insofar as the Second Circuit held that asking the recipient to remit the balance listed—and ***stopping there, without talk of the 'current'***

balance" [will not offend the statute]. *Taylor*, 886 F.3d at n.1 (citation omitted). Here, the Letters talked only of the "current balance," which clearly offends the holding in *Taylor*.

IV. DEFENDANT'S MATERIALITY ARGUMENT MUST BE REJECTED

In the next prong of its argument, Defendant avers that 'a misrepresentation in a collection letter will not be actionable unless the misrepresentation is material.' Def. Mem. at p. 6. While this may be a correct statement of the law, the argument must nonetheless fail insofar as the statements in Defendant's Letters herein are clearly "material" within the meaning of the statute. Indeed, the entire basis for the Second Circuit's holding in *Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72 (2d Cir. 2016) was that stating an amount due, without advising the consumer hat her balance would increase due to interest and/or fees would be misleading to the LSC. In other words, the Court in *Avila* necessarily found that accurately stating the amount of the debt is undeniably a "material" piece of information that must be communicated to a consumer.

Defendant's attempt to distinguish *Taylor* in this regard is unavailing. That is because Defendant cites *Taylor* for the premise that a debt collector is not required to call a consumer's attention to the fact that a debt which was once dynamic has now become static, because "there is no duty to encourage consumers to delay repayment of their debts." Def. Mem at p. 6. While this may be an accurate quotation from *Taylor,* it is isolated and out of context for the reasons noted above. More specifically, the Court in *Taylor* had a full record before it. In comparison, the only record before this Court is the Complaint—and argument, no matter how persuasive—cannot be considered on this motion cycle. *See e.g. In re Dewey & LeBoeuf, LLP*, 478 B.R. 627, 636 (Bankr. S.D.N.Y. 2012) (argument of counsel is not evidence); *Floyd v. Meachum*, 907 F.2d 347 (2d Cir. 1990) (same); *Tankleff v. Senkowski*, 135 F.3d 235, 253 (2d Cir. 1998).

V. PLAINTIFF WATSON'S CLAIMS ARE NOT TIME-BARRED AS A MATTER OF LAW

In the final prong of its argument, Defendant argues that Plaintiff Watson's claims are barred by the applicable statute of limitations. Defendant's argument in this regard is based solely on the observation that the Watson Letter is dated April 19, 2017, and that this action was not commenced until April 23, 2018. While this argument would appear to be facially valid, it is devoid of substance. That is because there is no evidence in the record to show *when* the Watson Letter was actually sent and/or received. Since those questions cannot be answered on the face of the pleadings and the record presently before the Court, even if Defendant's argument were meritorious (which it is not), it cannot be decided on the instant motion.

Defendant's argument must fail insofar as there is no evidence in this record to establish that the Letter was actually printed on that date and, if it was, whether it was mailed on that date. Indeed, there is no evidence to show whether the Watson Letter was printed by Midland or was outsourced to another entity. There is no evidence in this record to show the mailing procedures of whatever entity printed and/or (separately) sent the Watson Letter.

To this end, Defendant's argument must fail because it is *a fortiori* circular reasoning, and the law does not countenance such arguments. To the contrary, "the statute of limitations is an affirmative defense, the defendant bears the burden of proving that the plaintiff filed beyond the limitations period." *Payan v. Aramark Mgmt. Servs. L.P.* 495 F3d 1119, 1122-1123 (9th Cir. 2007) citing *Tovar v. U.S.P.S.*, 3 F.3d 1271, 1284 (9th Cir. 1993) ("In every civil case, the defendant bears the burden of proof as to each element of an affirmative defense"); *Wyatt v. Terhune*, 315 F.3d 1108, 1117-18 (9th Cir. 2003) ("[I]t is well-settled that statutes of limitations are affirmative defenses, not pleading requirements"); *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 108 (3d Cir. 2003) (the burden to prove expiration of statute of limitations, as an

affirmative defense, rests on the employer); *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997); *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 411 (7th Cir. 1989) (defendant has burden of proof regarding its affirmative defenses).

There is no evidence in the record at present to show if the Letter was actually printed on that date and, if it was, whether it was mailed on that date. The response to this inquiry necessarily begets questions as to Defendant's letter-writing process. Are the letters printed in house? Are they sent to a vendor to be printed? What is the mailing practice of either? Are letters printed on the same day they are dated? Are they posted on the date they are printed? If so, how are they posted? Are they bulk-mailed at a lower postage rate that may add days to the delivery time? If they are printed at the end of the day, might they not even be posted until a day or more after?

None of these questions can be answered at this time. That is because there is no allegation in the Complaint as to the date on which Watson received the Letter. Accordingly, the Court cannot resolve that question as a matter of law. *Anzelone v. ARS Nat'l Servs, Inc.*, No. 217CV04815ADSARL, 2018 WL 3429906 (E.D.N.Y. July 16, 2018) (citing *Gil v. Allied Interstate, LLC*, No. 17-cv-3362(ADS)(AKT), 2017 WL 5135600 at *3 (E.D.N.Y. Nov. 3, 2017)). As a result, Defendant cannot prevail in dismissing this case on limitations grounds on this record and on this motion.

Further to this point, the Honorable Arthur D. Spatt of this Court recently observed that, while "the Second Circuit has not yet spoken on the issue of whether an FDCPA violation occurs at the time a debt collector sends a letter to a debtor or whether it occurs when the debtor receives the communication ... [it is] 'more likely' that the statute of limitation would begin to run "on the date the debtor received the communication which supposedly violated the FDCPA".

Gil, 2017 WL 5135600 *3 (E.D.N.Y. Nov. 3, 2017) (quoting *Seabrook v. Onondaga Bureau of Med. Econ., Inc.*, 705 F. Supp. 81, 83 (N.D.N.Y. 1989)); *Somin v. Total Cmty. Mgmt. Corp.*, 494 F. Supp. 2d 153, 158 (E.D.N.Y. 2007) ("While a question may exist as to whether the cause of action accrues on the date upon which the allegedly unlawful communication is sent or received, there is no question that the latest date upon which the one year period begins to run is the date when a plaintiff receives an allegedly unlawful communication." (internal citations omitted)); *see also Donchatz v. HSBC Bank USA, N.A.*, No. 14-CV-194-JTC, 2015 WL 860760, at *9 (W.D.N.Y. Feb. 27, 2015) ("The one-year period begins to run on 'the date when the consumer receives an allegedly unlawful communication").

Since there is no evidence in this record to establish when the Watson Letter was mailed *or* received, the Court cannot decide this issue in favor of Defendant as a matter of law. Therefore, Defendant's motion based on this argument must be denied.

CONCLUSION

For all these reasons, Plaintiff respectfully requests that Defendant's motion to dismiss for failure to state a claim be denied in its entirety.

Dated: Garden City, New York
September 5, 2018

Respectfully submitted,

BARSHAY SANDERS, PLLC
Attorneys for Plaintiff

By: s/ *David M. Barshay*

David M. Barshay, Esq.
Jonathan M. Cader, Esq.
100 Garden City Plaza, Fifth Floor
Garden City, New York 11530
Telephone: (516) 203-7600
Fax: (516) 706-5055
dbarshay@barshaysanders.com
jcader@sanderslawpllc.com

CERTIFICATE OF SERVICE

I, Jonathan M. Cader, hereby certify that on the 5th day of September, 2018, a copy of the foregoing Memorandum of Law in Opposition to Defendant's Motion to Dismiss was served on counsel for Defendant, HINSHAW & CULBERTSON, LLP, by transmitting same to Han Sheng Beh, Esq. at hbeh@hinshawlaw.com.

/s/ Jonathan M. Cader
Jonathan M. Cader

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TERREL M. WATSON, GIUSEPPINA CALARCO and JARRET STRETCH,

Plaintiffs,

-against-

MIDLAND CREDIT MANAGEMENT, INC.,

Defendant.

No. 2:18-cv-02400-DRH-AKT

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MIDLAND CREDIT MANAGEMENT, INC.'S MOTION TO DISMISS

800 Third Avenue
13th Floor
New York, NY 10022
Telephone 212-471-6200
Facsimile *212-935-1166*
Attorneys for Defendant
MIDLAND CREDIT MANAGEMENT, INC

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PRELIMINARY STATEMENT

Faced with precedent rejecting Plaintiffs' exact theory of recovery, Plaintiffs now pivot and make two equally failing arguments. First, Plaintiffs' attempt to rely on Judge Spatt's decision in *Thomas v. Midland Credit Mgmt.*, 2:17-cv-00523, 2017 U.S. Dist. LEXIS 195182, at *1 (E.D.N.Y. Nov. 27, 2017) for their collateral estoppel argument fails because in that case, the Court analyzed different facts, the Court did not hold a full hearing on the facts, the Court did not enter a final judgment, and the Court's decision was not necessary to its granting of the motion to compel arbitration. Second, Plaintiffs attempt to recast their Complaint by asking this Court to ignore the words of their own Complaint and, instead read the words of Plaintiffs' Complaint to now allege that interest was accruing. A plain reading of the Complaint reveals that it contains no allegations that interest was accruing when the MCM sent the letters at issue in this case (the "Discount Letters").[1]

Even if this Court finds that Plaintiffs' Complaint somehow alleged that interest is accruing, this Court should still dismiss because the Second Circuit has held that letters containing a sum certain with an explicit due date by which to pay to resolve the debt relieves a debt-collector from the duty to disclose that interest was accruing. *See Avila v. Riexinger & Assocs., LLC*, 817 F.3d 72 (2d Cir. 2016). The Discount Letters here contain these exact elements and therefore satisfy this safe harbor. If interest was not accruing (which is the case in this matter) Plaintiffs' FDCPA claims also fail because, contrary to Plaintiffs' argument, the phrase "current balance" does not imply that interest and late fees are accruing and, in any event, such misrepresentation is immaterial. *See Taylor v. Financial Recovery Services., Inc.*, 886 F.3d 212 (2d Cir. Mar. 29, 2018); *Hussain v. Alltran Fin., LP*, 17-cv-3571-ARR-CP, 2018 U.S. Dist.

[1] In fact, Plaintiffs cannot allege that interest was accruing because it was not, and Plaintiffs are well aware of this fact.

LEXIS 57715, at *5 (E.D.N.Y. April 4, 2018). For these reasons, Plaintiffs' lawsuit should be dismissed with prejudice.[2]

ARGUMENT

POINT I

COLLATERAL ESTOPPEL DOES NOT APPLY

Plaintiffs argue that MCM's Motion to Dismiss must be disregarded because of the doctrine of collateral estoppel. The problem for Plaintiffs is that *Thomas* (the decision Plaintiffs rely on) considered a different letter; did not involve a full hearing on the facts; did not result in a final judgment; and was not necessary for the adjudication of that lawsuit. Plaintiffs also failed to annex any evidence and thus cannot meet ***their*** burden to establish that the doctrine of collateral estoppel precludes MCM's motion. *See In re Choez*, No. 15-45404-ESS, 2017 Bankr. LEXIS 3974, *36-37 (E.D.N.Y. Bank. Nov. 20, 2017) ("the burden of establishing the requirements of federal collateral estoppel lies with the party seeking to apply collateral estoppel.")

The federal doctrine of collateral estoppel allows a court, in its own discretion, to preclude re-litigation of claims if four elements are met: "(1) the issues of both proceedings must be identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there must have been 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgment on the merits." *Cent. Hudson Gas & Elec. Corp. v Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d

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[2] Notably, MCM also raised a statute of limitations defense in its moving papers and will rely on its moving papers for its argument on that point. But it should be noted that Plaintiffs' Opposition takes the incorrect position that the statute of limitations only begins to accrue upon receipt of a letter and further fails to even state when Terrel Watson's allegedly received his letter. Instead, Plaintiffs Opposition appears to focus on the fact that MCM's motion did not provide sufficient proof to establish the statute of limitations defense. Plaintiffs' argument is unavailing because it is axiomatic that MCM cannot introduce evidence on a motion to dismiss.

Cir. 1995). Plaintiffs' failure to annex any evidentiary proof establishing the above elements is fatal. *See Sullivan v. Gagnier*, 225 F.3d 161, 167 (2d Cir. 2000) (rejecting the application of collateral estoppel where the record was devoid of any evidence because "[t]he doctrine of collateral estoppel requires a detailed examination of the record in the prior . . . case, including the pleadings, the evidence submitted and the jury instructions, in order to determine what issues were actually litigated and necessary to support a final judgment on the merits. The burden of proof with respect to whether an issue is identical to one that was raised and necessarily decided in the prior action rests squarely on the party moving for preclusion.")

Plaintiffs' reliance on Judge Spatt's decision in *Thomas* is misplaced because first and foremost, the motion was to compel arbitration and any discussion of a claim under the FDCPA was not necessary to the arbitration claim. Furthermore, *Thomas* analyzed an initial letter sent by MCM to a consumer where, in this case, the Discount Letters were sent to Plaintiffs to resolve their outstanding accounts for less than the full balance. The letters do not contain the same language and Judge Spatt therefore analyzed a totally different set of facts than those at issue here.[3] Astoundingly, Plaintiffs admit that there is no parity between *Thomas* and this case as they argue, incorrectly, that "the letter at issue in *Thomas* was more detailed than are the Letters at-bar . . ." (*See* Pl.'s Opp. P. 8) (emphasis in original). The *Thomas* case (which again, was a determination on a motion to compel arbitration and did not consider any facts) did not result in a final judgment as Judge Spatt stayed the *Thomas* case and ordered the plaintiff to arbitrate his

[3] A copy of the letter at issue in *Thomas* is available in PACER and is annexed hereto for the convenience of the Court.

claims. Plaintiffs therefore cannot establish any (and definitely not all four) of the elements to meet their burden to establish that collateral estoppel applies. [4]

POINT II

SECOND CIRCUIT PRECEDENT REQUIRES DIMISSAL OF THE COMPLAINT

Plaintiffs' Opposition accuses MCM of "misrepresenting" that the Complaint did not allege that interest was accruing. But after making this baseless accusation, Plaintiffs then conspicuously avoid stating whether or not interest and late fees were accruing when the Discount Letters were sent. Instead, Plaintiffs merely quote portions of their Complaint where they allege the irrelevant fact that Plaintiffs were charged interest and late fees by their original creditors (and are again silent to the relevant fact of whether or not MCM charged interest after it acquired the accounts and sent the Discount Letters). (*See* Pl.'s Opp. p. 12). It is obvious that Plaintiffs are now attempting to re-characterize their Complaint as one that alleged that interest was accruing when the Discount Letters were sent (even though nothing in the Complaint actually says so) to survive MCM's Motion to Dismiss. As explained in MCM's moving papers and below, Plaintiffs' Complaint fails either way.

A. If Interest Was Accruing, Plaintiffs' Complaint Fails Pursuant To The Second Circuit's Decision In *Avila*

Plaintiffs' Complaint does not allege that interest was accruing when the Discount Letters were sent. Even assuming *arguendo* that it did, Plaintiffs still fail to state a claim under the FDCPA. As established in MCM's moving papers (and unopposed in Plaintiffs' Opposition),

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[4] Plaintiffs' reliance on *White v. Prof'l Claims Bureau, Inc.*, 284 F. Supp. 3d 351, 358 (E.D.N.Y. 2018) (J. Bianco) is misplaced because, in *White*, Judge Bianco considered the same form letter and the decisions Judge Bianco used as the basis for collateral estoppel were final judgments (rendered as a result of summary judgment motions).

the Second Circuit in *Avila* held that if interest is accruing, that a debt-collector must disclose to the consumer that the balance of a debt may increase due to interest. However, in this same decision, the Second Circuit also crafted a safe-harbor—that a disclosure regarding interest was not necessary if the communication "clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date." *Id.* at 77. Applying the Second Circuit's decision in *Avila*, Judge Glasser of this court held that a letter offering to resolve a debt for less than the amount owed if payment is made by a specific date relieved a debt-collector from the need to disclose that a debt may increase due to interest or fees. *See Kraus v. Prof'l Bureau of Collections*, 281 F. Supp. 3d 312, 319-20 (E.D.N.Y. 2017). Specifically, Judge Glasser reviewed a letter that stated:

> We have been authorized by our client Comenity Bank to offer you an opportunity to pay less than the amount due. This settlement as offered shall be in the amount of 40% of the balance.
>
> This settlement offer will expire unless we receive your payment of $1,552.45 due in our office on or before 6/20/216.

Id. at 315. Applying the Second Circuit's decision in *Avila*, Judge Glasser dismissed the plaintiff's FDCPA claim reasoning that "[t]he safe harbor covers a debt collector who ***either*** [1] accurately informs the consumer that the amount of the debt stated in the letter will increase over time, ***or*** [2] clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date." *Id.* at 320 (emphasis in original).

Here, like *Kraus*, the Discount Letters fall within the safe-harbor established by *Avila*. Each of the Discount Letters made offers to resolve the entire debt (using the phrase "put this debt behind you") for sums certain and provided an explicit "Offer Expiration date:" For example, the letter sent to plaintiff Terrell Watson gave him two options, a lump sum payment of

$419.03 (reflecting a 40% discount) or six monthly payments of $93.11 (reflecting a 20% discount). The letter also listed an "Offer Expiration date" of "05-19-2017." The Discount Letters, like the letter in *Kraus*, did not violate the FDCPA.

B. <u>If Interest Was Not Accruing, There Is Also No FDCPA Violation</u>

Plaintiffs' Complaint claims that the phrase "current balance" falsely implied that interest was accruing when the Discount Letters were sent. (*See* Compl. ¶ 31) ("Plaintiffs were never informed by anyone that interest and late fees would no longer be applied, and especially because of the use of the word 'Current,' the Letters can reasonably be read by the least sophisticated consumer to mean that interest and/or late fees **were still accruing**.") (emphasis added). Plaintiffs' theory thus relies on their factual allegation that interest and late fees were ***not*** accruing. However, as explained in MCM's moving papers, the word "current" does not imply that interest is accruing and, even if it did, the Second Circuit has held that such a "misrepresentation" (implying that interest was accruing when in actuality it is not) is immaterial and does not state a claim under § 1692e of the FDCPA.[5]

1. The Word "Current" Does Not Imply That Interest Is Accruing

Plaintiffs Opposition fails to cite any precedent to establish their claim that the phrase "current balance" falsely implies that interest and/or late fees are accruing. Instead, Plaintiffs mischaracterize a footnote from *Taylor* referencing the Seventh Circuit's decision in *Chuway v. Nat'l Action Fin. Servs.*, 362 F.3d 944 (7th Cir. 2004) by claiming that using the word "current"

[5] Notably, MCM's moving papers established as meritless Plaintiffs' claim that the Discount Letters should have expressly advised Plaintiffs that interest was not accruing. *See Taylor*, 886 F.3d at 215 ("a collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading within the meaning of Section 1692e."); *see also Stewart v. Selip & Stylianou*, 17-cv-2745 (JS)(SIL), 2018 U.S. Dist. LEXIS 126302, *9 (E.D.N.Y. July 26, 2018) (*Citing* to *Taylor* and holding: "[i]n that case, as in this case, the debt was not accruing interest—a fact on which the collection notice was silent. Applying these standards, the Court concludes that Defendant's omission of costs and disbursements . . . did not violate Section 1692e.") Plaintiffs' Opposition does not address MCM's argument and thus it appears that Plaintiffs have abandoned this theory of recovery.

automatically violates the FDCPA. (*See* Pl.'s Opp. pp. 12, 13). Plaintiffs' argument—which relies on misinterpreting cherry picked language in a footnote—is belied by a plain review of the *Taylor* and *Chuway* decisions. First, the letter at issue in *Taylor* actually used the phrase "current balance" and the Second Circuit did not find any violation of the FDCPA. Second, in *Chuway*, the Seventh Circuit's discussion of the word "current" appears in the context where a collection letter stated a "balance" of $367.42, but then proceeded to state: "To obtain ***your most current balance*** information, please call . . ." *Chuway*, 362 F.3d at 947 (emphasis added). The Seventh Circuit's decision was thus based on these two key components (stating the "balance" owed while contradictorily telling the consumer to call for the "most current balance") to find a possible FDCPA violation. These components do not exist in this case where "current balance" is used solely to describe the amount owed and there is no direction to call that would imply that the amount of the debt is increasing. Plaintiffs' reliance on *Chuway* is misplaced.

Unlike *Chuway*, the cases cited by MCM in its moving papers are analogous to the facts of this case. In *Hussain*, Judge Ross, applying the Second Circuit's decision in *Taylor*, expressly analyze the phrase "current amount due" and found no violation of the FDCPA. *See Hussain*, 2018 U.S. Dist. LEXIS 57715, at *5. Furthermore, a number of other cases decided in this jurisdiction have found language similar to the word "current" to comport with the FDCPA because it does not (contrary to Plaintiffs' argument) imply that interest is accruing. *See Feldheim v. Fin. Recovery Servs.*, No. 16-cv-3873 (KMK), 2017 U.S. Dist. LEXIS 101290, at *18-19 (S.D.N.Y. June 28, 2017) (ruling that the phrase "as of the Date of this Letter" does not "'Imply' or 'purport'—deceptively or otherwise—that the balance Plaintiff owed would increase over time. A plain reading of the notice's quoted language reveals that it was not false, deceptive, or misleading."); *see also Ghulyani v. Stephens & Michaels Assocs.*, No. 15-cv-

5191(SAS), 2015 U.S. Dist. LEXIS 145424, at *8 (S.D.N.Y. Oct. 26, 2015) ("[P]retending the clause 'Balance Due as of the Date of this Letter' actually reads 'Balance Due as of the Date of this Letter, as your balance may be subject to increase due to interest' . . . . [is a] farfetched and implausible interpretation.")

Plaintiffs' Opposition completely ignores the reasoning of these cases. Instead, Plaintiffs merely argue that *Hussain* is inapplicable because the plaintiff in *Hussain* alleged that interest was not accruing on the debt. (*See* Pl.'s Opp. p. 13). However, as explained above, Plaintiffs' theory that the word "current" violates the FDCPA necessarily rests on their allegation that interest was not accruing—the same allegation in *Hussain*.[6] Plaintiffs offer nothing else to challenge *Hussain* and, importantly, do not quarrel with Judge Ross' holding that the use of the phrase "current amount due" was not deceptive, misleading or false. Plaintiffs do not even bother to address the *Feldheim* and *Ghulyani* decisions, both of which thoroughly explained why language similar to "current" do not imply that a debt is increasing. The Discount Letters, like the letters in *Hussain*, *Feldheim* and *Ghulyani*, therefore do not violate the FDCPA.

2. Plaintiffs Cannot Avoid the Second Circuit's Holding in Taylor That A Misrepresentation That Interest Is Accruing is Immaterial

Even assuming *arguendo* that the Discount Letters misrepresented that Plaintiffs' debts were increasing, such a misrepresentation does not violate § 1692e of the FDCPA because it is immaterial. Plaintiffs concede that their claims (based solely on § 1692e) require a material misrepresentation. (*See* Pl.'s Opp. p. 15). As explained in MCM's moving papers, the Second Circuit in *Taylor* explicitly reasoned that there is no harm to the least sophisticated consumer

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[6] As explained in *supra* Point II(A), Plaintiffs' lawsuit is not salvaged (although for a different reason) even if this Court accepts Plaintiffs' argument that their Complaint sufficiently alleged that interest was accruing.

even if he/she is misled into believing that interest is accruing when, in actuality, it is not. Specifically, the *Taylor* court stated:

> Of course, being informed that their debts were not accruing interest or fees could have been advantageous to [Plaintiffs], as it would have alerted them to the fact that they could delay repayment without their debts increasing. The only harm that [plaintiffs] suggest a consumer might suffer by mistakenly believing that interest or fees are accruing on a debt is being led to think that there is a financial benefit to making repayment sooner rather than later. **This supposed harm falls short of the obvious danger facing consumers in *Avila*. It is hard to see how or where the FDCPA imposes a duty on debt collectors to encourage consumers to delay repayment of their debts.** And requiring debt collectors to draw attention to the fact that a previously dynamic debt is now static might even create a perverse incentive for them to continue accruing interest or fees on debts when they might not otherwise do so.

Taylor, 886 F.3d at 214-15. Plaintiffs argue that *Taylor's* reasoning is inapplicable because *Taylor* involved a motion for summary judgment while the instant motion is a motion to dismiss. However, Plaintiffs fail to explain—because they cannot—why this procedural difference renders *Taylor's* reasoning inapplicable. Plaintiffs' argument that they "alleged" that interest and fees were accruing in support of a different and wholly distinct theory of recovery (already addressed in *supra* Point II(A)) does not change the fact that for their theory based on the word "current" they are alleging that interest and fees were not accruing. The facts supporting this theory of recovery are thus squarely within the facts and reasoning of *Taylor*. As in *Taylor*, Plaintiffs did not suffer any harm even if they could have been "misled" into believing that interest was accruing, requiring dismissal of this lawsuit.

CONCLUSION

MCM's Motion to Dismiss does not argue any facts and instead assumes, as is required for a Rule 12(b) motion, that all allegations of fact are true. As explained above, whether or not interest was or was not accruing is of no moment because, as a matter of law, Plaintiffs fail to state a claim under either scenario. If accruing, the *Avila* safe harbor applies because the

Discount Letters provided sums certain to be paid with explicit due dates to fully resolve the debt. If not accruing, the phrase "current balance" does not imply that interest and/or late fees are accruing. Plaintiffs also fail to meet their burden to establish that collateral estoppel applies and, in any event, the *Thomas* decision Plaintiffs rely on do not meet any, much less all four, of the elements necessary for the doctrine to apply. Based on the foregoing, MCM respectfully requests that the Court grant MCM's Motion to Dismiss in its entirety and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 14, 2018

HINSHAW & CULBERTSON LLP
Attorneys for Defendant
Midland Credit Management, Inc.

By: */s Han Sheng Beh*
Han Sheng Beh
800 Third Avenue, 13th Floor
New York, New York 10022
Tel: (212) 471-6200
Fax: (212) 935-1166