

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DSJ

Janet Long, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

Fenton & McGarvey Law Firm P.S.C., a
Kentucky corporation, and Jefferson
Capital Systems, LLC, a Georgia limited
liability company,

Defendants.

CASE NO.: 1:15-cv-01924-SEB-DKL

**DEFENDANT JEFFERSON CAPITAL SYSTEMS LLC'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
AND
MOTION FOR JUDGMENT ON THE PLEADINGS**

NOW COMES Defendant, Jefferson Capital Systems LLC ("JCAP"), through undersigned counsel, and hereby moves this Honorable Court pursuant to Fed.R.Civ.P. 12(b)(1), to dismiss this action for lack of subject matter jurisdiction as Plaintiff has not personally suffered any particularized or concrete injury-in fact as a result of the putatively illegal conduct of Defendants.

In addition, Defendant, Jefferson Capital Systems LLC, moves this honorable Court pursuant to Fed.R.Civ.P. 12(c), for judgment on the pleadings and to dismiss this action, for the reasons that assuming the facts alleged in Plaintiff's Complaint are true, Plaintiff has failed to state a cause of action upon which relief may be granted, as more fully set forth in the memorandum in support that is attached hereto and incorporated herein by reference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 7, 2016, a copy of the foregoing was filed electronically in the ECF system. Notice of this filing will be sent to the parties of record by operation of the Court's electronic filing system, including Plaintiff's counsel as described below. Parties may access this filing through the Court's system.

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**MEMORANDUM IN SUPPORT OF
DEFENDANT JEFFERSON CAPITAL SYSTEMS LLC'S
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I. INTRODUCTION AND STATEMENT OF FACTS

Plaintiff Janet Long commenced this putative class action under the Fair Debt Collection Practices Act on December 7, 2015. Doc. No. 1. The complaint alleges Defendants Fenton & McGarvey Law Firm P.S.C. (“Fenton”), and Jefferson Capital Systems LLC (“JCAP”), violated 15 U.S.C. § 1692g(a)(2) when Fenton sent letters to her that stated the name of the original creditor was Comenity Bank, and then further stated: “Please be advised that Fenton & McGarvey Law Firm, P.S.C. has been retained by Jefferson Capital Systems, LLC to collect its account with you.” Doc. No. 1 ¶ 7; doc. No. 1-1 PID# 8, 9. Plaintiff filed a motion for class certification at the same time that the complaint was filed, and a supplemental motion was filed April 1, 2016. Doc. No. 2, 33, 34. These motions followed.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW: DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

Because that the U.S. District Court is a Court of limited jurisdiction, it is proper to first examine whether jurisdiction over an action exists. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)(“courts have ‘no business’ deciding legal disputes or expounding on law in the absence of such a case or controversy.”).

“As the party invoking federal jurisdiction, a plaintiff bears the burden of establishing the elements of Article III standing.” *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015). The *Twombly-Iqbal* plausibility standard applies in the context of a facial challenge to subject matter jurisdiction, asking the question of whether the well-pled facts in the complaint, assumed to be true, plausibly give rise to an entitlement to relief. *Silha v. ACT, Inc.*, 807 F.3d 169, 174. As to injury in fact, the focus of inquiry asks whether Plaintiff has “lost anything of value as a result of

the alleged misconduct.” *Id.* at 175.¹ A Plaintiff who would be no better off had the Defendant not engaged in the alleged unlawful conduct, does not have standing under Article III. *Id.* at 174 (quoting *McNamara v. City of Chic.*, 138 F.3d 1219, 1221 (7th Cir. 1998)).

I. Article III Standing

The judicial power granted to the Courts in Article III, Sections 1 & 2, of the United States Constitution, is understood to extend to “cases” and “controversies.” *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). Art. III requires a live controversy in which a personal stake is at issue “throughout the entirety of the litigation.” *Sosna v. Iowa*, 419 U.S. 393, 401-02 (1975). Article III standing involves a threshold inquiry into whether a federal court has the power to hear the suit before it. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.”); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976). That jurisdiction “be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). Without jurisdiction an action in federal court cannot proceed. *See Hay v. Indiana State Bd. of Tax Com'rs*, 312 F.3d 876, 879 (7th Cir. 2002) (“Jurisdiction is the ‘power to declare law,’ and without it the federal courts cannot proceed.”).

¹ In contrast, a factual attack on subject matter jurisdiction seeks to show that “‘there is in fact no subject matter jurisdiction,’ even if the pleadings are formally sufficient.” *Silha v. ACT, Inc.*, 807 F.3d at 173 (quoting *Apex Dig., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009)). “In reviewing a factual challenge, the court may look beyond the pleadings and view any evidence submitted to determine if subject matter jurisdiction exists.” *Id.*

Article III of the Constitution imposes its own standing requirements, and only certain plaintiffs will have suffered the particularized injury required to maintain an action in federal court for a statutory violation. *Lewert v. P.F. Chang's China Bistro, Inc.*, No. 14-3700, ___F.3d___, 2016 WL 1459226, at *2-5 (7th Cir. Apr. 14, 2016); *Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 661 (7th Cir. 2015). To establish the irreducible constitutional elements of Article III standing, “a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992); *Spokeo, Inc. v. Robins*, 2016 WL 2842447, 136 S. Ct. 1540 (2016).

In *Robins v. Spokeo, Inc.*, the plaintiff-consumer alleged that defendant operated its website in violation of the Fair Credit Reporting Act (“FCRA”) because the website contained inaccurate information that was marketed to entities performing background checks. *Robins v. Spokeo, Inc.*, No. 10-cv-05306, 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011). Plaintiff alleged concerns that the inaccurate information could adversely affect his ability to obtain credit, employment, insurance, and the like. *Id.* The district court found plaintiff’s bare allegations insufficient to satisfy the injury in fact requirement for constitutional standing and dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6). *Id.* at *2. The Ninth Circuit reversed, holding that plaintiff did adequately allege injury in fact because “the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them.” *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014) *cert. granted*, 135 S. Ct. 1892 (2015). Defendant appealed, the Supreme Court granted certiorari and reversed. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 2016 WL 2842447 (May

16, 2016). The Court noted the Ninth Circuit’s analysis was incomplete because “the injury-in-fact requirement requires a plaintiff to allege an injury that is *both* ‘concrete and particularized.’” *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2842447, at *3 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181 (emphasis added)).

The Court first noted that at the pleading stage, the Plaintiff must allege facts demonstrating each element to show a case or controversy exists, namely, that Plaintiff “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 2016 WL 2842447, at * 5 (construing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61). To establish injury in fact, a plaintiff must show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Spokeo*, 2016 WL 2842447, at *6 (quoting *Lujan*).

a. Injury-in-fact: Particularization & Concreteness

“For an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’” *Spokeo*, at *6. For an injury to be concrete, the injury must be “de facto”; that is, it must actually exist, be real and not abstract. *Spokeo*, at *7. A concrete injury may be either tangible or intangible, and assessing whether an intangible injury amounts to an injury in fact, “both history and the judgment of Congress play important roles.” *Id.* at 7. As to history, “it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Id.* As to Congress’ input, while Congress can enact “a statute [that] grants a person a statutory right and purports to authorize that person to sue to vindicate that right,” this is not, in and of itself, automatically enough to satisfy the concreteness requirement. *Id.* “Congress has the power to

define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.... [However], Article III standing requires a concrete injury even in the context of a statutory violation.” *Id.*

To maintain the distinction between statutory standing, which asks whether the Plaintiff’s claim is within the zone of interests protected by the statute at issue,² and Article III standing, which asks whether the plaintiff has suffered a particularized and concrete injury-in-fact, the Supreme Court clarified in *Spokeo* that it is not enough to satisfy Article III’s injury-in-fact requirements solely by alleging the bald deprivation of a statutory right that is intended to benefit the public at large. *Spokeo*, at *7-8. “For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency’s consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm.” *Spokeo*, at *8. *See also id.* at 13 (Thomas, J. concurring)(noting that violations of statutory duties owed to the public at large are not actionable absent a showing the Plaintiff suffered concrete and individualized harm, and when the statute grants individuals the “power to police” compliance with statutory duties, such statutes do not create “standing to sue for its violation absent an allegation that he has suffered individualized harm.”).

Thus, the allegation of a bare violation of a statute and the grant of a private right of action alone, divorced from any concrete or particularized individual harm, does not satisfy the injury-in-fact requirement of Article III. *Spokeo, supra.*

b. Injury-in-fact: actual or imminent, not conjectural or hypothetical

² See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388, 1388 n. 4 (2014).

This aspect of injury-in-fact analysis looks at whether the claimed injury actually occurred, or if not, whether the claimed injury is likely to be felt imminently, as opposed to a remote possibility or merely hypothetical that an injury may take place in the future. *Bell v. Keating*, 697 F.3d 445, 451 (7th Cir. 2012); *Otrompke v. Hill*, 592 F. App'x 495, 498 (7th Cir. 2014), *reh'g denied* (Dec. 4, 2014), *cert. denied*, 136 S. Ct. 49 (2015); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (“we have repeatedly reiterated that ‘threatened injury must be certainly impending to constitute injury in fact,’ and that ‘[a]llegations of possible future injury’ are not sufficient.”)(quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). The *Clapper* Court noted, however, that plaintiffs need not demonstrate that it is “literally certain” that they will suffer harm, and it acknowledged that “we have found standing based on a ‘substantial risk’ that the harm will occur.” *Id.* at 1150 n. 5 (quoting *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754-55 (2010)). Thus, “[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper*, 133 S. Ct. at 1147, 1150 n. 5).

c. Causal connection between injury and conduct complained

“Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits. Put differently, the proximate-cause requirement generally bars suits for alleged harm that is “too remote” from the defendant’s unlawful conduct.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390; *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 366 (3d Cir. 2014).

d. Redressability

The last requirement of Article III standing is redressability, which requires the plaintiff to show that “it ... [is] ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’ ” *Hassan v. City of New York*, 804 F.3d 277, 293 (3d Cir. 2015) (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). The availability of statutory damages is sufficient to show that the plaintiff’s injury is redressable. *Hammer v. Sam’s E., Inc.*, 754 F.3d 492, 498–500 (8th Cir. 2014), *cert. denied*, 135 S.Ct. 1175 (2015).

B. STANDARD OF REVIEW: JUDGMENT ON THE PLEADINGS

Federal Rule of Civil Procedure 12(c) permits a party to move for judgment after the parties have filed the complaint and answer. Rule 12(c) motions are reviewed under the same standard as a motion to dismiss under 12(b)(6). *Frey v. Bank One*, 91 F.3d 45, 46 (7th Cir. 1996). A motion under Rule 12(b)(6) to dismiss for failure to state a claim is used to test the legal sufficiency of the complaint. The Supreme Court has established a two-step process for determining whether a plaintiff has pled sufficient facts to overcome a motion to dismiss. A court must first ignore “mere conclusory statements” or legal conclusions, which are not entitled to the presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Then, assuming the veracity of the remaining facts, “a complaint must contain sufficient factual matter ... to ‘state a claim [for] relief that is plausible on its face.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 570). This obligation requires a plaintiff to plead “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. A complaint “must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Id.* at 562 (quoted case omitted). To survive a motion to dismiss, the plaintiff must state a claim that is plausible on its face. *Twombly*, 550 U.S. at 570; *Zemeckis v. Global Credit & Collection Corp.*, 679 F.3d 632,

635 (7th Cir. 2012). That is, “[f]actual allegations must be enough to raise a right to relief above the speculative level, ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Twombly* at 555 (citations omitted). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). Further, it is not enough to provide notice of a claim: “By emphasizing a plausibility requirement, *Twombly* and *Iqbal* obviously require more than mere notice. When ruling on a motion to dismiss, the court must review the complaint to determine whether it contains ‘enough fact to raise a reasonable expectation that discovery will reveal evidence’ to support liability for the wrongdoing alleged.” *Adams v. City of Indianapolis*, 742 F.3d 720, 729 (7th Cir. 2014).

In construing a motion to dismiss, the Court is permitted to construe not only the facts alleged in the complaint, but also any documents made part of the pleadings, and any judicially noticeable facts. *Geinosky v. City of Chicago*, 675 F.3d 743, 745–46 n. 1 (7th Cir. 2012). “[D]ocuments attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to his claim. Such documents may be considered by a district court in ruling on the motion to dismiss.” *188 LLC v. Trinity Industries, Inc.*, 300 F.3d 730, 735 (7th Cir. 2002) (quoting *Wright v. Assoc. Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994)). “The purpose of the exception is to prevent parties from surviving a motion to dismiss by artful pleading or by failing to attach relevant documents.” *188 LLC v. Trinity Industries, Inc.*, 300 F.3d 730, 735.

C. STATUTORY TEXT

15 U.S.C. § 1692g provides in pertinent part:

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

* * *

(2) the name of the creditor to whom the debt is owed;

15 U.S.C. § 1692g(a)(2).

D. STANDARD APPLICABLE TO FDCPA CLAIMS

Generally, in order for a plaintiff to recover under the FDCPA, a plaintiff must show that plaintiff is a “consumer,” the “debt” arises out of a transaction entered into primarily for personal, family, or household purposes, the defendant collecting the debt is a “debt collector”; and the defendant has violated, by act or omission, a provision of the FDCPA. *Forgey v. Kitchel*, No. 3:11-CV-341-JD, 2012 WL 6160497, at *7, n. 4 (N.D. Ind. Dec. 7, 2012); *Felty v. Driver Solutions, LLC*, No. 13 C 2818, 2013 WL 5835712, at *3 (N.D. Ill. Oct. 30, 2013).

Whether the letter complies with the requirements of 15 U.S.C. § 1692g(a)(2) presents a question of law. *Janetos v. Fulton Friedman & Gullace, LLP*, No. 15-1859, ___ F.3d ___, 2016 WL 1382174, at *7 (7th Cir. Apr. 7, 2016). *See also Sheriff v. Gillie*, No. 15-338, ___ S.Ct. ___, 2016 WL 2842453, at *7, n. 7 (May 16, 2016) (noting where “all of the relevant facts are undisputed, ... the application of the FDCPA to those facts is a question of law.”); *Walters v. PDI Mgmt. Servs.*, 2004 WL 1622217, at *7 (S.D. Ind. 2004) opinion modified on denial of reconsideration, 2004 WL 2137513 (S.D. Ind. 2004).

III. ARGUMENT

A. PLAINTIFF CANNOT SHOW ARTICLE III STANDING BECAUSE SHE HAS NOT PERSONALLY SUFFERED ANY PARTICULARIZED OR CONCRETE INJURY-IN FACT AS A RESULT OF THE PUTATIVELY ILLEGAL CONDUCT OF DEFENDANTS

If Congress had truly intended debt collectors to provide the statutorily required information in 15 U.S.C. § 1692g verbatim, one would have expected the statute to have read: “[A] debt collector shall... send the consumer a written notice ~~containing~~ stating-- ... (2) “the name of the creditor to whom the debt is owed is _____ [.]” See 15 U.S.C. § 1692g(a)(2). The statute clearly does not require a verbatim recitation of the statutory language followed by a fill in the blank reference. *Gruber v. Creditors' Protection Services, Inc.*, No. 12–C–1243, 2013 WL 2072976, *2 (E.D.Wis. May 14, 2013)(“to comply with § 1692g(a), a debt collector does not have to reproduce the statutory notices verbatim.”), *aff'd*. 742 F.3d 271 (7th Cir. 2014); *Barnes v. Advanced Call Center Technologies, LLC*, 493 F.3d 838, 841 (7th Cir. 2007)(§ 1692g(a)(1) does not require the debt collector to state verbatim “the amount of the debt;” debt collector complied with the requirement of § 1692g(a)(1) stating “Current Amount Due” complied).

What the statute does require is to send a written notice “containing ... the name of the creditor to whom the debt is owed.” 15 U.S.C. § 1692g(a)(2). The first sentence contained in the August 19 letters satisfies this requirement. Doc. No. 1-1. This statutorily mandated disclosure of information is a duty every debt collector owes to the public collectively, and there can be no question that Defendants satisfied the requirement by notifying Plaintiff that the debts originated by Comenity Bank belonged to JCAP. *See infra*.

Plaintiff has not alleged in the complaint how the absence of the statement, “the name of the creditor to whom the debt is owed is Jefferson Capital Systems, LLC,” affected her in any tangible way whatsoever. The complaint does not allege any fact of consequence befalling Plaintiff flowed from the alleged failure to clearly identify JCAP as the creditor, aside from rendering Defendants liable for statutory damages, costs and attorney’s fees. Doc. No. 1 ¶ 13.

There is no allegation, for instance, that believing her debts were still owed to Comenity Bank, she paid Comenity Bank instead and the debts remained unsatisfied despite payment. She likewise does not allege that she was led to believe that her Comenity Bank debts were owed to someone other than JCAP after she read the letters, and that she made her check payable to “someone other.” Nor does she allege that she intended her payment for JCAP but had the payment misapplied to a debt she did not intend to pay, or that she because she was unable to discern who the proper payee was, that she elected not to pay, causing the unpaid balance to increase.

As such, she does not allege and she cannot show that she suffered any pecuniary harm or loss as a result of the absence of an explicit reference to JCAP as the current creditor.

Likewise, she does not allege and she cannot show any form of injury to person or property, or even that the letter caused her any confusion because she does not allege that the absence of an explicit reference to JCAP as the current creditor led her to believe the debt was owed to anyone other than JCAP. She likewise fails to allege any facts that could plausibly explain how the alleged failure impacted her ability to choose whether to dispute the debt, or somehow affected her ability to discern whether the debts were already paid or was not owed by her. *See* S. REP. 95-382, 1977 U.S.C.C.A.N. 1695, 1699 (Aug. 7, 1977).

In fact, there is no tangible loss, harm or injury at all alleged in the complaint at all. Doc. No 1, *passim*.

Although the Supreme Court expressed no opinion on whether the procedural FCRA violation at issue in *Spokeo* constituted a “concrete injury” sufficient to confer standing on the plaintiff, instead “leav[ing] that issue for the Ninth Circuit to consider on remand,” the *Spokeo* Court indicated that some statutory violations could be sufficiently procedural or technical to fail the “concrete injury” requirement. *Id.* at *8 & n. 8.

As to whether the absence of an explicit reference to JCAP as the current creditor amounts to an actionable intangible injury for which judicial redress was intended, neither the common law or Congressional intent support the view that it is. *See Spokeo at* *7.

At common law, assignees have long been recognized as having the right to engage in collection. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008).³ The common law did not require notice of assignment to be given to the obligor to validate the assignment, and lack of notice of assignment was not a basis for any common law claim unless the lack of notice prejudiced the debtor. *Stilwell v. Am. Gen. Life Ins. Co.*, 555 F.3d 572, 578 (7th Cir. 2009)(“Absent a statutory requirement to the contrary, notice to the debtor is not essential to the validity of an assignment, unless the debtor acted to his prejudice because of lack of notice or before receiving notice of the assignment.”)(quoting *Grunloh v. Effingham Equity, Inc.*, 174 Ill.App.3d 508, 124 Ill.Dec. 140, 528 N.E.2d 1031, 1039 (1988)); *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 923 (8th Cir. 2000); *Spoor v. Q. & C. Co.*, 162 F.2d 529, 532 (7th Cir. 1947). Thus, the common law required a showing of some form of prejudice by a debtor before such debtor was allowed to make a claim related to the assignment.

The legislative history of the FDCPA shows that Congress was well aware that technical non-compliance with the requirements of the Act would rarely result in any compensable injuries. The standard ultimately adopted by Congress for assessing statutory damages reflects

³ Some resources suggesting the practice of selling accounts receivable dates back 4,000 years to the time of the Mesopotamians, but the practice was clearly part of the financial landscape of England as early as the 12th century, and part of the American financial services industry of the 1800's. DAVID B. TATGE, JEREMY B. TATGE, DAVID FLAXMAN, AMERICAN FACTORING LAW, pp. 8-126 (BNA 2009); *see also id.*, 2011 supplement at p. 6; *see generally William & James Brown & Co. v. McGran*, 39 U.S. 479, 1840 WL 4612 (1840). In any case, by the 1940's, assigned accounts receivable was already a billion dollar plus industry in the United States. *Corn Exchange Nat. Bank & Trust Co., Philadelphia v. Klauder*, 318 U.S. 434, 438, n. 10 (1943).

Congressional intent that technical non-compliance would not result in the imposition of a statutory penalty for every violation. 15 U.S.C. § 1692k(a)(2)(A).

Various drafts of the legislation Congress considered in 1975, 1976 and 1977 provided for “actual damages,” which would have departed from the common law understanding of that term, but because objections were raised, the departure from the common law was rejected. *See* H.R. 10191 §811(a)(1) 94th Cong. 1st Sess. (1975)(providing for “any actual damage, sustained by such consumer including any incidental, consequential or special damages sustained by the consumer as a result of the failure to comply;”); H.R. 11969 §812(a)(1), 94th Cong. 2d Sess. (1976) (“any actual damage sustained by such person as a result of such failure;”); H.R. 13720 §811(a)(1) 94th Cong. 2d Sess. (1976)(same); H.R. 29 §812(a)(1) 95th Cong. 1st Sess. (1977)(same); H.R. 5294 §812(a)(1) 95th Cong. 1st Sess. (1977)(same); S. 656 §812(a)(1) 95th Cong. 1st Sess.(1977)(same); S. 1130 §805(a)(1) 95th Cong. 1st Sess. (1975)(same); S. 918 §813(a)(1) 95th Cong. 1st Sess.(1977) (“any actual damage sustained by such person as a result of such failure, including damages for emotional distress or mental anguish suffered with or without accompanying physical injury;”).

Similarly, most of the Bill drafts also included a statutory damages component. H.R. 10191 §811(a)(2)(A) (providing for not less than \$100 or more than \$2,500 as determined by the Court); H.R. 11969 §812(a)(2)(A) (providing for not less than \$100 or more than \$1,000 as determined by the Court); H.R. 13720 §811(a)(2)(A)(same); H.R. 29 §812(a)(2)(A)(same); H.R. 5294 §812(a)(2)(A) (same); S. 656 §812(a)(2)(A)(same); S. 918 §813(a)(2)(A)(same); S. 1130 §805(a)(2)(A)(providing for punitive damages, not statutory damages in an individual case).

During the Senate Markup sessions, the Senate debated whether to mandate an award of statutory damages in every case, as was originally mandated in the Truth in Lending Act, or to adopt the standard applicable to the award of damages under the Fair Credit Reporting Act. *Senate*

Comm. on Banking, Housing & Urban Affairs, Markup on Debt Collection Legislation, pp. 4-24, 46-56 (July 26, 1977); *see id.* at 19-20 (Senator Garn: "...We feel the Truth in Lending Act with its provision for automatic minimum civil penalties of \$100 has been a disaster. It's been the basis for creditor harassment, has resulted in the filing of literally thousands and thousands of civil suits in federal district courts since 1972.") (proposing elimination of the minimum and maximum). After debate, it was decided to remove a mandatory statutory minimum of \$100, so that where a technical violation occurred, the Court was given discretion to award no statutory damages at all (instead of mandating at least a minimum award of \$100 in every case). *See id.*, pp. 4-24, 46-56; S. REP. 95-382, 1977 U.S.C.C.A.N. 1695, 1700 (Aug. 7, 1977).

Regarding the standard for actual damages, when H.R. 5294 passed the House, and the Senate conducted hearings on competing versions of the legislation, several objections to the language in § 813(a)(1) in S. 918 were made because it departed from the common law standard for actual damages. *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, & H.R. 5294 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing & Urban Affairs*, 95th Cong. (May 12-13, 1977), e.g., Statement of John L. Spafford, President, Associated Credit Bureaus, Inc., pp. 107-135, p. 128-29; Statement of Julia Boyd, representing American Retail Federation, pp. 203-210:

With respect to quantum of damages, we strenuously object to two provisions of Section 813(a) of S. 918. The first would permit recovery of actual damages for 'emotional distress' or 'mental anguish'

Whether emotional distress or mental anguish is recoverable without physical injury is a matter of State law and should be left that way. That issue pervades the entire field of tort actions, including negligence, products liability, and the like. Moreover, the issue is one which has been developed largely on the basis of judicial precedent. We feel that it would be inappropriate to include in a Federal debt collection statute any provision which might substantially alter a judicial precedent in an unrelated field of law. Furthermore, recovery for emotional distress or mental anguish should result in untold numbers of jury trials in

Federal courts each year, thus adding more congestion to that already caused by the plethora of suits under the Truth in Lending Act.

During the Senate Markup session in July, 1977, it was evident and understood that recovery for actual damages under the FDCPA would rarely occur, if at all. *Senate Comm. on Banking, Housing & Urban Affairs, Markup on Debt Collection Legislation*, p. 16 (July 26, 1977)(“Assuming that a debt collector were to violate the act and he was not able to claim the defense of bona fide error that is, there should be a recovery of some sort -... the problem is that in the debt collection area you have a unique situation where actual damages very, very seldom exist. If a consumer were to get a call at six o'clock in the morning or 11:30 at night, he has suffered no out-of-pocket expense. He has no actual damages.”).

When the legislation cleared the Senate, and in the version that became law, the law limited recovery to “any actual damage sustained by such person as a result of such failure.” As such, as used in the FDCPA, “[c]ompensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less * * *.” *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876); *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1453 (2012).

Moreover, the provision of the FDCPA at issue, 15 U.S.C. § 1692g, was intended to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.” S. REP. 95-382, 1977 U.S.C.C.A.N. 1695, 1699. Here, Plaintiff does not allege that she was dunned for another’s debt, that she already paid, or that she was unable to discern that the debt she was dunned for belonged to JCAP and was originated by Comenity Bank.

Thus, the legislative history does not evidence an intent to award a bounty in actual or statutory damages for every technical violation of the Act, nor an intent to afford a right of action

to every debtor dunned for an unpaid debt. Consequently, it cannot be said that just because the statute was allegedly violated, Congress equated claimed technical violations of the Act with a concrete injury sufficient to confer Article III standing.

Thus, neither the common law or the FDCPA reveal an intent to equate the bare violation of every substantive or procedural requirement in the FDCPA with Article III standing.

B. PLAINTIFF CANNOT SHOW ARTICLE III STANDING BECAUSE ANY CLAIM OF INJURY-IN-FACT IS ENTIRELY CONJECTURAL OR HYPOTHETICAL

As there are no allegations in the pleadings that reflect any concrete harm or injury befall Plaintiff, there is no present indication of any injury having already occurred or that is likely to be felt imminently. What remains is at best some mere hypothetical injury that may take place in the future.

This clearly does not satisfy the actual or imminence requirement.

Even if Plaintiff were to argue here that the statutory duties imposed on the Defendants have already resulted in a statutory violation, or that the deprivation of the statutorily required information under Section 1692g(a)(2) vested her with a right of action for this “harm” (despite the suggestion in *Spokeo* that the violation of the statutory requirements is not always enough to create Article III standing), as shown below, there has been no statutory violation here, as she was provided with all the information that Congress required.

C. PLAINTIFF CANNOT SHOW ARTICLE III STANDING BECAUSE SHE CANNOT SHOW A CAUSAL CONNECTION BETWEEN HER CLAIMED INJURY AND THE CONDUCT COMPLAINED OF

Again, because there is no harm alleged beyond the receipt of Defendants’ letters, and because the letters contained the name of the creditor to whom the debt was owed, Plaintiff cannot show a causal connection between the failure to “identify effectively” the name of the creditor to whom the debt was owed with any harm, that is fairly traceable to the conduct of Defendants.

CONCLUSION

Consequently, in light of the foregoing, Plaintiff cannot rely on her receipt of these letters alone as creating a concrete injury in fact to satisfy the requirements of Article III standing.

D. THE COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM FOR RELIEF UNDER 15 U.S.C. § 1692G(A)(2)

The name of the creditor (both current and original) to whom the debt is owed is plainly stated on Fenton's letter; it states the original creditor was Comenity Bank, and it states that Fenton was retained by "Jefferson Capital Systems, LLC to collect its account...." Doc. No. 1-1. Plaintiff's complaint does not dispute that JCAP is the name of the creditor to whom the debt is owed, or allege the name of the creditor to whom the debt is owed is not set forth in the Fenton letters, or is an entity other than JCAP. Doc. No. 1, *passim*.

Fenton's letter uses the possessive pronoun "its," in describing collection taking place on the account. Doc. No. 1-1. American Heritage Dictionary, p. 696 (1973) (defining "its" as: "The possessive form of the pronoun *it*. Used to indicate possession, agency, or reception of an action by the thing or nonhuman being spoken of.").

Giving the sentence its ordinary and plain meaning, the letter clearly and unequivocally relays the unambiguous meaning that the account belongs to JCAP. The use of an absolute possessive pronoun "its" following the reference to JCAP and in front of the noun "account," leaves no room for ambiguity or guesswork as to whom the account belongs. By clearly conveying to whom the account belongs, and including nothing else to suggest it might be owed to someone other than JCAP, there is no guesswork required and no doubt or ambiguity remaining as to whom the debt was owed.

What the statute requires is the sending of a written notice “containing ... the name of the creditor to whom the debt is owed.” 15 U.S.C. § 1692g(a)(2). The Fenton letters unequivocally satisfy this requirement.

Thus, there can be no dispute that Defendants letter complies with the requirement of 15 U.S.C. § 1692g(a)(2). *See Stricklin v. First Nat. Collection Bureau, Inc.*, No. 3:10-CV-01027-JPG, 2012 WL 1076679, at *10 (S.D. Ill. Mar. 30, 2012)(reference to the current creditor (Jefferson Capital Systems LLC) as “client” and original creditor as “Sprint”, complied with § 1692g(a)(2).

The Seventh Circuit has also held that § 1692g contains an “implied duty to avoid confusing the unsophisticated consumer,” prohibiting efforts to “defeat the statute's purpose by making the required disclosures in a form or within a context in which they are unlikely to be understood by the unsophisticated debtors,” which may come in the form of a statement that is logically inconsistent with the required notice, overshadowing, or failure to explain an apparent contradiction between rights given by statute and demands made in the notice. *Bartlett v. Heibl*, 128 F.3d 497, 500-01 (7th Cir. 1997).

Plaintiff's complaint can fairly be said to invoke this implied duty, as the complaint alleges the letter fails to “identify effectively” the name of the creditor to whom the debt is owed and “failed to explain who Jefferson Capital Systems was, or what the difference was between it and the original creditor, Comenity Bank, or why Jefferson had retained Fenton to collect the debts.” Doc. No. 1 ¶¶ 7, 8.

On this score, the statute itself introduces the notion that the “current creditor” may be different than the “original creditor,” as it requires every validation notice to include in the notice, “a statement that, upon the consumer's written request within the thirty-day period, the debt

collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.” 15 U.S.C. § 1692g(a)(5).

Thus, the mention of both the current creditor and the original creditor in a validation notice does not, in and of itself, introduce any measure of confusion beyond the statutorily mandated information that must be contained in every notice sent to consumers when collecting debts. The statute does not require a debt collector to outline the chain of title to a debt, or explain the legal relationships between the original creditor, the current creditor and the debt collector in language that has no inherent ambiguity. 15 U.S.C. § 1692g(a)(2) merely requires the name of the current creditor to whom the debt is owed - nothing more, nothing less.

The complaint cites four cases applying the requirements of 15 U.S.C. § 1692g(a)(2), doc. No. 1 ¶12, but the cases on which Plaintiff relies are distinguishable, and the letter at issue here clearly identified the original creditor as Comenity Bank, and clearly stated that Fenton was retained by JCAP “to collect its account with you.” Doc. No. 1-1. None of the cases cited in the complaint are comparable. *Braatz v. Leading Edge Recovery Solutions*, 2011 WL 9528479, 2011 U.S. Dist. LEXIS 123118 (N.D. III. 2011); *Walls v. United Collection Bureau*, 2012 WL 1755751, 2012 U.S. Dist. LEXIS 68079 (N.D. III. 2012); *Deschaine v. National Enterprise Systems*, 2013 U.S. Dist. LEXIS 31349 (N.D. III. 2013); and *Pardo v. Allied Interstate*, 2015 WL 5607646, 2015 U.S. Dist. LEXIS 125526 (S.D.Ind. 2015).

In *Braatz* the defendant’s letter “indicated that the creditor was LVNV. In the text of the letter, however, Leading Edge informed Braatz that her ‘delinquent CITIBANK account has been placed with our company for collections.’ Thus, the text of the letter identified a second creditor.” *Braatz*, 2011 WL 9528479, *1. In denying the defendant’s motion to dismiss, the Court observed: “In this case it is true that the notice explains that LVNV is the creditor. If that were the only

statement regarding the identity of the creditor, the Court might indeed conclude that as a matter of law the dunning letter was not confusing. However, the notice also identifies the debt as belonging to Citibank. Thus the dunning letter identifies two creditors. This is an apparent contradiction that the debt collector fails to explain.” *Id.*

In *Walls*, the defendant’s letter “at the top of the page, ... identifies Resurgent as the ‘Client’ and LVNV as the ‘Current Owner’ (while identifying Credit One Bank, N.A. as the ‘Original Merchant’ and ‘Original Creditor’).” The plaintiff claimed that the letter was confusing because there was “no explanation of the relationship between Resurgent and LVNV, or between the ‘Client’ and the ‘Current Owner.’” *Walls*, 2012 WL 1755751, *1. Here conversely, there is no mention of a third entity which services the debt for the account owner as was the case in *Walls*.

In *Deschaine*, the letter (with an included privacy policies notice) made reference to an original creditor (GE Money Bank), a current creditor (Precision Recovery Analytics, Inc., a client (Paragon Way, Inc.) and a debt collector (National Enterprise Systems, Inc.). The Court observed: “Naming an entity as ‘Client’ and a different entity as ‘Current Creditor’ especially where the ‘Client’ is named more often than the ‘Current Creditor’ plausibly could create confusion and it is only plausibility that must be shown to withstand a 12(b)(6) motion.” N.D. Ill. Case: 3:12-cv-50416 Document #: 26 Filed: 03/07/13 , <https://ecf.ilnd.uscourts.gov/doc1/067112291321>.

In *Pardo*, the letter referred to the client as Resurgent Capital Services, the current creditor as LVNV, Plains Commerce Bank as the originating creditor and Allied Interstate as the collector. *Pardo v. Allied Interstate, LLC*, No. 1:14-CV-01104-SEB, 2015 WL 5607646, at *1. The Court observed the failure to explain the relationship between LVNV and Resurgent was potentially confusing.

Lastly, the Seventh Circuit's recent decision in *Janetos v. Fulton Friedman & Gullace, LLP*, not mentioned in the complaint, concerned a letter that included Asset Acceptance, the debt buyer; Ameristar, the original creditor; Fulton, Friedman & Gullace, LLP, the debt collector, and referred to the "transfer" of the account from Asset Acceptance to Fulton. *Janetos v. Fulton Friedman & Gullace, LLP*, No. 15-1859, 2016 WL 1382174, at *3 (7th Cir. Apr. 7, 2016). The Court held that "if the validation notice required under § 1692g(a)(2) does not identify the current creditor clearly and accurately, the law has been violated. A plaintiff need not offer additional evidence of confusion or materiality to prove the violation." *Janetos v. Fulton Friedman & Gullace, LLP*, No. 15-1859, 2016 WL 1382174, at *7 .

However, *Janetos* is easily distinguishable from the instant action. In *Janetos*, the subject letter identified Asset Acceptance as the "assignee" of the original creditors but said that the plaintiffs' accounts had been "transferred" from Asset Acceptance to Fulton. Here, in contrast, F&M's collection letter stated that, "Fenton & McGarvey Law Firm, P.S.C. has been retained by Jefferson Capital Systems, LLC to collect *its* account with you." (emphasis added). The distinction between "transferred" and "retained by" has significant importance, as the *Janetos* court paid particular attention to the term "transferred" and its connotations:

[M]ore fundamental, even where a consumer would recognize Asset Acceptance as having owned the debt at some time in the past (perhaps from pre-lawsuit collection efforts or the lawsuit itself), the form letter said that the "account" had since been "transferred" from Asset Acceptance to Fulton. Defendants do not explain how, in light of this language, an understanding of Asset Acceptance's former role would have shown its current role.

Janetos, p. 8 .

Unlike in *Janetos*, the letter here contained no language connoting a change in ownership of the subject account. Rather, the letter stated that Jefferson Capital retained F&M "to collect *its account with you.*"

The language, “its account,” identifies Plaintiff’s account as belonging to Jefferson Capital, and the unsophisticated consumer possesses the requisite knowledge to understand such logical deductions: “the unsophisticated consumer possesses 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.*” *Pettit v. Retrieval Masters Creditor Bureau, Inc.*, 211 F.3d 1057, 1060 (7th Cir. 2000) (internal quotations omitted) (emphasis added); *Headen v. Asset Acceptance, LLC.*, 383 F. Supp. 2d 1097, 1101 (S.D. Ind. 2005). As such, the unsophisticated consumer understands plain English and syntax and accordingly that can identify his/her account as belonging to Jefferson Capital.⁴

In contrast to the cases above, the letters here contain no extraneous references to a third party servicer with an unexplained relationship to the debt collector or reference to a “transfer” of the account from one entity to another.

Defendants letter clearly states that the collection efforts concern Fenton was retained by “Jefferson Capital Systems, LLC to collect its account....” This statement makes it abundantly clear that the collection activity concerns an account belonging to JCAP and no one else.

As such, the letters comply with the requirement of 15 U.S.C. § 1692g(a)(2), as it “contains” the name of the creditor to whom the debt is owed and effectively conveys that information.

IV. CONCLUSION

For all the foregoing reasons, the Court should grant Jefferson Capital Systems LLC’s Motion to dismiss for lack of subject matter jurisdiction and motion for Judgment on the Pleadings

⁴ *Janetos* also concerned claims arising under Sections e and f of the FDCPA, which concern false and deceptive debt collection practices. Plaintiff’s Complaint alleges only a Section 1692g violation (i.e. whether the subject letter “contains” the name of the current creditor).

and dismiss with prejudice plaintiff's Complaint and grant Defendants any other relief that the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 7, 2016, a copy of the foregoing was filed electronically in the ECF system. Notice of this filing will be sent to the parties of record by operation of the Court's electronic filing system, including Plaintiff's counsel as described below. Parties may access this filing through the Court's system.

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