UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-CV-12258-PBS

WEN Y. CHIANG,
Plaintiff

v.

MBNA,
Defendant

REPORT AND RECOMMENDATION ON

DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED COMPLAINT
(*Docket # 20*)

ALEXANDER, M.J.

Plaintiff, Wen Y. Chiang ("Chiang"), filed the original Complaint against Defendant, MBNA ("MBNA"), on December 18, 2006. On February 23, 2007, MBNA filed a motion to dismiss or in the alternative for a more definite statement. Judge Saris referred the motion to this Court on March 20, 2007 for a Report and Recommendation; this Court recommended, and Judge Saris concurred, that Chiang file a more definite statement. On July 10, 2007, Chiang filed his Second Amended Complaint, alleging violations of the Fair Credit Reporting Act ("FCRA") (15 U.S.C. § 1681 *et seq.* (West 2007)), the Fair Debt Collection Practices Act ("FDCPA") (15 U.S.C. § 1692 *et seq.* (West 2007)), intentional violation of federal statutes, and

intentional infliction of emotional distress. MBNA filed a motion to dismiss all counts of the Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on July 24, 2007; on July 25, 2007, Judge Saris referred the motion to dismiss to this Court for a Report and Recommendation. During oral argument before this Court, MBNA withdrew its motion to dismiss Count I, which alleges violation of the FCRA.

Chiang, a user of MBNA's credit card services, alleges that FIA Card Services ("FIA") and its predecessor MBNA inaccurately reported delinquent payments on his credit card and closed his account, thereby damaging his credit. Based on the alleged damage to his credit, Chiang asseverates that MBNA violated the FCRA and the FDCPA, intentionally violated federal statutes, and intentionally inflicted emotional distress.

Fed. R. Civ. P. 12(b)(6) provides for dismissal of aspects of a complaint that fail to state a claim upon which relief can be granted. If the plaintiff fails to "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory," the complaint fails against a 12(b)(6) motion. Gibbs v. SLM Corp., 336 F. Supp. 2d 1, 9 (D. Mass. 2004).

MBNA moves to dismiss three of Chiang's four counts: Count II, violation of the FDCPA; Count III, intentional violation of federal statutes; and Count IV, intentional infliction of emotional distress. Given the standard discussed above, this

Court recommends that each count be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Chiang alleges that MBNA violated the FDCPA's debt collection procedures; however, MBNA is not a debt collector under the FDCPA. The FDCPA applies to people and organizations that collect debts on behalf of others. The statutory language, legislative history, and court interpretation all consistently illustrate that it does not apply to creditors collecting their own debts. See 15 U.S.C. § 1692(a)(6) (West 2007); see also Heintz v. Jenkins, 514 U.S. 291, 293 (1995); Aubert v. Am. Gen. Fin., Inc., 137 F. 3d 976, 978 (7th Cir. 1998); Skerry v. Mass. Higher Educ. Assistance Corp., 73 F. Supp. 2d 47, 51 (D. Mass. 1999); S. Rep. No. 95-832, 95th Cong., 1st Sess. 3.

On July 24, 2007, MBNA filed a motion requesting that the Court take judicial notice of a letter written by Robert A. Sihler, Senior Licensing Analyst, purportedly transmitted to Christine Costamagna of Bank of America on July 16, 2006. ("Letter"). In addition to the Letter, MBNA requested this Court take judicial notice of revised articles of association and title change for MBNA America Bank, National Association to FIA Card Services, National Association.[1] To assess MBNA's contention that the Court should take judicial notice of the Letter, the Court will first distinguish two concepts grouped together under the rubric of judicial notice: judicial notice of *fact* and

[1]While there may have been some initial confusion as to whether the attached articles of incorporation were an attachment to the Letter, during the hearing, the Court found that they were not.

judicial notice of *law*.

Judicial notice of fact, to which this matter pertains, is an evidentiary shortcut. Getty Petroleum Mktg., Inc. v. Capital Terminal Co., 391 F.3d 312 (1st Cir. 2004). This doctrine permits facts in a particular case to be established without proof by admissible evidence if they are "not subject to reasonable dispute" by virtue of being "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b); see United States v. Bello, 194 F.3d 18, 26 (1st Cir. 1999) (trial court did not err in taking judicial notice that a certain prison was within exclusive federal jurisdiction).

Judicial notice of law is the name given to the common sense doctrine that the rules of evidence governing admissibility and proof of documents generally do not make sense to apply to statutes or judicial opinions (which are technically documents) because they are presented to the court as law, not to the jury as evidence. Getty Petroleum Mktg., Inc., 391 F.3d at 312. In the federal system, "[t]he law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." Lamar v. Micour, 114 U.S. 218, 223 (1885); White v Gittens, 121 F.3d 803, 805 (1st Cir. 1997).

MBNA argues that it and FIA are one entity. This argument rests upon the name change from MBNA, National Association to FIA Card Services, National Association as purportedly evidenced by the Letter. Courts may only take judicial notice of adjudicative facts that are not subject to reasonable dispute in that it is "generally known within the territorial jurisdiction" of the district court or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Id. at 4. For instance, a court may take judicial notice of its own records or of those of inferior courts. Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260, 1277 (5th Cir. 1978).

MBNA asks this Court to take judicial notice of this Letter, which defendant attached to its request for judicial notice, but not to its motion to dismiss. During oral argument, however, Plaintiff, though not forcefully, could be said to have disputed the authenticity of the Letter. Where the authenticity of a document is disputed, courts are much less likely to apply judicial notice. Cf. Verisign, Inc. v. Internet Corp., Civ. A. No. 04-1292, 2004 U.S. District LEXIS 17330, at *3 (C.D. Cal. August 26, 2004) (documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading may be considered in ruling on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment). The statements included in the Letter are, indeed, unsworn

hearsay allegations and somewhat disputed by Chiang. The Court, therefore, declines to take judicial notice of the Letter.

This Court may, however, consider evidence submitted to supplement a Rule 12(b)(6) motion to dismiss. See, e.g., Fudge v. Penthouse Int'l LTD., 840 F.2d 1012, 1015 (1st Cir. 1988) (finding proper the district court's consideration of article in ruling on a motion to dismiss even though not technically attached to the pleadings because the article was "absolutely central" to the dispute). There can be no dispute that the corporate relationship of MBNA and FIA is "absolutely central" to Chiang's claims under the FDCPA. Following the First Circuit in Fudge, the Court will consider the Letter as supplemental evidence in support of MBNA's motion to dismiss. In so doing, this Court finds no reason to doubt the authenticity of the Letter, nor sees any persuasive evidence brought forth by Chiang to demonstrate contrary facts. Thus, this Court finds that FIA and MBNA are the same organization, and that MBNA was acting on its own behalf when proceeding with debt collection actions against Chiang. Therefore, the FDCPA does not apply, and this count should be dismissed.

Count III is intentional violation of federal statutes. However, the only federal statutes in question are the FCRA and the FDCPA; as the alleged violations of both of those statutes is duplicative, this count should also be dismissed.

Finally, Chiang alleges intentional infliction of emotional distress. However,

intentional infliction of emotional distress is a state law claim, and the FCRA, the one remaining count, preempts all such state law claims.[2] This count, therefore, should also be dismissed. See 15 U.S.C. § 1681t(b) (West 2007) (prohibiting plaintiffs from bringing state law claims against creditors, as conduct is already regulated by the FRCA,15 U.S.C. § 1681s-2).

For all the reasons discussed above, this Court RECOMMENDS that MBNA's motion to dismiss should be ALLOWED and Counts II, III, and IV DISMISSED.

SO ORDERED.

August 22, 2007
Date

/s/ Joyce London Alexander
United States Magistrate Judge

[2]There are limited exceptions to this rule; however, none of the exceptions apply here, as MBNA was acting under Section 1681s-2 of the FCRA. See 15 U.S.C. § 1681t(b) (West 2007); see also 15 U.S.C. § 1681s-2 (describing the immunity provided to creditors regarding state law claims when acting under the FCRA); Stafford v. Cross County Bank, 262 F. Supp. 2d 776, 785 (W.D. Ky. 2003) (stating that, when creditors are acting under §1681s-2, they are immune from state law claims).

NOTICE TO THE PARTIES

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, any party who objects to this proposed Report and Recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of the Report and Recommendation. The written objections must specifically identify the proportions of the proposed findings, recommendations or report to which objection is made and the basis for such objection. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Sec'y of Health and Human Servs., 848 F. 2d 271, 273 (1st Cir. 1988); United States v. Valencia-Copete, 792 F. 2d 4, 6 (1st Cir. 1986); Scott v. Schweiker, 702 F. 2d 13, 14 (1st Cir. 1983); United States v. Vega, 687 F. 2d 376, 378 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F. 2d 603, 604 (1st Cir. 1980); see also Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986).

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Patti B. Saris, presiding

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