APPENDIX

TABLE OF CONTENTS--APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 19-3327

ASHLEY NETTLES,

Plaintiff-Appellee,

v.

MIDLAND FUNDING LLC, and

MIDLAND CREDIT MANAGEMENT, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 18-cv-7766 — **Edmond E. Chang**, *Judge*.

ARGUED JUNE 4, 2020 — DECIDED DECEMBER 21, 2020

Before SYKES, *Chief Judge*, and EASTERBROOK, *Circuit Judge*.[1]

---

[1] The Honorable Amy Coney Barrett, Associate Justice of the Supreme Court of the United States, was a judge of this court and member of the panel when this case was submitted but did not participate in the decision and judgment. The appeal is resolved by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

SYKES, *Chief Judge*. After Ashley Nettles defaulted on her credit-card account, Midland Funding LLC acquired the debt. Midland sued Nettles in state court, and the parties entered a consent judgment requiring a monthly repayment plan with modest automatic draws from her bank account. The automatic draws ceased after three months when Midland's law firm went out of business. A Midland affiliate then sent Nettles a collection letter that overstated her remaining balance by about $100. That prompted this suit under the Fair Debt Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C. §§ 1692 *et seq*.

The complaint alleges that the letter is false, misleading, or otherwise unfair or unconscionable in violation of 15 U.S.C. §§ 1692e and 1692f. Nettles proposes to represent a class of consumers who received similar letters. The credit-card agreement, however, contains an arbitration provision giving either party the right to require arbitration of any dispute relating to the account, including collection matters. Midland moved to compel arbitration. The district judge denied the motion, concluding that the arbitration clause does not cover this claim. As permitted by the Federal Arbitration Act, Midland appealed, asking us to reverse and remand with instructions to grant the motion to compel arbitration.

A jurisdictional defect prevents us from reaching the arbitration question. Nettles sued for violation of §§ 1692e and 1692f, but she has not alleged any injury from the alleged statutory violations. Applying our recent decisions in *Larkin v. Finance System of Green Bay, Inc.*, Nos. 18-3582 & 19-1537, 2020 WL 7332483 (7th Cir. Dec. 14, 2020), and *Casillas v. Madison*

Avenue Associates, Inc., 926 F.3d 329 (7th Cir. 2019), we vacate and remand with instructions to dismiss the case for lack of standing.

I. Background

In 2015 Ashley Nettles applied for a credit card with Credit One Bank. The bank accepted her application and sent her a credit card and a copy of the cardholder agreement. The agreement explained that by using her card, she became bound by the terms of the cardholder agreement and that its terms were enforceable not only by Credit One but also its successors and assigns. The agreement contains a provision that either party may require arbitration of any dispute relating to the account, including collection matters. Nettles used the card after receiving it and thus became bound by the agreement.

Nettles continued to use her credit card but stopped making payments in January 2016. In July 2016 Credit One charged off the $601.97 balance and sold its rights in her account to MHC Receivables, LLC, which later sold the debt to Sherman Originator III LLC. Sherman Originator in turn sold the debt to Midland Funding LLC.

Midland hired the law firm Blatt, Hasenmiller, Leibsker & Moore LLC, which sued Nettles in Michigan state court to collect the debt. The parties entered a consent judgment that required Nettles to pay Midland $689.37 (the $601.97 account balance plus Midland's $87.40 in court costs) in monthly installments of $50 until paid in full. The Blatt law firm, acting on behalf of Midland, automatically withdrew the $50 payments from Nettles's bank

account for three months but then stopped when the firm dissolved. At this point Nettles owed Midland $539.37.

In June 2018 Midland Credit Management, Inc., a Midland affiliate, sent Nettles a letter stating that it would be servicing the debt on behalf of Midland Funding and that her current balance was $643.59, about $104 more than her actual outstanding balance. Nettles responded with this lawsuit against Midland and its affiliate.[2] (The appeal doesn't require us to distinguish between the two, so we refer to them collectively as "Midland.")

The complaint alleges that the collection letter was false, misleading, or otherwise unfair or unconscionable in violation of §§ 1692e and 1692f of the FDCPA. Nettles sought actual and statutory damages and proposed to represent a class of consumers who received similar letters overstating their account balances. Midland moved to compel arbitration, invoking the arbitration provision in the Credit One cardholder agreement. The judge denied the motion, concluding that the claim was beyond the scope of the arbitration provision. He reasoned that the dispute concerned a matter relating to the consent judgment entered in Michigan court—not Nettles's Credit One account.

Midland appealed under the Federal Arbitration Act, which authorizes an immediate appeal from an order denying a motion to compel arbitration. 9 U.S.C.

---

[2] The complaint also named the Blatt law firm as a defendant, but Nettles voluntarily dismissed her claim against the firm.

§ 16(a)(1); *see Hennessy Indus. v. Nat'l Union Fire Ins. Co.*, 770 F.3d 676, 678 (7th Cir. 2014).

II. Discussion

Most of the briefing concerns the arbitration issue, but the parties also identify a possible problem with Nettles's standing to sue. Their attention to the standing issue is belated; in the district court, no one addressed whether Nettles adequately pleaded an injury traceable to the alleged FDCPA violations. But Article III standing is jurisdictional and cannot be waived. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *Freedom from Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 737 (7th Cir. 2008). The standing inquiry resolves this appeal.

As the case comes to us, our analysis of Article III standing asks whether the complaint "clearly allege[s] facts" demonstrating that Nettles has "(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*, 136 S. Ct. 1540, 1547 (2016). An injury in fact is an "invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (quotation marks omitted). A concrete injury is a *real* injury—that is, one that actually exists, though intangible harms as well as tangible harms may qualify. *Id.* at 1548–49.

Nettles alleges that Midland's collection letter violated her rights under the FDCPA. But a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a

statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 1549. To the contrary, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

Our recent decisions in *Casillas* and *Larkin* applied these principles to claims alleging violations of the FDCPA. In *Casillas* the plaintiff alleged that the defendant debt collector violated her rights under § 1692g of the Act by sending her an incomplete collection letter omitting one part of the statutorily required notice about how to exercise her right to dispute her debt. *Casillas*, 926 F.3d at 332. We explained that the plaintiff lacked standing because she had not alleged that the incomplete notice harmed her or created any real risk of concrete harm to her. *Id.* at 334. She did not claim, for example, that she tried to dispute the debt or even *considered* contacting the defendant to dispute or verify the debt. *Id.* So there was no risk that the defendant's error could have caused her to lose § 1692g's statutory protections because she did not ever consider using them. *Id.* at 336.

In *Larkin* we extended the reasoning of *Casillas* to claims under §§ 1692e and 1692f of the FDCAP. 2020 WL 7332483, at *3–4. We acknowledged that § 1692g—the provision at issue in *Casillas*—imposes procedural obligations on debt collectors, while §§ 1692e and 1692f are *substantive* provisions prohibiting "false, deceptive, or misleading representations" and "unfair or unconscionable" debt-collection practices. *Id.* at *3. We held that the distinction between procedural and substantive statutes has no effect the standing analysis: "An

FDCPA plaintiff must allege a concrete injury regardless of whether the alleged statutory violation is characterized as procedural or substantive." *Id.* (citing *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1621 (2020)). The plaintiffs in *Larkin* alleged that certain statements in the defendant debt collector's dunning letters were false, misleading, and unfair, but the complaints contained no allegations of harm or "even an appreciable risk of harm" from the alleged statutory violations. *Id.* at *4. We concluded that the claims must be dismissed for lack of standing. *Id.*

The same result is required here. Nettles alleges that Midland violated §§ 1692e and 1692f when it overstated the amount of her debt in its collection letter. But her complaint does not allege that the statutory violations harmed her in any way or created any appreciable risk of harm to her. Indeed, on appeal she admits that the letter didn't affect her at all and that her only injury is receipt of a noncompliant collection letter. She invites us to reconsider *Casillas* under Circuit Rule 40(e). We decline the invitation.[3] As something of an afterthought at oral argument, Nettles argued that becoming annoyed and consulting a lawyer suffice to establish injury for standing

[3] Nettles relies in part on the Sixth Circuit's decision in *Macy v. GC Services Ltd. Partnership*, 897 F.3d 747, 757 (6th Cir. 2018), which held that an alleged violation of § 1692g is itself enough to create standing. But in *Casillas* we explicitly rejected *Macy* as inconsistent with *Spokeo*, acknowl-edging that in doing so, we created a circuit split. *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 335–36 (7th Cir. 2019). And as required by Circuit Rule 40(e), *Casillas* was circulated to the full court. *Id.* at 336 n.4. Another Rule 40(e) circulation on the same issue would be pointless.

purposes. We rejected that argument in *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, No. 19-3514, 2020 WL 7350278, at *2 (7th Cir. Dec. 15, 2020).

Larkin and *Casillas* are dispositive here. Because Nettles has not alleged that she suffered an injury from the claimed FDCPA violations, she has failed to plead facts to support her standing to sue. We VACATE the order denying Midland's motion to compel arbitration and REMAND with instructions to dismiss the case for lack of jurisdiction.

Nettles v. Midland Funding, LLC
Transcription of Oral Arguments, June 4, 2020

Judge Easterbrook
And with that, we're ready for our first case, *Nettles* against *Midland Funding*. Mr. Seitz.

Mr. Seitz
May it please the court: Ted Seitz appearing on behalf of the Appellants-Defendants, Midland Funding LLC & Midland Credit Management. This is an appeal from the district court's denial of a motion to compel arbitration. However, during the appeal briefing, there has been an issue raised – – by actually the appellee – – on Article III standing. This issue was briefly briefed before the court – – district court – – but never addressed in the district court's denial of the motion to compel arbitration opinion. So with that, I didn't know whether the court would like me to address the motion to compel arbitration opinion and that part of the appeal or the Article III standing.

Judge Easterbrook
Jurisdiction is the first issue in every case, and so that's where you should begin.

Mr. Seitz
Well, Your Honor, thank you. With Article III standing, just to give some background on the timing here: while the motion to compel arbitration was pending before the district court, this court entered its opinion in *Casillas* – – I think it was actually the same day as today, I think it was June 4, 2019 – – which addressed Article III standing in FDCPA cases,

including putative class action cases. So, as far as the court or the defendants, we had not mentioned that to the district court as far as address Article III standing at that time. That – – it kind of sat there for a little bit and then the court issued its opinion on the compel arbitration piece. It appears to be that the Plaintiff-Appellee concedes that under *Casillas*, she does not have Article III standing to advance her FDCPA claims in this case. And in the briefing there was a mention or request that instead *Casillas* be taken before the whole entire en banc of the Seventh Circuit to address standing at the court as a whole. We do mention our opinion on that in our reply brief, and that we don't see any reason for that to occur. At the time *Casillas* did come out on Article III standing, there was a request to bring it before the entire Seventh Circuit because it was viewed to be in conflict with an opinion from the United States Sixth Circuit Court of Appeals titled *Macy GC Services*. That was not accepted, and so *Casillas*, we believe, continues to remain good law. And, in fact, I think as we mentioned in our briefing before the court, we don't believe actually that the Sixth Circuit is in disharmony with the Seventh Circuit on Article III standing.

Judge Barrett
Mr. Seitz, could I interrupt you just to ask a question?

Mr. Seitz
Yes.

Judge Barrett
Just the fact – – I mean, this is different from *Casillas*, because in *Casillas* there was an omission of

information that was supposed to be in a form. And, you know, *Casillas* didn't allege that she suffered any harm from that omission. This is different because Midland sent a letter that, you know, was – – dealt more specifically with Nettles, misstating the amount of her debt. And I – – one thing I wanted to clarify that wasn't entirely clear to me: Midland never tried to correct that, right? Because it had actually underreported the amount that she owed to the credit agencies. Is that correct?

Mr. Seitz
That's correct, Your Honor.

Judge Barrett
So was this letter simply an informative letter, or was it an attempt to get this money from Nettles?

Mr. Seitz
Well, I think it was a little bit of both, Your Honor. This arose from a consent judgment in Michigan state court in which Midland was represented by a law firm which actually no longer is around – – Blatt Hasenmiller. And so once that occurred, Midland took over the debt and sent out a letter. And it was labeled a welcome letter. So, in a sense, it was informative, because there was a consent judgment in place. But I think also as well it was an attempt to collect on that consent judgment as well.

Judge Barrett
Okay.

Mr. Seitz
So – – and I don't think that our client disputes that piece, that the letter, while it was a welcome letter, saying, Yes, we have now taken the lead on your account that we owned anyway and we have a judgment in – – we are also trying to collect that amount. So you are correct.

Judge Barrett
But you never tried to do anything more after sending that letter to get that amount from Nettles?

Mr. Seitz
Not that I'm aware of, Your Honor. I mean, there was some garnishments in the Michigan state court that's actually the subject of another class action that's currently pending in the Eastern District of Michigan. But that was it, Your Honor, and so it was a misstatement of the balance – – incorrect balance on that letter. But it was a welcome letter since Midland Credit Management received it.

Judge Barrett
Okay. Thank you.

Mr. Seitz
Yeah. And just to get back to the Article III standing piece in the Sixth Circuit Court of Appeals being different than the Seventh Circuit. There have been some subsequent cases in the Sixth Circuit, a decent amount dealing with Article III standing. There was the *Hagy* decision, and there was the *Huff TeleCheck* decision, and then recently the *Buchholz* decision. All those appear to put more clarity on what *Macy* did and

did not stand for. And it appears that now the Sixth Circuit is in harmony with *Casillas*, we would argue, and the standard that "no harm, no foul." And if there's no injury arising from a statutory claim, just because it's a statutory claim, there cannot be Article III standing. And so, with that, certainly – –

Judges Sykes
Mr. Seitz, this is Judge Sykes. So what is your position about whether the plaintiff has standing?

Mr. Seitz
Our position is that the plaintiff does not have standing under *Casillas*. We take the plaintiff's counsel – – plaintiff at their word that they don't, and I believe that to be the case, especially – – it's even more supported on just the Article III standing issue by the U.S. Supreme Court's opinion issued Monday of this week in the *Thole v. U.S. Banks* case. Which, while it is an ERISA case, it provides some more clarity on Article III standing and statutory causes of action. And, in fact, tries to simplify that, to take it from *Spokeo*. So with that, and I don't know how much time I have left – –

Judge Easterbrook
You have exactly two minutes left.

Mr. Seitz
Thank you, Your Honor. With that, on the motion to compel arbitration, the district court denied it based on the fact that it did not believe that the dispute was in the scope of the arbitration provision – – meaning that a consent judgment was somehow different than

an account. But, as we set forth in our brief, we think that was certainly an error – – especially when looking at the United States Supreme Court precedent, and this court's precedent, that arbitration provisions are meant to be broadly construed. Really, the consent judgment related to the account. And there is caselaw from this circuit as well – – the *Gore v. TeleCheck* [sic][1] case, and there's the case from I think 1987, the *Niro* case, that deals with two agreements or settlement agreements and saying those also can be enforceable by an arbitration provision. So with that I would just reiterate that we ask that the district court's opinion be reversed, and the case remanded. However, if there is no Article III standing, then the Court should dismiss the case as well. Thank you, Your Honors.

Judge Easterbrook
Thank you, Counsel. Mr. Warner.

Mr. Warner
Good morning. May it please the court: I will address standing first and then to the merits. Plaintiff's response does not concede a lack of standing. Plaintiff's response brief here and below asserted that Article III's standing requirements were satisfied, applying *Spokeo*. If Midland's violation of the FDCPA falls under the prohibition that a debt collector may not attempt to collect more money than what the debt collector owes – – a personal right afforded to her under the Act. Seeking more money than owed is akin to the common-law tort of malicious prosecution. Plaintiff's response also set forth multiple potential

[1] *Gore v. Alltel Commc'ns,* 666 F.3d 1027, 1034 (7th Cir. 2012).

risks of harm that the form collection letter could objectively pose – –

Judge Easterbrook
Counsel?

Mr. Warner
Yes.

Judge Easterbrook
Counsel, the question I have is whether you believe your position on standing is consistent with *Casillas*.

Mr. Warner
Casillas is different in that the – – it sets a "no harm, no foul" standard, which I guess if you do – – we do disagree with the "no harm, no foul" standard. It's inconsistent with *Spokeo*. It's also now inconsistent with the – –

Judge Easterbrook
No Counsel, I would like you to address my question, which is whether your position that your client has standing is consistent with *Casillas*. You have asked us to overrule that decision, which implies that you can't win unless it is overruled. And I wonder if that's your understanding.

Mr. Warner
Well, judges disagree a lot of times, even at the Supreme Court they get five to four. We said that there's the potential. We see how *Casillas* could be read in a manner, by some of the district court judges, that would indicate that the Plaintiff does not have

standing in this case. Our – – and then, later on followed by Judge Wood's opinion that she issued in *Lavallee* seems even to depart by *Casillas* where the court then looks at the totality of the circumstances – –

Judge Easterbrook
Counsel, opinions speak for the court. They do not speak for their authors.

Mr. Warner
Correct.

Judge Easterbrook
It is not Judge Wood's opinion. It is the Seventh Circuit's opinion.

Judge Barrett
Counsel – – I'm – – this is Judge Barrett. I'm very confused by your argument, I have to say, because I read your brief the way that Judge Easterbrook, you know, is characterizing it to you. I read it as asking us to overrule *Casillas* and conceding that your client has suffered no harm. Am I understanding your position correctly?

Mr. Warner
No, that's not correct stated that way, Your Honor. Plaintiff was merely stating that there is a concern regarding the dearth of guidance in this circuit evaluating Article III standing requirements. Plaintiff asserts here that there are two main ways in which Ms. Nettles has satisfied Article III standing requirements, and that these should be addressed to

have a consistent guideline for practitioners on both sides to understand. Plaintiff's brief is that, look, under *Spokeo*, Justice Thomas's concurrence, if Congress has created a private right of duty owed personally to the plaintiff, then the violation of that legal duty suffices for an Article III injury in fact. A concrete injury. So maybe – –

Judge Easterbrook
Counsel, look, that line of argument is the argument taken by the dissent in *Thole v. U.S. Bank*. We're obviously going to follow the majority of the Supreme Court.

Mr. Warner
Unfortunately, Your Honor, I – –

Judge Easterbrook
Counsel, if it's not sufficient just to say, "Well, we have a statutory right, therefore we have standing," and you need to show harm – – injury in fact – – what, in your view, is the injury in fact?

Mr. Warner
Well, here the injury in fact was that when she received the letter there was a confusing statement about the amount of money that was owed. She's not – –

Judge Easterbrook
Maybe I'm not clear. I'm not asking you to describe what the defendants did. I'm asking you to describe how the plaintiff was injured.

Mr. Warner
How the plaintiff was injured is that she received an untruthful communication demanding more money than what she owed. That is the injury in fact.

Judge Easterbrook
I'll try once more. In a standard tort case, it isn't sufficient to say something like the defendant was speeding. It isn't even sufficient to say the defendant was speeding and hit my car. You say something like, the plaintiff suffered an injury and went to the hospital and spent money and lost time from work. That is, you describe how the plaintiff was injured rather than what the defendant did to cause the injury. Could you please describe how, in your view, the plaintiff was injured?

Mr. Warner
Yes, Your Honor. She received a letter that says that she demands – – demanding more money that what she assumed she had entered into her consent judgment. She goes to her attorneys, you know, gives the letter to her attorneys. She's upset about it. She doesn't understand her rights. She has to consult another attorney – – her attorney again to find out what's going on. Why is it this way? She tried to make payments. They stopped unilaterally and this is the first letter she gets demanding more money than what she owes. She's completely confused of her rights. She changed her course of action of just waiting around to pay the amount that she was owed, waiting for someone to tell her who she had to pay, and she has to go consult an attorney. So there's a change of course of behavior in which if she hadn't would follow your

example that was provided, is that there was something different that she did out of the ordinary course that changed her behavior. I mean, it is *de minimus* and that's why we're seeking statutory damages for loss of time, for irritants, for annoyance. I mean – – the court in the Seventh Circuit has said, for example, in TCPA cases that annoyance alone is sufficient for standing. And this is the same that can be applied to all consumers. When you analyze FDCPA cases – –

Judge Easterbrook
Counsel, I'm a little worried about the contention that consulting an attorney is an injury that affords Article III standing. Because then there's standing in every case. The plaintiff in *Casillas* consulted an attorney. The plaintiff in *Thole* consulted an attorney. Shouldn't those cases, on that view, have found standing?

Mr. Warner
Your Honor, unfortunately, I haven't read *Thole*. I haven't seen it come out. And no supplemental authority was filed by the defendant, so I apologize for not knowing what *Thole* is. And maybe I need to submit supplemental briefing after on the issue of standing after the Supreme Court's opinion that just came out on Monday. She goes – – she goes to the attorney because – – it's not that she just hands the letter to the attorney. There is an issue. She wants to know what her rights are. Why isn't the consent judgment, of which she agreed to, being applied? Why does Midland want to collect more money here? So there is – – that is a basis for a injury in fact, on that – –

Judge Barrett
So you're saying the injury is that she was upset and confused and fearful that she owed the higher amount?

Mr. Warner
Well, those are feelings. But you would – – if you look at this court's opinion in *Lavallee* it's that if you can look at what a reasonable unsophisticated consumer might react reading such a letter, that is the standard. So you can't look just at the plaintiffs themselves at what happened. You would have to look at would a unsophisticated consumer receiving a letter that tells them that they owe more money, and – –

Judge Barrett
Counsel, that's not – – the reasonable unsophisticated consumer standard is about how we interpret the language that they receive. It's not about defining the injury in the way that you're describing it. I mean, you said that it – – an irritant was enough to constitute a concrete injury. So here, you're saying that she was irritated. She was upset and confused. You tied it to an emotion, right? Irritation?

Mr. Warner
Yes. I'm just also stating the standard because when you look at class actions, I mean – – and this is going to be something that is going to be equally applicable to an unsophisticated consumer using an objective standard, is what does the conduct create? The whole thing about class actions is you don't look to individualized parts – –

Judge Easterbrook
Counsel, you have one minute left.

Mr. Warner
If there are no questions on standing, if I could just briefly discuss the merits. As to the merits, the district court was correct to deny arbitration. The consent judgment, it's a novation under Michigan law. The cases that Midland has cited – – especially that *Gore v. Alltel Communications* – – this court has given a hypothetical that states that if it arises out of a contract without an arbitration agreement, you can't compel arbitration. That's this case. *Garcia* didn't raise the exact same things that the plaintiff states. *Miller v. Williams*, they actually misstate the entire case, if you look at the federal court's docket. *Niro* is inapplicable, that's also – – it doesn't take into account that there was a novation. If there's nothing further, I conclude.

Judge Easterbrook
Thank you very much, Counsel. Mr. Seitz, you've got about thirty seconds left.

Mr. Seitz
Your Honor, I really have nothing further. With the court's permission, I will rest on my argument.

Judge Easterbrook
Certainly, Counsel. Thank you very much. The case is taken under advisement.

United States District Court,

N.D. Illinois, Eastern Division.

Ashley NETTLES, individually and on behalf of similarly situated persons, Plaintiff,

v.

BLATT, HASENMILLER, LEIBSKER & MOORE LLC, Midland Funding LLC, and Midland Credit Management, Inc., Defendant.

No. 18-cv-7766

Signed 09/30/2019

MEMORANDUM OPINION AND ORDER

Honorable Edmond E. Chang, United States District Judge

Ashley Nettles brings this proposed class action against Defendants Midland Funding LLC and Midland Credit Management, Inc.,[1] alleging that they violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*.[2] Midland Funding and Midland Credit now move to compel arbitration, arguing that Nettles' claim is subject to a "valid and enforceable arbitration agreement [that] exists between Plaintiff

[1] Nettles voluntarily dismissed another defendant (the law firm of Blatt, Hasenmiller, Leibsker & Moore LLC) earlier in the case. R. 35.

[2] The Court has subject matter jurisdiction under 28 U.S.C. § 1331.

and Defendants." R. 19,[3] Defs.' Mot. to Compel at 9. For the reasons explained below, the Defendants' motion to compel arbitration is denied without prejudice.

I. Background

The only facts set out here are those needed to decide the pending motion. The Defendants owned, by assignment, a credit card account that Nettles had opened with Credit One Bank in October 2015. *See* Defs.' Mot. to Compel at 2–4. This account was subject to a Cardholder Agreement, Disclosure Statement, and Arbitration Agreement (Credit Card Agreement). *Id.* at 2. Nettles made her last payment on the account in January 2016. *Id.* at 3. When the credit card account was charged off around six months later, in July 2016, the balance was $601.97. *Id.* In the weeks that followed, the account—and all underlying rights, title, and interest—was sold and assigned to multiple entities. *Id.* Ultimately, in August 2016, Midland Funding obtained ownership of the account. *Id.*

The arbitration provision of the Credit Card Agreement, which was assigned to the Defendants, covers (among other things) "communications" and "collections matters" relating to the account:

> Claims subject to arbitration include, but are not limited to . . . any disclosures or other documents or *communications* relating to your Account; . . . billing, billing errors, credit reporting, the posting of transactions, payment

[3] Citations to the record are noted as "R." followed by the docket number.

> or credits, or *collections matters* relating to your Account . . . and any other matters relating to your Account . . . .

Defs.' Mot. to Compel, Wiese Decl., Exh. C, Changes in Terms at 6 (emphases added). The arbitration provision also states that it survives any transfer or assignment of the account, *id.* at 9, and that "disputes about the validity, enforceability, coverage or scope of this Arbitration Agreement or any part thereof are not subject to arbitration and are for a court to decide[,]" *id.* at 7.

In March 2017, Midland Funding filed a lawsuit against Nettles in Michigan state court, demanding payment of the $601.97 due on the account. R. 25, Pl.'s Resp. Br. at 2; *id.* at Exh. A. A few months later, in June 2017, counsel for Nettles and Midland Funding engaged in settlement negotiations. Pl.'s Resp. Br. at 4. The case was ultimately resolved in a Consent Judgment, entered by the Michigan judge in July 2017, which set up a monthly payment plan: "Defendant [Nettles] shall pay $50.00 per month beginning in 08/01/2017 until paid in full. Should Defendant fail to comply with this agreement in any manner, Plaintiff may file an Affidavit of Non-Compliance and commence all legal collection activity on the remaining balance." *Id.* at Exh. C. The total amount of the Consent Judgment was $689.37, which included $87.40 in costs. *Id.* It is worth noting that the Consent Judgment explicitly disclaimed statutory interest, *id.*, and counsel for Midland Funding agreed during negotiations that there would be no interest charged post-judgment, *id.* at Exh. B (June 28, 2017 emails).

Under the Consent Judgment, Midland Funding's law firm withdrew $50 from Nettles' bank account each month from August to October 2017. Pl.'s Resp. Br. at 4. After this, Nettles alleges, the law firm stopped accepting her payments. *Id.* It turned out that the law firm later permanently closed in mid-December 2017. *Id.* at Exh. D. In any event, Nettles alleges that, as of October 3, 2017, she only owed $593.37 on the Consent Judgment. *Id.* at 5. Despite this, Nettles received a letter in June 2018 claiming that her current balance was $643.59 (and notifying her that Midland Credit was the new servicer on the account). *Id.* at Exh. E. The letter provided a "Legal Collections Account Number" (No. 17-321241) and identified the original creditor (Credit One Bank) and the original account number (ending in -0849). *Id.* But the letter did not refer to the Consent Judgment. *Id.*

Nettles alleges that the Defendants violated the Fair Debt Collection Practices Act (FDCPA) when they failed to properly credit the payments she had made, and when they tried to collect a larger amount of money than she actually owed. R. 1, Compl. ¶¶ 44–53.

II. Legal Standard

The Federal Arbitration Act requires federal courts to enforce valid arbitration agreements. 9 U.S.C. § 2. "Although it is often said that there is a federal policy in favor of arbitration, federal law places arbitration clauses on equal footing with other contracts, not above them." *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 740 (7th Cir. 2010) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010)). That is, the Act enforces parties' agreements to arbitrate and "put[s] arbitration on a par with other contracts and

eliminate[s] any vestige of old rules disfavoring arbitration." *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003).

If the parties have a valid arbitration agreement and the asserted claims in a lawsuit are within its scope, then the arbitration requirement must be enforced. 9 U.S.C. §§ 3–4; *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726 (7th Cir. 2004) (citing *Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 909 (7th Cir. 1999)). Whether the parties entered into a binding arbitration agreement is determined under principles of state contract law. *Janiga*, 615 F.3d at 742 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 934 (1995)). The party seeking to compel arbitration has the burden of establishing an agreement to arbitrate. 9 U.S.C. § 4; *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054, 1063 (7th Cir. 2018) ("[A]s the party seeking to compel arbitration, Credit One had the burden of showing that A.D. was bound by the cardholder agreement as an authorized user"). At the same time, the Act also "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). Indeed, the party that is resisting arbitration bears the burden of identifying a triable issue of fact on the purported arbitration agreement. *See Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002). The opponent's evidentiary burden is akin to that of a party opposing summary judgment under Federal Rule of Civil Procedure 56. *Id.* "[A] party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration rests; the party must identify

specific evidence in the record demonstrating a material factual dispute for trial." *Id.* Just like at the summary judgment stage, the Court must view the evidence in the light most favorable to the non-movant (that is, the party opposing arbitration) and draw reasonable inferences in the non-movant's favor. *Id.* If the party opposing arbitration identifies a genuine issue of fact as to whether an arbitration agreement was formed, "the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4; *see Tinder*, 305 F.3d at 735.

III. Analysis

The Defendants argue that Nettles' FDCPA claim is subject to the arbitration provision in the Credit Card Agreement, which also allegedly bars Nettles from bringing a class action (that is, it limits account holders to individual-only claims). Defs.' Mot. to Compel at 1. To compel arbitration, the Defendants must show: (1) an agreement to arbitrate, (2) a dispute within the scope of the arbitration provision, and (3) refusal by Nettles to proceed to arbitration. *See Zurich Am. Ins. Co. v. Watts Indus.*, 466 F.3d 577, 580 (7th Cir. 2006). In this case, the second element is at issue. Nettles asserts that the Consent Judgment—which does not contain an arbitration provision—is the only contract that governs this dispute, in part because it is the document that "Defendants' collection activity was based upon." Pl.'s Resp. Br. at 1, 7, 10. According to Nettles, because the arbitration provision is limited to claims related to the credit card *account*, and because her claim is based instead on the Defendants' attempts to collect money owed on the *Consent Judgment*, her lawsuit is not arbitrable. *Id.* at 7–10.

There is a genuine issue of material fact on exactly what it was—the credit card account, the Consent Judgment, or some combination—that the Defendants were trying to collect on via the June 2018 letter. First, the letter informs Nettles that "Your MCM [Midland Credit] *Legal Collections* account number(s) are listed below," and asks Nettles to refer to that number in any calls with Midland Credit." Pl.'s Resp. Br., Exh. E (emphasis added). The letter then lists the "Legal Collections Account Number." *Id.* The letter also specifies the identity of the "Original Creditor" (Credit One Bank) and the "Original Creditor Account Number." *Id.* When viewed in Nettles' favor, Midland Credit's use of the term "Legal Collections" gives rise to an inference that the Defendants were trying to collect on the Consent Judgment, which was the product of the prior legal action filed by Midland Funding. Also, in this now federal-court case, the Defendants have offered no evidence, so far, on how or why the June 2018 letter was generated, and its connection (or lack of it) to the Consent Judgment. It is not even clear where the $643.59 came from. On the current record, the Defendants have failed to provide enough evidence to indisputably show that the collection effort was for some amount arising from the credit card account, without any connection to the Consent Judgment. *See Johnson v. Uber Techs., Inc.*, 2017 WL 1155384, at *2 (N.D. Ill. Mar. 13, 2017) (denying the motion to compel arbitration for lack of evidence, and explaining that "Uber, as the movant, was required to present to the Court facts such that a reasonable jury could return a verdict in its favor[,]" especially because, absent any discovery, "the information that is lacking is completely within Uber's

control"). Taking all reasonable inferences in Nettles' favor, for now the Court must assume that the Defendants' demand for $643.59 in the June 2018 letter was based on the Consent Judgment.[4]

With this factual premise in mind, the Court now turns to whether the Consent Judgment falls within the scope of the arbitration provision. "To determine whether a contract's arbitration clause applies to a given dispute, federal courts apply state-law principles of contract formation." *Gore v. Alltel Communications, LLC*, 666 F.3d 1027, 1032 (7th Cir. 2012). In this case, the parties appear to rely on Michigan law, and this Opinion will do the same.[5]

---

[4] Although Nettles' contention that the June 2018 letter was an attempt to collect on the Consent Judgment works in her favor for avoiding *arbitration*, it is not clear how that characterization might undermine the FDCPA claim on the *merits*. That is, does the FDCPA apply at all to an attempt to collect on the Consent Judgment? This is worth the parties' attention if the case moves forward to the merits stage, and indeed is something worth considering when it comes to assessing the settlement value of the case.

[5] The Defendants assert in their motion to compel arbitration that Nevada law applies to the Credit Card Agreement. Defs.' Mot. to Compel at 10; *see id.* at Wiese Decl., Exh. C at 5. But the defense goes on to cite federal case law more generally, rather than Nevada-specific law. Defs.' Mot. to Compel at 12–13. Meanwhile, Nettles argues that the Consent Judgment is subject to Michigan law and cites a federal case that applies Michigan law. Pl.'s Resp. Br. at 8-9. In the defense's reply brief, when arguing in favor of a broad interpretation of the arbitration provision, the Defendants cite at least one federal case applying Michigan law. R. 28, Defs.' Reply at 6 (citing *Garcia v. Weltman, Weinberg & Reis Co.*, 2014 WL 1746522 (E.D. Mich. Apr. 30, 2014)). In any event, neither side argues that there is any

Continued …

Under Michigan law, the "primary task is to ascertain the intent of the parties at the time they entered into the agreement, . . . by examining the language of the agreement according to its plain and ordinary meaning." *Altobelli v. Hartmann*, 884 N.W.2d 537, 542 (Mich. 2016). When considering the scope of an arbitration provision, courts have emphasized that "a party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration." *Id.* at 542–43 (cleaned up).[6]

The Defendants argue that, even if Nettles' FDCPA claim "is based entirely on the consent judgment arising out of the Michigan action, it would still be subject to arbitration[,]" because Nettles "agreed that any issues arising out of collections matters, such as a consent judgment, would also be arbitrable." R. 28, Defs.' Reply at 2.[7] The Defendants also argue that the June 2018 letter was an attempt to collect on the account, so the letter is a "communication[ ] relating to [Nettles'] Account . . .[,]"

---

substantive difference in choice of law. So this Court will apply Michigan principles of contract interpretation.

[6] This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

[7] The Defendants also rely on *Garcia*, 2014 WL 1746522 to show that "[o]ther courts have applied credit card agreements to post-judgment activity." Defs.' Reply at 6. Unlike Nettles, however, the plaintiff in *Garcia* did not argue that the underlying judgment controlled her FDCPA claim and fell outside the scope of the arbitration provision. As such, the case is distinguishable from the present dispute.

which places it within the scope of the arbitration provision. *Id.* at 5.

The first problem with the defense's argument is that it assumes a factual premise that has not yet been proven, that is, that the letter was an attempt to collect on the account rather than the Consent Judgment. If, after discovery, the record evidence shows that the defense was collecting only on the account without any reference to the Consent Judgment, then the Defendants will be entitled to invoke the arbitration provision. But that fact is not yet established.

If, on the other hand, the record evidence later shows that the June 2018 letter was an attempt to collect on the Consent Judgment, then the FDCPA claim is outside the scope of the arbitration provision. Collection on the Consent Judgment would *not* qualify as communications or collections matters "*relating to*" the original credit card account. Defs.' Mot. to Compel, Wiese Decl., Exh. C, Changes in Terms at 6 (emphasis added). Instead, the Defendants would be attempting to collect on the Consent Judgment, which is not the same as the credit card account and is instead a separate contract. *Cf. United States v. City of Northlake, Ill.*, 942 F.2d 1164, 1167 (7th Cir. 1991) ("A judicially approved consent decree, like a settlement agreement, is essentially a contract for purposes of construction."). Against this, the Defendants rely on the notion that collecting on the Consent Judgment constitutes a "collections matter" subject to arbitration. But that stretches the term "collections matter" too far. "Collections matter" cannot possibly include the collections *lawsuit* itself (that is, the

Michigan state court case)—if it did, then Midland Funding's own lawsuit in state court would have been subject to arbitration. The same reasoning applies to the judgment that is the product of the lawsuit. Indeed, the consequences of the Defendants' argument is that not even the Michigan state court could enforce the very judgment that it entered. Consider this example: if Nettles had started paying $25 a month instead of $50 as required by the Consent Judgment, and if Defendants then asked the state court judge to enforce the Consent Judgment and compel Nettles' compliance (for example, through citations on assets or garnishment), then *Nettles* could force the Defendants to arbitrate that dispute. There is no reason to think that an arbitration provision dealing with collections matters relating to the original account, or communications "relating to" the account, is so expansive that it deprives a court from deciding disputes over a court-ordered judgment that resolved a collection lawsuit. So if the evidence reveals that the June 2018 letter was an attempt to collect on the Consent Judgment, then the arbitration provision will not apply.

IV. Conclusion

The Defendants' motion to compel arbitration is denied, though without prejudice. The status hearing of December 5, 2019 is accelerated to October 24, 2019 at 10:45 a.m. The parties shall confer on a discovery plan addressing whether the June 2018 letter was an attempt to collect on the Consent Judgment. The results of that conferral shall be reported in a joint status report, due on October 21, 2019.