NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

JENNIFER D. HOVERMALE, *on behalf of herself and all others similarly situated*, Plaintiffs, v. IMMEDIATE CREDIT RECOVERY, INC., Defendant.	Civil No. 15-05646 (RBK/JS) **OPINION**

KUGLER, United States District Judge:

Plaintiff Jennifer Hovermale, on behalf of herself and all others similarly situated, brings claims against Defendant Immediate Credit Recovery Inc. ("ICR"), for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* The Court addresses two motions: (1) ICR's Rule 12(b)(1) motion to dismiss for lack of Article III standing (Doc. Nos. 92–93); and (2) Hovermale's motion for class certification (Doc. No. 88).[1] The Court **DENIES** ICR's motion to dismiss and **GRANTS** Hovermale's motion for class certification.

I. BACKGROUND

Hovermale sued debt collector ICR after ICR sent her a letter about her defaulted federal Perkins student loan, which helped finance Hovermale's education at Rider University. (Doc. No. 1 ("Compl.") at ¶¶ 9–15.) The letter, dated February 9, 2015, stated:

> Due to interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Therefore, if you pay the amount shown above, an adjustment may be necessary.

[1] Because separate sets of briefs exist for these two motions, the Court's citations denote the class certification briefs with "Cert." and the motion to dismiss briefs with "MTD."

(Compl. at Ex. A.) Although Hovermale does not appear to dispute that the loan accrued interest, she avers that she initially believed the "late charges" representation to be true, but later learned it was false. (Doc. No. 88-5, Hovermale Dec. at ¶ 2.) Hovermale contends that during the proposed class period, ICR sent 2,893 other New Jersey addresses similar letters created from ICR's "Letter 4" template. (Doc. No. 88-2, Stern Dec. at Ex. A; *id.* at Ex. B, 66:7–17.) ICR contends it provided this number in error and only sent 207 such letters. (Def.'s Cert. Opp. Br. at 30.)

Hovermale brought this putative class action, alleging that the letter and its "late charges" language violated FDCPA Sections 1692e, f, and g. *See* 15 § U.S.C. 1692 *et. seq.* The Section 1692g claim is Hovermale's individual claim. (Compl. at ¶ 37c; *see also* Pl.'s Cert. Br. at 23.) Among other things, Hovermale alleges that the "late charges" representation violates the FDCPA because Perkins loans cannot accrue late charges after default. (Compl. at ¶ 20.) ICR then moved for summary judgment, which this Court granted in part. (Doc. Nos. 28–29); *Hovermale v. Immediate Credit Recovery Inc.*, No. 15-cv-5646, 2016 WL 4157160, at *1 (D.N.J. Aug. 4, 2016). The Court granted judgment to ICR on Hovermale's Section 1692f claim, but denied the motion as to the Section 1692e and g claims. *Id.* In denying ICR's motion as to the Section 1692e claim, this Court found the letter's late charges language "materially misleading to the least sophisticated debtor" because late charges cannot accrue after default. *Id.* at *4. It also held that "[t]he representation that Defendant could assess interest does not diminish the misrepresentation that it could assess late charges." *Id.* at *3.

Hovermale now seeks to certify a class of individuals who received letters at their New Jersey addresses during the proposed class period. ICR opposes class certification and has

separately moved to dismiss under Federal Rule of Procedure 12(b)(1), arguing that Hovermale lacks standing to bring the Section 1692e claims.

II. DISCUSSION

Courts generally decide standing issues before class certification issues because standing is jurisdictional. *See Clark v. McDonald's Corp.*, 213 F.R.D. 198, 204 (D.N.J. 2003); *but see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (explaining that the exception to this rule instructs courts to address class certification before standing when class certification is the "logically antecedent" issue). Because this case is no exception, the Court addresses ICR's motion to dismiss for lack of standing before deciding whether to certify any class. *See Clark*, 213 F.R.D. at 204 ("[T]he *Ortiz* exception treating class certification as the antecedent consideration does *not* apply if the standing issue would exist regardless of whether the named plaintiff filed his claim alone or as part of a class.") (emphasis in original).

A. ICR's Motion to Dismiss is Denied Because Hovermale Has Standing

Claiming that Hovermale lacks standing, ICR moves to dismiss Hovermale's claims under 15 U.S.C. § 1692e, which prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt," *id.*, and provides a non-exhaustive list of behavior that violates the prohibition.[2] *See Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997 (3d Cir. 2011). As set forth below, the Court denies ICR's motion because Hovermale has Article III standing.

[2] Specifically, Hovermale alleges violations of Section 1692e, including Sections 1692e(1), 1692e(2)(A), 1692(2)(B), 1692e(5), and 1692e(10). (Compl. at ¶ 37a.) As this Court previously held, "Plaintiff's Section 1692e claim will be restricted to the Letter's representations regarding late charges." *Hovermale*, 2016 WL 4157160, at *4.

1. Motion to Dismiss Standard

A motion to dismiss for lack of standing must be brought under Federal Rule of Civil Procedure 12(b)(1) because standing is jurisdictional. *See Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be brought at any time and may either (1) "attack the complaint on its face" or (2) "attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). In the second type of Rule 12(b)(1) motion—which ICR brings here—the Court does not presume that the Complaint's allegations are true. *Id.* Instead, it is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* The plaintiff has the burden to prove that the Court has jurisdiction. *Id.* If the Court does not, it must dismiss the case without prejudice. *In re Orthopedic "Bone Screw" Prods. Liab. Litig.*, 132 F.3d 152, 155–56 (3d Cir. 1997).

2. Hovermale Suffered a Concrete and Particularized Injury in Fact

For a court to have jurisdiction, a plaintiff must have standing at the time the complaint is filed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n.5 (1992). Plaintiff bears the burden of establishing standing by showing: (1) an injury in fact; (2) a causal relationship between that injury and the challenged action; and (3) the likelihood that a favorable decision would redress that injury. *See Defenders of Wildlife*, 504 U.S. at 560–61; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). ICR only challenges Hovermale's ability to show an "injury in fact" here. (*See generally* Def.'s MTD Br.)

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." *Defenders of Wildlife*, 504 U.S. at 560. Although a concrete injury "must actually exist," the injury need not be

tangible. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016). An intangible injury is concrete if it resembles harm traditionally recognized in English or American courts and has been elevated to a legally cognizable injury by Congress. *Id.* at 1549. Indeed, "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact" and "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Id.* at 1549 (emphasis in original); *see also In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 637–38 (3d Cir. 2017). However, "a bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III." *Spokeo*, 136 S. Ct. at 1549.

Here, the parties initially dispute the "harm" at issue. According to ICR, the "injury that results from use of [the letter's] language . . . only occurs if the balance stated in a letter will not change," as the language creates a "false sense of urgency for the obligor to pay the balance." (Def.'s MTD Br. at 9, 24–25.) Thus, ICR argues, Hovermale has suffered no "concrete and particularized" injury from the letter's late charges language because Hovermale's balance changed daily given the loan's accruing interest. (*See, e.g.*, Def.'s MTD Br. at 2, 25–30, 39.) Hovermale, by contrast, argues that the letter's late charges language caused her to suffer a concrete and particularized harm because its inclusion violated her substantive right to receive truthful, non-misleading, and non-deceptive information from ICR. (Pl.'s MTD Opp. at 19–22.)

The Court agrees with Hovermale as to the framing of the harm at issue because as courts have noted, "[t]he injury, for standing purposes, is framed as a right to receive accurate and non-misleading information" from ICR under Section 1692e of the FDCPA. *Bordeaux v. LTD Fin. Servs., L.P.*, No. 16-cv-0243, 2017 WL 6619226, at *1 (D.N.J. Dec. 28, 2017); *Medina v. Allianceone Receivables Mgmt., Inc.*, No. 16-cv-4664, 2017 WL 220328, at *1 (E.D. Pa. Jan. 19,

2017) ("The injury to the consumer alleged here is the false and misleading statement made by the debt collector in an effort to collect or settle the consumer's debt obligation.").[3]

When, as here, a plaintiff's standing is "based on a violation of a statutorily created right" like the right to be free from deceptive or misleading information under the FDCPA, the standing issue "turns on whether such a right is substantive or merely procedural." *Napolitano v. Ragan & Ragan*, No. 15-cv-2732, 2017 WL 3535025, at *5 (D.N.J. Aug. 17, 2017); *Pisarz v. GC Servs. Ltd. P'Ship*, No. 16-4552, 2017 WL 1102636, at *3 (D.N.J. Mar. 24, 2017). A "procedural right" is defined as "[a] right that derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right." *In re Michaels Stores, Inc.*, No. 14-cv-7563, 2017 WL 354023, at *12, 2017 WL 354023, at *7 n.12 (D.N.J. Jan. 24, 2017) (quoting *Landrum v. Blackbird Enters., LLC*, 214 F. Supp. 3d 566, 571 (S.D. Tex. 2016)) (internal citations omitted) (alteration original). A "substantive right" is "[a] right that can be protected or enforced by law; a right of substance rather than form." *Id.* (citing *Landrum*, 214 F. Supp. 3d at 571) (internal citations omitted) (alteration original).

ICR argues that Hovermale's reliance on the late charges language alleges only a "bare procedural violation" of the FDCPA divorced from any "concrete" harm, which is insufficient to satisfy Article III's "injury in fact" requirement. (*See, e.g.*, Def.'s MTD Br. at 25, 39.) Hovermale argues that the letter's late charges language caused her to suffer a "concrete" informational harm because its inclusion violated her substantive right to receive truthful, non-

[3] ICR disagrees that the late charges language was false or misleading. (Def.'s MTD Br. at 7, n.2.) But ICR must accept the Court's prior ruling that, "as a matter of law," the late charges language is "materially misleading to the least sophisticated debtor" under Section 1692e. *Hovermale*, 2016 WL 4157160, at *4. The Court thus rejects for a second time ICR's arguments that it did not violate the FDCPA because the letter's late charges language has been given "safe harbor" protection. *Id.*; (Def.'s MTD Br. at 20–24.) The Court also rejects ICR's arguments to the extent they seek to re-litigate whether the late charges language is material.

misleading, and non-deceptive information from ICR. (Pl.'s MTD Opp. at 19–22.) Like the many other courts in this district, the Court agrees with Hovermale.

Although post-*Spokeo*, the Third Circuit has not addressed whether an FDCPA violation gives rise to a concrete injury, courts in this district have considered that question. *See Pisarz*, 2017 WL 1102636, at *4 (collecting cases in which FDCPA violations gave rise to concrete injury). Despite ICR's claim that its letter's "late charges" language amounts to no more than a "bare procedural violation" of the FDCPA, the caselaw disagrees: Section 1692e provides "a substantive, and not merely procedural, statutory right under the FDCPA to be free from receiving allegedly false or deceptive information relating to the collection of a debt." *Napolitano*, 2017 WL 3535025, at *7; *see also Grubb v. Green Tree Servicing, LLC*, No. 13-cv-07421, 2017 WL 3191521, at *6 (D.N.J. July 27, 2017) (collecting cases and finding that Section 1692e's protections are "substantive in nature"). In fact, the "trend" in this district "favors finding concrete injury" when Section 1692e violations are alleged. *Napolitano*, 2017 WL 3535025, at *6. As courts have reasoned, allegations that debt collection letters contained "false and misleading statements" in violation of Section 1692e invoke "precisely [the harm] . . . the statute was intended to guard against." *Id.* (citation omitted).

Moreover, when a debt collector violates Section 1692e by providing false or misleading information, the informational injury that results—i.e., receipt of that false or misleading information—constitutes a concrete harm under *Spokeo*, which directs courts assessing intangible injuries to ask if the injury resembles harm traditionally recognized in English or American courts and if Congress elevated it to a legally cognizable injury. Section 1692e's "prohibition on providing false statements to induce a person to part with money" bears "a family resemblance to traditional causes of action for fraud and deceit, and protects interests

previously recognized at law." *Griffin v. Andrea Visgilio-McGrath, LLC*, No. 17-cv-0006, 2017 WL 3037387, at *6 (D.N.J. July 18, 2017). In passing the FDCPA, Congress also "elevated that entitlement to accurate disclosure" to the status of a legally cognizable, redressable injury. *Id.* (citing *In re Horizon Healthcare Servs. Inc., Data Breach Litig.*, 2017 WL 242554 at *9)); *see also Thomas v. John A. Youderian Jr., LLC*, 232 F. Supp. 3d 656, 669 (D.N.J. 2017) ("The right not to be given false information about the true amount owed is rooted in an interest traditionally recognized at law. Congress, in enacting the FDCPA, could give content to that interest and elevate particular violations of it to the status of a viable federal cause of action.").

Accordingly, "an overwhelming majority of the courts in this district have found that various types of violations under § 1692e give rise to concrete, substantive injuries sufficient to establish Article III standing." *Napolitano*, 2017 WL 3535025, at *6 (collecting cases); *Thomas*, 232 F. Supp. 3d at 669–71 (explaining that violations of the "right not to be given false information about the true amount owed" on a debt under Section 1692e "fit easily within the *Spokeo* rationale" and give rise to concrete injuries for Article III standing); *Bordeaux*, 2017 WL 6619226, at *1 (holding that plaintiff had standing to assert Section 1692e(10) claim because plaintiff alleged she was "injured by the fact that she received misleading information, and this is a sufficient injury to confer standing"); *Grubb*, 2017 WL 3191521, at *7 (holding that allegations that "ostensibly constitute a violation under § 1692e of the FDCPA, are sufficient for the purpose of establishing concreteness"); *Griffin*, 2017 WL 3037387, at *5–6 (denying motion to dismiss because plaintiff alleged a concrete "informational injury—specifically, the receipt of false information—of the kind recognized in the case law," which establishes a "trend in favor of finding concrete injury under the FDCPA where a debt collection letter contains materially misleading statements"); *Fuentes v. AR Res., Inc.*, No. 15-cv-7988, 2017 WL 1197814, at *5

(D.N.J. Mar. 31, 2017). Accordingly, this Court joins the overwhelming majority of courts that have determined that FDCPA violations under §§ 1692e and 1692f give rise to concrete, substantive injuries sufficient to establish Article III standing. (citations omitted)); Carney v. Goldman, No. 15-cv-260, 2016 WL 7408849, at *5 (D.N.J. Dec. 22, 2016) (finding that alleged violation of Section 1692e created a concrete injury in fact and thus sufficient to confer standing).

Thus, Plaintiff claims that ICR violated her substantive FDCPA rights by sending her a letter including the materially misleading late charges language when ICR had no lawful right to assess late charges. particularized because she received the debt collection communication. See Grubb, 2017 WL 3191521, at *7 (holding that plaintiff sufficiently alleged a particularized injury where she received a communication from Green Tree, in which Green Tree attempted to collect on a debt that Plaintiff allegedly owed). Plaintiff has thus shown a particularized injury as required to satisfy the injury in fact requirement of Article III standing.

This Court's decision in Scibetta v. LTD Bankruptcy, LLC, is not to the contrary. No. 16-cv-9218, 2017 WL 3448544, at *4 (D.N.J. Aug. 11, 2017). There, this Court granted the defendant's Rule 12(b)(1) motion to dismiss because the plaintiff sought to bring claims under Section 1692e(5) and 1692f(6)(B). Id. In finding that the plaintiff suffered no harm as to those claims, this Court observed that "[a]s stated, however, when ICR sent its letter, ICR misstated its right to assess late charges on defaulted Perkins loans. See Hovermale, 2017 WL 3190. The Court agrees with Plaintiff that, because Plaintiff was in default on a Federal Perkins Loan, Defendant did not have the lawful right to add