

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

MICHAEL C. PERKINS,  
INDIVIDUALLY AND ON BEHALF OF  
ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

AT&T MOBILITY, LLC and AFNI,  
INC.,

Defendants.

HONORABLE JOSEPH E. IRENAS

CIVIL ACTION NO. 10-6429  
(JEI/KMW)

**ORDER GRANTING DEFENDANT AFNI,  
INC.'S MOTION TO DISMISS**

**APPEARANCES:**

LAW OFFICE OF LEWIS ADLER  
By: Lewis Adler  
26 Newton Avenue  
Woodbury, NJ 08096  
Counsel for Plaintiff.

MAURICE & NEEDLEMAN PC  
By: Donald S. Maurice, Jr.  
5 Walter E. Foran Boulevard  
Suite 2007  
Flemington, NJ 08822

**IRENAS, Senior District Judge:**

This matter having appeared before the Court upon Defendant Afni, Inc.'s ("Afni") Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) and it appearing that:

1. Plaintiff Michael C. Perkins filed this complaint on October 21, 2010, alleging violations of the Fair Debt Collection

Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., the Truth-In-Consumer Contracts Warranty and Notice Act ("TCCWNA"), N.J.S.A. § 56:12-14, and consumer fraud under the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. § 56:8 et seq. The Complaint alleges that Afni, a debt collector, improperly attempted to collect debts owed to ATT Mobility, LLC ("ATT") by Plaintiff. On December 2, 2010, Plaintiff stipulated that ATT was dismissed from the case without prejudice.

2. Defendant Afni brings this motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

3. Plaintiff alleges that Afni violated the FDCPA by attempting to collect a debt which had been discharged in bankruptcy. While discharge in bankruptcy does serve as an injunction against a creditor's attempts to collect debts as obligations of the debtor, there is no private right of action for violation of that discharge. See *Joubert v. ABN Mortg. Grp., Inc.*, 411 F.3d 452, 455-456 (3d Cir. 2006). A debtor's lone remedy is a contempt proceeding in bankruptcy court. *Id.* The FDCPA does not serve as a "back door" which would allow such a private right of action. See *Jones v. Wolpoff & Abramson, L.L.P.*, 2006 U.S. Dist. LEXIS 4031, \*10 (E.D. Pa. Jan. 31, 2006). Because Plaintiff has not alleged any other facts which may give rise to an FDCPA claim, Plaintiff's claim under the FDCPA will be dismissed.

4. Plaintiff also alleges that Afni's notices to collect the debts violated the TCCWNA. The TCCWNA provides in relevant part:

No seller, lessor, creditor, lender or bailee shall in the course of his business . . . enter into any written consumer contract or give or display any written consumer warranty, notice or sign. . . which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the . . . the consumer contract is signed or the warranty, notice or sign is given or displayed.

N.J.S.A. § 56:12-15. Plaintiff's Complaint does not allege which provision violates a clearly established legal right of Plaintiff. Nor has Plaintiff alleged that Afni is a "seller, lessor, creditor, lender or bailee" as is required to state a claim under the TCCWNA. See *Boyko v. Am. Int'l Grp., Inc.*, 2009 U.S. Dist. LEXIS 119339, at \*\*9-11 (D.N.J. Dec. 23, 2009). Therefore Plaintiff has failed to adequately plead a claim under the TCCWNA, and Plaintiff's TCCWNA claim will be dismissed.

5. Finally, Plaintiff alleges a violation of the CFA. The CFA prohibits the use of unconscionable commercial practices or fraud "in connection with the sale" of merchandise or real estate. N.J.S.A. § 56:8-2. The purpose of the CFA is to protect consumers from deception and fraud, even when committed in good faith. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350, 365 (N.J. 1997). The CFA does not cover every transaction;

instead, “[i]ts applicability is limited to consumer transactions which are defined both by the status of the parties and the nature of the transaction itself.” *Arc Networks, Inc. v. Gold Phone Card Co.*, 333 N.J. Super. 587, 756 A.2d 636, 638 (N.J. Super. Ct. Law. Div. 2000). Plaintiff's CFA claim must fail because Afni did not sell any merchandise or real estate to him. The alleged violation here occurred when Afni sent notices to Plaintiff regarding a debt that he purportedly does not owe. However, Afni's notices were not offers to sell, and Plaintiff did not buy, anything from Afni. Therefore Plaintiff has failed to state a claim under the CFA, and Plaintiff's CFA claim will be dismissed.

6. The Third Circuit generally requires the district courts to provide plaintiffs whose claims are subject to dismissal with the opportunity to amend their complaints unless amendment would be inequitable or futile. *Phillips v. County of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2008).

**IT IS** on this 17th day of February, 2011,

**ORDERED THAT:**

- (1) Defendant Afni, Inc.'s Motion to Dismiss is hereby **GRANTED**, and Plaintiff's Complaint against Defendant Afni, Inc. is hereby **DISMISSED WITH PREJUDICE**.
- (2) Plaintiff is hereby **GRANTED LEAVE** to file a Motion to

Amend the Complaint within 30 days of the date of this Order. The motion shall have attached to it the proposed Amended Complaint in its entirety.

(3) The Clerk of Court is hereby directed to **CLOSE THIS FILE.**

s/ Joseph E. Irenas  
JOSEPH E. IRENAS, S.U.S.D.J.