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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MAY 13 1996

SHAROLYN CHARLES,

Plaintiff,

vs.

CHECKRITE, LTD., et al.,

Defendants.

No. CIV 95-2263 PHX PGR

ORDER

Among the motions pending before the Court are defendants Lundgren and Associates, P.C. and Alvin R. Lundgren's (collectively Lundgren) Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted (FRCP 12(b)(6)), filed December 14, 1995¹, and the plaintiff's Motion to Dismiss Counterclaim, filed November 29, 1995. Having considered the parties' memoranda and the oral argument of counsel, the Court finds that this entire action should be dismissed.

Since the plaintiff's complaint alleges only a claim under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq., arising from the defendants' efforts to collect on a non-

¹ Defendant Checkrite, Ltd. filed a joinder in the motion on April 5, 1996.

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1 sufficient funds (NSF) check that the plaintiff wrote to a
2 restaurant in payment for a meal, the primary issue before the Court
3 as to Lundgren's motion to dismiss, and the only issue in that
4 motion that the Court need decide given its ruling, is whether the
5 defendants' collection efforts fall within the purview of the FDCPA.
6 For purposes of Lundgren's motion to dismiss, the Court accepts the
7 definition of a transaction giving rise to a FDCPA-covered debt set
8 forth by the Third Circuit in Zimmerman v. HBO Affiliate Group, 834
9 F.2d 1163 (3rd Cir. 1987):

10 We find that the type of transaction which may
11 give rise to a "debt" as defined in the FDCPA, is
12 the same type of transaction as is dealt with in
13 all other subchapters of the Consumer Credit
14 Protection Act, i.e., one involving the offer or
15 extension of credit to a consumer. Specifically it
16 is a transaction in which a consumer is offered or
17 extended the right to acquire "money, property,
18 insurance, or services" which are "primarily for
19 household purposes" and to defer payment.

20 Zimmerman, 834 F.2d at 1168-69. While the Court recognizes that
21 there is a split of authority on the issue of whether a NSF check
22 can constitute a FDCPA-covered debt, none of the authority cited to
23 the Court constitutes precedent binding upon it. The Court
24 disagrees with the plaintiff's contention that the FDCPA governs
25 this action because a merchant who takes a check extends credit
26 until the check clears. The Court concludes instead that the FDCPA
does not pertain to this action because the acceptance of a check in
payment for consumer goods does not constitute the extension of
credit as contemplated by the FDCPA because there is no agreed-upon
deferral of payment. Under the Uniform Commercial Code as adopted
in Arizona, a check is a negotiable instrument which may immediately

1 be presented for payment; the fact that as a practical matter
2 payment may be delayed due to check processing procedures does not
3 constituted an extension of credit.² Cf. Roberts v. WalMart Stores,
4 Inc., 736 F.Supp. 1527, 1529-30 (E.D.Mo. 1990) ("Since plaintiffs'
5 check was negotiable upon execution, defendant did not grant
6 plaintiffs any right to purchase merchandise and defer payment for
7 it. Although a delay in payment of the check may be necessary due to
8 technology which does not currently allow for the immediate
9 processing of a check, defendant maintained the right to present the
10 check to the drawee immediately for payment.")

11 Since the plaintiff's complaint is premised upon a NSF check
12 being a FDCPA-covered debt and the Court has found that such a check
13 falls outside the protection of the FDCPA, the Court concludes that
14 there is no basis to certify a class of plaintiffs as requested in
15 Plaintiff's Motion for Class Certification.

16 Although the plaintiff argues that defendant CheckRite's
17 counterclaim on the underlying debt must be dismissed because it is
18 merely a permissive counterclaim with no independent jurisdictional
19 basis, the Court need not resolve the compulsory/permissive
20 counterclaim issue because, given its dismissal of the plaintiff's
21 complaint, the Court declines to exercise supplemental jurisdiction
22 over the state law claims in the counterclaim pursuant to the

25 ² It is undisputed in this case that the plaintiff did not
26 postdate her check and did not request the restaurant to delay the
cashing of her check.

1 discretion granted it by 28 U.S.C. § 1367(c)(3).³ Therefore,

2 It IS ORDERED that defendants Lundgren and Associates, P.C. and
3 Alvin R. Lundgren's Motion to Dismiss for Failure to State a Claim
4 Upon Which Relief can be Granted (FRCP 12(b)(6)) (doc. #8-1) is
5 granted and that the complaint is dismissed without leave to amend.

6 IT IS FURTHER ORDERED that the plaintiff's Motion to Dismiss
7 Counterclaim (doc. #4) is granted to the extent that the Court
8 declines to exercise supplemental jurisdiction over defendant
9 Checkrite, Ltd.'s counterclaim.

10 IT IS FURTHER ORDERED that defendants Lundgren and Associates,
11 P.C. and Alvin R. Lundgren's Motion for Sanctions (doc. #8-2) is
12 deemed withdrawn.⁴

13 IT IS FURTHER ORDERED that Plaintiff[']s Motion for Class
14 Certification (doc. #23) is denied.

15 IT IS FURTHER ORDERED that Defendants' Motion to Stay
16 Certification of the Class Action (doc. #28) is denied as moot.

17 IT IS FURTHER ORDERED that defendants' Motion for Leave to File
18 Overlength Memorandum (doc. #37) is granted.

19 IT IS FURTHER ORDERED that Defendant Lundgren & Associates,
20 P.C.'s Motion to Strike (doc. #42) is denied.

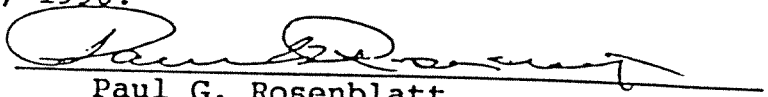
21 IT IS FURTHER ORDERED that the Clerk of the Court shall enter
22 / / /

23 _____
24 ³ It is undisputed that the amount in controversy in the
25 counterclaim is less than the \$50,000 mandated by 28 U.S.C.
§ 1332(a).

26 ⁴ Defendant Alvin Lundgren orally withdrew the motion at the
hearing on April 29, 1996.

1 a judgment dismissing this action in its entirety.

2 Dated this 8th day of May, 1996.

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4 Paul G. Rosenblatt
5 United States District Judge

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