

1 TOMIO B. NARITA (SBN 156576)
JEFFREY A. TOPOR (SBN 195545)
2 SIMMONDS & NARITA LLP
44 Montgomery Street, Suite 3010
3 San Francisco, CA 94104-4816
Telephone: (415) 283-1000
4 Facsimile: (415) 352-2625
tnarita@snllp.com
5 jtopor@snllp.com

6 Attorneys for Defendant
7 ARS National Services, Inc.

8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11
12 MICHAEL P. KOBY, an individual;
MICHAEL SIMMONS, an individual;
13 JONATHAN W. SUPLER, an
individual; on behalf of themselves
14 and all others similarly situated,

15 Plaintiffs,

16 vs.

17 ARS NATIONAL SERVICES, INC.,
a California Corporation; and JOHN
18 AND JANE DOES 1 through 25
inclusive,

19 Defendant.
20 _____

CASE NO. 09 CV 0780 JAH JMA

**DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Date: August 10, 2009
Time: 2:30 p.m.
Courtroom: 11

The Honorable John A. Houston

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
2 PLEASE TAKE NOTICE THAT at 2:30 p.m. on August 10, 2009, in
3 courtroom 11 of the above Court, located at 940 Front Street, San Diego, California,
4 the Honorable John A. Houston presiding, defendant ARS National Services, Inc.
5 (“ARS”) will and hereby does move this Court for an Order granting it judgment on
6 the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

7 This motion is made on the grounds that, as a matter of law, plaintiffs Michael
8 P. Koby, Michael Simmons and Jonathan W. Supler (“Plaintiffs”) have not stated a
9 valid claim for relief under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692
10 *et seq.* (the “FDCPA” or the “Act”). Plaintiffs allege that employees of ARS left
11 them voice mail messages which included the name of the caller and a toll-free
12 number to return the call, and that the messages did not state that ARS was a debt
13 collector seeking to collect a debt. Assuming these allegations are true, there has
14 been no violation of the FDCPA. A voice mail message that does not convey any
15 information regarding a debt is not a “communication” within the meaning of the
16 FDCPA. Moreover, when a voice mail message provides the name of the caller and
17 a dedicated toll-free number to return the call, the identity of the caller has been
18 “meaningfully disclosed” within the meaning of the FDCPA.

19 The Motion will be based on this Notice of Motion and Motion, the
20 Memorandum of Points and Authorities in Support of the Motion, all of the other
21 papers on file in this action, and such other and further evidence or argument as the
22 Court may allow.

23 DATED: May 20, 2009

SIMMONDS & NARITA LLP
TOMIO B. NARITA
JEFFREY A. TOPOR

26 By: s/Tomio B. Narita

27 Tomio B. Narita
Attorneys for Defendant
28 ARS National Services, Inc.

TABLE OF CONTENTS

1

2

3 I. INTRODUCTION 1

4 II. ALLEGATIONS OF COMPLAINT 2

5 III. ARGUMENT 3

6 A. Standard Governing Motions For Judgment On The Pleadings 3

7 B. The Messages Are Entirely Consistent With The Purpose Of
8 The FDCPA, Which Was Enacted To Prevent Serious
9 Harassment And Abuse And To Protect Consumer Privacy 4

10 C. The Section 1692e(11) Claim Fails Because A Voice Mail
11 Message That Does Not Convey Information Regarding A Debt
12 Is Not A Communication Under The FDCPA 6

13 D. The Section 1692d(6) Claim Fails Because A Voice Mail
14 Message That Supplies The Name Of The Caller And An
15 800-Number Provides “Meaningful Disclosure” Of The Caller’s
16 Identity 7

17 E. The Court Must Reject Any Interpretation Of The FDCPA
18 Which Raises Serious Constitutional Issues Regarding
19 Suppression Of Commercial Speech 8

20 1. The Voice Mail Messages Are Commercial Speech 8

21 2. The FDCPA Must Be Interpreted To Avoid Serious
22 Constitutional Issues 9

23 IV. CONCLUSION 10

24

25

26

27

28

TABLE OF AUTHORITIES

FEDERAL CASES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Adams v. Johnson,
355 F.3d 1179 (9th Cir. 2004)

Baker v. Allstate Fin. Servs., Inc.,
554 F. Supp. 2d 945 (D. Minn. 2008)

Belin v. Litton Loan Servicing, LP,
2006 WL 1992410 (M.D. Fla. July 14, 2006)

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)

Berg v. Merchs. Ass’n Collection Div.,
586 F. Supp. 2d 1336 (S.D. Fla. 2008)

Biggs v. Credit Collections, Inc.,
2007 WL 4034997 (W.D. Okla. Nov. 15, 2007)

Carmen v. San Francisco Unified Sch. Dist.,
982 F. Supp. 1396 (N.D. Cal 1997)

Central Hudson v. Public Serv. Comm. Of New York,
447 U.S. 557 (1980)

Clark v. Martinez,
543 U.S. 371 (2005)

Costa v. Nat’l Action Fin. Servs.,
2007 WL 4526510 (E.D. Cal. Dec. 19, 2007)

Debartolo v. Florida Gulf Coast Build. & Constr. Trades Council,
485 U.S. 568 (1988)

Edwards v. Niagara Credit Solutions, Inc.,
586 F. Supp. 2d 1346 (N.D. Ga. 2008)

Foti v. NCO Fin. Sys., Inc.,
424 F. Supp. 2d 643 (S.D.N.Y. 2006)

Guerrero v. RJM Acquisitions LLC,
499 F.3d 926 (9th Cir. 2007)

Hosseinzadeh v. M.R.S. Assocs., Inc.,
387 F.Supp.2d 1104 (C.D. Cal. 2005)

Jones v. United States,
590 U.S. 848 (2000)

1 *McGlinchy v. Shell Chem. Co.*,
845 F.2d 802 (9th Cir. 1988)

2

3 *Nelson v. City of Irvine*,
143 F.3d 1196 (9th Cir. 1998)

4 *N.L.R.B. v. Catholic Bishop of Chicago*,
440 U.S. 490 (1979)

5

6 *Pressley v. Capital Credit and Collection*,
760 F.2d 922 (9th Cir. 1985)

7 *Solid Waste Agency of Northern Cook County v.*
United States Army Corps of Engirs,
8 531 U.S. 159 (2001)

FEDERAL STATUTES

11 Fair Debt Collection Practices Act,
15 U.S.C. § 1692 *et seq.* *passim*

12 15 U.S.C. § 1692(a)

13 15 U.S.C. § 1692a(2)

14 15 U.S.C. § 1692b

15 15 U.S.C. § 1692c(b)

16 15 U.S.C. § 1692d

17 15 U.S.C. § 1692d(3)

18 15 U.S.C. § 1692d(6)

19 15 U.S.C. § 1692e

20 15 U.S.C. § 1692e(11)

21 15 U.S.C. § 1692f(7)

22 15 U.S.C. § 1692f(8)

OTHER AUTHORITIES

19 Federal Rules of Civil Procedure,
20 Rule 12(b)(6)
21 Rule 12(c)

22

23

24

25

26

27

28

1 **I. INTRODUCTION**

2 Congress enacted the FDCPA in 1977 in an effort to prevent collectors from
3 engaging in serious harassment and abuse, and to protect the privacy of consumers
4 during the collection process. Consistent with these goals, employees of ARS
5 allegedly left voice mail messages for Plaintiffs which did not reveal any information
6 regarding a debt. Each message provided Plaintiffs with the name of the person
7 placing the call, and requested a return call at the toll-free number maintained by
8 ARS. Plaintiffs claim that the voice mail messages should have explicitly stated that
9 they were from a debt collector seeking to collect a debt.

10 The voice mail messages omit any reference to a debt, thereby respecting the
11 consumer's right to privacy. If the messages had mentioned the debt, as urged by
12 Plaintiffs, they might violate the prohibition on third-party disclosure. The Act
13 expressly prohibits collectors from disclosing information about the debt to most
14 third parties. In fact, a district court recently held that a collector can violate the
15 FDCPA when its voice message is overheard by members of the debtor's family.

16 No circuit court has addressed whether, or how, the FDCPA should be applied
17 to voice mail messages. Plaintiffs will undoubtedly rely on the district court
18 decisions holding that a voice mail message is a "communication" under the FDCPA
19 even if the message does not convey any information regarding a debt. Plaintiffs will
20 also cite to district court cases holding that a message does not "meaningfully
21 disclose" the caller's identity unless the message expressly states that it is from a
22 debt collector seeking to collect a debt.

23 These district court decisions should not be followed. They are neither
24 binding, nor persuasive. The decisions ignore the plain language of the FDCPA,
25 which provides that no "communication" has occurred unless a collector conveys
26 "information regarding a debt." The decisions also ignore the fact that when a
27 message includes the name of the caller and an 800-number that can be used to return
28 the call, it has "meaningfully disclosed" the caller's identity.

1 There are serious constitutional issues raised by the Plaintiffs' proposed
2 interpretation of the FDCPA. The messages are a valid form of commercial speech.
3 Plaintiffs seek a ruling that every voice mail message must state that it is from a debt
4 collector. But if the Act is read in this manner, every voice mail message would
5 present a risk of third-party disclosure. A collector should not face strict liability
6 under the FDCPA every time it leaves a message. This interpretation of the Act
7 would effectively prevent collectors from leaving voice mail messages, silencing an
8 entire form of commercial speech. The Supreme Court has repeatedly followed the
9 canon of "constitutional avoidance" which provides that courts must avoid
10 interpretations of federal statutes that raise such serious constitutional issues.

11 All sections of the FDCPA should be read in harmony, and in a manner that
12 does not suppress valid speech. When a collector leaves a voice mail message for a
13 debtor, a collector should be permitted to simply state the name of the caller, and to
14 provide a number to return the call. This interpretation of the FDCPA makes sense,
15 and it strikes the correct balance between the need to protect the consumer's privacy,
16 and the need to allow collectors to utilize a critical means for seeking contact with
17 consumers.

18 ARS respectfully requests that this Court issue an Order granting judgment on
19 the pleadings in its favor.

20 **II. ALLEGATIONS OF COMPLAINT**

21 The Complaint alleges that Plaintiffs are "consumers" and that ARS is a "debt
22 collector" within the meaning of the FDCPA. *See* Complaint ¶¶ 21, 25, 30, and 33.
23 According to Plaintiffs, employees of ARS left messages on Plaintiffs' voice mail
24 machines in connection with an attempt to collect. *Id.* ¶¶ 34-36. At paragraph 39 of
25 the Complaint, Plaintiffs purport to transcribe examples of the voice mail messages,
26 as follows:

27 This is Robin calling for Michael Koby, if you could return my call at 800-
28 440-6613; my direct extension is 3171. Please refer to your Reference
Number as 15983225. [Received October 14, 2008].

1 ***

2 Hey John, uh, it's Mike Mazzouli with ARS National. Umm, there appears to
3 be some documents here in my office, uh, John at this point your [sic]
4 involved. Call me as soon as you can. My direct number and direct extension
is 800-440-6613; I'm at extension 3697. Thank you. [Received on or about
December 23, 2008].

5 ***

6 This is Brian Cooper. This call is for Mike Simmons, I need you to return this
7 call as soon as you get this message 877-333-3880, extension 2571. [Received
on April 9, 2009].

8 *Id.* ¶ 39. Plaintiffs allege that the messages fail to provide meaningful disclosure of
9 the caller's identity, and fail to disclose they were from a debt collector. *Id.* ¶ 37.

10 According to Plaintiffs, the messages violate section 1692d(6) and 1692e(11) of the
11 FDCPA. *Id.* ¶ 57.

12 **III. ARGUMENT**

13 **A. Standard Governing Motions For Judgment On The Pleadings**

14 "After the pleadings are closed, but within such time as not to delay the trial,
15 any party may move for judgment on the pleadings." *See* Fed. R. Civ. P. 12(c). The
16 standard applied to a motion for judgment on the pleadings is virtually identical to
17 the standard applicable to a motion to dismiss under Federal Rule of Civil Procedure
18 12(b)(6). *See Carmen v. San Francisco Unified Sch. Dist.*, 982 F. Supp. 1396, 1401
19 (N.D. Cal 1997); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir.
20 1988) (same standard applicable where 12(c) motion based on failure to state a
21 claim). "A judgment on the pleadings is properly granted when, taking all the
22 allegations in the pleading as true, the moving party is entitled to judgment as a
23 matter of law." *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir. 1998).

24 While the Court must accept as true Plaintiffs' material allegations and all
25 reasonable inferences therefrom, *see McGlinchy*, 845 F.2d at 810, the Court need not
26 accept as true conclusory allegations that are unsupported by the facts alleged or that
27 are couched in factual allegation, *see Carmen*, 982 F. Supp. at 1401; *see also Adams*
28 *v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004) ("conclusory allegations of law and

1 unwarranted inferences are insufficient to defeat a motion to dismiss”). Addressing
2 the standard used on motions to dismiss, the United States Supreme Court recently
3 explained that “labels and conclusions, and a formulaic recitation of the elements of
4 a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
5 “Factual allegations must be enough to raise a right to relief above the speculative
6 level.” *Id.* Where it is clear no relief could be granted to Plaintiff “under any set of
7 facts that could be proven consistent with the allegations,” judgment on the
8 pleadings is warranted. *McGlinchy*, 845 F.2d at 810.

9 **B. The Messages Are Entirely Consistent With The Purpose Of The**
10 **FDCPA, Which Was Enacted To Prevent Serious Harassment And**
11 **Abuse And To Protect Consumer Privacy**

12 Plaintiffs allege that the voice mail messages should have explicitly stated they
13 were from a debt collector seeking to collect a debt. But nothing in the plain
14 language of the FDCPA mandates that voice mail messages must contain these
15 statements. The messages are truthful, non-threatening, and they respect the
16 consumer’s privacy by omitting any reference to a debt, consistent with the purpose
17 of the FDCPA. The Plaintiffs’ claims must fail.

18 Congress did not pass the FDCPA with an eye toward regulating the content of
19 voice mail messages. Rather, the Act was passed to protect consumers from serious
20 threats, harassment, abuse and other deceptive practices utilized by unscrupulous
21 collectors. *See* 15 U.S.C. § 1692; *Pressley v. Capital Credit and Collection*, 760
22 F.2d 922, 925 (9th Cir. 1985) (purpose of Act “is to protect consumers from a host of
23 unfair, harassing, and deceptive debt collection practices without imposing
24 unnecessary restrictions on ethical debt collectors”) (citation omitted). Nothing in
25 the legislative history of the Act suggests it was meant to operate as a ban on polite
26 messages that request a return call. Rather, as the Ninth Circuit recently observed,

27 The purpose of the FDCPA is to protect vulnerable and unsophisticated
28 debtors from abuse, harassment and deceptive collection practices. . . .
Congress was concerned with disruptive, threatening, and dishonest tactics.
The Senate Report accompanying the Act cites practices such as ‘threats of
violence, telephone calls at unreasonable hours [and] misrepresentation of

1 consumer's legal rights.' (Citation). **In other words, Congress seems to have**
2 **contemplated the type of actions that would intimidate unsophisticated**
3 **individuals and which, in the words of the Seventh Circuit, 'would likely**
4 **disrupt a debtor's life.'** (Citation).

5 *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938-39 (9th Cir. 2007) (emphasis
6 added).

7 Congress took great pains to design a regulatory scheme that would do more to
8 protect the consumer's privacy during the collection process. *See* 15 U.S.C. §
9 1692(a) ("Abusive debt collection practices contribute to . . . invasions of individual
10 privacy."). With very limited exceptions, collectors are prohibited from disclosing
11 the existence of a debt to any third parties. *Id.* § 1692c(b). Although collectors may
12 contact third parties to obtain certain location information, collectors must carefully
13 avoid disclosing the existence of the debt during that process. *Id.* § 1692b.

14 Collectors may not publish lists of consumers with unpaid debts. *Id.* § 1692d(3). To
15 avoid third party disclosure, collectors may not communicate about a debt by post
16 card, nor may they use language on an envelope which indicates a collection letter is
17 enclosed. *Id.* §§ 1692f(7), 1692f(8).

18 Although Plaintiffs allege that the voice mail message should have revealed
19 they were from a debt collector, this would have put Plaintiffs' privacy at risk, and
20 would have exposed ARS to liability for third party disclosure. In *Berg v. Merchs.*
21 *Ass'n Collection Div.*, 586 F. Supp. 2d 1336 (S.D. Fla. 2008), the defendant left a
22 message on the plaintiff's voice mail machine which stated that it was "an attempt to
23 collect a debt." *Id.* at 1339. The debtor sued under section 1692c(b) of the FDCPA,
24 alleging the message was overheard by his father, step-mother, step-mother's ex-
25 spouse, girlfriend and neighbor. *Id.* Even though the collector had attempted to
26 prevent disclosure, by warning any third parties to stop listening, the court refused to
27 grant the collector's motion to dismiss. *Id.* at 1441-44.

28 Here, the voice mail messages challenged by Plaintiffs comply with the plain
language and the purpose of the FDCPA. The messages do not contain harassing,

1 abusive or deceptive language. They simply identify the name of the caller, and
 2 provide an 800-number that can be used to return the call. To safeguard the
 3 Plaintiffs' privacy, the messages do not reveal that they are from a debt collector
 4 seeking to collect a debt. There is no violation of the FDCPA.

5 **C. The Section 1692e(11) Claim Fails Because A Voice Mail Message**
 6 **That Does Not Convey Information Regarding A Debt Is Not A**
 7 **Communication Under The FDCPA**

8 Plaintiffs claim that the messages violate section 1692e(11) of the FDCPA
 9 because they do not explicitly state they are from a debt collector seeking to collect a
 10 debt.¹ This claim fails, however, because the disclosure requirements of section
 11 1692e(11) apply only to "communications." The messages allegedly left for
 12 Plaintiffs are not "communications" as defined by the FDCPA.

13 To qualify as a "communication" a voice mail message must convey
 14 "information regarding a debt" to the listener. *See* 15 U.S.C. § 1692a(2) ("The term
 15 'communication' means the conveying of information regarding a debt directly or
 16 indirectly to any person through any medium."). But the messages challenged by
 17 Plaintiffs do not convey any information regarding the debt. They do not state the
 18 amount owed by the consumer, the name of the creditor, the interest rate or any other
 19 information regarding the debt. Indeed, Plaintiffs' entire theory of recovery assumes
 20 that the messages fail to state that they are regarding a debt.

21 At most, the messages invite the Plaintiffs to contact ARS. If a consumer
 22 returns the call, the parties can have a conversation – a "communication" –
 23 concerning the specifics of the debt. At that point, section 1692e(11) would apply.

24 ¹ Section 1692e prohibits the use of any "false, deceptive, or misleading representation
 25 or means in connection with the collection of any debt" and provides a non-exhaustive list of
 26 such practices. *See* 15 U.S.C. §1692e. Section 1692e(11), relied upon by Plaintiffs, prohibits:
 27 "The failure to disclose in the initial written communication with the consumer, and in addition,
 28 if the initial communication with the consumer is oral, in that initial oral communication, that
 the debt collector is attempting to collect a debt and that any information obtained will be used
 for that purpose, and the failure to disclose in subsequent communications that the
 communication is from a debt collector" *Id.* § 1692e(11).

1 A voice mail message that does not convey any information regarding a debt is
 2 not a “communication” and need not recite the disclosure provided by section
 3 1692e(11) of the FDCPA. *See Biggs v. Credit Collections, Inc.*, 2007 WL 4034997,
 4 *4 (W.D. Okla. Nov. 15, 2007) (section 1692e(11) claim failed where voice mail
 5 messages did not convey any information regarding a debt). This Court should
 6 follow *Biggs* and should dismiss the section 1692e(11) claim.

7 A number of district court cases have reached a contrary result.² Given the
 8 plain language of the FDCPA, the purposes of the Act, and the doctrine of
 9 constitutional avoidance, discussed *infra*, this Court should not follow those cases.

10 **D. The Section 1692d(6) Claim Fails Because A Voice Mail Message**
 11 **That Supplies The Name Of The Caller And An 800-Number**
 12 **Provides “Meaningful Disclosure” Of The Caller’s Identity**

13 Plaintiffs argue that the messages violate section 1692d(6) of the FDCPA,
 14 because they do not “meaningfully disclose” the identity of the caller.³ This claim
 15 completely ignores the language of the messages, which Plaintiffs purport to recite
 16 verbatim. *See* Complaint ¶ 39. Each message did identify the name of the caller. *Id.*
 17 Moreover, each message provided a dedicated 800-number that can be utilized to
 18 return the call. *Id.* By supplying both the name of the caller and a number where the
 19 caller can be reached, the messages provided “meaningful disclosure” of the caller’s
 20

21 ² *See, e.g., Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1350-51
 22 (N.D. Ga. 2008) (voice mail messages which did not convey specific information about a debt
 23 held to be “communications” under the FDCPA); *Baker v. Allstate Fin. Servs., Inc.*, 554 F.
 24 Supp. 2d 945, 952 (D. Minn. 2008) (same); *Costa v. Nat’l Action Fin. Servs.*, 2007 WL
 25 4526510, *5 (E.D. Cal. Dec. 19, 2007) (same); *Belin v. Litton Loan Servicing, LP*, 2006 WL
 26 1992410, *4 (M.D. Fla. July 14, 2006) (same); *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643,
 27 655-57 (S.D.N.Y. 2006) (same); *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F.Supp.2d 1104,
 28 1116 (C.D. Cal. 2005) (same).

29 ³ Section 1692d provides that a debt collector may not “engage in any conduct the
 30 natural consequence of which is to harass, oppress, or abuse any person” while collecting. *See*
 31 15 U.S.C. § 1692d. Plaintiffs rely upon section 1692d(6), which prohibits “the placement of
 32 telephone calls without meaningful disclosure of the caller’s identity.” *Id.* § 1692d(6).

1 identity. There was nothing stated in any message that would “harass, oppress, or
2 abuse” the listener. No section 1692(d) violation has occurred.

3 Some district courts have held that a voice mail message cannot “meaningfully
4 disclose” the caller’s identity unless the message explicitly states that it is from a
5 debt collector.⁴ These decisions are not persuasive and should not be followed. The
6 plain language of section 1692(d) requires only that the “identity” of the caller be
7 meaningfully disclosed. It does not require disclosure of the nature of the caller’s
8 business, or disclosure that the purpose of the call is to collect a debt.

9 **E. The Court Must Reject Any Interpretation Of The FDCPA Which**
10 **Raises Serious Constitutional Issues Regarding Suppression Of**
11 **Commercial Speech**

12 The voice mail messages challenged here constitute commercial speech and
13 are entitled to protection under the First Amendment. But Plaintiffs’ proposed
14 interpretation of the FDCPA would make every voice mail message a potential
15 violation of the Act, exposing all collectors who leave messages to strict liability.
16 Plaintiffs’ reading of the Act has the potential to suppress this entire channel of
17 speech. The Supreme Court has repeatedly held that interpretations of statutes that
18 raise serious constitutional issues must be rejected. *See, e.g., Debartolo v. Florida*
19 *Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As
20 discussed below, application of basic principles of statutory construction confirms
21 that Plaintiffs’ claims must fail.

22 **1. The Voice Mail Messages Are Commercial Speech**

23 Plaintiffs allege that the messages were left in an attempt to collect debts on
24 behalf of creditors. Thus, the messages fall squarely within the definition of
25 commercial speech, which is any “expression related solely to the economic interests
26 of the speaker and its audience.” *See Central Hudson v. Public Serv. Comm. Of New*

27 ⁴ *See, e.g., Baker*, 554 F. Supp. 2d at 949-50 (voice mail message that did not identify
28 the nature of the debt collector’s business violated section 1692d(6)); *Costa*, 2007 WL 4526510,
at *4-5 (same); *Hosseinzadeh*, 387 F. Supp. 2d at 1112 (same).

1 *York*, 447 U.S. 557, 562 (1980).⁵ The voice mail messages are indisputably a form of
2 expression that relates to the parties' economic interests.

3 **2. The FDCPA Must Be Interpreted To Avoid Serious** 4 **Constitutional Issues**

5 ARS is not arguing by this motion that the FDCPA is unconstitutional.
6 Rather, ARS submits that the FDCPA, like all federal statutes, must not be
7 interpreted in a manner that raises serious constitutional issues. A "cardinal
8 principle" of statutory construction is "where an otherwise acceptable construction of
9 a statute would raise serious constitutional problems, the Court will construe the
10 statute to avoid such problems unless such construction is plainly contrary to the
11 intent of Congress." *See Debartolo*, 485 U.S. at 575 (citing *N.L.R.B. v. Catholic*
12 *Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)). This rule, which is
13 sometimes referred to as the "canon of constitutional avoidance," has been described
14 as "a tool for choosing between competing plausible interpretations of a statutory
15 text, resting on the reasonable presumption that Congress did not intend the
16 alternative which raises serious constitutional doubts." *See Clark v. Martinez*, 543
17 U.S. 371, 381 (2005).

18 In *Debartolo*, where the NLRB's interpretation of a provision of the National
19 Labor Relations Act raised serious First Amendment issues, the Court concluded it
20 "must independently inquire whether there is another interpretation, not raising these
21 serious constitutional concerns, that may fairly be ascribed to" the statute. *See*
22 *Debartolo*, 485 U.S. at 577. The statute was "open to a construction that obviates

23 ⁵ No regulation that restricts commercial speech can survive unless it directly advances
24 a substantial governmental interest and is not more extensive than necessary to serve that
25 interest. The Court in *Central Hudson* articulated the test as follows: "At the outset, we must
26 determine whether the expression is protected by the First Amendment. For commercial speech
27 to come within that provision, it at least must concern lawful activity and not be misleading.
28 Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield
positive answers, we must determine whether the regulation directly advances the governmental
interest asserted, and whether it is not more extensive than is necessary to serve that interest."
Central Hudson, 447 U.S. at 566.

1 deciding” the constitutional issues, and there was no “clear indication” in the
2 legislative history that Congress intended to prohibit the peaceful handbilling at
3 issue. For this reason, the lower court’s reversal of the NLRB’s ruling was affirmed.
4 *Id.* at 578, 583-88.⁶

5 Similarly, the Court should not construe the FDCPA in a manner that
6 effectively bans truthful, non-threatening voice mail messages, unless the Court finds
7 a “clear expression of an affirmative intention of Congress” to do so. *See Catholic*
8 *Bishop*, 440 U.S. at 504. As previously discussed, nothing in the plain language of
9 the FDCPA, or its legislative history, suggests that Congress intended to prevent
10 collectors from leaving polite messages which do nothing more than identify the
11 name of the caller and request a return call.

12 The most reasonable interpretation of the statute – and the one which avoids
13 the serious constitutional questions raised by chilling valid commercial speech – is
14 that the voice mail messages at issue do not violate sections 1692d(6) or 1692e(11)
15 of the FDCPA.

16 **IV. CONCLUSION**

17 The messages allegedly left by employees of ARS properly identify the name
18 of the caller and politely provide an 800-number to return the call. They do not
19 contain false statements or threats, nor do they compromise the consumer’s privacy
20 by revealing specific information about the debt or the nature of the call. Since the
21 messages are not “communications” as defined by the FDCPA, they need not reveal
22 that they are from a debt collector. Nor would such a disclosure make sense, in light
23

24 ⁶ *See also Solid Waste Agency of Northern Cook County v. United States Army Corps*
25 *of Engirs*, 531 U.S. 159, 172-74 (2001) (rejecting interpretation of Clean Water Act that would
26 raise “serious constitutional issues” relating to the reach of the Commerce Clause); *Jones v.*
27 *United States*, 590 U.S. 848, 857-58 (2000) (rejecting interpretation of federal arson statute that
28 raised serious constitutional issues regarding the scope of the Commerce Clause: “where a
statute is susceptible of two constructions, by one of which grave and doubtful constitutional
questions arise and by the other of which such questions are avoided, our duty is to adopt the
latter. (citation)”).

1 of the risk of third party disclosure. The interpretation of the FDCPA proposed by
2 Plaintiffs should be rejected, as it would chill a valid form of commercial speech,
3 thereby raising serious constitutional issues.

4 For each of the foregoing reasons, ARS respectfully requests the Court issue
5 an Order granting it judgment on the pleadings.

6
7 DATED: May 20, 2009

SIMMONDS & NARITA LLP
TOMIO B. NARITA
JEFFREY A. TOPOR

8
9
10 By: s/Tomio B. Narita
11 Tomio B. Narita
12 Attorneys for Defendant
13 ARS National Services, Inc.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, Tomio B. Narita, hereby certify that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 44 Montgomery Street, Suite 3010, San Francisco, California 94104-4816. I am counsel of record for the defendant in this action.

On May 20, 2009, I caused the **MOTION FOR JUDGMENT ON THE PLEADINGS** to be served upon the parties listed below via the Court's Electronic Filing System:

VIA ECF

Robert E. Schroth, Jr.
robschrothesq@sbcglobal.net
Counsel for Plaintiff

I declare under penalty of perjury that the foregoing is true and correct.
Executed at San Francisco, California on this 20th day of May, 2009.

By: s/Tomio B. Narita
Tomio B. Narita
Attorneys for Defendant
ARS National Services, Inc.