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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL P. KOBY, an individual; *et al.*, Plaintiffs, vs. ARS NATIONAL SERVICES, INC., *et al.*, Defendants.	CASE NO. 3:09-cv-00780-JAH-JMA **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S FED. R. CIV. P. 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS** HON. JOHN A. HOUSTON Dept.: Courtroom 11, Second Floor Hearing Date: August 10, 2009 Hearing Time: 2:30 p.m.

Plaintiffs, MICHAEL P. KOBY, MICHAEL SIMMONS, and JONATHAN W. SUPLER, on their own behalf and on behalf of the class they seek to represent, by and through their attorneys of record, respectfully submit the this memorandum of points and authorities in opposition to Defendant, ARS NATIONAL SERVICES, INC.'s Motion for Judgment on the Pleadings under Fed.R.Civ.P. 12(c).

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I.

INTRODUCTION

This case concerns the policy or practice of a debt collector who leaves voicemail messages for consumers without making the disclosures required under the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* ("FDCPA"). The messages seek a prompt return telephone call without first letting the consumer know the reason for the call or that the caller is a debt collector. The effect is to deprive consumers of their statutory right to not communicate with debt collectors. Nevertheless, by the pending Motion, Defendant seeks judgment in its favor on the pleadings.

Relying on overly restrictive interpretations of a statute designed to protect consumers, and refuting the overwhelming majority of decisions, Defendant argues: (1) its messages are consistent with the FDCPA's policies; (2) its messages, which do not reveal the features of or basis for the alleged debt, are not communications as defined by the FDCPA and, therefore, certain disclosures are not required; (3) messages that provide the name of the caller and a return phone number satisfy the FDCPA's requirement for "meaningful disclosure of the caller's identity;" and (4) the FDCPA should be interpreted to permit the messages because, if not, the statute would restrict constitutionally protected commercial speech.

Defendant's arguments are without merit and the Motion should be denied.

II.

STANDARD OF REVIEW APPLIED BY THE COURT IN RULING ON A MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS MADE PURSUANT TO FED.R.CIV.P. 12(C)

Judgment on the pleadings is proper when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law. *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999). A court abuses its discretion in not providing leave to amend, unless any amendment would be futile because there are no facts or legal theories upon which a litigant may state a claim. *United States v. County of San Diego*, 53 F.3d 965 (9th

Cir. 1995), review denied, *United States v. County of San Diego*, 516 U.S. 867 (1995).

III.

ARGUMENT

A. Defendant's Messages Undermine the FDCPA's Purpose

Defendant argues that its messages are consistent with the purpose of the FDCPA, which, according to Defendant, "was enacted to prevent serious harassment and abuse and to protect consumer privacy." [Doc. 6 at p. 9 of 17]. However, according to Congress:

> It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses. [15 U.S.C. §1692(e)].

Thus, contrary to Defendant's argument, the purposes of the FDCPA are silent about privacy.

Nowhere does Defendant address how its withholding of the disclosures in its voice mail messages eliminates abusive debt collection practices, avoids putting law-abiding debt collectors at a competitive disadvantage, or promotes State action. Contrary to Defendant's argument, the practice for which it seeks court approval runs afoul of the FDCPA's purposes as articulated by Congress.

Defendant's business purpose is to collect as much money as possible and it is unlikely it will collect much money unless it communicates with consumers. The FDCPA, however, expressly provides for the consumer's right to stop debt collector communications. 15 U.S.C. §1692c(c). Allowing debt collectors, such as Defendant, to leave telephone messages that fail to give sufficient information to consumers to allow them an opportunity to make an informed decision as to whether to return a debt collector's call can be abusive; it also deprives consumers of their right not to communicate and lures unsuspecting consumers into a dialogue when law-abiding collectors would get fewer return calls as some consumers may elect not to communicate with debt collector.

To further its effort to deceptively engage the unwitting consumer into a dialogue, Defendant's messages do not merely ask for a return call but instead convey a false sense of urgency: "Call me as soon as you can;" "I need you to return this call as soon as you get this message." [Doc. 1, ¶39]. Thus, the purposes of the FDCPA as expressed by Congress would not be advanced by permitting Defendant's messages in the form complained of by Plaintiffs.

Plaintiffs do not mean to imply that consumer privacy has nothing to do with the FDCPA. Congress expressly recognized, "There is abundant evidence of the use of abusive…debt collection practices [which] contribute … to invasions of individual privacy." 15 U.S.C. §1692(a). And, as Defendant's Memorandum correctly observes, there are several provisions in the FDCPA which protect consumer privacy. Defendant is mistaken, however, when it attempts to argue that compliance with the disclosure requirements would be inconsistent with the FDCPA's policies.

Defendant, however, seems to express concern that it is unable to navigate between compliance with the disclosure provisions and compliance with the third-party non-disclosure provisions. Defendant incorrectly assumes that it is entitled to leave voicemail messages and, when doing so, is caught between the required disclosures and the required non-disclosures.

As Homer described it, Ulysses had to navigate a difficult route between two rocks – one was inhabited by the six-headed Scylla which ate anything within its reach and the other was home to Charybdis, a sea monster that captured its prey by creating whirlpools. Debt collectors like Defendant have argued that they too must navigate the dangerous FDCPA waters between two great sea monsters. No court has ever accepted this argument.

On the one hand, a debt collector claims to fear the two-headed sea monster: the combination of 15 U.S.C. §1692d(6) and §1692e(11) which require "meaningful disclosure" of the caller's identity" and revealing that it is a debt collector. Simultaneously, it dreads the other demon, 15 U.S.C. §1692c(b), which prohibits communicating with third parties "in connection with the collection of any debt" – a risk they take when leaving voice messages containing the required disclosures. Debt collectors say that if they comply with one, then they will violate the other and there is no safe route between the two.

"This argument has been repeatedly rejected in the context of debt collector messages left on a consumer's home voicemail." *Baker v. Allstate Financial Services*, 554 F.Supp.2d 945, 950 (D. Minn. 2008); see, *Joseph v. J.J. MacIntyre Companies, L.L.C.*, 281 F.Supp.2d 1156 (N.D. Cal. 2003); *Costa v. National Action Financial Services*, 2007 U.S. Dist. Lexis 93230, *11 (E.D. Cal. 2007); *Foti v. NCO Financial Systems, Inc.*, 424 F.Supp.2d 643, 658 (S.D.N.Y. 2006) ("This argument is unconvincing"); *Leyse v. Corporate Collection Servs.*, 2006 U.S. Dist. Lexis 67719, *12-14 (S.D.N.Y. Sept. 18, 2006); and *Edwards v. Niagara Credit Solutions, Inc.*, 586 F.Supp.2d 1346, 1352-54 (N.D. Ga. 2008).

In *Leyse, supra* the debt collector, CCS, argued that, when it uses an automated dialer and pre-recorded messages, the FDCPA places it between a "rock and hard place." *Leyse, supra,* at *13. The court rejected this argument:

> The Court has no authority to carve an exception out of the statute just so CCS may use the technology they have deemed most efficient. * * * CCS has been cornered between a rock and a hard place, not because of any contradictory provisions of the FDCPA, but because the method they have selected to collect debts has put them there." [*Leyse, supra,* at *14.]

In *Edwards, supra,* the debt collector – much like ARS – argued that it had made a decision not to comply with §§1692d(6) and 1692e(11); opting instead to avoid violating §1692c(b). It argued that its decision should be treated as a bona fide error under 15 U.S.C. §1692k(c), which states:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

The *Edwards* court observed that the debt collector's conduct was intentional, which not only required rejection of the defense but justified imposing the maximum statutory damages permissible under the FDCPA.

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In a case cited by Defendant, *Berg v. Merchants Assn. Collection Div.*, 586 F.Supp.2d 1336 (S.D. Fla. 2008), the debt collector moved to dismiss the complaint. There, the debt collector – unlike ARS – had made the required disclosures. Third parties heard the message and it was alleged that the debt collector "knew or had reason to know that other persons besides the Plaintiff might hear the messages." *Berg, supra*, at 1339. Thus, the court concluded that the complaint stated a valid claim.

The debt collector in *Berg had* raised the "bona fide error" defense, however, as an affirmative defense involving factual issues, the *Berg* court could not consider it in the context of a motion to dismiss under Fed.R.Civ.P. 12(b)(6). *Berg, supra*, at 1345. Nevertheless, it is clear that the bona fide error defense could absolve a debt collector of liability – perhaps when it maintains procedures to ensure that messages, containing the complete disclosure, are left only on a sufficiently private voicemail system.

Thus, the *Berg* court observed:

> The Court is aware that this ruling will make it difficult, though perhaps not impossible, for debt collectors to comply with all of §§ 1692c(b), 1692d(6), and 1692e(11) at once in a message left on the consumer's voice mail. However, we follow reasoning similar to *Foti* to find no reason that a debt collector has an entitlement to use this particular method of communication. Debt collectors have other methods to reach debtors including postal mail, in-person contact, and speaking directly by telephone. [*Berg, supra*, at 1344.]

Here, Defendant made a conscious choice to try and get consumers to return a telephone call using technology which was inherently risky. Rather than take the risk that a third-party ***might*** overhear the message, Defendant chose to leave messages that always omit the required disclosures. Defendant seeks court approval of this practice; its request should be denied.

B. Defendant's Messages are "Communications" as Defined by the FDCPA

Next, Defendant argues that the messages do not violate 15 U.S.C. §1692e(11) because that section only applies to "communications" and the messages received by Plaintiffs are not "communications". Defendant is correct that 15 U.S.C. §1692e(11) only applies to a "communication." Defendant mistakenly argues, however, that the messages are not a

communication.

> The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium. [15 U.S.C. §1692a(2).]

Defendant takes an unsupported and unduly narrow view of "information regarding a debt."

The FDCPA is to be interpreted liberally for the consumer. *Clark v. Capital Credit & Collection Serv., Inc.*, 460 F.3d 1162, 1176 (9th Cir. 2006); *Winter v. I.C. Sys., Inc.*, 543 F.Supp.2d 1210, 1212 (S.D. Cal. 2008). Thus, "information regarding a debt" includes a reference number, *Anchondo v. Anderson, Crenshaw & Assoc.*, 583 F.Supp.2d 1278 (D. N.M. 2008), the return telephone number, *Stinson v. Asset Acceptance, LLC*, 2006 U.S. Dist. Lexis 42266, *7 (E.D. Va. June 12, 2006), and conveying "information to plaintiff, including the fact that there was an important matter that she should attend to and instructions on how to do so," *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1117 (C.D. Cal. 2005). Indeed, the fact that the messages "were merely the first step in a process designed to communicate with plaintiff about her alleged debt" is sufficient to qualify as a communication. *Id.*

Here, Defendant's messages left a reference number, a return telephone number, or both, and falsely suggested a degree of urgency. Doc. 1 at ¶39. Thus, each of the Defendant's messages is a communication under the FDCPA.

Defendant merely cites one case in support of its argument, *Biggs v. Credit Collection Corp.*, 2007 U.S. Dist. Lexis 84793 (W.D. Okla. 2007), an unpublished opinion from the Western District of Oklahoma. In *Biggs*, District Judge Stephen Friot concluded that the messages had not conveyed any information about a debt. No court has ever followed *Biggs* or cited it with approval; two courts, however, expressly rejected it. See, *Edwards, supra*, at 1351; and *Ramirez v. Apex Fin. Mgmt., L.L.C.*, 567 F. Supp. 2d 1035, 1041-42 (N.D. Ill. 2008).

Even if *Biggs, supra,* were a correct statement of the law regarding the live messages before it, those messages materially differ from the messages at bar. The *Biggs* opinion does not quote the messages. According to the motion papers available through PACER (Western District of Oklahoma, Case 5:07-cv-00053-F, Document 21-6, filed 10/01/2007), the voicemail or

answering machine messages in *Biggs* were:

> Trying to reach Diana Biggs. This is Robert Sullivan calling from Oklahoma City. Please return my call at 290-2018. Thank you.
>
> [and]
>
> I am trying to reach Diana Biggs. This is Robert Sullivan. Please return my call at 290-2018. Thank you.

The messages in this lawsuit radically differ because they include statements that, *inter alia*, leave "Reference Numbers," make vague references to "documents in [ARS's] office" that "involve" one of the Plaintiffs, request immediate return calls, express urgency in returning the calls, leave the name of some person who was unknown to each Plaintiff, and do not state what the calls concerned. [Doc. 1, ¶39]. Thus, *Biggs, supra*, is distinguishable on its facts.

Here, Defendant has admitted that:

(1) Each Plaintiff incurred a financial obligation within the relevant time period [Doc. 4, ¶¶19, 23, and 28];

(2) Each Plaintiffs' financial obligation was placed with Defendant for collection [Doc. 4, ¶¶22, 26, and 31];

(3) Defendant made telephone calls to each Plaintiff in an attempt to collect the financial obligations at issue [Doc. 4, ¶34]; and

(4) Defendant left at least one message for each Plaintiff at the telephone numbers associated with Plaintiffs' accounts [Doc. 4, ¶35].

Each of the messages left by Defendant were made in connection with the collection of a debt and, therefore, is a "communication" as defined by the FDCPA. Accordingly, Defendant was obligated to make the disclosures required under 15 U.S.C. §1692e(11).

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C. Defendant Failed to Provide Meaningful Disclosure of Its Identity in Violation of 15 U.S.C. §1692d(6)

When a debt collector places a telephone call, 15 U.S.C. §1692d(6) requires that there be "meaningful disclosure of the caller's identity." Thus,

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> * * *
>
> (6) Except as provided in section 804 [15 U.S.C. §1692b], the placement of telephone calls without meaningful disclosure of the caller's identity.

Defendant argues that simply "supplying both the name of the caller and a number where the caller can be reached" is all that is required to provide "meaningful disclosure of the caller's identity" in compliance with 15 U.S.C. §1692d(6). [Doc. 6, at p. 12 of 17]. Defendant fails to cite even a single case to support its argument; however, it does cite several decisions in footnotes, all of which squarely reject its argument.

"[T]he 'meaningful disclosure' required by §1692d(6) has been made if an individual debt collector who is employed by a debt collection company accurately discloses the name of her employer and the nature of her business and conceals no more than her real name." *Wright v. Credit Bureau of Ga., Inc.*, 548 F.Supp. 591, 597 (N.D. Ga. 1982). In *Wright*, the court was faced with the use of pseudonyms, called "desk names," for the individual employees and concluded that the use of desk names, although concealing the individual caller's real name, did not violate §1692d(6) so long as the caller accurately disclosed: (a) the employer's name; and (b) the nature of the call. Defendant's messages make neither disclosure.

In *Hosseinzadeh, supra*, the court observed that "'meaningful disclosure' presumably requires that the caller must state his or her name and capacity, and disclose enough information so as not to mislead the recipient as to the purpose of the call…." *Hosseinzadeh, supra*, at 1112.

In *Baker, supra*, the debt collector moved to dismiss claims based on five voice messages asserting violations of 15 U.S.C. §§1692d, 1692e, and 1692f. *Baker, supra* at 945. The court

concluded that §1692d(6) applies to a debt collector's voicemails. *Baker, supra,* at 949. "The relatively few courts construing *Section 1692d(6)* in similar contexts have uniformly held that it requires a debt collector to disclose the caller's name, the debt collection company's name, and the nature of the debt collector's business." *Baker, supra,* at 949 (footnote omitted).

Here, all of the messages that were left for Plaintiffs failed to: (1) identify Defendant by its company name; (2) disclose the caller's capacity; or (3) disclose the nature of the calls (i.e., an attempt to collect a debt). In short, the Plaintiffs did not know who was calling them or why. Consequently, the messages failed to give "meaningful disclosure" of the caller's identity and Defendant violated 15 U.S.C. §1692d(6).

D. Defendant's Messages Are Not Protected by the First Amendment

For its final argument, Defendant suggests that this Court should ignore the scores of judicial decisions requiring debt collectors, when leaving voice mail messages, to make "meaningful disclosure of the caller's identity" *and* to identify themselves as debt collectors. The reason, as Defendant argues, is that any other statutory construction would deny Defendant's constitutional right to commercial speech. Despite their diligence, Plaintiffs have only unearthed one court that has ever addressed this specific issue; that court expressly rejected the Defendant's argument.

As noted above in *Berg, supra,* the Southern District of Florida was faced with a motion to dismiss a claim that a debt collector's voice mail message violated the third party disclosure rules under §1692c(b) when the collector complied with the disclosure requirements of §§1692d(6) and 1692e(11), but its message was heard by third parties. "Defendant argues that the FDCPA must be found unconstitutional if it is to be interpreted to prohibit the communications described in the Plaintiff's complaint, because such a ruling would effectively make it impossible for debt collectors to leave messages on debtors' answering machine while conforming to the FDCPA." *Berg, supra,* at 1344.

The *Berg* Court did not use the term "commercial speech" but observed that the voice mail message involved purely private concerns and, therefore, was subject to only intermediate judicial scrutiny. That level of scrutiny, said the court, would uphold the constitutionality of

legislation if it were narrowly tailored to serve a "significant governmental interest." *Berg, supra,* at 1345. The court then reviewed the purposes of the FDCPA and concluded:

> [A] prohibition of these particular messages is narrowly tailored to serve the significant governmental interest of protecting consumers' privacy. Again, Defendant has alternative channels of communication available. [*Berg, supra,* at 1345].

Berg differs from the case at bar because, unlike the Defendant here, the debt collector in *Berg fully* complied with the disclosure requirements of §§1692d(6) and 1692e(11), but did so when it knew or reasonably should have known that the disclosures would be impermissibly heard by third parties. Here, Defendant intentionally opted to withhold those required disclosures – conduct which Congress declared to be *per se* false, deceptive, and misleading under §1692e(11). Nevertheless, Defendant seeks to have this Court permit its continuation of this illegal practice.

Up until about forty years ago, commercial speech was not afforded any protection under the First Amendment. See, *Valentine v. Chrestensen,* 316 U.S. 52 (1942). In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), the Supreme Court struck down a ban on a pharmacist's publication of prescription drug prices, opening the door to numerous cases protecting truthful, non-misleading advertisements from unwarranted regulation.

The Supreme Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557, 561 (1980). "[C]ommercial speech [is] usually defined as speech that does no more than propose a commercial transaction." *United States v. United Foods*, 533 U.S. 405, 409 (2001). Thus, the cases concerning commercial speech have involved:

- advertising prices of prescription drugs, *Virginia State Bd. of Pharmacy, supra*;
- advertising legal fees for routine services, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), and *In re R.M.J.*, 455 U.S. 191 (1982);
- advertising which promotes the use of the utility's services, *Central Hudson Gas*

& Electric Corp., *supra*;

- advertising liquor prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); and
- accountant's in-person solicitation, *Edenfield v. Fane*, 507 U.S. 761 (1993).

In re Sechuan City, Inc., 96 B.R. 37 (Bankr. E.D. Pa. 1989) involved an argument that the Bankruptcy Code's automatic stay improperly infringed a creditor's First Amendment rights. The debtor was a tenant within a hotel and operated a restaurant. Upon filing for bankruptcy, the hotel owner put up signs in the lobby discouraging patronage of the restaurant because the restaurant did not pay its bills. The court noted that classification of the signs did not neatly fit within the meaning of "commercial speech" but avoided the classification issue by observing, as did the court in *Berg*, *supra*, that lower scrutiny applied because the communication was purely a private concern not implicating public issues. *Sechuan City*, *supra*, at 96 B.R. at 42-44.

Thus, while the Defendant's characterization of the voice mail messages as "commercial speech" might not be accurate, the nature of the speech as between two parties regarding a private concern does not implicate core First Amendment values and the concomitant higher level of judicial scrutiny.

There are two distinct reasons for concluding that no First Amendment rights attach to Defendant's voice mail message. As detailed below, there is no protection for misleading speech and the public interest that prevents overreaching in the circumstances of a debt collector-consumer relationship justifies continued enforcement of all the FDCPA requirements.

Commercial speech is never protected by the Constitution if it concerns unlawful activity or, as here with this Defendant, is misleading. *Central Hudson*, *supra*, at 566. Unlike the message in *Berg*, *supra*, which fully disclosed the nature of the call, Defendant withheld full disclosure. Congress declared that a debt collector's failure to disclose to a consumer that it is a debt collector is *per se* false, deceptive, and misleading conduct. "The government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, *supra*, at 563.

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At §1692e(11), Congress defined the following as *per se* "false, deceptive, or misleading representation or means in connection with the collection of any debt":

> The failure to disclose in the initial written communication with the consumer and, in addition, 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, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

Here, Defendant failed to disclose that it was a debt collector, that it was attempting to collect a debt, and that any information obtained would be used for that purpose. The failure to make the required disclosures under §§1692d(6) and 1692e(11) deprives consumers of the information necessary to decide whether they want to engage in a dialogue with debt collectors, when consumers have the right to prohibit *all* communications from debt collectors. 15 U.S.C. §1692c(c).

Even if not misleading, the circumstances here do not implicate any First Amendment rights. Plaintiffs rely on *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) and *Tennessee Secondary School Athletic Assn. v. Brentwood Academy*, 551 U.S. 291 (2007).

Ohralik, supra, involved the complete prohibition of a lawyer's in-person solicitation of remunerative employment – in other words, ambulance chasing. The Supreme Court upheld the prohibition as the communication was not protected under the First Amendment. While Mr. Ohralik was not barred from informing a recent accident victim as to her rights, the State had the power to prohibit lawyers from seeking to be retained as her counsel from an in-person solicitation. Thus, although the prohibition did not impact truthful information, the nature of the face-to-face solicitation "actually may disserve the individual and societal interest, identified in *Bates*, *supra,* in facilitating 'informed and reliable decisionmaking.'" *Ohralik*, *supra*, at 458. "[T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." *Ohralik*, *supra*, at 464-465.

Furthermore, the *Ohralik* Court recognized the State's power to regulate conduct notwithstanding the conduct's inherent speech components.

> "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and the employers' threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component activity. [*Ohralik, supra,* at 456.]

In *Brentwood*, a high school was disciplined for violating the prohibition against recruiting middle school athletes. Noting that the opportunities offered to the adolescents by a high school coach playing on "youthful hopes and fears" can result in "undue pressure" which undermines "the societal interest in facilitating informed and reliable decisionmaking," the Supreme Court found no constitutional right to recruit middle school children. *Brentwood*, *supra*, at 299 (citations omitted).

The relationship between a debt collector and the targeted consumer is similar to that of the attorney-accident victim in *Ohralik*, and the recruiting coach-young athlete in *Brentwood*. The consumer, for FDCPA purposes, is judged from the standpoint of the "least sophisticated debtor." *Wade v. Regional Credit Ass'n*, 87 F.3d 1098, 1100 (9th Cir. 1996). The debt collector is one trained in the art of persuading people to pay their delinquent debts in an industry in which Congress found "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. §1692(a).

Indeed, it could be argued that *Ohralik* and *Brentwood* present stronger cases for First Amendment protection than the case at bar. Specifically, unlike *Ohralik* which entirely banned in-person solicitation of legal representation, and unlike *Brentwood* which prohibited all recruitment, Congress did not prohibit all debt collector communications with consumers.

Instead, as it relates to this case, the FDCPA merely required that, when communicating by telephone with a consumer, a debt collector give "meaningful disclosure of the caller's identity" and state that the caller is a "debt collector." That's it; that is all that's required.

Thus, Defendant does not even attempt to argue that Congress improperly regulated a "communication" between a debt collector and a consumer. Rather, Defendant argues that, when a debt collector makes a voluntary choice to use a mode of communication (i.e., voicemail), which the debt collector knows to carry risks of improper third party disclosures, the statute should interpreted to permit those risky communications notwithstanding the existence of alternate modes of communication.

Berg, *supra*, presented a far better – albeit insufficient – factual setting for this argument. Here, Defendant argues that the statute should be read to permit ***misleading*** voice mail messages. In *Berg*, the debt collector at least made full disclosure as required under the FDCPA. Thus, there could be no argument in *Berg* that the messages were misleading and the court nevertheless found no free speech right to leave voice mail messages.

Defendant fails to recognize that it could employ processes which eliminate the chance of a third party disclosure. If, prior to leaving a message, Defendant implemented and maintained reasonable procedures to ensure that the particular consumer's voice mail would not be heard by third parties, then it could leave full disclosure messages. In such a situation, the "bona fide error" defense under 15 U.S.C. §1692k(c) would protect the debt collector from the unintended third party disclosure notwithstanding proper implementation of those procedures.

Even if there were no means to comply with all of the FDCPA when leaving voice messages, "[d]ebt collectors have other methods to reach debtors including postal mail, in-person contact, and speaking directly by telephone." *Berg*, *supra*, at 1344. Thus, in view of the nature of the parties' relationship, the public policies inherent in regulating debt collection, and the misleading nature of Defendant's messages, no First Amendment protections are implicated here.

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IV.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion.

DATED: June 29, 2009

Respectfully submitted,
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--and--
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL P. KOBY, an individual; *et al.*, Plaintiffs, vs. ARS NATIONAL SERVICES, INC., *et al.*, Defendants.	CASE NO. 3:09-cv-00780-JAH-JMA **PROOF OF SERVICE**

I, Philip D. Stern, declare as follows:

I am, and was at the time of service of the papers herein referred to, over the age of 18 years, and not a party to the action. I one of the attorneys for the Plaintiffs, and I am admitted to practice *pro hac vice* in this case. I am registered with this Court's CM/ECF System.

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On June 29, 2009, I served the following document(s):

1. **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S FED. R. CIV. P. 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS**

BY CAUSING PERSONAL DELIVERY of the document(s) listed above, to the person(s) at the address(es) setforth below, in the following manner:

[XX] BY ELECTRONIC FILING/SERVICE. On the below date, I caused such document(s) to be Electronically Filed and/or Served through the Case Management / Electronic Case Filing System for the above entitled case to those parties on the Service List who are registered with the Court's CM/ECF System for this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 29th day of June 2009, at Morristown, New Jersey.

s/ Philip D. Stern
PHILIP D. STERN

Michael P. Koby, et al. v. ARS National Services, Inc., et al.
United States District Court, Southern District of California,
Case No. 3:09-cv-00780-JAH-JMA

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