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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL P. KOBY, an individual; MICHAEL SIMMONS, an individual; JONATHAN W. SUPLER, an individual; on behalf of themselves and all others similarly situated, Plaintiffs, vs. ARS NATIONAL SERVICES, INC., a California Corporation; and JOHN AND JANE DOES 1 through 25 inclusive, Defendant.	CASE NO. 09 CV 0780 JAH JMA **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS** Date: August 10, 2009 Time: 2:30 p.m. Courtroom: 11 The Honorable John A. Houston

I. INTRODUCTION

Congress carefully crafted the provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA") with an eye toward protecting the privacy of consumers during the collection process. In the "Findings And Purpose" section of the Act, Congress expressly acknowledged the legislation was needed because abusive collection practices contributed to "invasions of individual privacy." *See* 15 U.S.C. § 1692(a). To prevent embarrassment to consumers, collectors are prohibited from revealing the existence of the debt to most third parties. Collectors cannot publish debtor lists, cannot communicate about debts by post card, and may not use language or symbols on their envelopes which might reveal that the contents relate to debt collection.

Against this backdrop, Plaintiffs have filed this suit, seeking to penalize defendant ARS National Services, Inc. ("ARS") for allegedly leaving voice mail messages which did not reveal any information regarding a debt. Plaintiffs argue that ARS should have explicitly stated the messages were from a debt collector seeking to collect a debt. Under Plaintiffs' interpretation of the FDCPA, a collector could never leave a voice mail message without the risk of undermining the privacy concerns at the core of the FDCPA. But the Act should not be read in this manner.

When a collector leaves a voice mail message for a debtor, a collector should be permitted to simply state the name of the caller, and to provide a number to return the call. This interpretation allows all sections of the Act to be read in harmony, in a manner that honors the consumer's privacy, and without shutting down a critical channel of speech for ethical collectors. It is not realistic to argue that a collector should stop leaving messages because it can try to make contact with consumers solely by sending letters or by knocking on their front door.

ARS acknowledges that its interpretation of the FDCPA is not the only plausible reading of the statute. As expected, Plaintiffs cite to decisions holding that a voice mail message can violate section 1692d(6) or 1692e(11) even though it does

not state anything about a debt. The Court should not follow these cases since they are poorly-reasoned, they ignore the plain language of the Act, and they raise serious constitutional issues. Voice mail messages are a valid form of speech, as recognized by the cases cited by Plaintiffs. A collector should be allowed to leave voice mail messages, and should not face strict liability under the FDCPA each time it does so.

Plaintiffs seek to demonize ARS by painting it as an irresponsible company that seeks to avoid compliance with the Act. At bottom, however, the ARS voice mail messages are nothing more than polite requests for a return call. They are not harassing, oppressive or abusive. They contain no false or misleading statements. They do not refer to the debt, thereby honoring the consumer's right to privacy. They meaningfully disclose the identity of the caller (providing the name of the caller and a toll-free number maintained by ARS) in compliance with section 1692d(6) of the FDCPA. No information regarding the debt is conveyed, so section 1692e(11) of the FDCPA is not implicated.

The Court should grant this motion and the case should end here.

II. ARGUMENT

A. The Omission Of Information Regarding The Debt Protects The Consumer's Privacy And Does Not Impact The Consumer's Right To Request A Cease Of All Communications

Plaintiffs concede that a major focus of the FDCPA is safeguarding against invasions of consumer privacy. By omitting any specific reference to the collection of a debt, Defendant's messages respect this important goal.

According to Plaintiffs, by omitting any reference that they come from a debt collector, the messages somehow "deprives consumers of their right not to communicate" with the collector. This argument simply makes no sense. Defendant's voice mail messages have no effect a consumer's right to submit a written request to cease further communications.

A collector must honor any written cease and desist request received at any time during the collection process. *See* 15 U.S.C. § 1692c(c). To make such a

request, however, the consumer obviously must have the collector's address for receiving written communications.[1] Plaintiffs do not argue – and no court has ever held – that a voice mail message left for a consumer must include the address of the debt collector so that a consumer can invoke his rights under section 1692c(c) of the FDCPA. There is nothing in the Defendant's voice mail messages that "deprives" a consumer of the right to cease further communications.

B. The Section 1692e(11) Claim Fails Because The Messages Do Not Convey Information, Directly or Indirectly, Regarding A Debt

The messages do not convey any information regarding the debt, either directly or indirectly, and thus are not "communications" as defined by section 1692a(2) the FDCPA. Given this, section 1692e(11) does not apply.

It is not enough that the messages were left "in connection" with trying to collect a debt, or that they were the first step in a process that was designed to lead to a "communication" regarding a debt. The Act includes a specific definition for "communications" and since these messages do not convey information "regarding the debt" they are not covered.

The messages say nothing about how much the consumer owes. They do not identify the creditor, the interest rate or any other information regarding the debt. A person who listens to the message will learn nothing "regarding the debt" because no information is conveyed. *See, e.g., Biggs v. Credit Collections, Inc*., 2007 WL 4034997, *4 (W.D. Okla. Nov. 15, 2007) (no section 1692e(11) claim where voice mail messages did not convey information regarding a debt).[2]

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[1] No provision of the FDCPA expressly requires a collector to provide this address to the consumer, but it generally can be obtained from any collection letter. The collector's address may also be available on the internet or from some other publicly-available source, or it may be provided to the consumer during a phone conversation with the collector.

[2] In fact, according to Plaintiffs, it is this absence of information regarding the debt that allegedly will lead an "unsuspecting" consumer to return the call. Plaintiffs

Plaintiffs point out that the messages include "Reference Numbers" and make "vague references" to documents that involve the consumers. *See* Opposition at 12:7-11. But this is not information "regarding a debt" because there is no mention of money being owed. The messages merely invite Plaintiffs to contact ARS. If the consumer returns the call, ARS will confirm the consumer's identity and then a real "communication" regarding the specifics of the debt can proceed. At that point, Defendant must provide the section 1692e(11) disclosure.

This Court should not follow the district court decisions cited by Plaintiffs. *Anchondo v. Anderson, Crenshaw & Assoc.*, 583 F. Supp. 2d 1278 (D. N.M. 2008) was poorly reasoned. That court admittedly was unable to determine if the message was "regarding" a debt, since the message only included references to an "account" and an "important matter" and a "reference number." *Id* at 1282. ("[W]ithout additional evidence, the Court cannot affirmatively determine whether the information conveyed in the voicemail message was in reference to a debt or something else."). Despite this, the court refused to dismiss the claim. *Id*. If the *Anchodo* court was unable to tell that the message referenced a debt, then it was not a "communication" and the claim should have been dismissed.

The decision in *Hosseinzadeh v. M.R.S. Assocs., Inc*., 387 F.Supp.2d 1104 (C.D. Cal. 2005) is also unpersuasive. That court conceded that the messages did "not technically mention specific information about a debt" but held they were communications because they were about an "important matter" and were the "first step in a process designed to communicate with plaintiff regarding her alleged debt." *Id*. at 1116. With due respect, this reasoning is wholly flawed. Since no "information about a debt" was conveyed, there is no "communication." The "first

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cannot have it both ways. Since no information about the debt is conveyed, no "communication" has occurred.

step" in a process that is designed to lead to a "communication" about a debt is not a "communication" either. None of the cases cited by Plaintiffs should be followed.[3]

C. The Section 1692d(6) Claim Fails Because A Voice Mail Message That Supplies The Name Of The Caller And An 800-Number Provides "Meaningful Disclosure" Of The Caller's Identity

There is no violation of section 1692d(6) of the FDCPA because the messages do "meaningfully disclose" the identity of the caller. Each message identified the name of the caller and provided a dedicated 800-number that can be utilized to return the call. Nothing said in any message would "harass, oppress, or abuse" the listener.

The cases holding that a message must explicitly state it is from a debt collector to comply with section 1692d(6) should not be followed. Many of these cases rely upon *dicta* from a 27-year-old district court decision cited by Plaintiffs, *Wright v. Credit Bureau of Ga., Inc.*, 548 F.Supp. 591 (N.D. Ga. 1982).[4] But the *Wright* case did not involve a voice mail message, it involved live collection conversations. The *Wright* court rejected a claim that a collector had violated section 1692d(6) by using an alias during live collection conversations. *Id.* at 597. The *Wright* court noted that "the use of an alias by an individual debt collector who otherwise accurately discloses the name of her employer can hardly be termed harassment, oppression, or abuse." *Id*.

The holding in *Wright* is that a collector may use an alias without violating section 1692d(6). *Wright* also notes, in *dicta*, that it was proper for the collector to reveal "the nature of her business" during the live phone calls. *Id*. This was correct, in the context of that case, since the collector was engaged in live conversations with

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[3] Plaintiffs also cite to the opinion in *Stinson v. Asset Acceptance, LLC*, 2006 U.S. Dist. LEXIS 42266 (E.D. Va. June 12, 2006) but that opinion was subsequently vacated. *See Stinson v. Asset Acceptance, LLC,* 2006 WL 1647134 (E.D. Va. July 17, 2006).

[4] *See, e.g., Baker v. Allstate Fin. Servs.* 554 F. Supp. 2d 945, 949-50 (D. Minn. 2008) (citing to the *Wright* case); *Hosseinzadeh v. M.R.S. Assoc., Inc.*, 387 F.Supp.2d 1104, 1111 (N.D. Cal. 2005) (same); *Joseph v. J.J. MacIntyre Companies, Inc*., 281 F.Supp.2d 1156 (N.D. Cal. 2003) (same).

the debtor. *Id*. It would not be proper for a collector to conceal the nature of the call during a live conversation with the debtor.

The plain language of section 1692(d) requires only that the "identity" of the caller be meaningfully disclosed. It does not require disclosure of the nature of the caller's business, or disclosure that the purpose of the call is to collect a debt. "Meaningful disclosure" can vary based upon the context of the call. Here, unlike *Wright*, telephone calls were placed, but the consumers did not answer. Thus, the callers meaningfully disclosed their identity by providing their name and a call-back number. The consumer's privacy was also protected, since no information regarding the debt was conveyed. In the context of a voice mail message, this was proper under section 1692d(6). Defendant submits that this is the most reasonable interpretation of the FDCPA under these circumstances.[5]

D. Plaintiffs' Interpretation Of The FDCPA Must Be Rejected As It Raises Serious Constitutional Issues Regarding Suppression Of Commercial Speech

Any interpretation of a statute that raises serious constitutional issues must be rejected. *See, e.g., Debartolo v. Florida Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Plaintiffs do even attempt to address this

[5]Plaintiffs poke fun in their brief, suggesting that Defendant cannot navigate between the Scylla of the disclosures mandated by section 1692d(6) and 1692e(11), and the Charybdis that prohibits third-party disclosure in section 1692c(b). But Plaintiffs miss the point. Defendant has complied with all of these provisions. Its messages identify the caller and the number to return the call, but they convey no information regarding a debt, nor do they state that they are from a debt collector. This meaningfully discloses the identity of the caller, without revealing the debt in a manner that might be overheard by third parties. The messages do not contain harassing, abusive or deceptive language. The Court need not rely upon Greek mythology in making a ruling. Defendant simply asks that the FDCPA be interpreted according to its express terms, consistent with the purpose the Act and accepted rules of statutory construction.

"cardinal principle" of statutory construction. *Id.*[6] Instead, Plaintiffs suggest that Defendant's messages do not constitute speech worthy of protection. They are mistaken. The voice mail messages at issue here are indisputably a form of commercial speech, as defined by the very cases upon which Plaintiffs rely. The Court should reject Plaintiffs' proposed interpretation of sections 1692d(6) and 1692e(11) of the FDCPA, as it could potentially suppress an entire channel of truthful commercial speech.

1. The Voice Mail Messages Are Commercial Speech

As Plaintiffs correctly acknowledge, "commercial speech" is defined as any "expression related solely to the economic interests of the speaker and its audience." *See Central Hudson v. Public Serv. Comm. Of New York*, 447 U.S. 557, 562 (1980). The voice mail messages at issue here fall squarely within the *Central Hudson* definition of commercial speech, as they are a form of expression (messages left on a machine) that relate solely to the economic interests of Plaintiffs and Defendant.

Plaintiffs argue that the messages do not merit First Amendment protection because they are "misleading" (*see* Opposition at 16:21-17:14), but they do not identify specific language that they claim is misleading. Rather, Plaintiffs complain about what the messages do not say.

Using classic circular reasoning, Plaintiffs first assume the conclusion that they wish the Court to reach (*i.e.*, that the messages are "communications" governed by the FDCPA). Plaintiffs then argue that the First Amendment is not implicated

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[6] "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *See Debartolo*, 485 U.S. at 575 (*citing N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the "canon of constitutional avoidance" is a "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

because every "communication" must have the disclosure required by section 1692e(11) of the FDCPA, and its omission renders the messages *per se* misleading.

In truth, Congress declared only that a "communication" made in connection with collection must include state that it is from a debt collector. *See* 15 U.S.C § 1692e(11). As previously discussed, these voice mail messages are not "communications" as defined by section 1692a(2) the FDCPA, because they do not convey any information "regarding the debt" to the listener. The suggestion that the messages are not protected speech because they are *per se* misleading must fail.

2. The *Ohralik* and *Brentwood* Cases Do Not Apply

Plaintiffs rely upon *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) and upon *Tennessee Secondary School Athletic Assn. v. Brentwood Academy*, 551 U.S. 291 (2007), but neither case is controlling or even persuasive here. *Ohralik* upheld a ban on in-person solicitation by attorneys (*Ohralik*, 436 U.S. at 468), and *Brentwood* upheld a restriction on recruiting middle school students to play on high school athletic teams. *Brentwood*, 551 U.S. at 300. The challenged restrictions passed muster under the First Amendment because they were principally designed to regulate conduct, and speech was a subordinate component of the transaction. *See Ohralik*, 436 U.S. at 457. As the Court in *Brentwood* observed:

> We have since emphasized that *Ohralik's* narrow holding is **limited to conduct that is inherently conducive to overreaching and other forms of misconduct**. . . . In our view, however, the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader.

Brentwood, 551 U.S. at 298 (emphasis supplied).

Unlike *Ohralik* or *Brentwood*, Plaintiffs do not allege that Defendant was seeking to collect a debt by direct contact, such as by knocking on a debtor's front door. Rather, Plaintiffs complain about the contents of Defendant's voice mail messages. The First Amendment is directly implicated here. The Court must interpret the FDCPA in a way that will not raise serious constitutional issues.

3. The *Berg* Decision Supports Defendant's Position

It is not clear why Plaintiffs rely so heavily upon *Berg v. Merchants Assoc. Collect. Div., Inc*., 586 F.Supp.2d 1336 (S.D. Fla 2008), since that case undermines their position. Unlike the present case, the collector in *Berg* left a message which explicitly stated it was "an attempt to collect a debt." *Id*. at 1339. The consumer claimed the message was overhead by third parties, and sued under section 1692c(b) of the FDCPA. *Id*.

Although Plaintiffs in this case suggest that voice mail messages are not entitled to First Amendment protection, the *Berg* court recognized that the collector's voice mail message was protected speech. It elected to apply "intermediate scrutiny" which allows restrictions on speech where they are "narrowly tailored to serve a significant governmental interest." *Id.* at 1345. The *Berg* court held the FDCPA was not unconstitutional as applied to the collector's messages, since there was a "significant governmental interest in protecting consumers' privacy" and a prohibition on messages that contained "private and potentially embarrassing information" regarding the debt was narrowly tailored to serve that interest. *Id.*

The *Berg* decision supports Defendant. *Berg* acknowledges the paramount importance of protecting consumer privacy. ARS understands this too, and unlike the messages in *Berg*, its messages do not contain any information regarding the debt. Contrary to Plaintiff's position, *Berg* recognized that the collector's messages implicate the First Amendment.

Unlike the collector in *Berg*, ARS is not arguing that the FDCPA is unconstitutional as applied to its voice mail messages. Rather, ARS submits that its interpretation of the FDCPA is correct, or at a minimum, is plausible. Assuming there are two plausible interpretations of the FDCPA, the Court must reject Plaintiffs' interpretation as it raises "serious constitutional issues" regarding the chilling of valid speech.

IV. CONCLUSION

The messages properly identify the name of the caller and politely provide an 800-number to return the call. They contain no false statements or threats, nor do they compromise the consumer's privacy by revealing specific information about the debt or the nature of the call.

The messages are not "communications" under the FDCPA, so they need not recite that they are from a debt collector. Making the disclosure suggested by Plaintiffs would not make sense, as each message would pose the risk of third party disclosure. Plaintiffs' interpretation of the FDCPA would chill a valid form of commercial speech, thereby raising serious constitutional issues. It should be rejected. ARS respectfully requests the Court issue an Order granting it judgment on the pleadings.

DATED: July 13, 2009

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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 July 13, 2009, I caused the **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS** to be served upon the parties listed below via the Court's Electronic Filing System:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on this 13th day of July, 2009.

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