

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL P. KOBY, et. al.,
Plaintiffs,
v.
ARS NATIONAL SERVICES, INC., a
California Corporation, et. al.,
Defendants.

Civil No. 09cv0780 JAH (JMA)

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANT’S MOTION FOR
JUDGMENT ON THE PLEADINGS**

[Doc. No. 6]

INTRODUCTION

Pending before this Court is Defendant ARS National Services, Inc.’s (“ARS”) motion for judgment on the pleadings. Plaintiffs oppose the motion. The motion was taken under submission by this Court pursuant to CivLR 7.1 (d.1). After a thorough review of the pleadings and for the reasons set forth below, this Court hereby **GRANTS IN PART AND DENIES IN PART** Defendant’s motion.

BACKGROUND

I. Factual Background

Plaintiffs, Michael Koby, Michael Simmons and Jonathan Supler (“Plaintiffs”), allege they each incurred a financial obligation which was subsequently transferred to Defendant ARS. They further allege they received telephonic voice messages from Defendant attempting to collect their respective debts that did not comport with the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”). Cplt. at ¶12.

1 Plaintiffs specifically allege ARS left at least one telephonic message with each of the
2 Plaintiffs that was false, deceptive or misleading, as follows: on October 14, 2008, Koby
3 received a telephonic message from ARS stating “This is Robin calling for Michael Koby,
4 if you could please return my call at 800-440-6613. My direct extension is 3171. Please
5 refer to your Reference Number as 15983225.”; on or about December 23, 2008, Supler
6 received a telephonic message from ARS stating “Hey John, uh, it’s Mike Mazzouli with
7 ARS National. Umm, there appears to be some documents here in my office, uh, John at
8 this point your [sic] involved. Call me as soon as you can. My direct number and direct
9 extension is 800-440-6613; I’m at extension 3697. Thank you.”; and on April 9, 2009,
10 Simmons received a telephonic message from ARS stating “This is Brian Cooper. This call
11 is for Mike Simmons, I need you to return this call as soon as you get this message 877-
12 333-3880, extension 2571. Id. at ¶¶34, 39.

13 **II. Procedural Background**

14 On April 15, 2009, Plaintiffs filed a complaint, brought as a class action, asserting
15 violations of the FDCPA. Cplt. at ¶57. Specifically, Plaintiffs allege that in the telephonic
16 messages left by ARS, meaningful disclosure of ARS’s identity was not made as prescribed
17 by 15 U.S.C § 1692d(6) of the FDCPA. Id. Plaintiffs further allege ARS violated 15
18 U.S.C. § 1692d(6) because ARS did not disclose the nature or purpose of the phone
19 call. Id. Plaintiffs also assert ARS violated 15 U.S.C. § 1692e(11) by failing to disclose
20 in its initial communications with Plaintiffs that ARS, was a debt collector, attempting
21 to collect a debt and any information obtained would be used for that purpose. Id.

22 Defendant subsequently filed the instant motion for judgment on the pleadings on
23 May 20, 2009. See Doc. No. 6. Plaintiff filed an opposition on June 29, 2009. See Doc.
24 No. 12. Defendant filed a reply on July 13, 2009. See Doc. No. 14. On August 7, 2009,
25 this motion was taken under submission without oral argument pursuant to Civ.LR
26 7.1(d.1). See Doc. No. 15. Defendant sought and was granted leave to submit
27 supplemental authority in support of their motion on February 5, 2010. See Doc. Nos.
28 16, 17. Plaintiff filed a response on February 19, 2010. See Doc. No. 18.

DISCUSSION

I. Legal Standard

A. Motion for Judgment on the Pleadings

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings “[a]fter the pleadings are closed but within such time as not to delay the trial.” Judgment on the pleadings is proper only when there is no unresolved issue of fact and no question remains that the moving party is entitled to a judgment as a matter of law. Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002); Honey v. Distelrath, 195 F.3d 531, 532-33 (9th Cir. 1999). The standard applied on a Rule 12(c) motion is essentially the same as that applied on Rule 12(b)(6) motions. See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989). Thus, the allegations of the non-moving party are accepted as true, and all inferences reasonably drawn from those facts must be construed in favor of the responding party. Id. If matters outside of the pleadings are presented to and not excluded by the court, a motion for judgment on the pleadings shall be treated as one for summary judgment pursuant to Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Id.

Judgment on the pleadings is not appropriate where the complaint alleges facts which, if proved, would permit recovery. See General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989). Conclusory allegations and unwarranted inferences are insufficient to defeat a motion for judgment on the pleadings. In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

II. Analysis

Defendant argues that it is entitled to judgment on the pleadings because the messages left on Plaintiffs’ respective voice mails, even if construed as true, are not “communications” subject to the requirements of § 1692e(11) and the messages complied with the meaningful disclosure requirements of § 1692d(6). See Doc. No. 6.

1 **A. § 1629e(11) - Definition and Requirements of a “Communication”**

2 Defendant contends the a voice mail message that does not convey any information
3 regarding a debt is not a “communication” under the FDCPA. See Doc. No. 6. Plaintiffs
4 argue Defendant’s definition of a “communication” is too narrow in light of the purpose
5 of the FDCPA, the broad language the legislature used and other court rulings. See Doc.
6 No. 12. Plaintiffs maintain Defendant’s voice mail messages fall under the definition of
7 a communication under the FDCPA, and therefore are subject to its restrictions. Id.

8 The purpose of the FDCPA is to protect against harassing, oppressive or abusive
9 conduct by debt collectors. 15 U.S.C. § 1692d. Section 1692e of the FDCPA prohibits
10 any “false, deceptive, or misleading representation or means in connection with the
11 collection of any debt.” 15 U.S.C. § 1692e. Furthermore, the Ninth Circuit has held that
12 the statute is to be liberally construed as to protect the “least sophisticated debtor.” Clark
13 v. Capital Credit & Collection, Inc., 460 F.3d 1162, 1171 (9th Cir. 2006); see also
14 Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 938-39 (9th Cir. 2007). The purpose
15 of this standard is to “ensure that the FDCPA protects all consumers, the gullible as well
16 as the shrewd ... the ignorant, the unthinking and the credulous.” Clomon v. Jackson, 988
17 F.2d 1314, 1318-19 (2d Cir. 1993). The language of the statute and the holdings of the
18 Ninth Circuit demand a broad reading of the protections of the FDCPA.

19 The definition of a “communication” under the FDCPA is “the conveying of
20 information regarding a debt directly or indirectly to any person through any medium.”
21 15 U.S.C. § 1692a(2). Courts have found that voice mail messages from debt collectors
22 to debtors are “communications” regardless of whether a debt is mentioned in the message.
23 Berg v. Merchants Assoc. Collection Div., Inc., 586 F.Supp.2d 1336 (S.D. Fla. 2008);
24 citing Belin v. Litton Loan Servicing, LP, 2006 WL 1992410 *4 (M.D. Fla. July 14, 2006)
25 (holding that messages left on debtor’s answering machines were “communications” under
26 the FDCPA); Hosseinzadeh v. M.R.S. Assocs. Inc., 387 F.Supp.2d 1104, 1115-16 (C.D.
27 Cal 2005) (holding that a voice mail message is a “communication” under the FDCPA);
28 but see Biggs v. Credit Collections Inc., 2007 WL 4034997 *4 (W.D. Okla. Nov. 15,

1 2007) (ruling that a voice mail message by a debt collector was not a communication
2 because it contained no information regarding a debt).

3 § 1692e(11) includes a non-exclusive list of conduct that constitutes a false or
4 misleading representations. Section 1692e(11) provides the following conduct is a
5 violation of the FDCPA:

6 The failure to disclose ... in [the] initial oral communication that the debt collector
7 is attempting to collect a debt and that any information obtained will be used for
8 that purpose, and the failure to disclose in subsequent communications that the
communication is from a debt collector ...[.]

9 Courts have held that not disclosing the above prescribed facts in a message left for
10 the debtor can be a violation of § 1692e(11). See Costa v. National Action Financial
11 Services, 634 F.Supp.2d 1069 (E.D. Cal. 2007) (finding a voice mail message stating the
12 caller received a phone call in her office for the plaintiff and asking her to return the call
13 were “communications” within the definition of section 1692e(2)); Hosseinzadeh v.
14 M.R.S. Associates, Inc., 387 F.Supp.2d 1104 (C.D. Cal. 2005) (finding messages
15 conveying the fact there was an important matter to attend to and instructions how to do
16 so were “communications” within the meaning of the statute); see also Foti v. NCO
17 Financial Systems, Inc., 424 F.Supp.2d 643 (S.D. N.Y. 2006) (finding that a message
18 solely identifying the debt collector as “NCO Financial Systems” was insufficient to satisfy
19 disclosure requirement of § 1692e(11) when the message left for the plaintiff contained
20 “no other suggestion or clue that the correspondence [was] from a debt collector”).

21 Construing the facts in favor of the Plaintiffs, it is clear the messages left for the
22 Plaintiffs Koby and Supler were left to encourage the Plaintiffs to call ARS. Both messages
23 contained language asking the listener to return the call. Cplt. at ¶39. The intention of
24 ARS was to contact Plaintiffs, or be contacted by Plaintiffs, in order to attempt to collect
25 a debt and served no purpose other than encouraging the Plaintiffs to pay their debt. The
26 purpose of the statute to prevent misleading representations in connection with collecting
27 a debt supports a determination that the messages left by ARS are communications within
28 the meaning of the statute. Additionally, the calls which, provided Plaintiff Koby a
reference number, and stated there were documents in the caller’s office involving Plaintiff

1 Supler, indirectly conveyed information involving the debts involved and therefore, fall
2 within the definition of a “communication” under the FDCPA. Accordingly, these
3 communications by ARS fall under the purview and restrictions of the FDCPA.

4 The Court, however, finds the message left for Plaintiff Simmons, which merely
5 included the caller’s name and asked for a return call, does not convey, directly or even
6 indirectly, any information regarding the debt owed. As such, the claim based upon the
7 voicemail message left with Plaintiff Simmons would not permit recovery under section
8 1692e(11) and Defendant is entitled to judgment as to this claim.

9 In the messages cited by Plaintiffs, Defendant failed to disclose that: (1) it was
10 attempting to collect a debt; and (2) any information obtained will be used for that
11 purpose. Cplt. at ¶39. It is plausible that Defendant has violated § 1692e(11) when its
12 representatives left messages with Plaintiffs Koby and Supler that failed to convey the
13 information required by § 1692e(11). Because these facts, if proved, would permit
14 recovery under the FDCPA, judgment on the pleadings is not appropriate with respect to
15 Plaintiffs’ claims for relief under § 1692e(11) based upon the messages left with Koby and
16 Supler.

17 **B. § 1692d(6) - Meaningful Disclosure of Identity**

18 Defendant argues that under § 1692d(6) “meaningful disclosure” simply requires
19 the “identity” of the individual person calling on behalf of the debt collector be disclosed,
20 not necessarily the name of the debt collector or the fact that the person is, in fact, an
21 agent of a debt collector. See Doc. No. 6. Defendant further argues the Court should
22 avoid any interpretation of the meaning of the statute that would implicate serious
23 constitutional issues. Plaintiffs claim the messages left by Defendant failed to give them
24 “meaningful disclosure” of the caller’s identity and they were unable to know who was
25 calling them and why. See Doc. No. 12. Plaintiffs also argue the messages do not
26 implicate the First Amendment.

27 Section 1692d(6) states, in relevant part, that:

28 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.

1 Without limiting the general application of the foregoing, the following conduct is
2 a violation of this section: ... (6) ... the placement of telephone calls without
meaningful disclosure of the caller's identify. (Emphasis added.)

3 Although no circuit court, including the Ninth Circuit, has ruled on the issue of
4 what exactly "meaningful disclosure" requires, several district courts have come to a
5 consensus on the proper definition, which this Court finds persuasive. Two factually
6 similar cases speak to the issue of meaningful disclosure involving phone calls placed by
7 a debt collector that do not disclose that the caller is a debt collector. Costa, 634
8 F.Supp.2d at 1069; Hosseinzadeh, 387 F.Supp.2d at 1104. These district courts have
9 held that meaningful disclosure requires that the caller state his or her name and capacity,
10 and disclose enough information so as not to mislead the recipient as to the purpose of the
11 call. Id.

12 In Costa, the Plaintiff received a voice mail message at her home. Costa, 634
13 F.Supp.2d at 1072. The message stated: "This message is for Jessica Costa. My name is
14 Elizabeth. I received a phone call in my office for you. If you could please contact me
15 back I'll be here until 4 p.m. Eastern Time. My number is 866-529-1899 extension
16 2936." Id. In Hosseinzadeh, the Plaintiff received several pre-recorded messages on her
17 home phone. Hosseinzadeh, 387 F.Supp.2d at 1108. The agent of the debt collector
18 stated: "This message is for Ashraf. Ashraf, my name is Clarence Davis. I have some very
19 important information to discuss with you in reference to a file that has been forwarded
20 to my office that involves you personally. Contact my office right away at 877-647-5945,
21 extension 3618. Failure to return my call will result in a decision making process that you
22 will not be a part of." Id. The courts noted the caller failed to "divulge the true nature
23 and purpose of the call." Costa, 634 at 1074.

24 Here, the messages left on each of the Plaintiffs' respective voice mails are similar
25 to those in Costa and Hosseinzadeh as none of the messages relay to the listener the
26 nature of the call – to collect a debt – or the caller's identity as a "debt collector." See
27 Cplt. at ¶39. Accordingly, utilizing the definition of "meaningful disclosure" adopted by
28 the Eastern and Central districts of California, in each situation where ARS failed to

1 disclose that the caller was a debt collector and that the purpose of the call was to collect
2 a debt, ARS failed to meet the standards prescribed by § 1692d(6) of the FDCPA. See
3 accord Foti 424 F.Supp.2d at 643 (holding collector's identification of itself by name in
4 a pre-recorded message did not satisfy FDCPA's requirement that it disclose that the
5 communication is from a debt collector).

6 However, the Defendant contends that should the FDCPA be interpreted such that
7 "meaningful disclosure" requires them to state in a voice mail that ARS is a debt collector
8 and is attempting to collect a debt, there is a potential to expose ARS to liability for third
9 party disclosure under § 1692c(b) should someone other than the debtor overhear the
10 message. See Doc. No. 6. The Defendant further argues that because they may be
11 exposed to liability under this interpretation, this will limit their ability to communicate
12 with a debtor through the means of calling and leaving a voice mail. See Doc. No. 6. The
13 Defendant concludes that this interpretation, in essence, prohibits a form of speech, thus
14 raising constitutional concerns regarding the chilling of valid commercial speech. See Doc.
15 No. 6.

16 This argument is unconvincing. Nothing in the FDCPA or the Constitution entitles
17 or guarantees a debt collector the right to leave a message on a debtor's voice mail. See
18 Berg v. Merchants Assn. Collection Div., 586 F.Supp.2d 1336, 1344 (S.D. Fla. 2008);
19 Foti, 424 F.Supp.2d at 659.

20 As noted by the court in Foti, even though a debt collector is permitted to continue
21 to encourage a debtor to pay what he or she owes up to the allowed time period as
22 prescribed by the FDCPA, this does not entitle them to use *any* means in order to do so.
23 See Foti, 424 F.Supp.2d at 659; citing Clomon, 988 F.2d 1314 at 1321 ("It is apparent
24 that mass mailing may sometimes be the only feasible means of contacting a large number
25 of delinquent debtors, particularly when many of those debtors owe relatively small sums.
26 But it is also true that the FDCPA sets boundaries within which debt collectors must
27 operate."). In the course of leaving a voice mail for a debtor, should debt collectors choose
28 to ignore the requirements of § 1692d(6) in order to avoid the potential that they may

1 incur liability under § 1692c(b), “it does not seem unfair to require that one who goes
2 deliberately close to the line of proscribed conduct shall take the risk that he may cross the
3 line.” FTC v. Colgate-Palmolive Co., 380 U.S. 374, 393 (1965) (additional quotations
4 omitted). Here, ARS chose to communicate with the debtor via voice mail message, in the
5 process encumbering its ability to state in the message the meaningful disclosure required
6 under § 1692d(6), ostensibly for fear of violating § 1692c(b).

7 The Court is aware that compliance with both § 1692d(6) and § 1692c(b) in the
8 course of leaving a voice mail message may be difficult. However, this Court follows the
9 reasoning in Berg and Foti in finding that nothing entitles Defendant to use this particular
10 form of communication. Therefore, Defendant may not ignore mandated sections of the
11 FDCPA simply so that they may engage in a form of communication, to wit, leaving a
12 voice mail message, that they find most efficient.

13 Defendant further contends the messages are commercial speech, and the statute
14 must be interpreted to avoid the unconstitutional suppression of protected speech.
15 Plaintiff argues that Defendant’s messages are not protected by the First Amendment
16 because they are misleading. In its reply, Defendant maintains it does not argue, the
17 FDCPA is unconstitutional as applied to its voice mail messages.

18 Commercial speech is protected under the First Amendment only if it concerns
19 lawful activity and is not misleading. See Central Hudson Gas & Elc. Corp v. Public Svc.
20 Commission of New York, 447 U.S. 557, 566 (1980). The government may ban
21 misleading speech without implicating the constitution. Id. at 563. A governmental
22 restriction on protected commercial speech is valid if (1) it seeks to implement a
23 substantial governmental interest, (2) directly advances the interest and (3) reaches no
24 further than necessary to accomplish the given objective. Id. at 563-566.

25 The messages specific to this action are not entitled to constitutional protection
26 because, as discussed above, they are misleading. Further more, the Court’s finding that
27 the voice mail messages as alleged fail to provide “meaningful disclosure” does not result
28 in the unconstitutional suppression of commercial speech. The FDCPA directly advances

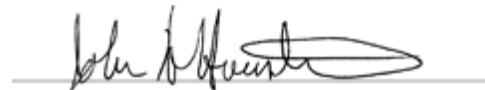
1 the government's substantial interest in protecting consumers from deceptive and abusive
2 conduct by debt collectors and protection against invasion of privacy. Requiring debt
3 collectors to provide enough information on a message so as not to mislead the recipient
4 about the purpose of the call and preventing debt collectors from disclosing information
5 to third parties directly advances these interests. As discussed above, the restrictions are
6 "narrowly tailored" to serve these interests in light of the fact debt collectors have "several
7 alternative channels of communication available to them." Berg, 586 F.Supp.2d 1336.
8 Accordingly, the "meaningful disclosure" requirement of the FDCPA does not raise serious
9 constitutional questions.

10 Because the facts raised by Plaintiffs regarding a lack of meaningful disclosure, if
11 proved, would permit recovery under the FDCPA, judgment on the pleadings is not
12 appropriate with respect to Plaintiff's claims for relief under § 1692d(6).

13 **CONCLUSION**

14 For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN**
15 **PART** Defendant's motion for Judgment on the Pleadings. The motion is **GRANTED**
16 as to the claim that the voice mail message left with Plaintiff Simmons violated section
17 1692e(11). The motion is **DENIED** as to the remaining claims.

18
19 DATED: March 29, 2010

20 

21 JOHN A. HOUSTON
22 United States District Judge

23
24
25
26
27
28