UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL P. KOBY, an individual; MICHAEL SIMMONS, an individual; JONATHAN W. SUPLER, an individual; on behalf of themselves and all others similarly situated, Plaintiffs/Respondents, vs. ARS NATIONAL SERVICES, INC., a California Corporation; and JOHN AND JANE DOES 1 through 25 inclusive, Defendant/Petitioner.	CASE NO. _____ (Southern District of California Case No.: 09 CV 0780 JAH JMA)

DEFENDANT ARS NATIONAL SERVICES, INC.'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for petitioner ARS National Services, Inc., a California Corporation, state that no parent corporation or publicly held corporation owns 10 percent or more of its stock.

DATED: August 9, 2010

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Defendant and Petitioner ARS National Services, Inc. ("ARS") petitions this Court, pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure, for permission to appeal the district court's amended order dated July 27, 2010.[1] An immediate appeal is warranted because the amended order involves controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal will materially advance the ultimate termination of the litigation.

I. INTRODUCTION

This case is about voice mail messages. The subject matter might seem inconsequential, but it is far from it. In fact, this case presents critical legal issues of first impression in this circuit – questions that, if answered by the Court, will undoubtedly shape the way that thousands of collectors attempt to contact millions of consumers each year. In addition, because this case involves a district court's interpretation of a federal statute in a manner that raises very serious constitutional issues, it should be addressed by this Court without further delay.

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[1] The district court's amended order, dated July 27, 2010, incorporated that court's earlier order, dated March 29, 2010, Granting In Part and Denying In Part Defendant's Motion For Judgment On The Pleadings, and certified this matter for immediate appeal. Copies of the complaint filed below, the March 29, 2010 Order (reported at *Koby v. ARS Nat'l Servs., Inc.*, 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010), and the July 27, 2010 Order, are attached to this petition as Exhibit A, Exhibit B, and Exhibit C, respectively.

Debt collectors must make contact with consumers in order to arrange for payment on outstanding debts. A principal way collectors seek to reach consumers is by telephone. When a collector places a call to a consumer and reaches an answering machine, however, what voice mail message, if any, should the collector leave? Should the collector state only her name and a phone number that can be used to return the call, without reciting any information regarding the debt? Must she also affirmatively state she is a "debt collector" in the message? Can she safely make this statement, however, without the risk of disclosing the unpaid debt to third parties who might overhear the message? Can she simply hang up without leaving any message at all?

The principal federal statute that governs debt collectors – the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. (the "FDCPA") – does not provide ready answers to these questions. Congress passed the Act in 1977, and (not surprisingly) it never mentions voice mail messages. Thus, district courts within this circuit and across the country have issued a series of conflicting rulings, leaving collectors struggling to find a way to reach consumers by phone without being sued. This is an issue of critical importance – for consumers, collectors, and for the financial industry as a whole. Guidance from this Court on these fundamental issues is sorely needed at this time.

Fortunately, these controlling issues of law are squarely presented by this petition. The complaint alleges that ARS employees left voice mail messages for Plaintiffs that allegedly failed to disclose that ARS was attempting to collect a debt, and allegedly failed to meaningfully disclose the callers' identity.

In a motion for judgment on the pleadings, ARS noted that the messages are not "communications" under the plain language of the FDCPA. They did not disclose any information "regarding a debt," such as the amount due, the name of the creditor or the applicable interest rate. In fact, by omitting this information, ARS respected the consumer's right to privacy, honoring a concern that goes to the very core of the FDCPA. The messages also did meaningfully disclose the "caller's identity," because each message stated the name of the caller and provided the consumer with a toll-free number to return the call.

The district court held that the messages left for Plaintiffs Koby and Supler stated a viable claim under section 1692e(11) of the FDCPA, because they were "communications" as defined by section 1692a(2) of the Act.[2] The message left for Plaintiff Simmons, however, – "which merely included the caller's name and asked for a return call" – was deemed not a "communication."[3] The district court

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[2] *See* Exhibit B (*Koby*, 2010 WL 1438763 at *3.)

[3] *Id.* at *4.

held that all three messages stated a viable claim under section 1692d(6) of the FDCPA for failure to provide meaningful disclosure of the caller's identity.[4]

There are at least three substantial grounds for difference of opinion regarding the order of the district court that warrant an immediate appeal.

First, the law is unclear regarding the section 1692e(11) claim, as no circuit court has directly addressed the issues raised, and district courts have reached conflicting results. The district court in this case, and another district court from Oklahoma, both held that a message like the one left for Plaintiff Simmons is not a "communication" under the FDCPA.[5] Other district courts have differed.

Second, the law is uncertain because no circuit court has addressed the "meaningful disclosure" requirements of section 1692d(6) in the context of voice mail messages. The district court opined that a collector can avoid liability under 1692d(6) by not leaving any voice mail message at all, but this directly conflicts with a ruling issued by the Northern District of California, which effectively held that a collector must leave a voice mail message in order to avoid liability.[6] The

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[4] *Id.* at *5.

[5] *Id.* at *4; *see also Biggs v. Credit Collections, Inc*., 2007 WL 4034997, *4 (W.D. Okla. Nov. 15, 2007).

[6] *Id.* at *5-6; *but see Langdon v. Credit Management, LP*, 2010 U.S. Dist. LEXIS 16138 (N.D. Cal. Feb. 24, 2010)

logic of the district court is also internally inconsistent. It found that ARS did not "communicate" with Simmons when ruling on the section 1692e(11) claim. Although there was no "communication" with Simmons, ARS was still required to state that it was a "debt collector" attempting to collect a debt in order to comply with section 1692d(6).

Finally, there are serious constitutional issues raised by the district court's interpretation of the FDCPA, because the voice mail messages are a valid form of commercial speech. If a collector must leave a message every time it calls – as at least one court has held – and if every message must state that it is from a "debt collector" – as the district court found here – then every message presents a risk of third-party disclosure. This interpretation of the Act would expose collectors to strict liability every time they place a call, deterring calls to consumers, and silencing an entire channel of commercial speech. The Supreme Court has repeatedly employed the canon of "constitutional avoidance" to prevent courts from interpreting statutes in a way that raises such serious constitutional issues.

Resolution of the controlling questions of law raised by this petition will materially advance the outcome of the litigation. If the Court concludes that the messages are not "communications" under the FDCPA, this would eliminate all claims under section 1692e(11). A ruling that the messages meaningfully

disclosed the "caller's identity" would negate all claims under section 1692d(6). There is an opportunity to terminate the entire litigation if this Court agrees with ARS, relieving the parties and the district court of the significant burdens of class-action litigation and a trial.

Any ruling from this Court – for or against ARS – would provide critical guidance for collectors who wish to leave voice mail messages for consumers in this circuit. ARS respectfully submits that the petition should be granted.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs filed their complaint on April 15, 2009, alleging that ARS employees left the following messages on Plaintiffs' voice mail machines:

> This is Robin calling for Michael Koby, if you could return my call at 800-440-6613; my direct extension is 3171. Please refer to your Reference Number as 15983225. [Received October 14, 2008].
>
> ***
>
> Hey John, uh, it's Mike Mazzouli with ARS National. Umm, there appears to be some documents here in my office, uh, John at this point your [sic] 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].
>
> ***
>
> This is Brian Cooper. This call is for Mike Simmons, I need you to return this call as soon as you get this message 877-333-3880, extension 2571. [Received on April 9, 2009].

Exhibit A ¶¶ 34-36, 39.

ARS moved for judgment on the pleadings. It argued no "communication"

had occurred under section 1692a(2) of the FDCPA, because the messages did not convey "information regarding a debt," and therefore 1692e(11) was not violated. ARS also argued the messages satisfied section 1692d(6) because they included the name of the caller and an 800-number that could be used to return the calls, thereby meaningfully disclosing the "caller's identity."

The Court granted in part and denied in part the motion. *See* Exhibit B. The parties filed a joint motion requesting the district court amend its order and certify it for immediate appeal under 28 U.S.C. § 1292(b). On July 27, 2010, the district court granted the parties' joint motion. *See* Exhibit C.

III. STATEMENT OF ISSUES PRESENTED

Pursuant to its order dated July 27, 2010, the district court certified the following two questions for immediate appeal to this Court:

1. Do each of the voice mail messages as alleged in the complaint in this action constitute a 'communication' within the meaning of section 1692a(2) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*., (the "FDCPA"); and,

2. Do the voice mail messages as alleged in the complaint violate section 1692e(11) and/or section 1692d(6) of the FDCPA?

IV. LEGAL STANDARD

Although a non-final order, such as the district court's order, is generally not immediately appealable, this Court may permit an interlocutory appeal where the requirements of 28 U.S.C. § 1292(b) have been satisfied. Thus, section 1292(b) requires this Court to undertake a two-step analysis:

> First, we must determine whether the district court has properly found that the certification requirements of the statute have been met. These certification requirements are (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. If we conclude that the requirements have been met, we may, but need not, exercise jurisdiction. The second step in our analysis is therefore to decide whether, in the exercise of the discretion granted us by the statute, we want to accept jurisdiction.

In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982).

A question of law is "controlling" if its resolution through "an interlocutory appeal would avoid protracted and expensive litigation." *Id.* (citations omitted). It is not necessary that a reversal of the district court's order must terminate the entire litigation. *Id*. "Rather, all that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *Id*.

To determine if there is "substantial grounds for difference of opinion" the Court "**must examine to what extent the controlling law is unclear**. Courts

traditionally will find that a substantial ground for difference of opinion exists where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Couch v. Telescope, Inc.*, _ F.3d _, 2010 WL 2681306, *3 (9th Cir. July 8, 2010) (emphasis supplied, citation omitted).

V. THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION ABOUT WHETHER THE MESSAGES ARE "COMMUNICATIONS" SUBJECT TO THE FDCPA AND WHETHER THEY MEANINGFULLY DISCLOSE THE "CALLER'S IDENTITY"

A. The Messages Are Consistent With Consumer Privacy Concerns That Are At The Heart Of The FDCPA

Nothing in the plain language of the FDCPA refers to voice mail messages, nor is there any indication that Congress intended to restrict the use of polite messages that simply request a return phone call. The messages allegedly left by ARS are entirely consistent with the purposes of the FDCPA, which was passed to protect consumers's privacy and to protect them against serious threats, harassment, abuse and other deceptive practices. *See* 15 U.S.C. § 1692; *Pressley v. Capital Credit and Collection*, 760 F.2d 922, 925 (9th Cir. 1985) (Act passed "to protect consumers from a host of unfair, harassing, and deceptive debt

collection practices without imposing unnecessary restrictions on ethical debt collectors") (citation omitted). As this Court recently observed,

> The purpose of the FDCPA is to protect vulnerable and unsophisticated 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 consumer's legal rights.' (Citation). **In other words, Congress seems to have contemplated the type of actions that would intimidate unsophisticated individuals and which, in the words of the Seventh Circuit, 'would likely disrupt a debtor's life.'** (Citation).

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

Congress took great pains to design a regulatory scheme that would do more to protect the consumer's privacy during the collection process. *See* 15 U.S.C. § 1692(a) ("Abusive debt collection practices contribute to . . . invasions of individual privacy."). With very limited exceptions, collectors are prohibited from disclosing the existence of a debt to any third parties. *See id*. § 1692c(b). While collectors may contact third parties for limited location information, collectors must carefully avoid disclosing the existence of the debt during that process. *See id*. § 1692b. Collectors may not publish lists of consumers with unpaid debts, may not communicate about a debt by post card, nor use language on an envelope referencing a debt. *See id*. §§ 1692d(3), 1692f(7), 1692f(8).

The district court's ruling – that the messages should have expressly revealed they were from a "debt collector" – would undermine Plaintiffs' privacy, contrary to the very purpose of the FDCPA, and would expose ARS to liability for third party disclosure.[7]

ARS's alleged messages comply with the plain language and the purpose of the FDCPA. The contain no harassing, abusive or deceptive language. They simply identify the name of the caller, and provide an 800-number to return the call. To safeguard the Plaintiffs' privacy, the messages do not reveal that they are from a debt collector. They do not violate the FDCPA.

B. The Messages Contain No Information "Regarding A Debt" And Therefore Are Not "Communications" Under The FDCPA

The district court held that the messages left for Koby and Supler violated section 1692e(11)[8] because they did not explicitly state they are from a "debt

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[7] For example, in *Berg v. Merchants. Ass'n Collection Div*., 586 F. Supp. 2d 1336 (S.D. Fla. 2008), the defendant left a message – like the one proposed by the district court here – stating it was "an attempt to collect a debt." *Id*. at 1339. The debtor sued under section 1692c(b), alleging the message was overheard by his family, his girlfriend and a neighbor. *See id.* The court refused to grant the collector's motion to dismiss. *Id.* at 1441-44.

[8] Section 1692e prohibits the use of any "false, deceptive, or misleading representation or means in connection with the collection of any debt" and provides a non-exhaustive list of such practices. *See* 15 U.S.C. § 1692e. Section 1692e(11), relied upon by the district court, prohibits: "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

collector" seeking to collect a debt. This appeal should be permitted, however, because there are substantial grounds for difference of opinion about whether the messages are "communications" subject to the requirements of section 1692e(11).

To qualify as a "communication" a voice mail message must convey "information regarding a debt" to the listener. *See* 15 U.S.C. § 1692a(2) ("The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium."). Contrary to the district court's ruling, however, the messages for Koby and Supler did not convey any "information regarding the debt." They did not state the amount owed, the name of the creditor, the interest rate or any other information regarding the debt.

When considering the message allegedly left for Simmons, however, the district court ruled it was not a "communication" because it "merely included the caller's name and asked for return call." *See* Exhibit B (*Koby*, 2010 WL 1438763, at **3-4). This portion of the district court's ruling was consistent with the plain language of the FDCPA and with *Biggs v. Credit Collections, Inc.*, 2007 WL 4034997, *4 (W.D. Okla. Nov. 15, 2007), which also denied a section 1692e(11)

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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).

claim where a voice mail messages did not convey information regarding a debt.

There is no material difference between the message left for Simmons and the messages allegedly left for Koby and Supler. At most, these messages invite the Plaintiffs to contact ARS. If a consumer returns the call, then the parties can have an actual conversation – a "communication" – concerning the specifics of the debt. At that point, section 1692e(11) would apply, but not sooner.

ARS acknowledges there is a difference of opinion on this point, and that other district courts have reached a contrary result.[9] This Court should grant this petition to allow the appeal to proceed to resolve this important issue.

C. The Messages Do Meaningfully Disclose The "Caller's Identity" Consistent With Section 1692d(6)

In addition, a substantial ground for difference of opinion exists regarding the ruling on the section 1692d(6) claim. This provision falls under the section of the FDCPA that prohibits a collector from engaging in any conduct designed to

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[9] *See, e.g., Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008) (voice mail messages which did not convey specific information about a debt held to be "communications" under the FDCPA), *aff'd on other grounds*, 584 F. 3d 1350 (11th Cir 2009) (liability ruling not appealed; "bona fide error" defense rejected); *Costa v. Nat'l Action Fin. Servs*., 2007 WL 4526510, *5 (E.D. Cal. Dec. 19, 2007) (same); *Foti v. NCO Fin. Sys., Inc*., 424 F. Supp. 2d 643, 655-57 (S.D.N.Y. 2006) (same); *Hosseinzadeh v. M.R.S. Assocs., Inc*., 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005) (same).

"harass, oppress, or abuse" any person while collecting a debt.[10] But the Act does not define the term "meaningful disclosure of the caller's identity."

The district court found the alleged messages stated a claim under section 1692d(6), because they did not meaningfully disclose the "**nature of the call**" or the "**purpose of the call**" – *i.e.*, that it was seeking to collect a debt. *See* Exhibit B (*Koby*, 2010 WL 1438763 at *5) (emphasis supplied). This completely ignores the plain language of the Act, however, which requires disclosure of the "caller's identity" and not disclosure of the "nature of the call." *See* 15 U.S.C. § 1692d(6).

Here, the alleged messages did meaningfully disclose the "caller's identity" by providing the name of the caller, and a dedicated toll-free number for the consumer to use to return the call. *See* Exhibit A, ¶ 39. Nothing stated in any message would "harass, oppress or abuse" the listener.

The district court reasoned that "nothing in the FDCPA or the Constitution entitles or guarantees a debt collector the right to leave a message on a debtor's voice mail," and that ARS did not have the right to leave voice mail messages just because it concluded this was the "most efficient" way of reaching consumers.

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

See Exhibit B (*Koby*, 2010 WL 1438763, at *5-6). But a decision issued earlier this year by district court in this circuit directly conflicts with this reasoning.

In *Langdon v. Credit Management, LP*, 2010 U.S. Dist. LEXIS 16138 (N.D. Cal. Feb. 24, 2010), the court held that a consumer had alleged a viable claim under sections 1692d(6) and 1692e(11) because the collector called and hung up **without** leaving any message on the plaintiff's voice mail. *See id*. at *6 ("If, as plaintiff alleges, defendant calls plaintiff and hangs up the phone, common sense dictates that defendant has not provided meaningful disclosure under FDCPA section 1692d(6). . . ."). Thus, contrary to the reasoning of the district court in the present case, the *Langdon* ruling effectively holds that debt collectors must leave voice mail messages whenever they place a call.

There are serious constitutional issues raised when decisions of the district courts in this circuit are telling collectors, on the one hand, they must leave messages or they violate the FDCPA (*Langdon*), and, on the other hand, that they can avoid liability by placing telephone calls without leaving a message (*Koby*). Reading these cases together, a collector's only option to avoid liability is to not place any telephone calls at all.

Finally, ARS submits that substantial grounds for difference of opinion exists because the district court's ruling is internally inconsistent. On the one

hand, the district court ruled the message from ARS for Simmons was not a "communication" in connection with attempting to collect a debt. Even though it was not a "communication," however, the district court also ruled under section 1692d(6) that the message had to explicitly state it was from a "debt collector" and that its purpose was to collect a debt. Why must a message that is not a communication to collect a debt state that it is one? This internal inconsistency shows there is substantial ground for difference of opinion as to what a debt collector must disclose to satisfy the requirements of section 1692d(6).[11]

D. An Immediate Appeal Is Appropriate Because The Ruling Of The District Court Raises Serious Constitutional Issues Regarding Suppression Of Commercial Speech That Should Be Addressed

The voice mail messages at issue here constitute commercial speech and are entitled to protection under the First Amendment. The district court's interpretation of the FDCPA would convert every voice mail message into a potential violation of the Act, exposing all collectors who leave messages to strict

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[11] ARS acknowledges that some district courts have held that a voice mail message does not "meaningfully disclose" the caller's identity unless the message explicitly states that it is from a debt collector. *See, e.g., Baker v. Allstate Fin. Servs., Inc*., 554 F. Supp. 2d 945, 949-50 (D. Minn. 2008) (voice mail message that did not identify 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). None of the decisions are persuasive, however, given the plain language of section 1692d(6), which requires only that the "caller's identity" be meaningfully disclosed.

liability. This is particularly true when the decision is read in conjunction with a case like *Langdon*, which essentially requires a collector to leave a message every time it attempts to contact a consumer by phone. The district court's interpretation of the FDCPA has the potential to suppress an entire channel of speech. As such, it raises serious constitutional issues, and must be rejected. *See, e.g., Debartolo v. Florida Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

1. The Voice Mail Messages Are Commercial Speech

The messages were left in an attempt to collect debts on behalf of creditors, and thus fall squarely within the definition of commercial speech, which is any "expression related solely to the economic interests of the speaker and its audience." *Central Hudson v. Public Serv. Comm. Of New York*, 447 U.S. 557, 562 (1980). The voice mail messages are indisputably a form of expression that relates to the parties' economic interests.

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

The FDCPA, like all federal statutes, must not be interpreted in a manner that raises serious constitutional issues. A "cardinal principle" of statutory construction is that "where 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." *Debartolo*, 485 U.S. at 575 (*citing N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)). This rule – described as 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." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).[12]

The district court should not interpret the FDCPA in a manner that effectively bans truthful, non-threatening voice mail messages, in the absence of any "clear expression of an affirmative intention of Congress" to do so. *See Catholic Bishop*, 440 U.S. at 504. Nothing in the plain language of the FDCPA, or its legislative history, suggests that Congress intended to prevent collectors from leaving polite messages like those at issue here.

While reasonable grounds for differing exist, ARS submits the most reasonable interpretation of the statute – and the one that avoids the serious

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[12] *See also Solid Waste Agency of No. Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159, 172-74 (2001) (rejecting interpretation of Clean Water Act that would raise "serious constitutional issues" relating to the reach of the Commerce Clause); *Jones v. United States*, 590 U.S. 848, 857-58 (2000) (rejecting interpretation of federal arson statute that 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)").

constitutional questions raised by chilling valid commercial speech – is that the voice mail messages challenged here do not violate sections 1692d(6) or 1692e(11) of the FDCPA.

VI. AN IMMEDIATE APPEAL OF THE ORDER WILL MATERIALLY ADVANCE THE LITIGATION

Allowing an immediate appeal at this time would materially advance the termination of this action. The appeal would present discrete legal questions that, if decided by this Court, would resolve whether ARS violated the FDCPA. The district court has set a discovery cut-off date, but no date has been set for the trial of this action, nor has any deadline been set for the filing a motion for class certification. If this Court resolves the controlling legal issues presented by the petition in favor of ARS now, this would spare the district court and the parties of the burden of proceeding with potentially expensive and time-consuming litigation, including class-related discovery, class certification briefing, providing class notice and possibly trial. A reversal of the district court ruling as requested by ARS would result in dismissal of Plaintiffs' claims, thereby avoiding all these burdens and expenditures. *See, e.g., Steering Committee v. United States*, 6 F.3d 572, 575 & n.1 (9th Cir. 1993) (district court determinations of liability particularly appropriate for interlocutory review where reversal would obviate

need for trial on damage issues).

Appellate guidance from this Court would not only assist in resolving the legal questions but also, if a class is certified, would assist in resolving potential issues of typicality and commonality with respect to each of the Plaintiffs' claims. Finally, a ruling from this Court, whether for or against ARS, would greatly assist the parties in connection with the potential settlement of this action.

VII. CONCLUSION

For each of the foregoing reasons, ARS respectfully request that the Court grant this petition and permit ARS to take an immediate appeal of the district court's order pursuant to 28 U.S.C. § 1292(b).

DATED: August 9, 2010

Respectfully submitted,

SIMMONDS & NARITA LLP
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By: _____
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PROOF OF SERVICE

I, the undersigned, declare:

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 readily familiar with the business practices of my employer, Simmonds & Narita LLP, for the collection and processing of correspondence by mailing with the United States Postal Service and that said correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

On this date, I served a copy of **DEFENDANT ARS NATIONAL SERVICES, INC.'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)** by causing such document to be placed in a sealed envelope for collection and delivery by the United States Postal Service to the addressees indicated below:

VIA U.S. MAIL

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on this 9th day of August, 2010.

Stephanie Schmitt

Exhibit A

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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,

Defendants.

CASE NO. '09 CV 0780 JAH JMA

CLASS ACTION

COMPLAINT FOR VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT

Plaintiffs, MICHAEL P. KOBY ("KOBY") and JONATHAN W. SUPLER ("SUPLER"), on behalf of themselves and all others similarly situated, by way of Complaint against the Defendants, say:

I. PARTIES

1. KOBY is a natural person.

2. At all times relevant to this complaint, KOBY is a citizen of Texas and resided in the City of Katy, Harris County, Texas.

CT

3. SIMMONS is a natural person.

4. At all times relevant to this complaint, SIMMONS is a citizen of Washington and resided in the City of Monroe, Snohomish County, Washington.

5. SUPLER is a natural person.

6. At all times relevant to this complaint, SUPLER is a citizen of North Carolina and resided in the City of Raleigh, Wake County, North Carolina.

7. At all times relevant to this complaint, ARS NATIONAL SERVICES, INC. ("ARS") is a for-profit corporation existing pursuant to the laws of the State of California. ARS maintains its principal business address at 960 South Andreasen Drive, Suite B, City of Escondido, San Diego County, California.

8. Defendants, JOHN AND JANE DOES 1 through 25 inclusive, are sued under fictitious names as their true names and capacities are yet unknown to Plaintiffs. Plaintiffs will amend this complaint by inserting the true names and capacities of these DOE defendants once they are ascertained.

II. JURISDICTION & VENUE

9. With respect to Plaintiffs' claims under the FDCPA, jurisdiction of this Court arises under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.

10. Declaratory relief is available pursuant to under 28 U.S.C. §§ 2201, 2202.

11. Venue is appropriate in this federal district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred within this federal judicial district, and because all the Defendants reside in the State of California within the meaning of 28 U.S.C. § 1391(b) and (c).

III. PRELIMINARY STATEMENT

12. Plaintiffs, on their own behalf and on behalf of the class they seek to represent, and demanding a trial by jury, bring this action for the illegal practices of the Defendants who used false, deceptive and misleading practices, and other illegal practices, in connection with their attempts to collect alleged debts from the Plaintiffs and others. The Plaintiffs allege that the Defendants' collection practices violate the Fair Debt Collection Practices Act, 15 U.S.C. §§

1692 *et seq.* ("FDCPA").

13. Such practices include, *inter alia*:

(a) Leaving telephonic voice messages for consumers, which fail to provide meaningful disclosure of Defendants' identity;

(b) Leaving telephonic voice messages for consumers, which fail to disclose that the call is from a debt collector; and

(c) Leaving telephonic voice messages for consumers, which fail to disclose the purpose or nature of the communication (i.e. an attempt to collect a debt).

14. The FDCPA regulates the behavior of collection agencies attempting to collect a debt on behalf of another. The United States Congress has found abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors, and has determined that abusive debt collection practices contribute to a number of personal bankruptcies, marital instability, loss of jobs, and invasions of individual privacy. Congress enacted the FDCPA to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote uniform State action to protect consumers against debt collection abuses. 15 U.S.C. § 1692(a) - (e).

15. The FDCPA is a strict liability statute, which provides for actual or statutory damages upon the showing of one violation. The Ninth Circuit has held that whether a debt collector's conduct violates the FDCPA should be judged from the standpoint of the "least sophisticated debtor." *Baker v. G.C. Services Corp.*, 677 F.2d 775, 778 (9th Cir. 1982).

16. To prohibit harassment and abuses by debt collectors the FDCPA, at 15 U.S.C. § 1692d, provides that 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 and names a non-exhaustive list of certain *per se* violations of harassing and abusive collection conduct. 15 U.S.C. § 1692d(1)-(6). Among the *per se* violations is the placement of telephone calls without meaningful disclosure of the caller's identity, 15 U.S.C. § 1692d(6).

17. To prohibit deceptive practices, the FDCPA, at 15 U.S.C. § 1692e, outlaws the use of false, deceptive, and misleading collection letters and names a non-exhaustive list of certain *per se* violations of false and deceptive collection conduct. 15 U.S.C. § 1692e(1)-(16). Among these *per se* violations are: the failure by debt collectors to disclose in initial oral communications 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 oral communications with consumers that the communication is from a debt collector, 15 U.S.C. § 1692e(11).

18. The Plaintiffs, on behalf of themselves and all others similarly situated, seek statutory damages, attorney fees, costs, and all other relief, equitable or legal in nature, as deemed appropriate by this Court, pursuant to the FDCPA and all other common law or statutory regimes. The Plaintiffs, on behalf of themselves and all others similarly situated, request that they and the class members be awarded statutory, common law, or actual damages payable by the Defendants.

IV. FACTS REGARDING KOBY

19. KOBY is informed and believes, and on that basis alleges, that sometime prior to September 2008 he allegedly incurred a financial obligation arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes and defaulted on that obligation ("Koby Obligation").

20. The alleged Koby Obligation is a "debt" as defined by 15 U.S.C. §1692a(5).

21. KOBY is, at all times relevant to this complaint, a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

22. KOBY is informed and believes, and on that basis alleges, that sometime prior to September 2008, the creditor of the Koby Obligation either directly or through intermediate transactions assigned, placed, transferred, or sold the debt to ARS for collection.

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V. FACTS REGARDING SIMMONS

23. SIMMONS is informed and believes, and on that basis alleges, that sometime prior to April 2009 he allegedly incurred a financial obligation arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes and defaulted on that obligation ("Simmons Obligation").

24. The alleged Simmons Obligation is a "debt" as defined by 15 U.S.C. §1692a(5).

25. SIMMONS is, at all times relevant to this complaint, a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

26. SIMMONS is informed and believes, and on that basis alleges, that sometime prior to April 2009, the creditor of the Simmons Obligation either directly or through intermediate transactions assigned, placed, transferred, or sold the debt to ARS for collection.

27. To date, SIMMONS has not received any written communications from ARS.

VI. FACTS REGARDING SUPLER

28. SUPLER is informed and believes, and on that basis alleges, that sometime prior to December 2008 he allegedly incurred a financial obligation arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes and defaulted on that obligation ("Supler Obligation").

29. The alleged Supler Obligation is a "debt" as defined by 15 U.S.C. §1692a(5).

30. SUPLER is, at all times relevant to this complaint, a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

31. SUPLER is informed and believes, and on that basis alleges, that sometime prior to December 2008, the creditor of the Supler Obligation either directly or through intermediate transactions assigned, placed, transferred, or sold the debt to ARS for collection.

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VII. FACTS COMMON TO ALL PLAINTIFFS

32. ARS collects, and attempts to collect, debts incurred, or alleged to have been incurred, for personal, family, or household purposes on behalf of creditors using interstate commerce or the mails.

33. ARS is a "debt collector" as defined by 15 U.S.C. § 1692a(6).

34. Within the one year immediately preceding the filing of this complaint, ARS contacted each of the Plaintiffs via telephone in an attempt to collect their respective alleged debts.

35. Within the one year immediately preceding the filing of this complaint, each of the Plaintiffs received from ARS at least one telephonic voice message on their home answering machines and/or cellular telephones ("Messages").

36. Each of the Messages was left, or caused to be left, by persons employed by ARS in connection with their attempt to collect a "debt" as defined by 15 U.S.C. §1692a(5).

37. Each of the Messages uniformly failed to:

(a) Provide meaningful disclosure of ARS's identity as the caller;

(b) Disclose that the communication was from a debt collector; and

(c) Disclose the purpose or nature of the communication (i.e., an attempt to collect a debt).

38. Each of the Messages is a "communication" as defined by 15 U.S.C. § 1692a(2).

39. An example of three such Messages are transcribed as follows:

> This is Robin calling for Michael Koby, if you could return my call at 800-440-6613; my direct extension is 3171. Please refer to your Reference Number as 15983225. [Received October 14, 2008].
>
> ***
>
> Hey John, uh, it's Mike Mazzouli with ARS National. Umm, there appears to be some documents here in my office, uh, John at this point your 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].
>
> ***

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

40. Each of the Messages is false, deceptive, and misleading in that the natural consequence of these communications is to harass, oppress, or abuse the least sophisticated consumer and other persons in violation of the FDCPA.

41. Each of the Messages is false, deceptive, and misleading insofar as ARS failed to give meaningful disclosure of its identity, disclose the purpose of its call, or disclose that ARS is a debt collector, thereby circumventing Congress's intent to permit the Plaintiffs to make an informed decision as to whether they wished to speak with a debt collector.

42. The Plaintiffs are informed and believe, and on that basis allege, that Defendants, JOHN AND JANE DOES 1 through 25 inclusive, are natural persons and/or business entities all of whom reside or are located within the United States who personally created, instituted and, with knowledge that such practices were contrary to law, acted consistent with and oversaw policies and procedures used by the employees of ARS that are the subject of this complaint. Those Defendants personally control the illegal acts, policies, and practices utilized by ARS and, therefore, are personally liable for all of the wrongdoing alleged in this Complaint.

VIII. POLICIES AND PRACTICES COMPLAINED OF

43. It is the Defendants' policy and practice to leave telephonic voice messages for consumers and other persons, such as the Messages, that uniformly fail to:

(a) Provide meaningful disclosure of ARS's identity as the caller;

(b) Disclose that the communication is from a debt collector; and

(c) Disclose the purpose or nature of the communication.

44. On information and belief, the Messages, as alleged in this complaint under the Facts Common to All Plaintiffs, number at least in the thousands, all of which uniformly fail to:

(a) Provide meaningful disclosure of ARS's identity as the caller;

(b) Disclose that the communication is from a debt collector; and

(c) Disclose the purpose or nature of the communication.

IX. CLASS ALLEGATIONS

45. This action is brought as a class action. Plaintiffs bring this action on behalf of themselves and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure.

46. The Plaintiff Class consists of all persons with addresses in the United States of America who received a telephonic voice message from ARS left after one-year immediately preceding the commencement of this civil action up through and including the date of preliminary class certification, which message failed to meaningfully identify ARS as the caller, disclose that the communication was from a debt collector, or state the purpose or nature of the communication.

47. The identities of all class members are readily ascertainable from the records of ARS and those companies and governmental entities on whose behalf ARS attempts to collects debts.

48. Excluded from the Plaintiff Class are the Defendants and all officers, members, partners, managers, directors, and employees of ARS, Defendants, and their respective immediate families, and legal counsel for all parties to this action and all members of their immediate families.

49. The class period is one year prior to the filing of the initial complaint in this action for all claims under the FDCPA and continues up to and including the date of preliminary class certification.

50. There are questions of law and fact common to the Plaintiff Class, which common issues predominate over any issues involving only individual class members. Those principal issues are: whether the Defendants' telephonic voice messages, such as the Messages, violate 15 U.S.C. §§ 1692d(6) and 1692e(11).

51. The Plaintiffs' claims are typical of the class members, as all are based upon the same facts and legal theories.

52. The Plaintiffs will fairly and adequately protect the interests of the Plaintiff Class defined in this Complaint. The Plaintiffs have retained counsel with experience in handling

consumer lawsuits, complex legal issues, and class actions, and neither the Plaintiffs nor their attorneys have any interests, which might cause them not to vigorously pursue this action.

53. This action has been brought, and may properly be maintained, as a class action pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure because there is a well-defined community interest in the litigation:

(a) **Numerosity:** The Plaintiffs are informed and believe, and on that basis allege, that the Plaintiff Class defined above is so numerous that joinder of all members would be impractical.

(b) **Common Questions Predominate:** Common questions of law and fact exist as to all members of the Plaintiff Class and those questions predominate over any questions or issues involving only individual class members. The principal issues are: whether the Defendants' telephonic voice messages, such as the Messages, violate 15 U.S.C. §§ 1692d(6) and 1692e(11).

(c) **Typicality:** The Plaintiffs' claims are typical of the claims of the class members. The Plaintiffs and all members of the Plaintiff Class have claims arising out of the Defendants' common uniform course of conduct complained of herein.

(d) **Adequacy:** The Plaintiffs will fairly and adequately protect the interests of the class members insofar as Plaintiffs have no interests that are adverse to the absent class members. The Plaintiffs are committed to vigorously litigating this matter. Plaintiffs have also retained counsel experienced in handling consumer lawsuits, complex legal issues, and class actions. Neither the Plaintiffs nor their counsel have any interests which might cause them not to vigorously pursue the instant class action lawsuit.

(e) **Superiority:** A class action is superior to the other available means for the fair and efficient adjudication of this controversy because individual joinder of all members would be impracticable. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum efficiently and without unnecessary duplication of effort and expense that

individual actions would engender. An important public interest will be served by addressing the matter as a class action, substantial expenses to the litigants and to the judicial system will be realized, and the potential inconsistent or contradictory adjudications will be avoided as contemplated by Rule 23(b)(1) of the Federal Rules of Civil Procedure.

54. Certification of a class under Rule 23(b)(3) of the Federal Rules of Civil Procedure is also appropriate in that:

(a) The questions of law and fact common to members of the Plaintiff Classes predominate over any questions affecting an individual member; and

(b) A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

55. Plaintiffs request certification of a hybrid class combining the elements of Rule 23(b)(2) for equitable relief and Rule 23(b)(3) for monetary damages.

X. FIRST CAUSE OF ACTION
VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT (AGAINST ALL DEFENDANTS)

56. Plaintiffs reallege and incorporate by reference the allegations in the preceding paragraphs of this Complaint.

57. Defendants violated the FDCPA. Defendants' violations with respect to the Messages include, but are not limited to, the following:

(a) Placing telephone calls without providing meaningful disclosure of ARS's identity as the caller in violation of 15 U.S.C. § 1692d(6);

(b) Placing telephone calls without disclosing the nature or purpose of the call in violation of 15 U.S.C. § 1692d(6);

(c) Failing to disclose in its initial communication with the consumer that ARS is attempting to collect a debt and that any information obtained will be used for that purpose, which constitutes a violation of 15 U.S.C. § 1692e(11); and

(d) Failing to disclose in all oral communications that ARS is a debt collector

in violation of 15 U.S.C. § 1692e(11).

XI. PRAYER FOR RELIEF

58. WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and in favor of the Plaintiff Class as follows:

A. **For the FIRST CAUSE OF ACTION:**

(1) An order certifying that the First Cause of Action may be maintained as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiffs and the undersigned counsel to represent the Plaintiff Class as previously set forth and defined above;

(2) An award of the maximum statutory damages for the Plaintiffs and the Plaintiff Class pursuant to 15 U.S.C. § 1692k(a)(B);

(3) Declaratory relief adjudicating that the Defendants' telephone messages violate the FDCPA;

(4) Attorney's fees, litigation expenses, and costs pursuant to 15 U.S.C. § 1692k(a)(B)(3); and

(5) For such other and further relief as may be just and proper.

SCHROTH & SCHROTH
Attorneys for Plaintiffs, MICHAEL P. KOBY, MICHAEL SIMMONS, JONATHAN W. SUPLER, and all others similarly situated

DATED: April 13, 2009

By: *s/ Robert E. Schroth, Jr.*
ROBERT E. SCHROTH, JR, ESQ.
(SBN 212936)

Exhibit B

Slip Copy, 2010 WL 1438763 (S.D.Cal.)
(Cite as: 2010 WL 1438763 (S.D.Cal.))

United States District Court,
S.D. California.
Michael P. **KOBY**, et. al., Plaintiffs,
v.
ARS NATIONAL SERVICES, INC., a California Corporation, et. al., Defendants.
Civil No. 09cv0780 JAH (JMA).

March 29, 2010.

Tomio B. Narita, Simmonds & Narita LLP, San Francisco, CA, for Defendant.

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

JOHN A. HOUSTON, District Judge.

INTRODUCTION

***1** 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. Plaintiffs specifically allege ARS left at least one telephonic message with each of the Plaintiffs that was false, deceptive or misleading, as follows: on October 14, 2008, Koby received a telephonic message from ARS stating "This is Robin calling for Michael Koby, if you could please return my call at 800-440-6613. My direct extension is 3171. Please refer to your Reference Number as 15983225."; on or about December 23, 2008, Supler received a telephonic message from ARS stating "Hey John, uh, it's Mike Mazzouli with ARS National. Umm, there appears to be some documents here in my office, uh, John at this point your [sic] 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."; and on April 9, 2009, Simmons received a telephonic message from ARS stating "This is

Brian Cooper. This call is for Mike Simmons, I need you to return this call as soon as you get this message 877-333-3880, extension 2571. *Id.* at ¶¶ 34, 39.

II. Procedural Background

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

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

***2** 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.

A. § 1629e(11)-Definition and Requirements of a "Communication"

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

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

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

Biggs v. Credit Collections Inc., 2007 WL 4034997 *4 (W.D.Okla. Nov.15, 2007) (ruling that a voice mail message by a debt collector was not a communication because it contained no information regarding a debt).

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

> The failure to disclose ... in [the] 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 ... [.]

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

Construing the facts in favor of the Plaintiffs, it is clear the messages left for the Plaintiffs Koby and Supler were left to encourage the Plaintiffs to call ARS. Both messages contained language asking the listener to return the call. Cplt. at ¶ 39. The intention of ARS was to contact Plaintiffs, or be contacted by Plaintiffs, in order to attempt to collect a debt and served no purpose other than encouraging the Plaintiffs to pay their debt. The purpose of the statue to prevent misleading representations in connection with collecting a debt supports a determination that the messages left by ARS are communications within 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 Supler, indirectly conveyed information involving the debts involved and therefore, fall within the definition of a "communication" under the FDCPA. Accordingly, these 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 included the caller's name and asked for a return call, does not convey, directly or even indirectly, any information regarding the debt owed. As such, the claim based upon the voicemail message left with Plaintiff Simmons would not permit

recovery under section 1692e(11) and Defendant is entitled to judgment as to this claim.

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

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

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

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

> 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 aplication of the foregoing, the following conduct is a violation of this section: ... (6) ... the placement of telephone calls without *meaningful disclosure* of the caller's identify. (Emphasis added.)

Although no circuit court, including the Ninth Circuit, has ruled on the issue of what exactly "meaningful disclosure" requires, several district courts have come to a consensus on the proper definition, which this Court finds persuasive. Two factually similar cases speak to the issue of meaningful disclosure involving phone calls placed by a debt collector that do not disclose that the caller is a debt collector. *Costa,* 634 F.Supp.2d at 1069; *Hosseinzadeh,* 387 F.Supp.2d at 1104. These district courts have held that meaningful disclosure requires that the caller 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. *Id.*

***5** In *Costa,* the Plaintiff received a voice mail message at her home. *Costa,* 634 F.Supp.2d at 1072. The message stated: "This message is for Jessica Costa. My name is Elizabeth. I received a phone call in my office for you. If you could please contact me back I'll be here until 4 p.m. Eastern Time. My number is 866-529-1899

extension 2936." *Id.* In *Hosseinzadeh,* the Plaintiff received several pre-recorded messages on her home phone. *Hosseinzadeh,* 387 F.Supp.2d at 1108. The agent of the debt collector stated: "This message is for Ashraf. Ashraf, my name is Clarence Davis. I have some very important information to discuss with you in reference to a file that has been forwarded to my office that involves you personally. Contact my office right away at 877-647-5945, extension 3618. Failure to return my call will result in a decision making process that you will not be a part of." *Id* . The courts noted the caller failed to "divulge the true nature and purpose of the call." *Costa,* 634 at 1074.

Here, the messages left on each of the Plaintiffs' respective voice mails are similar to those in *Costa* and *Hosseinzadeh* as none of the messages relay to the listener the nature of the call-to collect a debt-or the caller's identity as a "debt collector." See Cplt. at ¶ 39. Accordingly, utilizing the definition of "meaningful disclosure" adopted by the Eastern and Central districts of California, in each situation where ARS failed to disclose that the caller was a debt collector and that the purpose of the call was to collect a debt, ARS failed to meet the standards prescribed by § 1692d(6) of the FDCPA. *See accord Foti* 424 F.Supp.2d at 643 (holding collector's identification of itself by name in a pre-recorded message did not satisfy FDCPA's requirement that it disclose that the communication is from a debt collector).

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

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

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

collectors choose to ignore the requirements of § 1692d(6) in order to avoid the potential that they may incur liability under § 1692c(b), "it does not seem unfair to require that one who goes deliberately close to the line of proscribed conduct shall take the risk that he may cross the line." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965) (additional quotations omitted). Here, ARS chose to communicate with the debtor via voice mail message, in the process encumbering its ability to state in the message the meaningful disclosure required under § 1692d(6), ostensibly for fear of violating § 1692c(b).

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

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

Commercial speech is protected under the First Amendment only if it concerns lawful activity and is not misleading. *See Central Hudson Gas & Elc. Corp. v. Public Svc. Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The government may ban misleading speech without implicating the constitution. *Id.* at 563. A governmental restriction on protected commercial speech is valid if (1) it seeks to implement a substantial governmental interest, (2) directly advances the interest and (3) reaches no further than necessary to accomplish the given objective. *Id.* at 563-566.

The messages specific to this action are not entitled to constitutional protection because, as discussed above, they are misleading. Further more, the Court's finding that the voice mail messages as alleged fail to provide "meaningful disclosure" does not result in the unconstitutional suppression of commercial speech. The FDCPA directly advances the government's substantial interest in protecting consumers from deceptive and abusive conduct by debt collectors and protection against invasion of privacy. Requiring debt collectors to provide enough information on a message so as not to mislead the recipient about the purpose of the call and preventing debt collectors from disclosing information to third parties directly advances these interests. As discussed above, the restrictions are "narrowly tailored" to serve these interests in light of the fact debt collectors have "several alternative channels of communication available to them." *Berg*, 586 F.Supp .2d 1336. Accordingly, the "meaningful disclosure" requirement of the FDCPA does not raise serious constitutional questions.

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

CONCLUSION

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

S.D.Cal.,2010.
Koby v. ARS Nat. Services, Inc.
Slip Copy, 2010 WL 1438763 (S.D.Cal.)

END OF DOCUMENT

Exhibit C

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

ORDER GRANTING PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

The Court, having considered the Joint Motion filed by the parties seeking an Order amending this Court's Order dated March 29, 2010, Granting In Part and Denying In Part Defendant's Motion For Judgment On The Pleadings (Docket 19), and certifying the Order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) and Rule 5(a)(3) of the Federal Rules of Appellate Procedure, and good cause appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The joint motion is GRANTED. The Court finds that its Order (Docket 19) involves controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

2. The Order (Docket 19) is hereby amended to certify the following questions for appeal to the Ninth Circuit Court of Appeals consistent with 28 U.S.C. § 1292(b): "Do each of the voice mail messages as alleged in the complaint in this action constitute a 'communication' within the meaning of section 1692a(2) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et. seq*., (the "FDCPA"), 15 U.S.C. § 1692, *et seq.*;" and, "Do the voice mail messages as alleged in the complaint violate section 1692e(11) and/or section 1692d(6) of the FDCPA?"

DATED: July 26, 2010

JOHN A. HOUSTON
United States District Judge