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8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

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

15 Plaintiffs,

16 vs.

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

19 Defendant.
20 _____

CASE NO. 09 CV 0780 JAH JMA

ANSWER TO COMPLAINT

1 Defendant ARS NATIONAL SERVICES, INC. (“Defendant”) hereby submits
2 the following Answer to the Complaint filed in this action by plaintiffs MICHAEL P.
3 KOBY (“Koby”), MICHAEL SIMMONS (“Simmons”) and JONATHAN W.
4 SUPLER (“Supler”) (collectively, “Plaintiffs”):

5 1. Defendant admits, on information and belief, the allegations of
6 Paragraph 1 of the Complaint.

7 2. Defendant admits, on information and belief, the allegations of
8 Paragraph 2 of the Complaint.

9 3. Defendant admits, on information and belief, the allegations of
10 Paragraph 3 of the Complaint.

11 4. In answering Paragraph 4 of the Complaint, Defendant admits, on
12 information and belief, that Simmons is a citizen of Washington State. Defendant
13 denies, on information and belief, the remaining allegations of Paragraph 4 of the
14 Complaint.

15 5. Defendant admits, on information and belief, the allegations of
16 Paragraph 5 of the Complaint.

17 6. Defendant admits, on information and belief, the allegations of
18 Paragraph 6 of the Complaint.

19 7. Admitted.

20 8. Defendant avers that no response to Paragraph 8 of the Complaint is
21 required of it.

22 9. In answering Paragraph 9 of the Complaint, Defendant admits that
23 Plaintiffs allege that jurisdiction of this Court arises pursuant to 15 U.S.C. §
24 1692k(d) and 28 U.S.C. § 1331. Except as herein admitted, the remaining
25 allegations of Paragraph 9 are denied

26 10. Denied.

27 11. In answering Paragraph 11 of the Complaint, Defendant admits that
28 Plaintiffs allege that venue in this district is appropriate pursuant to 28 U.S.C. §

1 1391(b). Defendant admits that it resides in the State of California within the
2 meaning of 28 U.S.C. § 1391(b) and (c). Except as herein admitted, the remaining
3 allegations of Paragraph 11 are denied.

4 12. Denied.

5 13. Denied.

6 14. In answering Paragraph 14 of the Complaint, Defendant avers that the
7 contents of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (the
8 “FDCPA”) are self-explanatory. Except as herein admitted, the remaining
9 allegations of Paragraph 14 are denied.

10 15. In answering Paragraph 15 of the Complaint, Defendant avers that the
11 contents of the FDCPA and the case *Baker v. G.C. Services Corp.*, 677 F.2d 775,
12 778 (9th Cir. 1982) are self-explanatory. Except as herein admitted, the remaining
13 allegations of Paragraph 15 are denied.

14 16. In answering Paragraph 16 of the Complaint, Defendant avers that the
15 contents of the FDCPA are self-explanatory. Except as herein admitted, the
16 remaining allegations of Paragraph 16 are denied.

17 17. In answering Paragraph 17 of the Complaint, Defendant avers that the
18 contents of the FDCPA are self-explanatory. Except as herein admitted, the
19 remaining allegations of Paragraph 17 are denied.

20 18. Defendant denies that there is any legitimate basis to certify a class in
21 this action and denies all remaining allegations of Paragraph 18 of the Complaint.

22 19. In answering Paragraph 19 of the Complaint, Defendant admits that
23 Koby incurred a financial obligation before September 2008. Defendant lacks
24 sufficient knowledge to form a belief as to the remaining allegations of Paragraph 19
25 of the Complaint and on that basis, deny them.

26 20. In answering Paragraph 20 of the Complaint, Defendant lacks sufficient
27 knowledge to form a belief as to whether Koby’s financial obligation at issue was
28 incurred primarily for personal, family or household use, and therefore can neither

1 admit nor deny whether Koby's financial obligation qualifies as a "debt" as defined
2 by 15 U.S.C. § 1692a(3). On that basis, Defendant denies the allegations of
3 Paragraph 20 of the Complaint.

4 21. In answering Paragraph 21 of the Complaint, Defendant lacks sufficient
5 knowledge to form a belief as to whether Koby's financial obligation at issue was
6 incurred primarily for personal, family or household use, and therefore can neither
7 admit nor deny whether Koby qualifies as a "consumer" as defined by 15 U.S.C. §
8 1692a(5). On that basis, Defendant denies the allegations of Paragraph 21 of the
9 Complaint.

10 22. In answering Paragraph 22 of the Complaint, Defendant admits that,
11 Koby's financial obligation was referred to Defendant for collection. Except as
12 herein admitted, the remaining allegations of Paragraph 22 are denied.

13 23. In answering Paragraph 23 of the Complaint, Defendant admits that
14 Simmons incurred a financial obligation before April 2009. Defendant lacks
15 sufficient knowledge to form a belief as to the remaining allegations of Paragraph 23
16 of the Complaint and on that basis, deny them.

17 24. In answering Paragraph 24 of the Complaint, Defendant lacks sufficient
18 knowledge to form a belief as to whether Simmons' financial obligation at issue was
19 incurred primarily for personal, family or household use, and therefore can neither
20 admit nor deny whether Simmons' financial obligation qualifies as a "debt" as
21 defined by 15 U.S.C. § 1692a(3). On that basis, Defendant denies the allegations of
22 Paragraph 24 of the Complaint.

23 25. In answering Paragraph 25 of the Complaint, Defendant lacks sufficient
24 knowledge to form a belief as to whether Simmons' financial obligation at issue was
25 incurred primarily for personal, family or household use, and therefore can neither
26 admit nor deny whether Simmons qualifies as a "consumer" as defined by 15 U.S.C.
27 § 1692a(5). On that basis, Defendant denies the allegations of Paragraph 25 of the
28 Complaint.

1 26. In answering Paragraph 26 of the Complaint, Defendant admits that,
2 prior to April 2009, Simmons' financial obligation was referred to Defendant for
3 collection. Except as herein admitted, the remaining allegations of Paragraph 26 are
4 denied.

5 27. Defendant denies, on information and belief, the allegations of
6 Paragraph 27 of the Complaint.

7 28. In answering Paragraph 28 of the Complaint, Defendant admits that
8 Supler incurred a financial obligation before December 2008. Defendant lacks
9 sufficient knowledge to form a belief as to the remaining allegations of Paragraph 28
10 of the Complaint and on that basis, deny them.

11 29. In answering Paragraph 29 of the Complaint, Defendant lacks sufficient
12 knowledge to form a belief as to whether Supler's financial obligation at issue was
13 incurred primarily for personal, family or household use, and therefore can neither
14 admit nor deny whether Supler's financial obligation qualifies as a "debt" as defined
15 by 15 U.S.C. § 1692a(3). On that basis, Defendant denies the allegations of
16 Paragraph 29 of the Complaint.

17 30. In answering Paragraph 30 of the Complaint, Defendant lacks sufficient
18 knowledge to form a belief as to whether Supler's financial obligation at issue was
19 incurred primarily for personal, family or household use, and therefore can neither
20 admit nor deny whether Supler qualifies as a "consumer" as defined by 15 U.S.C. §
21 1692a(5). On that basis, Defendant denies the allegations of Paragraph 21 of the
22 Complaint.

23 31. In answering Paragraph 31 of the Complaint, Defendant admits that
24 Supler's financial obligation was referred to Defendant for collection. Except as
25 herein admitted, the remaining allegations of Paragraph 31 are denied.

26 32. In answering Paragraph 32 of the Complaint, Defendant admits that it
27 has, at times, collected or attempted to collect financial obligations that "have been
28 incurred, for personal, family, or household purposes on behalf of creditors using

1 interstate commerce or the mails.” Except as herein admitted, the remaining
2 allegations of Paragraph 32 are denied.

3 33. In answering Paragraph 33 of the Complaint, Defendant admits that it
4 has, at times, acted as a “debt collector” as that term is defined by the FDCPA, 15
5 U.S.C. § 1692a(6). Except as herein admitted, the remaining allegations of
6 Paragraph 33 are denied.

7 34. In answering Paragraph 34 of the Complaint, Defendant admits that it
8 placed telephone calls to Plaintiffs in an attempt to collect the financial obligations at
9 issue. Except as herein admitted, the remaining allegations of Paragraph 34 are
10 denied.

11 35. In answering Paragraph 35 of the Complaint, Defendant admits that its
12 records reflect that it left at least one message for each plaintiff at the telephone
13 numbers associated with Plaintiffs’ accounts. Except as herein admitted, the
14 remaining allegations of Paragraph 35 are denied.

15 36. In answering Paragraph 36 of the Complaint, Defendant admits that its
16 records reflect that it left least one message for each plaintiff at the telephone
17 numbers associated with Plaintiffs’ accounts. Defendant lacks sufficient knowledge
18 to form a belief as to whether Plaintiffs’ financial obligations at issue were incurred
19 primarily for personal, family or household use, and therefore can neither admit nor
20 deny whether those financial obligations qualify as “debts” as defined by the
21 FDCPA, 15 U.S.C. § 1692a(5) and on that basis, denies the allegation. Except as
22 herein admitted, the remaining allegations of Paragraph 36 are denied.

23 37. Denied.

24 38. In answering Paragraph 38 of the Complaint, Defendant lacks sufficient
25 knowledge to form a belief as to whether Plaintiffs’ financial obligations at issue
26 were incurred primarily for personal, family or household use, and therefore can
27 neither admit nor deny whether its messages left for Plaintiffs qualify as
28

1 “communications” as defined by the FDCPA, 15 U.S.C. § 1692a(2). On that basis,
2 Defendant denies the allegations of Paragraph 38 of the Complaint.

3 39. In answering Paragraph 39 of the Complaint, Defendant avers that the
4 contents of any messages left for Plaintiffs are self-explanatory. Except as herein
5 admitted, the remaining allegations of Paragraph 39 are denied.

6 40. Denied.

7 41. Denied.

8 42. Denied.

9 43. Denied.

10 44. Denied.

11 45. Defendant denies that there is any legitimate basis under Rule 23 of the
12 Federal Rules of Civil Procedure to certify a class in this case, and therefore deny the
13 allegations of Paragraph 45 of the Complaint.

14 46. Defendant denies that there is any legitimate basis under Rule 23 of the
15 Federal Rules of Civil Procedure to certify a class in this case, and therefore deny the
16 allegations of Paragraph 46 of the Complaint.

17 47. Denied.

18 48. Defendant denies that there is any legitimate basis under Rule 23 of the
19 Federal Rules of Civil Procedure to certify a class in this case, and therefore deny the
20 allegations of Paragraph 48 of the Complaint.

21 49. Defendant denies that there is any legitimate basis under Rule 23 of the
22 Federal Rules of Civil Procedure to certify a class in this case, and therefore deny the
23 allegations of Paragraph 49 of the Complaint.

24 50. Denied.

25 51. Defendant denies that there is any legitimate basis under Rule 23 of the
26 Federal Rules of Civil Procedure to certify a class in this case, and therefore deny the
27 allegations of Paragraph 51 of the Complaint.

1 52. Defendant denies that there is any legitimate basis under Rule 23 of the
2 Federal Rules of Civil Procedure to certify a class in this case, and therefore deny the
3 allegations of Paragraph 52 of the Complaint.

4 53. Denied.

5 54. Denied.

6 55. Defendant denies that there is any legitimate basis under Rule 23 of the
7 Federal Rules of Civil Procedure to certify a class in this case, and therefore deny the
8 allegations of Paragraph 55 of the Complaint.

9 56. Defendant incorporates by reference paragraphs 1 through 55 above as
10 if fully stated herein.

11 57. Denied.

12 58. Defendant denies that there is any legitimate basis under Rule 23 of the
13 Federal Rules of Civil Procedure to certify a class in this case, denies that Plaintiffs
14 are entitled to any award of statutory damages, attorney's fees, litigation expenses
15 and costs, or any other "relief" and all allegations of Paragraph 58 of the Complaint.

16
17 **AFFIRMATIVE DEFENSES**

18 As and for separate affirmative defenses to the Complaint, Defendant alleges
19 as follows:

20
21 **FIRST AFFIRMATIVE DEFENSE**

22 **(Failure to State a Claim)**

23 The allegations of the Complaint fail to state a claim against Defendant upon
24 which relief can be granted.

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26 //

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28 //

1 **SECOND AFFIRMATIVE DEFENSE**

2 **(Statute of Limitations/Laches)**

3 The purported claims set forth in the Complaint are barred in whole or in part
4 by the applicable statutes of limitation and/or the equitable doctrine of laches.

5
6 **THIRD AFFIRMATIVE DEFENSE**

7 **(Bona Fide Error)**

8 To the extent that any violation of law occurred, which Defendant expressly
9 denies, said violation was not intentional and resulted from a bona fide error
10 notwithstanding the maintenance by Defendant of procedures reasonably adapted to
11 avoid any such error.

12
13 **FOURTH AFFIRMATIVE DEFENSE**

14 **(Unclean Hands)**

15 The allegations in the Complaint and relief requested are on information and
16 belief barred in whole or in part by the doctrine of unclean hands.

17
18 **FIFTH AFFIRMATIVE DEFENSE**

19 **(No Wilful Conduct)**

20 Defendant acted in good faith at all times in its dealings with Plaintiffs, and if
21 any conduct by Defendant is found to be unlawful, which Defendant expressly
22 denies, such conduct was not willful and should not give rise to liability.

23
24 **SIXTH AFFIRMATIVE DEFENSE**

25 **(Failure to Mitigate)**

26 Plaintiffs, although under a legal obligation to do so, have failed to take
27 reasonable steps to mitigate any alleged damages that they may have and are
28 therefore barred from recovering damages, if any, from Defendant.

1 **SEVENTH AFFIRMATIVE DEFENSE**

2 **(Waiver)**

3 Plaintiffs have waived their rights, if any, to recover the relief they seek in the
4 Complaint based upon their own conduct and admissions with respect to the financial
5 obligation at issue.

6
7 **EIGHTH AFFIRMATIVE DEFENSE**

8 **(Good Faith)**

9 Defendant has, at all material times with respect to Plaintiffs, acted in good
10 faith in an effort to comply fully with all relevant federal and state laws.

11
12 **NINTH AFFIRMATIVE DEFENSE**

13 **(Apportionment)**

14 Without admitting that any damages exist, if damages were suffered by
15 Plaintiffs as alleged in the Complaint, those damages were proximately caused by
16 and contributed by persons other than Defendant. The liability, if any exists, of
17 Defendant and/or any responsible parties, named or unnamed, should be apportioned
18 according to their relative degrees of fault, and the liability of Defendant should be
19 reduced accordingly.

20
21 **TENTH AFFIRMATIVE DEFENSE**

22 **(Supervening Cause)**

23 The causes of action in the Complaint are barred, in whole or in part, to the
24 extent that any injury or loss sustained was caused by intervening or supervening
25 events over which Defendant had or has no control.

26 //

27 //

28 //

ELEVENTH AFFIRMATIVE DEFENSE

(Equitable Indemnity)

To the extent that Plaintiffs have suffered any damage as a result of any alleged act or omission of Defendant, which Defendant denies, Defendant is entitled to equitable indemnity according to comparative fault from other persons and/or entities causing or contributing to such damages, if any.

TWELFTH AFFIRMATIVE DEFENSE

(First Amendment)

Defendant’s conduct is protected under the First Amendment of the United States Constitution and the California Constitution. Plaintiffs’ proposed interpretation of provisions of the FDCPA must be rejected as it would place an unreasonable restraint upon Defendant’s First Amendment rights, thereby raising serious constitutional issues.

WHEREFORE, Defendant requests judgment as follows:

1. That Plaintiffs take nothing by the Complaint, which should be dismissed with prejudice.
2. That Defendant recover from Plaintiffs costs according to proof.
3. That Defendant recover attorneys’ fees according to proof.
4. That the Court orders such other further reasonable relief as the Court may deem just and proper.

DATED: May 8, 2009

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

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

PROOF OF SERVICE

I, Tomio B. Narita, hereby certify that:

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

On May 8, 2009, I caused the **ANSWER TO COMPLAINT** to be served upon the parties listed below via the Court's Electronic Filing System:

VIA ECF

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

I declare under penalty of perjury that the foregoing is true and correct.
Executed at San Francisco, California on this 8th day of May, 2009.

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