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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL P. KOBY, an individual; *et al.*, Plaintiffs, vs. ARS NATIONAL SERVICES, INC., *et al.*, Defendants.	CASE NO. 3:09-cv-00780 JAH (JMA) **PLAINTIFFS' RESPONSE TO DEFENDANT'S SUPPLEMENTAL AUTHORITY SUBMITTED IN SUPPORT OF DEFENDANT'S FED. R. CIV. P. 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS** HON. JOHN A. HOUSTON Dept.: Courtroom 11, Second Floor

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

I. INTRODUCTION

On February 1, 2010, Defendant ARS NATIONAL SERVICES, INC. ("ARS NATIONAL") submitted additional authority in support of its pending Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c). [Doc. 16]. On February 4, 2010, this Court granted Plaintiffs leave to file a response to Defendant's supplemental authority. [Doc. 17].

The additional authority submitted by Defendant is *Donohue v. Quick Collect, Inc.*, _ F.3d _, 2010 U.S. App. LEXIS 772, 2010 WL 103653 (9th Cir. January 13, 2010). Defendant argues that its failure to identify itself by its company name, disclose the purpose of its call, or state that the call was from a "debt collector," in its telephone messages left for Plaintiffs is not a material "misstatement that could have seriously misled a consumer." [Doc. 16, 3:12-20]. Defendant's reliance on *Donohue* is misplaced as this same argument has already been rejected.

II. ARGUMENT

The Complaint alleges that ARS NATIONAL's telephone messages violate 15 U.S.C. §§1692d(6) and 1692(e)(11). *Donohue* concerned claims under §§1692e and 1692f but not claims under §1692d. Thus, Defendant must concede that *Donohue* is not dispositive of Plaintiffs' §1692d(6) claims. Under §1692d(6), when placing a telephone call, a debt collector must make "meaningful disclosure of the caller's identity." "Courts have construed this section as requiring a debt collector disclose the caller's name, the debt collection company's name, and the nature of the debt collector's business." *Mark v. J.C. Christensen & Assocs.*, 2009 U.S. Dist. LEXIS 67724 (D. Minn. August 4, 2009) (also addressing the same First Amendment arguments raised in Defendant's motion). None of the messages here state the nature of Defendant's business and all but one do not even mention Defendant by name.

In *Donohue*, the Ninth Circuit observed that "[w]hether conduct violates §§1692e or 1692f requires an objective analysis that takes into account whether 'the least sophisticated debtor would likely be misled by a communication.'" Citation omitted. The court relied on Chief Judge Easterbrook's opinion in *Hahn v. Triumph Partnerships LLC*, 557 F.3d 755 (7th Cir.2009).

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In *Mark*, the debt collector made the same argument which Defendant makes here. Citing *Hahn*, that debt collector argued "that even if the messages could be viewed as deceptive or misleading 'in some technical sense, there was not material misrepresentation.'" *Mark* at *11. Repudiating the argument, the *Mark* court reasoned that "the statute specifically lists the failure to disclose that the communication is from a debt collector as being false, deceptive, or misleading and a violation of *§ 1692e*. It necessarily follows that because the failure to disclose is specifically listed as being a violation of the FDCPA, that such a failure to disclose is material." *Id.*

Defendant anticipates the argument that the failure to comply with §§1692d(6) and 1692e(11) is material because the omitted information impairs the consumer's ability to decide, under §1692c(c), whether to communicate with a debt collector. Defendant argues that its "voicemail messages do not impair the consumer's right to send a written cease communications request." Doc. 16, 5:9-10. The argument is foolish. It is impossible for the "least sophisticated debtor" to choose whether to return a call – and thereby engage in a dialogue with a debt collector – unless the consumer first understands who left the message and why, which is precisely the information required to be disclosed when complying with §§1692d(6) and 1692e(11). Thus, the omission of those disclosures passes *Donohue*'s materiality test because the information very much impacts the consumer's ability to make a decision about a course of action related to the attempted debt collection.

Defendant's overly broad interpretation of *Donohue* leads it to make the outlandish argument that a voice message which simply provides "a name and phone number they [consumers] can use to return the call" is legally sufficient. Doc. 16 4:26-28. If correct, Defendant will have eviscerated the mandatory disclosures under §1692e(11) which are expressly applicable to *every* written and oral communication a debt collector may have with a consumer. In not so many words, this is precisely the point made by the *Mark* court – nondisclosure is material because the FDCPA expressly requires it.

Attempting to bolster its minimalist message argument, Defendant contends that messages which omit all required disclosures promote consumer privacy. Defendant's position

seems disingenuous for it is less likely that Defendant is genuinely concerned with a consumer's privacy than it is with extracting payment for an alleged debt; Defendant can be presumed to have concluded that compliance with the FDCPA's disclosure requirements is less likely to yield return calls and, consequently, obtaining payment. Regardless, the argument continues to be rejected. In *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009), the Eleventh Circuit explained:

> Taking Niagara at its word, it was concerned that disclosing that the call was from a debt collector could result in a violation of 15 U.S.C. §1692c(b), which prohibits a debt collector from communicating with third parties about the consumer's debt. Niagara feared that leaving a message on a debtor's machine stating that it was from a debt collector calling to collect a debt might be viewed as a violation of § 1692c(b) if the message were overheard by or played in the presence of someone other than the debtor, such as a family member or roommate. We do not need to decide whether that concern is well-grounded in the law. Even if there would be a violation of §1692c(b) in those circumstances, involving fewer than all of the messages left on answering machines, Niagara's violation of §1692e(11) with every message it left cannot be said to be a bona fide error. [*Id.* at 1353 (footnote omitted).]
>
> Niagara complains that if it is not permitted to leave out of its answering machine messages the disclosure required by § 1692e(11), the result will be that it cannot leave any messages on answering machines. That assumes an answering machine message that includes the disclosure required by §1692e(11), if heard by a third party, would violate §1692c(b). We have not decided that issue, but even if Niagara's assumption is correct, the answer is that the Act does not guarantee a debt collector the right to leave answering machine messages. [*Id.* at 1354.]

In sum, Defendant's reliance on *Donohue* is misplaced. Materiality, while an appropriate concept when addressing whether an inaccurate affirmative statement is actionable, should not used to permit omission of expressly required disclosures.

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III. CONCLUSION

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

DATED: February 19, 2010

Respectfully submitted,
SCHROTH & SCHROTH
--and--
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s/ Philip D. Stern
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SOUTHERN DISTRICT OF CALIFORNIA

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

I, Philip D. Stern, declare as follows:

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

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On February 19, 2010, I served the following document(s):

1. **PLAINTIFFS' RESPONSE TO DEFENDANT'S SUPPLEMENTAL AUTHORITY SUBMITTED IN SUPPORT OF DEFENDANT'S FED. R. CIV. P. 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS**

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

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 19th day of February 2010, at Maplewood, New Jersey.

s/ Philip D. Stern
PHILIP D. STERN

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

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