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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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KRISTY SCHWARM, PATRICIA FORONDA, and JOSANN ANCELET, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

HENRY CRAIGHEAD, an individual, DISTRICT ATTORNEY TECHNICAL SERVICES, LTD., a Nevada Corporation, dba COMPUTER SUPPORT SERVICES, aka CHECK RESTITUTION/PROSECUTION PROGRAM, JOHN Q. LAWSON, an individual, MARY A. CHASE, an individual; and DOES 1 through 20, inclusive,

Defendants.

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NO. CIV. 05-01304 WBS GGH

ORDER RE: MOTION FOR SUMMARY JUDGMENT AND MOTION FOR RECONSIDERATION

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Defendant Henry Craighead founded defendant District Attorney Technical Services, Ltd. ("DATS"), to collect debts pursuant to California's Bad Check Diversion Act ("BCDA"), Cal. Penal Code §§ 1001.60-1001.67. Under the BCDA, district attorneys' offices could establish diversion programs for debtors

1 who wrote bad checks and contract with private entities, such as
2 DATS, to conduct the programs. Cal. Penal Code § 1001.60. Based
3 on DATS' collection efforts, plaintiff Kristy Schwarm initiated
4 this class action on June 29, 2005, alleging claims for 1)
5 violations of the Fair Debt Collection Practices Act ("FDCPA"),
6 15 U.S.C. §§ 1692-1692p; 2) violations of the Civil Rights Act,
7 42 U.S.C. § 1983, based on alleged procedural due process
8 violations; 3) state constitutional procedural due process
9 violations; 4) fraudulent misrepresentation; and 5) negligent
10 misrepresentation.

11 On March 4, 2006, this court certified the case as a
12 class action for "[a]ll persons who wrote checks in California to
13 whom DATS mailed collection demands concerning dishonored checks,
14 since June 29, 2003," and up until the date of the court's Class
15 Certification Order.¹ (Mar. 4, 2006 Order 20 (Docket No. 42).)
16 The court named Schwarm as the class representative and
17 subsequently granted plaintiffs' motion to add plaintiffs
18 Patricia Foronda and Josann Ancelet as class representatives.
19 (May 25, 2007 Order 5 (Docket No. 134).)

20 After DATS filed Chapter 7 bankruptcy, this action was
21 automatically stayed on August 18, 2006, pursuant to 11 U.S.C. §
22 362(a). On September 20, 2006, this court lifted the automatic
23 stay as to Craighead only and, on May 5, 2008, granted
24

25 ¹ The court also certified the following subclasses: "(1)
26 all members of the umbrella class, from whom DATS attempted to
27 collect, or collected money for checks written for personal,
28 family, or household purposes, since June 29, 2004; and (2) all
members of the umbrella class from whom [defendants] attempted to
collect, or collected money, since June 29, 2003." (Mar. 4, 2006
Order 20 (Docket No. 42).)

1 plaintiffs' motion for summary judgment with respect to
2 Craighead's violations of subsections 1692e(2)-(5), (9)-(11),
3 (14), 1692f(1), and 1692g(a) of the FDCPA. Schwarm v. Craighead,
4 552 F. Supp. 2d 1056 (E.D. Cal. 2008) ("Schwarm I"). In the same
5 order, the court denied plaintiffs' motion for summary judgment
6 on their claims based on alleged violations of their federal and
7 state procedural due process rights. Id. at 1082-87. Three
8 months later, plaintiffs sought summary judgment on the issue of
9 damages, and the court awarded plaintiffs actual damages against
10 Craighead in the amount of \$741,387.05. Schwarm v. Craighead,
11 No. 2:05-1304, 2008 WL 3286797 (E.D. Cal. Aug. 6, 2008) ("Schwarm
12 II").

13 In granting plaintiffs' motions for summary judgment,
14 the court found that Craighead was personally liable for
15 violations of the FDCPA and the resulting damages based on his
16 collection efforts on behalf of DATS. Schwarm I, 552 F. Supp. 2d
17 at 1070-74. In both cases, the court emphasized that its
18 findings would neither have a preclusive effect nor serve as the
19 law of the case as to DATS because the case against it was stayed
20 due to its pending bankruptcy. Id. at 1068 n.8; Schwarm II, 2008
21 WL 3286797, at *1.

22 In DATS' pending bankruptcy, plaintiffs filed claims in
23 excess of four million dollars and ultimately received
24 \$160,242.43 from the bankruptcy estate.² (Pls.' Req. for
25

26 ² The court takes judicial notice of the Trustee's Final
27 Report (Pls.' Req. for Judicial Notice Ex. 3) and the Final
28 Decree (id. Ex. 4) from DATS' bankruptcy case. See Reusser v.
Wachovia Bank, N.A., 525 F.3d 855, 857 n.1 (9th Cir. 2008) ("We
take judicial notice of the bankruptcy court order, because it is

1 Judicial Notice Ex. 3.) After the bankruptcy court issued a
2 Final Decree indicating that the administration of the estate was
3 complete, the automatic stay as to DATS was lifted. (Docket No.
4 213.)

5 Now, plaintiffs move for summary judgment against DATS
6 based on the exact conduct and damages at issue in their prior
7 motions for summary judgment against Craighead. Specifically,
8 plaintiffs seek summary judgment against DATS with respect to its
9 alleged violations of subsections 1692e(2)-(5), (9)-(11), (14),
10 1692f(1), and 1692g(a) of the FDCPA and joint liability for
11 \$741,387.05 in actual damages. Plaintiffs also seek an award
12 against Craighead and DATS of \$1,000.00 in statutory damages for
13 each named plaintiff under subsection 1692k(a)(2)(A). Lastly,
14 plaintiffs request the court to enter final judgment against
15 Craighead and DATS, holding them jointly and severally liable for
16 actual damages of \$741,387.05 and statutory damages of \$3,000.00
17 and attorney's fees and costs pursuant to § 1692k(a)(3). DATS
18 filed a Statement of Non-Opposition to the motion and Craighead
19 filed a document titled "Motion to Dismiss Summary Judgment upon
20 New Evidence for the Defense," which the court will construe as a
21 motion for reconsideration of the court's decisions in Schwarm I
22 and Schwarm II.

23 1. Violations of the FDCPA

24 The FDCPA governs the conduct of debt collectors, which
25 the Act defines as "any person who uses any instrumentality of
26 interstate commerce . . . in any business the principal purpose
27 _____
28 a matter of public record.").

1 of which is the collection of any debts, or who regularly
2 collects or attempts to collect, directly or indirectly, debts
3 owed or due or asserted to be owed or due another." 15 U.S.C. §
4 1692a(6). Courts have routinely concluded that corporations
5 constitute "persons" under subsection 1692(a)(6) and may thereby
6 be liable as a "debt collectors" under the Act. E.g., Fox v.
7 Citicorp Credit Servs., Inc., 15 F.3d 1507 (9th Cir. 1994); see
8 also 1 U.S.C. § 1 ("In determining the meaning of any Act of
9 Congress, unless the context indicates otherwise . . . the words
10 'person' and 'whoever' include corporations, companies,
11 associations, firms, partnerships, societies, and joint stock
12 companies, as well as individuals"); FCC v. AT&T Inc.,
13 --- S.Ct. ----, ----, 2011 WL 691243, at *5 (2011) ("We have no
14 doubt that 'person,' in a legal setting, often refers to
15 artificial entities. The Dictionary Act makes that clear.");;
16 compare 15 U.S.C. § 1692a(6), with 15 U.S.C. § 1692a(3) (defining
17 "consumer" as "any natural person obligated or allegedly
18 obligated to pay any debt") (emphasis added). DATS, a
19 corporation that exclusively engaged in the practice of
20 collecting debts, is therefore subject to the FDCPA.

21 In its May 2, 2008, Order, the court held Craighead
22 personally liable for violations of subsections 1692e(2)-(5),
23 (9)-(11), (14), 1692f(1), and 1692g(a) of the FDCPA based on
24 DATS' collection efforts. Craighead's personal liability derived
25 from his role within DATS, which included serving as its founder,
26 chief executive officer, president, and on its Board of
27 Directors, designing its automated software, managing and
28 maintaining its software program and computer system, marketing

1 its products, negotiating its contracts with district attorneys'
2 offices, managing its collection efforts, and interfacing with
3 clients and debtors. Schwarm I, 552 F. Supp. 2d at 1073-74.
4 Although the court's prior findings are not the law of the case
5 as to DATS and do not have preclusive effect, the court's
6 discussion throughout its order illustrates that Craighead's
7 conduct giving rise to his liability under the FDCPA was
8 indistinguishable from that of DATS.

9 More importantly, in light of DATS' non-opposition to
10 plaintiffs' motion for summary judgment, the court incorporates
11 its prior analysis herein, id. at 1074-82, and thereby concludes
12 that DATS' conduct violated subsections 1692e(2)-(5), (9)-(11),
13 (14), 1692f(1), 1692f(1), and 1692g(a) of the FDCPA for the
14 reasons explained in detail in its prior order.

15 Similarly, the court's prior award of \$741,387.05 in
16 actual damages against Craighead was based exclusively on the
17 diversion fees that DATS collected. While DATS was able to
18 dispute the amount or its liability based on those fees in the
19 pending motion, it has declined to do so and the court therefore
20 incorporates its prior analysis herein. See Schwarm II, 2008 WL
21 3286797, at *2-3.

22 Accordingly, the court will grant plaintiffs' motion
23 for summary judgment with respect to DATS' violations of the
24 aforementioned subsections of the FDCPA and liability for actual
25 damages in the amount of \$741,387.05.

26 2. Statutory Damages

27 Based on a single violation, the FDCPA allows the court
28 to award named plaintiffs "additional damages . . . not exceeding

1 \$1,000." 15 U.S.C. § 1692k(a)(2)(A)-(B). In determining whether
2 to award statutory damages and the amount of any such award, the
3 court must consider "the frequency and persistence of
4 noncompliance by the debt collector, the nature of such
5 noncompliance, and the extent to which such noncompliance was
6 intentional." Id. § 1692k(b)(1).

7 Plaintiffs previously sought an award of statutory
8 damages for the named plaintiffs and the court denied their
9 motion on that issue, concluding that whether Craighead's
10 "noncompliance was intentional" was a disputed factual issue. In
11 opposition to that motion, Craighead represented that he believed
12 he was lawfully implementing the BCDA at the request of and under
13 the direction of California district attorneys' offices.
14 Although he has not filed a similar declaration in opposition to
15 the pending motion, the court will not interpret the silence of a
16 pro se party as a concession. As the court previously concluded,
17 if Craighead believed he was lawfully implementing the BCDA at
18 the request of and under the direction of California district
19 attorneys' offices, plaintiffs would be entitled to little, if
20 any, statutory damages under § 1692k(a)(2).

21 It is also difficult for the court to find that the
22 "nature" of Craighead and DATS' noncompliance is severe enough to
23 merit statutory damages when DATS' collection efforts were
24 performed pursuant to contracts with district attorneys' offices.
25 While DATS' procedures did not comply with the FDCPA and did not
26 follow all the procedures required for a bad check diversion
27 program under the BCDA, see Schwarm I, 552 F. Supp. 2d at 1078-
28 79, the court cannot overlook the fact that DATS and Craighead

1 operated under contracts with district attorneys' offices. A lay
2 individual contracting to work with a district attorney's office
3 should be able to maintain some level of confidence that his
4 conduct pursuant to that contract comports with the law.³

5 Accordingly, the court will deny plaintiffs' motion for
6 summary judgment on the issue of statutory damages because a
7 genuine issue of material fact exists with respect to whether
8 Craighead's violations of the FDCPA were intentional and
9 plaintiffs have failed to show that the "nature" of the
10 noncompliance merits an award.

11 3. Abandonment of Plaintiffs' Remaining Claims

12 In addition to their claims for violations of the FDCPA
13 and federal and state procedural due process rights, plaintiffs'
14 First Amended Complaint also alleges state law claims for
15 fraudulent and negligent misrepresentation. Plaintiffs now
16 indicate that they do not intend to pursue their remaining state
17 law claims as the actual damages awarded against DATS and
18 Craighead exceed defendants' assets. Plaintiffs also appear to
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21 ³ The significance of the district attorneys'
22 involvement with the process is further illustrated by Congress's
23 amendment of the FDCPA in 2006 to exempt qualifying private
24 entities that contract with district attorneys to operate "bad
25 check enforcement programs." 15 U.S.C. § 1692p; see also Schwarm
26 I, 552 F. Supp 2d at 1069 (concluding that § 1692p does not apply
27 retroactively to shield Craighead from liability under the
28 FDCPA).

29 To counter the significance of the involvement of the
30 district attorneys' offices, plaintiffs submit a letter from the
31 Mendocino County District Attorney's Office, informing DATS and
32 Craighead that the office had "reviewed the lawsuit pending
33 against" them and expressing concerns about DATS' collection
34 letters and procedures. (Pls.' App'x Ex. 5 (Docket No. 208).)
35 Notably, however, none of the district attorneys' offices
36 expressed concerns about DATS collection procedures prior to this
37 lawsuit.

1 have abandoned their remaining claims for actual damages stemming
2 from bad check fees DATS collected, see Schwarm I, 552 F. Supp.
3 2d at 1080 n.17, the claims pertaining to Subclass 2, and their
4 claim for statutory damages for the class.

5 Pursuant to Federal Rule of Civil Procedure 23(e),
6 however, "claims, issues, or defenses of a certified class may be
7 settled, voluntarily dismissed, or compromised only with the
8 court's approval." Fed. R. Civ. P. 23(e) (emphasis added); see
9 also Diaz v. Trust Terr. of Pac. Islands, 876 F.2d 1401, 1408
10 (9th Cir. 1989) ("The district court must ensure that the
11 representative plaintiff fulfills his fiduciary duty toward the
12 absent class members, and therefore must inquire into the terms
13 and circumstances of any dismissal or compromise to ensure that
14 it is not collusive or prejudicial.") (citations omitted).

15 Rule 23(e) specifically provides:

16 The following procedures apply to a proposed settlement,
17 voluntary dismissal, or compromise:

18 (1) The court must direct notice in a reasonable manner
19 to all class members who would be bound by the proposal.

20 (2) If the proposal would bind class members, the court
21 may approve it only after a hearing and on finding that
22 it is fair, reasonable, and adequate.

23 (3) The parties seeking approval must file a statement
24 identifying any agreement made in connection with the
25 proposal.

26 (4) If the class action was previously certified under
27 Rule 23(b)(3), the court may refuse to approve a
28 settlement unless it affords a new opportunity to request
exclusion to individual class members who had an earlier
opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it
requires court approval under this subdivision (e); the
objection may be withdrawn only with the court's
approval.

1 While Rule 23(e) does not provide exceptions to its
2 notice requirements, courts have excused compliance with the
3 notice requirements when doing so would not prejudice the class.
4 See Gomez by Hernandez v. O'Connell, No. 93 C 3268, 1996 WL
5 51202, at *8 (N.D. Ill. Jan. 30, 1996) ("Although the language of
6 Rule 23(e) is mandatory in character, there are exceptions to the
7 notice requirements. . . . One exception is when the court finds
8 dismissal will not result in any prejudice to the interests of
9 absent class members."); Austin v. Pa. Dep't of Corr., 876 F.
10 Supp. 1437, 1455 (E.D. Pa. Jan. 17, 1995) ("Although Rule 23(e)
11 states without exception that 'notice of the proposed dismissal
12 or compromise shall be given,' courts have consistently held that
13 notice to class members is required only when consistent with the
14 rule's purpose--the protection of absent class members.").

15 Here, DATS' bankruptcy estate is closed and plaintiffs
16 have received only \$160,242.43 from the estate--only slightly
17 more than twenty percent of the actual damages awarded to
18 plaintiffs herein. Requiring notice to the 36,407 class members
19 about plaintiffs' abandonment of the aforementioned claims and
20 issues would be a futile exercise when defendants' financial
21 status would prevent any further recovery for plaintiffs if these
22 claims were successfully pursued. The court therefore approves
23 plaintiffs' decision to abandon the remainder of its claims and
24 issues.

25 4. Attorney's Fees and Costs

26 Plaintiffs request an award of attorney's fees pursuant
27 to 15 U.S.C. § 1692k(a)(3), which entitles plaintiffs in a
28 successful action under the FDCPA to "the costs of the action,

1 together with a reasonable attorney's fee as determined by the
2 court." While § 1692k(a)(3) clearly entitles plaintiffs to their
3 attorney's fees and costs, the court will address any such award
4 when plaintiffs file a motion for attorney's fees and their Bill
5 of Costs.

6 5. Craighead's Motion for Reconsideration

7 A district court may grant a motion for reconsideration
8 under Federal Rule of Civil Procedure 59(e) "if the district
9 court (1) is presented with newly discovered evidence, (2)
10 committed clear error or the initial decision was manifestly
11 unjust, or (3) if there is an intervening change in controlling
12 law." Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007)
13 (internal quotation marks omitted). In his motion for
14 reconsideration, Craighead indicates that, in a case alleging
15 FDCPA and state law claims against an entity similar to DATS, the
16 jury returned a verdict in favor of defendant. Assuming the
17 claims and facts in that case are analogous to the claims and
18 facts in the case at hand, a jury verdict contrary to this
19 court's prior decision does not amount to "an intervening change
20 in controlling law." Accordingly, because Craighead has not
21 identified a reason warranting reconsideration under Rule 59(e),
22 the court will deny his motion for reconsideration of the court's
23 decisions in Schwarm I and Schwarm II.

24 IT IS HEREBY ORDERED that

25 (1) plaintiffs' motion for summary judgment with
26 respect to DATS' violations of subsections 1692e(2)-(5), (9)-
27 (11), (14), 1692f(1), and 1692g(a) of the FDCPA be, and the same
28 hereby is, GRANTED;

1 (2) plaintiffs' motion for summary judgment with
2 respect to an award of actual damages against DATS in the amount
3 of \$741,387.05 be, and the same hereby is, GRANTED;

4 (3) plaintiffs' motion for summary judgment with
5 respect to statutory damages be, and the same hereby is, DENIED;

6 (4) plaintiffs' motion for summary judgment with
7 respect to attorney's fees and costs is DENIED without prejudice;
8 and

9 (5) Craighead's motion for reconsideration is DENIED.

10 The Clerk of the Court is instructed to enter final
11 judgment in favor of plaintiffs against Craighead and DATS,
12 holding them jointly and severally liable to plaintiffs in the
13 amount of \$741,387.05.

14 DATED: March 31, 2011

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16 WILLIAM B. SHUBB
17 UNITED STATES DISTRICT JUDGE
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