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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GILVERTO HERRERA AND
CLAUDIA HERRERA,

Plaintiffs,

v.

ALLIANCEONE RECEIVABLE
MANAGEMENT, INC. d.b.a.
ALLIANCEONE, INC. and DOES
1-50,

Defendants.

Case No. 14cv1844 BTM(WVG)

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT’S MOTION FOR
PARTIAL JUDGMENT ON THE
PLEADINGS; GRANTING
DEFENDANT’S MOTION FOR
PARTIAL SUMMARY
JUDGMENT; AND GRANTING
IN PART AND DENYING IN
PART PLAINTIFFS’ MOTION
FOR LEAVE TO FILE AN
AMENDED COMPLAINT**

Gilverto Herrera and Claudia Herrera (“Plaintiffs”) brought an action against AllianceOne Receivable Management, Inc., (“Defendant”), arising out of Defendant’s allegedly abusive debt collection practices. Defendant has collected \$1,496 from Plaintiffs for court-imposed traffic fines, while knowing that the fines were mistakenly attributed to Plaintiff Gilverto Herrera.

Plaintiffs’ first Complaint was brought under the California Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”), the Fair Debt Collection Practices Act (“FDCPA”), and several state tort causes of action. Plaintiffs now seek to amend the first Complaint by adding ten new federal and state causes of action. Currently pending are: (1) Defendant’s Motion for Partial Judgment on the Pleadings, Doc. 15, 15-1; (2) Defendant’s Motion for Partial Summary Judgment, Doc. 19, and; (3) Plaintiffs’ Motion for Leave to File an Amended Complaint, Doc. 23.

1 For the reasons below, Defendant’s Motion for Partial Judgment on the
2 Pleadings, Doc. 15, is GRANTED IN PART AND DENIED IN PART,
3 Defendant’s Motion for Partial Summary Judgment, Doc. 19, is GRANTED,
4 and Plaintiffs’ Motion for Leave to File an Amended Complaint, Doc. 23, is
5 GRANTED IN PART AND DENIED IN PART.

6
7 **I. BACKGROUND**

8 The following undisputed facts are stated in Plaintiffs’ first Complaint
9 (“Compl.”) and the parties’ motions. In late 2010/early 2011, Defendant was
10 assigned to collect several unpaid traffic fines by the San Diego County
11 Superior Court assessed against Gilberto G. Herrera. Doc. 19-2, ¶ 2.
12 Defendant used “skiptracing” to locate Gilberto G. Herrera by searching his
13 last name and an address associated with the fines. Id. at ¶ 3. The search
14 produced four results associated with the address, and one was Plaintiff
15 Gilverto Herrera. Id. at ¶ 4.

16 In January 2012, Plaintiffs received a Demand for Payment-Court
17 Ordered Debt Collection (“Demand”) notice from the Franchise Tax Board
18 (“FTB”), seeking \$1,496 to satisfy three outstanding orders for traffic fines.
19 Compl. at ¶ 2. Plaintiffs learned that Defendant had submitted the Demand
20 to the FTB as result of unpaid traffic fines, which the state court had issued
21 to another person with a similar name but a different birth date. Id. at ¶ 3. In
22 February 2012, Plaintiffs presented Defendant and the FTB with proof of
23 their identities, and filed reports of potential identity theft with their creditors,
24 banks, and the police department. Id. at ¶¶ 4-5. Plaintiffs allegedly contacted
25 Defendant in person and by telephone in an effort to clear up the error. Id.

26 Plaintiffs’ state income tax refund was then seized in March 2012 and
27 \$564.62 was sent to the FTB. Compl. at ¶¶ 2, 6. Plaintiffs made additional
28 inquiries and learned through state court records that the fines were issued

1 to persons driving a vehicle owned by “Gilberto Gamino Herrera.” Compl. at
2 ¶ 7. Plaintiffs filed a state court lawsuit and obtained an order on May 31,
3 2012 (“May 2012 Court Order” or “Court Order”) from the Superior Court
4 declaring them not responsible for the traffic fine debt. Compl. at ¶ 8; Doc.
5 28-2, at 37. The Court Order stated: “these cases be removed from
6 Petitioner’s credit record, AllianceOne and Franchise Tax Board. Any
7 monies garnished from Petitioner are to be refunded.” *Id.* Plaintiff Gilverto
8 Herrera then successfully cleared the citations from his driving record.
9 Compl. at ¶ 9. Plaintiffs provided actual notice of the Court Order to
10 Defendant on the day it was issued. *Id.* at ¶ 8.

11 Even after Defendant had notice of the May 2012 Court Order,
12 Defendant continued contacting Plaintiffs regarding the unpaid debt. Compl.
13 at ¶ 10. Defendant’s collection efforts continued by telephone and mail
14 throughout the spring of 2012. *Id.* Defendant even reported the unpaid fines
15 to the credit reporting agencies. *Id.* This decreased Plaintiffs’ credit score by
16 about 200 points and jeopardized Gilverto Herrera’s government job, which
17 requires him to maintain an active security clearance. *Id.* Plaintiffs also
18 continued receiving IRS and FTB garnishment notices. *Id.*

19 As a result of Defendant’s collection efforts, Plaintiffs allegedly
20 suffered harm including, but not limited to physical injury, mental stress,
21 medical expenses, and a decreased credit rating which, *inter alia*, prevented
22 Plaintiffs from refinancing their home. Compl. at ¶¶ 11-12. Mr. Herrera also
23 received an adverse work evaluation because he had to miss work to clear
24 up the identity mistake. Plaintiffs contacted Defendant in writing in
25 November 2012, attaching records of their medical expenses and adversely
26 impacted credit, but continued receiving unauthorized robo-calls demanding
27 payment throughout 2013. Compl. at ¶¶ 13.

28 Plaintiffs filed the present action in Superior Court on November 5,

1 2013. Defendants removed the case to this Court on August 6, 2014 relying
2 on federal question jurisdiction. Although this Order dismisses Plaintiffs'
3 single pending federal claim, infra section II.3.b., Plaintiffs' pending motion
4 to amend their Complaint with several new federal claims is partially
5 granted. Therefore, the Court continues to have federal question jurisdiction.

6 7 **II. DISCUSSION**

8 9 **1. Causes of Action**

10 Plaintiffs' first Complaint raises seven causes of action against
11 Defendant for violation of: (1) the Rosenthal Act, Cal. Civ. Code ("CCC")
12 § 1788, et seq; (2) the FDCPA, 15 U.S.C. § 1692, et seq; (3) Conversion;
13 (4) California Business and Professions Code ("CBPC") § 17200, et. seq; (5)
14 Negligence; (6) Intentionally Annoying or Harassing over the Telephone,
15 California Penal Code ("CPC") § 653(m), and; (7) Invasion of Privacy. Doc.
16 1. Plaintiffs' five state law causes of action are subject to this Court's
17 supplemental jurisdiction under 28 U.S.C. § 1367(a).

18 In response to facts raised in Defendant's pending motion for partial
19 summary judgment, Plaintiffs filed a motion for leave to amend the
20 Complaint, seeking to add ten new causes of action for: (8) Negligent
21 Violation of the Telephone Consumer Protection Act, 47 U.S.C. §§ 227, et
22 seq; (9) Willful/Intentional Violation of the Telephone Consumer Protection
23 Act, 47 U.S.C. §§ 227, et seq; (10) Deprivation of Constitutional and
24 Statutory Rights, CCC § 52.1, and violation of the following; (11)
25 California Credit Reporting Agencies Act, CCC § 1785.25(a); (12) Fair Credit
26 Reporting Act, 15 U.S.C. § 1681s-2(b); (13) Rosenthal Act, CCC
27 §1788.18(g), (14) Rosenthal Act, CCC § 1788.17; (15) FDCPA, 15 U.S.C.
28 §1692(e)(8); (16) Deprivation of Liberty Without Due Process under the Fifth
and Fourteenth Amendments to the United States and California

1 Constitutions, and 42 U.S.C. § 1983, and; (17) Deprivation of Rights
2 Pursuant to the Equal Protection Clause of the Fourteenth Amendment to
3 the United States and California Constitutions, and 42 U.S.C. § 1983. See
4 Doc. 23-2.

6 **2. Motion for Partial Judgment on the Pleadings**

7 a. Standard

8 The standard applied in considering a motion for judgment on the
9 pleadings under Fed. R. Civ. P. 12(c) is virtually identical to that applied in
10 motions to dismiss under Fed. R. Civ. P. 12(b)(6), see Cafasso, U.S. ex rel.
11 v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055, n.4 (9th Cir. 2011),
12 which provides a defense against complaints which “fail[] to state a claim
13 upon which relief can be granted.” A “Rule 12(b)(6) motion tests the legal
14 sufficiency of a claim.” Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).
15 As the Supreme Court has explained,

16 a valid complaint must contain a short and plain statement of
17 the claim showing that the pleader is entitled to relief. . . .
18 [T]he pleading standard Rule 8 announces does not require
19 detailed factual allegations, but it demands more than an
20 unadorned, the-defendant-unlawfully-harmed-me accusation
21 . . . To survive a motion to dismiss, a complaint must contain
22 sufficient factual matter, accepted as true, to state a claim to
23 relief that is plausible on its face. A claim has facial plausibility
24 when the plaintiff pleads factual content that allows the court
25 to draw the reasonable inference that the defendant is liable
26 for the misconduct alleged.

27 Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009); see also Petzschke v.
28 Century Aluminum Co., 729 F.3d 1104, 1107 (9th Cir. 2013). When
reviewing a motion to dismiss, the allegations of material fact in plaintiff’s
complaint are taken as true and construed in the light most favorable to the
plaintiff. See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th
Cir. 1995). However, “the tenet that a court must accept as true all of the

1 allegations contained in a complaint is inapplicable to legal conclusions.”
2 Iqbal, 556 U.S. at 678.

3
4 b. Analysis

5 On December 1, 2014, Defendant filed its motion for partial judgment
6 on the pleadings on Plaintiffs’ claims for conversion, negligence, invasion of
7 privacy, and violations of CBPC § 17200 and CPC § 653m. Defendant
8 argues that because its allegedly unlawful debt collection efforts involved
9 post-judgment collection, they are immune from statutory and tort liability
10 under California’s litigation privilege, CCC § 47(b).¹ Doc. 15-1, at 4-7. The
11 litigation privilege protects publications and communications: (1) made in
12 judicial or quasi-judicial proceedings; (2) by litigants or other participants
13 authorized by law; (3) to achieve the objects of the litigation, and; (4) that
14 have some connection or logical relation to the action. See Silberg v.
15 Anderson, 50 Cal.3d 205, 212 (1990).

16 The purpose of the litigation privilege is to afford litigants and
17 witnesses free access to the courts without fear of derivative tort liability.
18 See Action Apartment Assn., Inc. v. City of Santa Monica, 41 Cal.4th 1232,
19 1242-43 (2007). Additionally, §47(b) is designed to:

20 encourage open channels of communication and zealous
21 advocacy, to promote complete and truthful testimony, to give
22 finality to judgments, and to avoid unending litigation. [internal
23 citation omitted] To effectuate these purposes, the litigation
privilege is absolute and applies regardless of malice. [internal
citation omitted] Moreover, [i]n furtherance of the public policy
purposes it is designed to serve, the privilege prescribed by
section 47(2) has been given broad application.

24 Rickley v. Goodfriend, 212 Cal. App. 4th 1136, 1162 (2013), reh’g denied
25 (Feb. 5, 2013), review denied (Apr. 10, 2013) (quoting Rusheen v. Cohen,
26 37 Cal.4th 1048, 1063 (2006)).

27 ¹ Under section 47(b), communications made in any legislative, judicial or other official
28 proceedings authorized by law are absolutely privileged. See Cal. Civ. Code. § 47(b).
“[S]ection 47(b) is not limited to statements made in a courtroom.” Hagberg v. California
Federal Bank FSB, 32 Cal.4th 350 (Cal. 2004).

1 The application of the litigation privilege to undisputed facts in a
2 complaint is a question of law subject to the court’s independent review. See
3 Rothman v. Jackson, 49 Cal.App.4th 1134, 1139-1140 (1996). In debt
4 collection cases the litigation privilege bars tort claims other than malicious
5 prosecution. See People v. Persolve, LLC., 218 Cal.App.4th 1267, 1274,
6 review denied (Nov. 13, 2013). In Komarova v. National Credit Acceptance,
7 Inc., 175 Cal.App.4th 324, 337 (2009), a case of mistaken identity where the
8 defendant-debt collector attempted to enforce a default arbitration award
9 against a plaintiff who had not been a party to that arbitration, the court held
10 that the litigation privilege did not apply to immunize defendant from
11 plaintiff’s Rosenthal Act claim, but the privilege barred the plaintiff’s
12 intentional infliction of emotional distress claim. Id. at 343.

13 Plaintiffs argue that the litigation privilege does not shield Defendant
14 from liability for unlawful debt collection from the wrong person. But,
15 Komarova found that the litigation privilege barred the plaintiff’s tort claim,
16 despite her not having been a party to the arbitration, because she was
17 served with the petition to confirm the award and could have challenged it.
18 175 Cal.App.4th at 343. Though Komarova appears on-point, it is
19 distinguishable on the facts from this case because the May 2012 Court
20 Order gave Defendant actual notice that Plaintiffs were not the actual traffic
21 fine debtors. Doc. 28-2, at 37. Additionally, unlike the plaintiff in Komarova,
22 Plaintiffs here sought and obtained a legal remedy unambiguously clearing
23 them of the debt.

24 The general rule is that “[t]he litigation privilege applies only to torts
25 arising from communicative acts; it does not apply to purely
26 noncommunicative tortious conduct.” Brown v. Kennard, 94 Cal.App.4th 40,
27 45 (2001); Kimmel v. Goland, 51 Cal.3d 202, 211(1990). However, a court
28 need not reach the “communicative” analysis when the challenged conduct

1 clearly does not further a litigation. See Silberg, 50 Cal.3d at 219-20. In this
2 case, the Superior Court ordered Defendant to refund the monies garnished
3 from Plaintiffs' tax refund and to remove the debt cases from their credit
4 record. Notwithstanding the Court Order, Defendant persisted in its debt
5 collection efforts against Plaintiffs with the knowledge that they were not the
6 real debtors. As such, every collection action Defendant took against
7 Plaintiffs for the traffic fine debt after May 31, 2012 was not privileged
8 because it was in direct contravention of the May 2012 Court Order. See
9 Goodfriend, 212 Cal.App.4th at 1148 (litigation privilege did not apply to
10 attorneys' communications and actions because they did not achieve the
11 object of the litigation). Knowingly pursuing collection action against an
12 innocent party does nothing to further the litigation privilege's purpose. On
13 the contrary, extending the privilege to such action encourages
14 contemptuous conduct and subverts the legal system.

15 If the allegations in the Complaint are true, then Defendant is not
16 using the litigation privilege as a shield, but rather as a sword to injure
17 innocent persons not parties to the litigation. Once given notice of the May
18 2012 Court Order, Defendant had no cause to pursue Plaintiffs and the
19 action did not further the litigation against Gilberto G. Herrera in any way.
20 The Court stresses that this exception from the privilege is narrow, applying
21 only to conduct in contravention of a court order, and grounded in a similar
22 exception to the privilege for actions for malicious prosecution. See Silberg,
23 50 Cal.3d at 215–216. The California Legislature has provided that persons

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1 may be criminally prosecuted, CPC § 166, and civilly liable, Cal. C. Civ. P.
2 § 1219, for contemptuous action. Accepting Defendant's argument would
3 subvert these provisions and result in the privilege being used to shield all
4 acts in furtherance of a litigation but in contempt of a court order. The
5 litigation privilege was never designed to shield actions in contempt of court.
6 Therefore, the Court finds that Defendant's actions are not given protection.

7 Based on the forgoing, each of Plaintiffs' tort claims and Defendant's
8 underlying debt collection acts must be analyzed for privilege. First, the
9 misconduct pled in support of Plaintiffs' third cause of action for conversion
10 is the garnishment of their state income tax return, which is not privileged
11 because Defendant has failed to return it in violation of the May 2012 Court
12 Order. Compl. at ¶¶ 41-42. Therefore, the tort of conversion is not barred by
13 the litigation privilege and the third cause of action survives.

14 The acts stated in support of Plaintiffs' fifth cause of action for
15 negligence are Defendant's failure to: accurately determine the debtors'
16 identity; state an accurate debt amount; cease harassment and phone calls
17 after discovering the identity error; stop threatening Plaintiffs and otherwise
18 harming their reputations, property and person; cease communicating by
19 telephone and in person in a harassing, unreasonably frequent manner and
20 with abusive, misleading language. Compl. at ¶ 55. While some of these
21 alleged acts of misconduct took place before Defendant gained definitive
22 knowledge that Gilverto Herrera was not the traffic fine debtor through the
23 May 2012 Court Order, and may be privileged, those acts occurring
24 subsequent to the Court Order are not. Therefore, Plaintiffs' negligence
25 action states facts sufficient to overcome Defendant's motion for partial
26 judgment on the pleadings.

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1 Similarly, Plaintiffs' seventh cause of action for invasion of privacy is
2 based on Defendant's alleged acts of publishing Plaintiff's information
3 through different mediums, which includes reporting the debts to the credit
4 reporting agencies. Compl. at ¶ 10, 55. Again, this allegedly occurred after
5 the May 2012 Court Order was issued, and disregarded the portion of that
6 order directing that "these cases be removed from Petitioner's credit record."
7 Doc. 28-2, at 37. Additionally, reporting the debts was not meant to further
8 the objects of the litigation, which is collection of the outstanding fines,
9 because it lowered Plaintiffs' credit rating and jeopardized their employment.
10 See Silberg, 50 Cal.3d at 212; Compl. at ¶ 11. Finally, communication to
11 third party non-participants in the litigation is not protected by the privilege.
12 See Goodfriend, 212 Cal.App.4th at 1163. Therefore, Defendant's action
13 was not privileged and the motion is DENIED as to the seventh cause of
14 action.

15 Plaintiffs' fourth cause of action seeking equitable relief under
16 California's Unfair Competition Law ("UCL"), CBPC § 17200 et seq, also
17 survives. The UCL prohibits "unlawful, unfair or fraudulent business act[s] or
18 practice[s]." Id. A cause of action under this section must be based on some
19 predicate act involving a violation of some other statute. See Cel-Tech
20 Communications v. L.A. Cellular Tel. Co., 20 Cal.4th 163 (1999). As stated
21 above, none of Plaintiffs' tort claims are barred by the litigation privilege.
22 Since Plaintiffs have a number of surviving predicate causes of action, they
23 have stated a claim under § 17200.

24 The Court GRANTS Defendant's motion as to the sixth cause of
25 action for violation of CPC § 653m. Section 653m(b) makes it a
26 misdemeanor to make repeated phone calls with the intent to annoy or
27 harass. "A statute creates a private right of action only if the enacting body
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1 so intended.” See Farmers Ins. Exch. v. Superior Court, 137 Cal.App.4th
2 842, 849 (2006). “That intent need not necessarily be expressed explicitly,
3 but if not it must be strongly implied.” Id at 850. Private rights of action under
4 criminal statutes have rarely been implied, and when one has been read into
5 a criminal statute “there was at least a statutory basis for inferring that a civil
6 cause of action of some sort lay in favor of someone.” Chrysler Corp. v.
7 Brown, 441 U.S. 281, 316 (1979). The Court has reviewed section 653m
8 and finds that the statute does not include language suggesting a private
9 cause of action is available. See Aymar v. Stassinis, 2008 WL 4838232
10 (E.D. Cal. Oct. 7, 2008) (holding no private cause of action under section
11 653m). Additionally, Plaintiffs failed to cite authority showing that the state
12 legislature intended to create a private right of action in CPC § 653m.

13 Therefore, Court GRANTS Defendant’s motion in part, and the sixth
14 cause of action is DISMISSED from Plaintiffs’ first Complaint and may not be
15 included in the proposed First Amended Complaint. The Court DENIES
16 Defendant’s motion as to causes of action 3, 4, 5, and 7.

17 18 **3. Motion for Partial Summary Judgment**

19 a. Standard

20 Summary judgment is appropriate under Fed. R. Civ. P. 56 if the
21 moving party demonstrates the absence of a genuine issue of material fact
22 and entitlement to judgment as a matter of law. See Celotex Corp. v. Catrett,
23 477 U.S. 317, 322 (1986). A party seeking summary judgment always bears
24 the initial burden of establishing the absence of a genuine issue of material
25 fact. See id. at 323. The moving party can satisfy this burden in two ways:
26 (1) by presenting evidence that negates an essential element of the
27 nonmoving party’s case; or (2) by demonstrating that the nonmoving party
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1 failed to establish an essential element of the nonmoving party's case on
2 which the nonmoving party bears the burden of proving at trial. See id. at
3 322-23. When ruling on a summary judgment motion, the court must view all
4 inferences drawn from the underlying facts in the light most favorable to the
5 nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
6 475 U.S. 574, 587 (1986).

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8 b. Analysis

9 On December 31, 2014, Defendant filed a motion for partial summary
10 judgment on Plaintiffs' first two causes of action, arising under the Rosenthal
11 Act and the FDCPA (the "Acts"). Defendant argues that the Acts regulate
12 only the collection of "debts," and that traffic fines do not arise out of a
13 consensual transaction and don't constitute "debts" under the Acts. For the
14 same reasons, Defendant opposes the addition of three new causes of
15 action (13-15) arising under the Acts in Plaintiffs' proposed First Amended
16 Complaint. The Court finds that Plaintiffs' claims under the Acts do not
17 survive Defendant's motion.

18 The FDCPA defines debt as "any obligation or alleged obligation of a
19 consumer to pay money arising out of a transaction in which the money,
20 property, insurance, or services which are the subject of the transaction are
21 primarily for personal, family, or household purposes . . ." 15 U.S.C.
22 §1692a(5); see also Bloom v. I.C. Sys. Inc., 972 F.2d 1067, 1068-69 (9th
23 Cir. 1992) (explaining that the FDCPA applies to debt incurred for personal
24 rather than commercial reasons). The FDCPA defines consumer as "any
25 natural person obligated ... to pay any debt." 15 U.S.C. § 1692a(3). While
26 the FDCPA does not define transaction, the Ninth Circuit has stated that "the
27 statute is limited in its reach 'to those obligations to pay arising from
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1 consensual transactions, where parties negotiate or contract for
2 consumer-related goods or services.” Turner v. Cook, 362 F.3d 1219, 1227
3 (9th Cir. 2004) (quoting Bass v. Stolper, Koritzinsky, Brewster & Neider,
4 S.C., 111 F.3d 1322, 1326 (7th Cir. 1997)). Similarly, the purpose of the
5 Rosenthal Act is “to prohibit debt collectors from engaging in unfair or
6 deceptive acts or practices in the collection of consumer debts and to
7 require debtors to act fairly in entering into and honoring such debts . . .”
8 CCC § 1788.1(b). The Rosenthal Act defines consumer debt as “money,
9 property or their equivalent, due or owing or alleged to be due or owing from
10 a natural person by reason of a consumer credit transaction.” CCC §
11 1788.2(f).

12 In this case, the undisputed character of the “debts” as unpaid traffic
13 fines defeats the FDCPA and Rosenthal Act causes of action. Traffic fines
14 do not result from consensual consumer transactions, and are therefore not
15 “debts” within the meaning of the Acts. See Gulley v. Markoff & Krasny, 664
16 F.3d 1073, 1075 (7th Cir. 2011) (municipal fines not debts under FDCPA);
17 Stubbs v. City of Ctr. Point, Ala., 988 F. Supp. 2d 1270, 1276 (N.D. Ala.
18 2013) (traffic ticket not a “debt” under the FDCPA because it’s not the
19 product of a consumer transaction); see also Turner, 362 F.3d at 1227
20 (FDCPA is limited to obligations arising from consensual transactions for
21 consumer goods or services); Slenk v. Transworld Sys., Inc., 236 F.3d 1072,
22 1076 (9th Cir. 2001). Plaintiffs don’t address the character fo the debt, but
23 argue the purpose of the Acts is to protect mistakenly identified non-debtors
24 who are subjected to harassing debt collection. Doc. 28, at 7 (citing Beck v.
25 Maximus, 457 F.3d 291, 294 (3rd Cir. 2006); see also Wright v. Finance
26 Services, 22 F.3d 647, 649 (6th Cir. 1993); Dutton v. Wolhar, 809 F. Supp.
27 1130, 1134 (D. Del. 1992)). Plaintiffs also rely on Davis v. Midland Funding,
28

1 41 F. Supp. 3d 919 (E.D. Cal. 2014), which held that the FDCPA
2 encompasses claims brought by individuals subjected to collection efforts for
3 obligations they are falsely alleged to owe.

4 Plaintiffs' reliance on Beck, Wright, and Dutton, is unpersuasive
5 because those cases did not address whether the monetary obligations at
6 issue fell within the FDCPA's definition of "debts." Similarly, Davis is
7 distinguishable on its facts because the plaintiff-debtor could not prove the
8 consumer character of the debt since he did not know the nature of its
9 underlying transaction. 41 F. Supp. 3d at 922. By contrast, in this case,
10 though Plaintiffs did not incur the debt at issue, by their own efforts they
11 discovered that it is a non-consumer obligation for unpaid traffic fines.
12

13 Therefore, Defendant's motion is GRANTED and the first and second
14 causes of action are DISMISSED. Additionally, Plaintiffs are DENIED leave
15 to add causes of action numbers 13, 14, and 15, which also arise under the
16 Acts.

17 **4. Motion for Leave to File Amended Complaint**

18 a. Standard

19 Leave to amend a complaint should be freely given when justice so
20 requires. Fed. R. Civ. P. 15(a)(2). "Liberality in granting a plaintiff leave to
21 amend is subject to the qualification that the amendment not cause undue
22 prejudice to the defendant, is not sought in bad faith, and is not futile."
23 Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999).
24

25 b. Analysis

26 On February 20, 2015, Plaintiffs moved for leave to file a First
27 Amended Complaint ("FAC") adding ten new causes of action to their
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1 existing seven. Plaintiffs argue that leave to amend should be granted
2 because their motion is timely, brought in good faith, does not prejudice
3 Defendant, is not futile, and is their first request to amend the Complaint.
4 Doc. 23-1, at 4, 5.

5 Defendant opposes the first seven causes of actions (FAC, Cause of
6 Action [“COA”] 1-7) and the three new FDCPA and Rosenthal Act claims
7 (FAC COA 13-15), arguing that amendment of these claims is futile for the
8 reasons stated in Defendant’s pending motions. Defendant also opposes the
9 addition of the two new § 1983 causes of action (FAC COA 16, 17), arguing
10 that they do not meet the pleading standard because Plaintiffs have failed to
11 allege that Defendant is a state or government actor. See Grant v. United
12 States Gov’t, 2014 WL 6685035, *5 (E.D. Cal. Nov. 25, 2014); Williams v.
13 Bank of Am., 2013 WL 1907529, *5 (E.D. Cal. May 7, 2013). Defendant
14 does not appear to oppose the remaining new causes of action (FAC COA
15 8-12). Doc. 27, at 5, 9.

16
17 For the reasons stated above, the Court GRANTS Plaintiffs’ motion
18 for leave to file an amended complaint as to causes of action numbers 3, 4,
19 5, 7, since these claims are not dismissed. See supra section II.2.b.
20 However, causes of action 1, 2, 6, 13, 14, 15 fail as a matter of law, see
21 supra sections II.2.b and II.3.b, and leave to add them is DENIED because it
22 would be futile. The Court also GRANTS leave to add new causes of action
23 numbers 8-12, because Defendant has not opposed them.

24 Lastly, Plaintiffs’ new § 1983 claims (COA 16-17) are not clearly
25 futile, and leave to amend to add them is GRANTED. The Fifth and the
26 Fourteenth Amendments protect individuals from the deprivation of liberty or
27 property interests by state actors – not private persons. See Shelley v.
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1 Kraemer, 334 U.S. 1, 13 (1948); see also Public Utilities Comm’n v. Pollak,
2 343 U.S. 451, 461 (1952). Similarly, to state a claim under section 1983, a
3 plaintiff must demonstrate that the conduct complained of was committed by
4 a person acting under the color of state law. See Rendell–Baker v. Kohn,
5 457 U.S. 830, 838 (1982). The ultimate issue in determining whether a
6 person is subject to suit under § 1983 is whether the alleged infringement of
7 federal rights is fairly attributable to the government. Sutton v. Providence
8 St. Joseph Med. Ctr., 192 F.3d 826, 835 (9th Cir. 1999).

9
10 In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Supreme
11 Court set forth a two-part test for determining whether a deprivation of a
12 federal right could fairly be attributable to the state: (1) “the deprivation must
13 be caused by the exercise of some right or privilege created by the State or
14 by a rule of conduct imposed by the State or by a person for whom the State
15 is responsible”; and (2) “the party charged with the deprivation must be a
16 person who may fairly be said to be a state actor,” and “[t]his may be
17 because he is a state official, because he has acted together with or has
18 obtained significant aid from state officials, or because his conduct is
19 otherwise chargeable to the State.” Id. at 937.

20 Applying this test, Lugar held that a debtor-plaintiff who was
21 subjected to a prejudgment attachment procedure under state law was
22 deprived of his property through state action and therefore stated a valid
23 § 1983 cause of action against a corporate creditor and its president, who
24 were found to have acted under color of state law in participating in that
25 deprivation. Id. at 941-42. In Jensen v. Lane County, 222 F.3d 570 (9th Cir.
26 2000), the Ninth Circuit also held state action existed where a private
27 physician in Oregon operated under contract with the county in the detention
28 and mental examination of persons brought in by police officers. Applying

1 the “close nexus/joint action test,” the Court clarified that the “State [must
2 be] so far insinuated into a position of interdependence with the [private
3 party] that it was a joint participant in the enterprise.” Id. Lastly, in Ballard v.
4 Wall, 413 F.3d 510 (5th Cir. 2005), the Fifth Circuit found that even if a judge
5 that handed out the underlying debt judgment is entitled to absolute
6 immunity, state actors who act in concert with the court, such as a law firm
7 representing a creditor, may still be held liable under § 1983 if they jointly
8 engage with the state official in the challenged action. See 413 F.3d at 518
9 (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)).

10 Plaintiffs plead that Defendant acted under the color of state law
11 when collecting court imposed fines from Plaintiffs as an agent pursuant to a
12 contract with the Superior Court. Doc. 29, at 3. They also allege that
13 Defendant has an office in the courthouse and wielded the authority of the
14 state court to report the debt directly to the FTB. Doc. 29, at 3. Pursuant to
15 Lugar, Plaintiffs have stated sufficient facts to suggest that their §1983
16 claims are at least plausible. See Iqbal, 556 U.S. at 677-78.

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21 III. CONCLUSION

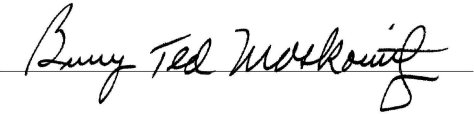
22 For the reasons discussed above: (1) Defendant’s Motion for Partial
23 Judgment on the Pleadings, Doc. 15, is **GRANTED IN PART** and **DENIED**
24 **IN PART**; (2) Defendant’s Motion for Partial Summary Judgment, Doc. 19, is
25 **GRANTED**, and; (3) Plaintiffs’ Motion for Leave to File an Amended
26 Complaint, Doc. 23, is **GRANTED IN PART** and **DENIED IN PART**. Causes
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of action numbers 1, 2, and 6 are DISMISSED from Plaintiffs' first Complaint as well as the identical claims proposed in the FAC, and causes of action numbers 13-15 may not be included in the FAC. Plaintiffs are granted leave to amend their first Complaint by adding causes of action 3, 4, 5, 7, 8-12, and 16-17 to the FAC.

IT IS SO ORDERED.

DATED: June 18, 2015



**BARRY TED MOSKOWITZ, Chief Judge
United States District Court**