

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

ZIBA YOUSSOFI,

Plaintiff,

v.

CMRE FINANCIAL SERVICES,
INC.,

Defendant.

CASE NO. 15cv2310 JM(WVG)

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS; SCHEDULING ORDER

Defendant CMRE Financial Services, Inc. (“CMRE”) moves to dismiss all claims asserted in the First Amended Complaint (“FAC”). Plaintiff Ziba Youssofi (“Plaintiff”) opposes the motion. Pursuant to L.R. 7.1(d)(1), the court finds the matters presented appropriate for decision without oral argument. For the reasons set forth below, the court grants the motion to dismiss Counts 1, 2, 4, 6-8 with prejudice and denies the motion to dismiss Counts 3 and 5. Furthermore, pursuant to Fed.R.Civ.P. 12(d) the court converts the Rule 12(b)(6) motion on Counts 3 and 5 to one for summary judgment. The parties are instructed to conduct targeted discovery on these two counts and to file cross motions for summary judgment by March 25, 2016, opposition briefs by April 8, 2016, and reply briefs by April 15, 2016. The motion for summary judgment is set for oral argument on *April 25, 2016 at 10:00 a.m.*

BACKGROUND

The FAC, filed on November 2, 2015, alleges eight counts for violation of the

1 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §1692 et seq., and a single
2 state law claim for violation of the Rosenthal Fair Debt Collections Practices Act
3 (“Rosenthal Act”), Cal. Civil Code §1788.17. Plaintiff’s claims arise from two
4 different collection letters or notices she received from CMRE regarding a consumer
5 debt.

6 On or about October 29, 2014, Plaintiff received the first collection notice from
7 CMRE seeking to collect an alleged debt of \$716.30 plus \$1.18 in interest (the
8 “Validation Notice”). (FAC Exh. 1). The Validation Notice allegedly did not identify
9 the name of the creditor nor provide any information to identify the nature of the debt.
10 On November 17, 2014, Plaintiff retained counsel and counsel sent a letter to CMRE
11 disputing the debt.

12 The second collection notice, dated December 9, 2014, identified the creditor as
13 Emergency Services Medical, arising from the provision of emergency medical services
14 to Plaintiff. The second notice identified the same debt of \$716.30, in addition to
15 interest charges of \$9.62. (FAC Exh. 2).

16 On October 14, 2015, Plaintiff commenced the present action. In broad brush,
17 Plaintiff alleges the two notices violated the FDCPA because the amount of interest
18 identified as owed in the two collection notices was actually substantially less than the
19 amount of interest that could have been charged by CMRE. Plaintiff has not paid for
20 the emergency medical services provided to her by Emergency Services Medical.

21 DISCUSSION

22 Legal Standards

23 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in
24 "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.
25 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a
26 "cognizable legal theory" or sufficient facts to support a cognizable legal theory.
27 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should
28 dismiss a complaint for failure to state a claim when the factual allegations are

1 insufficient “to raise a right to relief above the speculative level.” Bell Atlantic Corp.
2 v. Twombly, 550 U.S. 544, 555 (2007) (the complaint’s allegations must “plausibly
3 suggest[]” that the pleader is entitled to relief); Ashcroft v. Iqbal, 556 U.S. 662 (2009)
4 (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the
5 mere possibility of misconduct). “The plausibility standard is not akin to a ‘probability
6 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
7 unlawfully.” Id. at 678. Thus, “threadbare recitals of the elements of a cause of action,
8 supported by mere conclusory statements, do not suffice.” Id. The defect must appear
9 on the face of the complaint itself. Thus, courts may not consider extraneous material
10 in testing its legal adequacy. Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th
11 Cir. 1991). The courts may, however, consider material properly submitted as part of
12 the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555
13 n.19 (9th Cir. 1989).

14 Finally, courts must construe the complaint in the light most favorable to the
15 plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116
16 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in
17 the complaint, as well as reasonable inferences to be drawn from them. Holden v.
18 Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of
19 law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In
20 Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

21 **The Motion**

22 Plaintiff alleges eight counts for violation of the FDCPA. Plaintiff identifies the
23 following to support each of the eight FDCPA claims:

24 “(1) the Validation Notice stated the wrong amount of the debt since it
25 only stated part of the debt and not the entire debt owed in violation of
15 U.S.C. §§ 1692g(a)(10), 1692e(2)(A), and 1692e(10);

26 (2) the December 9, 2014 collection notice stated the wrong amount of the
27 debt since it only stated part of the debt and not the entire debt owed in
violation of 15 U.S.C. §§ 1692e, 1692e(2)(A), and 1692e(10);

28 (3) the Validation Notice failed to state the name of the creditor in
violation of 15 U.S.C. § 1692g(a)(2);

1 (4) The Validation Notice failed to disclose that the debt was accruing
2 interest in violation of 15 U.S.C. §§ 1692e(10), 1692e(2)(A), and
1692g(a)(1);

3 (5) the December 9, 2014 collection notice demanded an unlawful amount
4 of interest in violation of 15 U.S.C. §§ 1692f and 1692f(1).

5 (6) the December 9, 2014 collection notice misstated the amount of the
6 debt in violation of 15 U.S.C. §§ 1692e and 1692e(2)(A);

7 (7) the December 9, 2014 collection notice stated an inaccurate amount
8 of the debt at the time the notice was mailed in violation of 15 U.S.C.
9 §§ 1692e, 1692e(2)(A) and 1692e(10); and

10 (8) the December 9, 2014 collection notice is misleading and deceptive in
11 violation of 15 U.S.C. §§ 1692e, 1692e(2)(A) and 1692e(10).”
12 (Oppo. at pp.1:19-2:8).

13 The purpose of the FDCPA is “to eliminate abusive debt collection practices by
14 debt collectors, to insure that those debt collectors who refrain from using abusive debt
15 collection practices are not competitively disadvantaged, and to promote consistent
16 State action to protect consumers against debt collection abuses.” 15 U.S.C. §1692(e);
17 Baker v. G. C. Services Corp., 677 F.2d 775 (9th Cir. 1982) (The FDCA is designed
18 to protect consumers who have been victimized by unscrupulous debt collectors,
19 regardless of whether valid debt actually exists.”). In broad brush, “a debt collector may
20 not use unfair or unconscionable means to collect or attempt to collect any debt.”
21 15 U.S.C. 1692(f).¹

22 Counts 1, 2, 4, 6-8

23 Six of Plaintiff’s eight claims (Counts 1, 2, 4, 6-8) relate to interest charges and
24 center on the fact that the interest actually sought to be collected is substantially below
25 what Plaintiff would actually owe if interest were properly calculated. Plaintiff alleges
26 that the October 29, 2014 Validation Notice sought to collect \$1.18 in interest but the
27 amount actually owed (or could have been charged) was \$51.93 and the December 9,
28 2014 collection notice sought to collect \$9.62 in interest but the amount actually owed

¹ The parties do not dispute that Plaintiff is a consumer, Plaintiff’s debt is a
consumer debt, and CMRE is a third-party debt collector for purposes of the FDCPA.
See 15 U.S.C. §1692. The parties only dispute the fourth element of a FDCPA claim:
whether CMRE violated one of the provisions of the FDCPA.

1 (or could have been charged) was \$60.02. (FAC ¶25-33).

2 The difficulty with Plaintiff's argument is that the practice of a debt collector to
3 collect less interest than owed, is not an abusive practice. Under these circumstances,
4 the consumer actually benefits and Plaintiff simply fails to identify how this practice
5 is unfair or unconscionable. Plaintiff repeatedly argues that "[b]y understating the
6 amount of debt, CMRE failed to clearly state the amount of debt owed" and is therefore
7 strictly liable under the FDCPA. (Oppo. at p.6:11-12). The amount of the debt,
8 however, is simply the amount sought to be collected and is clearly stated in both
9 collection notices. There are no allegations suggesting that CMRE is somehow using
10 the \$1.18 in interest charges as a subterfuge to collect more than the amounts identified
11 in the notices.

12 The least sophisticated consumer test applicable to the FDCPA "protects all
13 consumers, the gullible as well as the shrewd . . . the ignorant, the unthinking, and the
14 credulous." Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1171
15 (9th Cir. 2006) (quoting Clomon v. Jackson, 988 F.2d 1314, 1318-19 (2d Cir. 1993)).
16 Viewing the notices from the perspective of the gullible and ignorant, and applying the
17 least sophisticated consumer test adopted by the Ninth Circuit, the court concludes that
18 the least sophisticated consumer would credibly believe that an interest charge of \$1.18
19 (or \$9.62 in the December 9, 2014 notice) means that the interest charge is \$1.18 (or
20 \$9.62 in the December 9, 2014 notice), and not some other theoretical amount that the
21 debt collector is not seeking to collect.

22 Notably, Plaintiff does not dispute that CMRE may lawfully charge interest on
23 the unpaid debt. Debt collectors are prohibited from seeking to collect any amount that
24 is not "expressly authorized by the agreement creating the debt or permitted by law."
25 15 U.S.C. §1692f(1). "A debt collector does not violate this provision if the amounts
26 it seeks are authorized by state law." Diaz v. Kubler Corp., 785 F.3d 1326 (9th Cir.
27 2015). As the interest rate provision is enforceable under state law, Cal. Civil Code
28 §§3287 and 3289, interest charges are properly included in the amount of the total debt.

1 For these reasons, the court dismisses Counts 1, 2, 4, 6-8 for failure to state a
2 claim. CMRE's efforts to collect a significantly smaller amount of interest than what
3 it theoretically could have collected is not an abusive, unfair, or unconscionable
4 collection practice under the FDCA. As there do not appear to be any circumstances
5 under which Plaintiff may be able to state a claim, the court dismisses these claims with
6 prejudice.

7 Count 3

8 Count 3 alleges that the Validation Notice failed to identify the creditor. (FAC
9 ¶27). The notice attached as an exhibit to the FAC does not identify the creditor
10 (Emergency Services Medical). (FAC, Exh. 1). The FDCPA requires that the notice
11 identify the creditor. 15 U.S.C. §1692g(a)(2). While this allegation is sufficient to
12 state a claim, the court is concerned that the FAC's supporting exhibit failed to include
13 the second page to the Validation Notice which does, in fact, identify Emergency
14 Services Medical as the creditor. As set forth in the declaration of Andrea Parr,
15 director of CMRE's legal department, CMRE's records show that Plaintiff was
16 provided a second page to the Validation Notice which identifies Emergency Services
17 Medical as the creditor. The court concludes that the arguments of the parties raise
18 factual issues not properly resolved on a motion to dismiss.

19 In sum, the court denies the motion to dismiss Count 3.

20 Count 5

21 Count 5 alleges that the interest charge of \$9.62 in the December 9, 2014 notice
22 overstated the actual interest charge by \$0.39. (FAC ¶29-30; Oppo. at pp.21:12-22-5).
23 The court notes that the calculation of interest presented by Plaintiff is somewhat
24 suspect. Notwithstanding, the arguments raised are better addressed in context of an
25 evidentiary motion, and not on a motion to dismiss.

26 In sum, the court denies the motion to dismiss Count 5.

27 The Rosenthal Act Claim

28 As the predicate for Plaintiff's Rosenthal Act claim is a violation of the FDCPA,

1 the court denies the motion to dismiss this claim because two of the FDCPA claims
2 survive CMRE's motion to dismiss.


3 **The Motion for Summary Judgment**

4 Pursuant to Fed.R.Civ.P. 12(d), the court converts the motion to dismiss to one
5 for summary judgment. The two remaining issues in this case are (1) whether Plaintiff
6 was provided with page two of the Validation Notice and (2) whether the interest
7 calculation set forth in the December 9, 2014 collection notice overstated the amount
8 of interest by \$0.39. These are discrete, narrowly focused factual issues readily subject
9 to discovery and, presumably, resolution by summary judgment.² The parties are
10 instructed to complete discovery and file cross motions for summary judgment by
11 March 25, 2016, opposition briefs by April 8, 2016, and reply briefs by April 15, 2016.
12 The motion for summary judgment is set for oral argument on *April 25, 2016 at*
13 *10:00 a.m.*

14 In conclusion, the court grants the motion to dismiss Counts 1, 2, 4, 6-8 with
15 prejudice, denies the motion to dismiss Counts 3 and 5, and denies the motion to
16 dismiss the Rosenthal Act claim. The court also sets a summary judgment hearing date
17 of *April 25, 2016 at 10:00 a.m.*, to resolve factual disputes related to Counts 3 and 5.

18 **IT IS SO ORDERED.**

19 DATED: January 21, 2016

20 
21 Hon. Jeffrey T. Miller
United States District Judge

22 cc: All parties

23
24
25
26

27 _____
28 ² The court notes that this procedure is consistent with Fed.R.Civ.P. 1 and will promote the “just, speedy, and inexpensive determination” of the remaining issues in this action.