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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Marvin Randall,

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No. CV-09-387-PHX-LOA

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Plaintiff,

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**ORDER**

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vs.

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Nelson & Kennard; LVNV Funding,  
L.L.C.,

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Defendants.

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This action arises on Plaintiff Marvin Randall’s (“Plaintiff”) Motion to Dismiss Defendant’s Counterclaim pursuant to Fed.R.Civ.P. 12(b)(1). (docket # 15) After review of the parties’ briefings and the relevant authorities, the Court will exercise its discretion to decline supplemental jurisdiction and will dismiss Defendant’s counterclaim without prejudice.

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**INTRODUCTION**

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Plaintiff moves to dismiss Defendant LVNV Funding, L.L.C.’s (“LVNV Funding”) counterclaim on the grounds that this District Court lacks subject-matter jurisdiction to adjudicate the counterclaim. (docket # 15) In particular, Plaintiff contends the counterclaim is permissive, not compulsory; there is no independent basis for federal jurisdiction for the Court to adjudicate the counterclaim; and, if subject-matter jurisdiction does exist, the Court should exercise its discretion to decline supplemental jurisdiction under

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1 28 U.S.C. § 1367. Plaintiff requests Defendant’s counterclaim be dismissed with prejudice.

2 **BACKGROUND**

3 Based on the limited record presented to date, the Court discerns the facts as  
4 follows. On February 25, 2009, Plaintiff commenced this lawsuit, alleging a violation of the  
5 Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (the “Act” or “FDCPA”) by  
6 Defendants’ attempts “to unlawfully and abusively collect a debt allegedly owed by Plaintiff,  
7 and . . . cause[ing] Plaintiff damages.” (docket # 1) Plaintiff contends Defendant LVNV  
8 Funding, a Nevada limited liability collection agency, and its lawyers, Defendant Nelson  
9 & Kennard, a Sacramento, California law firm, are “debt collectors” within the meaning of  
10 the Act.<sup>1</sup> (docket ## 8, 10) Plaintiff alleges Defendants violated the Act by suing Plaintiff,  
11 an Arizona resident and “consumer”<sup>2</sup> under the Act, for a credit card debt in the Riverside  
12 County Superior Court, a supposedly improper venue. (docket # 15 at 3) Plaintiff argues  
13 that Riverside County is a “judicial district . . . outside of where Plaintiff allegedly signed the  
14 contract sued upon and outside the judicial district . . . where Plaintiff resided at the  
15 commencement of the [debt collection] action.” (*Id.*) Alleging violations of 15 U.S.C. §§  
16 1692i, 1692e and 1692e(10), Plaintiff claims “[D]efendants intended, through this conduct,  
17 to file their action in an inconvenient forum and to obtain a default judgment through  
18 deceptive practice.” (*Id.*)

19 LVNV Funding claims that on or about May 9, 2002, Plaintiff was issued a  
20 “Sears Gold Mastercard” credit card and a corresponding extension of credit by Sears  
21 National Bank, a non-party. (docket # 10 at 2) The Counterclaim alleges that after making  
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23 <sup>1</sup> The FDCPA defines a “debt collector” as “any person who uses any instrumentality  
24 of interstate commerce or the mails in any business the principal purpose of which is the  
25 collection of any debts, or who regularly collects or attempts to collect, directly or indirectly,  
26 debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). Debt  
27 collectors may include attorneys litigating cases on behalf of their clients. *Heintz v. Jenkins*,  
28 514 U.S. 291, 297 (1995).

<sup>2</sup> The term “consumer” means any natural person obligated or allegedly obligated to  
pay any debt. 15 U.S.C. § 1692a(3).

1 various purchases and payments on his credit card account, Plaintiff defaulted on his  
2 payment obligations with the last payment made on or about October 7, 2005. (*Id.* at 3) In  
3 2006, Sears charged-off Plaintiff’s account and assigned it to LVNV Funding. (*Id.*) Denying  
4 any wrongdoing, LVNV Funding argues the “true facts” reflect that on October 10, 2008,  
5 it “filed suit in the county of [Plaintiff’s] last known residence but was unable to effect  
6 service of process . . . . [Because] it was unable to effect service of process, LVNV Funding  
7 LLC dismissed its state court action[.]” on March 9, 2009. (docket # 23 at 2) In footnotes 2  
8 and 3 of its Response, *id.*, LVNV Funding requests the Court take judicial notice of the  
9 California Complaint, the process server’s “Non-Service/Return” showing multiple attempts  
10 to serve Plaintiff, and LVNV Funding’s voluntary dismissal of the lawsuit.<sup>3</sup> (docket # 24,  
11 Exhibits (“Exh.”) 1, 2, and 3). The amount of money sought in the California debt-collection  
12 suit was \$4,124.00 plus interest at the rate of 7%, reasonable attorney’s fees, and court costs.  
13 (*Id.*, Exh. 1 at 8)

14 **RULE 12(B)(1) MOTION TO DISMISS STANDARD**

15 Federal Rule of Civil Procedure 12(b)(1) authorizes a motion to dismiss for  
16 lack of subject-matter jurisdiction. *Tosco Corp. v. Communities For a Better Environment*,  
17 236 F.3d 495, 499 (9th Cir. 2001); Fed. R. Civ. P. 12(b)(1). Federal courts are courts of  
18 limited jurisdiction, and can only hear those cases that the Constitution and Congress have  
19 authorized them to adjudicate: namely, cases involving diversity of citizenship, a federal  
20 question, or cases to which the United States is a party. *Arbaugh v. Y & H Corp.*, 546 U.S.  
21 500, 513 (2006); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). “A federal  
22 court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively  
23 appears.” *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

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26 <sup>3</sup> A district court may properly take judicial notice pursuant to Fed. R. Evid. 201 of  
27 “matters of public record” without converting a motion to dismiss into a motion for summary  
28 judgment. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) (citing *Mack v. South Bay  
Beer Distrib.*, 789 F.2d 1279, 1282 (9th Cir. 1986) and *MGIC Indemnity Corp. v. Weisman*,  
803 F.2d 500, 504 (9th Cir. 1986)).

1 Because federal courts are courts of limited jurisdiction, the party invoking the jurisdiction  
2 of the court has the burden of proof. *Kokkonen*, 511 U.S. at 377; *Thornhill Pub. Co., Inc. v.*  
3 *General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

4 Federal Rule of Civil Procedure 12(b)(1)'s jurisdictional attacks may be facial  
5 or factual. "In a facial attack, the challenger asserts that the allegations contained in a  
6 complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual  
7 attack, the challenger disputes the truth of the allegations that, by themselves, would  
8 otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
9 (9th Cir. 2004); *Larson v. Johnson*, 2007 WL 4143082 (D.Ariz. 2007) (counterclaim  
10 dismissed without prejudice for failure to allege a connection to the subject matter of  
11 Plaintiff's claim for breach of contract against defendant).

12 With these standards in mind, the Court turns to Plaintiff's jurisdictional  
13 challenges to Defendant's counterclaim.

#### 14 **FAIR DEBT COLLECTION PRACTICES ACT**

15 "The FDCPA, 15 U.S.C. § 1692 *et seq.*, was enacted 'to eliminate abusive debt  
16 collection practices by debt collectors, to insure that those debt collectors who refrain from  
17 using abusive debt collection practices are not competitively disadvantaged, and to promote  
18 consistent State action to protect consumers against debt collection abuses.'" *Rowe v.*  
19 *Educational Credit Management Corp.*, 559 F.3d 1028, 1031 (9<sup>th</sup> Cir. 2009) (citing 15 U.S.C.  
20 § 1692(e)). "The FDCPA regulates the collection of 'debts' by 'debt collectors' by regulating  
21 the number and type of contacts a debt collector may make with the debtor." *Id.* The FDCPA  
22 "broadly prohibits a debt collector from using any false, deceptive, or misleading  
23 representation or means in connection with the collection of any debt." *Dunlap v. Credit*  
24 *Protection Ass'n*, 419 F.3d 1011, 1012 (9th Cir. 2005) (citing 15 U.S.C. § 1692e) (internal  
25 punctuation removed).

#### 26 **COUNTERCLAIM: COMPULSORY OR PERMISSIVE**

27 Federal Rule of Civil Procedure 13 defines two types of counterclaims:  
28 compulsory and permissive. Rule 13(a) states that "[a] pleading must state as a counterclaim

1 any claim . . . the pleader has against any opposing party if the claim: (A) arises out of the  
2 transaction or occurrence that is the subject matter of the opposing party’s claim; and (B)  
3 does not require adding another party over whom the court cannot acquire jurisdiction.” By  
4 contrast, Rule 13(b) defines a permissive counterclaim as a claim against an opposing party  
5 “that is not compulsory,” *i.e.*, a counterclaim that does not arise out of the transaction or  
6 occurrence that is the subject matter of the opposing party’s claim. Rule 13(a), (b), Fed. R.  
7 Civ. P.

8 To determine if claims arise out of the same transaction or occurrence, courts  
9 in the Ninth Circuit consider whether “the essential facts of the various claims are so  
10 logically connected that considerations of judicial economy and fairness dictate that all of  
11 the issues be resolved in one lawsuit.” *Pochiro v. Prudential Ins. Co. of Amer.*, 827 F.2d  
12 1246, 1249 (9th Cir.1987) (quoting *Harris v. Steinem*, 571 F.2d 119, 123 (2d Cir. 1978)  
13 (applying Fed.R.Civ.P. 13). Among the factors district courts consider in determining  
14 whether the test is met is whether “the facts necessary to prove the two claims substantially  
15 overlap, [and whether] the collateral estoppel effect of . . . the first action would preclude [the  
16 claims from being brought in a later action].” *Pochiro*, 827 F.2d at 1251. If a defendant fails  
17 to bring a compulsory counterclaim, he is barred from asserting that claim in a future  
18 proceeding. *Id.* (affirming dismissal of former employee’s claims for defamation, abuse of  
19 process, breach of employment contract and intentional interference with business  
20 relationship because such claims were compulsory counterclaims which should have been  
21 raised in employer’s prior state court action against employee for appropriating confidential  
22 consumer information.); *Sams v. Beech Aircraft*, 625 F.2d 273, 276 n. 4 (9th Cir. 1980)  
23 (citing *Baker v. Gold Seal Liquors*, 417 U.S. 467, 469, n. 1 (1974)).

24 **COUNTERCLAIM FOR DEBT OWED IN FDCPA ACTION**

25 “[A]lthough the Ninth Circuit has not specifically decided whether a  
26 counterclaim for the underlying debt in an FDCPA action is compulsory or permissive, most,  
27 if not all of the district courts within the Ninth Circuit . . . have determined that such a  
28 counterclaim is permissive.” *Marlin v. Chase Cardmember Services*, 2009 WL 1405196, \*

1 3 (E.D. Cal. 2009); *Koumarin v. Chase Bank USA*, 2008 WL 5120053 (N.D. Cal. 2008); *Witt*  
2 *v. Experian Information Solutions, Inc.*, 2008 WL 2489132, \* 4 (E.D. Cal. 2008); *Avery v.*  
3 *First Resolution Mgmt. Corp.*, 2007 WL 1560653 (D. Or. 2007), *affirmed by*, 568 F.3d 1018  
4 (9<sup>th</sup> Cir. 2009) (in debtor’s FDCPA action, Ninth Circuit affirms district court’s refusal to  
5 exercise supplemental jurisdiction over debt collector’s counterclaim on debt-owed and  
6 denial of plaintiff’s claim for award of attorney’s fees as a prevailing party); *Moore v. Old*  
7 *Canal Financial Corp.*, 2006 WL 851114 (D. Idaho 2006); *Sparrow v. Mazda American*  
8 *Credit*, 385 F.Supp.2d 1063, 1068 (E.D. Cal. 2005); *Campos v. Western Dental Svcs., Inc.*,  
9 404 F.Supp.2d 1164 (N.D. Cal. 2005); *Taylor v. Bryant, Inc.*, 275 F.Supp.2d 1305 (D. Nev.  
10 2003); *Hart v. Clayton-Parker and Associates, Inc.*, 869 F.Supp. 774, 776 (D. Ariz. 1994).

11           In *Peterson v. United Accounts, Inc.*, 638 F.2d 1134 (8th Cir. 1981), the Eighth  
12 Circuit, using analogies from Truth-in-Lending Act cases from other circuits, reversed the  
13 district court’s dismissal of the FDCPA lawsuit and reinstated the complaint on grounds that  
14 FDCPA claim asserted is permissive, rather than a compulsory counterclaim, and stated that  
15 the purpose of the FDCPA can best be effectuated by holding a FDCPA counterclaim to be  
16 permissive, rendering it cognizable in either the state or federal court. 638 F.2d at 1137. It  
17 concluded the circumstances giving rise to the original debt are separate and distinct from  
18 the collection activities undertaken by the collection agency. The court provided this  
19 analysis:

20           While the debt claim and the FDCPA counterclaim raised here may, in a  
21 technical sense, arise from the same loan transaction, the two claims bear no  
22 logical relation to one another. Although there is some overlap of issues raised  
23 in both cases as a result of the defenses raised in the state action, the suit on the  
24 debt brought in state court is not logically related to the federal action initiated  
25 to enforce federal policy regulating the practices for the collection of such  
26 debts.

27 *Id.*

28           Defendants concede that “[i]t seems well-settled in the Ninth Circuit that  
counter-claims for the debt claimed by the creditor defending [a FDCPA] claim are  
considered permissive.” (docket # 23 at 3) The Court agrees with the above authorities and  
finds that LVNV Funding’s counterclaim is permissive.

1 **SUPPLEMENTAL JURISDICTION**

2 **A. Whether Supplemental Jurisdiction Exists over Defendant’s Counterclaim.**

3 In 1990, Congress enacted the supplemental jurisdiction statute, 28 U.S.C. §  
4 1367. *CV Partners Inc. v. Boben*, 2009 WL 1331108, \* 1 n.2 (N.D. Cal. 2009) (indicating  
5 “[t]he Ninth Circuit has not explicitly addressed the issue of whether courts should still  
6 engage in a compulsory/permissive counterclaim analysis in light of Section 1367.”) Even  
7 if no independent basis for jurisdiction exists, section 1367(a) grants supplemental  
8 jurisdiction over state law counterclaims “that are so related to claims in the action within  
9 such original jurisdiction that they form part of the same case or controversy under Article  
10 III of the United States Constitution.” *Sparrow v. Mazda American Credit*, 385 F.Supp.2d  
11 1063, 1066 (E.D.Cal. 2005); *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 213 (2d Cir.  
12 2004). Thus, when a counterclaim meets the requirements of § 1367(a), a district court may  
13 exercise supplemental jurisdiction over such claim, even if no independent basis for  
14 jurisdiction exists. *Koumarin*, 2008 WL 5120053 at \* 2 (citing *Jones*, 358 F.3d at 213 and  
15 *Channell v. Citicorp Nat’l Servs., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996)). The “case or  
16 controversy” test mentioned above asks whether a counterclaim is “so related to claims in  
17 the action within such original jurisdiction that they form part of the same case or  
18 controversy under Article III of the United States Constitution.” *Sparrow*, 385 F.Supp.2d at  
19 1070.

20 Here, although LVNV Funding’s Counterclaim did not “arise” from the same  
21 “transaction or occurrence” as Plaintiff’s FDCPA claim, nonetheless it “derive[s] from a  
22 common nucleus of operative fact,” in that both claims are technically related to a single debt  
23 allegedly owed by Plaintiff to LVNV Funding. *Koumarin*, 2008 WL 5120053 at 3 (citing  
24 *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) that § 1367(a) is, at least,  
25 as broad as the pre-§ 1367 test which required that state and federal law claims “derive from  
26 a common nucleus of operative fact,”). In the numerous cases brought within the Ninth  
27 Circuit under the FDCPA since the passage of § 1367, all district courts have held  
28 supplemental jurisdiction exists over the defendant’s counterclaim for the underlying debt.

1 *Koumarin*, 2008 WL 5120053 at 3; *Campos*, 404 F.Supp.2d at 1169 (holding supplemental  
2 jurisdiction existed over counterclaim for underlying debt where counterclaim and FDCPA  
3 claim were “related to the single debt incurred by plaintiff”); *Sparrow*, 385 F.Supp.2d at  
4 1070. As the District Judge in *Campos* explained, “there will be some permissive  
5 counterclaims over which the court has supplemental jurisdiction and some it does not. The  
6 reason is that the standard for supplemental jurisdiction is broader than the standard for a  
7 counterclaim to be compulsory.” *Campos*, 404 F.Supp.2d at 1169 (citing Fed.R.Civ.P. 13(a)  
8 and 28 U.S.C. § 1367(a)).

9           The Court rejects Plaintiff’s argument that the Court should dismiss  
10 Defendant’s Counterclaim because there is no independent basis for federal jurisdiction to  
11 adjudicate the Counterclaim. The Court has supplemental jurisdiction over LVNV Funding’s  
12 Counterclaim.

### 13 **B. Whether to Exercise Supplemental Jurisdiction**

14           A district court’s exercise of supplemental jurisdiction is discretionary, and it  
15 may decline to exercise such jurisdiction. *City of Chicago v. International College of*  
16 *Surgeons*, 522 U.S. 156, 173 (1997). “[D]istrict courts [should] deal with cases involving  
17 pendent [supplemental] claims in the manner that best serves the principles of economy,  
18 convenience, fairness, and comity which underlie the pendent jurisdiction doctrine.” *Id.*  
19 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988)). Section 1367(c)  
20 provides:

21           The district courts may decline to exercise supplemental jurisdiction over a  
22 claim under subsection (a) if-

23           (1) the claim raises a novel or complex issue of State law,

24           (2) the claim substantially predominates over the claim or claims over which  
the district court has original jurisdiction,

25           (3) the district court has dismissed all claims over which it has original  
26 jurisdiction, or

27           (4) in exceptional circumstances, there are other compelling reasons for  
28 declining jurisdiction.



1 Title 28 U.S.C. § 1367(c). In addition to the factors contained in § 1367(c), the Supreme  
2 Court identified “a host of factors” to consider when deciding whether to exercise  
3 supplemental jurisdiction: “the circumstances of the particular case, the nature of the state  
4 law claims, the character of the governing state law, and the relationship between the state  
5 and federal claims.” *Cohill*, 484 U.S. at 357.

6 Plaintiff identifies primarily two reasons why the Court should decline to  
7 exercise supplemental jurisdiction: 1) allowing counterclaims for the underlying debt in  
8 FDCPA suits “would undermine congressional efforts to protect consumers by discouraging  
9 victims [a “chilling effect”] from asserting their rights under the FDCPA,” relying upon  
10 *Sparrow*, 385 F.Supp.2d at 1071; and 2) “public policy reasons should dissuade federal  
11 courts from hearing state-law based counterclaims brought by defendants against plaintiffs  
12 who have filed FDCPA suits against them[,]” citing *Ballard v. Equifax Check Serv., Inc.*,  
13 186 F.R.D. 589, 599 (E.D.Cal. 1999) (“The court finds that there are compelling reasons of  
14 public policy embodied in the FDCPA for declining jurisdiction in this case.”) (docket # 15  
15 at 8-9)

16 On the other hand, LVNV Funding argues that exercising supplemental  
17 jurisdiction would “(1) conserve the parties’ monetary resources; (2) promote judicial  
18 economy; (3) avoids litigation of duplicative claims, and (4) precludes the potential of  
19 inconsistent outcomes.” (docket # 23 at 5) Relying on *Koumarin*, 2008 WL 5120053 at 3-4,  
20 LVNV Funding claims “that the interests of judicial economy, efficiency and fairness  
21 outweigh the potential chilling effect,” given the relatively small amount of Plaintiff’s  
22 alleged debt, \$4,124.00, interest from July 28, 2006, attorneys’ fees and court costs. (*Id.* at  
23 6; docket # 24, Exh. 1 at 8) Rather, LVNV Funding argues, Plaintiff’s FDCPA “claim was  
24 brought to ‘chill’ the creditor from asserting its rights with respect to the collection of the  
25 debt.” (*Id.* at 7)

26 Whether to exercise supplemental jurisdiction in this case is a closer call than  
27 it initially appears. Here, the Court agrees with the District Judge in *Koumarin*, given the  
28 relatively small amount of Plaintiff’s alleged credit card debt (\$4,124.00), it seems unlikely

1 that the Court's exercise of supplemental jurisdiction over LVNV Funding's Counterclaim  
2 would have a "chilling effect" on Plaintiff's FDCPA claim or on potential analogous claims  
3 made by similarly situated individuals. Similarly, nor should any plaintiff expect a federal  
4 court to use the fact that case-by-case enforcement is expensive (perhaps too expensive to  
5 justify independent legal action in California) to bestow on plaintiff a legal right to avoid or  
6 delay collection, if the alleged credit card debt is in fact valid. *Koumarin*, 2008 WL 5120053  
7 at 4. As LVNV Funding points out, the exercise of supplemental jurisdiction in this case  
8 promotes most of the important goals, identified by the Supreme Court in *City of Chicago*,  
9 522 U.S. at 173, of judicial economy, convenience, fairness and efficiency, as all claims  
10 related to Plaintiff's alleged credit card debt will be resolved in a single action.

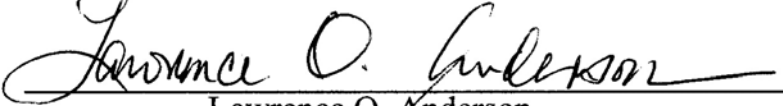
11           Accepting supplemental jurisdiction, however, will increase both the  
12 complexity and length of time to resolve Plaintiff's narrow and straightforward FDCPA  
13 claim. Although the Counterclaim issue is not novel (a debt allegedly owed), the Court,  
14 sitting in Arizona, will be required to determine choice-of-law questions and, if appropriate,  
15 apply California law to LVNV Funding's state claim. A California court is better suited to  
16 resolve California state law claims and disputes regarding state law. Declining supplemental  
17 jurisdiction also reduces the risk of incorrect application of California law and furthers the  
18 principle of comity. Accepting supplemental jurisdiction would also involve this District  
19 Court and its limited resources in legal questions of no federal significance and may  
20 substantially predominate over Plaintiff's FDCPA claim. *Leatherwood v. Universal Business*  
21 *Service Co.*, 115 F.R.D. 48, 50 (W.D.N.Y. 1987). Finally, considering the purpose of the  
22 FDCPA is to give those harmed by an alleged FDCPA violation a remedy against a debt  
23 collector regardless of whether the underlying debt is valid, the Court is persuaded to follow  
24 the majority of the district courts in the Ninth Circuit that strong public policy reasons exist  
25 for declining to exercise jurisdiction over LVNV Funding's Counterclaim. *Witt*, 2008 WL  
26 2489132 at \* 5; *Avery*, 2007 WL 1560653 at \* 8-9; *Moore*, 2006 WL 851114 at \* 4;  
27 *Campos*, 404 F.Supp.2d 1171; *Sparrow*, 385 F.Supp.2d at 1071; *Taylor*, 275 F.Supp.2d at  
28 1307. The Court finds compelling reasons to decline to exercise supplemental jurisdiction

1 over LVNV Funding's Counterclaim.

2 Accordingly,

3 **IT IS ORDERED** that Plaintiff Marvin Randall's Motion to Dismiss  
4 Defendant's Counterclaim, docket # 15, is **GRANTED**. Defendant LVNV Funding's  
5 Counterclaim is hereby **DISMISSED** but this dismissal is without prejudice.

6 DATED this 25<sup>th</sup> day of August, 2009.

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8 \_\_\_\_\_  
9 Lawrence O. Anderson  
United States Magistrate Judge

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