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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

David Gallaher,

Plaintiff,

v.

Autovest, LLC,

Defendant.

No. CV-15-0266-TUC-BGM

**ORDER**

Currently pending before the Court is Defendant Autovest, LLC’s Motion for Summary Judgment (Doc. 10). Plaintiff filed his Response (Doc. 20) and Defendant has replied (Doc. 23). Oral argument was held on March 29, 2016. *See* Minute Entry 3/29/2016 (Doc. 24).

**I. FACTUAL BACKGROUND**

**A. Defendant Autovest, LLC’s Relationship to Wells Fargo Financial, Inc.**

Defendant Autovest, LLC asserts that on July 8, 2010, it acquired certain contracts, including Plaintiff David Gallaher’s contract, from Wells Fargo Financial, Inc. pursuant to agreement. *See* Def.’s Statement of Facts (“SOF”) (Doc. 11) at ¶ 1; *see*

1 Def.'s Mot. for Summ. J. (Doc. 10), Bill of Sale and Assignment of Receivables Pursuant  
2 to the Purchase Agreement 7/8/2010 (Exh. "A"). Plaintiff agrees, for purposes of this  
3 motion, that Defendant acquired certain contracts; however, contests that it acquired his  
4 specific contract. Pl.'s Controverting SOF (Doc. 21) at ¶ 1. Under the terms of the  
5 purchase agreement, Wells Fargo granted Defendant a limited power of attorney to  
6 execute assignments relating to contracts Defendant had acquired under the agreement.  
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8 Def.'s SOF (Doc. 10), Form of Limited Power of Attorney 7/8/2010 (Exh. "C"). Plaintiff  
9 asserts that he "denies" this assertion, because "Defendant has not produced a copy of the  
10 Agreement, so the terms are unknown." Pl.'s Controverting SOF (Doc. 21) at ¶ 2. The  
11 Court notes, however, that Vice President Dean R. Anderson signed the Form of Limited  
12 Power of Attorney "[f]or itself and for and on behalf of the other Sellers under the  
13 Purchase Agreement[.]" Def.'s SOF (Doc. 10), Exh. "C".

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17 ***B. The Arizona State Court Proceeding***

18 The "Assignment of Installment Contract" ("the Assignment") attached to the  
19 complaint filed on behalf of Defendant in the Santa Cruz County Superior Court,  
20 *Autovest, LLC v. David Gallaher, et al.*, case number CV-14-258, lists Plaintiff David  
21 Gallaher as the obligor under a contract he entered into on February 18, 2008 in  
22 connection with the purchase of a 2005 Honda Accord. Def.'s SOF (Doc. 10),  
23 Assignment of Installment Contract (Exh. "D"); *see also* Compl. (Doc. 1), Exh. "A." The  
24 Assignment identifies the "assignor" as Wells Fargo and was executed by Darren Kazich  
25 as an "agent" of Wells Fargo. Def.'s SOF (Doc. 10), Exh. "D"; *see also* Compl. (Doc. 1),  
26 Exh. "A." Plaintiff denies that Darren Kazich executed the Assignment and that he was  
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1 an “agent” for Wells Fargo. Pl.’s Controverting SOF (Dox. 21) at ¶ 4. Plaintiff’s  
2 contention is based on counsel’s statement that Darren Kazich’s exact signature appears  
3 on nine other assignments unrelated to this cause of action. *See id.* The Assignment lists  
4 Wells Fargo as the original creditor and that the contract was assigned to Autovest on  
5 July 8, 2010. Def.’s SOF (Doc. 10), Exh. “D”; *see also* Compl. (Doc. 1), Exh. “A.” The  
6 Assignment does not state that Mr. Kazich is an employee of Wells Fargo. *Id.*  
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9 Pursuant to the Form of Limited Power of Attorney attached to the agreement  
10 between Defendant and Wells Fargo, Wells Fargo gave Defendant a limited power of  
11 attorney that granted Defendant the authority to execute assignments relating to the  
12 contracts subject to the Agreement. Def.’s SOF (Doc. 10), Exh. “C.” Mr. Kazich was  
13 authorized to execute the assignment on behalf of Wells Fargo as its agent pursuant to the  
14 Limited Power of Attorney attached to the agreement between Defendant and Wells  
15 Fargo. Def.’s SOF (Doc. 10), Basha Decl. at ¶ 6. Plaintiff argues that Ms. Basha’s  
16 statement that Mr. Kazich is an employee of Defendant Autovest, LLC is controverted by  
17 her prior trial testimony in the New Mexico state court case *Autovest, LLC v. Irene*  
18 *Evans*, et al., case number CV-13-2039, in which she stated “Mr. Kazich is a member of  
19 the member partners or member companies of Autovest. He is a member of BXS, which  
20 is an owner of Autovest, and through the purchase agreement with Wells Fargo, Wells  
21 Fargo provided Autovest a power of attorney to sign documents such as this.” Pl.’s  
22 Controverting SOF (Doc. 21), Evans Trial Tr. 1/8/2015 (Exh. “B”) at 19:22–20:2.  
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27 In the prior Santa Cruz County Superior Court proceeding, Plaintiff admitted that  
28 he had financed a vehicle with Wells Fargo and breached that contract. Def.’s SOF (Doc.

1 10), Answer and Affirmative Defenses, *Autovest, LLC v. Gallaher, et al.*, Ariz. Superior  
2 Ct. Case No. CV14-258 (Exh. “2”) at ¶¶ 4 & 5.

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4 **C. *The Instant Litigation***

5 On June 18, 2015, Plaintiff initiated the current cause of action. *See* Compl. (Doc.  
6 1). Plaintiff alleges that “Autovest created the Assignment and attached it to the  
7 Complaint [in the Arizona state court action] in order to falsely represent that a Wells  
8 Fargo employee signed the document verifying that Mr. Gallaher’s contract ha[d] been  
9 assigned to Autovest.” Compl. (Doc. 1) at ¶ 14. Plaintiff further alleges that “Autovest  
10 routinely uses these ‘Assignment’ forms signed by Kazich in order to mislead consumers  
11 into believing that the statement was signed by a Wells Fargo employee.” *Id.* at ¶ 17.  
12 Plaintiff asserts that “Autovest purposefully uses the misleading Assignment to falsely  
13 represented [sic] that Wells Fargo provided the Assignment to establish that Plaintiff’s  
14 contract had been assigned to Autovest.” *Id.* at ¶ 19. Plaintiff further asserts that “[a]t  
15 the time Autovest filed suit and attached the Assignment to the complaint, it knew, or  
16 should have known, that its misrepresentation as to the origin of the Assignment was  
17 false and misleading to the least sophisticated debtor.” *Id.* at ¶ 20. Plaintiff asserts that  
18 Defendant violated Sections 1692e, 1692e(2)(A), 1692e(5), 1692e(10), and 1692e(14), 15  
19 U.S.C., of the Fair Debt Collection Practices Act (“FDCPA”).

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24 **D. *Plaintiff’s Controverting Facts***

25 Upon receipt of the complaint in the Santa Cruz County Superior Court  
26 proceeding, Plaintiff reviewed the complaint and attachments, including the document  
27 identified as Assignment of Installment Contract. Pl.’s Controverting SOF (Doc. 21),  
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1 Gallaher Decl. (Exh. “3”) at ¶ 4. Upon review of the Assignment of Installment Contract,  
2 Plaintiff believed it was a document prepared by Wells Fargo and signed by Wells Fargo  
3 personnel. *Id.*, Exh. 3 at ¶ 5.  
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5 The Limited Power of Attorney states that it is “subject to the terms and conditions  
6 of the aforementioned Purchase Agreement,” which is identified as “that certain Purchase  
7 Agreement . . . dated as of July 8, 2010.” Def.’s SOF (Doc. 10), Exh. “C.” Defendant  
8 has not provided Plaintiff or the Court a copy of the Purchase Agreement.  
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## 10 11 **II. STANDARD OF REVIEW**

12 Summary judgment is appropriate when, viewing the facts in the light most  
13 favorable to the nonmoving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255  
14 (1986), “there is no genuine issue as to any material fact and [] the moving party is  
15 entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is “material” if it  
16 “might affect the outcome of the suit under the governing law,” and a dispute is  
17 “genuine” if “the evidence is such that a reasonable jury could return a verdict for the  
18 nonmoving party.” *Anderson*, 477 U.S. at 248. Thus, factual disputes that have no  
19 bearing on the outcome of a suit are irrelevant to the consideration of a motion for  
20 summary judgment. *Id.* In order to withstand a motion for summary judgment, the  
21 nonmoving party must show “specific facts showing that there is a genuine issue for  
22 trial,” *Celotex Corp. v. Catrett* in , 477 U.S. 317, 324 (1986). Moreover, a “mere scintilla  
23 of evidence” does not preclude the entry of summary judgment. *Anderson*, 477 U.S. at  
24 252. The United States Supreme Court has also recognized that “[w]hen opposing parties  
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1 tell two different stories, one of which is blatantly contradicted by the record, so that no  
2 reasonable jury could believe it, a court should not adopt that version of the facts for  
3 purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372,  
4 380, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007).  
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### 7 **III. ANALYSIS**

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9 Defendant seeks summary judgment because the Assignment was not materially  
10 false or misleading. *See* Def’s. Mot. for Summ. J. (Doc. 10). Plaintiff contends that Mr.  
11 Kazich’s signature “leads the least sophisticated debtor to believe that Wells Fargo ha[d]  
12 assigned his contract to Autovest.” Pl.’s Response (Doc. 20) at 4. Plaintiff further  
13 asserts that the “Assignor” listed in the Assignment is not the same entity listed in the  
14 original loan contract and that the Assignment is ineffective under Arizona law. *Id.* at 6–  
15 7.  
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#### 18 **A. The FDCPA**

19 “The FDCPA was enacted as a broad remedial statute designed to ‘eliminate  
20 abusive debt collection practices by debt collectors, to insure that those debt collectors  
21 who refrain from using abusive debt collection practices are not competitively  
22 disadvantaged, and to promote consistent State action to protect consumers against debt  
23 collection abuses.’” *Gonzales v. Arrow Fin. Serv., LLC*, 660 F.3d 1055, 1060 (9th Cir.  
24 2011) (quoting 15 U.S.C. § 1692(e)). “The FDCPA comprehensively regulates the  
25 conduct of debt collectors, imposing affirmative obligations and broadly prohibiting  
26 abusive practices.” *Id.* at 1060–61 (citations omitted). “The FDCPA is a strict liability  
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1 statue that ‘makes debt collectors liable for violations that are not knowing or  
2 intentional.’” *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027 (9th Cir. 2010) (quoting  
3 *Reichert v. Nat’l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008)).  
4

5 Section 1692e broadly prohibits the use of “any false, deceptive, or misleading  
6 representation or means in connection with the collection of any debt.” 15 U.S.C. §  
7 1692e. Proscribed conduct includes, but is not limited to:  
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- 9 (2) The false representation false representation of –  
10 (A) the character, amount, or legal status of any debt,

11 \* \* \*

- 12 (5) The threat to take any action that cannot legally be taken or that  
13 is not intended to be taken.

14 \* \* \*

- 15 (10) The use of any false representation or deceptive means to  
16 collect or attempt to collect any debt or to obtain information  
17 concerning a consumer.

18 \* \* \*

- 19 (14) The use of any business, company, or organization name other  
20 than the true name of the debt collector’s business, company, or  
21 organization.

22 15 U.S.C. § 1692e.

23 ***B. Least Sophisticated Debtor***

24 “Whether conduct violations [§ 1692e] . . . requires an objective analysis that takes  
25 into account whether the least sophisticated debtor would likely be misled by a  
26 communication.” *Gonzales v. Arrow Fin. Serv., LLC*, 660 F.3d 1055, 1061 (9th Cir.  
27 2011) (citations omitted) (alterations in original). “The objective least sophisticated  
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1 debtor standard is ‘lower than simply examining whether particular language would  
2 deceive or mislead a reasonable debtor.’ *Terran v. Kaplan*, 109 F.3d 1428, 1431–32 (9th  
3 Cir. 1997) (citations omitted). Moreover, because it is an objective standard, “the  
4 specific plaintiff need not prove that [ ]he was actually confused or misled, only that the  
5 objective least sophisticated debtor would be.” *Jensen v. Pressler & Pressler*, 791 F.3d  
6 413, 419 (3d Cir. 2015) (citations omitted). This standard “ensure[s] that the FDCPA  
7 protects all consumers, the gullible as well as the shrewd . . . the ignorant, the unthinking  
8 and the credulous.” *Clark v. Capital Cred & Collection Services, Inc.*, 460 F.3d 1162,  
9 1171 (9th Cir. 2006) (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1318–19 (2d Cir.  
10 1993)). “At the same time, the standard ‘preserv[es] a quotient of reasonableness and  
11 presum[es] a basic level of understanding and willingness to read with care.’” *Gonzales*,  
12 660 F.3d at 1062 (quoting *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008)).  
13 “In this circuit, a debt collector’s liability under § 1692e of the FDCPA is an issue of  
14 law.” *Gonzales*, 660 F.3d at 1061 (citing *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th  
15 Cir. 1997)).

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21 Additionally, “a false or misleading statement is not actionable under § 1692e  
22 unless it is material.” *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir.  
23 2010). “[M]ateriality is an ordinary element of any federal claim based on a false or  
24 misleading statement.” *Id.* (citations omitted). The Ninth Circuit Court of Appeals  
25 relying on the Seventh Circuit’s opinion in *Hahn v. Triumph Partnerships LLC*, 557 F.3d  
26 755 (7th Cir. 2009), recognized that “[t]he purpose of the FDCPA, ‘to provide  
27 information that helps consumers to choose intelligently,’ would not be furthered by  
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1 creating liability as to immaterial information because “by definition immaterial  
2 information neither contributes to that objective (if the statement is correct) nor  
3 undermines it (if the statement is incorrect).” *Donohue*, 592 F.3d at 1033. “[I]f a  
4 statement would not mislead the unsophisticated consumer, it does not violate the  
5 [Act]—even if it is false in some technical sense.” *Id.* (quoting *Hahn*, 557 F.3d at 758)  
6 (2d alteration in original).  
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9 **C. *Kazich as an Agent of Wells Fargo***

10 Plaintiff’s Complaint asserts that “Autovest routinely uses these ‘Assignment’  
11 forms signed by Kazich in order to mislead consumers into believing that the statement  
12 was signed by a Wells Fargo employee.” Compl. (Doc. 1) ¶ 17; *see also* Pl.’s Response  
13 (Doc. 20) at 4–7.  
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15 The assignment indicates David Gallaher as the “obligor,” Wells Fargo Financial,  
16 Inc. as the “assignor” and is signed by “Darren Kazich, Agent.” Def.’s SOF (Doc. 10),  
17 Assignment of Installment Contract (Exh. “D”); *see also* Compl. (Doc. 1), Exh. “A.” The  
18 Oxford English Dictionary defines “agent” as “[a] person who . . . acts upon someone or  
19 something; one who . . . exerts power; the doer of an action.” *OED Online*. Oxford  
20 University Press (March 2016). An “employee” is defined as “[a] person who works for  
21 an employer; *spec.* a person employed for wages or a salary under an employment  
22 contract[.]” *OED Online*. Oxford University Press (March 2016). Accepting Plaintiff’s  
23 contention that the least sophisticated debtor would confuse Darren Kazich position as  
24 that of a Wells Fargo employee as true, the Court finds that such confusion is immaterial.  
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26 Whether one believes that Mr. Kazich is an agent or an employee of Wells Fargo leads to  
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1 the same conclusion — he possessed the authority to assign the contract to Autovest.  
2 Plaintiff has not demonstrated how this confusion would in any way alter the least  
3 sophisticated debtor’s response. At oral argument, Plaintiff’s counsel emphasized that  
4 the attachment of the assignment to the state court complaint is what makes the  
5 assignment misleading. This assertion is without support. As such, the Court finds  
6 summary judgment in favor of Defendant is appropriate.  
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9 ***D. Plaintiff’s Additional Arguments***

10 Plaintiff raises additional arguments in his response to Defendant’s summary  
11 judgment motion that he did not allege as claims in his Complaint, *e.g.*, invalidity of  
12 assignment under Arizona law; incorrect name of lender (Wells Fargo Financial, Inc.  
13 instead of Wells Fargo Financial Arizona, Inc.); and the implication that the document is  
14 the actual assignment. “A complaint . . . put[s] the defendant on notice of the evidence it  
15 needs to adduce in order to defend against the plaintiff’s allegations.” *Coleman v.*  
16 *Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000). “Simply put, summary judgment is not  
17 a procedural second chance to flesh out inadequate pleadings.” *Wasco Products, Inc. v.*  
18 *Southwall Technologies, Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). As such, the Court  
19 declines to reach these issues.  
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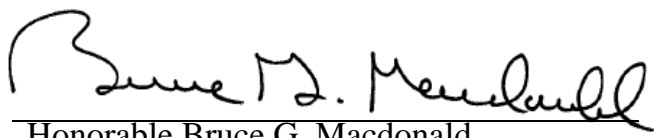
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**IV. CONCLUSION**

For the reasons discussed, *supra*, Defendant Autovest, LLC's Motion for Summary Judgment (Doc. 10) is GRANTED. The Clerk of the Court shall enter judgment and close its file.

Dated this 30th day of March, 2016.



Honorable Bruce G. Macdonald  
United States Magistrate Judge