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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NICOLE LYON,

Plaintiff,

v.

BERGSTROM LAW, LTD.,

Defendant.

No. 1:16-cv-00401-DAD-SKO

ORDER DENYING DEFENDANT’S
MOTION TO DISMISS

(Doc. No. 5)

On March 24, 2016, plaintiff Nicole Lyon filed a complaint alleging damages against defendant Bergstrom Law, Ltd. for violations of (1) the Fair Debt Collections Practices Act (“FDCPA”), 15 U.S.C. §§ et seq. and (2) the Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”), Cal. Civ. Code §§ 1788–1788.32. (Doc. No. 1.) On May 31, 2016, defendant moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (Doc. No. 5.) On July 19, 2016, the court heard oral argument on the motion. (Doc. No. 17.) Attorneys Crosby Connolly and Robert Hyde appeared at the hearing telephonically for plaintiff. (Id.) Attorney Katherine Heidbrink appeared telephonically for defendant. (Id.) For the reasons set forth below, defendant’s motion to dismiss will be denied.

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1 **BACKGROUND**

2 Plaintiff alleges that sometime before February 2016, she fell behind in payments
3 allegedly owed on a debt. (Doc. No. 1, at 4.) On or about February 2016, defendant contacted
4 plaintiff by telephone “in an attempt to collect [p]laintiff’s alleged debt and left [p]laintiff a
5 voicemail.” (Id.) Defendant, however, did not disclose in this voicemail message that the
6 communication was from a debt collector. (Id.) Plaintiff alleges that this conduct violated 15
7 U.S.C. § 1692e(11)’s required disclosure that the communication is from a debt collector. (Id.)
8 Because this portion of the FDCPA is incorporated by reference in the Rosenthal Act, plaintiff
9 alleges that the conduct violated the Rosenthal Act as well. (Id.)

10 Defendant has moved to dismiss plaintiff’s complaint on the grounds that voicemail
11 messages providing only a name and callback number should not be deemed “communication”
12 subject to § 1692e(11)’s required disclosure that the communication is from a debt collector
13 because to make that disclosure in these circumstances could subject the debt collector to liability
14 under violated 15 U.S.C. § 1692c(b) for the unintentional disclosure of the existence of debt to
15 third parties. (Doc. No. 5.) Furthermore, defendant notes, courts have found that repeated calling
16 by debt collectors and not leaving any message can violate the FDCPA as well. (Id.)

17 **LEGAL STANDARD**

18 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
19 sufficiency of the complaint. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir.
20 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of
21 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901
22 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to
23 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A
24 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
25 the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S.
26 at 678.

27 In determining whether a complaint states a claim on which relief may be granted, the
28 court accepts as true the allegations in the complaint and construes the allegations in the light

1 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*
2 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se complaints are held to less
3 stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519,
4 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the
5 form of factual allegations. *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th
6 Cir. 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than
7 an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A
8 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the
9 elements of a cause of action.” *Twombly*, 550 U.S. at 555. See also *Iqbal*, 556 U.S. at 676
10 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
11 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove
12 facts which it has not alleged or that the defendants have violated the . . . laws in ways that have
13 not been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,
14 459 U.S. 519, 526 (1983).

15 ANALYSIS

16 The purpose of the FDCPA is to protect against harassing, oppressive or abusive conduct
17 by debt collectors. 15 U.S.C. § 1692d. Section 1692e of the FDCPA prohibits any “false,
18 deceptive, or misleading representation or means in connection with the collection of any debt.”
19 *Id.* at § 1692e. The Ninth Circuit has held that the statute is to be liberally construed so as to
20 protect the “least sophisticated debtor.” *Clark v. Capital Credit & Collection, Inc.*, 460 F.3d
21 1162, 1171 (9th Cir. 2006). See also *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938–39
22 (9th Cir. 2007). This standard is to be applied in order to “ensure that the FDCPA protects all
23 consumers, the gullible as well as the shrewd . . . the ignorant, the unthinking and the credulous.”
24 *Clomon v. Jackson*, 988 F.2d 1314, 1318–19 (2d Cir. 1993). Both the language of the statute
25 itself and the decisions of this circuit therefore demand a broad reading of the protections of the
26 FDCPA.

27 The definition of a “communication” under the FDCPA is “the conveying of information
28 regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2).

1 Many courts have found that voice mail messages left by debt collectors for debtors are
2 “communications” within the meaning of the statute regardless of whether a debt is mentioned in
3 the message. *Berg v. Merchants Assoc. Collection Div., Inc.*, 586 F. Supp. 2d 1336 (S.D. Fla.
4 2008) (citing *Belin v. Litton Loan Servicing, LP*, No. 8:06-cv-760-T24-EAJ, 2006 WL 1992410
5 *4 (M.D. Fla. July 14, 2006) (holding that messages left on debtor’s answering machines were
6 “communications” under the FDCPA)); *Hosseinzadeh v. M.R.S. Assocs. Inc.*, 387 F. Supp. 2d
7 1104, 1115–16 (C.D. Cal. 2005) (holding that a voice mail message is a “communication” under
8 the FDCPA); but see *Biggs v. Credit Collections Inc.*, No. CIV-07-0053-F, 2007 WL 4034997, at
9 *4 (W.D. Okla. Nov. 15, 2007) (ruling that a voice mail message by a debt collector was not a
10 communication because it contained no information regarding a debt); *Koby v. ARS Nat. Services,*
11 *Inc.*, No. 3:09-cv-00780-JMA, 2010 WL 1438763, at *3-4 (S.D. Cal. Mar. 29, 2010) (a message
12 which merely stated caller’s name and asked for a return call, but did not convey directly or
13 indirectly any information about the debt was not “communication” under the FDCPA).

14 Section 1692e(11) includes a non-exclusive list of conduct that constitutes a false or
15 misleading representations. Section 1692e(11) provides the following conduct is a violation of
16 the FDCPA:

17 The failure to disclose . . . in [the] initial oral communication that
18 the debt collector is attempting to collect a debt and that any
19 information obtained will be used for that purpose, and the failure
to disclose in subsequent communications that the communication
is from a debt collector . . . [.]

20 Courts have held that not disclosing the above information in a message left for the debtor can be
21 a violation of § 1692e(11). See *Costa v. National Action Financial Services*, 634 F. Supp. 2d
22 1069 (E.D. Cal. 2007) (finding a voice mail message stating the caller received a phone call in her
23 office for the plaintiff and asking her to return the call were “communications” within the
24 definition of section 1692e(2)); *Hosseinzadeh*, 387 F. Supp. 2d at *1104 (finding messages
25 conveying the fact there was an important matter to attend to and instructions how to do so were
26 “communications” within the meaning of the statute); see also *Foti v. NCO Financial Systems,*
27 *Inc.*, 424 F. Supp. 2d 643 (S.D. N.Y. 2006) (finding that a message solely identifying the debt
28 collector as “NCO Financial Systems” was insufficient to satisfy disclosure requirement of

1 § 1692e(11) when the message left for the plaintiff contained “no other suggestion or clue that the
2 correspondence [was] from a debt collector”).

3 Here, the message plaintiff alleges that defendant left on her answering machine
4 constitutes “communication” within the meaning of § 1692a(2). Plaintiff alleges that “[o]n or
5 about February, 2016, [d]efendant contacted [p]laintiff by telephone in an attempt to collect
6 [p]laintiff’s alleged debt and left [p]laintiff a voicemail. In this February, 2016 voicemail,
7 [d]efendant failed to disclose in this communication that the communication was from a debt
8 collector.” (Doc. No. 1, at 4.) Although plaintiff has not alleged exactly what was said in the
9 message, § 1692a(2) applies to information conveyed “directly or indirectly.” *Hosseinzadeh*, 387
10 F. Supp. 2d at 1116. See also *Belin*, 2006 WL 1992410, at *4 (where messages were repeatedly
11 left on plaintiff’s answering machine only giving the name of the caller, a phone number to call,
12 directions to have plaintiff call that number, but not disclosing that they came from a debt
13 collector found to be messages indirectly conveying information about a debt because their
14 purpose was to have the debtor to return the call to discuss the debt).


15 Accordingly, this court concludes the message allegedly left by defendant was a
16 “communication,” subjecting defendant to the provisions of § 1692e. Since plaintiff alleges
17 defendant did not disclose that this communication was from a debt collector, plaintiff has
18 sufficiently alleged a violation of § 1692e(11). See *Edwards v. Niagra Credit Solutions, Inc.*, 584
19 F.3d 1350, at 1353-54 (7th Cir. 2009) (Alarcon, J. sitting by designation) (“It was not reasonable
20 for [defendant] to violate § 1692e(11) of the Fair Debt Collection Practices Act with every
21 message it left in order to avoid the possibility that some of those messages might lead to a
22 violation of § 1692c(b).”)

23 For the reasons set forth above,

- 24 1) Defendant’s motion to dismiss the complaint (Doc. No. 5) is denied; and
25 2) Defendant is directed to file an answer within fourteen days after notice of this order.

26 IT IS SO ORDERED.

27 Dated: August 5, 2016

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UNITED STATES DISTRICT JUDGE