

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**THOMAS MORRISON, individually and on
behalf of all other similarly situated,**

1:17-cv-00743-LJO-JLT

**MEMORANDUM DECISION AND
ORDER DISMISSING PLAINTIFF'S
CLAIMS UNDER THE RFDCPA**

**DEVRY UNIVERSITY, INC., and DOES 1-10,
inclusive,**

Defendants.

I. PRELIMINARY STATEMENT TO PARTIES AND COUNSEL

Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this Court is unable to devote inordinate time and resources to individual cases and matters. Given the shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters necessary to reach the decision in this order. The parties and counsel are encouraged to contact the offices of United States Senators Feinstein and Harris to address this Court's inability to accommodate the parties and this action. The parties are required to reconsider consent to conduct all further proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to parties than that of U.S. District Judge Lawrence J. O'Neill, who must prioritize criminal and older civil cases.

Civil trials set before Judge O'Neill trail until he becomes available and are subject to suspension mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if Judge O'Neill is unavailable on the original date set for trial. Moreover, this Court's Fresno Division randomly and without advance notice reassigned civil actions to U.S. District Judges throughout the nation to serve as

1 visiting judges. In the absence of Magistrate Judge consent, this action is subject to reassignment to a
2 U.S. District Judge from inside or outside the Eastern District of California.

3 **II. INTRODUCTION**

4 This case involves claims for alleged violations of the Rosenthal Fair Debt Collection Practices
5 Act (“RFDCPA”), Cal. Civil Code. § 1788 *et seq.*, and the Servicemembers Civil Relief Act (“SCRA”).
6 50 U.S.C. § 3901 *et seq.* On June 6, 2017, Defendant DeVry University, Inc. (“Defendant”) filed a
7 motion to dismiss the RFDCPA claims. CM/ECF Document No. (“Doc.”) 5. Plaintiff filed an opposition
8 on July 10, 2017. Doc. 6. Defendant filed a reply on July 17, 2017. Doc. 7. For the following reasons,
9 Plaintiff’s RFDCPA claims are DISMISSED.

10 **III. BACKGROUND**

11 The following facts are drawn from the complaint and filings in this matter, and are accepted as
12 true only for the purpose of this motion to dismiss. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
13 2009). Plaintiff is a retired member of the armed services of the United States. Doc. 1 at 26, ¶ 4. Plaintiff
14 was eligible for fully paid tuition at any college, university, or trade school through the Veterans
15 Administration. *Id.* Plaintiff attended DeVry University, a for-profit university. *Id.* at 25, ¶ 3; 26, ¶ 5. On
16 February 3, 2017, Defendant mailed to Plaintiff one or more collection letters (“the letters”) attempting
17 to collect a purported \$60 debt which Defendant asserted was in default. *Id.* at 11, ¶¶ 15-16. In the
18 letters, Defendant stated that “it is our intent to notify a national credit bureau that you are in default of
19 your Devry [sic] University account” and that “[t]his notification could have an adverse effect on you
20 when applying for a personal loan or credit cards.” *Id.* at 11, ¶¶ 18-19 (emphasis omitted). Defendant
21 also stated in the letters “I sincerely hope that you response [sic] because we do not like to adopt such
22 drastic procedures that could have serious consequences and could result in unnecessary expense.” *Id.* at
23 12, ¶ 20. The letters did not contain any statement of Plaintiff’s rights under the RFDCPA or the Fair
24 Debt Collection Practices Act (“FDCPA”), including Plaintiff’s right to dispute the debt and right to a
25 verification of the debt if the debt is disputed. *Id.* at ¶¶ 21-24. The letters also stated that “legal action is

1 being considered as state law applies.” *Id.* at ¶ 25.

2 Plaintiff filed a complaint, alleging that the letters constituted violations of the RFDCPA, in the
3 Superior Court of the State of California for the County of Kern (“Kern County Superior Court”) on
4 April 14, 2017. Doc. 1 at 8. On April 21, 2017, Plaintiff filed a separate complaint alleging violation of
5 the SCRA in Kern County Superior Court, alleging that Defendant had acknowledged Plaintiff’s
6 military enlistment and agreed not to charge him directly for tuition. Doc. 1 at 25-27. On May 20, 2017,
7 the Kern County Superior Court consolidated the RFDCPA and SCRA cases. Doc. 1 at 32. Also on May
8 30, 2017, Defendant filed a notice of removal of the consolidated case. Doc. 1.

9 **IV. STANDARD OF DECISION**

10 A Rule 12(b)(6) motion challenges the legal sufficiency of the opposing party’s pleadings.
11 Dismissal of an action under Rule 12(b)(6) is proper where there is either a “lack of a cognizable legal
12 theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica*
13 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). When considering a motion to dismiss for failure to
14 state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and construed
15 in the light most favorable to the pleading party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38
16 (9th Cir. 1996). The inquiry is generally limited to the allegations made in the complaint. *Lazy Y Ranch*
17 *Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

18 To overcome a Rule 12(b)(6) challenge, the complaint must allege “enough facts to state a claim
19 to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is
20 plausible on its face when “the plaintiff pleads factual content that allows the court to draw the
21 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.
22 662, 678 (2009). A plausible claim is one which provides more than “a sheer possibility that a defendant
23 has acted unlawfully.” *Id.* A claim which is possible but not supported by enough facts to “nudge [it]
24 across the line from conceivable to plausible . . . must be dismissed.” *Twombly*, 550 U.S. at 570.

25 A complaint facing a Rule 12(b)(6) challenge “does not need detailed factual allegations [but] a

1 plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and
2 conclusions, and a formulaic recitation of the element of a cause of action will not do." *Id.* at 555
3 (internal citations omitted). In essence, "a complaint . . . must contain either direct or inferential
4 allegations respecting all the material elements necessary to sustain recovery under some viable legal
5 theory." *Id.* at 562. To the extent that any defect in the pleadings can be cured by the allegation of
6 additional facts, the plaintiff should be afforded leave to amend, unless the pleading "could not possibly
7 be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*,
8 911 F.2d 242, 247 (9th Cir. 1990). In determining whether amendment would be futile, the court
9 examines whether the complaint could be amended to cure the defect requiring dismissal "without
10 contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus., Inc.*, 912 F.2d
11 291, 296 (9th Cir. 1990). Leave to amend should be freely given "when justice so requires," Fed. R. Civ.
12 P. 15, taking into account the purpose of Rule 15 to "facilitate decision on the merits, rather than on the
13 pleadings or technicalities." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

14 **V. ANALYSIS**

15 Plaintiff alleges that Defendant violated the RFDCPA by engaging in conduct prohibited by
16 sections of the FDCPA, specifically conduct prohibited by 15 U.S.C. §§ 1692d, 1692g(a)(3)-(4), and
17 1692e(4)-(5). Doc. 1 at 17-18, ¶¶ 42-43. The RFDCPA requires compliance with the provisions of the
18 FDCPA, and a plaintiff may state a claim for violation of the RFDCPA by showing that a defendant
19 violated provisions of the FDCPA, subject to statutory limitations. Cal. Civ. Code § 1788.17; *Riggs v.*
20 *Prober & Raphael*, 681 F.3d 1097, 1100 (9th Cir. 2012). As a general rule, whether an act "violates the
21 [RFDCPA] turns on whether it violates the FDCPA." *Riggs*, 681 F.3d at 1100.

22 One important distinction between the RFDCPA and the FDCPA is how each defines a debt
23 collector. A "debt collector," as defined in the RFDCPA, includes "any person who, in the ordinary
24 course of business, regularly, on behalf of himself or herself or others, engages in debt collection," and
25 therefore includes those collecting debts on their own behalf. Cal. Civ. Code § 1788.2(c); *Masuda v.*

1 *Citibank, N.A.*, 38 F. Supp. 3d 1130, 1134 (N.D. Cal. 2014). The FDCPA, on the other hand, designates
2 as debt collectors only those persons who are attempting to collect on an obligation originally owed to
3 another person. 15 U.S.C. § 1692a(6). The RFDCPA's definition of debt collector is therefore "broader
4 and more inclusive than under the FDCPA because it allows for those collecting debts on their own
5 behalf to be considered 'debt collectors.'" *Masuda*, 38 F. Supp. 3d at 1134.

6 **A. RFDCPA Claim Premised on 15 U.S.C. § 1692g**

7 Defendant argues that Plaintiff's claims for violation of the RFDCPA due to non-compliance
8 with §1692(g) must be dismissed because Plaintiff has not pled a cognizable claim. Doc. 5-1 at 10.
9 Defendant, citing California Civil Code § 1788.17, asserts that the RFDCPA specifically exempts
10 entities attempting to collect their own debts from compliance with § 1692g. *Id.* at 9-10. Plaintiff offers
11 no rebuttal to Defendant's RFDCPA arguments. Doc. 6 at 11-14.¹

12 Section 1692g requires a debt collector to provide to a consumer, within five days after an initial
13 communication, a written notice including:

- 14 (1) the amount of the debt;
- 15 (2) the name of the creditor to whom the debt is owed;
- 16 (3) a statement that unless the consumer, within thirty days after receipt of the notice,
17 disputes the validity of the debt, or any portion thereof, the debt will be assumed to be
 valid by the debt collector;
- 18 (4) a statement that if the consumer notifies the debt collector in writing within the thirty-
19 day period that the debt, or any portion thereof, is disputed, the debt collector will obtain
 verification of the debt or a copy of a judgment against the consumer and a copy of such
 verification or judgment will be mailed to the consumer by the debt collector; and
- 20 (5) a statement that, upon the consumer's written request within the thirty-day period, the
21 debt collector will provide the consumer with the name and address of the original
 creditor, if different from the current creditor.

22 15 U.S.C. § 1692g(a). The notice required by § 1692g "is commonly referred to as a 'validation'"

24
25 ¹ Plaintiff argues in his opposition that Defendant is liable for violations of § 1692g under the FDCPA, but Plaintiff's
 complaint does not allege any violations of the FDCPA, except as incorporated by the RFDCPA. Doc. 1 at 8-12; Doc. 6 at
 11-14.

1 notice.” *Mashiri v. Epstein Grinnell & Howell*, 845 F.3d 984, 991 (9th Cir. 2017).

2 The RFDCPA provides that debts collectors, including creditors collecting their own debts, must
3 generally comply with the provisions of the FDCPA, but exempts “any person specified in paragraphs
4 (A) and (B) of subsection (6) of Section 1692a of Title 15 of the United States Code or that person’s
5 principal.” *Id.* The persons specified in the aforementioned paragraphs are “any officer or employee of a
6 creditor while, in the name of the creditor, collecting debts for [a creditor named in § 1692a(6)],” and
7 “any person while acting as a debt collector for another person, both of whom are related by common
8 ownership or affiliated by corporate control, if the person acting as a debt collector does so only for
9 persons to whom it is so related or affiliated and if the principal business of such person is not the
10 collection of debts.” 15 U.S.C. § 1692a(6)(A)-(B). In plain English, § 1692a(6)(A) refers to “creditors
11 collecting money on their own behalf.” *Marcotte v. General Elec. Capital Servs.*, 709 F. Supp. 2d 994,
12 998 (S.D. Cal. 2010). In enacting the RFDCPA, California elected to require that creditors collecting
13 their own debt comply with the FDCPA generally but chose not to require compliance with the initial
14 disclosure and debt validation provisions found at § 1692e(11) and § 1692(g), respectively. The
15 RFDCPA, therefore, does not require that entities collecting on their own debts comply with § 1692g.
16 As Defendant was collecting its own debt, and is therefore not subject to § 1692g under the RFDCPA,
17 Plaintiff’s RFDCPA claim premised on violations of § 1692g are DISMISSED. Amendment of this
18 claim would be futile, and leave to amend is consequently denied. *See Bonin v. Calderon*, 59 F.3d 815,
19 845 (9th Cir. 1995).

20 **B. RFDCPA Claim Premised on 15 U.S.C. §§ 1692e(4) and (5)**

21 Defendant contends that Plaintiff has failed to state a claim for violation of the RFDCPA under
22 15 U.S.C. §§ 1692e(4) and (5), arguing that the complaint does not plead facts establishing a violation of
23 either section. Doc. 5-1 at 11. Plaintiff argues that by including the statement “I sincerely hope that you
24 response [sic] because we do not like to adopt such drastic procedures that could have serious
25 consequences and could result in unnecessary expense” the letters threaten litigation which Defendant

1 did not intend to initiate. Doc. 6 at 16-18. Defendant also argues that Plaintiff did not address its
2 arguments regarding § 1692(e)(4), and has therefore waived the claim. Doc. 7 at 4-5.

3 As a preliminary matter, while Plaintiff did not respond in any great detail to Defendant's
4 arguments regarding § 1692e(4), Plaintiff did briefly touch on that subsection and on the allegations
5 which he believes constitute a violation. *See* Doc. 6 at 15. Therefore, the Court finds that Plaintiff has
6 not waived his §1692e(4) claim.

7 Section 1692e, as applied through the RFDCPA, bars debt collectors from using "any false,
8 deceptive, or misleading representation or means in connection with the collection of any debt." 15
9 U.S.C. § 1692e. Specific conduct prohibited by § 1692e includes, but is not limited to, "[t]he
10 representation or implication that nonpayment of any debt will result in the arrest or imprisonment of
11 any person or the seizure, garnishment, attachment, or sale of any property or wages of any person
12 unless such action is lawful and the debt collector or creditor intends to take such action," and "[t]he
13 threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. §§
14 1692e(4)-(5).

15 In considering whether a statement in a debt collection communication violates the FDCPA,
16 courts apply the "least sophisticated debtor" standard. *Guerrero v. RJM Acquisitions, LLC*, 499 F.3d
17 926, 934 (9th Cir. 2007). "An FDCPA plaintiff need not even have actually been misled or deceived by
18 the debt collector's representation; instead, liability depends on whether the hypothetical 'least
19 sophisticated debtor' likely would be misled." *Tourgeaman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109,
20 1117-18 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014). "The
21 standard is designed to protect consumers of below average sophistication or intelligence, or those who
22 are uninformed or naïve, particularly when those individuals are targeted by debt collectors." *Gonzales*
23 *v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1062 (9th Cir. 2011) (internal quotation marks and citation
24 omitted). "At the same time, the standard preserv[es] a quotient of reasonableness and presume[s] a
25 basic level of understanding and willingness to read with care." *Id.* (internal quotation marks and

1 citation omitted). “The FDCPA does not subject debt collectors to liability for ‘bizarre,’ ‘idiosyncratic,’
2 or ‘peculiar’ misinterpretations.” *Id.* Whether a communication would confuse the least sophisticated
3 debtor is a question of law. *Id.* at 1061 & n.3 (citation omitted); *see also Tourgeman*, 755 F.3d at 1118
4 (holding that the “least sophisticated debtor” standard “inquiry is objective and is undertaken as a matter
5 of law”); *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997) (same).

6 Only false and misleading statements that are material will trigger a violation of the FDCPA.
7 Such statements must be “genuinely misleading” and “frustrate the consumer’s ability to intelligently
8 choose his or her response to the collector’s communication.” *Donohue v. Quick Collect, Inc.*, 592 F.3d
9 1027, 1033-34 (9th Cir. 2010); *see also Tourgeman*, 755 F.3d at 1119 (“[i]n assessing FDCPA liability,”
10 courts are concerned “with genuinely misleading statements that may frustrate a consumer’s ability to
11 intelligently choose his or her response”) (internal quotation marks and citation omitted).

12 The Court finds that Plaintiff’s complaint does not allege sufficient facts to state claims for
13 violations of §1692e(4) and § 1692e(5). To survive a Rule 12(b)(6) motion, a complaint must allege
14 “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. The
15 “least sophisticated debtor” could reasonably have taken Defendant’s statement that “we do not like to
16 adopt such drastic procedures that could have serious consequences and could result in unnecessary
17 expense” and that “legal action is being considered as state law applies” as implying that legal action or
18 actions including garnishment or seizure of Plaintiff’s wages or property. However, threats to sue or of
19 garnishment are prohibited by the FDCPA only if the threatening party has no legal right to take such
20 actions. *See* 15 U.S.C. §§ 1692e(4)-(5). Plaintiff does not allege any facts which would allow the Court
21 to determine whether Defendant’s alleged threats were unlawful or that Defendant had no intention of
22 acting on them, apart from a conclusory statement that “Defendant threatened to take actions that are not
23 lawful or that Defendant has no intent on [sic] taking.” Doc. 1 at 13 ¶ 26. This conclusory statement
24 does not meet the pleading requirements of Rule 8(a)(2), and accordingly Plaintiff has failed to state a
25 claim for violations of §§ 1692e(4) and (5). These claims are DISMISSED with leave to amend.

C. RFDCPA Claim Premised on 15 U.S.C. § 1692d

Section 1692d prohibits a debt collector from “engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” 15 U.S.C. § 1692d. This may include using threats, profane language, advertisements to sell the debt to coerce payment, and repeatedly placing phone calls with intent to harass or annoy. *See id.*

Plaintiff's sole factual allegation related to this claim is that "as a direct and proximate result of Defendants [sic] RFDCPA violations, Plaintiff felt harassed, anxious, and annoyed." Doc 1 at 12 ¶ 26. This is not a sufficiently detailed factual allegation to meet the pleading requirement of Rule 8(a)(2). Therefore, the Court finds that Plaintiff has failed to state a claim for violation of § 1692d. This claim is DISMISSED with leave to amend.

VI. CONCLUSION AND ORDER

For the foregoing reasons, Defendant's motion to dismiss is GRANTED. Plaintiff's RFDCPA claim premised on 15 U.S.C. § 1692g is DISMISSED WITHOUT LEAVE TO AMEND. Plaintiff's RFDCPA claim premised on 15 U.S.C. §§ 1692e(4) and (5), as well as Plaintiff's RFDCPA claim premised on 15 U.S.C. § 1692d, are DISMISSED WITH LEAVE TO AMEND as explained above. Any amended complaint shall be filed within twenty (20) days of electronic service of this Memorandum Decision and Order.

IT IS SO ORDERED.

Dated: **August 25, 2017**

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE