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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LEONARD OFFRIL,

Plaintiff,

No. C 08-5050 PJH

v.

**ORDER GRANTING MOTION
TO DISMISS**

J.C. PENNY COMPANY, INC., G.E.
MONEY BANK, NATIONWIDE CREDIT,
INC.,

Defendants.

Before the court is defendant Nationwide Credit Inc.'s ("Nationwide") motion to dismiss on the grounds that plaintiff Leonard Offril's ("plaintiff") complaint (1) fails to state a claim under the Fair Debt Collection Practice Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* ; and (2) fails to state a claim under the state equivalent, California's Rosenthal Fair Debt Collection Practice Act ("CFDCPA"), Cal. Civ. Code § 1788 *et seq.* Plaintiff did not oppose the motion, nor did he file a statement of non-opposition as required by Civil Local Rule 7-3. The court finds this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and hereby VACATES the hearing scheduled for January 14, 2009. Having read Nationwide's papers and carefully considered its arguments and the relevant legal authority, the court hereby GRANTS Nationwide's motion to dismiss, for the reasons stated below.

BACKGROUND

Defendant J.C. Penny Company, Inc. ("JC Penny") is a corporation that co-ventures in partnership with defendant G.E. Money Bank ("GE Money") to issue credit cards under the name J.C. Penny Privilege Platinum Credit Card. Compl. ¶¶ 5-6. Defendant Nationwide is a debt collector. *Id.* ¶ 8. Plaintiff is a resident of San Francisco and a cardholder of a J.C. Penny Privilege Platinum Credit Card ("credit card"). *Id.* ¶¶ 4, 11. On

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1 a date or dates unknown to plaintiff, plaintiff incurred a financial obligation on this credit
2 card through his purchase of items from JC Penny Stores (“debt”). Id. ¶ 13. Plaintiff
3 subsequently defaulted on this financial obligation by failing to make the required payments
4 on his credit card account. Id. ¶ 14. Sometime thereafter, due to his concern about
5 making payments on his credit card account, his receipt of calls from collection callers and
6 his desire to relieve himself of his credit card debt, plaintiff retained counsel, Irving L. Berg
7 (“Berg”). Id. ¶¶ 15-18.

8 In a letter dated August 12, 2008, Berg notified JC Penny that he represented
9 plaintiff and that any further communications regarding plaintiff’s debt should be directed to
10 his office. Compl. ¶¶ 19-20. JC Penny subsequently transferred the collection of plaintiff’s
11 debt to Nationwide. Id. ¶ 22. Thereafter, notwithstanding Berg’s letter of representation,
12 Nationwide contacted plaintiff directly with a collection letter, seeking immediate payment of
13 plaintiff’s debt. Id. ¶ 23; Exh. B, attached to Compl. This letter informed plaintiff that his
14 balance on his credit card was past due and now due in full. Exh. B, attached to Compl.
15 The letter advised plaintiff that if he wanted to settle the matter he needed to pay the total
16 account balance directly to Nationwide. Id.

17 On September 23, 2008, plaintiff brought a state action against, among others,
18 Nationwide, alleging violations of the FDCPA and the CFDCPA. The action was removed
19 to this court on the basis of federal question jurisdiction. On November 13, 2008,
20 Nationwide filed a motion to dismiss, which, as previously noted, plaintiff did not oppose.
21 Instead, plaintiff filed a first amended complaint (“FAC”) on December 13, 2008.
22 Nationwide is named again as a defendant in the FAC, which is substantially similar to the
23 original complaint, except for one notable exception. In the FAC, plaintiff alleges, on
24 information and belief, that JC Penny agreed to transmit to Nationwide all records
25 concerning the collection of his account, including Berg’s letter of representation. FAC ¶
26 23. A reply brief was not filed.

27 **DISCUSSION**

28

1 A. Legal Standard

2 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
3 alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).
4 Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen.
5 Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be
6 based on either the “lack of a cognizable legal theory” or on “the absence of sufficient facts
7 alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dept., 901 F.2d 696,
8 699 (9th Cir. 1990). Hence, the issue here is not whether the claimant will ultimately
9 prevail, but whether the claimant is entitled to offer evidence to support the claims
10 asserted. Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997). In
11 considering such a motion, all material factual allegations should be accepted as true and
12 construed “in the light most favorable to the nonmoving party.” Cahill v. Liberty Mutual Ins.
13 Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

14 To survive a motion to dismiss for failure to state a claim, a complaint generally must
15 satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8,
16 which requires that the complaint include a “short and plain statement of the claim showing
17 that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). Specific facts are unnecessary –
18 the statement need only give the defendant “fair notice of the claim and the grounds upon
19 which it rests.” Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (citing Bell Atlantic Corp.
20 v. Twombly, 127 S.Ct. 1955, 1964-65 (2007)). All allegations of material fact are taken as
21 true. Erickson, 127 S.Ct. at 2200. However, a plaintiff’s obligation to provide the grounds
22 of his entitlement to relief “requires more than labels and conclusions, and a formulaic
23 recitation of the elements of a cause of action will not do.” Bell Atlantic, 127 S.Ct. at 1964-
24 65 (citations and quotations omitted). Rather, the allegations in the complaint “must be
25 enough to raise a right to relief above the speculative level.” Id. at 1965. A motion to
26 dismiss should be granted if the complaint does not proffer enough facts to state a claim for
27 relief that is plausible on its face. See id. at 1966-67.

28

1 B. Legal Analysis

2 In his complaint, plaintiff alleges that Nationwide violated the FDCPA, 15 U.S.C. §
3 1692c(a)(2) and the CFDCPA, Cal. Civ.Code § 1788.14(c) and 1788.17 by communicating
4 with him after being notified that he was represented by counsel. Nationwide argues that
5 the complaint does not state cognizable claims for relief because is does not allege that
6 Nationwide had actual knowledge that plaintiff was represented by counsel when it
7 contacted plaintiff regarding the collection of debt.

8 The purpose of the FDCPA is “to eliminate abusive debt collection practices by debt
9 collectors, to insure that those debt collectors who refrain from using abusive debt
10 collection practices are not competitively disadvantaged, and to promote consistent State
11 action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692(e).
12 California has incorporated by reference provisions of the FDCPA into the CFDCPA. Alkan
13 v. Citimortgage, Inc., 336 F.Supp.2d 1061, 1065. California Civil Code § 1788.17 requires
14 debt collectors in California to comply with 15 U.S.C. §§ 1692b through 1692j, and states
15 that violators will be subject to the remedies provided by 15 U.S.C. § 1692k. Cal. Civ.Code
16 § 1788.17.¹

17 Both the FDCPA and CFDCPA prohibit the collection of a consumer’s debt by
18 means of a communication with a debtor after a debt collector has been notified the debtor
19 is represented by an attorney. 15 U.S.C. § 1692c(a)(2) provides: “a debt collector may not
20 communicate with a consumer in connection with the collection of any debt . . . (2) if the
21 debt collector knows the consumer is represented by an attorney with respect to such debt
22 and has knowledge of, or can readily ascertain, such attorney's name and address . . .”

23

24 ¹ The FDCPA limits the definition of debt collector to one who collects debts “owed or
25 due or asserted to be owed or due to another.” 15 U.S.C. § 1692a(6). The CFDCPA defines
26 a debt collector more broadly as one who collects debts “on behalf of himself or herself or
27 others, engage[d] in debt collection.” Cal. Civ.Code § 1788.2(c). Thus, unlike the FDCPA,
28 which creates a private right of action only against debt collectors, and not original creditors
(with limited exceptions), the CFDCPA creates a private right of action against both debt
collectors and original creditors such as JC Penny. For purposes of this motion, Nationwide
does not dispute that it is a debt collector as defined by the FDCPA and the CFDCPA.

1 California Civil Code § 1788.14(c) provides:

2 No debt collector shall collect or attempt to collect a consumer debt by
3 means of the following practices:

4 . . .

5 (c) Initiating communications, other than statements of account, with the
6 debtor with regard to the consumer debt, when the debt collector has
7 been previously notified in writing by the debtor's attorney that the debtor
8 is represented by such attorney with respect to the consumer debt and
9 such notice includes the attorney's name and address and a request by
10 such attorney that all communications regarding the consumer debt be
11 addressed to such attorney . . .

12 Here, the complaint alleges that plaintiff's counsel, Berg, notified JC Penny in writing
13 that he represented plaintiff and that all further communications in connection with plaintiff's
14 debt should be directed to his office. In addition, the complaint alleges that JC Penny
15 subsequently transferred collection of plaintiff's debt to Nationwide, and that Nationwide
16 thereafter contacted plaintiff directly with a collection letter. Plaintiff then filed this lawsuit
17 and Nationwide moved to dismiss. In response to Nationwide's motion to dismiss, plaintiff
18 amended his complaint,² alleging, on information and belief, that JC Penny provided
19 Nationwide with all records concerning plaintiff's credit card account, including Berg's
20 representation letter. However, neither the complaint nor the FAC specifically alleges that
21 either JC Penny or Berg directly notified Nationwide that plaintiff was represented by
22 counsel with respect to plaintiff's debt. As plaintiff did not plead that Nationwide had actual
23 knowledge of Berg's representation prior to contacting him regarding the collection of debt,
24 he has not stated a valid claim against Nationwide unless there is some other theory that
25 recognizes such a claim based on these thin facts. Schmitt v. FMA Alliance, 398 F.3d 995,
26 997(8th Cir. 2005) (holding that a plaintiff must plead actual knowledge under the FDCPA
27 in order to state a claim upon which relief may be granted). Although plaintiff did not
28 allege or argue that JC Penny's actual knowledge of Berg's representation of plaintiff is

26 ² Because Nationwide has not filed an answer or other responsive pleading to the
27 complaint, Miles v. Department of Army, 881 F.2d 777, 781 (9th Cir. 1989) (a motion to dismiss
28 under Rule 12(b)(6) is not a responsive pleading), and plaintiff has not yet amended, plaintiff
was entitled to file an amended complaint as a matter of course. See Fed.R.Civ.P. 15(a).

1 imputed to Nationwide, Nationwide argued against this theory citing appropriate authority in
2 support of its position. Based on that authority, the court finds that JC Penny's actual
3 knowledge of Berg's representation of plaintiff cannot be imputed to Nationwide. See
4 Gorman v. Wolpoff & Abramson, LLP, 435 F.Supp.2d 1004, 1011 (N.D. Cal. 2006) (citing
5 Randolph v. IMBS, Inc., 368 F.3d 726, 729-30 (7th Cir. 2004) (holding that collection
6 agency's letter to debtor who was represented by counsel did not violate FDCPA, since
7 collection agency did not know debtor was represented by counsel, even if creditor's files
8 contained information that she was, because a creditor's knowledge is not imputed to
9 collection agency); Schmitt, 398 F.3d at 997-98, (holding that a creditor's knowledge that
10 the consumer is represented by counsel is not imputed to the debt collector under the
11 FDCPA; noting that imputing a creditor's actual knowledge of a debtor's representation to
12 the debt collector "contradicts established agency law, which dictates that while the
13 knowledge of the agent is imputed to the principal, the converse is not true").


14 Because plaintiff did not oppose the motion to dismiss, the court has no way of
15 knowing whether there are additional facts that could be pleaded to state viable claims
16 under the FDCPA and CFDCPA against Nationwide. The motion to dismiss challenged the
17 allegations of the original complaint and clearly identified this defect in the original
18 complaint. Because the FAC was filed after the motion to dismiss, plaintiff clearly had the
19 opportunity to cure the defect, but did not, and the court assumes that he could not. Under
20 these circumstances, the court finds that leave to amend would be futile.

CONCLUSION

22 For the reasons stated above, Nationwide's motion to dismiss is GRANTED and
23 dismissal of Nationwide is with prejudice.

IT IS SO ORDERED.

25 Dated: January 9, 2009



PHYLLIS J. HAMILTON
United States District Judge