

1 Collection Practices Act, Cal. Civ. Code 1788 et seq.. These alleged violations arose from LVNV
2 Funding, LLC (“LVNV”), The Brachfeld Law Group, PC (“BLG”), and Erica Brachfeld’s
3 (collectively “Defendants”) handling of Plaintiff’s delinquent consumer credit card account.
4 Plaintiff requested actual and statutory damages, as well as attorney’s fees, for both causes of
5 action.

6 The parties do not dispute the events comprising the basis of this action. Plaintiff had a
7 credit card account that became delinquent. Her delinquent account was assigned to LVNV, which
8 filed a collection action in the Santa Clara County Superior Court, Case No. 108-cv-124270 (the
9 “State Court action”). BLG represented LVNV in that matter. After the State Court action was
10 filed, Plaintiff and BLG came to a settlement agreement, wherein BLG would deduct \$100 a
11 month, for five months, from Plaintiff’s bank account. Plaintiff’s first payment was scheduled for
12 October 31, 2008, and her last payment for February 28, 2009. Under the settlement, after the
13 February payment was made, Plaintiff’s obligation would be fulfilled.

14 Plaintiff did make the five payments pursuant to the settlement agreement. However, on
15 September 23, 2009, Defendants filed a Request for Entry of Default in the State Court action, and
16 their request was granted in the amount of \$4210.75. On March 2, 2010, Defendants had
17 Plaintiff’s bank account levied. In October of 2010, Defendants served an earnings withholding
18 order on Plaintiff’s employer. On May 3, 2011, the state court judgment was set aside.

19 II. Legal Standard

20 Entry of summary judgment is proper “if the movant shows that there is no genuine dispute
21 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
22 56(a). The moving party bears the initial burden “of informing the court of the basis for its motion,
23 and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, admissions
24 on file, together with the affidavits, if any’” that demonstrate the absence of a triable issue of
25 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)
26 (citation omitted). If the moving party meets this initial burden, the burden then shifts to the non-
27 moving party to go beyond the pleadings and “designate specific facts showing that there is a
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1 genuine issue for trial.” Celotex, 477 U.S. at 324 (citation omitted). The court must regard as true
2 the opposing party's evidence, if supported by affidavits or other evidentiary material. Id.
3 However, the mere suggestion that facts are in controversy, as well as conclusory or speculative
4 testimony in affidavits and moving papers, is not sufficient to defeat summary judgment. See
5 Thornhill Publ'g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

6 **III. Discussion**

7 **A. Federal Fair Debt Collection Practices Act**

8 Plaintiff seeks summary adjudication that Defendants violated Sections 1692(f) and
9 1692(f)(1) of the Federal Fair Debt Collection Practices Act (“FDCPA”). Section 1692(f)
10 prohibits a debt collector from using “unfair or unconscionable means to collect or attempt to
11 collect any debt.” The statute provides examples of violations, including Section 1692(f)(1),
12 which prohibits “[t]he collection [by a debt collector] of any amount (including any interest, fee,
13 charge, or expense incidental to the principal obligation) unless such amount is expressly
14 authorized by the agreement creating the debt or permitted by law.” 15 U.S.C. § 1692f(1). Plaintiff
15 contends that Defendants violated the FDCPA by serving an earnings withholdings order to her
16 employer. Pl.’s Mot. for Partial Summ. J. at 15, Dkt. No. 35.

17 The parties agree on the factual underpinnings of these claims. From their briefs it appears
18 that the parties also agree that Defendants’ actions could potentially constitute a violation of the
19 FDCPA.² See Opp’n at 4:17-21, Dkt. No. 37. Therefore, Plaintiff has met its burden of showing
20 no issue of material fact remains on the question of whether Defendants actions violated the
21 FDCPA.

22 In their opposition brief, Defendants assert that the default judgment was mistakenly filed
23 as the result of a clerical error, and that the attempt at wage garnishment stemmed from the
24 erroneous filing. Because the default judgment and wage garnishment allegedly occurred merely

25 ² At the hearing on this motion, Defendants contested liability by mentioning a “recent case” that
26 held the service of an earnings withholding order did not constitute a sufficient basis for an FDCPA
27 claim. Neither party’s brief addressed the law on this issue, and Defendants’ opposition brief
28 focused only on affirmative defenses. Defendants have not submitted a notice of new authority,
nor provided the name or citation of this case to the Court. Without more, the Court is left to
consider only the supported statements made by the parties in their briefing.

1 as a result of an error, Defendants argue that they are entitled to present evidence at trial on a bona
2 fide error defense. See 15 U.S.C. § 1692k(c) (providing for a bona fide error defense when a
3 defendant proves by a preponderance of the evidence “that the violation was not intentional and
4 resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted
5 to avoid any such error”).

6 Defendants will bear the burden of proving their affirmative defense at trial, and therefore
7 at the summary judgment stage must “go beyond the pleadings and by [their] own affidavits, or by
8 the depositions, answers to interrogatories, and admissions on file, designate specific facts showing
9 that there is a genuine issue for trial.” Celotex, 477 U.S. at 324 (citation omitted). In addition, this
10 district’s Local Civil Rule 7-5 states that “factual contentions made in support of or in opposition to
11 any motion must be supported by an affidavit or declaration and by appropriate references to the
12 record.” To satisfy its burden, Defendants must produce evidence, and not rely on mere allegations
13 or denials of Plaintiff’s evidence. See Estate of Tucker v. Interscope Records, 515 F.3d 1019, 1030
14 (9th Cir. 2008).

15 Defendants have submitted nothing more than bare assertions that a bona fide error may
16 exist. Their opposition brief contains neither evidence suggesting or showing that an error did
17 occur, nor even declarations to the truth of their assertions. Instead, Defendants argue that though
18 the full deposition transcript of Jonathan Birdt could dispose of this issue, they cannot submit that
19 transcript because Plaintiff never provided a copy or offered Defendants or Mr. Birdt an
20 opportunity to review it. Opp’n at 6, Dkt. No. 37. Defendants have not filed a declaration
21 establishing that they never received, or were denied access to, the deposition transcript. See Fed.
22 R. Civ. P. 56(d) (instructing that when a nonmovant shows by affidavit or declaration that “it
23 cannot present facts essential to justify its position,” the court may take appropriate action).
24 Defendants also allege that Plaintiff has in her possession other documents which further establish
25 the existence of a bona fide error, but that Plaintiff has failed to amend her initial disclosures or
26 produce them outside of Mr. Birdt’s deposition. Opp’n at 6-7, Dkt. No. 37. Again, Defendants
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1 failed to file a declaration attesting to the truth of these allegations, or submit any other evidence
2 which may support them.

3 “The district court need not examine the entire file for evidence establishing a genuine issue
4 of fact, where the evidence is not set forth in the opposition papers with adequate references so that
5 it could conveniently be found.” Carmen v. San Francisco Sch. Dist., 237 F.3d 1026, 1031 (9th Cir.
6 2001). In the absence of evidence that a bona fide error may exist, or evidence that Defendants
7 unsuccessfully attempted to obtain Mr. Birdt’s deposition transcript, this court finds that
8 Defendants have not met their burden establishing that a question of material fact exists as to their
9 bona fide error defense. Summary adjudication as to Plaintiff’s FDCPA claims is therefore
10 GRANTED.

11 **B. California’s Rosenthal Fair Debt Collection Practices Act**

12 Plaintiff also seeks summary adjudication that Defendants violated Sections 1788.17 and
13 1788.14(b) of California’s Rosenthal Fair Debt Collection Practices Act (“the Rosenthal Act”).
14 Section 1788.17 provides that:

15 ...every debt collector collecting or attempting to collect a consumer debt shall comply
16 with the provisions of Sections 1692b to 1692j, inclusive of, and shall be subject to the
17 remedies in Section 1692k of, Title 15 of the United States Code.

18 Section 1788.14(b) states:

19 No debt collector shall collect or attempt to collect a consumer debt by means of the
20 following practices: ... (b) Collecting or attempting to collect from the debtor the whole or
21 any part of the debt collector’s fee or charge for services rendered, or other expense
22 incurred by the debt collector in the collection of the consumer debt, except as permitted by
23 law...

24 The parties dispute whether any of the Defendants are subject to liability under the Rosenthal Act,
25 and, if so, whether Defendants are entitled to present a bona fide defense at trial.

1 **1. The Brachfeld Law Group**

2 The parties do not appear to dispute that if BLG is a “debt collector” under the Rosenthal
3 Act, then BLG is liable under the Act. The Act defines “debt collector” as “any person who, in the
4 ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt
5 collection. The term includes any person who composes and sells, or offers to compose and sell,
6 forms, letters, and other collection media used or intended to be used for debt collection, but does
7 not include an attorney or counselor at law.” Cal. Civ. Code § 1788.2(c). Debt collectors are
8 subject to liability under the Act.

9 The parties point to a split in authority as to whether a law firm can be considered a “debt
10 collector.” Plaintiff asserts that twelve of the fifteen district courts that have considered this issue
11 have found that law firms can qualify as “debt collectors.” Defendants cite to a small set of cases
12 finding to the contrary. See Minasyan v. Creditors Fin. Group, LLC, No. 2:12-cv-01864, 2012 WL
13 232824 (C.D. Cal. June 19, 2012); Owings v. Hunt & Henriques, No. 08-cv-1931, 2010 WL
14 3489342, at *3 (S.D. Cal. Sept. 3, 2010); Carney v. Rotkin, Schmerin & McIntyre, 206 Cal.App.3d
15 1513 (1988).

16 Plaintiff is correct that the majority of federal district courts in California considering the
17 issue have found that a law firm is a debt collector within the meaning of the Rosenthal Act. See
18 McNichols v. Moore Law Group, No. 11-cv-1458, 2012 WL 667760 at *4 (S.D. Cal. Feb. 28,
19 2012) (finding that law firms are included in the definition of “debt collector” under the Rosenthal
20 Act); Bautista v. Hunt & Henriques, No. 11-cv-4010, 2012 WL 160252 at *8 (N.D. Cal. Jan. 17,
21 2012); Reimann v. Brachfeld, No. 10-cv-04156, 2010 WL 5141858 (N.D. Cal. Dec. 3, 2010)
22 (rejecting *Owings*); Abels v. JBC Legal Grp., P.C., 227 F.R.D. 541, 548 (N.D. Cal. 2005) (“Since
23 the legislature specifically excluded attorneys from the statute but was silent on law firms, this
24 Court presumes that the legislature did not intend to exclude law firms”); Robinson v. Managed
25 Accounts Receivables Corp., 654 F.Supp.2d 1051, 1061 (C.D. Cal. 2009) (“The Court finds
26 persuasive the authority holding that a law firm may be a ‘debt collector’ under the California
27 FDCPA.”); Moriarity v. Henriques, No. 11-cv-01208, 2011 WL 3568435 at * 6 (E.D. Cal. Aug.15,
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1 2011) (“[D]istrict courts throughout the Ninth Circuit have found that a law firm is a ‘debt
2 collector’ within the meaning of the RFDCPA.”). The authority cited by Defendants is not
3 persuasive, and does not fit within the majority view of the federal district courts in California. In
4 keeping with prior decisions in this district, this court finds that a law firm can be a “debt collector”
5 under the Rosenthal Act.

6 Defendants also argue that BLG is not a law firm, stating that “[t]he Brachfeld Law Group
7 is a professional corporation established under the state bar act (*sic*), and is solely owned by Erica
8 Brachfeld and authorized by the State Bar to engage in the practice of law.” At the hearing,
9 Defendants admitted that Ms. Brachfeld employs numerous attorneys across the country, but
10 argued BLG is not a law firm because Ms. Brachfeld does not share fees with these employees.
11 Again, Defendants have submitted no evidence suggesting that BLG should not be treated as a law
12 firm. In the absence of any evidence to the contrary, this court finds that BLG is a law firm for
13 purposes of the Rosenthal Act.

14 Defendants also argue that they should be permitted to put forth a bona fide error defense to
15 the Rosenthal Act claims at trial. For the reasons stated in Section III.A of this opinion, Defendants
16 have failed to meet their burden on this argument. The court therefore GRANTS summary
17 adjudication on Plaintiff’s Rosenthal Act claims as to BLG.

18 **2. Erica Brachfeld**

19 Plaintiff does not make any specific argument as to whether Ms. Brachfeld is subject to the
20 Rosenthal Act. Defendants contend that Ms. Brachfeld is exempt from any liability under the
21 Rosenthal Act. Plaintiff has not met her burden of proving that no issue of material fact exists as to
22 Ms. Brachfeld’s liability. Moreover, even if Plaintiff had supplied an argument, it appears that
23 such argument would fail because the Act expressly excludes attorneys from the definition of debt
24 collector. Ms. Brachfeld cannot be held liable as a matter of law. Cal. Civ. Code § 1788.2(c); see
25 Bretana v. Int’l Collection Corp., No. 07-cv-5934, 2010 WL 1221925 at *1 (N.D. Cal. Mar. 24,
26 2010) (finding that a solo practitioner is not subject to liability under the Rosenthal Act); Abels v.
27 JBC Legal Grp., P.C., 227 F.R.D. 541, 547-48 (N.D. Cal. 2005) (holding that the plain language of
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1 the Rosenthal Act excludes an individual attorney from the definition of debt collector). The court
2 therefore DENIES summary adjudication on Plaintiff's Rosenthal Act claims as to Erica Brachfeld.

3 **3. LVNV**

4 Plaintiff has also moved for summary adjudication on the Rosenthal Act claims as to
5 LVNV. While Plaintiff did establish in her briefing that LVNV is a debt collector, she did not
6 include argument as to LVNV's liability under the Rosenthal Act. Without evidence
7 demonstrating LVNV's liability, there remains a genuine issue of material fact. The court DENIES
8 summary adjudication on the Rosenthal Act claims as to LVNV.

9 **IV. Conclusion**

10 For the foregoing reasons, IT IS HEREBY ORDERED that Plaintiff's motion for partial
11 summary judgment is GRANTED as to all Defendants on the FDCPA claims, GRANTED as to
12 BLG on the Rosenthal Act claims, and DENIED as to Erica Brachfeld and LVNV on the Rosenthal
13 Act claims.

14 **IT IS SO ORDERED.**

15 Dated: September 11, 2012

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18 EDWARD J. DAVILA
19 United States District Judge
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