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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ERIK MEMBRILA,

vs.

RECEIVABLES PERFORMANCE
MANAGEMENT, LLC,

Defendant.

CASE NO. 09-CV-2790-IEG (RBB)

**ORDER DENYING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

[Doc. No. 24]

Presently before the Court is Defendant Receivables Performance Management, LLC’s motion for summary judgment. Along with his opposition, Plaintiff Erik Membrila filed a declaration in support of his request for a continuance under Federal Rule of Civil Procedure 56(f) to allow him an opportunity to conduct discovery.

This motion is suitable for disposition without oral argument pursuant to Local Civil Rule 7.1(d)(1). For the reasons stated herein, the Court DENIES Defendant’s motion for summary judgment.

BACKGROUND

This matter involves Defendant’s attempts to collect a debt allegedly owed by Plaintiff. On December 14, 2009, Plaintiff filed a Complaint, alleging: (1) violation of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et seq; (2) violation of the California Rosenthal Fair Debt Collection Practices Act (“RFDCPA”), Cal. Civ. Code §§ 1788-1788.32; and

1 (3) illegal telephone recording in violation of California Penal Code §§ 631, 632 and 637.2.

2 Plaintiff later filed an amended complaint.

3 On February 16, 2010, Defendant filed a motion to dismiss Plaintiff's third cause of action
4 for illegal telephone recording. The Court granted the motion to the extent the cause of action was
5 based on California Penal Code § 631, but found Plaintiff stated a cause of action under Section
6 632.

7 On June 3, 2010, Defendant filed a motion for summary judgment as to each of Plaintiff's
8 three causes of action.

9 **LEGAL STANDARD**

10 Summary judgment is proper where the pleadings and materials demonstrate "there is no
11 genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law."
12 Fed. R. Civ. P. 56(c)(2); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A dispute is genuine
13 "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

14 The moving party bears "the initial responsibility of informing the district court of the basis
15 for its motion." Celotex, 477 U.S. at 323. To satisfy this burden, the movant must demonstrate that
16 no genuine issue of material fact exists for trial. Id. at 322. Where the moving party does not have
17 the ultimate burden of persuasion at trial, it may carry its initial burden of production in one of two
18 ways: "The moving party may produce evidence negating an essential element of the nonmoving
19 party's case, or, after suitable discovery, the moving party may show that the nonmoving party
20 does not have enough evidence of an essential element of its claim or defense to carry its ultimate
21 burden of persuasion at trial." Nissan Fire & Marine Ins. Co., v. Fritz Cos., 210 F.3d 1099, 1106
22 (9th Cir. 2000).

23 If the moving party carries its initial burden, the nonmovant must then show that there are
24 genuine factual issues which can only be resolved by the trier of fact. Reese v. Jefferson Sch. Dist.
25 No. 14J, 208 F.3d 736, 738 (9th Cir. 2000). The nonmoving party may not rely on the pleadings
26 alone, but must present specific facts creating a genuine issue of material fact through affidavits,
27 depositions, or answers to interrogatories. Fed R. Civ. P. 56(e); Celotex, 477 U.S. at 324. The
28 court must review the record as a whole and draw all reasonable inferences in favor of the

1 nonmoving party. Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107, 1112 (9th Cir. 2003).

2 However, unsupported conjecture or conclusory statements are insufficient to defeat summary
3 judgment. Id.; Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008).

4 DISCUSSION

5 I. Debt Validation Letter

6 Plaintiff alleges Defendant violated the FDCPA, 15 U.S.C. § 1692f, and RFDPCA,
7 California Civil Code § 1788.17, by failing to provide a debt validation letter within five days of
8 Defendant’s initial communication with Plaintiff regarding the debt. (FAC ¶¶ 23-27.) According
9 to Plaintiff, the initial communication took place on or about November 14, 2009. (FAC. ¶¶ 23-
10 24.)

11 Defendant, however, argues the initial communication with Plaintiff regarding the debt was
12 a debt validation letter it sent on October 4, 2009. Defendant submits the Declaration of Robert
13 Polus (“Polus”), the company’s Director of Operations. In his declaration, Polus states he
14 reviewed the “Accounts Notes” for Plaintiff’s account, which indicate Defendant sent Plaintiff an
15 “rpm” letter on October 4, 2009. (Polus Decl. ¶ 11; Ex. B.) An “rpm” letter is a debt validation
16 letter. (Polus Decl. ¶ 11.) The “Accounts Notes” section further indicates Defendant’s first
17 attempted phone call to Plaintiff was October 5, 2009. (Polus Decl. ¶¶ 4-14; Ex. A.) Therefore,
18 Defendant contends the evidence shows it sent the requisite debt validation letter within five days
19 of the initial communication.

20 Plaintiff responds by attaching his own declaration to the opposition. In his declaration,
21 Plaintiff states he did not receive a debt validation letter on or about October 4, 2009, or at any
22 time. (Declaration of Erik Membrila (“Membrila Decl.”) ¶ 18.) Rather, the first time he had ever
23 heard of or from the Defendant was on November 14, 2009, when he received a telephone call
24 about the alleged debt. (Membrila Decl. ¶¶ 10-12.) Plaintiff also points to statements in Polus’
25 declaration that Defendant outsources the generation of all written correspondence to debtors to a
26 third party vendor, and no actual copies of the letters sent are retained by either Defendant or the
27 third-party vendor. (Polus Decl. ¶ 12.)

28

1 In its reply, Defendant reveals that after Plaintiff filed the opposition, Defendant learned
2 the October 4, 2009 debt validation letter was not sent, because the address it had on file for
3 Plaintiff was invalid. Defendant submits the declaration of Brian Hodge, Manager of Operations
4 and Systems for Remkim Corporation, the third-party vendor that sends letters on behalf of
5 Defendant. Hodge confirms Defendant requested Remkin send a letter to Plaintiff on October 4,
6 2009, but explains Remkin never generated or mailed the letter because the address information
7 was invalid. (Declaration of Brian Hodge ¶¶ 2-14.) Defendant also attaches to its reply a
8 supplemental declaration from Polus, in which Polus states that Defendant followed its ordinary
9 business practices in inputting address information. (Supplemental Declaration of Robert Polus ¶¶
10 3-11.)

11 Defendant argues summary judgment is appropriate because it need only establish it sent
12 the debt validation letter, not that Plaintiff actually received the letter. While this point of law is
13 correct, see Mahon v. Credit Bureau of Placer County Inc., 171 F.3d 1197, 1201 (9th Cir.1999),
14 Defendant's own evidence shows the letter was not sent. Hodge's declaration states, "the letter
15 was not generated nor mailed to Mr. Membrila." (Hodge Decl. ¶ 14.)

16 Therefore, Defendant is not entitled to summary judgment on this issue. There is a genuine
17 issue of material fact as to whether Defendant sent the requisite debt validation letter within five
18 days of the initial communication.

19 **II. Threats to Disclose Debt**

20 Plaintiff alleges he is a member of the United States Navy, and Defendant threatened to
21 contact his commanding officer regarding the alleged debt on two occasions, in violation of the
22 FDCPA, 15 U.S.C. § 1692e(5) & (10), and RFDCPA, Cal. Civ. Code § 1788.17.¹

23 Defendant contends it never made these threats, again relying on Polus' declaration. In his
24 declaration, Polus states that employees are trained on the company's policy that no debt collector
25

26 ¹Subsections 1692e(5) and (10) of the FDCPA prohibit debt collectors from "threat[ening] to
27 take any action that cannot legally be taken or that is not intended to be taken" or from "us[ing] . . . any
28 false representation or deceptive means to collect or attempt to collect any debt or to obtain
information concerning a consumer." 15 U.S.C. § 1692e(5), (10) It is a violation of the statute for a
debt collector to tell a third party that the consumer owes a debt. Id. § 1692b(2). RFDCPA § 1788.17
requires debt collectors to comply with the provisions of the FDCPA.

1 may threaten a debtor with disclosure of the account information to a third party. (Polus ¶¶ 20-
2 23.) Defendant also submits the declaration of Jason Edwards, the employee who allegedly made
3 the threats. Edwards states he never threatened Plaintiff and was trained not to make such threats.
4 (Declaration of Jason Edwards ¶¶ 19-23.)

5 In response, Plaintiff relies on his own declaration. Plaintiff states that contrary to
6 Defendant’s evidence, Jason Edwards “repeatedly threatened and/or suggested that he was going
7 to speak with my commanding officer and report to my commanding officer that I was not, and
8 would not, pay my debts.” (Declaration of Erik Membrila ¶¶ 10-12.) Plaintiff further states:
9 “During the November 14, 2009 conversation, I asked if the defendant was threatening me, and in
10 response the defendant stated, ‘it’s not a threat but a promise,’ and that my commanding officer
11 would ‘put me in line to pay the bill.’” (Membrila Decl. ¶¶ 16-17.) Finally, Plaintiff states that in
12 the December 9, 2009 conversation, Defendant again threatened to contact his commanding officer
13 and told Plaintiff he had committed a crime by not paying the debt. (Membrila Decl. ¶ 22.)

14 Defendant argues Plaintiff’s “uncorroborated and self-serving” declaration is insufficient to
15 create a genuine issue of material fact, citing Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054,
16 1061 (9th Cir. 2002). This argument is unavailing. Plaintiff’s declaration is based on personal
17 knowledge, concerns his own conversations with Defendant, and is not undermined by other
18 evidence so as to be incredible. It is not the role of this Court to weigh the parties’ conflicting
19 declarations. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 (1986).

20 Therefore, Defendant is not entitled to summary judgment on this issue. A genuine issue
21 of material fact exists as to whether Defendant threatened to disclose the alleged debt to a third
22 party.

23 **RULE 56(f) REQUEST FOR CONTINUANCE**

24 The remaining issues in this case are: (1) whether Defendant violated the FDCPA and the
25 RFDCPA by contacting Plaintiff after he informed Defendant he was represented by counsel, and
26 (2) whether Defendant violated the California Penal Code by recording its phone conversations
27 with Plaintiff. Defendant relies on Polus’ declaration, arguing it is entitled to summary judgment
28 on these issues.

1 Plaintiff, however, requests a continuance of the summary judgment motion under Federal
2 Rule of Civil Procedure 56(f), because he has not yet had an opportunity for any discovery in this
3 case. Indeed, a scheduling order has not even been issued. In support of the request, Plaintiff's
4 counsel submits his declaration, in which he asserts discovery is needed to oppose the motion for
5 summary judgment; in particular, to determine whether Defendant secretly recorded phone
6 conversations and whether communications took place on certain dates. (Declaration of Joshua
7 Swigart ("Swigart Decl.") ¶¶ 6, 13-14.) Plaintiff intends to conduct written discovery and
8 depositions on these issues. (Swigart Decl. ¶¶ 9-10.)

9 The Court finds it appropriate to deny Defendant's motion for summary judgment as to the
10 remaining issues in this case. Plaintiff is entitled to discovery on these issues before responding.
11 Therefore, Defendant's motion is denied without prejudice to it being re-filed after the close of
12 fact discovery.


13 CONCLUSION

14 Accordingly, the Court DENIES Defendant's motion for summary judgment. There is a
15 genuine issue of material fact as to whether Defendant failed to provide a debt validation letter
16 within five days of Defendant's initial communication with Plaintiff, in violation of FDCPA, 15
17 U.S.C. § 1692f, and RFDPCA, Cal. Civ. Code § 1788.17. A genuine issue of material fact also
18 exists as to whether Defendant threatened to contact Plaintiff's commanding officer regarding the
19 alleged debt, in violation of FDCPA, 15 U.S.C. § 1692e(5) & (10), and RFDPCA, Cal. Civ. Code
20 § 1788.17.

21 As to the remaining issues in this case, the Court declines to grant summary judgment
22 because Plaintiff is entitled to discovery before responding. Defendant may re-file the motion
23 after the close of fact discovery.

24 **IT IS SO ORDERED.**

25
26 **DATED: August 4, 2010**

27 
28 **IRMA E. GONZALEZ, Chief Judge**
United States District Court