

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

STEPHEN D. AHO, individually, and on
behalf of all others similarly situated,

Plaintiff,

vs.

AMERICREDIT FINANCIAL SERVICES,
INC. dba ACF FINANCIAL SERVICES,
INC.,

Defendant.

CASE NO. 10cv1373 DMS (BLM)

**ORDER DENYING
DEFENDANT’S MOTION FOR
PARTIAL SUMMARY
JUDGMENT ON ROSENTHAL
ACT CLAIM**

[Docket Nos. 105, 144]

This matter comes before the Court on Defendant’s motion for partial summary judgment on Plaintiff’s Rosenthal Act claim. Plaintiff filed an opposition to the motion, and Defendant filed a reply. The motion came on for hearing on January 20, 2012. John Hanson and Michael Lindsey appeared and argued on behalf of Plaintiff, and Anna McLean and Shannon Peterson appeared and argued on behalf of Defendant. Having carefully considered the pleadings and arguments of counsel, the Court now denies the motion.¹

¹ After the briefs were submitted, but before oral argument, Plaintiff filed an *ex parte* application for an order shortening time on its motion for approval of class notice and requesting the Court postpone ruling on the present motion, and Plaintiff’s pending motion for partial summary judgment, to avoid potential issues of “one-way intervention.” Plaintiff has raised the potential issue of “one-way intervention” in three previous motions, all of which the Court has denied. Plaintiff fails to provide any reason why the Court should now reverse course, and it declines to do so. Furthermore, it appears any

1 I.

2 BACKGROUND

3 On December 14, 2003, Plaintiff Steven Aho entered into a Retail Installment Sale Contract
4 (“RISC”) with Rancho Chrysler Jeep Dodge for the financing and purchase of a 2002 Dodge Dakota
5 truck. Pursuant to the RISC, Plaintiff was to make monthly payments on the loan beginning in January
6 2004.

7 Plaintiff’s truck was repossessed on August 13, 2005, after he failed to make the monthly
8 payments required by the RISC. On August 15, 2005, Defendant AmeriCredit Financial Services, Inc.
9 sent Plaintiff a “Notice of Our Plan to Sell Property” (“NOI”). The NOI informed Plaintiff that the truck
10 would be sold, and the proceeds from the sale would be used to pay the outstanding balance. It also
11 informed Plaintiff that he would be responsible for any balance remaining if the sale proceeds did not
12 cover the entire outstanding amount.

13 On September 15, 2005, Plaintiff’s truck was sold at a private sale. On September 27, 2005,
14 Defendant sent Plaintiff a “Deficiency Calculation,” which listed a deficiency in the amount of
15 \$9,212.48. Over the next three years, Defendant attempted to collect this deficiency from Plaintiff, and
16 reported the deficiency to various credit reporting agencies. Plaintiff did not make any payments toward
17 the deficiency until June 14, 2010, at which time he made a \$25 payment.

18 About two weeks after making that payment, Plaintiff filed the present case. He alleges three
19 claims: (1) for violation of California Civil Code §§ 1788, *et seq.* (“the California Fair Debt Collection
20 Practices Act” or “the Rosenthal Act”), (2) for violation of California Business and Professions Code
21 §§ 17200, *et seq.*, and (3) for declaratory relief. Plaintiff’s theories are that Defendant’s collection and
22 credit reporting activities violated the Rosenthal Act, and Defendant’s NOI failed to comply with
23 California Civil Code §§ 2981, *et seq.* (“the Automobile Sales Finance Act” or “Rees-Levering Act”).

24 This is the second summary judgment motion Defendant has filed on Plaintiff’s Rosenthal Act
25 claim. In the first motion, Defendant argued the claim was time-barred. The Court found Defendant

26 _____
27 concerns about one-way intervention are premature. Although the Court’s rulings on the pending
28 motions are dispositive of the issues raised therein, they are not entitled to preclusive effect until the
Court enters a final judgment on the merits of the entire case. For these reasons, the Court denies
Plaintiff’s *ex parte* application for an order shortening time and request to postpone ruling on the
pending motions.

1 failed to meet its burden to show the absence of a genuine issue of material fact to support that
2 argument, and therefore denied the motion as to the Rosenthal Act claim.

3 Plaintiff then moved for class certification, including on the Rosenthal Act claim. After full
4 briefing and a motion for reconsideration, the Court declined to certify a class on the Rosenthal Act
5 claim. Thus, the only Rosenthal Act claim at issue before the Court is Plaintiff's individual claim.

6 II.

7 DISCUSSION

8 Defendant argues it is entitled to summary judgment on Plaintiff's Rosenthal Act claim for three
9 reasons. First, Defendant reasserts its argument that this claim is time-barred. Second, Defendant
10 argues it is not a debt collector under the federal Fair Debt Collections Practices Act ("FDCPA"), which
11 Plaintiff relies on to support his Rosenthal Act claim. Third, Defendant contends it did not engage in
12 any conduct that violates the Rosenthal Act.

13 A. Summary Judgment

14 Summary judgment is appropriate if there is no genuine issue as to any material fact, and the
15 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has
16 the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398
17 U.S. 144, 157 (1970). The moving party must identify the pleadings, depositions, affidavits, or other
18 evidence that it "believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp.*
19 *v. Catrett*, 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the
20 litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard*
21 *Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

22 The burden then shifts to the opposing party to show that summary judgment is not appropriate.
23 *Celotex*, 477 U.S. at 324. The opposing party's evidence is to be believed, and all justifiable inferences
24 are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, to
25 avoid summary judgment, the opposing party cannot rest solely on conclusory allegations. *Berg v.*
26 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, it must designate specific facts showing there
27 is a genuine issue for trial. *Id.* See also *Butler v. San Diego District Attorney's Office*, 370 F.3d 956,
28 958 (9th Cir. 2004) (stating if defendant produces enough evidence to require plaintiff to go beyond

1 pleadings, plaintiff must counter by producing evidence of his own). More than a “metaphysical doubt”
2 is required to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith*
3 *Radio Corp.*, 475 U.S. 574, 586 (1986).

4 **B. Statute of Limitations**

5 The statute of limitations for Plaintiff’s Rosenthal Act claim is one year. Cal. Civ. Code §
6 1788.30(f). Defendant argues this claim is untimely because it did not *initiate* any collection activity
7 on Plaintiff’s account after February 3, 2009, which is more than one year prior to the filing of the
8 Complaint on June 29, 2010. However, whether Defendant *initiated* any collection activity in the year
9 prior to the filing of the Complaint is not the issue. Rather, the issue is whether Defendant *engaged in*
10 any conduct that violates the Rosenthal Act within that one year. On this issue, there is, at a minimum,
11 a genuine issue of material fact. For instance, Defendant’s phone logs reflect that Defendant followed
12 up on payment on Plaintiff’s account in May and June of 2010, after Plaintiff initiated contact on his
13 account. (Docket No. 51-2.) Therefore, Defendant is not entitled to summary judgment on the
14 Rosenthal Act claim on the ground the claim is time-barred.

15 **C. Debt Collector**

16 Next, Defendant argues that when a Rosenthal Act claim relies on substantive violations of the
17 FDCPA, as Plaintiff’s claim does, it also incorporates the FDCPA’s definition of “debt collector.”
18 Because Defendant is not a “debt collector” under the FDCPA, it argues it cannot be held liable for
19 Plaintiff’s claim under the Rosenthal Act.

20 In support of this argument, Defendant relies on *Marcotte v. General Electric Capital Services,*
21 *Inc.*, 709 F.Supp.2d 994 (S.D. Cal. 2010). In that case, the plaintiff owed a consumer debt to the
22 defendant. *Id.* at 996. The plaintiff hired a law firm to assist with his debts and file for bankruptcy. *Id.*
23 The firm sent a letter to the defendant informing the defendant of its representation of the plaintiff, and
24 asking that all future communications be sent to the firm. *Id.* Thereafter, the defendant sent two billing
25 statements to the plaintiff. *Id.* Based thereon, the plaintiff alleged the defendant violated that portion
26 of the Rosenthal Act that “prohibits certain communications by creditors to debtors represented by
27 counsel.” *Id.*

28 ///

1 The defendant moved for judgment on the pleadings. It noted the Rosenthal Act’s definition of
2 prohibited communications did not include billing statements, therefore its conduct could not be a
3 violation of the Act. *Id.* at 997. However, the plaintiff did not allege a substantive violation of the
4 Rosenthal Act. Instead, he alleged the defendant violated a substantive provision of the FDCPA, which
5 also prohibited certain communications by debt collectors to debtors represented by counsel. *Id.* at 997-
6 98. The defendant urged the court to “harmonize these provisions by applying the exception for billing
7 statements to both sections.” *Id.* at 998.

8 The court did so for three reasons. First, the court found that although the Rosenthal Act
9 incorporated certain specific provisions of the FDCPA, those provisions “must be read in the context
10 of a statutory scheme that permits and requires credit-card companies to send billing statements.” *Id.*
11 at 1001. Second, the court found that portion of the Rosenthal Act that incorporates the FDCPA was
12 modified by the specific exception for billing statements. *Id.* “Any other interpretation would result
13 in an implied repeal-a result disfavored by both California and federal law.” *Id.* at 1001-02. Third, the
14 court found the plaintiff’s construction of the state and federal statutes “would result in the preemption
15 and partial invalidity of § 1788.17[.]” *Id.* at 1002.

16 Defendant asserts the facts of this case are similar to those alleged in *Marcotte*, therefore this
17 Court should likewise find that Plaintiff’s claim is not viable. However, none of the reasons for the
18 *Marcotte* decision apply here. First, unlike in *Marcotte*, there is no specific provision of federal law that
19 allows, much less requires, that Defendant engage in the specific conduct at issue in this case. In
20 *Marcotte*, that conduct was the transmission of billing statements, which was required by TILA. There
21 is no similar law that requires or allows for false representations, threats or the use of deceptive means
22 to collect debts, which is the alleged conduct at issue here. Second, there is no specific exception for
23 this conduct in the Rosenthal Act. This is in contrast to *Marcotte*, where billing statements were
24 specifically excluded from the definition of prohibited communications. Third, there is no conflict
25 between the FDCPA and Rosenthal Act that would lead to preemption. Although the Rosenthal Act
26 and the FDCPA define “debt collector” differently, that difference does not create a conflict like the one
27 discussed in *Marcotte*. Indeed, “nothing indicates that Congress intended to preempt the CFDCPA or
28 to completely occupy the field of debt collection.” *Alkan v. Citimortgage, Inc.*, 336 F.Supp.2d 1061,

1 1065 (N.D. Cal. 2004). Thus, *Marcotte* is distinguishable from the facts of this case, and does not
2 support Defendant's argument in its request for summary judgment. Absent any other authority,
3 Defendant's argument that it is not a debt collector under the FDCPA does not warrant summary
4 judgment in its favor.

5 **D. Substantive Violations**

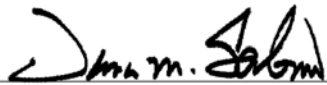
6 Defendant's final argument in support of its motion for partial summary judgment is that there
7 is no evidence that it engaged in conduct that violates the Rosenthal Act. However, this argument
8 misses the mark. The conduct at issue here is alleged to violate the FDCPA, which is incorporated into
9 the Rosenthal Act by California Civil Code § 1788.17. Defendant offers no evidence or argument that
10 it did not engage in that conduct. Thus, this argument does not warrant summary judgment in
11 Defendant's favor.

12 **III.**
13 **CONCLUSION**

14 For these reasons, Defendant's motion for partial summary judgment on Plaintiff's Rosenthal
15 Act claim is denied.

16 **IT IS SO ORDERED.**

17 DATED: January 31, 2012

18 
19 _____
20 HON. DANA M. SABRAW
21 United States District Judge
22
23
24
25
26
27
28