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SOUTHERN DISTRICT OF CALIFORNIA

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

10 BRIAN W. MCALISTER and  
11 JEANNIE E. MCALISTER,

Plaintiffs,

12 vs.

13  
14 BASELINE FINANCIAL SERVICES,  
15 INC. and THE LAW OFFICE OF  
16 PAUL R. KRAFT,

Defendants.

CASE NO. 13-CV-1412 BEN (NLS)

**ORDER DENYING MOTION TO  
DISMISS UNDER RULE 12(B)(6),  
AND IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT  
UNDER RULE 56**

[Docket No. 10]

17  
18 Presently before the Court is Defendant Baseline Financial Services, Inc.'s  
19 Motion to Dismiss for Failure to State a Claim Pursuant to Federal Rule of Civil  
20 Procedure 12(b)(6), or in the Alternative, for Summary Judgment Pursuant to Federal  
21 Rule of Civil Procedure 56, on Plaintiffs' First Amended Complaint. (Docket No. 10.)  
22 For the reasons stated below, the Motion is **DENIED**.

23 **BACKGROUND**

24 Plaintiffs Brian W. McAlister and Jeannie E. McAlister incurred financial  
25 obligations to Defendant Baseline Financial Services, Inc. at some time before August  
26 17, 2012. (FAC ¶ 20.) Plaintiffs allegedly fell behind in making payments owed on  
27 the debt, and the debt was assigned to Defendant The Law Office of Paul R. Kraft for  
28 collection on behalf of Baseline. (*Id.* ¶¶ 22-23.) On August 17, 2012, Fred Watkins,  
Baseline's president, contacted Ms. McAlister by telephone. (*Id.* ¶ 24.)

1 On October 12, 2012, Defendants filed suit in the El Centro Superior Court in  
2 an attempt to collect the alleged debt (“Collection Action”).<sup>1</sup> (*Id.* ¶ 32.) Plaintiffs  
3 allege that they “did not reside in [the] jurisdiction in which the lawsuit was filed in at  
4 the time the lawsuit was filed, and further, did not enter in the alleged contract with  
5 Defendants while present in El Centro, and did not incur any portion of the alleged debt  
6 while present in El Centro.” (*Id.* ¶ 33.)

7 Plaintiffs initiated this action on June 17, 2013. The First Amended Complaint  
8 (the operative complaint) alleges two claims against both defendants: (1) violation of  
9 the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 *et seq.*; and (2)  
10 violation of the Rosenthal Fair Debt Collection Practices Act, California Civil Code  
11 §§ 1788-1788.32.

12 Presently before the Court is Baseline’s Motion to Dismiss for Failure to State  
13 a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the Alternative, for  
14 Summary Judgment Pursuant to Federal Rule of Civil Procedure 56, on Plaintiffs’ First  
15 Amended Complaint.

## 16 DISCUSSION

17 Baseline moves to dismiss Plaintiffs’ claims under Rule 12(b)(6). Baseline  
18 moves in the alternative for summary judgment pursuant to Rule 56. The Court will  
19 first address Baseline’s motion under Rule 12(b)(6), and next address Baseline’s  
20 motion under Rule 56.

### 21 I. MOTION TO DISMISS

22 Under Rule 12(b)(6), dismissal is appropriate if, taking all factual allegations as  
23 true, the complaint fails to state a plausible claim for relief on its face. FED. R. CIV. P.  
24 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007); *see also Ashcroft*  
25 *v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring plaintiff to plead factual content that  
26 provides “more than a sheer possibility that a defendant has acted unlawfully”). Under

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27  
28 <sup>1</sup>Baseline’s Request for Judicial Notice (Docket No. 10-4) is **GRANTED**. *See* FED. R. EVID. 201(b); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

1 this standard, dismissal is appropriate if the complaint fails to state enough facts to  
2 raise a reasonable expectation that discovery will reveal evidence of the matter  
3 complained of, or if the complaint lacks a cognizable legal theory under which relief  
4 may be granted. *Twombly*, 550 U.S. at 556.

5 When deciding a motion to dismiss made under Rule 12(b)(6), a court generally  
6 may consider only matters stated in or incorporated into the complaint, matters of  
7 public record, and documents upon which the complaint relies. *Coto Settlement v.*  
8 *Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). If a court does consider evidence  
9 outside the pleading, the motion must be converted into a motion for summary  
10 judgment. *Inlandboatmens Union of the Pac. v. Dutra Grp.*, 279 F.3d 1075, 1083 (9th  
11 Cir. 2002).

12 Baseline moves to dismiss all claims in the First Amended Complaint. Each  
13 claim will be addressed in turn.

14 **A. Disclosures Required Under 15 U.S.C. § 1692g(a)**

15 The First Amended Complaint alleges that Baseline violated both the FDCPA  
16 and Rosenthal Act by failing to provide written notification containing the five  
17 disclosures required by 15 U.S.C. § 1692g(a) within five days of its initial  
18 communication with Plaintiffs. (FAC ¶¶ 25-31.) According to the First Amended  
19 Complaint, the initial communication between Baseline and Plaintiffs was a telephone  
20 conversation between Baseline's president, Fred Watkins, and Ms. McAlister, that  
21 occurred on August 17, 2012. (*Id.* ¶ 24.)

22 Section 1692g(a) provides:

23 Within five days after the initial communication with a consumer in  
24 connection with the collection of any debt, a debt collector shall, unless  
25 the following information is contained in the initial communication or  
26 the consumer has paid the debt, send the consumer a written notice containing—  
27 (1) the amount of the debt;  
28 (2) the name of the creditor to whom the debt is owed;  
(3) a statement that unless the consumer, within thirty days after receipt  
of the notice, disputes the validity of the debt, or any portion thereof, the  
debt will be assumed to be valid by the debt collector;  
(4) a statement that if the consumer notifies the debt collector in writing  
within the thirty-day period that the debt, or any portion thereof, is

1           disputed, the debt collector will obtain verification of the debt or a copy  
2           of a judgment against the consumer and a copy of such verification or  
3           judgment will be mailed to the consumer by the debt collector; and  
4           (5) a statement that, upon the consumer's written request within the  
5           thirty-day period, the debt collector will provide the consumer with the  
6           name and address of the original creditor, if different from the current  
7           creditor.

8           These portions of the FDCPA are incorporated by reference in the Rosenthal  
9           Act, through California Civil Code § 1788.17.

10           Baseline argues that its first contact with Plaintiffs was a collection letter sent  
11           to Plaintiffs at 3352 Palm Drive, El Centro, California 92243 on July 18, 2012.  
12           Baseline argues that it provided all of the information required by § 1692g(a) in the  
13           July 18 collection letter. The July 18 collection letter, however, is not referenced in the  
14           First Amended Complaint, nor is it a matter of public record or a document upon which  
15           the First Amended Complaint relies. Accordingly, this Court may not consider the July  
16           18 collection letter while deciding the motion to dismiss. If the Court were to consider  
17           this letter, the motion must be converted into a motion for summary judgment.

#### 18           **B.     Filing of Collection Action in Imperial County**

19           The First Amended Complaint alleges that the Collection Action was filed in El  
20           Centro Superior Court. (FAC ¶ 32.) According to the First Amended Complaint,  
21           "Plaintiffs did not reside in [the] jurisdiction in which the lawsuit was filed in at the  
22           time the lawsuit was filed, and further, did not enter in the alleged contract with  
23           Defendants while present in El Centro, and did not incur any portion of the alleged debt  
24           while present in El Centro." (*Id.* ¶ 33.) Plaintiffs allege that Baseline violated both 15  
25           U.S.C. § 1692i and California Civil Code § 1788.17 by filing suit in an improper  
26           venue. (*Id.* ¶¶ 33-37.)

27           Under both the FDCPA and the Rosenthal Act, a debt collector can be liable for  
28           filing a collection action in a county where the debtor did not reside at the time the suit  
          was filed, nor where the contract was entered into or the debt incurred. 15 U.S.C.  
          § 1692i; CAL. CIV. CODE § 1788.17. The Collection Action was filed in Imperial  
          County. The parties do not dispute that the contract for the loan was entered into in

1 San Diego County, and the debt was incurred in San Diego County.

2 Baseline offers three alternative arguments in support of its motion to dismiss  
3 this claim. First, Baseline argues that Plaintiffs resided in Imperial County at the time  
4 the complaint in the Collection Action was filed. In support of its argument, Baseline  
5 submits declarations by both Paul Kraft and Fred Watkins, which outline the reasons  
6 Baseline had for believing that Plaintiffs resided in Imperial County. Second, Baseline  
7 argues that it attempted to cure the potential violation within 15 days of learning of it,  
8 and therefore Baseline is protected from liability under the safe harbor provision  
9 created by the Rosenthal Act, California Civil Code § 1788.30(d). In support of this  
10 argument, Baseline points to Watkins' and Kraft's Declarations, in which they testify  
11 that Kraft sent a letter to Plaintiffs on August 12, 2013 offering to stipulate to transfer  
12 the action to San Diego County. Third, Baseline argues that the filing of the complaint  
13 in a county in which Plaintiffs did not reside was a bona fide error under California  
14 Civil Code § 1788.30(e) and 15 U.S.C. § 1692k(c). Baseline points to Watkins' and  
15 Kraft's Declarations, which purport to show that the alleged violation was  
16 unintentional and that Baseline's procedures were reasonably adapted to avoid such an  
17 error.

18 The information contained in Kraft's and Watkins' Declarations, however, is not  
19 referenced in the First Amended Complaint, nor are the declarations a matter of public  
20 record or a document upon which the First Amended Complaint relies. Accordingly,  
21 this Court may not consider these declarations while deciding the motion to dismiss.  
22 If the Court were to consider these declarations, the motion must be converted into a  
23 motion for summary judgment.

## 24 II. MOTION FOR SUMMARY JUDGMENT

25 A motion for summary judgment may be granted only "if the movant shows that  
26 there is no genuine dispute as to any material fact and the movant is entitled to  
27 judgment as a matter of law." FED. R. CIV. P. 56(a). "If a nonmovant shows by  
28 affidavit or declaration that, for specified reasons, it cannot present facts essential to

1 justify its opposition, the court may: (1) defer considering the motion or deny it; (2)  
2 allow time to obtain affidavits or declarations or to take discovery; or (3) issue any  
3 other appropriate order.” FED.R. CIV. P. 56(d). Specifically, when a motion to dismiss  
4 is converted into a motion for summary judgment, “the non-moving party must be  
5 allowed to conduct discovery in order to oppose that motion.” *Inlandboatmens Union*  
6 *of the Pac.*, 279 F.3d at 1083.

7 Here, Plaintiffs argue that they “cannot present certain facts essential to justify  
8 Plaintiff’s opposition to Defendant’s motion for summary judgment in this matter  
9 without conducting significant discovery in this matter.” (Connolly Decl. ¶ 4.) In  
10 support of this argument, they submit Crosby S. Connolly’s Declaration, which outlines  
11 sixteen pieces of information that Plaintiffs hope to investigate if granted the  
12 opportunity to conduct discovery.


13 Baseline argues that Plaintiffs do not need to conduct discovery because the  
14 information they need to oppose a motion for summary judgment is in Plaintiffs’  
15 possession. Much of the information outlined in Connolly’s Declaration, however,  
16 concerns Baseline’s actions. It appears that Plaintiffs may need to conduct additional  
17 discovery on these matters to oppose a motion for summary judgment.<sup>2</sup> Accordingly,  
18 this Court declines to convert Baseline’s motion to dismiss into a summary judgment  
19 motion.

20 **CONCLUSION**

21 For the reasons stated above, Baseline’s Motion to Dismiss for Failure to State  
22 a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the Alternative, for  
23 Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 is **DENIED**.

24 **IT IS SO ORDERED.**

25 Dated: March 13, 2014

26   
27 HON. ROGER T. BENITEZ  
United States District Judge

28 <sup>2</sup>This Order does not express a viewpoint on any discovery disputes that may  
later arise in this action.