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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TOOTH ACRES, LLC, a Washington
limited liability company, and GENE
SCHEEL, an individual,

Plaintiffs,

v.

HOODSTOCK RANCH, LLC, a
Washington limited liability
company, and MARK GORDON
HERON and MARY KATHLEEN
HERON, husband and wife,

Defendants.

NO. 1:20-CV-3091-TOR

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION FOR PARTIAL
SUMMARY JUDGMENT

BEFORE THE COURT is Plaintiffs’ Motion for Partial Summary Judgment
Re Punitive Damages and Unfair Debt Collection Claim (ECF No. 29). This
matter was submitted for consideration without oral argument. The Court has
reviewed the record and files herein, and is fully informed. For the reasons
discussed below, Plaintiffs’ Motion for Partial Summary Judgment Re Punitive

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT ~ 1

1 Damages and Unfair Debt Collection Claim (ECF No. 29) is **GRANTED in part**
2 and **DENIED in part**.

3 **BACKGROUND**

4 This case concerns a 2019 real estate transaction in which Plaintiffs sold
5 property in Klickitat County, Washington, to Defendants. *See* ECF No. 1-2.
6 Plaintiffs seek partial summary judgment on Defendants’ counterclaims for
7 punitive damages and for alleged violations of the Oregon Unfair Debt Collection
8 Practices Act (“OUDCPA”). ECF No. 29. Plaintiffs’ initial statement of facts rely
9 solely on those stated in Defendants’ pleading for counterclaims. ECF No. 30.
10 Defendants filed a response with supporting declarations. ECF Nos. 38-39.
11 Plaintiffs’ reply included a declaration in support of the motion. ECF No. 41.
12 Defendants subsequently filed a Motion to Supplement Record to add an additional
13 document into the record. ECF No. 43. Except where noted, the following facts
14 are not in dispute.

15 Plaintiffs are residents of Washington. ECF No. 30 at 2, ¶¶ 3-4. Defendant
16 Hoodstock is also a Washington limited liability company. ECF No. 30 at 2, ¶ 5.

17 Defendants’ counterclaims include damage in part for personal property
18 repossessed in Washington. ECF No. 30 at 2, ¶¶ 1-2. However, Defendants’
19 counterclaims also include damage allegedly incurred in Oregon, including
20 damage from communications received in Oregon. ECF No. 37 at 2, ¶ 1.

1 Plaintiffs allege that the parties' relationship is centered solely on the
2 Defendants' purchase of real and personal property in Washington from Plaintiffs.
3 ECF No. 30 at 2, ¶ 6. Defendants dispute this characterization and point to the ties
4 in Oregon, including that Plaintiff Dr. Scheel sent communications to Oregon to
5 threaten Defendants and interfere with Defendants' business relationships, the sale
6 agreement was negotiated across state lines, and the sale agreement was executed
7 on an "Oregon Commercial Form" governed by Oregon law. ECF No. 37 at 2-3, ¶
8 6; ECF No. 43. Plaintiffs dispute that the agreement was negotiated across state
9 lines, alleging that all negotiations and meetings occurred in Washington. ECF
10 No. 42 at 1-2, ¶ 1.

11 Plaintiffs originally alleged that the communication on which Defendants
12 rely for their counterclaims were sent by Washington residents from Washington.
13 ECF No. 30 at 2, ¶ 7. Defendants assert it remains unknown from where the
14 messages were sent and Plaintiffs now claim in reply that the text messages were
15 sent from Washington and Idaho. ECF No. 42 at 2, ¶ 2.

16 Plaintiffs seek a ruling that the choice of law analysis results in application
17 of Washington law, thereby removing Defendants' punitive damage claims. ECF
18 No. 29. Plaintiffs also contend that neither are a "creditor" as defined by the
19 OUDCPA, so those alleged violations should be dismissed. *Id.*

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1 **DISCUSSION**

2 **A. Summary Judgment Standard**

3 The Court may grant summary judgment in favor of a moving party who
4 demonstrates “that there is no genuine dispute as to any material fact and that the
5 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling
6 on a motion for summary judgment, the court must only consider admissible
7 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The
8 party moving for summary judgment bears the initial burden of showing the
9 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
10 317, 323 (1986). The burden then shifts to the non-moving party to identify
11 specific facts showing there is a genuine issue of material fact. *See Anderson v.*
12 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla
13 of evidence in support of the plaintiff’s position will be insufficient; there must be
14 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

15 For purposes of summary judgment, a fact is “material” if it might affect the
16 outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is
17 “genuine” only where the evidence is such that a reasonable jury could find in
18 favor of the non-moving party. *Id.* The Court views the facts, and all rational
19 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*
20 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted

1 “against a party who fails to make a showing sufficient to establish the existence of
2 an element essential to that party’s case, and on which that party will bear the
3 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

4 If the nonmoving defendant can show that “it cannot present facts essential
5 to justify its opposition, the court may: (1) defer considering the motion or deny it;
6 (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue
7 any other appropriate order.” Fed. R. Civ. P. 56(d).

8 **B. Choice of Law Dispute**

9 Plaintiffs move this Court to apply Washington law to Defendants’
10 counterclaims for punitive damages and dismiss Defendants’ counterclaim for
11 violation of Oregon’s Unlawful Debt Collection Practices Act (“OUDCPA”). ECF
12 No. 29 at 1-2. Defendants argue in part that Plaintiffs’ motion is premature.

13 In determining choice of law, Washington utilizes the “most significant
14 relationship test.” *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings,*
15 *Inc.*, 180 Wash. 2d 954, 967 (2014). In determining which state law applies, courts
16 will 1) “evaluate the contacts with each interested jurisdiction” and 2) “evaluate
17 the interests and public policies of potentially concerned jurisdictions.” *Id.* at 968.
18 This requires “a subjective analysis of objective factors” so that “the ultimate
19 outcome, in any given case, depends upon the underlying facts of that case.” *Id.* at

1 966, n.12 (quoting *Southwell v. Widing Transp., Inc.*, 101 Wash. 2d 200, 204
2 (1984)).

3 While the *FutureSelect* decision analyzed a choice of law dispute on the
4 pleadings in a motion to dismiss, the Court finds the circumstances analogous here
5 where Plaintiffs' motion was filed before formal discovery began. Defendants'
6 motion to supplement a document that was allegedly sent to Oregon to interfere
7 with Defendants' business relationships underscores the need for further discovery
8 on the relevant contacts in Oregon. ECF No. 43. At the very least, the Court will
9 deny summary judgment under Rule 56(d) as Defendants have shown that it cannot
10 present facts essential to the choice of law dispute at this time. Therefore, summary
11 judgment on the choice of law dispute is not appropriate.

12 However, the Court notes that Defendants acknowledge the trespass claim is
13 "likely" based on Washington law as it is based on an invasion of property in
14 Washington. ECF No. 36 at 7. Therefore, finding this claim undisputed,
15 Washington law will govern Defendants' counterclaim for trespass and Oregon's
16 punitive damage provision will not apply to this claim.

17 **C. OUDCPA**

18 Plaintiffs also argue that Defendants' OUDCPA must be dismissed because
19 neither Plaintiff is a "creditor" for purposes of the Act. ECF No. 29 at 6.
20 Defendants argue that Plaintiff Dr. Scheel is a "creditor" where he "appears to

1 concede that he regularly makes and attempts to collect loans to consumers as part
2 of his dental practice.” ECF No. 36 at 11.

3 Under the OUDCPA, a “creditor” is defined as “a person that, in the
4 ordinary course of the person’s business, engages in consumer transactions that
5 result in a consumer owing a debt to the person.” ORS § 646.639(1)(e). In turn, a
6 “consumer” is defined as “a natural person who purchases or acquires property,
7 services or credit for personal, family or household purposes.” ORS §
8 646.639(1)(b).

9 Setting aside the choice of law dispute, there is a material question of fact as
10 to whether Plaintiff Dr. Scheel’s conduct occurred within the ordinary course of his
11 dental business to fall within the OUDCPA. However, Defendant Hoodstock, as a
12 limited liability company, is not a “natural person” to qualify as a “consumer”
13 under the plain meaning of the statute. Moreover, Defendants do not contend on
14 summary judgment that Plaintiff Tooth Acres is a “creditor” within the meaning of
15 the Act. Therefore, Defendants’ counterclaim for the alleged violation of the
16 OUDCPA must be limited accordingly.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiffs' Motion for Partial Summary Judgment Re Punitive Damages
3 and Unfair Debt Collection Claim (ECF No. 29) is **GRANTED in part**
4 and **DENIED in part**.

5 The District Court Executive is directed to enter this Order and furnish
6 copies to counsel.

7 **DATED** November 2, 2020.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge