

1 **II. BACKGROUND**

2 **A. Factual Background¹**

3 Defendant AAI is a debt collector and was attempting to collect a consumer
4 debt from Mr. Lang, a consumer. ECF No. 16 at ¶1. AAI was assigned a claim
5 from R.C. Schwartz and Associates against Mr. Lang for money owed pursuant to
6 a rental agreement for an apartment in Spokane. *Id.* at ¶¶ 2 & 5. On March 4,
7 2014, Defendant filed a lawsuit, which to date has not been resolved, against
8 Plaintiff in the Spokane County District Court based on the R.C. Schwartz claim.
9 *Id.* at ¶¶ 4 & 6. On April 29, 2014, a Note for Trial Setting in the state matter
10 was prepared, signed, and filed with the Spokane County District Court. *Id.* at ¶
11 9. The Note for Trial Setting, ECF No. 29-1, contains a “CERTIFICATION OF
12 MAILING” section that is signed by Robin Wood, an employee of AAI, stating
13 that, on April 29, 2014, she mailed the Note to Plaintiff. ECF No. 29-1. On April
14 29, 2014, Robin Wood placed the Note for Trial Setting in AAI’s mail system.
15 ECF No. 16 at ¶ 11. The envelope containing the Note sent to Plaintiff indicates
16 that it was mailed on May 2, 2014. ECF No. 29-1.

17 Until April 30, 2014, Plaintiff represented himself in the state court matter.
18 On April 30, 2014, Mr. Miller filed with the Spokane County District Court a
19 Notice of Appearance on Plaintiff’s behalf. Defendant admits it was served with a

20 ¹ In ruling on the motion for summary judgment, the Court has considered the facts and all reasonable inferences
therefrom as contained in the submitted affidavits, declarations, exhibits, and depositions, in the light most
favorable to the party opposing the motion. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999).

1 copy of Plaintiff's attorney's Notice of Appearance at 1:43 PM on April 30, 2014.
2 ECF No. 23 at 2 ¶ 4.7. Defendant also admits that an employee or agent of
3 Defendant hand-wrote an acknowledgement of receipt of the Notice, ECF No. 28-
4 1 ("rec'd 4/30/14). ECF No. 23 at 2 ¶ 4.8. On May 1, 2014, Robin Wood learned
5 of Mr. Miller's representation of Plaintiff. ECF No. 15 at 2, ¶ 6. At the time
6 Defendant mailed a copy of the Note for Trial Setting to Plaintiff, Defendant had
7 not requested or received permission from Plaintiff's counsel or any court to
8 communicate with Plaintiff directly. ECF No. 23 at 2 ¶ 4.16.

9 **B. Procedural Background**

10 On June 11, 2014, Plaintiff filed a Complaint alleging two violations of the
11 Fair Debt Collection Practices Act ("FDCPA"), specifically sections 15 U.S.C. §
12 1692b(6) and § 1692e. On September 22, 2014, Defendant moved for summary
13 judgment. ECF No. 13. That same day, Plaintiff sought leave to amend his
14 Complaint, ECF No. 17, to change the violation of § 1692b(6) to a violation of §
15 1692c(a)(2), which was granted September 24, 2014, ECF No. 21. Plaintiff filed
16 the Amended Complaint, ECF No. 22, on September 29, 2014, and that same day,
17 Defendant filed an Answer to the Amended Complaint, ECF No. 23. Also that
18 same day, Plaintiff filed for summary judgment, ECF No. 25.

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1 **III. MOTIONS FOR SUMMARY JUDGMENT**

2 **A. Legal Standard**

3 Summary judgment is appropriate if the “movant shows that there is no
4 genuine dispute as to any material fact and the movant is entitled to judgment as a
5 matter of law.” Fed. R. Civ. P. 56(a). Once a party has moved for summary
6 judgment, the opposing party must point to specific facts establishing that there is
7 a genuine dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If
8 the nonmoving party fails to make such a showing for any of the elements
9 essential to its case for which it bears the burden of proof, the trial court should
10 grant the summary judgment motion. *Id.* at 322. “When the moving party has
11 carried its burden under Rule [56(a)], its opponent must do more than simply
12 show that there is some metaphysical doubt as to the material facts. . . . [T]he
13 nonmoving party must come forward with ‘specific facts showing that there is a
14 genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
15 U.S. 574, 586-87 (1986) (internal citation omitted) (emphasis in original). When
16 considering a motion for summary judgment, the Court does not weigh the
17 evidence or assess credibility; instead, “the evidence of the non-movant is to be
18 believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v.*
19 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). When considering the summary
20 judgment motion, the Court 1) took as true all undisputed facts; 2) viewed all

1 evidence and drew all justifiable inferences therefrom in non-moving party's
2 favor; 3) did not weigh the evidence or assess credibility; and 4) did not accept
3 assertions made that were flatly contradicted by the record. *See Scott v. Harris*,
4 550 U.S. 372, 380 (2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
5 (1986).

6 **B. Discussion**

7 The parties do not dispute that Plaintiff was a consumer and that Defendant
8 was a debt collector attempting to collect on a debt. As the parties have both
9 moved for summary judgment, the sole issue before this Court is whether on the
10 facts presented a violation of 15 U.S.C. § 1692e or 15 U.S.C. § 1692c(a)(2) can be
11 determined as a matter of law.

12 1. Violation of § 1692e: False, Deceptive, or Misleading Representation

13 Plaintiff maintains that Defendant violated 15 U.S.C. § 1692e by stating on
14 the Note for Trial Setting that the Note was sent by Robin Wood in first class mail
15 on April 29, 2014, but that the May 2, 2014 mailing date and Ms. Woods own
16 declaration indicates the document was not placed in the mail by Ms. Woods nor
17 mailed on April 29, 2014.

18 Section 1692e provides in pertinent part that “[a] debt collector may not use
19 any false, deceptive, or misleading representation or means in connection with the
20 collection of any debt” and that “[t]he use of any false representation or deceptive

1 means to collect or attempt to collect any debt or to obtain information concerning
2 a consumer” is “a violation of this section.” 15 U.S.C. § 1692e(10). However, for
3 violation of § 1692e, the Ninth Circuit has adopted the approach taken by the
4 Sixth and Seventh Circuit, requiring that the representation must be material.
5 “[F]alse but non-material representations are not likely to mislead the least
6 sophisticated consumer and therefore are not actionable under § 1692e.” *Donohue*
7 *v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010). The Ninth Circuit has
8 “consistently held that whether conduct violates § 1692e . . . requires an objective
9 analysis that considers whether ‘the least sophisticated debtor would likely be
10 misled by a communication.’” *Id.* (quoting *Guerrero v. RJM Acquisitions LLC*,
11 499 F.3d 926, 934 (9th Cir. 2007)). “[T]he materiality requirement functions as a
12 corollary inquiry into whether a statement is likely to mislead an unsophisticated
13 consumer.” *Id.* at 1034. “In assessing FDCPA liability, [Courts] are not
14 concerned with mere technical falsehoods that mislead no one, but instead with
15 genuinely misleading statements that may frustrate a consumer's ability to
16 intelligently choose his or her response” concerning her debt. *Id.* (finding the
17 representations in the Complaint at issue did not undermine Plaintiff’s ability to
18 intelligently choose her actions concerning her debt).

19 Here, even assuming the representations in the Note are false, in that the
20 Note was not placed in first class mail by Ms. Wood on April 29, 2014, such a

1 false representation, if true, could not affect Plaintiff's ability to intelligently
2 choose his response concerning his debt. The Note informed Plaintiff that the
3 case regarding his alleged debt would be brought on the trial setting docket on
4 May 23, 2014, and would be assigned a trial date in June or July 2014. ECF No.
5 29-1. Whether the note was mailed April 29, 2014, or May 2, 2014, and whether
6 it was placed in first class mail by Ms. Wood or another employee of AAI, could
7 not impact Plaintiff's decisions concerning his alleged debt. While Plaintiff
8 maintains that the misrepresentation is material because it resulted in an alleged
9 violation of § 1692c(a)(2), Plaintiff's argument misplaces the focus of the
10 materiality requirement. The Ninth Circuit's inquiry is whether it was material to
11 his decision concerning his debt, not whether he may have an articulable separate
12 cause of action against the debt collector. *See Donohue*, 592 F.3d at 1032-34.
13 Accordingly, the Court finds that, taking the facts in a light most favorable to
14 Plaintiff, Plaintiff cannot demonstrate a violation of § 1692e based upon the Note.

15 2. Violation of § 1692c(a)(2): Communication with Represented Debtor

16 Next, Plaintiff maintains that Defendant violation § 1692c(a)(2) by causing
17 the Note to be sent directly to Plaintiff after Defendant's knew he was represented
18 by counsel. Section 1692c(a)(2) provides:

19 Without the prior consent of the consumer given directly to the debt
20 collector or the express permission of a court of competent
jurisdiction, a debt collector may not communicate with a consumer
in connection with the collection of any debt—

1 (2) if the debt collector knows the consumer is represented by
2 an attorney with respect to such debt and has knowledge of, or
3 can readily ascertain, such attorney's name and address, unless
4 the attorney fails to respond within a reasonable period of time
5 to a communication from the debt collector or unless the
6 attorney consents to direct communication with the consumer.

7 15 U.S.C. § 1692c(a)(2). As the parties agree that Defendant is a debt
8 collector, Plaintiff is a consumer, and Defendant did not have permission of
9 a court or consent from the attorney, the two sole issues before this Court is
10 whether the Note was a “communication in connection with the collection
11 of any debt” and whether at the time the communication was sent to
12 Plaintiff, Defendant knew Plaintiff was represented by an attorney.

13 *a. Communication in Connection with Collection of Debt*

14 The FDCPA defines a “communication” as “the conveying of information
15 regarding a debt directly or indirectly to any person through any medium.” 15
16 U.S.C. § 1692a(2). The Fourth Circuit explains that the FDCPA defines
17 “communication” “broadly[.]” *Sayed v. Wolpoff & Abramson*, 485 F.3d 226, 232
18 (4th Cir. 2007). A communication need not expressly request payment of an
19 outstanding debt in order to qualify as a communication with a consumer in
20 connection with the collection of a debt. *Gburek v. Litton Loan Servicing LP*, 614
F.3d 380, 385 (7th Cir. 2010). For example, the Seventh Circuit recently held that
a letter from a mortgage servicer to a homeowner in default seeking to discuss
“foreclosure alternatives” and urging her that it was “not too late to save [her]

1 home” was a communication made in connection with the collection of a debt. *Id.*
2 at 386. In *Donohue*, the Ninth Circuit found that because Quick Collect caused
3 Donohue to be served with the Complaint to further its efforts to collect the debt
4 through litigation, the Complaint was a communication under the FDCPA.
5 *Donohue v. Quick Collectin, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010). Similarly,
6 while acknowledging the Supreme Court’s decision in *Heintz*² that the FDCPA
7 applies to the litigation activities of lawyers, the Ninth Circuit in *McCollough*
8 concurred with the Fourth Circuit that the FDCPA applies to written discovery
9 documents including the requests for admissions at issue. *McCollough v.*
10 *Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 951 (9th Cir. 2011). *See*
11 *also Ruth v. Triumph Partnerships*, 577 F.3d 790, 798-99 (7th Cir. 2009) (finding
12 any reasonable trier of fact would conclude that the Privacy Notice included with
13 the collection letter was sent in connection with an attempt to collect a debt,
14 noting that “defendants would not have sent this combination of materials to the
15 plaintiffs if they had not been attempting to collect a debt”).

16 Here, the Court finds that the Note for Trial Setting was a communication
17 made in connection with the collection of a debt. First, the Note directly
18 conveyed information regarding a debt. Specifically, the Note informed Plaintiff
19 that Defendant sought to set its collection efforts for trial in June or July of 2014

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² *Heintz v. Jenkins*, 514 U.S. 291 (1995).

1 and that a hearing was scheduled in relation to the lawsuit over the alleged debt.
2 As in *Donohue*, where the complaint furthered the debt collector's efforts to
3 collect the debt through litigation, here too, the Note for Trial Setting furthered
4 Defendant's efforts to collect the debt through litigation by setting a hearing to set
5 the matter for trial. Second, as the very issue that was to be set for trial was
6 Plaintiff's alleged debt that Defendant sought to collect, the Court finds the
7 communication was made in connection with the collection of a debt.

8 *b. Time of the Communication*

9 Based upon the foregoing, the sole issue remaining is whether, at the time
10 Defendant communicated directly to Plaintiff, Defendant knew Plaintiff was
11 represented by counsel. First, the record is clear that on April 30, 2014, Mr.
12 Miller filed a Notice of Appearance, which Defendant admits they received at
13 1:43 PM on April 30, 2014, and hand-wrote their acknowledgment of receipt of
14 the Notice. Additionally, Ms. Wood acknowledges she reviewed the Notice of
15 Appearance sometime on May 1, 2014. However, the Court finds there is a
16 genuine dispute of material fact as to when the Note for Trial Setting was sent to
17 Plaintiff. Defendant maintains that the Note was mailed on April 29, 2014. In its
18 Answer, Defendant states the date of mailing was April 29, 2014, ECF No. 23 at
19 ¶ 4.10, and states on summary judgment that Ms. Wood placed the Note in AAI's
20 mailing system on April 29, 2014, ECF No. 15. In contrast, Plaintiff maintains

1 that the Note was sent on May 2, 2014, the date contained on the envelope
2 received by Plaintiff. ECF No. 29-1. Courts have recognized that the date
3 something is placed in the mail can be distinct from the date it is postmarked. *See*
4 *e.g. In re Albertson's Inc. Employment Practices Litig.*, No. MS-98-1215-S-BLW,
5 2006 WL 2524117, at *2 (D. Idaho Aug. 30, 2006) (“claimant who places his
6 Notice in a post office box just before midnight on a Friday has ‘mailed’ the
7 Notice as of Friday even though the Notice will not be postmarked until the
8 following Monday”). Additionally, it is unclear from the record whether the
9 statement “Mailed From 99201 05/02/2014” was placed by a mail machine at AAI
10 or by the post office. If AAI placed the forty-eight cent stamp on the envelope on
11 May 2, 2014, a full day after Ms. Wood acknowledge she knew Plaintiff was
12 represented, then clearly AAI violated 1692c(a)(2). However, because the Court
13 on summary judgment cannot weight the credibility of evidence and therefore
14 cannot give more credit to the representation that it was mailed³ on April 29,
15 2014, than it can to the May 2, 2014 envelope marking, based upon the record
16 before this Court, when the Note was sent is a matter for the jury to resolve.

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19 ³ While the Court is not convinced that placing a mailing in their internal mailing system, over which AAI still
20 maintains control, in any way relieves them of their obligation under the FDCPA to not directly communication
with a represented consumer, because it is unclear when AAI actually relinquished control over the communication
by placing it in the custody of the United States Postal Service, the determination of when the communication more
likely than not was sent is a matter best reserved for the jury.

1 3. Bad Faith

2 Defendant asks the Court to find that Plaintiff filed this matter in bad faith.

3 Section 1692k provides that:

4 (3) . . . On a finding by the court that an action under this section was
5 brought in bad faith and for the purpose of harassment, the court may
6 award to the defendant attorney's fees reasonable in relation to the
7 work expended and costs.

8 15 U.S.C. § 1692k. However, because the Court finds there is a genuine dispute
9 of material fact precluding summary judgment, which means there is a basis on
10 which Plaintiff may have a legitimate claim, the Court finds the lawsuit could not
11 have been filed in bad faith or for the purpose of harassment.

12 **IV. CONCLUSION**

13 In conclusion, the Court finds no violation of § 1692e as any
14 misrepresentation was immaterial. While the Court finds that the Note was a
15 communication, a genuine dispute of material fact regarding when the Note was
16 sent to Plaintiff precludes a finding, at this time, whether § 1692c(a)(2) was
17 violated as a matter of law. Accordingly, left unresolved is the factual
18 determination as to when Defendant effected communication of the Note to
19 Plaintiff, and whether, regardless of when the Note was mailed, the alleged
20 violation of § 1692c(a)(2) is within Defendant's affirmative defenses of bona fide
 error.


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

2 **1.** Defendant's Motion for Summary Judgment, **ECF No. 13**, is
3 **GRANTED IN PART** (finding no violation of § 1692e) and
4 **DENIED IN PART** (finding the Note was a communication; finding
5 genuine dispute of material fact precludes summary judgment as to
6 alleged violation of § 1692c(a)(2); finding no bad faith).

7 **2.** Plaintiff's Motion for Summary Judgment, **ECF No. 25**, is
8 **GRANTED IN PART** (finding the Note was a communication) and
9 **DENIED IN PART** (finding no violation of § 1692e; finding
10 genuine dispute of material fact precludes summary judgment as to
11 alleged violation of § 1692c(a)(2)).

12 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order
13 and provide copies to all counsel.

14 **DATED** this 18th day of November 2014.

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16 SALVADOR MENDOCZA, JR.
17 United States District Judge
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