UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

MONIR MIRSHAFIEI,

Plaintiff,

v.

LEGAL RECOVERY LAW OFFICES, INC.,

Defendant.

Case No.: SACV 15-00873-CJC(DFMx)

ORDER GRANTING IN SUBSTANTIAL PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Monir Mirshafiei brings this action against Defendant Legal Recovery Law Offices, Inc. for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692–1692(p). (Dkt. 25 [First Amended Complaint ("FAC")].) Before the

Court is Plaintiff's motion for partial summary judgment (which she refers to as a motion for summary judgment or "summary adjudication").[1] (Dkt. 33-1 ("Mot.").) Plaintiff seeks to litigate any "remaining issues," including damages, at trial, which is currently scheduled on November 1, 2016. For the following reasons, the motion is GRANTED IN SUBSTANTIAL PART.

II. BACKGROUND

The following facts are not in dispute. At some point prior to February 26, 2010, Plaintiff obtained a loan from Washington Mutual Bank.[2] (Dkt. 54-1 [Plaintiff's Reply Concerning Statement of Undisputed Facts ("SUF")] ¶ 1.)[3] Sometime thereafter, Plaintiff fell behind in the loan payments, and her resulting debt was transferred to Arrow Financial Services, LLC ("Arrow") for collection purposes. (SUF ¶¶ 3, 4.) Arrow retained Defendant to take legal action against Plaintiff for the collection of the debt. (SUF ¶ 5.) Defendant filed a state collection action on Arrow's behalf on February 26, 2010. (SUF ¶ 5.)

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[1] Plaintiff's motion does not address damages or the negligence claims in her FAC. (Dkt. 33-1; FAC at 11.) For this reason, the Court treats Plaintiff's motion as one for partial summary judgment.

[2] The parties do not state exactly when this debt was incurred or when Plaintiff fell behind in payments. Additionally, Plaintiff's FAC, motion, and statement of undisputed facts state that Plaintiff "allegedly" incurred the debt, which was due and owing or "allegedly" due and owing, and that she "allegedly" fell behind on those payments. (FAC ¶¶ 20, 22; Mot. at 3; SUF ¶¶ 1, 3.) To the extent that Plaintiff disputes that she in fact did incur these financial obligations, fall behind in payments, or owe any resulting debt, such arguments are not before the Court. Therefore, for the purposes of this motion the Court assumes that Plaintiff did owe the debt in question.

[3] The Court GRANTS Plaintiff's request for judicial notice of the eleven documents which support her statement of undisputed facts. (Dkt. 35.) The requests consist of state court filings and state business records that are "not subject to reasonable dispute because [they] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. For simplicity, however, the Court will continue to cite to the statement of undisputed facts. (SUF.)

On April 12, 2010, either Defendant or ABC Legal Services (Defendant's retained process server) filed a Proof of Service of Summons in the state court action.[4] (SUF ¶ 8.) The proof of service indicated that Plaintiff was served by substituted service at 27921 Sheffield, Mission Viejo, California 92692. (SUF ¶ 8.) Service was recorded as being delivered to a male described as "Steven Doe, Resident who refused to give last name, a middle eastern male approx. 40–45 years of age, 5'6"–5'8" in height [and] weight 180–200 lbs[.] with black hair." (SUF ¶ 8.) Defendant mainly relied on a credit report of some sort in obtaining this address. (Dkt. 34 [Declaration of Abbas Kazerounian ("Kazerounian Decl.")] Ex. 1 at 35:4–8.) At the time of service, Plaintiff had not lived at the address listed on the proof of service for approximately two years, as the property went through foreclosure. (SUF ¶ 9; Mot. at 14; Dkt. 33-3 [Declaration of Monir Mirshafiei ("Mirshafiei Decl.")] Ex. 2.) Therefore, Plaintiff was not actually served and did not make an appearance in the action. (*See* Mirshafiei Decl. ¶ 8.) On behalf of Arrow, Defendant obtained a default judgment against Plaintiff on August 6, 2010. (SUF ¶ 10.)

Upon learning about the default approximately four years later, on September 2, 2014, Plaintiff moved to set aside the default, quash the proof of service, and obtain monetary sanctions. (SUF ¶ 11; Mirshafiei Decl. ¶ 8.) Defendant opposed the motion on September 18, 2014. (SUF ¶ 12.) At the time Defendant filed the opposition, Arrow was no longer an active LLC, as it had been dissolved two years earlier. (Kazerounian Decl. Ex. 3; SUF ¶ 13.) The same day, ABC Legal Services prepared a Service Issue Investigation Report in response to Plaintiff's contesting of service, which stated "[a]fter a diligent search, the service address does not appear to have been the Defendant's address of record at the time of service." (SUF ¶ 14.) The next day, on September 19,

[4] The parties dispute whether Defendant or ABC Legal Services actually filed the Proof of Service. (SUF ¶ 8.) This distinction is not material—even if the process server filed it, it did so at Defendant's direction. (*See id.*)

2014, Defendant filed the process server's investigative report in the state court action. (SUF ¶14; Kazerounian Decl. Ex. 5.) However, Defendant continued to oppose Plaintiff's motion to set aside the default judgment. (SUF ¶ 15.)

On October 2, 2014, the Court granted Plaintiff's motion to set aside the default judgment, and Plaintiff answered the Complaint on October 10, 2014. (SUF ¶¶ 16–17.) That same day, Plaintiff also sent discovery requests, a deposition notice, and a demand for bill of particulars to Defendant, but Defendant did not respond. (SUF ¶¶ 18–20; Kazerounian Decl. at 65:1–66:13.) Plaintiff's counsel followed up with a meet and confer letter to Defendant dated October 31, 2014. (SUF ¶ 21.) Neither Defendant nor any other party representing Arrow attended the deposition scheduled for November 12, 2014. (SUF ¶ 22.) Defendant had dismissed the state action against Plaintiff without prejudice one week earlier on November 4, 2014, but did not notify Plaintiff of the dismissal. (SUF ¶ 23.)

On June 3, 2015, Plaintiff brought this action under the FDCPA against Defendant based on its conduct during the state court collection action. (Dkt. 1.) Plaintiff amended her complaint on March 31, 2016. (FAC). Plaintiff now moves for partial summary judgment, asserting that Defendant violated Sections 1692d, 1692e, and 1692f of the FDCPA by filing the invalid proof of service with the state court, representing to the court that Arrow had the right to collect on the judgment even though it was a dissolved entity, and continuing to oppose Plaintiff's motion to set aside the default judgment despite "an invalid service of process and an invalid creditor (Arrow), and lack of any proper attorney investigation of the debt status." (Mot. at 8.) In the alternative, Plaintiff requests "summary adjudication" to narrow the issues for trial. (*Id.*)

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III. LEGAL STANDARD

The Court may grant summary judgment on "each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). "The standards and procedures for granting partial summary judgment, also known as summary adjudication, are the same as those for summary judgment." *Campbell v. Vitran Express Inc.*, No. CV1105029RGKSSX, 2016 WL 873009, at *3 (C.D. Cal. Mar. 2, 2016). Summary judgment is proper where the pleadings, the discovery and disclosure materials on file, and any affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 325. A factual issue is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" when its resolution might affect the outcome of the suit under the governing law, and is determined by looking to the substantive law. *Id.* "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 249.

Where the movant will bear the burden of proof on an issue at trial, the movant "must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Once this burden is met, the party resisting the motion must set forth, by affidavit, or as otherwise provided under Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. A party opposing summary judgment must support its assertion that a material fact is genuinely disputed by (i) citing to materials in the record, (ii) showing the moving party's materials are inadequate to establish an absence of genuine dispute, or (iii) showing that the moving party lacks admissible evidence to

support its factual position. Fed. R. Civ. P. 56(c)(1)(A)–(B). The opposing party must show more than the "mere existence of a scintilla of evidence"; rather, "there must be evidence on which the jury could reasonably find for the [opposing party]." *Anderson*, 477 U.S. at 252.

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.*; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The court does not make credibility determinations, nor does it weigh conflicting evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992). But conclusory and speculative testimony in affidavits and moving papers is insufficient to raise triable issues of fact and defeat summary judgment. *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The evidence the parties present must be admissible. Fed. R. Civ. P. 56(c). "If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g).

IV. DISCUSSION

"Seeking somewhat to level the playing field between debtors and debt collectors, the FDCPA prohibits debt collectors 'from making false or misleading representations and from engaging in various abusive and unfair practices.'" *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1030 (9th Cir. 2010) (quoting *Heintz v. Jenkins*, 514 U.S. 291, 292 (1995)). "The FDCPA is a strict liability statute that 'makes debt collectors liable for violations that are not knowing or intentional.'" *Id.* (quoting *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008)). "Because the FDCPA is a remedial

statute, it should be construed liberally in favor of the consumer, and, when in doubt, against debt collectors." *Heathman v. Portfolio Recovery Associates, LLC*, No. 12CV201IEGRBB, 2013 WL 755674, at *2 (S.D. Cal. Feb. 27, 2013) (internal quotations and citations omitted). *See also Gonzales v. Arrow Fin. Servs.*, LLC, 660 F.3d 1055, 1060 (9th Cir. 2011) (explaining that the FDCPA is a "broad remedial statute").

To assess whether a debt collector's conduct violates the FDCPA, courts apply an objective analysis taking into account whether "the least sophisticated debtor would likely be misled by a communication." *Donohue*, 592 F.3d at 1030 (quoting *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 934 (9th Cir. 2007)). "Most courts agree that although the least sophisticated debtor may be uninformed, naive, and gullible, nonetheless her interpretation of a collection notice cannot be bizarre or unreasonable." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1027 (9th Cir. 2012).

"To establish a violation of the FDCPA, Plaintiff must show: (1) he was a consumer (2) who was the object of a collection activity arising from a consumer debt, and (3) the defendant is a "debt collector" as defined by the FDCPA, (4) who engaged in an act or omission prohibited by the FDCPA." *Townsend v. Nat'l Arbitration Forum, Inc.*, No. CV099325VBFRNBX, 2012 WL 12736, at *8 (C.D. Cal. Jan. 4, 2012).

The parties do not dispute that the first three requirements of a FDCPA claim are met here. First, Plaintiff is a consumer who owed a debt to Arrow. (SUF ¶¶ 1–3.) *See also* 15 U.S.C. §1692a(3). Second, Plaintiff was the object of collection activity arising from a consumer debt to Washington Mutual Bank, which was later transferred to Arrow for collection purposes. (SUF ¶¶ 2, 4.) *See also* 15 U.S.C. § 1692a(5). Third, Defendant is a debt collector. (SUF ¶¶ 5–7.) *See also* 15 U.S.C. § 1692a(6); *Heintz*, 514 U.S. at 299 (The FDCPA "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation.").

The main issue concerns the fourth element of an FDCPA claim: whether Defendant's conduct was "prohibited by the FDCPA." *See Townsend*, 2012 WL 12736, at *8. Plaintiff alleges that Defendants violated the FDCPA in three ways: (1) "falsely, deceptively, and misleadingly filing of the invalid Proof of Service with the state court where Plaintiff had not lived at the Property for years," in violation of Sections 1692e, 1692e(10), 1692f, and 1692f(1); (2) "falsely, deceptively, and misleadingly misrepresenting to the state court that Arrow had the right to collect on the judgment despite the fact that Arrow was no longer an active entity" in violation of Sections 1692e, 1692e(2)(A), 1692e(5), 1692e(10), 1692d, 1692f, 1692f(1); and (3) "harassing the Plaintiff by frivolously litigating in the state court despite an invalid service of process and an invalid creditor (Arrow), and lack of any proper attorney investigation of the debt status" in violation of Sections 1692e, 1692e(2)(A), 1692e(5), 1692e(10), 1692d, 1692f, and 1692f(1)." (Mot. at 8.) The Court considers Plaintiff's claims under Sections 1692e, 1692d, and 1692f in turn.

A. Section 1692e

Section 1692e prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Section 1692e also contains subsections, which further prohibit, among other things, "false representation of . . . the character, amount, or legal status of any debt," 15 U.S.C. § 1692e(2)(A), "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken," § 1692e(5), and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer," § 1692e(10). A violation of section 1692e(5) is a "*per se* violation" of Section 1692e(10). *Gonzales*, 660 F.3d at 1064 n.6 (emphasis in original).

1. Filing the Proof of Service

Plaintiff contends that Defendant violated Sections 1692e and 1692e(10) by filing the proof of service of summons, which falsely represented to the state court that Plaintiff was properly served in the state court collection action in 2010. (Mot. at 14.) At the time of service, Plaintiff had not lived at the address listed on the proof of service for approximately two years, as the property had gone through foreclosure. (SUF ¶ 9; Mirshafiei Decl. Ex. 2.) Specifically, Plaintiff asserts that Defendant failed "to use reasonable due diligence to personally serve the summons and complaint" such as running a property search. (*Id.*) Instead, Defendant relied on a "stale address provided by either an Accurint or a credit report". (*Id.*)

Plaintiff has presented evidence that clearly establishes a violation under Section 1692e and 1692e(10). Defendant filed a proof of service with the Court which incorrectly stated that Plaintiff had been served with a state court action. (SUF ¶8; Mirshafiei Decl. Ex. 2.) Defendant did not undertake reasonable due diligence to confirm that Plaintiff lived at that address before attempting to serve her and did not follow up upon learning that the process server only served an *unidentified male* through supposed substituted service.[5] *See* Cal. Civ. Proc. Code § 415.20 ("If a copy of the summons and

[5] The Court granted the second of Defendant's two *ex parte* applications to file a late opposition to Plaintiff's motion, (Dkt. 38; Dkt. 50), even though Defendant only requested such relief after the opposition deadline had already passed. (Dkt. 53). In its opposition, which was filed before the Court granted such relief, Defendant attached Exhibits 4, 5, and 6, purporting to show that Plaintiff was associated with the address used by the process server. (Dkt. 46 Exs. 4–6.) Plaintiff objects to Defendant's reliance on such documents on several grounds. (Dkt. 55.) First, these exhibits were not produced in discovery in violation of Fed. R. Civ. P. 56(c)(2), or anytime thereafter, thereby prejudicing Plaintiffs. (*Id.* at 4.) Second, Exhibits 4 and 6 are redacted in their *entirety*, rendering the documents unintelligible. (*Id.* at 6.) Third, the exhibits not properly authenticated in the accompanying declaration of Andrew P. Rundquist, and there is no evidence that Defendant possessed these documents at the time it filed the proof of service in the state court action. (*Id.* at 7–8.) Troublingly, Exhibit 6 is dated December 28, 2015, which is over one year after Defendant dismissed the state court action against Defendant. (*Id.*) The Court agrees with Plaintiff that Exhibits 4, 5, and 6 are inadmissible, and in any

complaint cannot with reasonable diligence be personally delivered to the person to be served," then substituted service is appropriate). Due to Defendant's lack of diligence and false filing, Plaintiff faced the severe consequence of default judgment which she did not learn about for four years. The least sophisticated consumer in Plaintiff's position would not have been able to oppose a state court action if she was *never notified* of it. Given that the FDCPA is a broad remedial statute that is to be construed liberally in the consumer's favor, *Heathman*, 2013 WL 755674, at *2, its protections reasonably extend to prevent debt collectors from carelessly and improperly serving consumers and then obtaining default judgments against them. There is no genuine dispute of material fact that the proof of service was a "false representation" that Plaintiff had been properly served, and that Defendant specifically employed this false representation to collect a debt against Plaintiff.

Defendant argues it was unaware that Plaintiff did not reside at that address at the time. (Dkt. 46 ["Opp."] at 13–14). The FDCPA does not require knowledge, however—it is a strict liability statute. *Donohue*, 592 F.3d at 1030. Defendant also contends that it should not be liable for the process server's mistake, since Plaintiff has not demonstrated that Defendant was vicariously liable for the process server's actions. (Opp. at 6.) Plaintiff's theory against Defendant is not based on vicarious liability. Instead, Plaintiff is suing Defendant for its own wrongful action, specifically, for failing to exercise due diligence when giving the process server Plaintiff's address and subsequently filing the

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event, do not aid Defendant in meeting its burden of demonstrating that there is a genuine issue of material fact regarding Defendant's diligence in determining Plaintiff's address.

After Plaintiff filed its reply to Defendant's late opposition, Defendant filed another *ex parte* application, seeking leave to amend the opposition to add an additional document connecting Plaintiff to the address. (Dkt. 56 Ex. 2.) The Court denied Defendant's request because its attorney had failed to meet and confer with Plaintiff's counsel before filing the application in violation of the Local Rules and because Defendant's counsel failed to show why he did not seek to obtain those documents before the discovery deadline passed, since the complaint was filed over one year ago. (Dkt. 60.) Again, these documents would be inadmissible because they were not provided during discovery, (*see* Dkt. 59 at 7), and would not aid Defendant in meeting its burden because Defendant's *ex parte* application included no evidence that it relied on such documents when seeking to serve Plaintiff with the state court action.

proof of service based on its inadequate research. (Mot. at 14.) Simply put, vicarious liability is irrelevant here. Finally, Defendant argues that its conduct is protected by the litigation privilege. (Opp. at 13.) However, California's litigation privilege is preempted by FDCPA claims. *See Santos v. LVNV Funding, LLC*, No. 5:11CV2683EJD, 2012 WL 216398, at *2 (N.D. Cal. Jan. 24, 2012) (citing *Heintz*, 514 U.S. 291); *Reyes v. Kenosian & Miele, LLP*, 619 F. Supp. 2d 796, 801–04 (N.D. Cal. 2008) ("[A]ny common law or First Amendment-based litigation immunity doctrine is trumped by the statutory language of the FDCPA and the court's holding in *Heintz*.") (same). *See also Heintz*, 514 U.S. at 299. In fact, an attorney's litigation activities, including the filing of court documents, are subject to the prohibitions in the FDCPA. *Reyes*, 619 F. Supp. 2d at 801–04; *Heintz*, 514 U.S. at 299 (The FDCPA "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation."). Therefore, the Court rejects this defense as to all of Plaintiff's claims.

2. Representations Regarding Arrow

Plaintiff contends that Defendant also violated FDCPA Sections 1692e, 1692e(2)(A), and 1692e(10) by falsely representing to the state court that Arrow had the right to pursue the debt against Plaintiff in 2014 when Defendant knew Arrow had in fact dissolved in 2012. (*See* Mot. at 15.) Additionally, Plaintiff submits that Defendant's continued litigation on behalf of Arrow, a non-existent entity, violated Sections 1692e(5) and 1692e(10). (*Id.* at 19.)

"In assessing FDCPA liability, [the Court is] not concerned with mere technical falsehoods that mislead no one, but instead with genuinely misleading statements that may frustrate a consumer's ability to intelligently choose his or her response." *Donohue*, 592 F.3d at 1034. For example, a "[c]omplaint's mislabeling $32.89 as 12% interest, when $32.89 included both interest and pre-assignment finance charges, is not materially

false." *Id.* at 1033. However, "the identity of a consumer's original creditor is a critical piece of information, and therefore its false identification . . . would be likely to mislead some consumers in a material way." *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1121 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014).

Plaintiff has presented evidence that establishes that Defendant made another false representation to the state court in connection with its attempt to collect the debt—specifically, Defendant omitted that the original debtor dissolved two years earlier, in violation of Section 1692e and 1692e(10).[6] This information is critical to the debtor because such an omission would mislead the least sophisticated consumer in Plaintiff's position to pay money that she no longer owes. *See, e.g.*, *Heathman*, 2013 WL 755674, at *3 (finding that a debt collector violated Section 1692e for filing a state court collections complaint against a consumer for a debt that he did not in fact owe).

Plaintiff also correctly notes that, as a non-existent entity, Arrow could not be named as the real party in interest in the state court action concerning Plaintiff's debt. Consequently, Defendant brought an action that "could not legally be taken" in violation of Section 1692e(5) and 1692e(10).[7] Under California law, "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Cal. Code Civ. P. § 367. Additionally, "California law provides that 'upon the

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[6] In both its late-filed opposition, (Dkt. 46 Ex. 8), and its denied *ex parte* application to add additional exhibits, (Dkt. 56 Ex. 2), Defendant attempted to introduce evidence that a successor to Arrow authorized Defendant to oppose Plaintiff's motion to set aside the default judgment in state court. As with the evidence described in footnote 5, Defendant again failed to disclose these documents in discovery and did not show that it was in possession of such documents when it filed the opposition, making them inadmissible. (*See* Dkt. 55 at 4, 7–8; Dkt. 59 at 6–9.) In any event, evidence regarding Arrow's successors would not make Defendant's omission regarding Arrow's dissolved status any less false or misleading, so such evidence would not aid Defendant in meeting its burden of showing a genuine dispute concerning material facts.

[7] Since Defendant violated Section 1692e(5), this action also constitutes a *per se* violation of Section 1692e(10). *Gonzales*, 660 F.3d at 1064 n.6.

filing of the certificate of cancellation, the limited liability company shall be canceled and its powers, rights and privileges shall cease' . . . . Among these rights is the right to sue." *Hullinger v. Anand*, No. CV1507185SJOPJWX, 2015 WL 11072169, at *9 (C.D. Cal. Dec. 22, 2015) (quoting Cal. Corp. Code §§ 17701.05(b), 17707.08(c)). Simply put, as a cancelled LLC, Arrow no longer had the right to sue in 2014. (*See* Kazerounian Decl. Ex. 3; SUF ¶ 13.)

Defendant suggests that Plaintiff should have notified Defendant of Arrow's dissolved status. (Opp. at 9.) This is nonsensical, since the least sophisticated consumer in Plaintiff's position would not likely know, or have reason to suspect, that Arrow had been dissolved. Defendant also argues that Arrow hypothetically could have revived itself as a corporate entity, but fails to present any evidence that Arrow actually did so when the opposition was filed. (*Id.*) In fact, Plaintiff has provided, and Defendant has not rebutted, evidence that Defendant knew that Arrow recalled Plaintiff's account in 2012. (Dkt. 54 ["Reply"] at 12; Kazerounian Decl. Ex. 1 at 14:13–15:12.) Finally, Defendant argues that it has a duty to favor its own client's rendition of the facts and that its duty to its client conflicts with FDCPA requirements. (Opp. at 12.) However, Defendant has not explained, and the Court fails to see, how the duty to its client prevented Defendant from disclosing Arrow's legal status or negated its responsibility to use reasonable inquiry to verify the validity of its opposition. *See* Fed. R. Civ. P. 11(b).

3. Failure to Investigate Status of Plaintiff's Debt

Plaintiff also contends that Defendant violated Sections 1692e(5) and 1692e(10) by failing to investigate whether Plaintiff did in fact owe any debt before filing the state collection action. (Mot. at 18–19.) Plaintiff points to deposition testimony revealing that Defendant's deponent did not recall having any billing statements regarding Plaintiff's alleged debt, and instead the deponent relied on the file obtained from Arrow showing

"the date when account was opened, last payment date, Plaintiff's identifying information, charge-off date, date when account is sold to the next assignee." (Mot. at 17; Kazerounian Decl. Ex. 1 at 89:14–94:13.)

The Ninth Circuit has adopted a baseline regarding debt collectors' efforts to verify the existence of a debt: "[a]t the minimum, verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed . . . . Within reasonable limits, [the debt collectors] were entitled to rely on their client's statements to verify the debt." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1173–74 (9th Cir. 2006). Here, the record shows that Defendant reasonably relied on representations from its client that Plaintiff owed the debt. (Kazerounian Decl. Ex. 1 at 89:14–94:5–13.) The evidence does not show that Defendant's conduct fell below the minimum acceptable standard established in *Clark.* Thus, Defendant did not violate Sections 1692e(5) and 1692e(10) with regard to its failure to thoroughly investigate the status of Plaintiff's debt.

4. Continued Litigation Despite Knowledge of Invalid Service

Finally, Plaintiff contends that Defendant violated Sections 1692e(5) and 1692e(10) by continuing to oppose Plaintiff's motion to set aside the default even after receiving the process server's investigative report showing that Plaintiff was not actually served. (Mot. 18–19.) Defendant argues that it actually "did not litigate" after that, pointing out that it received the report from the process server on September 18, 2014, the same day it filed its opposition, that it disclosed this report the next day, and then dismissed the action against Plaintiff within a "very short timeframe." (Opp. at 6, 9; SUF ¶ 12–13, 23.)

In fact, the record shows that Defendant dismissed the action on November 4, 2014—*one and a half months* after receiving the report. (SUF ¶ 23.) Interestingly, Plaintiff had sent Defendant discovery requests on October 10, 2014, and after no response, had followed up with a meet and confer letter on October 31, 2014, to which Defendant again failed to respond.[8] (SUF ¶¶ 19–21; Kazerounian Decl. at 65:1–66:13.) Defendant dismissed the action just four days after receiving that meet and confer letter, but did not notify Plaintiff of its intent to dismiss the case or indicate that the deposition scheduled for November 12, 2014 would not take place. (*See* SUF ¶ 23; Kazerounian Decl. at 65:1–66:13.) It is unclear when, in fact, Plaintiff learned of the dismissal, but it occurred sometime after Defendant failed to attend the deposition scheduled on November 12, 2014. (*See* SUF ¶ 22.)

Defendant also argues that it had a valid reason to oppose Plaintiff's state court motion to set aside the default judgment. Defendant relies on a handful of non-FDCPA cases where default judgments were ultimately *not* set aside for lack of proper service because the default judgments were attacked after the statutory limit of two years. (Opp. at 8 (citing *Trackman v. Kenney*, 187 Cal. App. 4th 175, 180–81 (2010) and *Rogers v. Silverman*, 216 Cal. App. 3d 1114, 1120–1124 (1989)).) Defendant points out that here, Plaintiff attacked the default judgment four years later. (Opp. at 8.) The authority Defendant provides is not on point, however, because in those cases the parties attacking the default judgments had not shown extrinsic fraud or mistake. *Trackman*, 187 Cal. App. 4th at 181; *Rogers*, 216 Cal. App. 3d 1114. Where there is evidence of extrinsic fraud or mistake, a party can move to set aside a default judgment at any time. *Id.* Here, Defendant obtained and filed direct evidence of extrinsic fraud or mistake: the process

[8] Defendant argues that the deposition notice was void because the case was dismissed before the date of the scheduled deposition, and because the witness that they would have produced lived in a different state. (Opp. at 10.) These explanations may have excused Defendant's failure to produce a witness for the deposition, but not its failure to *respond* to any of Plaintiff's discovery requests or to notify Plaintiff's counsel that the deposition would not take place.

server itself confirmed in an investigative report that Plaintiff did not live at the residence at the time of service. Therefore, Defendant did not have a good faith basis to continue to oppose Plaintiff's motion to set aside the default judgment.

Contrary to Defendant's assertions, one and a half months is not a permissible amount of time to wait before dismissing the action, and there is no justification for Defendant's decision to completely ignore Plaintiff's discovery requests. The combination of Defendant's decision to continue to oppose the Plaintiff's motion to set aside the default judgment despite evidence of extrinsic fraud or mistake, while at the same time refusing to meaningfully engage in discovery evidenced a strategic, "deceptive means" to collect a debt. Therefore, the Court finds that Defendant's conduct violated Section 1692e(10).

Defendant makes additional counter-arguments that are unavailing. Defendant argues that "[f]inding that [Defendant's] conduct rose to the level of sanctionable activity would effectively be an appeal of the decision not to grant sanctions, and so are [sic] barred by the *Rooker-Feldman* doctrine." (Opp. at 6–7.) The *Rooker-Feldman* doctrine forbids a losing party in state court from filing suit in federal district court complaining of an injury caused by a state court judgment and seeking federal court review and rejection of that judgment. *Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013). Here, however, Plaintiff is not attacking or attempting to evade the state court judgment—she is arguing that Defendant's use of the state court litigation constituted misleading, abusive, and unfair conduct in violation of the FDCPA. This type of claim is permitted under the FDCPA. *Reyes*, 619 F. Supp. 2d at 801–04; *Heintz*, 514 U.S. at 299.

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B. Section 1692d

Section 1692d prohibits debt collectors from engaging in "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. The statute includes a non-exhaustive list of such conduct, which includes threats of violence or other criminal means to harm one's physical person, reputation, or property; use of obscene, profane, or abusive language; publication of a list of consumers who refuse to pay debts; advertisement for sale of a debt to coerce payment; repeated or continuous telephone calls; and telephone calls made without disclosing the caller's identity. 15 U.S.C. § 1692d(1)–(6). "[C]laims under § 1692d should be viewed from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse." *Lopez v. Prof'l Collection Consultants*, No. CV113214PSGPLAX, 2013 WL 708701, at *2 (C.D. Cal. Feb. 26, 2013)

1. Failure to Investigate Status of Plaintiff's Debt

Plaintiff first asserts that Defendant's failure to confirm whether Plaintiff did, in fact, owe the debt violated Section 1692d. (Mot. at 21.) As explained in the previous section, there is evidence in the record that Defendant adequately investigated the status of Plaintiff's debt, given the very low standard the Ninth Circuit established in *Clark*. *See Clark*, 460 F.3d at 1173–74. Therefore, Defendant's modest investigation into the status of Plaintiff's debt does not constitute harassing, oppressive, or abusive practices under Section 1692d.

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2. Continued Litigation Despite Knowledge of Invalid Service and Failure to Respond to Discovery Requests

Plaintiff asserts that Defendant's continued opposition of plaintiff's motion to set aside the default judgment even after receiving the process server's investigative report, and its failure to notify Plaintiff that it dismissed the state court action against her one and a half months later, violated Section 1692d. (Mot. at 21.) Plaintiff further asserts that Defendant could not have an objective good faith expectation that it would prevail in its opposition after learning that Plaintiff had never been served. (*Id.*) The Court agrees.

Filing meritless debt collection actions and improperly opposing a motion to set aside a default judgment can, in appropriate circumstances, constitute violations of Section 1692d. *See, e.g.*, *Riley v. Giguiere*, No. S-06-2126 LKK/KJM, 2008 WL 436943, at *6 (E.D. Cal. Feb. 14, 2008). The record shows here that even after learning Plaintiff had never been served, and that the default judgment rested on a proof of service that was the product of extrinsic fraud or mistake, Defendant continued to oppose Plaintiff's motion to set aside the default that was improperly entered against her. *At the same time*, Defendant failed to respond to any discovery requests and dismissed the action against Plaintiff approximately one week before the scheduled deposition without notifying Plaintiff of its intent to dismiss or otherwise cancelling the deposition. Defendant's self-serving and incompatible actions—failing to engage in the discovery process while continuing to oppose Plaintiff's motion to set aside the default—would leverage the litigation to create an unfair advantage over an unsophisticated debtor "whose circumstances make[] him relatively more susceptible to harassment, oppression, or abuse." *Lopez*, 2013 WL 708701, at *2. Therefore, the natural consequence of Defendant's conduct was to harass, oppress, or abuse Plaintiff in violation of Section 1692d.

C. Section 1692f

Finally, Section 1692f prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. This section also specifically prohibits "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1).

1. Litigation on Behalf of Arrow

Plaintiff asserts that Defendant's misrepresentations to the Court about the legal status of Arrow and "frivolous litigation of the state matter in 2014 despite an invalid service of process and lack of the real party in interest" violated Section 1692f and 1692f(1). (Mot. at 22–25.) As explained above, Defendant did not have the legal authority to continue to litigate the state law claim on behalf of Arrow, because Arrow dissolved in 2012. Thus, Defendant's wrongful actions constituted collection activity not permitted by law, in violation of Section 1692f and 1692f(1).

2. Lack of Diligence Regarding the Proof of Service and Validity of Arrow's claims

Plaintiff also asserts that Defendant's lack of diligence in investigating both the status of the debt Plaintiff owed and the false proof of service constituted unfair and unconscionable conduct in violation of Section 1692f. (Mot. at 22–24.)

A touchstone of unconscionable conduct is that it "shocks the conscience." *Sonic-Calabasas A, Inc. v. Moreno,* 57 Cal. 4th 1109, 1145, 311 P.3d 184, 202–03, 205, 212

(2013). *See also Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098, 1100 (9th Cir. 1996) ("the notice did not violate Section 1692f's prohibition against unfair or unconscionable means of collecting. The notice was relatively innocuous, and not "unconscionable" in either a legal or lay sense.") Plaintiff relies on *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 952 (9th Cir. 2011), where a law firm propounded on a *pro se* debtor requests for admission that asked him to admit, among other things, "facts that were not true: that he had never disputed the debt, that he had no defense, [and] that every statement in [the] complaint was true," while failing to explain that such requests would be deemed admitted if he did not respond in thirty days. *Id.* The Court concluded that this was "unfair or unconscionable" means to collect a debt. *Id.* Plaintiff also relies on *Heathman*, 2013 WL 755674, at *2, where a debt collector's attempt to collect a debt that the plaintiff did not in fact owe was also unfair and unconscionable.

Here, although Defendant did make false and misleading representations regarding the proof of service, the Court cannot conclude that this conduct was comparable to that in *McCullough* or *Heathman*, or that it was otherwise so egregious that it could be classified as "unfair or unconscionable." Additionally, as mentioned earlier, the record does not definitively show that the sufficiency of Defendant's investigation of the status of Plaintiff's debt fell below the standard laid out in *Clark*, 460 F.3d at 1173–74. The Court finds that Defendant's lack of diligence did not violate Section 1692f.

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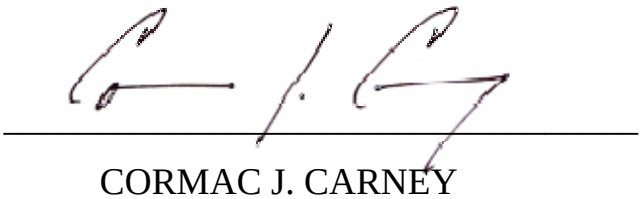
V. CONCLUSION

For the foregoing reasons, Plaintiff's motion for partial summary judgment is GRANTED IN SUBSTANTIAL PART.

DATED: October 5, 2016



CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE