UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

JS-6

Case No. CV 21-9786-MWF (MARx) **Date: April 6, 2023**
Title: Derrick Stephens v. I.C. System, Inc.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [26]

Before the Court is Defendant I.C. System, Inc.'s ("ICS") Motion for Summary Judgment (the "Motion"), filed on February 27, 2023. (Docket No. 26). Plaintiff Derrick Stephens filed an Opposition on March 6, 2023. (Docket No. 27). Defendant filed a Reply on March 13, 2023. (Docket No. 28).

The Court has read and considered the papers filed in connection with the Motion and held a hearing on **April 3**, **2023**.

The Motion is **GRANTED**. Plaintiff cannot establish Article III standing because he admits that he did not read the letter allegedly giving rise to his injury.

I. BACKGROUND

Plaintiff commenced this action pursuant to the Fair Debt Collections Practices Act ("FDCPA") (15 USC § 1692 et seq.) and the Rosenthal Fair Debt Collection Practices Act (the "Rosenthal Act") (Cal. Civ. Code § 1778 et seq.) on December 17, 2021. (Complaint (Docket No. 1)).

Plaintiff incurred a debt that was subsequently placed with Defendant for collections. (Statement of Undisputed Fact ("SUF") (Docket No. 26-2) ¶ 2). Plaintiff sent a letter to Defendant on August 20, 2021, which contained language that indicated Plaintiff was refusing to pay the debt. (*Id.* at ¶ 3; Response to SUF (Docket No. 26-1) ¶ 24). Defendant sent a letter (the "ICS Letter") to Plaintiff on September 16, 2021,

which in addition to a box indicating the balance of $291.65 in service charges due, stated:

> 9/16/2021
>
> Derrick Stephens:
>
> We will honor your request that I.C. System cease communication with you regarding the debt specified in the Account Summary. We are terminating further collection efforts and will not communicate with you again unless you contact us and request us to do so.
>
> Spectrum is both the original and current creditor to whom this debt is owed.
>
> I.C. System sends a weekly electronic file to credit reporting agencies listing debts that are unresolved and unpaid 45 days after I.C. System began its collection efforts. You have the right to inspect your credit file in accordance with federal law.
>
> Your dispute has been noted and information verifying the debt is attached to this letter.
>
> We are a debt collector attempting to collect a debt and any information obtained will be used for that purpose.
>
> This does not contain a complete list of the rights consumers have under Federal, State, or Local laws.
>
> I.C. System, Inc. I444 Highway 96 East, P.O. Box 64378, St. Paul MN 55164-0378

(Complaint, Ex. B). The ICS Letter also included a detachable coupon which re-stated the balance due of $291.65 and included Plaintiff's name, address, and information where a check or money order is made payable to. (*Id.*).

Defendant contends Plaintiff admitted he could not recall receiving or seeing the letter. (SUF ¶ 7). In a declaration attached to his Opposition, Plaintiff states that he received the ICS Letter and on review at his deposition found it "very unsettling and just constant feeling of being anxious and uneasy and stressful." (Declaration of Derrick Stephens ("Stephens Decl.") ¶ 8; Response to SUF ¶ 8). Defendant did not communicate with Plaintiff after the letter sent on September 16, 2021. (SUF ¶ 9–10).

Plaintiff asserts claims for violation of: (1) Section 1692c of the FDCPA; (2) Section 1692e of the FDCPA; and (3) section 1788.18 of the Rosenthal Act.

Defendant moves for summary judgement on all claims. (Motion at 1)

II. EVIDENTIARY OBJECTIONS

Defendant contends that Plaintiff submitted a "sham" declaration in opposition to the Motion. (*See* Defendant's Objections (Docket No. 28-3)). Defendant asserts that Plaintiff cannot create a genuine dispute of fact that he suffered a concrete injury by contradicting his testimony that he has not seen the ICS letter before his deposition. (Motion at 7–8 (citing Ex. C ("Deposition of Plaintiff") (Docket No. 26-7) at 30:5–30:17).

"The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)). "In order to trigger the sham affidavit rule, the district court must make a factual determination that the contradiction is a sham, and the 'inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit.'" *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (quoting *Van Asdale*, 577 F.3d at 998–99).

The relevant portion of Plaintiff's deposition reads as follows:

> Q: This is a one-page document. In the top left corner, it says, "I.C. System." Below that, "Communications Are Ceased." And then below that, "9/16/2021." And then there's some additional information [on] the letter as well. Is that the document that you are looking at?
>
> A: Yes, it is.
>
> Q: And did you receive this document from I.C. System?
>
> A: I don't recall.
>
> Q: Before today have you seen this document?
>
> A: No, I have not.

(Deposition of Plaintiff at 30:5–30:17). In a declaration filed with his Opposition, Plaintiff asserts that "[u]pon reading ICS' letter, I experienced stress and anxiety, nausea, and other feelings of frustration due to the fact that ICS continued to contact me regarding the debt at issue in this case despite my refusal to pay letter." (Declaration of Derrick Stephens ("Stephens Decl.") (Docket No. 27-2) ¶ 14).

To the extent Plaintiff's declaration suggests that he received the ICS letter and experienced emotional distress upon its receipt, such a statement is directly contradicted by Plaintiff's deposition testimony that he had not seen the ICS letter before being showed the letter at his deposition.

At the hearing, Plaintiff argued that memory is fallible and that an errata sheet should have been filed after the declaration. Defendant argued that Plaintiff was consistent in stating that he did not receive the letter, even upon attempted rehabilitation by his counsel at the deposition. Plaintiff's deposition testimony is not that he does not remember seeing the letter but that he had not seen it. Regardless, Plaintiff lacks a reasonable explanation for why he would remember reading the letter now after previously saying that he had never seen it. Plaintiff's declaration therefore clearly contradicts his sworn deposition testimony. *See Cole v. CVS Pharmacy, Inc.*,

No. 1:19-CV-01384, 2022 WL 2791354, at *3-4 (E.D. Cal. July 15, 2022) (finding contradiction when slip-an-fall plaintiff said in her deposition that she did not recall seeing anything wet on the floor but later said in her affidavit that she felt herself slip on a wet substance).

Accordingly, the Objection is **SUSTAINED**.

III. LEGAL STANDARD

In deciding a motion for summary judgment under Rule 56, the Court applies *Anderson*, *Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The Ninth Circuit has defined the shifting burden of proof governing motions for summary judgment where the non-moving party bears the burden of proof at trial:

> The moving party initially bears the burden of proving the absence of a genuine issue of material fact. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor.

Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255, 1259 n.2 (9th Cir. 2016) (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)).

"A motion for summary judgment may not be defeated, however, by evidence that is 'merely colorable' or 'is not significantly probative.'" *Anderson*, 477 U.S. at 249-50. "When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)). Additionally, where the facts set forth by the moving party specifically contradict the facts of the non-moving party, the motion for summary judgment must be denied. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

IV. DISCUSSION

Defendant argues that summary judgment is appropriate because (1) Plaintiff lacks Article III standing, (2) the ICS Letter did not violate Section 1692c because a ceased communication letter is allowed under the exception, (3) the ICS Letter does not violate Section 1692e because it is not misleading, and (4) the Rosenthal Act claim fails because Defendant did not violate the FDCPA. (Motion at 1).

Standing

Courts employ a three-part test to determine if a plaintiff has Article III standing. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Id.* Second, there must be a causal connection between the injury and the conduct complained of. *Id.* Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* "In the ADA context, a plaintiff may establish injury in fact to pursue injunctive relief through evidence that the plaintiff encountered an access barrier and either intends to return or is deterred from returning to the facility." *Kirola v. City and Cty. of San Francisco*, 860 F.3d 1164, 1174 (9th Cir. 2017) (citing *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631

F.3d 939, 950 (9th Cir. 2011) (en banc)). A likelihood of future injury is required to sustain prospective injunctive relief. *See id*. (citing *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

As the party invoking federal jurisdiction, Plaintiff bears the burden of demonstrating that they have standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). Defendant argues that Plaintiff lacks Article III standing because he cannot show that he suffered a concrete and particularized injury in fact. (*Id.* at 7).

A concrete injury in fact may be financial or nonfinancial, tangible or intangible, but it must be "real, and not abstract"; "it must actually exist." *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2204; *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016).

> The most obvious are traditional tangible harms, such as physical harms and monetary harms. . . . Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion.

TransUnion, 141 S. Ct. at 2204 (cleaned up; citing, in part, *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020)). Additionally, although Congress "may not simply enact an injury into existence," it may "elevate harms that exist in the real world." *Id.* at 2205 (cleaned up). Thus, "Congress's views may be instructive" in "determining whether a harm is sufficiently concrete to qualify as an injury in fact." *Id.* at 2204 (cleaned up).

Plaintiff argues that Defendant invaded his privacy and caused him garden variety emotional distress by sending him the ICS letter after he had requested a cease in communications. (*See* Opposition at 2).

The harm of receiving an unwanted and misleading letter may be a concrete injury in fact with a close relationship to the harm of intrusion upon seclusion, traditionally recognized as providing a basis for lawsuits in American courts. *Cf.*

Gadelhak, 950 F.3d at 462 ("The common law has long recognized actions at law against defendants who invaded the private solitude of another by committing the tort of intrusion upon seclusion.... Courts have [ ] recognized liability . . . for irritating intrusions—such as when telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff. The harm posed by unwanted text messages is analogous to that type of intrusive invasion of privacy." (cleaned up)); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (noting that "[u]nsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients," and finding concrete injury in fact). Additionally, the harm of receiving an unwanted and misleading letter relates to the substantive rights codified by Congress in the FDCPA. Plaintiff alleges violations of the FDCPA provisions prohibiting debt collectors from: "communicat[ing] further with the consumer with respect to [a] debt". . . "if a consumer notified a debt collector in writing that the consumer refuses to pay a debt"; and "us[ing] false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. §§ 1692c(c), 1692e. These are substantive provisions that fulfill the statute's purpose "to eliminate abusive debt collection practices by debt collectors." *Id.* § 1692(e); *see Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017) ("[The] provision at issue . . . does not describe a procedure that video service providers must follow. Rather, it protects generally a consumer's substantive privacy interest in his or her video-viewing history.").

However, while the FDCPA may reinforce a consumer's substantive right to be free from unwanted and misleading letters, there is no evidence here to establish that the ICS letter harmed Plaintiff in any way. "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *TransUnion LLC*, 141 S. Ct. 2190 at 2205 (emphasis in original).

Plaintiff admits that he had not read the ICS letter before his deposition. (Deposition of Plaintiff at 30:5–30:17). The substantive right Congress meant to protect with the FDCPA cannot arise from mere receipt of a letter. Indeed, Section 1692c permits debt collectors to communicate with debt consumers after a cease

communication notice in limited situations, suggesting that the content of the letter matters. In full, Section 1692c states:

> (c) Ceasing communication
>
> If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—
>
> (1) to advise the consumer that the debt collector's further efforts are being terminated;
>
> (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
>
> (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.
>
> If such notice from the consumer is made by mail, notification shall be complete upon receipt.

15 U.S.C. §§ 1692c(c). Because Section 1692c(c) allows debt collectors to communicate with debt consumers in limited circumstances, receipt of a letter, without more, cannot give rise to the type of harm meant to be protected by Section 1692c(c).

Similarly, the substantive right to be free from misleading letters protected by Section 1692e cannot be violated by mere receipt of a letter, because a letter must be read to mislead the recipient.

Plaintiff argues that *TransUnion* acknowledges that "a plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm." (Opposition at 5). However,

the Supreme Court also noted that "the risk of future harm on its own does not support Article III standing for the plaintiffs' damages claim." *TransUnion LLC*, 141 S. Ct. at 2213. Moreover, the Supreme Court found that the unnamed *Transunion* plaintiffs had not demonstrated that they suffered any harm at all from the statutory violations at issue where the unnamed plaintiffs presented no evidence that they "so much as *opened* the dual mailings." *Id.* at 2213 (emphasis in original). The Supreme Court concluded that without any evidence of harm caused, the statutory violations (improper formatting of credit file mailings) were "bare procedural violation[s], divorced from any concrete harm." (*Id.* (citing *Spokeo*, 578 U.S. at 341)).

Here, Plaintiff provides no evidence that he was even aware of the content of the ICS letter which allegedly violated the FDCPA, as he admits that he did not read the ICS letter. Accordingly, Plaintiff cannot establish that he suffered a concrete injury based on Defendant's alleged violation. *See Lenzini v. DCM Serrvices* [sic], *LLC*, No. 4:20-CV-07612-YGR, 2021 WL 2139433, at *4 (N.D. Cal. May 26, 2021) (granting motion to dismiss for lack of standing under the FDCPA where the plaintiff's allegations did not explain reliance or demonstrate any risk of actual confusion resulting from the debt collection letter); *Moldasheva v. Hunter Warfield*, No. 2:20-cv-06062-SVW (JC), 2021 WL 2953171, at *5 (C.D. Cal. Mar. 29, 2021) (finding a lack of standing on § 1692e claim when "none of Defendant's statements to Plaintiff even created a material risk of confusing or misleading Plaintiff or inducing any detrimental reliance"); *cf. Uvaldo v. Germaine L. Off. PLC*, No. CV-20-00680-PHX (JJT), 2022 WL 194536, at *4 (D. Ariz. Jan. 21, 2022) ("Because Defendant's statements could genuinely mislead, they threaten Plaintiff's substantive rights thus posing actual harm or a material risk of harm to the Plaintiff. Since Plaintiff states she received and read the letter, she has alleged a concrete and particularized harm sufficient to confer Article III standing.").

Plaintiff does not address the argument that he could not have suffered a concrete injury because he did not read the letter. Instead, Plaintiff argues that the Fourth Circuit has held that a single unwanted phone call from a debt collector after the debtor's cease-and-desist letter was an invasion of the debtor's privacy in violation of the FDCPA. (Opposition at 6 (citing *Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021)). However, in *Lupia*, there were factual allegations that the plaintiff

received the unwanted phone call and voicemail. *Lupia*, 8 F. 4th at 1193. While the Court agrees that Plaintiff may have been able to establish standing based on ICS's letter had he read it, the undisputed evidence precludes such a determination.

Plaintiff additionally argues that he established a concrete injury because he suffered pecuniary loss from paying out of pocket for postage for his letter to ICS sent on August 20, 2021, which stated that he refused to pay the debt that ICS was collecting from him. (Opposition at 5). Defendant argues that Plaintiff did not plead the postage paid as damages in his Complaint and cannot plead additional facts on summary judgment. (Reply at 4 (citing *Wasco Prods. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.")). Putting that issue aside, Plaintiff's late-alleged pecuniary loss cannot establish Article III standing because the postage cost occurred before the ICS letter was sent on September 16, 2021. It is therefore impossible that the complained of conduct (the ICS letter) caused Plaintiff's pecuniary injury. *See Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1114 (9th Cir. 2014) ("there must be a causal connection between the injury and the conduct complained of").

The Court determines that Plaintiff fails to meet his burden of showing that the case is properly in federal court. Accordingly, the Motion is **GRANTED.** The action is **DISMISSED *without prejudice*** for lack of subject matter jurisdiction.

IT IS SO ORDERED.

This Order shall constitute notice of entry of judgment pursuant to Federal Rule of Civil Procedure 58. Pursuant to Local Rule 58-6, the Court **ORDERS** the Clerk to treat this Order, and its entry on the docket, as an entry of judgment.