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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RENE ORTIZ,  
  
Plaintiff,  
  
v.  
  
DIVERSIFIED CONSULTANTS, INC., et  
al.,  
  
Defendants.

No. 2:17-cv-0713-TLN-KJN PS

ORDER AND  
FINDINGS AND RECOMMENDATIONS

INTRODUCTION

Presently pending before the court is defendants Diversified Consultants, Inc. (“DCI”); Charlotte L. Zehnder; and Christopher Zehnder’s motion to dismiss plaintiff Rene Ortiz’s second amended complaint. (ECF No. 34.)<sup>1</sup> Plaintiff has opposed the motion, and defendants filed a reply brief. (ECF Nos. 38, 41.)

Also pending before the court is plaintiff’s motion for default judgment (ECF No. 39), which defendants have opposed (ECF No. 42).<sup>2</sup>

<sup>1</sup> Plaintiff represents himself in this action without the assistance of counsel, and the case thus proceeds before the undersigned pursuant to Local Rule 302(c)(21).

<sup>2</sup> Both pending motions were submitted for decision without oral argument on the record and written briefing pursuant to Local Rule 230(g). (ECF Nos. 40, 45.)

1 For the reasons discussed below, the court RECOMMENDS that defendants' motion to  
2 dismiss be GRANTED without further leave to amend and that plaintiff's motion for default  
3 judgment be DENIED.

4 BACKGROUND

5 The background factual allegations, whether disputed or undisputed, are taken from  
6 plaintiff's operative second amended complaint, unless otherwise noted. (See Second Amended  
7 Complaint, ECF No. 33 ["SAC"].) Plaintiff alleges that around January 2016, DCI began to  
8 report a \$68.00 debt on plaintiff's credit report. (SAC ¶ 2, Exs. A, G.) After plaintiff disputed  
9 the debt with DCI, DCI sent plaintiff a letter dated June 8, 2016, which stated, in part:

10 Our offices are in receipt of your letter of dispute or request for  
11 verification pursuant to 15 U.S.C. § 1692g of the Fair Debt  
12 Collection Practices Act. Please be advised we have contacted our  
13 client, AT&T, who has confirmed the name and address listed on  
14 the account in addition to the amount owed.

15 Enclosed is a summary of the charges on the account and any  
16 billing statements provided by our client that confirm the charges.

17 If we can be of any further assistance please call us using the  
18 contact number at the bottom of this letter. Calls to or from this  
19 company may be monitored or recorded.

20 This communication is made for the limited purpose of responding  
21 to your dispute and is not an attempt to collect a debt.

22 (SAC ¶ 2, Ex. D.) The letter included a billing statement from AT&T for Rene Ortiz showing an  
23 amount owed of \$68.40. (SAC ¶ 2, Ex. F.) However, plaintiff alleges that the account number in  
24 DCI's June 8, 2016 letter did not match the account number on the AT&T billing statement.  
25 (SAC ¶ 2, Exs. D, F.) According to plaintiff, DCI removed the AT&T debt from plaintiff's credit  
26 report around September 2016, but then unlawfully re-reported that same disputed debt (\$68)  
27 around January 2017. (SAC ¶¶ 2, 4, 6, Ex. G.) The January 2017 reporting included a notation  
28 that "Consumer disputes this account information." (Id.) Subsequently, on January 31, 2017, and  
March 7, 2017, plaintiff allegedly applied for a mortgage loan, but was denied due to the AT&T  
debt that appeared on his credit report. (SAC ¶ 6, Exs. Ka, Kb.)

Based on the above allegations, and as discussed in greater detail below, plaintiff contends  
that DCI's credit reporting violated sections 1692g and 1692e(8) of the Fair Debt Collection

1 Practices Act (“FDCPA”). (SAC ¶¶ 3-4.) Plaintiff consequently seeks \$139,136.90 in damages.  
2 (SAC at 5.)

3 DISCUSSION

4 Motion to Dismiss

5 *Legal Standard*

6 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)  
7 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase  
8 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard  
9 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and  
10 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see  
11 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “To survive a motion to dismiss,  
12 a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that  
13 is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.  
14 Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads  
15 factual content that allows the court to draw the reasonable inference that the defendant is liable  
16 for the misconduct alleged.” Id.

17 In considering a motion to dismiss for failure to state a claim, the court accepts all of the  
18 facts alleged in the complaint as true and construes them in the light most favorable to the  
19 plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is “not,  
20 however, required to accept as true conclusory allegations that are contradicted by documents  
21 referred to in the complaint, and [the court does] not necessarily assume the truth of legal  
22 conclusions merely because they are cast in the form of factual allegations.” Paulsen, 559 F.3d at  
23 1071. The court must construe a *pro se* pleading liberally to determine if it states a claim and,  
24 prior to dismissal, tell a plaintiff of deficiencies in her complaint and give plaintiff an opportunity  
25 to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v.  
26 Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police  
27 Dep’t, 901 F.2d 696, 699 (9th Cir. 1990) (stating that “pro se pleadings are liberally construed,  
28 particularly where civil rights claims are involved”); see also Hebbe v. Pliler, 627 F.3d 338, 342

1 & n.7 (9th Cir. 2010) (stating that courts continue to construe *pro se* filings liberally even when  
2 evaluating them under the standard announced in Iqbal).

3 In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court “may generally  
4 consider only allegations contained in the pleadings, exhibits attached to the complaint, and  
5 matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506  
6 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not  
7 consider a memorandum in opposition to a defendant’s motion to dismiss to determine the  
8 propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep’t of Corrections, 151 F.3d 1194,  
9 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding  
10 whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir.  
11 2003).

12 *Claim under Section 1692g against DCI*

13 Plaintiff alleges that DCI failed to properly verify the alleged debt in violation of 15  
14 U.S.C. § 1692g. That statute requires, *inter alia*, a debt collector to obtain verification of the debt  
15 upon the request of the consumer, and to mail a copy of such verification to the consumer. See 15  
16 U.S.C. § 1692g(a)(4), (b).

17 According to plaintiff, DCI failed to properly verify the alleged debt, because although  
18 DCI sent the June 8, 2016 letter attaching the AT&T billing statement in response to plaintiff’s  
19 dispute, the account number in DCI’s June 8, 2016 letter did not match the account number on the  
20 AT&T billing statement. (SAC ¶ 2, Exs. D, F.) To be sure, the account number on the AT&T  
21 billing statement (138933396) did not match the account number listed on DCI’s June 8, 2016  
22 letter (933138396), although it is far from clear whether the account number on the DCI letter  
23 referred to the AT&T account number or DCI’s own internal account number. As plaintiff also  
24 points out, plaintiff’s address listed on DCI’s June 8, 2016 letter is also different from the address  
25 listed on the June/July 2015 AT&T billing statement, even though the significance of that  
26 difference is unclear given the passage of time, potential relocation, etc. Regardless, plaintiff’s  
27 argument ultimately fails because it attempts to hold DCI to a higher standard than that articulated  
28 in binding Ninth Circuit Court of Appeals case law.

1 As the Ninth Circuit has explained:

2 In *Mahon v. Credit Bureau of Placer County Inc.*, we described one  
 3 way to provide proper verification: “[T]he Credit Bureau, when it  
 4 received the[verification] request, promptly contacted [the  
 5 creditor’s] office, verified the nature and balance of the outstanding  
 6 bill, learned that monthly statements had been sent from [the  
 7 creditor’s] office to the[debtors] for over two years, and established  
 8 that the balance was still unpaid. The Credit Bureau then promptly  
 9 conveyed this information to the [debtors], along with an itemized  
 10 statement of the account.” 171 F.3d 1197, 1203 (9th Cir.1999).  
 11 Now, the Clarks urge us to hold that *Mahon* sets a standard below  
 which a debt collector’s verification efforts must not fall. We  
 decline to impose such a high threshold. Rather, we adopt as a  
 baseline the more reasonable standard articulated by the Fourth  
 Circuit in *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir.1999). At  
 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.” *Id.* at 406  
 (citing *Azar v. Hayter*, 874 F. Supp. 1314, 1317 (N.D. Fla.), *aff’d*,  
 66 F.3d 342 (11th Cir.1995)).

12 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1173 (9th Cir. 2006). Here,  
 13 the documents attached to plaintiff’s complaint show that DCI contacted AT&T and confirmed  
 14 that the amount DCI was collecting (\$68.00) was what AT&T claimed was owed by plaintiff.  
 15 (SAC Ex. D.) Indeed, the AT&T billing statement provided to plaintiff showed that an individual  
 16 named Rene Ortiz purportedly owed AT&T an amount of \$68.40. (SAC, Ex. F.) Although  
 17 plaintiff points to potential discrepancies in addresses and account numbers, it was reasonable for  
 18 DCI to rely on the information provided by AT&T given the matching name and amount. See  
 19 Clark, 460 F.3d at 1174 (noting debt collectors do not have to vouch for the validity of the  
 20 underlying debt and that the FDCPA does not impose a duty upon debt collectors to  
 21 independently investigate the claims presented by a creditor). Here, DCI “satisfied the  
 22 requirement that [it] confirm with [its] client the particular amount being claimed.” Id.  
 23 Therefore, the second amended complaint fails to state a claim for violation of 15 U.S.C.  
 24 § 1692(g) against DCI.<sup>3</sup>

25 \_\_\_\_\_  
 26 <sup>3</sup> To the extent that the second amended complaint alleges that DCI violated 15 U.S.C. § 1692g  
 27 by failing to provide plaintiff with a written notice pursuant to section 1692g(a) prior to re-  
 28 reporting plaintiff’s debt in January 2017 (SAC ¶ 9), that claim plainly lacks merit. The FDCPA  
 contains no requirement that a written notice pursuant to section 1692g(a) be provided after a debt  
 has already been validated pursuant to section 1692g(b).

1 *Claim under Section 1692e(8) against DCI*

2 15 U.S.C. § 1692e prohibits, in relevant part, a debt collector from “[c]ommunicating or  
3 threatening to communicate to any person credit information which is known or which should be  
4 known to be false, including the failure to communicate that a disputed debt is disputed.” 15  
5 U.S.C. § 1692e(8). In support of his claim under that statute, plaintiff alleges that DCI unlawfully  
6 re-reported the alleged AT&T debt in January 2017, because even though DCI failed to properly  
7 verify the debt, it nonetheless falsely reported the debt. That argument is unavailing. For the  
8 reasons discussed above, DCI properly verified the debt. Moreover, when DCI re-reported the  
9 AT&T debt in January 2017, it included a notation that “Consumer disputes this account  
10 information” in compliance with the statute.” (SAC Ex. G.) See Burdick v. Palisades Collection  
11 LLC, 2008 WL 80943, at \*2 (C.D. Cal. Jan. 3, 2008) (“A defendant with actual notice that a debt  
12 is disputed violates § 1692e(8) by communicating with any third party about the debt *without*  
13 *disclosing the disputed nature of the debt.*”) (emphasis added).

14 Therefore, the second amended complaint also fails to state a claim for violation of 15  
15 U.S.C. § 1692e(8) against DCI.

16 *Claims against defendants Charlotte L. Zehnder and Christopher Zehnder*

17 Plaintiff named Charlotte Zehnder and Christopher Zehnder as defendants ostensibly  
18 because they are alleged to be executive officers of DCI. (SAC ¶ 1.) As an initial matter,  
19 plaintiff fails to allege sufficient facts from which the court could reasonably infer that defendants  
20 Charlotte Zehnder and Christopher Zehnder were debt collectors for purposes of the FDCPA. See  
21 Schwarm v. Craighead, 552 F. Supp. 2d 1056, 1073 (E.D. Cal. 2008) (noting that “because the  
22 FDCPA imposes personal, not derivative, liability, serving as a shareholder, officer, or director of  
23 a debt collecting corporation is not, in itself, sufficient to hold an individual liable as a ‘debt  
24 collector’”).

25 Moreover, even assuming that plaintiff had adequately alleged that defendants Charlotte  
26 Zehnder and Christopher Zehnder were debt collectors under the FDCPA, plaintiff’s claims  
27 against those defendants would fail for the same reasons discussed above with respect to  
28 plaintiff’s claims against DCI.

1                    *Whether Further Leave to Amend Should be Granted*

2                    Ordinarily, the court, consistent with applicable law, liberally grants leave to amend if it  
3 appears possible that a plaintiff, and especially a *pro se* plaintiff, could amend to state a  
4 potentially cognizable claim. However, in this case, plaintiff has already previously been  
5 provided with notice regarding federal pleading requirements and an opportunity to amend. (See  
6 ECF Nos. 11, 26.) Additionally, the nature of plaintiff's claims here, as discussed above, does  
7 not suggest that they could be cured in a third amended complaint.

8                    In his opposition brief, plaintiff for the first time alleges that DCI violated 15 U.S.C.  
9 § 1692g by failing to provide a written notice pursuant to 15 U.S.C. § 1692g(a) with respect to  
10 DCI's *initial reporting* of the AT&T debt in *January 2016*. Even if the court were inclined to  
11 entertain a newly-raised claim at this late juncture, such a claim lacks merit. DCI, with its reply  
12 brief and in response to plaintiff's new contention in his opposition brief, provided a copy of a  
13 January 25, 2016 letter that DCI sent to plaintiff, which plainly complies with the notice  
14 requirements of 15 U.S.C. § 1692g(a). (See ECF No. 41, Ex. A.)

15                    Consequently, the court concludes that granting further leave to amend would be futile.  
16 See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996).

17                    Motion for Default Judgment

18                    The court recommends that plaintiff's motion for default judgment against defendants  
19 Charlotte Zehnder and Christopher Zehnder be denied for three reasons. First, the Clerk of Court  
20 has not entered the default of those defendants, a prerequisite to filing a motion for default  
21 judgment. Second, defendants Charlotte Zehnder and Christopher Zehnder have appeared in the  
22 action and joined in DCI's motion to dismiss. Third, for the reasons outlined above, the court  
23 recommends dismissal of plaintiff's claims against all defendants pursuant to Federal Rule of  
24 Civil Procedure 12(b)(6). As such, the court also finds that plaintiff cannot show that his claims  
25 are sufficiently pled and have merit for purposes of obtaining a default judgment. See Eitel v.  
26 McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

27                    ///

28                    ///

1 CONCLUSION

2 Accordingly, IT IS HEREBY RECOMMENDED that:


- 3 1. Defendants' motion to dismiss (ECF No. 34) be GRANTED without further leave to  
4 amend.
- 5 2. The entire action be DISMISSED WITH PREJUDICE.
- 6 3. Plaintiff's motion for default judgment (ECF No. 39) be DENIED.
- 7 4. The Clerk of Court be directed to close this case.

8 In light of those recommendations, IT IS ALSO HEREBY ORDERED that all pleading,  
9 discovery, and motion practice in this action are STAYED pending resolution of the findings and  
10 recommendations. With the exception of objections to the findings and recommendations and  
11 non-frivolous motions for emergency relief, the court will not entertain or respond to any motions  
12 and filings until the findings and recommendations are resolved.

13 These findings and recommendations are submitted to the United States District Judge  
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
15 days after being served with these findings and recommendations, any party may file written  
16 objections with the court and serve a copy on all parties. Such a document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
18 shall be served on all parties and filed with the court within fourteen (14) days after service of the  
19 objections. The parties are advised that failure to file objections within the specified time may  
20 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th  
21 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

22 IT IS SO ORDERED AND RECOMMENDED.

23 Dated: May 1, 2018

24   
25 \_\_\_\_\_  
26 KENDALL J. NEWMAN  
27 UNITED STATES MAGISTRATE JUDGE  
28