IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02049-REB-STV

AISLAND RHODES, on behalf of herself and others similarly situated,

Plaintiff,

v.

NATIONAL COLLECTION SYSTEMS, INC.,

Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This debt collection matter is before the Court on Plaintiff Aisland Rhodes' Motion for Summary Judgment [#34] (the "Motion"). The Motion was originally referred to Magistrate Judge Tafoya [#37], then reassigned to this Court [#52]. The Court has considered the Motion and related briefing, the case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the instant Motion. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). Because the Court determines that there are no disputed facts as to whether Defendant National Collections Systems, Inc.'s ("NCS") conduct violated the Fair Debt Collection Practices Act (the "Act"), I RECOMMEND that Plaintiff's Motion be GRANTED, and that summary judgment be entered in favor of Plaintiff as to liability on Counts One and Two of the Complaint [#1].

I. BACKGROUND

The undisputed facts are as follows. Ms. Rhodes defaulted on her student loan debt. [#34, Undisputed Facts ¶ 12; #49 Undisputed Facts Response ¶ 12] NCS, a company that exclusively collects student loan debts, attempted to collect this debt. [*Id.* at ¶¶ 2, 7] NCS made several telephone calls to Ms. Rhodes and left voicemails. [*Id.* at ¶¶ 10-11] Over the course of four months, NCS representatives left the following voicemails:

> 1. Hi [Ms. Rhodes], my name is Andrew Johnson. Please give me a call at 800-333-3169. I'm at extension 207, thank you.
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> 2. Yes, hi [Ms. Rhodes], this is Tavia Wheeler again. I'm calling because I do still need to talk to you about that business matter regarding the same reference matter of 1798255. I need you to please call me when you get this message. My number again is 1-800-333-3169 and my extension is 208. Thank you.
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> 3. Hello [Ms. Rhodes], this is Tavia Wheeler. I left you a message back on the 9th. And I'm calling again because I do still need to talk to you about that business matter. It does indeed require your attention regarding the same reference number of 1798255. I urge you to call me when you get this message. My number again is 1-800-333-3169, extension is 208. What I have is usually a quick and easy resolve, however you need to call me so we can discuss it. Thank you.
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> 4. Yes hi [Ms. Rhodes], this is Tavia Wheeler. I'm still trying to reach you about that personal business matter. This is not a sales or marketing call. This is a matter that pertains specifically to you and does indeed require your attention. I need you to please call me when you get this message. My number here is 800-333-3169, extension 208. Thank you.

[*Id.* at ¶¶ 18-21] The parties agree that NCS representatives did not disclose that: (1) they were calling on NCS's behalf, (2) NCS was a debt collector, and (3) the information

they sought was for the purpose of collecting a debt. [*Id.* at ¶¶ 13-15] The content of these four voicemails is the subject of this action.[1]

Ms. Rhodes' Motion asks the Court to enter judgment as to liability on all claims because NCS violated 15 U.S.C. §§ 1692d(6) and 1692e(11). NCS asserts that because it communicated through voicemails and the agents left their names, NCS meaningfully disclosed its identity in compliance with § 1692d(6). Additionally, NCS argues that it did not violate § 1692e(11) because the voicemails did not directly or indirectly convey information with respect to Ms. Rhodes' debt and, therefore, were not communications. The Court disagrees and concludes that the voicemails were communications and that they failed to contain meaningful disclosures.

II. STANDARD OF REVIEW

Summary judgment is appropriate only 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1178 (10th Cir. 2013). "[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require

[1] The parties dispute whether NCS sent written correspondence to Ms. Rhodes identifying itself, the debt, and other statutory disclosures prior to making the telephone calls. [#49, Response ¶ 17] But NCS does not argue that this fact is dispositive or a necessary part of the Court's analysis. Even if NCS made prior disclosures, this would

submission to a jury. *See Anderson*, 477 U.S. at 248–49; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000); *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable party could return a verdict for either party. *Anderson*, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). The Court reviews the evidence in the light most favorable to the nonmoving party. *United States v. Distefano*, 279 F.3d 1241, 1243 (10th Cir. 2002).

III. ANALYSIS

To succeed on her claims under the Act, Ms. Rhodes must establish the following four elements: (1) she is a natural person who is a "consumer" under 15 U.S.C. § 1692a(3); (2) the "debt" arises out of a transaction entered primarily for personal, family, or household purposes under 15 U.S.C. § 1692a(5); (3) NCS is a "debt collector" within the meaning of 15 U.S.C. § 1692a(6); and (4) NCS has violated, by act or omission, a provision of the Act. *Rhodes v. Olson Assocs., P.C.*, 83 F. Supp. 3d 1096, 1103 (D. Colo. 2015); Marjorie Wengert, *Causes of Action for Violation of Fair Debt Collection Practices Act [15 U.S.C.A. §§ 1692-1692o], in* 29 Causes of Action 2d 1 § 9 (2nd ed. 2005). Here, NCS admits that a debt was at issue pursuant to § 1692a(5) and that it was a debt collector pursuant to § 1692a(6). [#34, Undisputed Facts ¶¶ 2, 6;

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not relieve NCS of the future obligation to disclose information in subsequent

#49, Undisputed Facts Response ¶¶ 2,6] NCS also does not contest that Ms. Rhodes is a natural person who is a consumer under § 1692a(3). [#1, Complaint ¶¶ 4-5; #11, Answer ¶¶ 4-5; *see generally*, #49 Response] Thus, the Court must only resolve the fourth element, whether NCS has violated, by act or omission, a provision of the Act.[2]

The provisions NCS is accused of violating are §§ 1692d(6) (Count 1) and 1692e(11) (Count 2). Section 1692d(6) requires a debt collector to "meaningful[ly] disclos[e]" its identity in telephone calls to consumers. Section 1692e, in turn, prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." With limited exception not relevant here, § 1692e is violated when a debt collector, during an initial oral communication with the debtor, fails to disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and [fails] to disclose in subsequent communications that the communication is from a debt collector." § 1692e(11).

A. NCS Failed to Meaningfully Disclose Its Identity in Violation of § 1692d(6)

NCS concedes that when a debt collector is making a telephone call, meaningful disclosure is required under § 1692d(6). [#49, p. 5]; 15 U.S.C. §1692d(6) (requiring meaningful disclosure when placing a telephone call to a debtor). But, without citation to any case authority supporting its position, NCS argues that this "meaningful

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communications with Ms. Rhodes.

[2] Absent raising an affirmative defense under 15 U.S.C. § 1692k(c), which NCS has not done in its Response [#49], the Act is a strict liability statute and Ms. Rhodes need only prove a violation of the Act's provisions to be entitled to a favorable judgment. *See Johnson v. Riddle*, 305 F.3d 1107, 1121-22 n.15 (10th Cir. 2002) (noting the many courts that have stated the Act is a strict liability statute).

disclosure" does not require its representatives to disclose that they were calling on behalf of a debt collector in order to collect a debt. In essence, NCS argues that the "meaningful disclosure" requirement of §1692d(6) does not encompass the same type of disclosures set forth in §1692e(11).

NCS fails, however, to give any plausible alternative definition of "meaningful disclosure." Certainly, "meaningful disclosure" must mean more than simple disclosure of the agent's name. Requiring only disclosure of the agent's identity would appear to read the "meaningful" requirement out of the "meaningful disclosure" definition. Indeed, NCS's interpretation has been rejected by several courts in this district. *See, e.g.*, *Rhodes*, 83 F. Supp. 3d at 1108-09; *Torres v. ProCollect, Inc.*, 865 F. Supp. 2d 1103, 1105 (D. Colo. 2012) (holding that the debt collector was required to "disclose its company name in a voicemail left for a consumer"); *Doshay v. Glob. Credit Collection Corp.*, 796 F. Supp. 2d 1301, 1304 (D. Colo. 2011).

Rather than explaining how providing only a name satisfies the "meaningful disclosure" requirement, NCS emphasizes that the voicemails were brief, nonthreatening, and respected Ms. Rhodes' privacy by not referring to her debt. In doing so, NCS focuses solely upon the Act's goal of protecting a debtor's privacy, while ignoring the Act's goal of protecting the debtor from receiving harassing communications or communications in which the debt collector fails to disclose his or her identity. *See Guerro v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007) (stating as a goal of the Act the "protect[ion] of vulnerable and unsophisticated debtors from abuse, harassment, and deceptive collection practices"); *see also* § 1692d(6) (prohibiting "the placement of telephone calls without meaningful disclosure of the

caller's identity"). The Court, however, is not free to ignore the multiple purposes of the Act. Here, because NCS indisputably failed to comply with the disclosure requirements of § 1692d(6), the Court Recommends granting summary judgment as to liability on Count 1.

B. NCS's Voicemails Were Communications in Violation of § 1692e(11)

As quoted previously, § 1692e prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." With limited exception not relevant here, § 1692e is violated when a debt collector, during an initial oral communication, fails to disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and [fails] to disclose in subsequent communications that the communication is from a debt collector." § 1692e(11). § 1692a broadly defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium."

NCS asserts that the voicemails were not communications in violation of § 1692e(11) because the voicemails did not directly or indirectly convey information regarding Ms. Rhodes' debt. NCS is correct that the voicemail messages did not "directly" mention the word "debt." But, NCS's representatives were calling about a debt, and left both their names and telephone numbers in the hope that Plaintiff would resolve that debt. By providing the name and telephone number of an agent who could resolve Plaintiff's outstanding debt, the voicemails "convey[ed] . . . information regarding a debt." § 1692a.

In support of its assertion that the voicemails were not communications, NCS cites to *Marx v. General Revenue Corporation*, 668 F.3d 1174 (10th Cir. 2011), *aff'd*, 133 S. Ct. 1166 (2013). *Marx* addressed a facsimile of an employment verification form sent by a debt collector to a debtor's employer. *Id.* at 1176. There was no evidence that the debtor's employer knew or inferred that the facsimile involved a debt, and *Marx* concluded that the facsimile did not satisfy the statutory definition of a "communication." *Id.* at 1777.

NCS's reliance on *Marx* is misplaced. *Marx* involved a third-party communication under a different statutory section, § 1692c(b). That section bars debt collectors from communicating with third parties with respect to any debtor's debt, and is designed to protect the debtor's privacy interests. Thus, the fact that the "communication" involved in *Marx* did not directly mention a debt was relevant to § 1692c(b)'s privacy concerns; the third party was never notified that the call was in relation to debt collection activity. *See id.* at 1183 ("The ban on communicating with third parties like employers is meant to protect debtors from harassment, embarrassment, loss of job, denial of promotion" and plaintiff was "unable to testify that anyone at her office had any idea what the fax concerned."); *Rhodes*, 83 F. Supp. 3d at 1104.

In contrast, NCS's communications were directed to the debtor, not a third party. The Act treats these two types of communications differently. *Compare* 15 U.S.C § 1692c(a) (communications with debtor), *with* § 1692c(b) (communications with third parties). Indeed, as explained above, the third-party communication provisions are designed to protect the debtor's privacy, whereas the debtor communication provisions are designed to protect debtors from misleading communications, including those that

fail to adequately disclose the caller's identity and purpose of the call. Given the differing goals sought to be achieved by the third-party and debtor communications provisions, reliance upon *Marx*'s third-party communications analysis is inappropriate in a debtor communications context.[3]

Again, going back to the statutory framework, concluding these voicemails were communications is consistent with the Act's broad mandate to protect consumers. *Rhodes*, 83 F. Supp. 3d at 1107. Adopting NCS's narrow reading would "produce an absurd result: consumers would entirely lose the Act's protections under Section 1692e(11) if debt collectors were to leave messages obscuring their true identity and the purpose for their call." *Id.* Therefore, the Court concludes that the voicemails were communications and that NCS violated § 1692e(11) by failing to disclose that the communications were from a debt collector. The Court Recommends granting summary judgment as to liability on Count 2.

[3] NCS cites to *Hanson v. Green Tree Servicing, LLC*, No. 12-2933 (DSD/SER), 2013 WL 4504290 (D. Minn. Aug. 23, 2013) and *Zortman v. J.C. Christensen & Associates, Inc.*, 870 F. Supp. 2d 694 (D. Minn. 2012), but those cases also involve third-party communications under § 1692c(b). Indeed, in reaching its conclusion, the *Zortman* Court discussed the application of § 1692e(11), and stated that "nearly every court to have faced the question has determined that answering machine or voicemail messages are 'communications' and that §§ 1692d(6) and 1692e(11) require debt collectors to identify themselves." 870 F. Supp. 2d at 699. NCS also cites to *Brody v. Genpact Services, LLC*, 980 F. Supp. 2d 817 (E.D. Mich. 2013) and *Biggs v. Credit Collections, Inc.*, No. CIV-07-0053-F, 2007 WL 4034997 (W.D. Okla. 2007), but those cases are contrary to *Rhodes* and *Doshay,* both of which are persuasive cases in this district.

C. The Court's Conclusion Does Not Create a Conflict Between the Privacy and Disclosure Goals

Likely recognizing that its interpretation of the statute fails to give deference to the Act's disclosure requirements, NCS argues that there is a conflict between the Act's disclosure requirements and its privacy requirements, placing NCS in a Catch-22 predicament. Specifically, NCS asserts that requiring such disclosures is contrary to the Act's third-party privacy requirements because voicemails left by its representatives identifying themselves as debt collectors could violate the Act if third parties listened to the voicemails. NCS maintains that because the overriding purpose of the Act is to protect consumer privacy, the disclosure requirements should not apply to voicemail messages.

While NCS's position has some initial appeal, further review demonstrates that this Catch-22 is a problem of NCS's own making. The Act does not guarantee debt collectors the right to leave voicemails, *see, e.g.*, *Edwards v. Niagara Credit Sols., Inc.*, 584 F.3d 1350, 1354 (11th Cir. 2009), and NCS could simply not leave a voicemail when the debtor does not answer the phone.[4] If NCS chooses to leave a voicemail, the danger that third parties may listen to those voicemails, thereby subjecting NCS to liability, is simply a risk that NCS must endure. *See, e.g.*, *Edwards*, 584 F.3d at 1354; *Rhodes*, 83 F. Supp. 3d at 1105 n.3 ("The Court recognizes that the Act places debt collectors between the proverbial 'rock and a hard place' when it comes to leaving voicemail messages.").

[4] Of course, NCS would need to be mindful of § 1692d(5)'s prohibition against "[c]ausing a telephone to ring . . . repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."

The Act requires both meaningful disclosure to consumers and that debt collectors protect consumers' information throughout the debt collection process. These goals are not conflicting, as NCS asserts, but work hand in hand in ensuring consumer protection. *See generally Johnson*, 305 F.3d at 1117 ("Because the [Act] . . . is a remedial statute, it should be construed liberally in favor of the consumer."). If NCS is concerned that voicemails may be heard by third parties thereby violating the privacy provisions of the Act, NCS can tell its agents to not leave voicemails. What NCS cannot do is disregard the Act's meaningful disclosure requirement.

IV. CONCLUSION

For the foregoing reasons, this Court respectfully **RECOMMENDS** that:

(1) Plaintiff's Motion for Summary Judgment [#34] be **GRANTED**; and

(2) Judgment enter in favor of Plaintiff as to liability on all claims; and

(3) Damages on all claims be determined at trial after ruling on the Motion for Class Certification and Appointment of Class Counsel [# 29].[5]

DATED: October 31, 2016

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

[5] Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyoming Coal Refining Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the magistrate judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the magistrate judge's ruling). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).