

Jonathan Goldsmith, Esq. (11805) in assoc. with
KROHN & MOSS, LTD.
9029 South Pecos Rd #2800
Henderson, NV 89074
Ph: 702-386-8637
Fax: 702-385-3025
Email: jgoldsmith@lawrosen.com
Attorneys for Plaintiff Eva Bennett

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

EVA BENNETT,) **Case No: 2:10-CV-01688-PMP-PAL**
)
Plaintiff,)
)
vs.) **PLAINTIFF’S RESPONSE TO**
) **DEFENDANT’S MOTION FOR**
) **SUMMARY JUDGMENT**
FREDERICK J. HANNA & ASSOCIATES,)
P.C.)
)
Defendant.)

**MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Plaintiff, EVA BENNETT (“Plaintiff”), by her attorneys, KROHN & MOSS, LTD., and in response to Defendant’s, FREDERICK J. HANNA & ASSOCIATES, P.C.’s (“Defendant”), Motion for Summary Judgment [Doc. 14], affirmatively states as follows:

I. STATEMENT OF DISPUTED MATERIAL FACTS

On September 28, 2010, Plaintiff filed a Complaint against Defendant for engaging in unlawful debt collection practices in violation of the Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq. (“FDCPA”). [Doc. 1]. Defendant’s call records show that Defendant called Plaintiff five times in ten days, between August 7, 2010 and August 17, 2010. [Doc. 14-1] Affidavit of Frederick J. Hanna at Exhibit B (Electronic File Report). This included two calls after August 11, 2010, when Plaintiff’s spouse called and told Defendant that Plaintiff was hurt

1 in an accident, lost her job and that neither of them have money to pay Defendant. *Id.* Plaintiff
2 respectfully submits that there is a question of fact as to whether Defendant's continued calls to
3 Plaintiff *after* it was informed that Plaintiff was in no condition and unable to pay were
4 harassment for purposes of the FDCPA. Defendant actions, as well as its purpose in making
5 these calls, constitute disputed material facts for a jury to decide, to wit: Whether the calls were
6 legitimate or, instead, made in order to harass Plaintiff into paying Defendant as an unlawful debt
7 collection tactic. Accordingly, summary judgment should be denied.

8 **II. LEGAL STANDARD**

9 The Federal Rules of Civil Procedure provide for summary judgment when "the
10 pleadings, depositions, answers to interrogatories, and admissions on file, together with
11 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
12 party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether
13 a genuine issue of material fact exists, the Court construes all facts in the light most favorable to
14 the nonmoving party and draws all reasonable and justifiable inferences in that party's favor. *See*
15 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is not proper if
16 material factual issues exist for trial. *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980
17 F.2d 1217, 1219 (8th Cir.1992). The moving party bears the burden of proving the absence of
18 any triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). The non-
19 moving party can defeat a motion for summary judgment by producing evidence "such that a
20 reasonable jury could return a verdict" in his favor. *Anderson*, 477 U.S. at 248.

21 **III. LEAST SOPHISTICATED DEBTOR STANDARD & STRICT LIABILITY**

22 "The FDCPA is a remedial, strict liability statute which was intended to be applied in a
23 liberal manner." *Picht v. Hawks*, 77 F.Supp.2d 1041, 1043 (D.MN 1999). FDCPA violations
24 should be evaluated under the "least sophisticated debtor" standard. *Id.* citing *FTC v. Raladam*
25 *Co.*, 316 U.S. 149, 151-52 (1942); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d

1 Cir.1961), cert. denied, 370 U.S. 917 (1962); and *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168,
2 1172-1175 (11th Cir.1985). The least sophisticated debtor standard is objective and meant to
3 protect all consumers, “the gullible as well as the shrewd ... the ignorant, the unthinking and the
4 credulous.” *Clark v. Capital Credit & Collection Serv.*, 460 F.3d 1162, 1171 (9th Cir. 2006);
5 *see also Sonmore v. CheckRite Recovery Services, Inc.*, 2000 WL 34494810 at *3 (D. Minn. Oct.
6 25, 2000), quoting *Duffy v. Landberg*, 215 F.3d 871 (8th Cir.2000) (determination of whether a
7 debt collector's conduct has violated the FDCPA are made from the perspective of the
8 “unsophisticated consumer”).

9 “Proof of one violation is sufficient to support a finding of summary judgment in favor of
10 the Plaintiff in an FDCPA action.” *Picht*, 77 F. Supp. at 1043 citing *Bentley v. Great Lakes*
11 *Collection Bureau*, 6 F.3d 60, 62 (2nd Cir.1993); *Cacace v. Lucas*, 775 F.Supp. 502, 505
12 (D.Conn.1990). In addition, “[t]he FDCPA is a strict liability statute.” *Irwin v. Mascott*, 112
13 F.Supp.2d 937, 963 (N.D. Cal. 2000). Accordingly, the plaintiff need not prove either that the
14 defendant knew that their debt collection practices were illegal or that they intended to violate
15 the law. *Id.*

16 In deciding the instant motion for summary judgment, Plaintiff’s FDCPA case requires
17 the application of the least sophisticated debtor standard liberally within the parameters of strict
18 liability. As a result, Defendant’s minimization of its conduct should not serve as a bar to
19 Plaintiff’s Complaint for Defendant’s unfair and unscrupulous conduct in trying to collect money
20 from her. Instead, using the aforementioned principles, a court must ask whether the actions of
21 the debt collector were harassing to the least sophisticated debtor. *See Jeter*, 760 F.2d at 1168
22 (11th Cir. 1985) (applying the “least sophisticated” consumer standard); *Graziano v. Harrison*,
23 950 F. 2d 107 (3d Cir. 1991) (noting that statutory notice under FDCPA is to be interpreted from
24 perspective of “least sophisticated debtor” standard); *Gammon v. GC Services Ltd. Partnership*,
25 27 F. 3d 1254 (7th Cir. 1994) (using the “unsophisticated consumer,” rather than the “least

1 sophisticated consumer,” in order to protect consumers who are uninformed, naive or trusting,
2 while admitting objective element of reasonableness). In the instant case, applying the FDCPA
3 in the liberal manner, Defendant’s conduct, viewed in a light most favorable to Plaintiff and
4 under the least sophisticated debtor standard, violated the FDCPA.

5 **IV. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER**
6 **DEFENDANT’S CONDUCT VIOLATED THE FDCPA**

7 **A. Plaintiff’s Section 1692d and Section 1692d(5) claims**

8 Defendant called Plaintiff at least twice on August 17, 2010 after expressly being told on
9 August 10, 2010 that she was unable to pay Defendant. [Doc. 14-1] - Affidavit of Frederick J.
10 Hanna at Exhibit B (Electronic File Report). Specifically, on August 11, 2010, Plaintiff’s spouse
11 called Defendant went so far as to explain Plaintiff’s circumstances to Defendant – that she had
12 been in a car accident and lost her job. *Id.* Further, during this same conversation, Plaintiff’s
13 spouse told Defendant that his business had suffered as a result of Plaintiff’s accident and that
14 they were unable to make **any** type of payment arrangement. *Id.* Plaintiff’s spouse even told
15 Defendant that they were considering filing for bankruptcy. *Id.*

16 The fact that Defendant continued to call Plaintiff twice on August 17, 2010 after being
17 expressly informed on August 10, 2010 that she could not pay provides evidence of Defendant’s
18 intent to annoy, harass, or abuse Plaintiff. [Doc. 14-1] - Affidavit of Frederick J. Hanna at
19 Exhibit B (Electronic File Report). Upon being unequivocally informed that Plaintiff could not
20 pay, Defendant continued its collection calls. *Id.* at ¶5 and ¶16. This evidence shows that
21 Defendant’s actions were not legitimate follow-up activities or made to establish contact. *See* 15

1 U.S.C. §1692a(3) (spouses are not considered third parties for purposes of the FDCPA). Instead,
2 these calls were made with the intent to annoy, harass and abuse Plaintiff.¹

3 The FDCPA contemplates that causing someone's phone to ring repeatedly, in and of
4 itself, is harassment. Section 1692d provides in pertinent part:

5 A debt collector may not engage in any conduct the natural consequence
6 of which is to harass, oppress, or abuse any person in connection with the
7 collection of a debt. Without limiting the general application of the
8 foregoing, the following conduct is a violation of this section:

9 (5) Causing a telephone to ring or engaging any person in telephone
10 conversation repeatedly or continuously with intent to annoy, abuse, or
11 harass any person at that number called.

12 15 U.S.C. §1692d(5). In *Meadows v. Franklin Collection Service*, No. 10-13474, 2011 WL
13 479997 at *3 (11th Cir. February 11, 2011),² the Eleventh Circuit found that “there is a factual
14 dispute as to whether Franklin's follow-up activities were reasonable. The reasonableness of
15 Franklin's follow-up activities turns in part on when and in what manner Meadows informed

16 ¹ Intent may be proven by direct or circumstantial evidence. *See, e.g., In re Coffey's Case*, 157 N.H. 156,
17 178, 949 A.2d 102 (2008) (recognizing that intent may be proven through sufficient circumstantial
18 evidence); *see also United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478, 460 U.S. 711
19 (S.Ct. 1983); *Caputo v. Professional Recovery Services, Inc.*, 261 F.Supp.2d 1249 (D. Kansas 2003); and
20 *Gilroy v. Ameriquet Mortg. Co.*, 632 F.Supp.2d 132 (D. N.H. 2009).

21 ² *Meadows* is the first circuit court to specifically address virtually the same issues as present in the case
22 at bar. While the opinion was not published, per Fed. R. App. P. 32.1 and 11th Cir. R. 36-2, Plaintiff may
23 properly rely upon and cite the decision to this Court as persuasive authority. Furthermore, while
24 *Meadows* was decided by the Eleventh Circuit, district courts should give careful consideration to the
25 decisions of other circuit courts. *See Overland Exp., Inc. v. Int'l Multifoods*, 765 F. Supp. 1386 (S.D. Ind.
1990); *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119 (7th Cir.1987) (“we give most respectful
consideration to the decisions of the other courts of appeals and follow them whenever we can”);
Richards v. Local 134, Int'l Brotherhood of Electrical Workers, 790 F.2d 633 (7th Cir.1986) (“decisions
of other circuits are not necessarily controlling, the district courts should give them substantial weight”);
United States v. Weil, 46 F. Supp. 323 (E.D. Ark. 1942) (absent a holding by the Supreme Court or circuit
court where the district courts sits, if the holding in another circuit court case is not clearly erroneous it
would be the duty of the district court to follow it).

1 Franklin that she did not owe the debts and that Taylor did not live with her.” *Id.* at *3. *See*
2 *also Kerwin v. Remittance Assistance Corp.*, 559 F.Supp.2d 1117, 1124 (D. Nev. 2008) (“Intent
3 to annoy, abuse, or harass may be inferred from the frequency of phone calls, the substance of
4 the phone calls, or the place to which phone calls are made”).

5 In the instant case, Defendant’s calls to Plaintiff on August 17, 2010 after speaking with
6 her spouse in detail about their situation were not legitimate follow-up activities because
7 Defendant had established contact, verified her information and was duly informed in detail of
8 her, as well as her spouse’s, situation prohibiting them from paying Defendant. [Doc. 14-1] -
9 Affidavit of Frederick J. Hanna at Exhibit B (Electronic File Report). At minimum, there is a
10 question of fact for the jury to resolve as to whether the call pattern in this case constitutes an
11 unfair debt collection practice.

12 **B. Whether the nature and frequency of debt collection calls constitutes**
13 **harassment is a fact issue for the jury**

14 The majority of courts throughout the nation recognize that whether the nature and
15 frequency of debt collection calls constitutes harassment is a fact issue for the jury. *See*
16 *Meadows v. Franklin Collection Service*, 2011 WL 479997 at *2 (“[W]e find that there is a
17 genuine issue of material fact as to whether Franklin caused Meadows’s telephone to ring with
18 the intent to annoy or harass her.”); *Rucker v. Nationwide Credit, Inc.*, No. 2:09-cv-2420-GEB-
19 EFB, 2011 WL 25300 (E.D. Cal. Jan. 5, 2011) (number of calls created an issue of fact as to
20 whether § 1692d(5) had been violated); *Brown v. Hosto & Buchan, PLLC*, 2010 WL 4352932, -
21 -F. Supp.2d -- (W.D. Tenn., Nov., 2, 2010) (“The nature of telephone calls, including their
22 frequency, substance, or the place to which they are made, provides grounds to infer a debt
23 collector’s intent to annoy, abuse, or harass without any other evidence of the debt collector’s
24 motive in calling”); *Valentine v. Brock & Scott, PLLC*, 2010 U.S. Dist. Lexis 40532 *11 (D.S.C.
25 Apr. 26, 2010) (in which the court found allegations that the court called Plaintiff eleven times

1 over a period of nineteen days, with two calls occurring on the same day to be sufficient to state
2 a claim for relief).

3 Claims under Section 1692d of the FDCPA should be viewed from the perspective of a
4 consumer whose circumstances make her relatively more susceptible to harassment, oppression,
5 or abuse. *Jeter*, 760 F.2d 1168, 1179 (11th Cir. 1985). Applying this standard in the instant
6 case, at minimum, a fact issue exists as to whether calling Plaintiff after being informed that she
7 could not pay due to her accident and unemployment was harassment for purposes of the
8 FDCPA. In fact, a jury could find that just one of the calls to Plaintiff after being so informed
9 could be actionable harassment. *See Bingham v. Collection Bureau, Inc.*, 505 F.Supp. 864, 873
10 (D. N.D. 1981) (a single subsequent call could constitute harassment under § 1692d(5)
11 regardless of the content of the call).

12 Accordingly, case law from throughout the nation recognizing that whether the nature
13 and frequency of debt collection calls constitutes harassment is a factual issue for the jury. *See*
14 *Bassett*, 715 F.Supp.2d at 810, (2010); *Krapf*, 2010 WL 2025323 at *2; *Joseph v. J.J. Mac*
15 *Intyre Companies, LLC.*, 238 F.Supp.2d 1158, 1168 (N.D. Cal. 2002) (“[w]hether there is
16 actionable harassment or annoyance turns not only on the volume of calls made, but also on the
17 pattern of calls”); *Kuhn v. Account Control Tech., Inc.*, 865 F.Supp. 1443, 1453 (D. Nev. 1994);
18 *United States v. Central Adjustment Bureau, Inc.*, 667 F.Supp. 370, 376 (N.D. Tex. 1986), *aff’d*,
19 823 F.2d 880 (5th Cir. 1987); *Akalwadi v. Risk Mgmt. Alternatives, Inc.*, 336 F.Supp.2d 492,
20 506 (D. Md. 2004); *Prewitt v. Wolpoff & Abramson, LLP*, 2007 WL 841778 (W.D. N.Y. 2007)
21 (number of calls was an issue of fact for fact finder); and *Clark v. Quick Collect, Inc.*, 2005 WL
22 1586862, *4 (D. Or. 2005) (“The Court, therefore, holds the reasonableness of Morrin's volume
23 of calls and their pattern is a question of fact for the jury”). Because there is a fact issue as to
24 whether calls made after being informed that Plaintiff could not pay in the instant case
25 constitutes an unlawful debt collection tactic, summary judgment should be denied.

1 **C. Plaintiff's Section 1692e and Section 1692e(10) claims**

2 Plaintiff voluntarily withdraws her Section 1692e and Section 1692e(10) claims.

3 **V. CONCLUSION**

4 As the moving party, Defendant has the burden to show that there are no triable issues of
5 fact to be determined at trial. Defendant failed to provide sufficient evidence establishing that it
6 should be entitled to judgment as a matter of law. There remain genuine issues of material fact
7 as to whether Defendant violated Sections 1692d and 1692d(5) of the FDCPA. Defendant failed
8 to meet its burden and, accordingly, Defendant's motion should be denied as to these claims.

9 WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter an order
10 denying Defendant's Motion for Summary Judgment and for any additional relief deemed just
11 and appropriate.

12 Dated: April 1, 2011

13 RESPECTFULLY SUBMITTED,

14 Jonathan Goldsmith, Esq. (11805) in assoc. with

15 **KROHN & MOSS, LTD.**

16 9029 South Pecos Rd #2800

17 Henderson, NV 89074

18 Ph: 702-386-8637

19 Fax: 702-385-3025

20 Email: jgoldsmith@lawrosen.com

21 Attorneys for Plaintiff Eva Bennett

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2011, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT and the Affidavit of Eva Bennett** were served on counsel through the Court's electronic service system as follows:

Patrick J. Reilly, Esq.
Nevada Bar No. 6103
HOLLAND & HART LLP
3800 Howard Hughes Parkway, 10th Floor
Las Vegas, Nevada 89169
(702) 669-4600
(702) 669-4650 – fax
preilly@hollandhart.com
learl@hollandhart.com
Attorneys for Defendant

/s/ Jonathan Goldsmith
Jonathan Goldsmith