

Hey Dave, uh, Sam Coffee, Federal Credit, I apologize for the inconvenient call. Um, over some time we've tried to settle a case with you and I don't know what had happened but I think they may have initiated legal action. Could you call me so I can see if I can nip this thing and stop it? 866-611-6300. My extension is 221. Please call me ASAP so I know what has happened. This is uh, I apologize, I apologize, I think I see a docket number here, please call.¹

During November, 2007, an employee of Federal Credit Corp. identifying herself as "Jill Brown" left a message for Plaintiff:

Message is for David Sears and Denise Finey. This is Jill Brown, I'm with the Federal Credit Corporation's Legal Department and we've been trying to get a hold of you for some time now regarding a case that was pending legal action against you here in our office. However, this has now been forwarded to our attorney and on the 30th they're going to determine whether or not this is going to affect your Federal Income Tax next year. In order to help prevent this from happening[,] I need to hear from you at Toll Free 866-611-6300 at extension 228. You will need to reference the Case Number 29613 when you call back.²

Attorneys, Charles Allen Jr. and Chad Steur moved for leave of the court to withdraw on June 30, 2009, representing that Defendant had terminated counsels' services. (Dkt. # 14.) Plaintiff objected, noting that a corporation may not appear pro se in federal court. (Dkt. # 17.) On June 30, 2009, Plaintiff also filed a Motion for Partial Summary Judgment with this court, requesting statutory damages of two thousand dollars (\$2,000), which amounts to one thousand dollars (\$1,000) per violation. (Dkt. # 16.) Plaintiff additionally requested that attorney's fees be awarded.

¹Defendant did not admit that this is a precise transcript of the call. In Defendant's Responses to Request for Admission (Dkt. # 49), Defendant indicated that there were several "uhs" in the actual call that were not included. However, Defendant does not indicate that the call is different in any material way.

²Defendant did not admit that this is a precise transcript of the call. In Defendant's Responses to Request for Admission (Dkt. # 49), Defendant indicated that the employee is misidentified as "Jill." However, Defendant does not indicate that the call is different in any material way than as it is listed above.

The court initially denied counsels' request to withdraw. By Order dated July 8, 2009, the court directed the Gary Williky, the principal of Federal Credit Corp. to retain counsel for Defendant by July 15, 2009. (Dkt. # 18.) Additionally, on July 9, 2009, the Court entered an Order requiring Defendant to supply supplemental discovery responses to Plaintiff on or by July 15, 2009. (Dkt. # 20.) Defendant failed to comply with both Orders. On July 21, 2009, Plaintiff filed a Motion for Sanctions, seeking a default judgment against Defendant. (Dkt. # 27).

At a hearing on July 29, 2009, counsel for Defendant reported that they had no contact with the Williky. Steur and Robinson were then permitted to withdraw as counsel. (Dkt. # 41.) The court additionally awarded attorney's fees in the amount of \$497.50 to Plaintiff, for Defendant's failure to comply with the Court's July 9, 2008 Order requiring Defendant to respond to discovery. On August 12, 2009, the court received a letter from Williky saying he had retained counsel. (Dkt. # 48.) To date, no counsel has appeared on the record for Defendant.

II.

Federal Rule of Civil Procedure 56(c) provides that a court should grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "As to materiality . . . [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In order to preclude summary judgment, the dispute about a material fact must be "'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. However, if the evidence of a genuine issue of material fact "is merely colorable or is not

significantly probative, summary judgment may be granted.” Id. at 250. In considering a motion for summary judgment under Rule 56, the court must view the record as a whole and draw reasonable inferences in the light most favorable to the nonmoving party. See, e.g., id. at 248–50 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322–24 (1986); In re Apex Express Corp., 190 F.3d 624, 633 (4th Cir. 1999).

Defendant has not filed an opposition to the Motion for Partial Summary Judgment. Nor has Defendant appeared by counsel as directed by the court numerous times. However, a non-movant’s failure to respond does not remove movant’s burden of demonstrating that he or she is entitled to summary judgment. Miles v. Bollinger, 979 F.2d 848 (4th Cir. 1992). Thus, the undersigned must examine the affidavits and declarations, as well as the record.

III.

The purpose of the FDCPA is to “eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C.A. § 1692(e). To establish a violation under the FDCPA, a plaintiff must show that “(1) the plaintiff is a ‘consumer’ within the meaning of the statute; (2) the defendant collecting the debt is a ‘debt collector’ within the meaning of the statute; (3) the defendant has violated by act or omission a provision of the FDCPA.” Creighton v. Emporia Credit Service, 981 F.Supp. 411, 414 (Ed. Va. 1997). See also, Talbott v. GC Servs. Lim. Partnership, 53 F.Supp.2d 846, 850 (W.D. Va. 1999). Pursuant to the FDCPA, a consumer is “any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C. § 1692a(3). A debt collector is “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any

debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C.A. § 1692a. In considering whether there was an FDCPA violation, the undersigned is to use the “least sophisticated consumer” standard, “to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd.” United States v. Nat’l Fin. Servs., Inc., 98 F.3d 131, 136 (4th Cir. 1996); Talbott, 53 F.Supp.2d at 850.

Plaintiff alleges that the calls from Sam Coffey and Jill Brown, the “Coffee Call” and the “Brown Call” respectively, violate 15 U.S.C. § 1692e(11).³ This provisions provide that:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

.....

The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

15 U.S.C.A. § 1692e & e(11). A communication under the FDCPA “means the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C.A. § 1692a(2).

Defendant admitted in the Requests for Admission that David Sears is a consumer within the meaning of the FDCPA. The undersigned concludes based on the verified Complaint, Defendant’s Answer and the Requests for Admission, that Federal Credit Corp. is a debt

³Though 15 U.S.C. § 1692e(11) is not specifically cited in the Complaint, the undersigned concludes that the Defendant was put on notice that Federal Credit Corp. was being sued for this matter because the Plaintiff alleged that representatives of Federal Credit Corp. failed to identify themselves as debt collectors as required by statute.

collector within the meaning of the statute. Defendant admitted in the Requests for Admission that it falls within that statutory definition. Additionally, in its Answer, it admitted that it attempted to collect a debt allegedly owed by Plaintiff. The record further supports this conclusion revealing that Defendant attempted to reach Plaintiff by telephone, that it sends out letters regarding debt collection, that it trains its employees regarding the FDCPA and maintains “Debtor History Reports” for various accounts. Taken together, these activities and training indicate that the Federal Credit Corp. regularly attempts to collect debts. Thus, Federal Credit Corp. was under an obligation to comply with 15 U.S.C. § 1692e(11) in its communications with David Sears.

Plaintiff’s Motion for Summary Judgment states that the Coffee Call and the Brown Call demonstrate violations 15 U.S.C. § 1692e(11), which requires that a debt collector identify him or herself as a debt collector in every communication. Defendant does not contest the material portions of the calls as set forth in the record. Rather, the difference between the parties, to the degree the Defendant has placed a view on the record, turns on the application of the disclosure requirements to the communications.

The plain language of the two communications from Federal Credit Corp. reveal that Federal Credit Corp.’s representatives did not identify themselves as debt collectors and thus violated 15 U.S.C. § 1692e(11). In the Coffee Call, the caller stated that he was calling because Federal Credit Corp. had tried to “settle a case” and may have “initiated legal action.” Such information is ambiguous, and does not indicate that it is regarding an alleged debt. Rather, it could be regarding a whole host of issues. Similarly, in the Brown Call, the speaker said that she was calling regarding a legal action which could effect Plaintiff’s federal income tax liability.

This too is ambiguous, and not logically linked with an attempt to collect a debt to a third party. Thus, in contravention of the statute, the least sophisticated consumer would not be put on notice that such communications were from a debt collector attempting to collect a debt. Rather, the least sophisticated consumer would likely be confused, believing that such calls were regarding a legal suit of which the consumer was not aware. As noted, the record also contains various denials by Defendant. However, these denials do not present countervailing facts sufficient to create a genuine issue of material fact. Instead, they are blanket denials by Federal Credit Corp. Thus, there is no genuine issue of material fact as to whether Defendant violated the disclosure requirements contained 15 U.S.C. § 1692e(11), and the undersigned **RECOMMENDS** that partial summary judgment be granted in favor of Plaintiff David Sears.

IV.

Plaintiff seeks damages of \$2,000, i.e., \$1,000 per communication, and attorney's fees.

The FDCPA provides that

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--

....

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or

....

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a). In awarding damages pursuant to an individual's case against a debt collector, the court is to consider the "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." 15 U.S.C. § 1692k(b)(1).

Plaintiff has presented limited evidence regarding the frequency and persistence of Defendant's non-compliance. However, Plaintiff has been hampered by Defendant's failure to comply with court orders and to fully participate in this suit. Specifically, the court has entered Orders compelling Defendant to retain counsel and to respond fully to discovery. Defendant still has no counsel registered on the record, though the principal of Federal Credit Corp. has claimed at various times to have retained counsel. Additionally, Defendant has only slowly responded to discovery requests, leading the Court to sanction Defendant.

The two communications set forth in the verified Complaint and confirmed in the Requests for Admission demonstrate Defendant's clear failure to comply with disclosure requirements and to mask Defendant's true purpose in contacting Sears with vague allusions to legal actions. Accordingly, the undersigned **RECOMMENDS** that Defendant be required to pay damages of \$1,000, plus Plaintiff's court costs, and those reasonable attorney's fees that the court has not already ordered Defendant to bear. The award of \$1,000 for the proceeding, rather than per violation, is consistent with the interpretation of 15 U.S.C. § 1692k(b)(1) taken by a court in this circuit. See Spencer v. Hendersen-Webb, Inc., 81 F.Supp.2d 582, 594 (D. Md. 1999); see also, Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647, 650 (6th Cir. 1994).

V.

Based on the evidence submitted by Plaintiff, it is **RECOMMENDED** that David Sears' Partial Motion for Summary Judgment be granted and that he be awarded damages in the amount

of \$1,000. It is further **RECOMMENDED** that Plaintiff be awarded costs and reasonable fees as set out in the prior section. Accordingly, Plaintiff is **DIRECTED** to file a document setting forth the costs and reasonable fees associated with this matter.

The Clerk is directed to transmit the record in this case to Honorable Glen E. Conrad, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned that is not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusion reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send copies of this Order to all counsel of record and Gary Williky, principal of Federal Credit Corp., via the United States Postal Service at 2815 Exchange Boulevard, Suite 100, South Lake, Texas 76092; P.O. Box 599, Colleyville, Texas 76034 and via facsimile at (817) 488-1595.

Enter: This 18th day of August, 2009.

/s/ Michael F. Urbanski
United States Magistrate Judge