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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 280608-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DEBBIE DONOHUE, and all other similarly situated persons,

Plaintiffs/Appellants,

v.

GREGORY A. NIELSON and/or GREGORY A. NIELSON, P.S.

Defendants/Respondents.

REPLY BRIEF OF APPELLANT RE:
VALIDATION NOTICE

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....i

A. ARGUMENT IN REPLY.....1

B. REQUEST FOR ATTORNEY FEES.....6

C. CONCLUSION.....7

TABLE OF AUTHORITIES

SUPREME COURT CASES

Heintz v. Jenkins, 514 U.S. 291(1995).....6

DISTRICT COURT CASES

Ditty v. CheckRite, Ltd, 973 F. Supp. 1320 (D. Utah 1997).....5

DiRosa v. North Shore Agency, 56 F. Supp.2d 1039
(N.D. Ill. 1999).....3

Griswold v. JR Anderson Business Services, Inc. 1983 U.S.
Dist LEXIS 20365 (D. Or. Oct.21, 1983).....3

Horkey v. J.V.D.B. & Associates, 179 F. Supp. 2d 861

(N.D. Ill. 2002) aff'd, 333 F.3d 769 (7 th Cir. 2003).....	3
<i>Oppong v. First Union Mortgage Corp.</i> 566 F. Supp.2d 395 (2008).....	4
<i>Senftle v. Landau</i> , 390 F. Supp 2d 463 (D. Md. 2005).....	2
<i>Sutton v. Law Offices Of Alexander L. Lawrence</i> 1992 U.S. Dist. LEXIS 22761 (D. Del. June 17, 1992).....	3
<i>Tipping-Lipshie v. Riddle</i> , 2000 U.S. Dist. LEXIS 2477 (E.D.N.y. Mar. 1, 2000).....	3
<i>Turner v. Shenandoah Legal Group, PC</i> 2006 WL 1685698 (E.D. Va. June 2006).....	3

FEDERAL STATUTES

15 U.S.C. § 1692.....	2
15 U.S.C. §1692(a),(c),(d),(e).....	2
15 U.S.C. § 1692a.....	3
15 U.S.C. § 1692a (5),(6)(B).....	2
15 U.S.C. § 1692g.....	1, 2, 4, 6
16 U.S.C. § 1692 k.....	6

STATE CASES

<i>Panorama Village Condominium Owners Association Board Of Directors v. Allstate Inc.</i> CO 144 Wn.2d 130, 26P.3d 910(2001).....	7
---	---

OTHER AUTHORITIES

Congressional Findings and Declaration of Purpose
[Section 802 of P.L.].....2

A. ARGUMENT IN REPLY

1. THE COURT SHOULD ADOPT THE ANALYSIS OF THE AUTHORITIES CITED BY THE APPELLANT CONCLUDING THAT THE DEFENDANTS/RESPONDENTS VIOLATED THE FDCPA BY FAILING TO PROVIDE A VALIDATION NOTICE

The issue in this appeal is identified in the appellants initial brief, whether the defendants/respondents must comply with §1692g of the FDCPA, the validation notice requirement. Ms. Donohue received a letter from the defendants/respondents dated February 7, 2008. [CP 79 line 19 through 80 line 25, 125 line 13-15, 137, 158, 172] The demand letter did not contain a validation notice. [CP 79 line 19 through 80 line 25, 125 line 13-15, 137, 158, 172]. Except for the summons and complaint prepared by Nielson, this was the initial communication from the defendants/respondents attempting to collect the debt [CP 79 line 19 through 80 line 25, 125 line 13-15, 137, 158, 172].

Should Mr. Nielson or his firm have provided a validation notice? The defense, through the cited authority, contends no, arguing that Mr. Nielson's client, Quick Collect Inc. a collection agency provided a

validation notice to Ms. Donohue prior to the commencement of litigation. The notice was provided by Quick Collect Inc. in October of 2007. [CP 158]. Mr. Nielson's demand letter to Ms. Donohue is dated February 7, 2008. [CP 172] The authorities cited by the defense focus on the concept of "initial communication". See *Senftle v. Landau*, 390 F.Supp.2d 463 (D. Maryland, 2005). The emphasis by the court on the "initial communication" is misguided because it is contrary to the primary focus of the FDCPA. The primary focus of the FDCPA is on the debt collection practices of "debt collectors". See 15 U.S.C. §1692, Congressional findings and declaration of purpose (a),(c),(d),(e). The constant reference by Congress is to the "debt collection practices" of the "debt collectors". *Id.* Thus, the emphasis is first on the fact that there is a debt collector covered by the act and secondarily on the communications. In this case, there is no dispute that the debt and the defendants are covered by the act. 15 U.S.C. §1692a (5),(6)(B). Since the actions of the debt collector are the primary focus of Congress and the act, the examination by the court should emphasize the affirmative responsibilities of the debt collector and a most significant one is the validation notice required by 15 U.S.C. §1692g. It is in that section of

the law that the debt collector is required to advise the debtor of various rights within five days of the “initial communication”. See 15 U.S.C. §1692a. Therefore, the spotlight is on the individual debt collector, then on the communications that person has with the debtor. This analysis allows the court to zero in on the actions or omissions of the specific debt collector. Hence, the evidence should be reviewed from the point of view of each separate person or entity. *Sutton v. Law Offices of Alexander L. Lawrence*, 1992 U.S. Dist. LEXIS 22761 (D. DEL. June 17, 1992). Numerous other courts have held that the validation notice requirements apply to each debt collector separately. See *Turner v. Shenandoah Legal Group*, PC 2006 WL 1685698 (E.D. Va. June 2006); *Horkey v. J.V.D.B. & Associates*, 179 F. Supp. 2d 861 (N.D. Ill. 2002) aff’d, 333 F.3d 769 (7th Cir. 2003); *Tipping-Lipshie v. Riddle*, 2000 U.S. Dist. LEXIS 2477 (E.D.N.y. Mar. 1, 2000); *DiRosa v. North Shore Agency*, 56 F. Supp.2d 1039 (N.D. Ill. 1999); *Sutton v. Law Offices of Alexander L. Lawrence*, 1992 U.S. Dist. LEXIS 22761 (D. DEL. June 17, 1992); *Griswold v. J&R Anderson Bus. Servs. Inc.* 1983 U.S. Dist. LEXIS 20365 (D. Or. Oct.21, 1983).

The theory cited by the defense is not universal. For example, In

Oppong v. First Union Mortgage Corp. 566 F. Supp.2d 395 (2008), the court was faced with the issue of a subsequent debt collector that did not provide the debtor with a new validation notice. *The second debt collector never attempted to collect the debt. Oppong* at page 403. Although the court represented that the filed foreclosure complaint was an “initial communication” by the first collector, the court went on to examine, significantly so, whether the foreclosure complaint contained all the information required by 15 U.S.C. §1692g, concluding in detail that it complied with the requirements of 15 U.S.C. §1692g. *Oppong* at page 401. The court further stated that “it would serve no purpose to require that the same information be given again and again, each time the servicing function was passed from one creditor to another” *Oppong* at 404. The facts before the *Oppong* court are distinguishable from the case at bar and the reasoning flawed and inapplicable to the facts in this case since the facts concerning the debt changed dramatically once the debt moved from prelitigation while in the hands of the collection agency, to litigation in the hands of Neilson. The February 7, 2008, demand letter included new charges for filing, service and statutory attorney fees. The interest charged was different from the agency’s

validation notice [CP 158]. The amount owed, less interest, was now twice the amount originally demanded for the principle alone. This is a very significant difference from the demand made by the agency. [CP 158, 170]. Ms. Donohue should have been advised of her right to dispute the specifics of the debt as represented by Mr. Neilson.

Often cited by authorities and relied upon by the defense, but not examined, is the case of *Ditty v. CheckRite, Ltd*, 973 F. Supp. 1320 (D. Utah 1997). Interestingly, in *Ditty* both the agency and the attorney sent validation notices. *Ditty* at page 1329. The plaintiff Ditty alleged that the second notice sent by the attorney “overshadowed” the first notice sent by the agency. The court ruled there was no overshadowing since the first notice was the “initial communication” *Ditty* at page 1329. The *Ditty* court did not address the facts identified here where there has been a significant change in the information contained in the demand letter written by the second collector, Neilson. This point, along with others, was addressed in the appellants initial brief and will not be repeated again here. The logic of the authorities relying upon the “initial communication” analysis fails to deal with the situation present in this case, where significant changes occur during the course of the collection

process. The only way to protect the rights of the debtor as acknowledged by the FDCPA is to require each debt collector to comply individually with the statute. Anything short of this allows the debt collector to circumvent the letter and spirit of the FDCPA. In this case, there is a significant change in the information contained in Mr. Nelson's demand letter that should necessitate a second validation notice. Requiring each debt collector to observe the requirements of the act, safeguards the act. If Congress wishes to change the application of certain provisions such as 15 U.S.C. 1692g, it can do so legislatively. Meanwhile each attorney must comply with all the provisions of the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291(1995).

B. REQUEST FOR ATTORNEY FEES

In the event the challenged decision of the superior court is reversed and overturned, Ms. Donohue respectfully requests that, as provided by 15 U.S.C. 1692k, she be awarded her attorney fees and costs including a reasonable attorney fee in having to seek review in this matter, in so far that these fees and costs are duly authorized pursuant to 15 U.S.C. §1692k. It is a long standing rule that a party is entitled to

recover reasonable attorney fees when a statute, contract or recognized ground in equity allows for the same. *See, Panorama Village Condominium Owners Association Board of Directors v. Allstate Inc. CO.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001).

C. CONCLUSION

Based upon the initial brief of the appellant and the foregoing analysis and authorities, Petitioner, Ms. Debbie Donohue, respectfully requests that the decision of the trial court granting summary judgment be reversed and petitioner awarded attorney fees and costs.

DATED this 5th day of January, 2011.

Respectfully submitted:



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