No. 06-12088-F

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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HARRY L. DANOW,

*Plaintiff-Appellant*,

v.

DAVID E. BORACK and
THE LAW OFFICE OF DAVID E. BORACK, P.A.,

*Defendants-Appellees*.

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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# REPLY BRIEF FOR APPELLANT HARRY L. DANOW

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## INTRODUCTION

The defendants' brief is notable more for what it does not say than for what it says. Defendants do not dispute the fact that the district court offered no explanation of its reasons, if any, for dismissing the claims at issue in this appeal. Nor, despite their creative attempts to recharacterize the proceedings below, do defendants ultimately dispute the fact that their motion in the district court never argued that the dismissed claims failed to state a claim upon which relief could be granted, but instead argued only that one of those claims required a more definite statement. And, finally—although they attempt to brush it aside on the basis of irrelevant factual distinctions (Br. at 9-12)—they do not dispute that binding Eleventh Circuit authority plainly prohibits such *sua sponte* dismissals.

On the merits, the defendants' omissions are no less glaring. Arguing for the very first time that the dismissed claims fail to state a cognizable claim, the defendants eschew any analysis of the relevant statutory provisions and cite no authority to support the district court's actions. Indeed, the *only* authority that defendants put forward, a district court decision from California (Br. at 14), undermines rather than supports the defendants' position. In that case, a debt collector filed a motion to dismiss an FDCPA claim based on allegedly improper telephone communications. The court, however, did *not* dismiss the claim with prejudice, as the district court did here. Instead it gave the plaintiff leave to amend

and plead with greater specificity. Thus, even under the lone authority submitted by the defendants, the district court's dismissals of Mr. Danow's claims were improper. Mr. Danow's allegations were enough to show that he has cognizable claims and to put the defendants on notice of those claims, which is all that the Federal Rules of Civil Procedure require.

## I. DEFENDANTS SOUGHT A MORE DEFINITE STATEMENT, NOT DISMISSAL, WITH RESPECT TO THE CLAIMS AT ISSUE.

On the procedural issue presented by this appeal, the defendants are content to rely primarily on bald mischaracterizations of the proceedings below. They argue that Mr. Danow was not deprived of any procedural rights because "[t]he motion for a more definite statement was clearly included in the motion to dismiss the complaint and the Appellant was able to present his opposition . . ." Br. at 11. That simply is not so. Although filed together in a single document, the two requests were distinct. Lest there be any uncertainty, the defendants, under a separate heading entitled "MOTION FOR A MORE DEFINITE STATEMENT," explicitly stated that they were "*unable to file a responsive pleading*" to the allegations under 15 U.S.C. § 1692c relating to their telephone calls to Mr. Danow because "the allegations regarding the time that the alleged telephone calls occurred are ambiguous." (RE 7 at 9) (emphasis added). For that reason, and that reason alone so far as their motion revealed, the defendants "request[ed] a more

definite statement as to these allegations pursuant to Rule 12e of the Federal Rules of Civil Procedure." *Id.*

Thus, not only did the defendants *not* specifically request dismissal of the telephone call claims for failure to state a claim, but they made a request for a more definite statement under Rule 12(e)—a request that the claims go forward but only with a supplementation of the allegations—that was *inherently incompatible* with a request for dismissal of those claims for failure to state a claim. To be sure, litigants are permitted to, and routinely do, make incompatible requests by pleading in the alternative, but the defendants here did not do so. They gave no indication that their request for a more definite statement was anything other than what it said and indeed, explicitly acknowledged that they were not "fil[ing] a responsive pleading" to the relevant allegations. (RE 7 at 9).

Mr. Danow, taking the defendants at their word, responded in his opposition brief by addressing the defendants' arguments *seriatim*. Mirroring the defendants' motion, he addressed the telephone call claim under a separate heading of "MOTION FOR MORE DEFINITE STATEMENT." (RE 19 at 8). His brief addressed only the arguments made by the defendant, discussing the standard for a more definite statement under Rule 12 and citing a decision by the same district court that had rejected a similar Rule 12 motion under similar circumstances. *Id.* The defendants' reply brief did not take up the telephone call claims at all (RE 22),

nor was the claim under 15 U.S.C. § 1692c addressed by either party in the subsequent briefing concerning Mr. Danow's motion to alter or amend the judgment.

The defendants similarly mischaracterize the motion to alter or amend the judgment. That motion made a single point—that the district court had, apparently inadvertently, dismissed Mr. Danow's complaint in its entirety without ever addressing his claim under 15 U.S.C. § 1692d. (RE 31). The motion was not, as defendants now seem to suggest, an opportunity for the defendants to seek dismissal on the merits of a claim that their own motions had not addressed at all. Thus, defendants fail entirely to rebut the proposition that the district court dismissed Mr. Danow's claims *sua sponte* and without argument or explanation. Such a dismissal cannot stand.

## II. DEFENDANTS FAIL TO JUSTIFY THE DISTRICT COURT'S DISMISSAL OF MR. DANOW'S CLAIMS ON THE MERITS.

**A.** Remarkably, the only authority defendants manage to present to support their argument on the merits is a single district court decision concluding that an FDCPA claim involving debt collector telephone calls was not stated with particularity. *See* Defs. Br. At 14 (citing *Gorman v. Wolpoff & Abramson, LLP*, 370 F. Supp. 2d 1005 (N.D. Cal. 2005)). The court in that case did *not* dismiss the

claim with prejudice, as the district court did here, but instead permitted the plaintiff leave to plead the claim with specificity.

Defendants' inability to find any authority to support the district court's unexplained dismissal is not surprising. The FDCPA not only specifically prohibits harassing, oppressive or abusive telephone calls, 15 U.S.C. § 1692d(5), but also prohibits communication with the consumer where the debt collector knows or has reason to know that the communication will be inconvenient, 15 U.S.C. § 1692c(a)(1), and any communication once a consumer has notified the debt collector in writing that the consumer wishes the debt collector to cease communications, 15 U.S.C. § 1692c(c). Thus, under the plain terms of the FDCPA, a consumer may successfully bring a claim concerning telephone calls by a debt collector even when the consumer has not previously notified the debt collector that such calls will be inconvenient or that the consumer simply prefers not to receive the calls. But where, as here, the debt collector is on written notice that the consumer does not want to be contacted and that he is, as Mr. Danow put it, "often a nervous wreck when the phone rings or if [he has] to talk to a creditor," (RE 1, Exhibit C), and the complaint alleges that the debt collector made repeated calls *after* receiving such notice, there can be no doubt that the consumer presents cognizable claims. Simply put, under the FDCPA, "debt collectors must honor requests to cease communications . . . because the statute places on the debt

collector the burden of not communicating with the consumer once the debt collector knows or has reason to know" that the call will be inconvenient for the consumer. *Brzezinski v. Vital Recovery Services, Inc*., 2006 WL 1982501 (E.D. Wis. 2006), at *5.

District courts thus regularly reject motions to dismiss claims that are indistinguishable from Mr. Danow's. *See Harrison v. Federal Pacific Credit Co., LLC,* 2006 WL 276605 (W.D.N.Y. 2006), at *5 ("Defendant has failed to point to any caselaw supporting dismissal of Plaintiff's claims under either 15 U.S.C. § 1692c(3), based on Defendant's repeated telephone calls to Plaintiff's place of employment, or 15 U.S.C. § 1692d(5) . . . Nor has the court's research revealed any case that would support dismissal of Plaintiff's claims at this time. Moreover, [under Rule 8(a)], a federal civil complaint shall 'contain a short and plain statement of the claims showing that the pleader is entitled to relief.' Thus, even with a required liberal reading, unless such statement unequivocally demonstrates Plaintiff cannot recover under any applicable legal theory of liability under the Act, assuming that the facts as alleged are proved, the Amended Complaint cannot be dismissed."). Indeed, district courts routinely refuse to dispose of such claims even on summary judgment. *See Stinson v. Asset Acceptance*, *LLC*, 2006 WL 1647134 (E.D. Va. 2006), at *2 (denying defendants' motion for summary judgment where plaintiff alleged that defendant "contacted him by telephone after being instructed

in writing not to do so" in violation of 15 U.S.C. § 1692c(c)); *Segal v. National Action Financial Services, Inc.*, 2006 WL 449176 (M.D. Fla. 2006), *3 (denying defendants' motion for summary judgment as to claim under 15 U.S.C. 1692c(c); even though neither party presented evidence concerning number frequency of telephone calls, there was a "genuine issue of fact as to the number and frequency of phone calls made by Defendant"); *Wolfe v. Encore Receivable Managment, Inc.*, 2006 WL 266535 (N.D. Ohio 2006) (summary judgment on 1692d(5) claim unwarranted where plaintiff stated he received calls from defendant during relevant time period); *Clark v. Quick Collect, Inc.*, 2005 WL 1586862 (D. Or. 2005), at *4 (denying summary judgment on Section 1692d(5) claim because "the reasonableness of [the] volume of calls and their pattern is a question of fact for the jury")*; see also Chiverton v. Federal Financial Group, Inc.*, 399 F.Supp.2d 96 (D. Conn. 2005) (holding that defendant violated §§ 1692c(a)(1) and (3) by repeatedly calling plaintiff at work after he expressly requested the defendant not to do so because he was not permitted to receive personal calls at work); *Horkey v. J.V.D.B. & Associates, Inc.*, 333 F.3d 769, 773 (7th Cir.2003) (defendant violated § 1692c(a)(3) when it continued to call plaintiff at work after she said that she could not talk while at work); *Austin v. Great Lakes Collection Bureau, Inc.*, 834 F.Supp. 557, 559 (D.Conn. 1993) (defendant's continued attempts to contact plaintiff despite her requests that defendant not call her because such calls inconvenienced

her violated 15 U.S.C. § 1692c(a)(1)). In the face of the weight of this authority, the authority cited in our opening brief, and the statutory text, the paucity of authority in the defendants' brief speaks volumes.

**B.** Although their position before this Court is now that Mr. Danow's claims with respect to the telephone calls fail to state a claim upon which relief could be granted, defendants' basic submission is similar to that advanced in the court below. They argue that Mr. Danow makes "bare allegations that some telephone contact of an unspecified nature was made by Appellees at some unspecified time subsequent to Appellant's letter and therefore the Complaint lacked sufficient facts to form a cognizable legal claim." (Br. at 15). But this is a quarrel about the specificity of the allegations, not the cognizability of Mr. Danow's claims under 15 U.S.C. §§ 1692c and 1692d.

To the extent that a party seeks dismissal based on the failure to plead with specificity, the proper procedure is for the court to treat the request for dismissal as a motion for a more definite statement under Fed. R. Civ. P. 12(e). *Pelletier v. Zweifel*, 921 F.2d 1465, 1491 n.58 (11th 1991); *see also Pelman ex rel. Pelman v. McDonald's Corp*., 396 F.3d 508, 512 n.5 (2005) ("the cure for such deficiencies, in a claim not required to be plead with particularity, is a motion for a more definite statement under Rule 12(e), Fed.R.Civ.P., rather than dismissal"); *see also Pardee v. Moses*, 605 F.2d 865 (5th Cir. 1979) (dismissal for failure to state a

sufficiently definite claim exceeded district court's discretion). The district court here did just the opposite, in effect converting a motion for a more definite statement, *sub silentio*, into a motion to dismiss. The defendants' arguments, if accepted, would turn on its head the applicable standard of review–that the court "may affirm the dismissal of the complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Mesocap Ind. Ltd. v. Torm Lines*, 194 F.3d 1342, 1343 (11th Cir. 1999).

Defendants' position is also irreconcilable with the settled understanding of modern notice pleading, as articulated in cases such as *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). Under Rule 8(a)(2), a complaint "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Id.* at 512 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the

inspection of the court." 5 Wright & Miller, *Federal Practice and Procedure* § 1202, at 76 (2d ed. 1990).

That standard approach is no less appropriate here, where the evidence will permit the court to easily discern whether Mr. Danow's claims are meritorious. Indeed, counsel can represent to the court that Mr. Danow possesses tape recordings of defendants' telephone calls—which he will produce at the appropriate stage of this litigation—demonstrating conclusively that, as the complaint alleges, the defendants repeatedly telephoned him *after* he notified them in writing that he preferred not to receive such calls and that the calls had a tendency to make him "a nervous wreck."

## CONCLUSION

Because the district court improperly dismissed plaintiff's claims under 15 U.S.C. §§ 1692c and 1692d *sua sponte* and without explanation, this Court should reverse the dismissal of those claims and remand for further proceedings. Alternatively, if the Court is inclined to reach the merits, it should do so and reverse the district court's dismissal on the merits.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 2,345 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

July 31, 2006 Donald Yarbrough

## CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on the following counsel:

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July 31, 2006