EXHIBIT "2"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mark J Kinna, Plaintiff, v. Maxwell & Morgan PC, Defendant.	No. CV-16-00909-PHX-JZB **ORDER**

This case involves Defendant's efforts to collect debts owed by Plaintiff Mark J. Kinna. Plaintiff claims that Defendant's actions violated numerous provisions of the Fair Debt Collection Practices Act ("FDCPA"). The parties have filed cross motions for summary judgment. (Docs. 31, 34.) Oral argument will not aid in the Court's decision. The Court will deny Plaintiff's motion and grant Defendant's motion.

I. Background.

In March 1995, Plaintiff acquired a home in Gilbert, Arizona (the "Property"). (Doc. 35, ¶ 2.) The Property was part of the Vineyards Community Association (the "Association") and was subject to a declaration of covenants, conditions, and restrictions. (*Id.*, ¶ 4-5.) Under this declaration, Plaintiff was required to pay assessments to the Association "for his pro rata share of common expenses relating to the community." (*Id.*, ¶5; Doc. 35-2 at 20, Exhibit H-6.)

Prior to August 2013, Plaintiff fell behind on payment of his assessments.

(Doc. 35, ¶ 6.) On August 9, 2013, the Association filed a complaint in the Agua Fria Precinct Justice Court in Maricopa County, Arizona, seeking to recover unpaid assessments, fees, and costs from Plaintiff. (*Id.*, ¶ 18.). (*Id.* (Justice Court Case No. CC2013142081RC).) Defendant represented the Association in the Justice Court Action.

On September 16, 2013, Defendant sent Plaintiff a letter offering to stipulate to a judgement resolving the matter (the "Stipulated Judgement"). (*Id.*, ¶ 20.) Under the proposed Stipulated Judgement, Plaintiff would be required to pay $135 per month until the judgment was paid in full. (*Id.*) The proposed Stipulated Judgment included the following term defining Plaintiff's liability:

> [Plaintiff] agrees that [the Association] is entitled to judgment in the following terms:
>
> Principal:(*after deducting the interim payment) $688.60
>
> Plus accruing assessments of $35.00 per month, including a $5.00 monthly late charge, plus fines, or such greater amount as the Association may assess in the future, commencing October 1, 2013, until all amounts due and owing under this Judgment are paid in full.
>
> Interest: Interest at the rate of 12% per annum pursuant to Section 8.1 and 14.1 of the CC&Rs. the contract between the parties, from the date of this Judgment, until paid.
>
> Attorney Fees: $775.00
>
> Costs of Suit: $398.20
>
> For all costs and attorney fees incurred by Plaintiff after the date of this stipulation in collecting the amounts listed herein.

(Doc. 35-2 at 60-61, Exhibit 10; Doc. 35, ¶¶ 26, 27.) Additionally, the letter included the following disclaimer: "THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE." (*Id.*, ¶ 21 ("Debt-Collector-Disclaimer").)

Plaintiff agreed to the proposed Stipulated Judgment, and returned the signed offer to Defendant, who in turn filed it with the Justice Court. (*Id.*, ¶ 22.) On October 22, 2013, the Justice Court entered an order stating that "[Defendant] have judgment against

[Plaintiff] pursuant to the terms of the Stipulated Judgment executed by the parties dated September 16, 2013, as though incorporated herein by reference." (Doc. 35-2 at 63, Exhibit 11; Doc. 41, ¶ 23.) On December 1, 2014, Defendant recorded the Stipulated Judgment with the Maricopa County Recorder's Office at instrument number 2014-0789401 ("Recorded Judgment"). (Doc. 35, ¶ 24.)

It is undisputed that between October 1, 2013 and September 23, 2014, Plaintiff made payments to Defendant totaling at least $1,755.00 under the Stipulated Judgment. (*See id.*, ¶ 30; Doc. 41, ¶ 30.) Plaintiff argues, however, that Defendant has not accounted for an initial payment of $135 that he made at the time of the agreement, and asserts that he actually made payments totaling $1,890 during that time period. (Doc. 35, ¶ 31.)

On November 10, 2014, Defendant sent another letter to Plaintiff demanding payment for:

> the amount due under the Judgment totaling $1,861.80, less partial payments made, plus accruing interest, assessments, fines, costs, and attorney fees, or for your agreement to pay and continue to pay the non-exempt portion of your earnings which is approximately twenty-five percent (25%) of your take-home pay, until the Judgment is satisfied.

(Doc. 35-2 at 70; Doc. 35, ¶¶ 33-34; Doc. 41, ¶¶ 33-34.) This letter also included the same Debt-Collector-Disclaimer language used by Defendant in the September 16, 2013 letter. (*Id.*) On November 21, 2014, Defendant filed copies of the Stipulated Judgment and the Recorded Judgment with Maricopa County Superior Court at case number TJ2014-009301 (the "Superior Court Action"). (Doc. 35, ¶ 36.)

On April 14, 2015, Defendant made three filings in the Superior Court Action: (1) an Application for Garnishment (the "Garnishment Application") seeking a writ of garnishment for $2,650.30 allegedly owed by Plaintiff on the Stipulated Judgment; (2) an "Application for Amount of Attorneys' Fees" (the "Fee Application") seeking $1,580.00 for attorneys' fees incurred after the Stipulated Judgment and prior to filing of the Garnishment Application; and (3) a "Statement of Costs" seeking $ 302.47 for costs incurred post-judgment but prior to filing of the Garnishment Application. (*Id.*, ¶¶ 37, 44, 47.)

When calculating the total requested by the Garnishment Application, Defendant included the following post-judgment amounts: (a) post-judgment interest - $21.03; (b) post-judgment assessments - $570.00; (c) post-judgment late fees - $95.00; (d) post-judgment attorneys' fees - $1,585.00; and (e) post-judgment costs - $302.47. (*Id.*, ¶ 38.) Defendant's Garnishment Application also recognized that Plaintiff had made payments toward the Stipulated Judgment totaling $1,785.00, and stated that those payments were accounted for in the requested total. (*Id.*)

In support of its Fee Application, Defendant also filed a *China Doll* affidavit.[1] (*Id.*, ¶ 46.) On or about the day of filing, Defendant mailed a copy of the Fee Application, *China Doll* Affidavit, and Statement of Costs to Plaintiff at the Property's address. (*Id.*, ¶ 50.)

On April 17, 2015, the superior court issued a Writ of Garnishment and Summons (*id.*, ¶ 40), and Defendant served the Plaintiff's employer (the "Garnishee") that same day (*id.*, ¶ 41). The Writ of Garnishment stated that the Association "has a Judgment against [Plaintiff] in the amount of $2,650.30" and ordered the Garnishee to withhold Plaintiff's earnings based on that judgment balance. (*Id.*, ¶¶ 42-43.)

On April 27, 2015, the Garnishee filed its Answer to the Writ of Garnishment. (*Id.*, ¶ 51.) On May 13, 2015, Defendant filed an Application for Order of Continuing Lien against Plaintiff's earnings based on the alleged judgment referenced in the Writ of Garnishment. (*Id.*, ¶ 52.) On May 18, 2015, the superior court entered two orders. First, the superior court awarded the Association the fees and costs sought by Defendants in their Fee Application and Statement of Costs. (*Id.*, ¶ 54.) Second, the superior court entered an Order of Continuing Lien against Plaintiff's earnings, as requested in Defendant's May 13, 2015 application. (*Id.*, ¶ 53).

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[1] A *China Doll* affidavit is an affidavit made by counsel when seeking attorneys' fees that details counsel's billing rate, hours expended, and a description of the legal services provided – including the date, attorney, and time spent providing the service. *Schweiger v. China Doll Rest., Inc.*, 673 P.2d 927, 932 (Ariz. Ct. App. 1983).

Between May 24, 2015 and November 21, 2015, the Garnishee withheld a total of $3,036.26 from Plaintiff's paychecks. (*Id.*, ¶ 55; Doc. 35-3 at 4-55.)

On July 16, 2015, Defendant filed a Report of Judgment Balance in the Superior Court Action stating that it had received $840.71 from the Garnishee through June 18, 2015, and reporting an outstanding balance of $2,065.65 on the judgment. (Doc. 35, ¶ 56; Doc. 35-3 at 57-58 (Exhibit 28).) Plaintiff asserts that the July 2015 Report includes approximately $200 in new charges that had not been previously reported or requested. (Doc. 35, ¶¶ 57-60.) On October 8, 2015, Defendant filed a Report of Judgment Balance in the Superior Court action stating that it had received $1,235.80 from the Garnishee between July 2, 2015 and September 10, 2015, and stating that the current balance of the judgment was $959.75. (*Id.*, ¶¶ 61, 64.) Plaintiff asserts that the October 2015 Report included an additional $105 in new charges that had not been previously reported or requested. (*Id.*, ¶¶ 62-63.)

Between the October 2015 report and January 21, 2016, the Garnishee withheld and submitted the remaining $959.75 to Defendant. (*Id.*, ¶ 65.) On January 21, 2016, Defendant filed a Notice of Satisfaction of Judgment and Writ of Garnishment in the Superior Court action, stating that all amounts owed under the Stipulated Judgment and Writ of Garnishment had been paid in full. (*Id.*, ¶ 66.)

Plaintiff filed this lawsuit on April 1, 2016, naming as Defendants Maxwell & Morgan P.C., an Arizona Professional Corporation. (Doc. 1.) Plaintiff claims that Defendants violated the FDCPA by misrepresenting the amount and character of his debt, and using unfair or unconscionable means to collect or attempt to collect that debt. (*Id.*, ¶¶ 56-68.) In March 2017, the parties filed cross motions for summary judgment. (Docs. 31, 34.) The Motions are fully briefed and the parties have submitted the accompanying statements of facts. (Docs. 31, 32, 34, 35, 38, 39, 40, 41, 42, 43.) The Court will deny Plaintiff's Motion, and grant Defendant's Motion.

II. Legal Standards.

Summary judgment is appropriate if the evidence, viewed in the light most

favorable to the nonmoving party, 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). Summary judgment is also appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Only disputes over facts that might affect the outcome of the suit will preclude the entry of summary judgment, and the disputed evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The FDCPA was enacted to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from those practices are not competitively disadvantaged, and to promote consistent state action to protect consumers. 15 U.S.C. § 1692(e); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010). The FDCPA regulates interactions between consumer debtors and "debt collector[s]," defined to include any person who "regularly collects . . . debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). A lawyer regularly engaged in debt collection activity, even litigation, is considered a debt collector. *See Heintz v. Jenkins*, 514 U.S. 291, 299 (1995). A debt collector "who fails to comply with any provision of [the FDCPA] with respect to any person is liable to such person" for actual damages and additional damages not to exceed $1,000. 15 U.S.C. § 1692k(a).

The FDCPA is a strict liability statute. *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006). It prohibits a wide array of abusive and unfair practices. *See Heintz*, 514 U.S. at 292-93. In deciding whether a debt collector has violated the FDCPA, courts assess the debt collector's conduct from the perspective of a hypothetical "least sophisticated debtor." *See Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 934 (9th Cir. 2007) (citing *Clark*, 460 F.3d at 1171; *Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098, 1099-1100 (9th Cir. 1996)). The "least sophisticated debtor" standard protects the "naïve and trusting" debtor while shielding debt collectors "against

liability for bizarre or idiosyncratic interpretations of collection notices." *Isham v. Gurstel, Staloch & Chargo, P.A.*, 738 F. Supp. 2d 986, 995 (D. Ariz. 2010) (quotation marks and citation omitted). The FDCPA is a remedial statute and should be interpreted liberally to protect debtors from abusive debt collection practices. *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1025 (9th Cir. 2012).

III. Analysis.

In Defendant's Motion (doc. 31), Defendant argues that it is entitled to summary judgment because (1) under the Ninth Circuit's least sophisticated debtor standard, Defendant did not misrepresent the amount Plaintiff owed in the Garnishment Application (*id.* at 13-16); (2) Defendant's request for post-judgment fees and costs was not materially false because it did not frustrate the debtor's ability to intelligently choose a response (*id.* at 16-17); (3) the Garnishment Application and proceedings did not fail to comply with the state rules cited by Plaintiff because those state rules do not apply (*id.* at 18); (4) if the state rules cited by Plaintiff do apply, there is still no violation of the FDCPA (*id.* at 19); and (5) Plaintiff's claims based on allegations that the Association was not entitled to seek attorneys' fees or costs are untimely and meritless because they are outside the statute of limitations to bring such claims and because Arizona law permits such collection post-judgment fees and costs (*id.* at 14-16).

In Plaintiff's Motion for Summary Judgment, Plaintiff alleges that Defendant: (1) failed to account for all payments made on the debt by Plaintiff, (2) improperly initiated garnishment proceedings, and (3) garnished more than permitted by the Writ of Garnishment. (Doc. 34.) Plaintiff also argues that the underlying Stipulated Judgment "is an unlawful *cognovit*, or judgment by confession, that unlawfully gives [a party] the right to add principal amounts to judgment without so much as notice to [Plaintiff]." (*Id.* at 12.) In response, Defendant argues that (1) Plaintiff is asserting new theories for the first time on summary judgment and those theories are not alleged in the complaint, and thus the Court should not consider these new theories; (2) Plaintiff's new theories are meritless, and (3) Plaintiff has failed to provide evidence that Defendant is a "Debt

Collector" as defined by the FDCPA. (Doc. 40.) The Court finds Defendant's arguments to be dispositive.

A. Statute of Limitations.

As an initial matter, the Court will address Defendant's argument that Plaintiff's "[c]laims are barred by the FDCPA's one-year statute of limitations." (Doc. 31 at 21.) Under the FDCPA, a plaintiff must bring suit "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Plaintiff filed his complaint on April 1, 2016 (doc. 1), approximately 30 months after Plaintiff agreed to the Stipulated Judgment in October 2013. Plaintiff argues that he "is not complaining of Defendant's actions in obtaining the Stipulated Judgment, which is an improper confession judgment, but rather of actions in the garnishment proceedings that took place within the one-year period preceding the Complaint." (Doc. 43 at 8.)

Plaintiff's argument that the Stipulated Judgment is an improper confession judgment, and thus that Defendant's attempts to collect post-judgment fees under it are invalid under the FDCPA is time-barred. Defendant first attempted to collect post-judgment fees and costs in September 2013, when it sent Plaintiff the proposed Stipulated Judgment. Defendant continued to attempt to collect post-judgment fees and costs between October 2013 and November 2014, when Plaintiff made regular payments to Defendant under the Stipulated Judgment. It is undisputed that, in December 2014, after Defendant stopped making payments on the Stipulated Judgment, Defendant – at Plaintiff's request – provided Plaintiff with an explanation of the balance calculation, and asked Plaintiff to enter into another payment plan on the judgment. (Doc. 31-1 at 29-32 (December 2014 email chain between Defendant, Plaintiff, and Plaintiff's counsel detailing that Defendant was attempting to collect post-judgment legal fees and costs in the amount of $1,005.35 as of that date).) On January 29, 2015, Plaintiff sent Defendant another email requesting a detailed accounting of the debt. (*Id.* at 35.) On February 20, 2015, Defendant responded to Plaintiff's request, asserting that the Judgment Balance totaled $2,127.15, and included $1,455.35 in post-judgment legal fees and costs. (*Id.* at

36-37.)

Even assuming that Plaintiff is correct, and that Defendant is not entitled to seek post-judgment fees under the Stipulated Judgment, the absolute latest date that Plaintiff was put on notice of this claim is February 20, 2015, when he received the second email.[2] As stated above, Plaintiff did not file this action until April 2016, outside of the one-year statute of limitations period under the FDCPA. Accordingly, Plaintiff's claims that Defendant's attempts to collect post-judgment fees and costs were in violation of the FDCPA because the Stipulated Judgment was an improper confession judgment, and because such collections are barred under Arizona law, are time-barred.

In the alternative, Plaintiff urges the Court to adopt the continuing-violation doctrine. Specifically, Plaintiff argues that his claims are timely because the discovery of his injury – the garnishment of his wages – occurred less than a year before he filed suit.

The continuing-violation doctrine has roots in the common law. Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 308 (2008) (discussing early versions of the doctrine in trespass and nuisance suits from the 1500s). But in the context of statutorily-created causes of action, the applicability of the doctrine is a question of statutory interpretation. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109-10 (2002); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

The FDCPA states that "[a]n action to enforce any liability created by this subchapter may be brought . . . within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). By referring to "the violation," the statute could be read as referring to a single act, but courts could also consider an ongoing violation of the FDCPA to be one violation that consisted of several parts. Some courts have adopted this view, holding that when "the conduct complained of [under the FDCPA] constitutes a

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[2] Plaintiff all but admits he was made aware of these fees prior to February 20, 2015. Specifically, in his deposition, Plaintiff states that the $626.80 amount he proposes to pay in satisfaction of his debt in his January 29, 2015 email was calculated by taking the "amount [listed in the December 10, 2014 email] minus the post-judgment fees and legal costs [also listed in the December 10, 2014 email]" that he objected to. (Doc. 31-2 at 52.)

continuing pattern and course of conduct as opposed to unrelated discrete acts," then the entirety of that conduct is a single violation of the FDCPA. *See Joseph v. J.J. MacIntyre Cos., LLC*, 281 F. Supp. 2d 1156, 1161-62 (N.D. Cal. 2003) (applying the doctrine when the defendant had made hundreds of repeated, automated collection calls to Plaintiff over an 18 month period). Under this approach, a plaintiff's claim regarding a continuing pattern of FDCPA violations could accrue on the date of the most recent violation and a defendant could be liable for conduct that otherwise falls outside of the limitations period.

The Supreme Court has provided guidance on the distinction between a continuing violation and a series of individual violations. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Morgan*, 536 U.S. at 109-11. Title VII requires a claimant to file a claim within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Interpreting this language, the Supreme Court found that "[t]here is simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." *Morgan*, 536 U.S. at 111. For that reason, "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" do not call for application of the continuing-violation doctrine, even when a time-barred discriminatory act is related to more recent acts. *Id.* at 114.

The Supreme Court has adopted a different approach, however, for hostile work environment claims under Title VII. It has explained that such claims:

> are different in kind from discrete acts. Their very nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. . . . Such claims are based on the cumulative effect of individual acts. . . . A hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.' . . . [Thus, p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Id. at 115-17 (quotation marks and citations omitted).

In this instance, the alleged "violations" the FDCPA are more similar to "the

alleged unlawful employment practice" in Title VII, and are more akin to discrete acts than to a continuing course of conduct. *See McNair*, 142 F. Supp. 3d at 865-69 (finding that similar alleged FDCPA violations are more akin to discrete acts than a continuing course of conduct because "Defendants' actions are each alleged to have violated specific provisions of the FDCPA, occurred on definite days, involved different conduct and different debt amounts").

The following alleged FDCPA violations are identified in the parties' briefing:

- September 2013 – Defendant proposes Stipulated Judgment that includes that collection of of post-judgment costs and fees. The Stipulated Judgment is improper because it is a *cognovit* or confession judgment. (Doc. 34 at 11-14.)
- October 2013 – Plaintiff agrees to the Stipulated Judgment and submits a $135 payment which Defendant failed to credit in violation of the FDCPA. (Doc. 34 at 10; Doc. 35, ¶ 31.)
- November 2014 – Defendant records the Stipulated Judgment in the Superior Court of Arizona for the purpose of increasing attorneys' fees that it could later collect from Plaintiff. (Doc. 34 at 3; Doc. 1, ¶¶ 32-33.)
- December 2014-March 2015 – Defendant seeks to collect post-judgment fees and costs, relying on the improper Stipulated Judgment as a basis for doing so; Plaintiff seeks clarification of the amount owed, and offers Defendant $626.80 in full satisfaction of the debt (doc. 31 at 10; doc. 31-2 at 52); Defendant twice provides the requested clarification, detailing the amounts owed for post-judgment costs and fees(doc. 31 at 10), but refuses the Plaintiff's partial payment offer (doc. 35, ¶ 35).
- April 2015 – Defendant improperly files an Application for Garnishment, Writ of Garnishment, and Statement of Costs in the Superior Court action, and misrepresents the amount and nature of the debt to that court by seeking post-judgment fees and costs as provided in the Stipulated

Judgment. (Doc. 1, Doc. 34.) Further, the Garnishment Application and Writ of Garnishment violated the FDCPA because they sought collection of amounts that were not included in the Stipulated Judgment. (Doc. 34 at 8.)

- May 2015-January 2016 – Defendant violated the FDCPA by garnishing $306.76 more than the amount of the Writ. (Doc. 34 at 14-15.)

All of these alleged wrongs involved Defendant's attempts to collect the debt Plaintiff owed to the Association under the Stipulated Judgment, and almost all involved alleged misrepresentations, such as inflating Plaintiff's debt, failing to account for payments, or charging fees to which the Association was not entitled. These violations are interrelated, but they are not sufficiently linked to be considered an ongoing violation of the FDCPA. *See McNair*, 142 F. Supp. 3d at 865-69. The alleged wrongs occurred over a span of multiple years and involved, respectively, a letter, a draft agreement, an email chain, another separate email chain, a garnishment application filed in superior court, a writ filed in superior court, a failure to respond or object by Plaintiff, and a ultimately the garnishment of Plaintiff's wages under the terms of the writ. Each instance involved different claimed amounts and many included additional, unrelated alleged violations of the FDCPA.

Plaintiff argues that "[t]he application of the continuing violation doctrine is 'entirely consistent with the FDCPA's [] broad remedial purpose of protecting consumers.'" (Doc. 34 at 14 (citing *Joseph v. J.J. MacIntyre Co., L.L.C.*, 281 F. Supp 2d 1156, 1161 (N.D. Cal. 2003).) But Plaintiff's reliance on *Joseph* is misplaced. In that case, the court found the defendant's conduct to be a continuing violation where the defendant had made hundreds of automated collection calls to the plaintiff over a period of 18 months. *See* 281 F. Supp. 2d at 1161-62. Such conduct is not similar to the individual and discrete actions complained of here. Nor is this action similar to a hostile work environment claim, as discussed by the Supreme Court in *Morgan*, which "cannot be said to occur on any particular day," "is composed of a series of separate acts that collectively constitute one 'unlawful employment practice,'" and may not even rise to the

level of an actionable hostile work environment until the cumulative effect of the many wrongs is understood. *Morgan*, 536 U.S. at 115, 117. In this instance, Defendant's actions are each alleged to have violated specific provisions of the FDCPA, occurred on definite days, involved different conduct and different debt amounts, and extended over multiple years. The Court finds Defendant's acts to be more similar to "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire," which may be related but nevertheless do not implicate the continuing-violation doctrine. *Id.* at 114.

Furthermore, the notion that every communication regarding a debt starts the limitations period anew is troubling. As other courts have explained, "[i]f plaintiff's theory were correct, . . . his cause of action could be kept alive indefinitely because each new communication would start a fresh statute of limitations." *Sierra v. Foster & Garbus*, 48 F. Supp. 2d 393, 395 (S.D.N.Y. 1999); *see also Nutter v. Messerli & Kramer, P.A.*, 500 F. Supp. 2d 1219, 1223 (D. Minn. 2007) (finding that "'[n]ew communications . . . concerning an old claim . . . [do] not start a new period of limitations'") (quoting *Campos v. Brooksbank*, 120 F. Supp. 2d 1271, 1274 (D.N.M. 2000)). In sum, the Court concludes that the continuing-violation doctrine does not save Plaintiff's claims for violations that occurred before April of 2015.

The Court will grant Defendant's Motion for Summary Judgment as to Plaintiff's Claims accruing before April 1, 2015.

B. Plaintiff's Timely FDCPA Claims.

Plaintiff asserts three claims based on conduct occurring less than one year before this case was filed: (1) Defendant improperly filed an Application for Garnishment, Writ of Garnishment, and Statement of Costs in the Superior Court action, and misrepresented the amount and nature of the debt to that court by seeking post-judgment fees and costs as provided in the Stipulated Judgment; (2) the Garnishment Application and Writ of Garnishment violated the FDCPA because they sought collection of amounts that were not included in the Stipulated Judgment; and (3) Defendant violated the FDCPA by garnishing $306.76 more than the amount of the Writ. (Doc. 34 at 8-15). The Court finds

that each claim fails to survive Defendant's Motion for Summary Judgment.

1. Defendant had the Right to Commence Garnishment Proceedings.

Plaintiff first argues that Defendant violated the FDCPA by initiating garnishment proceedings at all. Specifically, Plaintiff argues that "[u]nder the Stipulated Judgment, [Plaintiff] was to pay 'all amounts *awarded* hereunder[,]'" which – according to Plaintiff – was the sum certain amount of $1,861.80. (Doc. 34 at 8.) Plaintiff calculates that, at $135 per month, Plaintiff "would have paid off the $1,861.80 by September 2014[,]" and asserts that Plaintiff actually paid $1,890.00 during that same time. (*Id.*) Therefore, Plaintiff concludes, "there was no basis for Defendant to pursue garnishment against Kinna as of April 2015" and by doing so "Defendant made misrepresentation and took actions it was not entitled to take under the law in violation of 15 U.S.C. § 1692e and 15 U.S.C. § 1692f." (*Id.*)

The Court finds Plaintiff's "amounts awarded" argument to be unclear and difficult to follow. Plaintiff provides no legal citation in support of the proposition that the "amounts awarded" under the Stipulated Judgment are limited to the stated value listed in the document. Such an interpretation would require that the parties and the Court ignore significant other portions of the Stipulated Judgment that are not contested. For example, in his deposition, Plaintiff agreed that the Stipulated Judgment obligated him to pay "accruing assessments of $35.00 per month, including a $5.00 monthly late charge, plus fines, or such greater amount as the Association may assess in the future, commencing October 1, 2013, until all amounts due and owing under this Judgment are paid in full." (Doc. 35-2 at 60-61.) Plaintiff also agreed that the Stipulated Judgment would accrue "[i]nterest at the rate of 12% per annum pursuant to Section 8.1 and 14.1 of the CC&Rs. the contract between the parties, from the date of this Judgment, until paid." (*Id.*)

Both examples include monetary amounts that Plaintiff agrees he owes under the Stipulated Judgment, but neither example is contemplated by the $1,861.80 value that

Plaintiff argues is the limit of the amount owed under the Stipulated Judgment. The Court finds this inconsistency to be untenable, and Plaintiff's argument to be disingenuous. Indeed, Plaintiff stated in his deposition that he agreed that the Association could have judgment against Plaintiff for "all costs and attorneys' fees incurred by Plaintiff after the date of this stipulation in collecting the amounts listed above." (Doc. 31-2 at 39.)

Ultimately, Plaintiff's "amounts awarded" argument is a tortured interpretation of a phrase clearly intended to include "all amounts owing, pursuant to the above referenced terms." (Doc. 31-1 at 26, ¶ 3.) The Court finds that Defendant had the right to initiate garnishment proceedings in an attempt to collect amounts owed under the Stipulated Judgment from Plaintiff.

2. Defendant's Filings in the Garnishment Proceedings were not False, Deceptive, or Misleading.

Plaintiff next claims that Defendants violated the FDCPA by (1) understating the amount Plaintiff had paid to Defendants by $135.00, and thus overstating the amount owed by Defendant; and (2) falsely stating that the Association had a judgment of $2,650.30 against Plaintiff. (Doc. 34 at 10.) As for the attorneys' fees, Plaintiff emphasizes that,

> Defendants never sought judicial approval for any of these amounts, never had any court determine they were reaso[n]able, and simply decided for themselves the reasonableness of the attorneys' fees and costs that they incurred. . . . Defendants collected these unilaterally awarded fees even though Arizona law does not provide for post-judgment attorneys' fees except where expressly permitted by statute or other basis for such fees.

Id. at 12.

Although not clearly stated, Plaintiff appears to claim that Defendant's conduct violates 15 U.S.C. § 1692e, which prohibits the misrepresentation of "the character, amount, or legal status of any debt." Among other points, Defendant argues that because the stipulated judgment that Plaintiff signed authorized the amounts sought in the Garnishment Application and Writ of Garnishment, the Court should grant Defendant's summary judgment on Plaintiff's claims regarding these amounts. (Doc. 40 at 9-11.)

The stipulated judgment signed on September 16, 2013, stated that the "principal" owed was "$688.60 . . . Plus accruing assessments of $35.00 per month, including a $5.00 monthly late charge, *plus* fines, or *such greater amount* as the Association may assess in the future, commencing October 1, 2013, until all amounts due and owing under this Judgment are paid in full." (Doc. 35-2 at 76.) The judgment also stated that Plaintiff owed "$398.20 . . . For all costs and attorney fees incurred by Plaintiff after the date of this stipulation in collecting the amounts listed herein." (*Id.* at 77.) When Defendant sought the Writ of Garnishment, it stated that the total amount owed was $2,650.30, which included "post-judgment, pre-garnishment attorney fees and costs of $1,887.47, subject to Court approval, plus accruing amounts pursuant to the Judgment." (Doc. 35-2 at 79.) After review, the Maricopa County Superior Court Clerk issued a writ of garnishment and summons reflecting these amounts. (*Id.* at 83-84.) That same day, Defendant served Plaintiff's employer, the Garnishee, with the writ of garnishment and summons. (*Id.* at 88.)

Plaintiff has not explained how this conduct amounts to a misrepresentation of "the character, amount, or legal status of any debt." As Defendants note, the stipulated judgment authorized the fees that were included in the writ of garnishment. Plaintiff argues that Arizona law generally does not allow a party to collect post-judgment attorneys' fees, but "[i]t is well-settled in Arizona that [c]ontracts for payment of attorneys' fees are enforced in accordance with the terms of the contract." *Bennett Blum, M.D., Inc. v. Cowan*, 330 P.3d 961, 963 (Ariz. Ct. App. 2014) (quotation marks and citations omitted). What is more, "[w]hen the 'broad language' of a contractual attorneys' fees provision gives no indication of an intent to exclude fees for work done after entry of judgment, those fees are generally recoverable." *Costa v. Maxwell & Morgan PC*, No. CV-15- 00315-PHX-NVW, 2015 WL 3490115, at *5 (D. Ariz. June 3, 2015).

Plaintiff also argues that Defendants could not "unilaterally" decide whether the requested attorneys' fees were reasonable. This is true. "Arizona law is clear that even when fees are awarded pursuant to an express contractual agreement, rather than statute,

the prevailing party is not entitled to its fees unless a court has already determined that the specific amount that party seeks is reasonable." *Id.* at *6. But Defendants in this case did not unilaterally determine the amount of fees they were to receive – the Maricopa County Superior Court approved the fees Defendants requested. Specifically, the superior court found the writ of garnishment to be valid and issued a continuing lien against Plaintiff's non-exempt earnings only after Plaintiff was provided notice of the proceedings and given an opportunity to respond. (*See id.* at 111-12.) By so ruling, the state court implicitly found that the requested attorneys' fees were reasonable. *See, e.g.*, *Costa*, 2015 WL 3490115, at *6. The Court cannot conclude that Defendants violated the FDCPA by seeking attorneys' fees in a filing they made with a court, particularly when it was clear that the fees would be paid only if the court found them to be reasonable.

Plaintiff argues that Defendants misrepresented the amount of Plaintiff's debt in the writ of garnishment. But again, the stipulated judgment authorized these amounts. Plaintiff has not shown that there is a genuine dispute of material fact as to whether the stipulated judgment authorized the amounts Defendants collected. The Court therefore grants Defendants' motion for summary judgment on this claim.

3. Least Sophisticated Debtor.

Plaintiff's argues that Defendant's writ of garnishment and summons was misleading under the Ninth Circuit's "Least Sophisticated Debtor" standard. Specifically, Plaintiff contends:

> The Writ, at the top of page 2 in section 1, states: "The Judgment creditor has a Judgment Against [Plaintiff] in the amount of $2,650.30, as of the date of issuance of this Writ of Garnishment." [SOF, ¶ 42] This statement is false. $135.00 of the amount sought in the Writ of Garnishment had been paid. The remaining amounts were comprised of claims for additional assessments, late fees, attorney fees, and costs. Claims are not judgments. Calling these claims a "judgment" misstates the character, nature, and legal status of an alleged debt in violation of § 1692e. The least sophisticated consumer would be dissuaded from attempting to challenge the debt since a "judgment" implies that it is too late for such a challenge. *Conteh*, 648 Fed. Appx. at 379 (misstatement is material if it "would have been *important* to the consumer *in deciding how to respond* to collect the debt"); *Taylor v. Heath W. Williams, L.L.C.*, 510 F. Supp. 2d 1206, 1211 (N.D. Ga. 2007) (misrepresentation of judgment amount constituted a false representation under the FDCPA).

(Doc. 34 at 10.)

The "least sophisticated debtor" standard is "lower than simply examining whether particular language would deceive or mislead a reasonable debtor." *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997). The standard is "designed to protect consumers of below average sophistication or intelligence," or those who are "uninformed or naive," particularly when those individuals are targeted by debt collectors. *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061-62 (9th Cir. 2011). At the same time, the standard "preserv[es] a quotient of reasonableness and presum[es] a basic level of understanding and willingness to read with care." *Id.* (quoting *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008)). "The FDCPA does not subject debt collectors to liability for 'bizarre,' 'idiosyncratic,' or 'peculiar' misinterpretations." *Id.*

Here, Plaintiff ignores the fact that "a basic level of understanding and willingness to read with care" would have removed all confusion. It is undisputed that the writ of garnishment states in its first full sentence that Defendant's claim of $2,650.30, "include[s] post-judgment fees and costs of $1,887.47 *subject to court approval*[.]" (Doc. 35-2 at 83.) Defendant made no claim that such judgment was already in existence.

Furthermore, given that the writ clearly stated Defendant's claim was subject to court approval, Plaintiff's argument that "the least sophisticated consumer would be dissuaded from attempting to challenge the debt since a 'judgment' implies that it is too late for such a challenge" appears disingenuous.

Because Plaintiff is presumed to have read the communication "as a whole," with a "basic level of understanding" and "with care" (*see Gonzales*, 660 F.3d at 1064), the Court finds that Plaintiff's interpretation that the writ was "a final, unchallengeable decree" (doc. 38 at 9) is "bizarre," "idiosyncratic," and "peculiar." Accordingly, the Court will deny Plaintiff's Motion for Summary Judgment on the issue.

4. The Garnishment Proceedings Complied with State Court Rules.

Defendant seeks summary judgment on Plaintiff's claim that the garnishment filings violated the FDCPA, because they failed to comply with State Court Rules. (Doc.

31 at 18-19.) In his Complaint, Plaintiff argues that the garnishment proceedings violated state court rules because (1) Defendant failed to post a $1,887.47 "bond payable" to Plaintiff pursuant to A.R.S. § 12-1573 with the garnishment filings; (2) the filings were untimely under Rule 59(1) of the Arizona Rules of Civil Procedure (ARCP); and (3) the Fee Application, China Doll Affidavit and Statement of Costs were not properly served on Plaintiff. (Doc. 1, ¶¶ 40, 48, 49.) Defendant argues that the garnishment proceedings violated none of the rules cited by Plaintiff, because those rules do not apply in this case. (Doc. 31 at 18-19.) The Court notes that nowhere in the briefs does Plaintiff respond to Defendant's arguments on these issues. (*See* Docs. 34, 38, 43.) Nevertheless, the Court agrees with Defendants for the following reasons.

First, A.R.S. § 12-1573 states "[i]f a garnishment is requested and **no judgment has been entered**, a writ shall not be issued until the judgment creditor executes and delivers to the court a bond payable to the judgment debtor in the amount of the debt claimed therein, ..." A.R.S. § 12-1573 (emphasis added). Here, Plaintiff stipulated to judgment for the Association, and the state court entered it. (*See* Doc. 32 at ¶¶ 7-9.) Accordingly, A.R.S. § 12-1573 does not apply.

Second, Rule 59(1) of the ARCP applies to amending judgments, not to garnishment filings. *See* ARCP 59(1) ("[a] motion to alter or amend the judgment shall be filed not later than 15 days after the entry of judgment."). Here, Defendant did not seek to amend the Judgment. Rather, the Garnishment Application and Writ sought to collect the unpaid balance of the Judgment. Accordingly, Rule 59(1) was inapplicable.

Lastly, Plaintiff's argument that Defendant was required to serve the Fee Application, China Doll Affidavit and Statement of Costs on Plaintiff "as a new complaint and summons," is incorrect. Plaintiff does not contest that Defendant sent him these via U.S. mail. Such service is proper under Arizona law for pleadings filed after the original complaint. *See* ARCP 5(a)(2)(B), (D) (pleadings filed after original complaint and written motion must be served pursuant to Rule 5(c)); *id.* 5(c)(2)(C) (document is served by "mailing it by U.S. mail to a person's last-known address . . ."). Plaintiff admits

that he was served with the filings and that he forwarded them directly to his counsel. (*See* Doc. 32, ¶¶ 22-24; Doc. 31-2 at 55 (Kinna Deposition Transcript).)

Accordingly, the Court finds that A.R.S. § 12-1573, ARCP 59(l) and Rule 5(c)(4) do not apply to the filings that Plaintiff challenges here, and any alleged failure to comply with these rules did not violate the FDCPA. Therefore, the Court will grant Defendant's Motion for Summary Judgment on these issues.

IV. Conclusion.

In summary, the Court finds that (1) Defendant did not misrepresent the amount Plaintiff owed in the Garnishment Application or Writ of Garnishment, (2) Defendant's request for post-judgment fees and costs was not materially false, (3) Plaintiff's claims that the underlying Stipulated Judgment "is an unlawful *cognovit*," and that Defendant failed to account for all payments made by Plaintiff on the debt, are untimely, (4) Defendant did not improperly initiate garnishment proceedings, and (5) Plaintiff has failed to establish that Defendant violated any state rules in regard to the garnishment application or proceedings. Accordingly, the Court will grant Defendant's Motion for Summary Judgment as to all of Plaintiff's claims.

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment (doc. 31) is **granted**.

2. Plaintiff's Motion for Summary Judgment (doc. 34) is **denied**.

3. The Clerk is directed to dismiss all of Plaintiff's claims against Defendant, and terminate this action.

Dated this 1st day of December, 2017.

Honorable John Z. Boyle
United States Magistrate Judge