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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF CALIFORNIA  
5

6 SHERRY FENN,

7  
8 Plaintiff,

9 v.

10  
11 CIR, Law Offices, and Does 1  
12 through 10, inclusive,

13 Defendants.

No. 1:10-CV-01903-OWW-SMS

MEMORANDUM DECISION AND ORDER  
RE: DEFENDANT'S MOTION TO  
DISMISS (Doc. 5)

14 I. INTRODUCTION.

15 Plaintiff Sherry Fenn filed a complaint against Defendant CIR,  
16 Law Offices ("CIR"), a debt collector, pursuant to the Fair Debt  
17 Collection Practices Act, 15 U.S.C. § 1692, et seq ("FDCPA").<sup>1</sup>  
18 Plaintiff alleges that Defendant violated the FDCPA by engaging in  
19 abusive and improper behavior while attempting to collect a debt  
20 from Plaintiff.

21 Defendant CIR moves to dismiss the complaint pursuant to Fed.  
22 R. Civ. P. 12(b)(6). Defendant argues that Plaintiff has failed to  
23 state a cognizable violation of the FDCPA.  
24

25 <sup>1</sup> The complaint also alleged violations of the California  
26 Rosenthal Act, Cal. Civ. Code § 1788, et seq. Those claims were  
27 abandoned on February 21, 2011. See Doc. 7 at 4:4-4:6 ("Plaintiff  
28 agrees that the Rosenthal Act does not apply to this Defendant and  
voluntarily dismisses her Second Cause of Action for violations of  
the Rosenthal Act.").

1 II. BACKGROUND.

2 The following background facts are taken from the parties'  
3 submissions in connection with the motions and other documents on  
4 file in this case.

5 This matter involves a dispute between a Plaintiff and  
6 Defendant CIR concerning the latter's attempts to collect an unpaid  
7 debt of \$2,651.58 (owed to Target National Bank). On January 29,  
8 2010, a validation notice was purportedly sent to Plaintiff seeking  
9 the balance of the debt, \$2,651.58. It is undisputed that  
10 Plaintiff did not respond to the validation notice.

11 On August 18, 2010, Defendant CIR filed a debt collection suit  
12 against Plaintiff on behalf of Target National Bank in the Superior  
13 Court of California, County of Stanislaus, Case No. 657041.  
14 Defendant claims that Plaintiff, or someone matching her  
15 description, was served by substituted service on September 4,  
16 2010.

17 On September 10, 2010, Plaintiff contacted Defendant CIR to  
18 discuss a settlement. Plaintiff offered to resolve the matter for  
19 \$1,458.37, the amount identified in an expired settlement letter.  
20 The parties ultimately agreed to settle the debt collection matter  
21 for \$1,856.78.

22 On September 13, 2010, Defendant CIR received a cashier's  
23 check from Plaintiff in the amount of \$1,856.78. Defendant  
24 dismissed the state court action against Plaintiff on October 13,  
25 2010.

26 On October 11, 2010, Plaintiff filed this action to recover  
27 actual, statutory and punitive damages stemming from Defendant's  
28

1 allegedly unlawful debt collection practices.<sup>2</sup> The federal  
2 complaint advances two claims for relief: (1) violations of the  
3 Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq.; and  
4 (2) violations of the California Rosenthal Act, Cal. Civ. Code §  
5 1788 et seq.

6 On November 24, 2010, Defendant moved to dismiss this action  
7 on grounds that Plaintiff has not stated a claim upon which relief  
8 can be granted.<sup>3</sup> Plaintiff's opposition, filed February 21, 2011,  
9 is limited to the merits of the FDCPA claim against Defendant. See  
10 Doc. 7 at 4:4-4:6 ("Plaintiff agrees that the Rosenthal Act does  
11 not apply to this Defendant and voluntarily dismisses her Second  
12 Cause of Action for violations of the Rosenthal Act.").

### 13 14 III. LEGAL STANDARD.

15 Federal Rule of Civil Procedure 12(b)(6) permits a motion to  
16 dismiss a claim for "failure to state a claim upon which relief can  
17 be granted[.]"

18 "To survive a motion to dismiss, a complaint must contain  
19 sufficient factual matter, accepted as true, to 'state a claim to  
20 relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129  
21 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*,  
22 550 U.S. 544, 570 (2007)); see also *Weber v. Dep't of Veterans*  
23 *Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). This tenet - that

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24  
25 <sup>2</sup> Plaintiff requested actual damages for emotional distress,  
26 along with the maximum statutory damages of \$1,000.00 per  
violation.

27 <sup>3</sup> While the motion to dismiss was filed on November 22, 2010,  
28 the "Memorandum of Points & Authorities" appears on the docket as  
Doc. 8, filed on February 22, 2011.

1 the court must accept as true all of the allegations contained in  
2 the complaint - "is inapplicable to legal conclusions." *Iqbal*, 129  
3 S.Ct. at 1949. Accordingly, "[t]hreadbare recitals of the elements  
4 of a cause of action, supported by mere conclusory statements, do  
5 not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Rather, "[a]  
6 claim has facial plausibility when the plaintiff pleads factual  
7 content that allows the court to draw the reasonable inference that  
8 the defendant is liable for the misconduct alleged." *Id.* at 1949  
9 (citing *Twombly*, 550 U.S. at 556). Factual allegations that only  
10 permit the court to infer "the mere possibility of misconduct" do  
11 not show that the pleader is entitled to relief. *Id.* at 1950.

#### 12 13 IV. DISCUSSION.

14 The FDCPA imposes strict liability on debt collectors for  
15 their violations, i.e., it makes debt collectors liable for  
16 violations that are not knowing or intentional. *Reichert v. Nat'l*  
17 *Credit Sys.*, 531 F.3d 1002, 1004-05 (9th Cir. 2008); see also  
18 *Clark v. Capital Credit & Collection Serv., Inc.*, 460 F.3d 1162,  
19 1176 & n. 11 (9th Cir. 2006). In order to prevail on a FDCPA  
20 claim, plaintiff must prove that: (1) she was the object of  
21 collection activity arising from consumer debt; (2) defendants are  
22 debt collectors as defined by the FDCPA; and (3) defendants have  
23 engaged in an act or omission prohibited by the FDCPA. See, e.g.,  
24 *Som v. Daniels Law Offices, P.C.*, 573 F. Supp. 2d 349, 356 (D.  
25 Mass. 2008).

26 Defendants do not dispute that Plaintiff was the object of  
27 collection activity arising from consumer debt. The complaint  
28 alleges that Defendant is a "debt collector" within the meaning of

1 FDCPA. Compl., Doc. 1, ¶ 2.

2 Defendant asserts, however, Plaintiff has failed to  
3 sufficiently allege that it engaged in any "act or omission"  
4 prohibited by the FDCPA. Defendant characterizes Plaintiff's  
5 allegations as "conclusory" and "unsustainable."

6 Plaintiff brings one FDCPA claim premised on violations of  
7 various FDCPA subsections, including 15 U.S.C. § 1692b(1), §  
8 1692b(2), § 1692b(3), § 1692d(2), § 1692d(5), § 1692e(5), §  
9 1692e(9) and § 1692e(10):

- 10 21. The Defendants contacted third parties and failed to  
11 identify themselves and further failed to confirm or  
12 correct location information, in violation of 15 U.S.C.  
§ 1692b(1).
- 13 22. The Defendants informed third parties of the nature of  
14 Plaintiff's debt and stated that the Plaintiff owed a  
debt, in violation of 15 U.S.C. § 1692b(2).
- 15 23. The Defendants contacted third parties in regards to the  
16 Plaintiff's debt on numerous occasions, without being  
17 asked to do so, in violation of 15 U.S.C. § 1692b(3).
- 18 24. The Defendants used profane and abusive language when  
19 speaking with the consumer, in violation of 15 U.S.C. §  
20 1692d(2).
- 21 25. The Defendants caused a phone to ring repeatedly and  
22 engaged the Plaintiff in telephone conversations, with  
the intent to annoy and harass, in violation of 15 U.S.C.  
§ 1692d(5).
- 23 26. The Defendants threatened to take legal action, without  
24 actually intending to do so, in violation of 15 U.S.C. §  
25 1692e(5).
- 26 27. The Defendants falsely misrepresented to the Plaintiff  
that the documents received by the Plaintiff from the  
27 Defendant were authorized by a court or official, in  
violation of 15 U.S.C. § 1692e(9).
- 28 28. The Defendants employed false and deceptive means to  
collect a debt, in violation of 15 U.S.C. § 1692e(10).

Compl., ¶¶ 21-28.

1 Plaintiff's complaint is insufficient to state a claim for  
2 relief because it merely asserts a list of legal conclusions that  
3 Defendant "violated" several provisions of the FDCPA. See, e.g.,  
4 Compl., ¶ 24 ("The Defendants used profane and abusive language  
5 when speaking with the consumer, in violation of 15 U.S.C. §  
6 1692b(3)."). But the complaint does not plead sufficient facts to  
7 support these legal conclusions. For instance, to establish the  
8 third element of the FDCPA claim, i.e., whether the debt collector  
9 engaged in an act or omission prohibited by the FDCPA, Plaintiff  
10 pleads that:

11 12. CIR called the Plaintiff numerous times per day in an  
12 attempt to collect the Debt with the intent to harass.

13 13. CIR was rude and abusive when speaking to the  
14 Plaintiff.

15 14. CIR discussed the Debt with the Plaintiff's father.

16 15. CIR sent papers to the Plaintiff insinuating a court  
17 action had been initiated.

18 16. CIR threatened to file legal action against the  
19 Plaintiff. To date, no such action has been filed.

20 Compl., ¶¶ 12-16.

21 These "facts" simply repeat the relevant statutory language  
22 without any dates, identities or the circumstances. While  
23 Plaintiff has pled adequate facts to establish that CIR used the  
24 telephone to attempt to collect a debt, it is unclear *when* the  
25 conversations took place, *who* initiated the conversations, *what* was  
26 allegedly discussed and/or disclosed, and *in what manner* CIR was  
27 "rude and abusive." These basic facts are necessary to maintain  
28

1 causes of action under §§ 1692b and 1692d of the FDCPA.<sup>4</sup> See  
2 *Skelley v. Ray Klein, Inc.*, No. 09-6242-AA, 2010 WL 438148, at 3  
3 (D. Or. Feb. 3, 2010) ("Plaintiff's claims are speculative as he  
4 relies only on his assertion that the phone calls are 'false and  
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6 <sup>4</sup> Section 1692b states in relevant part:

7  
8 Any debt collector communicating with any person other than  
9 the consumer for the purpose of acquiring location  
information about the consumer shall --

- 10 (1) identify himself, state that he is confirming or  
11 correcting location information concerning the consumer,  
and, only if expressly requested, identify his employer;  
12 (2) not state that such consumer owes any debt;  
13 (3) not communicate with any such person more than once  
14 unless requested to do so by such person or unless the  
15 debt collector reasonably believes that the earlier  
16 response of such person is erroneous or incomplete and  
that such person now has correct or complete location  
information;

17 15 U.S.C. § 1692b(1)-(3).

18 Section 1692d states in relevant part:

19 A debt collector may not engage in any conduct the natural  
20 consequence of which is to harass, oppress, or abuse any  
21 person in connection with the collection of a debt. Without  
22 limiting the general application of the foregoing, the  
following conduct is a violation of this section [...]

- 23 (2) The use of obscene or profane language or language the  
24 natural consequence of which is to abuse the hearer or  
reader.  
25 (5) Causing a telephone to ring or engaging any person in  
26 telephone conversation repeatedly or continuously with  
27 intent to annoy, abuse, or harass any person at the  
called number.

28 15 U.S.C. § 1692d(2), (5).

1 deceptive' [] [t]hat label is insufficient to state a claim.");  
2 accord *Narog v. Certegy Check Services, Inc.*, No. C-10-03116 SI ---  
3 F. Supp. 2d ----, 2011 WL 70595, at 4 (N.D. Cal. Jan. 10, 2011) ("A  
4 plaintiff cannot allege a claim for violation of the FDCPA based on  
5 conduct that occurred after he paid his debt in full, and after the  
6 debt collector acknowledged that the debt was paid in full.")<sup>5</sup>  
7 Plaintiff's assertions are insufficient to state a claim pursuant  
8 to §§ 1692b and 1692d. Plaintiff does little more than reiterate  
9 those sections in her complaint.

10 Plaintiff also fails to state a claim under § 1692e(5). A  
11 violation occurs under § 1692e(5) when a debt collector threatens  
12 to take any action that cannot legally be taken or that is not  
13 intended to be taken. Here, legal action was taken - it was not  
14 just a threat - and Plaintiff does not otherwise allege how CIR's  
15 conduct violated § 1692e(5), i.e., it is not alleged that CIR was  
16 (1) legally barred from pursuing a debt collection suit, or (2)  
17 lacked the requisite intent to do so.

18 Plaintiff's claims under §§ 1692e(9) and (10) fail for the  
19 same reasons as articulated above. Section 1692e states in  
20 relevant part:

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

25 <sup>5</sup> Under the FDCPA, once a debt is paid there is no "debt" and  
26 there can be no debt collection that violates the FDCPA. See,  
27 e.g., *Gorbaty v. Portfolio Recovery Assocs., LLC*, 355 F. App'x 580  
28 (3d Cir. 2009), cert. denied, --- U.S. ----, 130 S.Ct. 2116 (2010).  
As Plaintiff fails to identify when or how CIR was "rude and  
abusive" or when her father was contacted, it is unclear whether  
she has plead a prima facie claim under the FDCPA.



1 (9) The use or distribution of any written communication  
2 which simulates or is falsely represented to be a document  
3 authorized, issued, or approved by any court, official, or  
4 agency of the United States or any State, or which creates  
a false impression as to its source, authorization, or  
approval.

5 (10) The use of any false representation or deceptive means  
6 to collect or attempt to collect any debt or to obtain  
information concerning a consumer.

7  
8 15 U.S.C. § 1692e(9)-(10).

9 Plaintiff has not pleaded any facts to support a claim under  
10 §§ 1692e(9) and (10). No factual allegations describe how CIR, as  
11 a debt collector, used or distributed any false or deceptive  
12 written communication or misrepresented itself to collect a debt or  
13 to obtain information about Plaintiff. Facts, not labels or black  
14 letter restatements, plead actionable claims in this Circuit. See  
15 *Twombly*, 550 U.S. at 570 (2007) (holding that a "plaintiff's  
16 obligation to provide the 'grounds' of his 'entitlement to relief'  
17 requires more than labels and conclusions, and a formulaic  
18 recitation of the elements of a cause of action will not do.").  
19 Further, there are no facts to indicate that the "papers" allegedly  
20 sent by CIR to Plaintiff are of the same class/type as the  
21 documents described in § 1692e(9).

22 Supreme Court authority requires that Plaintiff plead facts to  
23 appropriately identify with particularity the conduct undertaken by  
24 CIR that she claims was unlawful. Plaintiff has not done so.  
25 Defendant's Motion to dismiss Plaintiff's FDCPA claim is granted  
with leave to amend.

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27 ///

V. CONCLUSION.

For the reasons stated:

1. Plaintiff has failed to plead the requisite facts to establish a cognizable legal claim under the FDCPA.
2. Defendant's Motion to dismiss Plaintiff's FDCPA claim against Defendant CIR is GRANTED WITH LEAVE TO AMEND.
3. Plaintiff's Rosenthal Act claim against Defendant CIR is DISMISSED WITH PREJUDICE.
4. Any amended complaint shall be filed within twenty ("20") days following date of electric service of this decision. Defendant shall have twenty-one ("21") days to respond.

IT IS SO ORDERED.

Dated: March 8, 2011

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE