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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA

8 SHERRY FENN,

CASE NO. 1:10-cv-01903-SMS

9 Plaintiff,

10 ORDER DISMISSING CASE FOR
FAILURE TO STATE A CLAIM

11 v.

12 CIR, LAW OFFICES,

13 Defendant.

(Doc. 18)

14
15 Defendant CIR, Law Offices moves for dismissal of Plaintiff's Amended Complaint for
16 failure to state a claim. F.R.Civ.P. § 12(b)(6). Despite the District Court's prior order dismissing
17 Plaintiff's claim with leave to amend due to its factual insufficiency, the amended complaint still
18 alleges only threadbare claims and conclusory, unwarranted deductions of fact. Because
19 Plaintiff's factual allegations are insufficient to state a claim under any of the six statutory
20 provisions that she alleges that Defendant violated, the Court grants Defendant's motion to
21 dismiss. F.R.Civ.P. 12(b)(6).

22 **I. Procedural History**

23 On October 11, 2010, Plaintiff filed a complaint alleging violations of the Fair Debt
24 Collection Practices Act (15 U.S.C. § 1692 *et seq.*) (FDCPA) and the Rosenthal Fair Debt
25 Collection Practices Act (California Civil Code § 1788 *et seq.*) (the Rosenthal Act). On
26 November 24, 2010, Defendant moved for the complaint's dismissal for failure to state a claim.
27 On March 8, 2011, the District Court dismissed the FDCPA claim with leave to amend and the
28 Rosenthal Act claim with prejudice. In its opinion, the District Court clearly set forth the

1 standards for sufficient complaints and explained, in detail, the shortcomings of the dismissed
2 complaint.

3 On March 28, 2011, Plaintiff filed her amended complaint, again alleging FDCPA claims.
4 On April 15, 2011, both parties consented to the jurisdiction of a United States Magistrate Judge.
5 On April 18, 2011, Defendant moved to dismiss the amended complaint pursuant to F.R.Civ.P.
6 12(b)(6) .

7 **II. Factual Allegations of the Amended Complaint**

8 Plaintiff alleges that she incurred a debt to a creditor for goods purchased primarily for
9 family, household, or personal purposes. The creditor hired Defendant, a “debt collector” as
10 defined in 15 U.S.C. § 1692a(6), to collect the debt from Plaintiff. Defendant called Plaintiff
11 daily “with the intent to harass.” Various callers demanded payment, making settlement offers
12 which changed daily. “Plaintiff does not recall the names or dates of the callers or calls, but the
13 calls occurred from approximately mid through late 2010, but in any event within one year of the
14 filing of the action.”

15 Plaintiff alleges that Defendant discussed Plaintiff’s debt with her father. “Defendant sent
16 papers to Plaintiff, insinuating a court action had been initiated.” Because the papers bore the
17 wrong address, an illegible stamp, and had the court’s address crossed out, Plaintiff considered the
18 papers to be suspect. No proof of service was ever filed. The lawsuit (*Target Nat’l Bank v. Fenn*,
19 Stanislaus Superior Court No. 657041) was filed August 18, 2010, and dismissed October 13,
20 2010.

21 Defendant was rude and abusive to Plaintiff. When Plaintiff called to accept a \$1400
22 settlement offer, Defendant advised her that the offer had expired and that settlement then would
23 be \$1856. Plaintiff accepted the offer and paid \$1856 in or about August 2010. Thereafter, on
24 September 9, 2010, Defendant sent Plaintiff a settlement offer of \$1590.95.

25 Plaintiff contends that Defendant’s outrageous action caused Plaintiff humiliation, anger,
26 anxiety, emotional distress, fear, frustration, and embarrassment.

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1 **III. Sufficiency of Complaint**

2 Federal Rule of Civil Procedure 12(b)(6) provides for a claim’s dismissal “if as a matter of
3 law it is clear that no relief could be granted under any set of facts that could be proved consistent
4 with the allegations.” *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). In considering a motion to
5 dismiss for failure to state a claim, the Court must accept as true the allegations of the complaint
6 in question, construe the pleading in the light most favorable to the party opposing the motion,
7 and resolve all doubts in the pleader’s favor. *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425
8 U.S. 738, 740 (1976); *Jenkins v. McKeithen*, 395 U.S. 411, 421, *reh’g denied*, 396 U.S. 869
9 (1969). A motion to dismiss for failure to state a claim should not be granted unless it appears
10 beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle
11 him to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Palmer v.*
12 *Roosevelt Lake Log Owners Ass’n*, 651 F.2d 1289, 1294 (9th Cir. 1981).

13 At its most basic level, evaluating whether a complaint states a claim against particular
14 defendants requires its analysis in light of applicable pleading standards. “Rule 8(a)’s simplified
15 pleading standard applies to all civil actions, with limited exceptions,” none of which applies here.
16 *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002). Pursuant to Rule 8(a), a complaint must
17 contain “a short and plain statement of the claim showing that the pleader is entitled to relief. . . .”
18 Fed. R. Civ. P. 8(a). “Such a statement must simply give the defendant fair notice of what the
19 plaintiff’s claim is and the grounds upon which it rests.” *Swierkiewicz*, 534 U.S. at 512.

20 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of
21 the cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*,
22 129 S.Ct. 1937, 1949 (2009), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
23 “Plaintiff must set forth sufficient factual matter accepted as true, to ‘state a claim that is plausible
24 on its face.’” *Iqbal*, 129 S.Ct. at 1949, *quoting Twombly*, 550 U.S. at 555. The Court should not
25 accept as true allegations that are merely conclusory, unwarranted deductions of fact, or
26 unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended on*
27 *denial of rehearing*, 275 F.3d (9th Cir. 2001). While factual allegations are accepted as true, legal
28 conclusions are not. *Iqbal*, 129 S.Ct. at 1949.

1 Although accepted as true, “[f]actual allegations must be [sufficient] to raise a right to
2 relief above the speculative level.” *Twombly*, 550 U.S. at 555 (*citations omitted*). A plaintiff
3 must set forth “the grounds of his entitlement to relief,” which “requires more than labels and
4 conclusions, and a formulaic recitation of the elements of a cause of action.” *Id.* at 555-56
5 (*internal quotation marks and citations omitted*). To adequately state a claim against a defendant,
6 a plaintiff must set forth the legal and factual basis for his claim. *Id.* In this motion, Defendant
7 contends that Plaintiff has failed to allege facts sufficient to state a plausible FDCPA claim.

8 **IV. Discussion**

9 “Congress enacted the FDCPA to protect consumers from ‘improper conduct’ and
10 illegitimate collection practices “without imposing unnecessary restrictions on ethical debt
11 collectors.”” *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1169-70 (9th Cir.
12 2006), *quoting* S.Rep. No. 95-382, at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696,
13 1698-99. To prevail on an FDCPA claim, a plaintiff must prove that (1) he or she was the object
14 of collection activity arising from consumer debt; (2) the defendant is a debt collector as defined
15 by the FDCPA; and (3) the defendant has engaged in an act or omission prohibited by the
16 FDCPA. *McCorriston v. L.W.T., Inc.*, 536 F.Supp.2d 1268, 1273 (M.D.Fla. 2008). The amended
17 complaint fails to allege facts to support any of these three elements, simply setting forth legal
18 conclusions that echo the statutory language.

19 For example, in paragraphs 8 and 9 of the amended complaint, Plaintiff alleges that she
20 incurred a financial obligation to a creditor for services that “were primarily for family, personal
21 or household purposes” and that met the definition of “debt” in 15 U.S.C. § 1692a(5). These
22 allegations are legal conclusions, not facts. Factual allegations would set forth information
23 supporting the legal standard, that is, that Plaintiff became indebted to Target National Bank in
24 the amount of \$2651.58 for whatever specific goods or services she purchased there.¹ Those
25 specific facts would enable the jury to conclude that Plaintiff had incurred a consumer debt of the
26 type addressed by FDCPA. Similarly, the amended complaint pleads the legal conclusion that

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28 ¹ Specific factual information is drawn from Defendant’s factual account.

1 Defendant is a debt collector within the statutory definition (15 U.S.C. § 1692a(6)) but does not
2 allege specific facts supporting that conclusion.

3 Finally, the amended complaint recites legal conclusions that Defendant violated various
4 provisions of the FDCPA: 15 U.S.C. §§ 1692b(1), 1692b(2), 1692b(3), 1692d(2), 1692d(5), and
5 1692e(10).

6 **A. 15 U.S.C. §§ 1692b(1), (2), and (3)**

7 These three sections address a debt collector’s communication with a third party to secure
8 location information regarding the consumer. In such communications, the debt collector must
9 identify him- or herself, state that he or she is confirming or correcting location information
10 concerning the consumer, and may not identify his or her employer unless expressly requested by
11 the third party. 15 U.S.C. § 1692b(1). He or she may not state that the consumer owes any debt.
12 15 U.S.C. § 1692b(2). Nor may the debt collector communicate with any third party more than
13 once unless the third party requests that the debt collector do so or the debt collector believes that
14 the earlier response was erroneous or incomplete and that the third party now has complete or
15 correct information. 15 U.S.C. § 1692b(3). The amended complaint alleges that Defendant’s
16 contacting her father violated these three statutory provisions in the words of the statute itself. It
17 includes no specific factual allegations. The absence of any factual allegations whatsoever is not
18 sufficient to raise a right to relief above the speculative level. *See Twombly*, 550 U.S. at 555. The
19 amended complaint fails to state a claim for violation of these statutory sections.

20 **B. 15 U.S.C. § 1692d(2) and (5)**

21 This statute prohibits a debt collector’s harassing or abusing a consumer. “A debt
22 collector may not engage in any conduct the natural consequence of which is to harass, oppress, or
23 abuse any person in connection with the collection of the debt. 15 U.S.C. §1692d. Among the
24 prohibited conduct is the use of obscene or profane language which has the natural consequence
25 of abusing the hearer or reader. 15 U.S.C. § 1692d(2). Also prohibited is causing a telephone to
26 ring or engaging any person in conversation repeatedly or continuously with the intent to annoy,
27 abuse, or harass. 15 U.S.C. § 1692d(5). Again, the amended complaint presents its allegations in
28 the words of the statutes themselves.

1 The complaint generally alleges that Defendant called Plaintiff every day with the intent to
2 harass from “about mid 2010 through late 2010.” The complaint further alleges that various
3 callers from Plaintiff called Plaintiff and demanded payment in full, then made settlement offers
4 which changed daily. “Plaintiff does not recall the names or dates of the callers or calls, but the
5 calls occurred approximately mid through late 2010, but in any event within the one year [*sic*] of
6 the filing of the action.”

7 As the Court previously explained in its dismissal of Plaintiff’s original complaint, these
8 facts are insufficient to allege the violations since they do not provide sufficient information
9 regarding when the conversations occurred, who contacted Plaintiff, what was discussed or
10 disclosed, and in what manner Defendant was rude or abusive. The vague allegations of the
11 amended complaint are insufficient to give Defendant fair notice of what Plaintiff’s claim is and
12 the grounds upon which it rests. *See Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 555;
13 *Swierkiewicz*, 534 U.S. at 512.

14 The complaint also alleges that Defendant was rude and abusive in telling Plaintiff, when
15 she called to respond to a settlement offer of \$1400 that the prior settlement offer had been
16 withdrawn and that Defendant would then settle for \$1856. Since the interest on Plaintiff’s debt
17 accrued as it remained unpaid and collection costs increased, particularly once Defendant was
18 required to prepare and file its lawsuit, increasing settlement demands are not surprising. That
19 Defendant’s increased settlement offer was, of itself, harassing or abusive is not a reasonable
20 inference. *See Sprewell*, 266 F.3d at 988.

21 Finally, the amended complaint alleges harassment in a settlement offer received after
22 Plaintiff had reached a settlement with Defendant and paid the amount due by cashier’s check.
23 Since no debt collection violative of the FDCPA can exist once the debt has been paid, this
24 allegation cannot state a cause of action under 15 U.S.C. § 1692d(5). *Gorbaty v. Portfolio*
25 *Recovery Associates, LLC*, 355 Fed.Appx. 580, 581 (3d Cir. 2009), *cert. denied*, 130 S.Ct. 2116
26 (2010).

27 The amended complaint fails to state a claim for violation of these statutory sections.

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