

1 previously filed complaint. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King*
2 *v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

3 The Court must dismiss a complaint, or portion of the complaint, if it is “frivolous, malicious
4 or fails to state a claim upon which relief may be granted; or . . . seeks monetary relief from a
5 defendant who is immune from such relief.” 28 U.S.C. § 1915A(b); 28 U.S.C. § 1915(e)(2). A
6 claim is frivolous “when the facts alleged rise to the level of the irrational or the wholly incredible,
7 whether or not there are judicially noticeable facts available to contradict them.” *Denton v.*
8 *Hernandez*, 504 U.S. 25, 32-33 (1992). In determining malice, the Court examines whether the
9 claims are pled in good faith. *Kinney v. Plymouth Rock Squab. Co.*, 236 U.S. 43, 46 (1915). If the
10 Court determines that the complaint fails to state a cognizable claim, the Court may grant leave to
11 amend to the extent that deficiencies of the complaint can be cured by an amendment. *Lopez v.*
12 *Smith*, 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc).

13 **II. Pleading Standards**

14 The Federal Rules of Civil Procedure General set forth the general rules for pleading a
15 complaint. A pleading stating a claim for relief must include a statement demonstrating the Court’s
16 jurisdiction, “a short and plain statement of the claim showing the pleader is entitled to relief; and . .
17 . a demand for the relief sought, which may include relief in the alternative or different types of
18 relief.” Fed. R. Civ. P. 8(a). The Federal Rules adopt a flexible pleading policy, and *pro se*
19 pleadings are held to “less stringent standards” than pleadings by attorneys. *Haines v. Kerner*, 404
20 U.S. 519, 521-21 (1972).

21 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and
22 succinct manner. *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). The
23 purpose of the complaint is to give the defendant fair notice of the claims against him, and the
24 grounds upon which the complaint stands. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

25 The Supreme Court noted,

26 Rule 8 does not require detailed factual allegations, but it demands more than an
27 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers
28 labels and conclusions or a formulaic recitation of the elements of a cause of action will
not do. Nor does a complaint suffice if it tenders naked assertions devoid of further
factual enhancement.

1 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (internal quotation marks and citations omitted).
2 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673
3 F.2d 266, 268 (9th Cir. 1982). The Court clarified further,

4 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim
5 to relief that is plausible on its face.” [Citation]. A claim has facial plausibility when the
6 plaintiff pleads factual content that allows the court to draw the reasonable inference that
7 the defendant is liable for the misconduct alleged. [Citation]. The plausibility standard
8 is not akin to a “probability requirement,” but it asks for more than a sheer possibility
9 that a defendant has acted unlawfully. [Citation]. Where a complaint pleads facts that are
10 “merely consistent with” a defendant’s liability, it “stops short of the line between
11 possibility and plausibility of ‘entitlement to relief.’

12 *Iqbal*, 129 S.Ct. at 1949. Where the factual allegations are well-pled, a court should assume their
13 truth and determine whether the facts would make the plaintiff entitled to relief; conclusions in the
14 pleading are not entitled to the same assumption of truth. *Id.* If the Court determines that the
15 complaint fails to state a cognizable claim, the Court may grant leave to amend to the extent that
16 deficiencies of the complaint can be cured by an amendment. *Lopez v. Smith*, 203 F.3d 1122, 1127-
17 28 (9th Cir. 2000) (en banc).

18 **III. Plaintiff’s Factual Allegations**

19 Plaintiff alleges she obtained a credit card from Bank of America, which was transferred to
20 FIA Cardservices. (Doc. 7 at 2). Plaintiff contends the account, ending in 2791, remained in good
21 standing until she defaulted in September 2009. *Id.* On April 6, 2010, Frederick J. Hanna &
22 Associates (“Hanna”) contacted Plaintiff to collect on a FIA Cardservices account with a debt in the
23 amount of \$7,498.31. *Id.* Plaintiff asserts “the account number as provided, did not match any Bank
24 of America or FIA Cardservices accounts under the name of Plaintiff,” and that she informed Hanna
25 of these facts on April 15, 2010. *Id.*

26 Nevertheless, Plaintiff asserts she received a collection note from Hunt & Henriques Law
27 Firm (“Hunt & Henriques”) on May 20, 2010, which alleged the law firm represented FIA
28 Cardservices and was attempting to collect a debt in the amount of \$7,498.31. (Doc. 7 at 2).
According to Plaintiff, the collection note gave “the same invalid credit card account number as used
by Hanna & Assoc.” *Id.* On May 25, 2010, Plaintiff sent a demand to Hunt & Henriques for
validation of the debt, and “notified Hunt & Henriques that this was not an account number under

1 the name of Linda D. Moriarity.” *Id.* Plaintiff included a “[n]otice of cease and desist for further
2 collection attempts until validation was furnished.” *Id.* Plaintiff alleges that no further contact was
3 made regarding the validity or verification of the account. *Id.*

4 According to Plaintiff, “On the weekend of August 6, 2010, [she] was advised that some
5 paperwork had been found on the windshield of a parked vehicle on her property, by a person there
6 to feed her pets.” (Doc. 7 at 2). Plaintiff states she never saw it the documents, and was informed
7 “that paperwork was returned to an address on the paperwork.” *Id.* Plaintiff asserts she learned of a
8 complaint filed by Hunt & Henriques, only through a request for entry of default judgment signed by
9 defendant Janalie Henriques, from the law firm of Hunt & Henriques. *Id.* Plaintiff states she sent a
10 notice denying service to Hunt & Henriques on November 7, 2010, but received no response. *Id.*
11 Plaintiff alleges the default judgment was granted. *Id.* at 3.

12 **IV. Discussion and Analysis**

13 According to Plaintiff, Janalie Henriques and Hunt & Associates (“Defendants”) violated the
14 Fair Debt Collection Practices Act and California’s corollary statute, the Rosenthal Fair Debt
15 Collections Act. (Doc. 7 at 3-5). Plaintiff alleges, “The account number listed in their
16 communications is erroneous and bogus as related to Plaintiff, and remains to this date un-validated
17 and un-verified.” *Id.* at 2-3. Plaintiff states Defendants “proceeded with litigation with full
18 knowledge the account was not that of the Plaintiff[.]” *Id.* at 3. Also, Plaintiff asserts Defendants’
19 actions were a violation of due process because she was “never serve[d] pursuant to Federal FRCP
20 12(b)(4).” *Id.* at 5.

21 **A. Fair Debt Collection Practices Act (“FDCPA”)**

22 Under the provisions of the FDCP, debt collectors are prohibited “from making false or
23 misleading representations and from engaging in various abusive and unfair practices.” *Heintz v.*
24 *Jenkins*, 514 U.S. 291, 292 (1995); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1030 (9th Cir.
25 2010). To establish a violation of the FDCPA, Plaintiff must show: (1) she was a consumer (2) who
26 was the object of a collection activity arising from a consumer debt, and (3) the defendant is a “debt
27 collector” as defined by the FDCPA, (4) who engaged in an act or omission prohibited by the
28 FDCPA. *Miranda v. Law Office of D. Scott Carruthers*, 2011 U.S. Dist. LEXIS 55180, at *11 (E.D.

1 Cal. May 23, 2011), citing *Turner v. Cook*, 362 F.3d 1219, 1227-28 (9th Cir. 2004). Plaintiff alleges
2 she is a consumer within the meaning of FDCPA, and Defendants are debt collectors within the
3 meaning of FDCPA. (Doc. 7 at 3). Plaintiff asserts Defendants have violated several sections of the
4 FDCPA, including § 1692e(2) by falsely representing the character, amount or legal status of a debt;
5 §§ 1692e(8) and 1692g(b) by failing to verify or validate the disputed debt; and § 1692f by using
6 unfair and unconscionable means to collect a debt. *Id.* at 3-4.

7 *Section 1692e(2)*

8 The FDCPA prohibits a debt collector’s use of “any false, deceptive, or misleading
9 representation or means in connection with the collection of any debt” including “[t]he false
10 representation of . . . the character, amount, or legal status of any debt.” 15 U.S.C. § 1692e(2)(A). A
11 plaintiff is not required to prove the defendant knowingly or intentionally made the false
12 representation. *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1166, 1176 (9th Cir. 2006).

13 Here, Plaintiff asserts Defendants falsely represented “the character, amount, or legal status
14 of [the] debt.” (Doc. 7 at 3). According to Plaintiff, she notified Defendants that the account was
15 not hers, and states, “If [the] account is not Plaintiff’s it is not Plaintiff’s legal debt.” *Id.* at 2-3.
16 Plaintiff’s alleges the collection note from Hunt & Henriques characterized the debt as hers, though
17 it was not. *Id.* at 2. In addition, Plaintiff alleges the complaint signed by Janalie Henriques
18 mischaracterized the debt. *Id.* at 4. Therefore, Plaintiff alleges Defendants falsely represented the
19 debt, and states a cognizable claim for a violation of § 1692e(2).

20 *Section 1692e(8)*

21 Debt collectors are prohibited from “[c]ommunicating or threatening to communicate to any
22 person credit information which is known or which should be known to be false, including the
23 failure to communicate that a disputed debt is disputed.” 15 U.S.C. § 1692e(8). Unlike § 1692e(2),
24 this section requires the plaintiff to show the defendant knew or should have known that the
25 information was false. *Id.*; *see also Clark*, 460 F.3d at 1176 n.11 (noting though the FDCPA is
26 generally a strict liability statute, Congress expressly required elements of knowledge and intent
27 where it deemed them necessary).

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1 Plaintiff seems to allege Defendants violated § 1692e(8) by communicating false information
2 to the court. Notably, because Plaintiff asserts Defendants made particular false representations
3 regarding the debt, the heightened pleading standard of Fed. R. Civ. P. 9(b) is applicable to the claim
4 because it sounds in fraud. *Compare Bledea v. Indymac Fed. Bank*, 2010 U.S. Dist. LEXIS 23391,
5 at *21 (E.D. Cal. Feb. 25, 2010) (when the plaintiff alleged the defendant falsely stated the debt, the
6 allegation violation of §1692e(8) was subject pleading standard of Rule 9(b), and required the
7 plaintiff to allege “the time, place or manner of the misrepresentation with sufficient particularity”)
8 with *Champlaie v. BAC Home Loans Servicing*, 706 F.Supp.2d 1029, 1055 (E.D. Cal. 2009) (finding
9 Rule 9(b) inapplicable where the plaintiff alleged the defendant *threatened* to make false reports as a
10 violation of § 1692e(8), because fraud was not the basis of the claim).

11 Therefore, because Plaintiff asserts Hunt & Henriques made false representations regarding
12 the debt, Plaintiff is required to state “the who, what, when, where and how” of the false
13 representations. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1120 (9th Cir. 2003); *see also*
14 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2004) (allegations must include “an account of
15 the time, place, and specific content of the false representations as well as the identities of the parties
16 to the misrepresentations”) (internal quotation marks and citation omitted). Here, Plaintiff alleges
17 Defendants filed a complaint against her on July 20, 2010, in which they included “knowingly false
18 information as to Plaintiff’s credit, by claiming an erroneous obligation.” (Doc. 7 at 4). Because
19 Plaintiff alleges when, by what means, and to whom Hunt & Henriques made false representations,
20 she has stated a cognizable claim for a violation of § 1692e(8).

21 *Section 1692g(b)*

22 When “a consumer notifies the debt collector in writing within the thirty-day period
23 described in subsection (a) that the debt, or any portion thereof, is disputed... the debt collector shall
24 cease collection of the debt, or any disputed portion thereof, until the debt collector obtains
25 verification of the debt or a copy of a judgment...” 15 U.S.C. § 1692g(b). In essence, § 1692g(b)
26 gives a debt collector “a choice: it either may choose not to verify the debt and abandon its collection
27 efforts, or it may decide to verify the debt and resume the collection activities once the requested
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1 validation has been provided.” *Golliday v. Chase Home Finance, LLC*, 671 F.Supp. 629, 637 (W.D.
2 Mich. 2011), citing *Purnell v. Arrow Fin. Servs., LLC*, 303 Fed. App’x. 297, 304 (6th Cir. 2008).

3 Here, Plaintiff alleges Henriques and Hunt & Henriques failed to obtain verification of the
4 debt and if they had done so, the defendants would have recognized the account was not her debt:

5 If they attempted to validate with [the] original creditor, then they were fully aware that
6 account did not belong to the Plaintiff. If Defendants did verify, then they were aware
7 that account did not belong to the Plaintiff. If Defendants did verify, then they moved
forward with full knowledge that their claim was fraudulent. If they failed to attempt
verification, then they simply violated this section . . .

8 (Doc. 7 at 4). Plaintiff alleges that she notified Defendants in writing that the debt was not hers, yet
9 they continued in a court action to collect the debt despite receiving notice that the debt was disputed
10 and without providing verification of the debt. Therefore, Plaintiff has stated a cognizable claim for
11 a violation of § 1692g(b).

12 *Section 1692f*

13 The FDCPA prohibits a debt collector from using “unfair or unconscionable means to collect
14 or attempt to collect any debt.” 15 U.S.C. § 1692f. The FDCPA does not define “unfair” or
15 “unconscionable,” but Section 1692f provides eight examples of violative conduct “without limiting
16 the general application” of the statute. *See id.* Notably, “[t]he filing of a lawsuit alone is neither
17 unfair nor unconscionable.” *MediaIdea v. Law Office of Evan L. Loeffler, PLCC*, 2008 U.S. Dist.
18 LEXIS 109013 (W. Wash. June 19, 2008). However, the filing of “a lawsuit to which there appears
19 to exist a complete defense, without first making a reasonable inquiry as to whether the defense is in
20 fact not complete,” may be a violation of § 1692f. *See Kimber v. Federal Financial Corp.*, 668 F.
21 Supp. 1480, 1487 (M.D. Ala. 1987) (finding the defendant violated § 1692f where the suit was
22 barred by the statute of limitations and the attorney failed to make a reasonable inquiry that the
23 limitations period was to be tolled).

24 In this case, Plaintiff asserts, “Janalie Henriques violated 15 U.S.C. § 1692f by [using] unfair
25 and unconscionable means to collect a debt, by signing and causing said complaint to be filed,
26 having knowledge the alleged account was invalid and not that of Plaintiff.” (Doc. 7 at 4).
27 Consequently, Plaintiff asserts she had a complete defense to the debt because it was not hers, and
28 Plaintiff has stated a cognizable claim for a violation of § 1692f.

1 B. Rosenthal Fair Debt Collection Practices Act

2 Plaintiff alleges Defendants¹ violated the Rosenthal Fair Debt Collection Practices Act
3 (“RFDCPA) arising under California law (Doc. 7 at 4-5). The RFDCPA “like its federal counterpart,
4 is designed to protect consumers from unfair and abusive debt collection practices.” *Robinson v.*
5 *Managed Accounts Receivable Corp.*, 654 F.Supp.2d 1051, 1060 (C.D. Cal. 2009), citing Cal. Civ.
6 Code § 1788.1. The provisions of FDCPA are incorporated in the RDCPA under Cal. Civ. Code §
7 1788.17. Consequently, conduct by a debt collector that violates the FDCPA violates RFDCPA as
8 well. *See, e.g., id.; Hosseinzadeh v. M.R.S. Assoc.*, 387 F.Supp.2d 1104, 1118 (C.D. Cal. 2005);
9 *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 548 (N.D. Cal. 2005).

10 Notably, the RFDCPA excludes attorneys from the definition of “debt collectors” while the
11 FDCPA does not. *Compare* Cal. Civ. Code § 1788.2(c) (“the term . . . does not include an attorney
12 or counselor at law”) *with* 15 U.S.C. §1692a(6). On the other hand, district courts throughout the
13 Ninth Circuit have found that a law firm is a “debt collector” within the meaning of the RFDCPA:

14 The statute merely states that it does not apply to ‘attorney’ or ‘counselor at law;’ it does
15 not outright exclude law firms. Since the legislature specifically excluded attorneys from
16 the statute but was silent with respect to law firms, this Court presumes that the
legislature did not intend to exclude law firms.

17 *Abels*, 227 F.R.D. at 547-48; *see also Robinson*, 654 F.Supp.2d at 1061; *Miranda*, 2011 U.S. Dist.
18 LEXIS 55180, at *19-20. Consequently, though Plaintiff has stated a cognizable claim for a
19 violation of RFDCPA against the law firm of Hunt & Henriques, the claim against Janalie Henriques
20 based upon the RFDCPA is **DISMISSED**.

21 V. Conclusion and Order

22 Plaintiff states cognizable claims for the violation of the Fair Debt Collection Practices Act
23 against Defendants, including a claim for a violation of 15 U.S.C. § 1692f against Janalie Henriques,
24 a violation of 15 U.S.C. § 1692g(b) against Hunt & Henriques Law Firm, and violations of
25 §1692e(2) by Janalie Henriques and Hunt & Henriques Law Firm. In addition, Plaintiff stated a

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27 ¹ In the First Amended Complaint, Plaintiff asserts the cause of action against Defendant Hunt & Henriques. (Doc.
28 7 at 4). However, Plaintiff asserts that “Janalie Henriques is a debt collector within the meaning of the RFDCPA” and that
“Janalie Henriques violated RFDCPA.” *Id.* at 5. Therefore, it appears Plaintiff seeks to assert this cause of action against both
defendants.

1 cognizable claim for a violation of the Rosenthal Fair Debt Collection Practices Act against Hunt &
2 Henriques Law Firm.

3 The Court will provide Plaintiff with the opportunity to file an amended complaint curing the
4 deficiencies identified in this order. *See Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987).
5 Alternatively, Plaintiff may notify the Court in writing that she does not wish to file an amended
6 complaint and is agreeable to proceeding against Janalie Henriques for the violations of §§1692f and
7 § 1692e(2), and against Hunt & Henriques Law Firm for the violations of § 1692g(b), § 1692e(2)
8 and RFDCPA. If Plaintiff so notifies the Court, at that time, the Court will dismiss the claim for
9 violation of Rosenthal Fair Debt Collection Practices Act against Janalie Henriques, and will
10 forward a summons and USM-285 form for completion and return. Upon receipt of the forms, the
11 Court will direct the United States Marshal to initiate service of process.

12 If Plaintiff opts to amend, her Second Amended Complaint should be brief, but must state
13 facts supporting allegations as to the harm caused by each defendant. Fed. R. Civ. P. 8(a); *Iqbal*, 129
14 S. Ct. at 1948-49. Although accepted as true, “[f]actual allegations must be [sufficient] to raise a
15 right to relief above the speculative level” *Twombly*, 127 S. Ct. at 1965 (citations omitted).

16 Plaintiff is advised that an amended complaint supersedes the original complaint. *Forsyth v.*
17 *Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.
18 1987). In addition, the Second Amended Complaint must be “complete in itself without reference to
19 the prior or superseded pleading.” Local Rule 220. Plaintiff is warned that “[a]ll causes of action
20 alleged in an original complaint which are not alleged in an amended complaint are waived.” *King*,
21 814 F.2d at 567, (citing *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981)); *accord*
22 *Forsyth*, 114 F.3d at 1474.

23 Accordingly, it is **HEREBY ORDERED** that:

- 24 1. Plaintiff’s First Amended Complaint is **DISMISSED**, with leave to amend;
- 25 2. Within **30 days** from the date of service of this order, Plaintiff must either:
 - 26 a. File an amended complaint curing the deficiencies identified by the Court in
27 this order, or
 - 28 b. Notify the Court in writing of her willingness to proceed only on the

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cognizable claims against Janalie Henriques for violations of 15 U.S.C. §1692f and § 1692e(2), and against Hunt & Henriques Law Firm for the violations of 15 U.S.C. § 1692e(2), § 1692g(b) and RFDCPA.

3. If Plaintiff fails to comply with this order, the action will be dismissed for failure to obey a court order.

IT IS SO ORDERED.

Dated: October 7, 2011

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE