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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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OLENA LYSYUK,

No. 2:17-cv-00283-JAM-CKD

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Plaintiff,

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v.

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO DISMISS**

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I.C. SYSTEM, INC., a
Minnesota corporation,

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Defendant.

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This matter is before the Court on Plaintiff Olena Lysyuk's

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Amended Motion to Dismiss with Prejudice. Am. Mot., ECF No. 13.

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Defendant L.C. System, Inc. filed an opposition to Plaintiff's

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motion to dismiss, requesting payment of its costs and attorney's

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fees. Opp'n, ECF No. 14. After consideration of the parties'

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briefing on the motion and relevant legal authority, the Court

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will grant in part and deny in part Plaintiff's Amended Motion to

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Dismiss with Prejudice and allow Defendant to collect costs under

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Federal Rule of Civil Procedure 54(d)(1).¹

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¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for October 3, 2017.

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1 I. BACKGROUND

2 On February 10, 2017, Plaintiff, represented by Kimmel &
3 Silverman, P.C., filed suit under the Fair Debt Collection
4 Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA") and Rosenthal
5 Act, Cal. Civ. Code § 1788.17. Compl., ECF No. 1. Specifically,
6 Plaintiff's Complaint alleged that Defendant "placed repeated and
7 harassing debt collection calls to Plaintiff's cellular
8 telephone" from phone numbers including (202)870-5891. Id. at
9 ¶¶ 14-15. Plaintiff further alleged that Defendant continued to
10 call after she requested not to be contacted on her cellular
11 telephone. Id. at ¶¶ 16-17. Plaintiff's counsel based these
12 allegations on Plaintiff's "clear memory" that she told Defendant
13 to stop calling and screenshots of calls from the (202)870-5891
14 number continuing into 2016. See Ginsburg Cert., ECF No. 15-1,
15 ¶¶ 4, 7; Reply, Ex. B, ECF No. 15-2.

16 In April 2017, Defendant sought to have Plaintiff dismiss
17 the case, stating "the last attempt from the IC number identified
18 in your complaint occurred July 7, 2015." Dove Decl., ECF No.
19 14-2. Defendant did not provide Plaintiff's counsel with call
20 logs or recordings to verify its statement. Ginsburg Cert.,
21 ¶¶ 7-8. Shortly thereafter Defendant filed an Answer, denying
22 Plaintiff's allegations. Answer, ECF No. 5.

23 The following month, Plaintiff served a document subpoena to
24 Straight Talk Wireless for her telephone records. Subpoena, ECF
25 No. 14-1. After reviewing the documents from Straight Talk,
26 Plaintiff's counsel determined that they did not provide the
27 evidence necessary to continue the suit. Ginsburg Cert., ¶ 12.
28 Plaintiff's counsel reached out to Plaintiff, obtained consent to

1 dismiss, and filed the current motion. Id. at ¶¶ 14-15.

2 Plaintiff's motion to voluntarily dismiss her Complaint with
3 prejudice asks "each side to bear its own costs." Mot. at 1.

4 Although Defendant opposes Plaintiff's motion, the substance of
5 Defendant's brief makes clear that it does not oppose dismissal
6 with prejudice. See Opp'n. Rather, Defendant argues Plaintiff
7 should have to pay Defendant's attorney's fees and costs. Id. at
8 4. Defendant seeks to recover costs and attorney's fees under 15
9 U.S.C. § 1692k(a)(3), Federal Rule of Civil Procedure 54(d), and
10 28 U.S.C. § 1927. Id. at 4-9.

11 12 II. OPINION

13 A. Legal Standard

14 Federal Rule of Civil Procedure 41(a) governs the voluntary
15 dismissal of an action in federal court. Rule 41(a) provides
16 that "an action may be dismissed at the plaintiff's request only
17 by court order, on terms that the court considers proper," unless
18 a plaintiff files a notice of dismissal before the opposing party
19 serves either an answer or a motion for summary judgment, or the
20 parties stipulate to the dismissal. Fed. R. Civ. P. 41(a)(1-2).
21 Whether to grant a Rule 41(a)(2) motion lies within the district
22 court's discretion. Sams v. Beech Aircraft Corp., 625 F.2d 273,
23 277 (9th Cir. 1980).

24 A Rule 41(a)(2) motion should be granted unless a defendant
25 can show it will suffer "some plain legal prejudice" as a result
26 of dismissal. Smith v. Lenches, 263 F.3d 972, 975 (9th Cir.
27 2001). "Although costs and attorney fees are often imposed upon
28 a plaintiff who is granted a voluntary dismissal under [Rule]

1 41(a)(2), no circuit court has held that payment of the
2 defendant's costs and attorney fees is a prerequisite to an order
3 granting voluntary dismissal." Stevedoring Servs. of Am. v.
4 Armilla Int'l B.V., 889 F.2d 919, 921 (9th Cir. 1989).

5 Although the Ninth Circuit has yet to resolve the issue,
6 district courts have concluded that fees and costs should not
7 ordinarily be imposed on a plaintiff² as a condition of a Rule
8 41(a) motion. Internmatch, Inc. v. Nxtbigthing, LLC, No. 14-CV-
9 05438-JST, 2016 WL 540812, at *2 (N.D. Cal. Feb. 11, 2016);
10 Burnette v. Godshall, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993).
11 In other circuits, attorney's fees may be imposed as a
12 consequence of voluntary dismissal only under "exceptional
13 circumstances" or pursuant to Federal Rule of Civil Procedure 11.
14 See Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985) ("Fees
15 are not awarded when a plaintiff obtains a dismissal with
16 prejudice because the 'defendant cannot be made to defend
17 again.' " (quoting Smoot v. Fox, 353 F.2d 830, 833 (6th Cir.
18 1965))); AeroTech, Inc. v. Estes, 110 F.3d 1523, 1528 (10th Cir.
19 1997) ("[A] defendant may not recover attorneys' fees when a
20 plaintiff dismisses an action with prejudice absent exceptional
21 circumstances.").

22 B. Analysis

23 In this case, Plaintiff moves to dismiss her claims against
24 Defendant with prejudice, asking each party to bear its own fees
25 and costs. See Mot. Defendant opposes having to bear its own
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27 ² In the Ninth Circuit, Rule 41(a)(2) does not provide an
28 independent base of authority for sanctioning lawyers.
Heckethorn v. Sunan Corp., 992 F.2d 240, 242 (9th Cir. 1993).

1 fees and costs. See Opp'n. After consideration of this matter,
2 the Court will grant Plaintiff's motion to the extent that her
3 claims are dismissed with prejudice under Rule 41(a)(2).

4 Because Rule 41(a) does not automatically impose fees and
5 costs upon dismissal, Defendant argues that it is entitled to an
6 award of fees and costs under three other means: 15 U.S.C.
7 § 1692k, Federal Rule of Civil Procedure 54(d), and 28 U.S.C.
8 § 1927.

9 1. FDCPA Fee Provision

10 Defendant first asserts it is entitled to fees and costs
11 under the FDCPA. Opp'n at 4-6. A debt collector may recover
12 attorney fees upon a finding that the plaintiff brought a FDCPA
13 claim in bad faith and for purposes of harassment. See 15 U.S.C.
14 § 1692k(a)(3). Section 1692k(a)(3) authorizes an award of fees
15 against an unsuccessful plaintiff, but not her counsel. Hyde v.
16 Midland Credit Mgmt., Inc., 567 F.3d 1137, 1140-42 (9th Cir.
17 2009) ("We hold that 15 U.S.C. § 1692k(a)(3) does not authorize
18 the award of attorney's fees and costs against a plaintiff's
19 attorneys."). To show bad faith or harassment, the defendant
20 must provide evidence that "the plaintiff both knew that his or
21 her claim was meritless and pursued it with the purpose of
22 harassing the defendant." Millard v. Northland Grp., Inc., No.
23 2:13-CV-00819-JAD, 2014 WL 6455986, at *1 (D. Nev. Nov. 17, 2014)
24 (alterations omitted). The defendant must show the plaintiff's
25 bad faith "with more than conclusory assertions." Chavez v.
26 Northland Grp., No. CV-09-2521-PHX-LOA, 2011 WL 317482, at *5 (D.
27 Ariz. Feb. 1, 2011).

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1 In support of its bad faith allegation, Defendant contends
2 that Plaintiff's counsel did not seek pre-litigation discovery,
3 maintained claims after Defendant provided evidence to counter
4 them, and has filed similar suits against Defendant with other
5 plaintiffs. Opp'n at 5-6.

6 The Court does not find these assertions sufficient to
7 establish that Plaintiff brought this action in bad faith or to
8 harass Defendant. The Court first notes that Defendant did not
9 cite any case law discussing the application of § 1692k(a)(3).
10 See Chavez, 2011 WL 317482, at *5 (denying a defendant's motion
11 for attorney fees under § 1692k(a)(3) where the defendant failed
12 to cite any case law discussing the application of
13 § 1692k(a)(3)); Millard, 2014 WL 6455986, at *1 (same). Second,
14 Defendant does not allege any bad faith or harassment on behalf
15 of Plaintiff herself. Instead, all of Defendant's allegations in
16 this section rely on Plaintiff's counsel's conduct.

17 Accordingly, Defendant has not shown that Plaintiff both
18 knew that her claim was meritless and pursued it with the purpose
19 of harassing Defendant. See Millard, 2014 WL 6455986, at *1.
20 The Court therefore denies Defendant's request for attorney fees
21 and costs under § 1692k(a)(3).

22 2. Costs Under Rule 54(d)(1)

23 Next, Defendant relies on the Supreme Court's opinion in
24 Marx v. General Revenue Corporation, 133 S. Ct. 1166 (2013), to
25 argue that it is entitled to fees and costs under Federal Rule
26 of Civil Procedure 54(d). Opp'n at 6-8. Rule 54(d)(1) provides
27 that "[u]nless a federal statute, these rules, or a court order
28 provides otherwise, costs—other than attorney's fees—should be

1 allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1).³ In
2 Marx, the Supreme Court held that "a district court may award
3 costs to prevailing defendants in FDCPA cases without finding
4 that the plaintiff brought the case in bad faith and for the
5 purpose of harassment." 568 U.S. at 374. Marx maintained that
6 courts are not required to award costs to prevailing defendants
7 and "may appropriately consider an FDCPA plaintiff's indigency
8 in deciding whether to award costs." Id. at 387 n.9.

9 In determining whether to award costs under Rule 54(d)(1),
10 the Court must first determine whether Defendant is a
11 "prevailing party." In the Ninth Circuit, a voluntary dismissal
12 with prejudice is sufficient to confer prevailing party status
13 on a defendant, enabling the defendant to recover costs under
14 Rule 54(d)(1). Zenith Ins. Co. v. Breslaw, 108 F.3d 205, 207
15 (9th Cir. 1997), abrogated on other grounds by Ass'n of Mexican-
16 Am. Educ. v. Cal., 231 F.3d 572 (9th Cir. 2000); see also
17 Nutrivita Labs., Inc. v. VBS Distribution Inc., 160 F. Supp. 3d
18 1184, 1190 (C.D. Cal. 2016), aff'd, No. 16-55329, 2017 WL
19 4217454 (9th Cir. Sept. 22, 2017) (analyzing Ninth Circuit
20 precedent to conclude that voluntary dismissal with prejudice
21 confers prevailing party status). Here, where Plaintiff has
22 filed a motion to dismiss her case with prejudice, Defendant

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24 ³ Rule 54(d)(1) provides for costs other than attorney's fees,
25 which must be requested by a separate motion under Rule 54(d)(2).
26 Compare Fed. R. Civ. P. 54(d)(1) with Fed. R. Civ. P. 54(d)(2)(A)
27 ("A claim for attorney's fees and related nontaxable expenses
28 must be made by motion unless the substantive law requires those
fees to be proved at trial as an element of damages." (emphasis
added)). Defendant did not file a motion for attorney's fees, so
it is not eligible to receive fees under Rule 54(d)(2).

1 qualifies as the prevailing party. As the prevailing party,
2 Defendant presumptively should be allowed to collect its costs
3 pursuant to Rule 54(d)(1).

4 Based on this presumption, the losing party—here,
5 Plaintiff—must show why costs should not be awarded. Save Our
6 Valley v. Sound Transit, 335 F.3d 932, 944–45 (9th Cir. 2003).
7 The district court need only give affirmative reasons when
8 denying costs; no explanation is needed when awarding costs.
9 Id. at 945. Plaintiff’s arguments against costs are that
10 (1) Defendant has not incurred any recoverable costs and
11 (2) Defendant is not a prevailing party. Reply, ECF No. 15,
12 p. 7. As analyzed above, Plaintiff’s argument as to the latter
13 is incorrect in this circuit. As to the former, Defendant has
14 not yet filed a bill of costs, so the Court is unable to
15 determine what eligible costs Defendant incurred.

16 The Court finds that these reasons for denying costs are
17 not sufficiently persuasive to overcome the presumption in favor
18 of an award. See, e.g., Rodriguez v. IC Sys., No. EP-16-CV-
19 00186-DCG, 2017 WL 2105679, at *4 (W.D. Tex. May 12, 2017)
20 (awarding the defendant Rule 54(d)(1) costs after the plaintiff
21 voluntarily dismissed FDCPA claims with prejudice). Defendant
22 may file a proposed bill of costs, defined by 28 U.S.C. § 1920,
23 in conformance with Local Rule 292.

24 3. Attorney’s Fees and Costs Under 28 U.S.C. § 1927

25 Defendant’s final argument seeks attorney’s fees and costs
26 from Plaintiff’s counsel under 28 U.S.C. § 1927. Opp’n at 8.
27 Section 1927 provides that any counsel who “multiplies the
28 proceedings in any case unreasonably and vexatiously” may be

1 required to pay "costs, expenses, and attorneys' fees reasonably
2 incurred because of such conduct." 28 U.S.C. § 1927. "The
3 imposition of sanctions under § 1927 requires a finding of bad
4 faith." Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.,
5 210 F.3d 1112, 1118 (9th Cir. 2000). Bad faith conduct
6 sanctionable under § 1927 may be knowing or reckless. Id. The
7 Ninth Circuit has clarified, though, that § 1927 applies only to
8 the unnecessary multiplication of filings and tactics once a
9 lawsuit has begun. In re Keegan Mgmt. Co., Sec. Litig., 78 F.3d
10 431, 435 (9th Cir. 1996). Sanctionable conduct under § 1927 does
11 not include the original complaint's filing. Id.

12 Here, Defendant argues that Plaintiff's counsel's conduct
13 was unreasonable and vexatious because: (1) counsel did not
14 secure a document subpoena during the pre-suit investigation; and
15 (2) counsel did not amend or dismiss in April 2017 when Defendant
16 stated there were not records of calls after July 2015. Opp'n at
17 8. These arguments focus predominately on the merits of
18 Plaintiff's Complaint, as well as factual disputes where evidence
19 counters the allegation of bad faith. See Reply, Ex. A, ECF No.
20 15-1; Reply Ex. B, ECF No. 15-2. This conduct is not
21 sanctionable under § 1927. 28 U.S.C. § 1927; In re Keegan Mgmt.,
22 78 F.3d at 436.

23 This case is still at an early stage. Neither party took
24 any depositions and Defendant has not filed any dispositive
25 motions. Indeed, Defendant's involvement in the case appears
26 limited to (1) filing an answer; (2) working on the joint
27 scheduling report; and (3) opposing Plaintiff's motion to
28 dismiss. See Answer, ECF No. 5; Joint Sched. Order, ECF No. 7;

1 Opp'n. In the few months between when Plaintiff filed her
2 Complaint and sought to dismiss it, proceedings were not
3 unreasonably and vexatiously multiplied.

4 Defendant has not provided any citations to cases where
5 conduct like Plaintiff's counsel's has been sufficient to
6 constitute bad faith or harassment. Instead, Defendant relies on
7 claims that Plaintiff's counsel has harassed Defendant through
8 conduct in cases involving other consumers. Opp'n at 6. Courts
9 have found similar allegations of misconduct insufficient to
10 warrant fees or costs under § 1927. See, e.g., Chavez, 2011 WL
11 317482, at *7-8 (denying a request for § 1927 sanctions);
12 Anderson v. Asset Acceptance, LLC, No. C 09-2970 MEJ, 2010 WL
13 1752609, at *5 (N.D. Cal. Apr. 29, 2010) (same).

14 The Court finds that Plaintiff's counsel's conduct in these
15 proceedings, while of concern to the Court, is not sanctionable
16 under § 1927, and denies Defendant's request for fees and costs
17 under this section.

18 19 III. ORDER

20 For the reasons set forth above, IT IS ORDERED THAT
21 Plaintiff's Amended Motion To Voluntarily Dismiss Her Complaint
22 Pursuant to F.R.C.P. 41(a)(2), ECF No. 13, is GRANTED IN PART and
23 DENIED IN PART. The Motion is DENIED as to Plaintiff's request
24 that each side bear its costs and GRANTED as to all other
25 provisions.

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1 IT IS THEREFORE ORDERED that this case is DISMISSED WITH
2 PREJUDICE to Plaintiff's right to refile same or any part
3 thereof; that each party SHALL BEAR its own fees; and that any
4 eligible costs SHALL BE TAXED against Plaintiff.

5 IT IS SO ORDERED.

6 Dated: October 5, 2017

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8 JOHN A. MENDEZ,
9 UNITED STATES DISTRICT JUDGE
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