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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

OLENA LYSYUK,  
  
Plaintiff,  
  
v.  
  
I.C. SYSTEM, INC., a  
Minnesota corporation,  
  
Defendant.

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

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

This matter is before the Court on Plaintiff Olena Lysyuk's Amended Motion to Dismiss with Prejudice. Am. Mot., ECF No. 13. Defendant L.C. System, Inc. filed an opposition to Plaintiff's motion to dismiss, requesting payment of its costs and attorney's fees. Opp'n, ECF No. 14. After consideration of the parties' briefing on the motion and relevant legal authority, the Court will grant in part and deny in part Plaintiff's Amended Motion to Dismiss with Prejudice and allow Defendant to collect costs under Federal Rule of Civil Procedure 54(d)(1).<sup>1</sup>

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<sup>1</sup> 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.

I. BACKGROUND

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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 plaintiff<sup>2</sup> 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 <sup>2</sup> 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).<sup>3</sup> 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 <sup>3</sup> 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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9 JOHN A. MENDEZ,  
10 UNITED STATES DISTRICT JUDGE  
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