

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ERIN MUZYKA,  
  
Plaintiff,  
  
v.  
  
RASH CURTIS & ASSOCIATES,  
  
Defendant.

No. 2:18-cv-01097 WBS

MEMORANDUM AND ORDER RE:  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

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Plaintiff Erin Muzyka brought this action against defendant Rash Curtis & Associates. Plaintiff asserts that defendant violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq., and California's Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"), Cal. Civ. Code §§ 1788 et seq. Pursuant to Federal Rule of Civil Procedure 56, defendant now moves for summary judgment on all of plaintiff's claims.

I. Factual and Procedural Background

Defendant is a third-party debt collection agency.

(Keith Decl. ¶ 4 (Docket No. 17).) On May 7, 2015, defendant was assigned to collect an outstanding medical debt owed by plaintiff. (Id. ¶ 7.) Between 2015 and 2017, defendant called plaintiff about the outstanding debt. (Id. ¶ 10.) Sometimes, defendant called plaintiff more than once in a single day. (Id. ¶ 15.) In September 2017, plaintiff's counsel sent defendant a cease-and-desist letter demanding that defendant not engage in further with plaintiff. (Id., Ex. F.)

The parties dispute whether plaintiff told defendant to stop calling her at any point before the September 2017 cease-and-desist letter. Plaintiff contends that she spoke with representatives of Rash Curtis & Associates via telephone in summer 2016 and "repeatedly instructed them to stop calling her." (Pl.'s Opp. to Mot. for Sum. J., Ex. B ("Pl.'s Answers to Interrog.") at No. 7 (Docket No. 23-2).) Defendant denies that any of its representatives or employees ever made any contact with plaintiff. (Keith Decl. ¶ 10.)

Plaintiff also contends that defendant "threatened to file suit against [p]laintiff if she did not pay the balance of the alleged debt," but that it "did not follow through with that threat." (Pl.'s Answers to Interrog. at No. 8.)<sup>1</sup> Defendant denies that it ever spoke with plaintiff, let alone threatened legal action against her. (Keith Decl. ¶ 20.)

## II. Discussion

Summary judgment is proper "if the movant shows that

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<sup>1</sup> The court cites to plaintiff's interrogatory responses because plaintiff has not proffered any declarations or affidavits in support of these contentions.

1 there is no genuine dispute as to any material fact and the  
2 movant is entitled to judgment as a matter of law.” Fed. R. Civ.  
3 P. 56(a). A material fact is one that could affect the outcome  
4 of the suit, and a genuine issue is one that could permit a  
5 reasonable jury to enter a verdict in the non-moving party’s  
6 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
7 (1986).

8 The party moving for summary judgment bears the initial  
9 burden of establishing the absence of a genuine issue of material  
10 fact and can satisfy this burden by presenting evidence that  
11 negates an essential element of the non-moving party’s case.  
12 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

13 Alternatively, the movant can demonstrate that the non-moving  
14 party cannot provide evidence to support an essential element  
15 upon which it will bear the burden of proof at trial. Id. Any  
16 inferences drawn from the underlying facts must, however, be  
17 viewed in the light most favorable to the party opposing the  
18 motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475  
19 U.S. 574, 587 (1986).

20 A. FDCPA Claims

21 In 1977, Congress enacted the FDCPA “to eliminate  
22 abusive debt collection practices by debt collectors, to insure  
23 that those debt collectors who refrain from using abusive debt  
24 collection practices are not competitively disadvantaged, and to  
25 promote consistent State action to protect consumers against debt  
26 collection abuses.” 15 U.S.C. § 1692(e). The Act establishes a  
27 nonexclusive list of unlawful debt collection practices and  
28 provides for public and private remedies. Id. §§ 1692-1692p.

1 Plaintiffs bringing actions under the FDCPA must do so "within  
2 one year from the date on which the violation occurs." 15 U.S.C.  
3 § 1692k(d).

4 1. Calling plaintiff despite her alleged cease and  
5 desist request

6 Section 1692d of the FDCPA ("Section 1692d") prohibits  
7 debt collectors from engaging in "any conduct the natural  
8 consequence of which is to harass, oppress, or abuse any person  
9 in connection with the collection of a debt." 15 U.S.C. § 1692d.  
10 Courts have recognized that contacting debtor who has asked the  
11 debt collector to cease and desist communications may violate  
12 Section 1692d. See Arteaga v. Asset Acceptance, LLC, 733 F.  
13 Supp. 2d 1218, 1227 (E.D. Cal. 2010) (O'Neill, J.) ("[A] debt  
14 collector may harass a debtor by continuing to call the debtor  
15 after the debtor has requested that the debt collector cease and  
16 desist communication.") See also Moltz v. Firstsource Advantage,  
17 LLC, No. 08-CV-239S, 2011 WL 3360010, at \*3 (W.D.N.Y. Aug. 3,  
18 2011) (denying summary judgment for defendant debt collector on  
19 Section 1692d claim where plaintiff made verbal, but not written,  
20 request that defendant cease calls).

21 Plaintiff alleges that defendant violated Section 1692d  
22 by "continu[ing] to call [p]laintiff multiple times daily in  
23 spite of [p]laintiff's multiple demands to stop calling her."  
24 (Compl. ¶ 20.) Defendant argues that it is entitled to summary  
25 judgment on this claim because plaintiff has failed to put forth  
26 sufficient evidence to create a triable issue of fact as to  
27 whether she ever told defendant to stop calling her. See  
28 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)  
(quotation omitted) ("[A] party opposing a properly supported

1 motion for summary judgment may not rest upon the allegations or  
2 denials in the pleadings, but . . . must set forth specific facts  
3 showing that there is a genuine issue for trial."). Defendant  
4 contends that plaintiff has not set forth any "specific facts"  
5 showing that there is a genuine issue as to whether or not  
6 plaintiff ever told defendant to stop calling her. In support of  
7 this contention, defendant points to its "uncontroverted"  
8 evidence that it never spoke to plaintiff. (See Keith Decl. ¶  
9 10). Defendant also dismisses plaintiff's interrogatory answers  
10 as a mere "recitation" of the allegations in plaintiff's  
11 complaint. (Def.'s Reply in Supp. of Mot. for Summ. J. at 4  
12 (Docket No. 28.)

13 Federal Rule of Civil Procedure 56(c) explicitly  
14 permits district courts to consider "answers to interrogatories  
15 when reviewing a motion for summary judgment so long as the  
16 content of those interrogatories would be admissible at trial."  
17 Johnson v. Holder, 700 F.3d 979, 982 (7th Cir. 2012) (quoting  
18 Hardrick v. City of Bolingbrook, 522 F.3d 758, 761 (7th Cir.  
19 2008)). See also Alaska Ctr. for Env't v. Browner, 20 F.3d 981,  
20 986 (9th Cir. 1994) ("The federal rules specifically authorize  
21 the use of interrogatory answers in summary judgment  
22 practice[.]"). In order to be admissible at trial, an  
23 interrogatory answer must be made on personal knowledge.  
24 Johnson, 700 F.3d at 982.

25 In the instant case, plaintiff's opposition to  
26 defendant's Motion for Summary Judgment relies on her response to  
27 Interrogatory Number Two. That interrogatory read:

28 INTERROGATORY NO. 2:

For each and every date identified in YOUR response to Interrogatory No. 1, please state with specificity the substance of each conversation.

Plaintiff's response to it was:

While Plaintiff does not recall the exact dates of each telephone conversation she had with Defendant, she remembers repeatedly telling Defendant's collectors to stop the harassing collection calls.

(Pl.'s Answers to Interrog. at No. 2.)

This interrogatory response is based on plaintiff's personal knowledge, and there is no indication that plaintiff is incompetent to testify on this issue at trial. As such, under Federal Rule of Civil Procedure 56(c), plaintiff's response to Interrogatory Number Two is properly considered as evidence at the summary judgment stage. This evidence directly contradicts defendant's evidence that it never made contact with plaintiff. (See Keith Decl. ¶ 10.) The fact that plaintiff does not remember exactly when she told defendant to stop calling her does not fatally undermine the credibility of her evidence. See Krapf, 2010 WL 2025323, at \*2 (denying summary judgment for defendant in FDCPA case even though the plaintiff "could not specifically remember the dates when the [defendant] calling started or stopped." (emphasis in original)).<sup>2</sup> Defendant does

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<sup>2</sup> In Mammen v. Bronson & Migliaccio, LLP, 715 F. Supp. 2d 1210 (M.D. Fla. 2009), the court considered a Section 1692d claim brought by plaintiffs, one of whom who testified that the defendant debt collector told him "you're lying" during a debt collection call. Defendant's discussion of Mammen in its reply brief asserts that the Mammen court considered the plaintiffs' inability to specifically identify the phone call or caller he alleged harassed him in deciding to grant the defendant's motion for summary judgment. (Def.'s Reply in Supp. of Mot. for Summ.

1 not cite, and the court is not aware of any, caselaw requiring  
2 that a FDCPA plaintiff produce detailed contemporaneous notes  
3 authenticating the time and date of every call with a defendant  
4 debt collector in order to survive a motion for summary judgment.

5 Plaintiff's opposition to defendant's Motion for  
6 Summary Judgment also relies on defendant's call logs. (Pl.'s  
7 Opp. to Mot. for Summ. J., Ex. A (Docket No. 23-1).) Defendant's  
8 call log lists dozens of calls as "answered" and lasting for  
9 relatively long periods of time, e.g., 72 seconds, 39 seconds,  
10 and 84 seconds. Defendant claims that despite these nearly three  
11 dozen "answered" calls, it never spoke to plaintiff. (Keith  
12 Decl. ¶ 11.) Defendant explains that it has collection software  
13 and that if a live person had been detected when it called  
14 plaintiff, the software would have transferred the call to a  
15 collector and automatically notated the time and date of the  
16 connected call. (Id. ¶ 13.) Thus, the "answered" notation next  
17 to the outgoing calls, defendant contends, does not mean that it  
18 actually spoke with plaintiff.

19 Plaintiff offers a different interpretation of  
20 defendant's call logs: the calls demarcated as "answered" were  
21 answered by her, and, on at least one occasion in summer 2016,

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22 J. at 4.) This is technically true: the court did note that the  
23 plaintiffs were "unable to provide detailed information about the  
24 telephone calls [p]laintiffs received, including date, time, or  
25 day of the week." Id. at 1219. However, this does not appear to  
26 be the primary substantive reason that the Mammen court granted  
27 defendant's motion for summary judgment on the plaintiff's  
28 Section 1692d claim. The Mammen court held that calling someone  
a liar is not "akin to profanity or obscenity." Id. It was, in  
other words, the inadequacy of plaintiffs' allegations, not their  
lack of authentication, that was fatal to the plaintiffs' Section  
1692d claim in Mammen.

1 she told defendant to stop calling her, a request it allegedly  
2 ignored. (Pl.'s Answers to Interrog. at No. 2.) The court  
3 agrees that, when viewed in the light most favorable to the non-  
4 moving party, defendant's call logs could be interpreted as  
5 corroborating plaintiff's contentions. Plaintiff's answer to  
6 Interrogatory Number Two and the defendant's call logs raise a  
7 "genuine dispute" as to whether or not plaintiff told defendant  
8 to stop calling her at any point before her counsel mailed a  
9 cease and desist letter to defendant. Based on the factual record  
10 in this case, a reasonable jury could thus find that plaintiff  
11 and defendant spoke and that, on at least one occasion in summer  
12 2016, plaintiff orally told defendant to stop calling her. To  
13 the extent that this oral request also preceded any of  
14 defendant's calls, its materiality is undisputed. Defendant  
15 itself admits that a plaintiff would have a viable Section 1692d  
16 claim against a defendant that called the plaintiff "after  
17 receiving a cease and desist." (Mot. for Summ. J. at 6.) See  
18 Arteaga, 733 F.Supp.2d at 1227. See also Tucker, 710 F. Supp. 2d  
19 at 1305 (describing hypothetical repeated calls to a debtor who  
20 asked debt collector to cease calling as "oppressive conduct").

21 Defendant also argues that plaintiff's Section 1692d  
22 claim is time-barred. The FDCPA's one year statute of  
23 limitations is subject to the discovery rule, under which the  
24 limitations period begins to run only when a plaintiff "knows or  
25 reasonably could have become aware of" an alleged violation.  
26 Bondi v. Nationstar Mortg. LLC, 752 F. App'x 431, 433 (9th Cir.  
27 2018) (internal quotations and citation omitted). Defendant  
28 contends that plaintiff's Section 1692d claim is not timely



1 because it was not brought within one year of plaintiff's  
 2 "discovery" of the defendant's first alleged Section 1692d  
 3 violation in summer 2016, i.e., the first time that defendant  
 4 allegedly called plaintiff after orally being asked not to.

5 This argument fails because under plaintiff's theory of  
 6 defendant's Section 1692d liability, each of the fourteen calls  
 7 that occurred after May 2017 was harassing and abusive since it  
 8 occurred after plaintiff repeatedly told defendant not to call  
 9 her. The fact that plaintiff allegedly learned of defendant's  
 10 first alleged violation in summer 2016 does not bar her from  
 11 asserting claims based on subsequent violations which occurred  
 12 within the statutory period. As such, when the evidence is  
 13 viewed in the light most favorable to the non-moving party,  
 14 plaintiff's Section 1692d claim is not time-barred because it is  
 15 based, in part, on conduct which occurred within the applicable  
 16 statutory period.

## 17 2. Excessive Calling

18 Although plaintiff states that her claim of excessive  
 19 calling is based on both Section 1692d and Section 1692d(5), the  
 20 court considers that claim only under Section 1692d(5).<sup>3</sup>

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21 <sup>3</sup> Numerous courts have found that "concurrent claims for  
 22 violations of § 1692d and § 1692d(5) must be treated as a single  
 23 claim under § 1692d(5) where . . . the underlying conduct fits  
 24 squarely within § 1692d(5)." Hollis v. LVNV Funding, No. EDCV  
 25 18-1866 JGB KKx, 2019 WL 1091336, at \*3 (C.D. Cal. Jan. 2, 2019)  
 26 (internal quotations and citation omitted). See, e.g., Fields v.  
 27 Credit Mgmt. Sys., No. EDCV 14-1853 JGB (SPx), 2015 WL 11367930,  
 28 at \*6 (C.D. Cal. Nov. 23, 2015) ("[W]here there is no factual  
 distinction between the underlying allegations, bringing two  
 separate claims under sections 1692d and 1692d(5) for harassment  
 by telephone is redundant, and as such, improper."); Stirling v.  
Genpact Servs., LLC, No. 2:11-CV-06369-JHN, 2012 WL 952310, at \*3  
 (C.D. Cal. Mar. 19, 2012) (declining to allow a plaintiff to

1           Section 1692d(5) of FDCPA specifically prohibits  
2   "[c]ausing a telephone to ring or engaging any person in  
3   telephone conversation repeatedly or continuously with intent to  
4   annoy, abuse, or harass any person at the called number."

5           Plaintiff alleges that defendant called her cellphone  
6   "daily, often multiple times per day." (Compl. ¶ 11.)  
7   Defendant's records indicate it called plaintiff 18 times in  
8   2015, approximately 90 times in 2016, and approximately 12 times  
9   from the number 866-729-2722 in 2017. (Keith Decl. ¶ 10.)  
10   Plaintiff has not produced any evidence that defendant called her  
11   more frequently than defendant's records indicate. Plaintiff  
12   alleges that the mere volume of calls she received from defendant  
13   raises a triable issue of fact as to defendant's intent in  
14   placing those calls. Defendant disputes this claim and cites  
15   several district court opinions holding that a FDCPA defendant's  
16   high call volumes alone did not evidence abusive intent. See  
17   e.g. Jiminez v. Accounts Receivable Mgmt., Inc., No. CV 09-9070-  
18   GW AJWx, 2010 WL 5829206 at \*5 (C.D. Cal. Nov. 15, 2010)  
19   (granting summary judgment on Section 1692d claim where defendant  
20   called plaintiff 72 times in 115 days because, absent some  
21   unacceptable pattern of calls, "any reasonable juror" could only  
22   find that the debt collector's calls were placed "with the intent

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23   concurrently pursue Section 1692d and Section 1692d(5) claims on  
24   the grounds that doing so would "effectively eviscerate the  
25   requisite intent contemplated in situations governed by §  
26   1692d(5)" and "render that entire subsection superfluous.").  
27   Plaintiff's excessive calling allegations fit squarely within the  
28   purview of Section 1692d(5). Given this, the court declines to  
consider plaintiff's redundant Section 1692d claim for excessive  
calling and will evaluate plaintiff's excessive calling  
allegations exclusively under Section 1692d(5).

1 to reach [plaintiff] to collect the [debt] and not with the  
2 intent to annoy, abuse, or harass); Tucker v. CBE Grp., Inc., 710  
3 F. Supp. 2d 1301 (M.D. Fla. 2010) (granting summary judgment for  
4 defendant on Section 1692d because 57 calls, seven of which were  
5 on a single day, do not evidence an intent to annoy); Jones v.  
6 Rash Curtis & Assocs., No. C 10-00225 JSW, 2011 WL 2050195, at \*3  
7 (N.D. Cal. Jan. 3, 2011) (granting summary judgment for defendant  
8 on Section 1692d claim because 179 calls in a year, in and of  
9 itself, did not raise a triable issue as to whether the calls  
10 were initiated with intent to harass).

11 Defendant also relies heavily on Arteaga, 733 F. Supp.  
12 2d 1218. In that case, Judge O'Neill held that absent some other  
13 egregious feature of the calls, "daily" or "near daily" telephone  
14 calls did not constitute harassment as a matter of law. In  
15 granting the defendant debt collector's motion for summary  
16 judgment on the plaintiff's Section 1692d and 1692d(5) claims,  
17 Judge O'Neill cited the absence of evidence that "[defendant]  
18 called [plaintiff] immediately after she hung up, called multiple  
19 times in a single day, called her place of employment, family, or  
20 friends, called at odd hours, or called after she requested  
21 [defendant] to cease calling." Id. at 1229. Relying on Arteaga,  
22 defendant contends that plaintiff's Section 1692d(5) claim fails  
23 as a matter of law because "in cases where there is only a high  
24 frequency of calls, some conduct does not constitute harassment  
25 as a matter of law." (Def.'s Mot. in Supp. of Summ. J. at 6  
26 (Docket No. 13).)

27 Defendant is correct that many district courts  
28 considering Section 1692d(5) claims have granted summary judgment

1 for defendants where there is a high volume of calls but no other  
2 factors indicative of an intent to annoy, e.g. calls at  
3 inconvenient hours or locations. However, several district  
4 courts have been more reluctant to resolve the question of intent  
5 at the summary judgment stage. In Akalwadi v. Risk Management  
6 Alternatives, Inc., 336 F. Supp. 2d 492 (D. Md. 2004), for  
7 example, the court denied cross-motions for summary judgment  
8 where the defendant made 26 or 28 calls to plaintiff in a two-  
9 month period, including three on one day. After noting the  
10 "disagreement among district courts as to the specific volume and  
11 pattern of calls that will allow a plaintiff to raise a triable  
12 issue of fact of the defendant's intent to annoy or harass," the  
13 court in Krapf v. Nationwide Credit Inc., No. SACV 09-00711  
14 JVSMLG, 2010 WL 2025323, at \*3 (C.D. Cal. May 21, 2010), likewise  
15 denied summary judgment to a defendant that had called the  
16 plaintiff 180 times in a single month.

17 This court is of the mind that sometimes, as the court  
18 in Majeski v. I.C. System, Inc., No. 08 CV 5583, 2010 WL 145861  
19 (N.D. Ill. Jan. 8, 2010), noted, "the reasonableness of the  
20 volume and pattern of telephone calls is a question of fact best  
21 left to a jury." See id. at \*3. It is true that in the instant  
22 case, plaintiff provides no evidence that defendant called her at  
23 an inconvenient location or at inappropriate hours. Nor are  
24 there allegations or evidence that defendant used abusive  
25 language. There is simply the volume, extent, and frequency of  
26 defendant's calls, which occurred between 2015 and 2017, at most  
27 90 in a year, and sometimes more than once in a single day.  
28 Perhaps defendant's first and second calls to plaintiff were made

1 purely with the intent to reach plaintiff to collect the debt.  
2 But was the eightieth? The hundredth? The hundred and  
3 twentieth? In the view of this court, these circumstances give  
4 rise to a genuine disputed issue of material fact as to  
5 defendant's intent that is not appropriately resolved at the  
6 summary judgment stage. If, as defendant maintains, it never  
7 made contact with plaintiff, why did it persist in calling her  
8 after dozens and dozens of unanswered calls? Plaintiff's theory  
9 -- that defendant engaged in this conduct because it intended to  
10 grind her down, harass and oppress her with the sheer volume and  
11 incessance of its calls -- is no less plausible than defendant's  
12 explanation that it called merely to collect the debt. As such,  
13 there is a genuine dispute as to the material fact of whether or  
14 not defendant called plaintiff with the intent to harass, abuse,  
15 or oppress her.

16 Defendant also argues that plaintiff's Section 1692d(5)  
17 claim is time-barred. Specifically, it contends that all conduct  
18 occurring before May 2, 2017 is outside the statutory period and  
19 that since defendant only called plaintiff 14 times after May 2,  
20 2017, it did not intend to harass her: 14 calls in a year does  
21 not, as a matter of law, defendant contends, evidence abusive  
22 intent.

23 Plaintiff counters that because of the "continuing  
24 violation" doctrine, her Section 1692d(5) claim is not in any way  
25 time barred. (Pl.'s Opp. to Mot. for Summ. J. at 8-9 (Docket No.  
26 23).) Under that doctrine, which district courts have applied in  
27 the FDCPA context, a plaintiff may recover "for actions that take  
28 place outside the limitations period if these actions are

1 sufficiently linked to unlawful conduct within the limitations  
2 period [.]” Komarova v. Nat’l Credit Acceptance, Inc., 175 Cal.  
3 App. 4th 324, 343 (1st Dist. 2009) (quoting Richards v. CH2M  
4 Hill, Inc., 26 Cal. 4th 798, 812 (2001)). “The key is whether  
5 the conduct complained of constitutes a continuing pattern and  
6 course of conduct as opposed to unrelated discrete acts.” Joseph  
7 v. J.J. Mac Intyre Cos., L.L.C., 281 F. Supp. 2d 1156, 1161 (N.D.  
8 Cal. 2003). If there is a pattern of allegedly unlawful conduct,  
9 a suit is timely filed if it is brought “within one year of the  
10 most recent date on which the defendant is alleged to have  
11 violated the FDCPA.” Id. (quoting Padilla v. Payco Gen. Am.  
12 Credits, Inc., 161 F. Supp. 2d 264, 273 (S.D.N.Y. 2001)).

13 Defendant’s call logs evidence a relatively steady  
14 stream of telephone calls that began in 2015 and continued up  
15 until August 2017. Plaintiff’s Section 1602d(5) claim is  
16 predicated on the repetitive and continuous nature of these  
17 calls. As such, the fourteen calls which occurred within the  
18 statutory period are united with the dozens that preceded them in  
19 a single course of conduct. Plaintiff’s 1692d(5) claim was  
20 brought “within one year of the most recent date on which the  
21 defendant is alleged to have violated [Section 1692d(5)].” See  
22 Joseph, 281 F. Supp. 2d at 1161. Accordingly, it is not barred  
23 by the statute of limitations.

24 3. Unfair or unconscionable means of debt collection

25 Section 1692f of the FDCPA (“Section 1692f”) prohibits  
26 a debt collector from using “unfair or unconscionable means to  
27 collect or attempt to collect any debt.” 15 U.S.C. § 1692f.  
28 Plaintiff alleges that defendant violated Subsection 1692f of the

1 FDCPA by: (1) calling her an excessive number of times between  
2 early 2016 and September 2017; and (2) falsely threatening to  
3 pursue legal action against her without actually intending to  
4 pursue that course of action. (Compl. ¶ 22.)

5 Section 1692f "serves a backstop function, catching  
6 those 'unfair practices' which somehow manage to slip by §§ 1692d  
7 & 1692e." Edwards v. McCormick, 136 F. Supp. 2d 795, 806 (S.D.  
8 Ohio 2001). Given this purpose, "courts have dismissed claims  
9 under 15 U.S.C. § 1692f where such claims are based on facts that  
10 are also the basis for another more specific FDCPA claim."

11 Martin v. Target Card Servs., No. CV 17-5372 PA (MRWx), 2018 WL  
12 2723258, at \*5 (C.D. Cal. Apr. 24, 2018). See, e.g., Lake v.  
13 Consumer Adjustment Co., Inc., No. 4:15-CV-01495-JCH, 2015 WL  
14 8770719, at \*4 (E.D. Mo. Dec. 14, 2015) (dismissing a plaintiff's  
15 claim under Section 1692f which arose from the same set of  
16 factual allegations as his Section 1692e claim); Foti v. NCO Fin.  
17 Sys., Inc., 424 F. Supp. 2d 643, 667 (S.D.N.Y. 2006) (holding  
18 that the plaintiffs' Section 1692f claim was deficient where the  
19 plaintiffs did not "identify any misconduct beyond that which  
20 Plaintiffs assert violate other provisions of the FDCPA.");  
21 Turner v. Prof'l Recovery Servs., Inc., 956 F. Supp. 2d 573, 580-  
22 81 (D.N.J. 2013) (granting summary judgment for defendant on §  
23 1692f claim based entirely on alleged conduct encompassed by  
24 Sections 1692c(a)(1) and 1692d of the FDCPA).

25 Thus, to the extent that plaintiff's Section 1692f  
26 claim is grounded in defendant's allegedly excessive phone calls,  
27 the court will dismiss that claim because those allegations were  
28 already considered in the context of plaintiff's Section 1692d(5)

1 claim.

2 Plaintiff also alleges that defendant violated Section  
3 1692f by falsely threatening, in November 2016, to file a lawsuit  
4 against plaintiff.<sup>4</sup> (Compl. ¶ 22.) Defendant contends that this  
5 claim is time barred.

6 Though the continuing violation doctrine saves  
7 plaintiff's Section 1692d(5) claim from being untimely, it cannot  
8 do the same for plaintiff's Section 1692f claim. Plaintiff  
9 alleges a single discrete empty threat of litigation that  
10 occurred in November 2016, and not, for example, a series of  
11 empty threats that began in November 2016 and continued beyond  
12 May 2017. The alleged violation is not a "pattern" of behavior  
13 that spans across and beyond the limitations period, but a  
14 discrete act that occurred well before May 2, 2017. As such,  
15 plaintiff's claim that defendant violated Section 1692f by  
16 threatening litigation, without intending to pursue it, is time-  
17 barred.

18 For the foregoing reasons, the court will grant  
19 defendant's Motion for Summary Judgment with respect to  
20 plaintiff's Section 1692f claim.

21 B. Rosenthal Act Claim

22 California's Rosenthal Act prohibits debt collectors  
23

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24 <sup>4</sup> Since Section 1692e(5) explicitly prohibits debt collectors  
25 from makings "threat[s] to take any action that cannot legally be  
26 taken or that is not intended to be taken," these facts would  
27 arguably more appropriately form the basis of a Section 1692e  
28 claim. Since claims arising out of defendant's alleged November  
2016 claim are time barred, however, the court declines to grant  
summary judgment for defendant merely because plaintiff has  
improperly denominated her claims.



1 from engaging in unfair or deceptive practices in the collection  
2 of consumer debts. Cal. Civ. Code § 1788.1. Under the Rosenthal  
3 Act, "every debt collector collecting or attempting to collect a  
4 consumer debt shall comply with the provisions of Sections 1692b  
5 to 1692j, inclusive, of, and shall be subject to the remedies in  
6 Section 1692k of, Title 15 of the United States Code." Cal. Civ.  
7 Code § 1788.17.

8 Because the court finds that summary judgment is not  
9 appropriate on plaintiff's Section 1692d and Section 1692d(5)  
10 FDCPA claims, the court must also deny defendant's motion for  
11 summary judgment on her Rosenthal Act claim, to the extent that  
12 that claim is premised on defendant's alleged violation of those  
13 sections of the FDCPA.

14 IT IS THEREFORE ORDERED that defendant's Motion for  
15 Summary Judgment (Docket No. 12) be, and hereby is, GRANTED with  
16 respect to plaintiff's claim that defendant violated Section  
17 1692f by engaging in unfair and unconscionable debt collection  
18 practices;

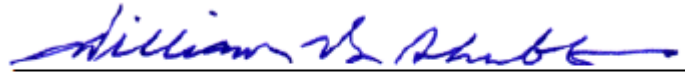
19 IT IS FURTHER ORDERED that defendant's Motion for  
20 Summary Judgment be, and hereby is, DENIED with respect to  
21 plaintiff's claim that defendant violated Section 1692d by  
22 calling her after she requested it cease and desist contacting  
23 her;

24 IT IS FURTHER ORDERED that defendant's Motion for  
25 Summary Judgment be, and hereby is, also DENIED with respect to  
26 plaintiff's claim that defendant violated Section 1692d(5) by  
27 calling her excessively;

28 AND IT IS FURTHER ORDERED that defendant's Motion for

Summary Judgment be, and hereby is, DENIED with respect to  
plaintiff's Rosenthal Act claim.

Dated: July 3, 2019



WILLIAM B. SHUBB  
UNITED STATES DISTRICT JUDGE