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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTINA PEARSON,

Plaintiff,

v.

APRIA HEALTHCARE GROUP,
INC. and ARSTRAT, LLC,

Defendants.

Case No.: 3:19-cv-02400-WQH-JLB

ORDER

HAYES, Judge:

The matters pending before the Court are the Motion for Summary Judgment filed by Defendant Apria Healthcare Group, Inc. (ECF No. 44); the Motion to Seal filed by Defendant Apria Healthcare Group, Inc. (ECF No. 45); the Motions to Seal filed by Plaintiff Christina Pearson (ECF Nos. 52, 55); and the Motions for Summary Judgment filed by Plaintiff Christina Pearson (ECF Nos. 71, 72).

I. PROCEDURAL BACKGROUND

On December 13, 2019, Plaintiff Christina Pearson initiated this action by filing a Complaint against Defendants Apria Healthcare Group, Inc. (“Apria”) and ARSTRAT, LLC (“ARS”). (ECF No. 1). Plaintiff alleges that “[t]his is a case about a healthcare provider and its debt collection agency [that] deliberately dunned a military spouse instead of her military insurance carrier for her child’s nebulizer.” *Id.* at 2. Plaintiff alleges that

1 Defendants “continued to dun her even after they knew that [] she and her child had
2 insurance which covered the machine, and even after they acknowledged – to her – that
3 they knew she didn’t owe the debt.” *Id.* Plaintiff brings the following five causes of action:
4 (1) violation of the Fair Debt Collection Practices Act (“FDCPA”) (15 U.S.C. § 1692c)
5 against Defendant ARS; (2) violation of the FDCPA (15 U.S.C. § 1692e) against Defendant
6 ARS; (3) violation of the FDCPA (15 U.S.C. § 1692f) against Defendant ARS; (4) violation
7 of the Rosenthal Fair Debt Collection Practices Act (“RFDCPA”) (California Civil Code
8 § 1812.700) against Defendant ARS; and (5) violation of the RFDCPA (California Civil
9 Code § 1788.17) against Defendants ARS and Apria. *See id.* at 11-14. Plaintiff seeks
10 actual and statutory damages, costs and attorneys’ fees, and “such other and further relief
11 as may be just and proper.” *Id.* at 14-15.

12 On December 8, 2020, Defendant Apria filed a Motion for Summary Judgment (ECF
13 No. 44) and a Motion to Seal (ECF No. 45). On January 4, 2021, Plaintiff filed a Motion
14 to Seal (ECF No. 52) and a Response in opposition to Defendant Apria’s Motion for
15 Summary Judgment (ECF No. 54)¹. On January 5, 2021, Plaintiff filed a Motion to Seal
16 (ECF No. 55). On January 25, 2021, Defendant Apria filed a Reply to its Motion for
17 Summary Judgment. (ECF No. 66). On January 28, 2021, Plaintiff filed a Corrected
18 Response in opposition to Defendant Apria’s Separate Statement of Undisputed Material
19 Facts and a Corrected Separate Statement of Undisputed Material Facts. (ECF No. 70).

20 On February 11, 2021, Plaintiff filed a Motion for Summary Judgment against
21 Defendant Apria (ECF No. 71) and a Motion for Summary Judgment against Defendant
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¹ Plaintiff requests the Court to take judicial notice of Exhibits J (ECF No. 54-13) and K (ECF No. 54-14) filed in support of Plaintiff’s Response in opposition to Defendant Apria’s Motion for Summary Judgment. *See* ECF No. 54-17. Plaintiff further requests the Court to “take judicial notice of the fact that Pacific Time zone is 2 hours behind Central” filed in support of Plaintiff’s Reply to her Motion for Summary Judgment against Defendant ARS. (ECF No. 80 at 6). The Court has not considered these exhibits or this fact in resolving this Order. Plaintiff’s requests for judicial notice are denied. *See Asvesta v. Petroutsas*, 580 F.3d 1000, 1010 n.12 (9th Cir. 2009) (denying request for judicial notice where judicial notice would be “unnecessary.”).

1 ARS (ECF No. 72). On February 25, 2021, Defendant Apria filed a Response in opposition
2 to Plaintiff’s Motion for Summary Judgment (ECF No. 74) and a Response in opposition
3 to Plaintiff’s Corrected Response in opposition to Defendant Apria’s Separate Statement
4 of Undisputed Material Facts and Corrected Separate Statement of Undisputed Material
5 Facts (ECF No. 75). On the same day, Defendant ARS filed a Response in opposition to
6 Plaintiff’s Motion for Summary Judgment (ECF No. 76) and a Response in opposition to
7 Plaintiff’s Corrected Response in opposition to Defendant Apria’s Separate Statement of
8 Undisputed Material Facts and Corrected Separate Statement of Undisputed Material Facts
9 (ECF No. 77). On March 4, 2021, Plaintiff filed a Reply to her Motion for Summary
10 Judgment against Defendant Apria (ECF No. 79) and a Reply to her Motion for Summary
11 Judgment against Defendant ARS (ECF No. 80). On March 11, 2021, the Court heard oral
12 argument on the Motions for Summary Judgment. (ECF No. 82).

13 **II. FACTS²**

14 On October 14, 2017, Plaintiff received a nebulizer from Defendant Apria on behalf
15 of her minor daughter. *See* Pl.’s Resp. to Def. Apria’s Separate Statement of Undisputed
16 Material Facts (“SSUMF”) ¶ 1, ECF No. 70 at 2. Defendant Apria “generated a Sales,
17 Service, and Rental Agreement (‘SSRA’) for the nebulizer it provided to Plaintiff for her
18 daughter.” *Id.* ¶ 2, ECF No. 70 at 2. The SSRA includes a financial responsibility term,
19 which states, in relevant part, “the patient’s Third Party Payor may refuse to authorize or
20 pay for further treatment . . . , with the result that the Responsible Party will . . . become
21 financially responsible for ongoing rental or purchase charges and the cost of related
22 Equipment” *Id.* ¶ 4, ECF No. 70 at 6 (emphasis omitted); Ex. 1 to Patton Decl., ECF
23 No. 46-3 at 8. The SSRA further states, in relevant part, “[i]f the Company determines that
24 any Equipment for which payment has not been properly arranged cannot be returned to
25 the Company without unreasonably endangering the patient, the Company may . . . transfer
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28 ² The parties have filed evidentiary objections, which have been reviewed by the Court. *See* ECF No. 54-1; 66-2; 70; 74-1; 75; 77; 79-1; 80-1. The parties’ evidentiary objections do not affect this Order.

1 ownership of such Equipment to the patient and charge the Responsible Party the remaining
2 Third Party Payor contract balance to purchase the same” Pl.’s Resp. to Def. Apria’s
3 Separate Statement of Additional Undisputed Material Facts (“SSAUMF”) ¶ 99, ECF No.
4 79-1 at 3; Ex. 1 to Patton Decl., ECF No. 46-3 at 12.

5 One of Defendant Apria’s Billing Center Quality Specialists states in a sworn
6 declaration that

7 [Defendant] Apria’s standard business practice is to provide a copy of the
8 SSRA upon delivery of its equipment to the customer’s home. If the customer
9 is not home at the time of the delivery or is otherwise not available to sign
10 the SSRA, it is [Defendant] Apria’s standard business practice for the
11 technician completing delivery to “porch” the SSRA, meaning that the SSRA
is left with the equipment at the delivery location, without requiring a
signature.

12 Patton Decl. ¶ 5, ECF No. 44-5 at 3-4.

13 “The nebulizer was rented to Plaintiff on monthly basis from [Defendant] Apria, for
14 which [Plaintiff’s insurance provider] Tricare made payments of \$3.34/month” “from
15 October 2017 to June 2018.” Def. Apria’s Resp. to Pl.’s Separate Statement and
16 Supplemental Separate Statement of Undisputed Material Facts (“SS & SSSUMF”) ¶ 26,
17 ECF No. 75 at 24; Pl.’s Resp. to Def. Apria’s SSAUMF ¶ 100, ECF No. 79-1 at 3. In
18 December of 2018, Defendant Apria converted the nebulizer rental arrangement into a
19 purchase arrangement even though Plaintiff did not request to purchase the nebulizer. *See*
20 Def. Apria’s Resp. to Pl.’s SS & SSSUMF ¶¶ 54-55, ECF No. 75 at 32-33.

21 In January of 2019, Plaintiff received a bill from Defendant Apria for \$117.59,
22 “stating that this account was ‘seriously past due’ and a payment was expected
23 ‘immediately.[.]’” *Id.* ¶ 57, ECF No. 75 at 33; *see also* Pl.’s Resp. to Def. Apria’s SSUMF
24 ¶ 11, ECF No. 70 at 9; Pl.’s Resp. to Def. Apria’s SSAUMF ¶ 101, ECF No. 79-1 at 4. The
25 bill stated that Defendant “Apria is currently missing or has invalid information on file that
26 is required by your insurance plan. Please contact your plan for resolution.” Pl.’s Resp. to
27 Def. Apria’s SSUMF ¶ 11, ECF No. 70 at 9; Pl.’s Resp. to Def. Apria’s SSAUMF ¶ 101,
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1 ECF No. 79-1 at 4; *see also* Def. Apria’s Resp. to Pl.’s SS & SSSUMF ¶ 58, ECF No. 75
2 at 33-34. Plaintiff and Defendant Apria disagreed as to who was responsible for the
3 payment. *See* Def. Apria’s Resp. to Pl.’s SS & SSSUMF ¶¶ 60, 63-65 ECF No. 75 at 34-
4 36.

5 On February 11, 2019, Plaintiff called Defendant Apria and spoke to one of
6 Defendant Apria’s representatives. *See* Pl.’s Resp. to Def. Apria’s SSUMF ¶ 12, ECF No.
7 70 at 9. Defendant Apria’s representative provided Plaintiff the representative’s contact
8 information and cautioned Plaintiff that if Plaintiff continued to receive bills from
9 Defendant Apria, she should call her back. *See id.* ¶ 13, ECF No. 70 at 10. From February
10 to September 2019, Defendant Apria continued to send Plaintiff bills each month. *See id.*
11 ¶ 15, ECF No. 70 at 11; *see also* Def. Apria’s Resp. to Pl.’s SS & SSSUMF ¶ 75, ECF No.
12 75 at 40. “Between February and September 2019, Plaintiff did not pay or respond to any
13 bills from [Defendant] Apria”, “threw the bills away”, “did not contact Tricare to discuss
14 whether it was not paying for the nebulizer”, and did not contact the Defendant Apria
15 representative that she spoke with on February 11, 2019. Pl.’s Resp. to Def. Apria’s
16 SSUMF ¶¶ 16-17, ECF No. 70 at 11-12.

17 On September 9, 2019, Defendant Apria employed Defendant ARS to collect on
18 Plaintiff’s debt. *See* Def. ARS’s Resp. to Pl.’s Separate Statement and Supplemental
19 Separate Statement of Undisputed Material Facts (“SS & SSSUMF”) ¶ 76, ECF No. 77 at
20 16. The principal business purpose of Defendant ARS is to collect on debts owed to other
21 companies. *See id.* ¶ 91, ECF No. 77 at 19. Defendant ARS identifies debts as being owed
22 to Defendant Apria when it calls patients. *See* Def. Apria’s Resp. to Pl.’s SS & SSSUMF
23 ¶ 83, ECF No. 75 at 42. At the inception of its collection efforts, Defendant ARS received
24 a datafile from Defendant Apria containing Plaintiff’s phone number and San Diego,
25 California address. *See* Def. ARS’s Resp. to Pl.’s SS & SSSUMF ¶ 93, ECF No. 77 at 19.
26 Defendant ARS used the phone number (920) 283-1508 to call Plaintiff. *See id.* ¶ 77, ECF
27 No. 77 at 16. Defendant ARS called Plaintiff in attempt to collect on a debt. *Id.* ¶ 96, ECF
28 No. 77 at 20. The “collection activity on the debt” by Defendant ARS “occurred over the

1 period of one week, September 12 to 19, 2019.” Pl.’s Resp. to Def. ARS’s Separate
2 Statement of Undisputed Material Facts (“SSUMF”) ¶ 105, ECF No. 80-1 at 3. Plaintiff
3 states that, in September of 2019, she received at least three calls from Defendant ARS on
4 behalf of Defendant Apria in which a 920 area code phone number appeared on her phone
5 and that she did not answer any of the calls because she suspected the caller to be a
6 telemarketer. *See* Pl. Decl. ¶ 46, ECF No. 54-2 at 6; Ex. Q to Felipe Decl., ECF No. 76-4
7 at 6; Pl.’s Resp. to Def. ARS’s SSUMF ¶¶ 98-99, ECF No. 80-1 at 2. The account notes
8 produced by Defendant ARS state that it called Plaintiff four times in September of 2019.
9 *See* Ex. P to Cardoza Decl., ECF No. 72-5 at 2-3.

10 On September 19, 2019, Plaintiff called the (920) 283-1508 phone number because
11 she wanted to identify the caller and told Defendant ARS to stop calling her. *See* Pl.’s
12 Resp. to Def. ARS’s SSUMF ¶¶ 100-02, 104, ECF No. 80-1 at 2-3. Defendant ARS
13 “stopped calling and ceased all collection efforts on Plaintiff.” *Id.* ¶ 103, ECF No. 80-1 at
14 3. On September 25, 2019, Plaintiff called Defendant Apria. *See* Pl.’s Resp. to Def.
15 Apria’s SSUMF ¶ 20, ECF No. 70 at 12. Defendant “Apria reported that it had recalled
16 the collections effort.” *Id.*

17 **III. STANDARD OF REVIEW**

18 “The inquiry performed [at the summary judgment stage] is the threshold inquiry of
19 determining whether there is the need for a trial—whether, in other words, there are any
20 genuine factual issues that properly can be resolved only by a finder of fact because they
21 may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477
22 U.S. 242, 250 (1986). “A party may move for summary judgment, identifying each claim
23 or defense--or the part of each claim or defense--on which summary judgment is sought.
24 The court shall grant summary judgment if the movant shows that there is no genuine
25 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
26 Fed. R. Civ. P. 56(a). A material fact is one that is relevant to an element of a claim or
27 defense and whose existence might affect the outcome of the suit. *See Matsushita Elec.*
28 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The materiality of a fact is

1 determined by the substantive law governing the claim or defense. *See Anderson*, 477 U.S.
2 at 248.

3 “On summary judgment, the moving party bears the [initial] burden of establishing
4 the basis for its motion and identifying evidence that demonstrates the absence of a genuine
5 issue of material fact.” *Davis v. United States*, 854 F.3d 594, 598 (9th Cir. 2017) (citing
6 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). “[W]ith respect to an issue on which
7 the nonmoving party bears the burden of proof . . . , the burden on the moving party may
8 be discharged by ‘showing’—that is, pointing out to the district court—that there is an
9 absence of evidence to support the nonmoving party’s case” and not by “*negating* the
10 opponent’s claim.” *Celotex*, 477 U.S. at 323, 325.

11 The burden then shifts to the nonmovant to provide admissible evidence, beyond the
12 pleadings, of specific facts showing a genuine issue for trial. *See Anderson*, 477 U.S. at
13 256. To survive summary judgment, the nonmovant cannot rest solely on “conclusory
14 allegations of the complaint” or “conclusory allegations of an affidavit [or declaration].”
15 *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990). “A conclusory, self-serving
16 affidavit [or declaration], lacking detailed facts and any supporting evidence, is insufficient
17 to create a genuine issue of material fact.” *F.T.C. v. Publ’g Clearing House, Inc.*, 104 F.3d
18 1168, 1171 (9th Cir. 1997), *as amended* (Apr. 11, 1997). Instead, the nonmovant must
19 designate which specific facts show that there is a genuine issue for trial. *See Anderson*,
20 477 U.S. at 256. “In short, what is required to defeat summary judgment is simply evidence
21 ‘such that a reasonable juror drawing all inferences in favor of the respondent could return
22 a verdict in the respondent’s favor.’” *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th Cir.
23 2017) (quoting *Reza v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015)).

24 “The evidence of the non-movant is to be believed, and all justifiable inferences are
25 to be drawn in his favor.” *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress & Co.*,
26 398 U.S. 144, 158-59 (1970)). The nonmoving party’s affidavit or “declaration is to be
27 accepted as true” and the nonmoving party’s “evidence should not be weighed against the
28 evidence of” the moving party. *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1289 (9th

1 Cir. 1987). “Credibility determinations, the weighing of the evidence, and the drawing of
2 legitimate inferences from the facts are jury functions, not those of a judge” *Anderson*,
3 477 U.S. at 255.

4 **IV. DISCUSSION**

5 **A. Defendant ARS – Violation of the FDCPA (15 U.S.C. § 1692c) (claim 1);** 6 **Violation of the FDCPA (15 U.S.C. § 1692e) (claim 2); Violation of the** 7 **FDCPA (15 U.S.C. § 1692f) (claim 3)**

8 Plaintiff moves for summary judgment on the first, second, and third claims alleging
9 that Defendant ARS violated the FDCPA by repeatedly calling Plaintiff before 8:00 a.m.
10 in an attempt to collect a debt on behalf of Defendant Apria. Plaintiff contends that there
11 is no dispute of material fact that Defendant ARS called Plaintiff before 8:00 a.m. on
12 several occasions in an attempt to collect on the debt in violation of the FDCPA (15 U.S.C.
13 § 1692c). Defendant ARS contends that it did not violate the FDCPA because the
14 unanswered calls to Plaintiff do not constitute a communication pursuant to the FDCPA.
15 Defendant ARS further asserts that Plaintiff has failed to present evidence that she received
16 a call from Defendant ARS before 8:00 a.m. in her local time. Defendant ARS asserts that
17 Plaintiff has failed to show that she has suffered any harm or injury-in-fact as a result of
18 the alleged violation by Defendant ARS.

19 The purpose of the FDCPA is “to eliminate abusive debt collection practices by debt
20 collectors, to insure that those debt collectors who refrain from using abusive debt
21 collection practices are not competitively disadvantaged, and to promote consistent State
22 action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692(e). “The
23 purpose of the Act . . . is to protect consumers from a host of unfair, harassing, and
24 deceptive debt collection practices without imposing unnecessary restrictions on ethical
25 debt collectors” and “to limit harassing, misleading, and fraudulent contacts and
26 communications with or about consumer debtors.” *Pressley v. Cap. Credit & Collection*
27 *Serv., Inc.*, 760 F.2d 922, 925 (9th Cir. 1985); *Romine v. Diversified Collection Servs., Inc.*,
28 155 F.3d 1142, 1149 (9th Cir. 1998). “The FDCPA notes that [c]ollection abuse takes

1 many forms, including obscene or profane language, threats of violence, telephone calls at
2 unreasonable hours, misrepresentation of a consumer’s legal rights, disclosing a
3 consumer’s personal affairs to friends, neighbors, or an employer, obtaining information
4 about a consumer through false pretense, impersonating public officials and attorneys, and
5 simulating legal process.” *Romine*, 155 F.3d at 1149 n.9 (alteration in original). However,
6 “mere information gathering or message delivery . . . are [not] the type [of activities] that
7 the FDCPA was designed to deter.” *Id.* at 1149.

8 To determine a violation of the FDCPA, district courts apply a “least sophisticated
9 debtor standard” *Wade v. Reg’l Credit Ass’n*, 87 F.3d 1098, 1100 (9th Cir. 1996).
10 “For example, [district courts] shall find a violation . . . if [a defendant]’s letter and
11 telephone call are likely to deceive or mislead a hypothetical least sophisticated debtor.”
12 *Id.* “[T]he caselaw makes clear that the question whether language in a [communication
13 would] confuse a least sophisticated debtor is a question of law.” *Terran v. Kaplan*, 109
14 F.3d 1428, 1432 (9th Cir. 1997).

15 15 U.S.C. § 1692c(a)(1) states that

16 (a) Communication with the consumer generally

17 Without the prior consent of the consumer given directly to the debt collector
18 or the express permission of a court of competent jurisdiction, a debt collector
19 may not communicate with a consumer in connection with the collection of
20 any debt—

21 (1) at any unusual time or place or a time or place known or which
22 should be known to be inconvenient to the consumer. In the absence
23 of knowledge of circumstances to the contrary, a debt collector shall
24 assume that the convenient time for communicating with a consumer
25 is after 8 o’clock antemeridian and before 9 o’clock postmeridian,
26 local time at the consumer’s location

25 15 U.S.C. § 1692c(a)(1). 15 U.S.C. § 1692e(2)(A) states that

26 A debt collector may not use any false, deceptive, or misleading
27 representation or means in connection with the collection of any debt.
28

1 Without limiting the general application of the foregoing, the following
2 conduct is a violation of this section:

3

4 (2) The false representation of--

5 (A) the character, amount, or legal status of any debt

7 15 U.S.C. § 1692e(2)(A). 15 U.S.C. § 1692f(1) states that

8 A debt collector may not use unfair or unconscionable means to collect or
9 attempt to collect any debt. Without limiting the general application of the
10 foregoing, the following conduct is a violation of this section:

11 (1) The collection of any amount (including any interest, fee, charge,
12 or expense incidental to the principal obligation) unless such amount
13 is expressly authorized by the agreement creating the debt or permitted
14 by law.

15 15 U.S.C. § 1692f(1). 15 U.S.C. § 1692a(2) states that “[t]he term ‘communication’
16 means the conveying of information regarding a debt directly or indirectly to any person
17 through any medium.” 15 U.S.C. § 1692a(2).

18 Defendant ARS contends that an unanswered call is not a communication under the
19 FDCPA or actionable under 15 U.S.C. §1692c because it does not actually convey
20 information. Defendant ARS cites to three cases in support of its contention: *Wilfong v.*
21 *Persolve, LLC*, No. 10–3083–CL, 2011 WL 2678925, at *4 (D. Or. June 2, 2011), *report*
22 *and recommendation adopted*, No. 10–3083–CL, 2011 WL 2601559 (D. Or. June 30,
23 2011) (concluding that receipt of an unanswered phone call without a message left on the
24 plaintiff’s phone does not constitute a communication within the meaning of the FDCPA);
25 *Worsham v. Accts. Receivable Mgmt., Inc.*, 497 F. App’x 274, 277 (4th Cir. 2012)
26 (concluding that unanswered phone calls can hardly be considered communications under
27 the FDCPA); and *Rush v. Portfolio Recovery Assocs. LLC*, 977 F. Supp. 2d 414, 423
28 (D.N.J. 2013) (concluding that the mere fact that the defendant’s phone number and a

1 portion of its name appeared on the plaintiff’s caller ID is insufficient to transform these
2 phone calls into communications under the FDCPA). *See* ECF No. 76 at 10-11.

3 Plaintiff contends that “[a] number of courts previously found that unanswered calls
4 without any information about the debt constituted communications under the FDCPA . .
5 . .” (ECF No. 80 at 3-4). However, Plaintiff’s cited cases involve voicemails regarding
6 debt collection. *See e.g., Rhodes v. Olson Assocs., P.C.*, 83 F. Supp. 3d 1096, 1106 n.6,
7 1107 (D. Colo. 2015) (concluding that voicemails constituted communications for
8 purposes of Section 1692e); *Dona v. Midland Credit Mgmt., Inc.*, No. CV 10–
9 0825(JS)(WDW), 2011 WL 941204, at *2 (E.D.N.Y. Feb. 10, 2011), *report and*
10 *recommendation adopted*, No. CV 10–0825(JS)(WDW), 2011 WL 939724 (E.D.N.Y.
11 Mar. 15, 2011) (recommending that the plaintiff’s motion for default judgment be granted
12 as to the plaintiff’s 15 U.S.C. § 1692e(11) claim because the “[p]laintiff claim[ed] to have
13 received numerous phone messages from the defendant in violation of 15 U.S.C. §
14 1692e(11)”; *Costa v. Nat’l Action Fin. Servs.*, 634 F. Supp. 2d 1069, 1076 (E.D. Cal.
15 2007) (concluding that messages left by the defendant on the plaintiff’s answering
16 machine constituted communications within the meaning of § 1692a(2)); *Hosseinzadeh v.*
17 *M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005) (concluding that
18 messages left by the defendant on the plaintiff’s answering machine constituted
19 communications); *Lensch v. Armada Corp.*, 795 F. Supp. 2d 1180, 1189 (W.D. Wash.
20 2011) (concluding that voicemails are communications that must conform to the
21 disclosure requirements of section 1692e(11)); *see also Cerrato v. Solomon & Solomon*,
22 909 F. Supp. 2d 139, 149 (D. Conn. 2012) (concluding that unanswered telephone calls
23 can constitute communications under the FDCPA—at least calls in which the debt
24 collector’s name and telephone number appear on the consumer’s caller ID display and
25 follow over 100 calls previously placed by that debt collector).

26 Denial of a plaintiff’s motion for partial summary judgment as to the plaintiff’s
27 FDCPA claim is appropriate when “no mention of [the] plaintiff’s debt was conveyed at
28 any time during” “telephone messages left with persons at [the] plaintiff’s place of

1 employment” because “these messages were not communications for purposes of the
2 FDCPA” *Martin v. L. Offs. of John F. Edwards*, No. 09cv0177 JAH(POR), 2011
3 WL 13177280, at *5 (S.D. Cal. Feb. 16, 2011). In addition, a “[d]efendant is entitled to
4 judgment as to [the plaintiff’s 15 USC § 1692e(11)] claim” when a voicemail “left for
5 [the] [p]laintiff [], which merely included the caller’s name and asked for a return call,
6 d[id] not convey, directly or even indirectly, any information regarding the debt owed.”
7 *Koby v. ARS Nat. Servs., Inc.*, No. 09cv0780 JAH (JMA), 2010 WL 1438763, at *4 (S.D.
8 Cal. Mar. 29, 2010).

9 In this case, the evidence in the record shows that Plaintiff received at least three
10 calls from Defendant ARS in September 2019. *See* Pl. Decl. ¶ 46, ECF No. 54-2 at 6. A
11 phone number with a 920 area code appeared on Plaintiff’s phone which Plaintiff did not
12 recognize. *See* Ex. Q to Felipe Decl., ECF No. 76-4 at 6. Plaintiff did not know the
13 identity of the caller and did not answer any of the calls because she suspected the caller
14 to be a telemarketer. *See id.*; Pl.’s Resp. to Def. ARS’s SSUMF ¶¶ 98-99, ECF No. 80-1
15 at 2. On September 19, 2019, Plaintiff called the phone number back to identify the caller,
16 identified the caller as Defendant ARS, and instructed Defendant ARS to stop calling her.
17 *See id.* ¶¶ 100-02, 104, ECF No. 80-1 at 2-3. After the September 19, 2019 call, Defendant
18 ARS “stopped calling and ceased all collection efforts on Plaintiff.” *Id.* ¶ 103, ECF No.
19 80-1 at 3.

20 Plaintiff did not recognize the phone number on display, did not know the caller’s
21 identity, and did not know what the calls were pertaining to until she called the phone
22 number back. Defendant ARS did not leave Plaintiff any voicemails or phone messages.
23 Plaintiff did not discern from the unanswered calls that Defendant ARS was attempting to
24 contact Plaintiff regarding a debt. Plaintiff was not aware of Defendant ARS’s
25 involvement or role as a debt collector before Plaintiff called the phone number back.

26 In this case, “information regarding a debt” was not conveyed “directly or
27 indirectly” to Plaintiff by the receipt of unanswered calls. 15 U.S.C. § 1692a(2). An
28 unanswered call without more is insufficient to constitute a “communication” pursuant to

1 15 U.S.C. § 1692a(2). Even applying a broad interpretation of the FDCPA and the least
2 sophisticated debtor standard, the unanswered calls do not constitute a “communication”
3 pursuant to the FDCPA under the facts of this case. 15 U.S.C. § 1692a(2). In addition,
4 Plaintiff has failed to present evidence that Defendant ARS violated 15 U.S.C. § 1692e or
5 15 U.S.C. § 1692f. Plaintiff’s Motion for Summary Judgment (ECF No. 72) is denied as
6 to Plaintiff’s first, second, and third causes of action.

7 Federal Rule of Civil Procedure 56(f) states that “[a]fter giving notice and a
8 reasonable time to respond, the court may [] grant summary judgment for a nonmovant . .
9 . .” Fed. R. Civ. P. 56(f). “It is generally recognized that a court has the power sua sponte
10 to grant summary judgment to a non-movant when there has been a motion but no cross-
11 motion.” *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000). “Even
12 when there has been no cross-motion for summary judgment, a district court may enter
13 summary judgment sua sponte against a moving party if the losing party has had a full and
14 fair opportunity to ventilate the issues involved in the matter.” *Gospel Missions of Am. v.*
15 *City of Los Angeles*, 328 F.3d 548, 553 (9th Cir. 2003). In other words, “where the party
16 moving for summary judgment has had a full and fair opportunity to prove its case, but has
17 not succeeded in doing so, a court may enter summary judgment *sua sponte* for the
18 nonmoving party.” *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014).

19 In this case, Plaintiff presented facts and arguments as to why Defendant ARS
20 violated the FDCPA in Plaintiff’s Motion for Summary Judgment against Defendant ARS.
21 There is no dispute of material fact that Plaintiff did not answer any of the calls from
22 Defendant ARS. The sole issue at hand was a question of law: whether the calls from
23 Defendant ARS to Plaintiff constitute a communication pursuant to the FDCPA. Plaintiff
24 has had “a full and fair opportunity to prove its case, but has not succeeded in doing so”
25 because the Court has found that the calls from Defendant ARS to Plaintiff did not
26 constitute communications pursuant to the FDCPA. *Id.* The Court finds it appropriate to
27 grant summary judgment sua sponte for Defendant ARS and against Plaintiff as to
28 Plaintiff’s first, second, and third causes of action. *See e.g., Verdun v. Fid. Creditor Serv.*,

1 No. 14-cv-0036-DHB, 2017 WL 1047109, at *10 (S.D. Cal. Mar. 20, 2017) (same);
2 *Wheeler v. Credit Bureau of Santa Maria*, No. 2:15-cv-02684-SVW-E, 2015 WL
3 12669881, at *2 n.2 (C.D. Cal. Sept. 3, 2015) (same). Summary judgment is granted for
4 Defendant ARS and against Plaintiff as to Plaintiff’s first, second, and third causes of
5 action.

6 **B. Defendant ARS – Violation of the RFDCPA (California Civil Code §**
7 **1812.700) (claim 4); Defendants ARS and Apria – Violation of the RFDCPA**
8 **(California Civil Code § 1788.17) (claim 5)**

9 The federal claims for violations of the FDCPA have been dismissed because the
10 Court has granted summary judgment for Defendant ARS and against Plaintiff as to
11 Plaintiff’s first, second, and third claims. The remaining claims for violation of the
12 RFDCPA (California Civil Code § 1812.700) against Defendants ARS (claim 4) and
13 violation of the RFDCPA (California Civil Code § 1788.17) against Defendants ARS and
14 Apria (claim 5) do not arise under federal law. The Complaint alleges that jurisdiction is
15 proper in this Court based on federal question jurisdiction over the federal law claims and
16 supplemental jurisdiction over the remaining state law claims. *See* ECF No. 1 at 3.

17 The federal supplemental jurisdiction statute provides:

18 [I]n any civil action of which the district courts have original jurisdiction, the
19 district courts shall have supplemental jurisdiction over all other claims that
20 are so related to claims in the action within such original jurisdiction that they
21 form part of the same case or controversy under Article III of the United
States Constitution.

22 28 U.S.C. § 1367(a). “The district courts may decline to exercise supplemental
23 jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all
24 claims over which it has original jurisdiction” 28 U.S.C. § 1367(c)(3).

25 Having dismissed the only federal claims in this action, the Court declines to
26 exercise supplemental jurisdiction over the remaining state law claims pursuant to 28
27 U.S.C. § 1367(c). *See e.g., Khosroabadi v. N. Shore Agency*, 439 F. Supp. 2d 1118, 1125
28 (S.D. Cal. 2006) (granting the defendant’s motion for summary judgment as to the

1 plaintiff's claim for violation of the FDCPA (15 U.S.C. § 1692, et seq.); declining to
2 exercise supplemental jurisdiction and dismissing without prejudice the plaintiff's claim
3 for violation of the RFDCPA (California Civil Code § 1812.700); and closing the case);
4 *Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115, 1124 (S.D. Cal. 2006) (“Because
5 the Court has dismissed all claims over which it has original jurisdiction in this matter, the
6 Court will decline to exercise supplemental jurisdiction over Plaintiff's remaining state law
7 claims.”).

8 **V. CONCLUSION**

9 IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by
10 Plaintiff Christina Pearson (ECF No. 72) is DENIED. The Clerk of the Court shall enter
11 judgment for Defendant ARSTRAT, LLC and against Plaintiff Christina Pearson as to
12 Plaintiff's first, second, and third causes of action.


13 IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by
14 Defendant Apria Healthcare Group, Inc. (ECF No. 44) and the Motion for Summary
15 Judgment filed by Plaintiff Christina Pearson (ECF No. 71) are DENIED as moot. The
16 Court declines to exercise supplemental jurisdiction over Plaintiff's fourth and fifth causes
17 of action. The Court dismisses Plaintiff's state law claims (fourth and fifth causes of
18 action) without prejudice.

19 IT IS FURTHER ORDERED that the Motion to Seal filed by Defendant Apria
20 Healthcare Group, Inc. (ECF No. 45) is GRANTED.

21 IT IS FURTHER ORDERED that the Motions to Seal filed by Plaintiff Christina
22 Pearson (ECF Nos. 52, 55) are GRANTED.

23 The Clerk of Court is directed to close this case.

24 Dated: May 10, 2021

25 
26 Hon. William Q. Hayes
27 United States District Court
28