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United States District Court, C.D. California.

Donna JACKSON, Plaintiff,
v.
FIRST NATIONAL BANK
OF OMAHA, Defendant.

CV 20-1295 DSF (JCx)
|
Signed 01/18/2022

Attorneys and Law Firms

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Order GRANTING in Part and DENYING in Part Plaintiff Donna Jackson's Motion for Summary Judgment (Dkt. 29)

Dale S. Fischer, United States District Judge

***1** This case arises out of phone calls Defendant First National Bank of Omaha (FNBO) made to Plaintiff Donna Jackson to collect on her "consumer debt." See dkt. 22 (FAC). Jackson moves for summary judgment on her claims for violation of the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788, et seq.; intrusion upon seclusion; and violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, et seq. Dkt. 29 (Mot.). FNBO opposes. Dkt. 32 (Opp'n). The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. Jackson's motion is GRANTED in part and DENIED in part.

I. UNDISPUTED FACTS

Jackson has at least two unsecured credit accounts with FNBO. PSUF ¶ 1.[1] In her credit applications, she listed her cell phone number as her contact number. Id. ¶ 2; DSUF ¶ 2.

1 Citations to PSUF refer to Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law, dkt. 29-2, and Plaintiff's Supplemental Statement of of Uncontroverted Facts and Conclusions of Law, dkt. 43-1, which contain Jackson's proposed uncontroverted facts. Citations to DSUF refer to FNBO's proposed uncontroverted facts, which are included in its opposition. Opp'n at 4-5. The Court's standing order regarding summary judgment, which is linked on the Court's website, requires that the opposing party submit a statement of genuine disputes in a specific format, stating among other things, whether the opposing party disputes any facts asserted by the moving party. FNBO has not filed a proper statement of genuine disputes and specifically does not deny the truth of any of Jackson's "uncontroverted facts." The Court therefore finds Jackson's supported proposed uncontroverted facts to be true. To the extent certain facts are not mentioned in this Order, the Court has not relied on those facts in reaching its decision. The Court has independently considered the admissibility of the evidence and has not considered facts that are irrelevant or based on inadmissible evidence.

FNBO uses a program called LiveVox to call customers. PSUF ¶¶ 28, 38. The list of customers is provided to LiveVox through a pre-programmed file transfer process that occurs six days a week, in which a collection mainframe called The Wayne System (TWS) is fed information from FNBO's The Bank Card System. Id. ¶¶ 37-40. Before transferring the list to LiveVox, TWS sequences the accounts from top to bottom using account numbers. Id. ¶ 42. LiveVox then sequences the cell phone numbers based on the relevant calling campaign strategy and based on geographic region. Id. ¶¶ 43-44, 47. LiveVox can initiate multiple calls simultaneously. Id. ¶ 46.

In August 2019, FNBO started using LiveVox to call Jackson because she had defaulted on her monthly payments. Dkt. 29-19 (Call Log). Jackson hired counsel, who prepared a letter of representation and revocation of consent dated August 29, 2019. Id. ¶¶ 4, 28. The Letter stated that under the Rosenthal Act, all future communications should be directed to Jackson's counsel instead of Jackson. Dkt. 29-6 (Letter). The Letter also revoked Jackson's prior consent under the TCPA to call her cell phone with an autodialer. Id. Jackson's counsel sent the Letter via United States Postal Service certified mail on September 5, 2019 and the Letter arrived on September 9, 2019. PSUF ¶¶ 5-6.[2]

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2 The Court GRANTS Jackson's unopposed request for judicial notice of the USPS Tracking Results and Tracking History. Dkt. 30.

***2** The Letter contained Jackson's attorney's name, address, and telephone number; Jackson's first and last name; Jackson's scrambled account number as it appeared on her Equifax Credit Report;[3] Jackson's cell phone number; and the last four digits of Jackson's social security number. Id. ¶ 7. The Letter did not contain Jackson's middle initial, correct account number, full social security number, address, or account type. DSUF ¶ 3. Jackson's counsel had her billing statements, which listed her account number, her middle initial, and an address and P.O. Box to which communication regarding Jackson's account should be sent. Id. ¶ 6.

3 FNBO "scrambles" a consumer's account number when reporting the account number to a credit reporting agency and is unable to unscramble the number when attempting to locate a customer's account. Id. ¶¶ 20, 21.

FNBO has a policy for processing letters of representation and revocations of consent. PSUF ¶ 23. FNBO uses a system, called the TBS system, to search for specific cardholders through a name or account number search. Id. ¶ 18. FNBO employees being by typing the consumer's name into TBS, but they are unable to search for a consumer by telephone number. Id. ¶¶ 18, 23. The lead specialist then looks at each separate search result to match the other identifying information, such as the last four digits of a social security number or a phone number. Id. ¶ 24. FNBO's credit card database listed eighty-two hits for "Donna Jackson." DSUF ¶ 7.

In response to this Letter, FNBO did not locate Jackson in the database and instead sent a letter to Jackson's counsel requesting additional clarifying information. Id. ¶ 4. Jackson's counsel did not send the requested information, but instead sent the same letter again on October 16, 2019; October 30, 2019; and November 15, 2019. Id. ¶ 5; PSUF ¶¶ 9, 11, 12. Jackson's counsel sent the letters to a P.O Box listed on FNBO's webpage as the address for correspondence and payments. PSUF ¶¶ 14, 15. The letters were all confirmed by USPS as delivered. Id. ¶¶ 10, 11, 12.

FNBO did not stop calling Jackson. Id. ¶ 12. After the Letter was delivered to FNBO, Jackson received a total of 211 autodialed calls, 10 text messages, and 2 letters/emails from FNBO. Id. ¶ 13. FNBO's policy manual states that it must have consent from a consumer in order to use its automated dialer in order to comply with the TCPA. Id. ¶ 30. The policy also states that if consent is taken away or revoked, FNBO cannot use its autodialer and must call the consumer manually. Id. ¶ 31.

After receipt of the last letter sent to FNBO, lead specialist Teresa McCart found Jackson's account based on the letter and noted Jackson had revoked consent to be called with an autodialer. Id. ¶ 25. McCart stated she would not have spent more than two hours locating the account, which is the longest she has ever spent looking for a customer in TBS. Id. ¶ 25. FNBO employees have been trained to follow the same policy and practice as McCart followed when locating Jackson's account. Id. ¶ 26.

II. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "This burden is not a light one." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

***3** Summary judgment is improper "where divergent ultimate inferences may reasonably be drawn from the undisputed facts." Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 988 (9th Cir. 2006)). Instead, "the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (punctuation omitted).

III. DISCUSSION

A. Rosenthal Act Claim

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Jackson alleges FNBO violated two provisions of the Rosenthal Act: § 1788.11 and § 1788.14. FAC ¶¶ 50, 54. To establish a violation of the Rosenthal Act, a plaintiff must prove: (1) she is a "debtor," (2) the debt at issue is a "consumer debt," (3) the defendant is a "debt collector," and (4) the defendant violated one of the liability provisions of the Rosenthal Act. Davidson v. Seterus, Inc., 21 Cal. App. 5th 283, 295, 230 Cal.Rptr.3d 441 (2018); Long v. Nationwide Legal File & Serve, Inc., No. 12-CV-03578, 2013 WL 5219053, at *17 (N.D. Cal. Sept. 17, 2013); Cal. Civ. Code § 1788 *et seq.*

1. Violation of § 1788.14

Jackson alleges the calls made to her after September 9, 2019 violated Section 1788.14(c) of the Rosenthal Act, which prohibits communicating "with the debtor with regard to the consumer debt, when the debt collector has been previously notified in writing by the debtor's attorney that the debtor is represented by such attorney with respect to the consumer debt and such notice includes the attorney's name and address...." Mot. at 5-6 (quoting Cal. Civ. Code § 1788.14(c)). To show FNBO violated Section 1788.14(c), Jackson must establish that FNBO had "actual knowledge" that she was represented by an attorney. Munoz v. Cal. Bus. Bureau, Inc., No. 1:15-CV-01345-BAM, 2016 WL 6517655, at *8 (E.D. Cal. Nov. 1, 2016).

FNBO disputes only the fourth element, arguing the claim fails because Jackson's Letter did not provide "sufficient information for First National to adequately identify the 'Donna Jackson' that Plaintiff's attorneys represent." Opp'n at 8. FNBO asserts that Jackson's Letter lacked adequate information to identify who she was because the Letter did not include Jackson's (1) correct account number (or a full account number of any sort), (2) address, (3) middle name or initial, (4) full social security number, (5) date of birth, or (6) account relationship with FNBO. Id. at 8-9. To support this argument, FNBO relies on Wright v. USAA Sav. Bank, No. No. 2:19-cv-00591 WBS CKD, 2020 WL 2615441 (E.D. Cal. May 22, 2020). There the court found the defendant did not have actual knowledge that the plaintiff was represented by an attorney because defendants either did not receive or did not process the Letter. Id., 2020 WL 2615441 at *6.

Here, FNBO unquestionably received Jackson's Letter because an FNBO employee responded to it asking for more information. DSUF ¶ 4. Although the Letter did not contain certain identifying information that would have made locating Jackson easier, id. ¶ 3, the Letter did contain Jackson's attorney's name, address, and telephone number; Jackson's scrambled account number as it appeared on her Equifax Credit Report; Jackson's cell phone number; and the last four digits of Jackson's social security number, id. ¶ 7. Even with eighty-two hits for "Donna Jackson" in FNBO's database, id., this information, particularly her cell phone number and the last four digits of her social security number, ultimately proved sufficient to identify Jackson when FNBO's own lead specialist McCart was able to locate Jackson's account based on an identical letter. PSUF ¶ 25. FNBO employees have been trained to follow the same policy and practice as McCart followed when locating Jackson's account. Id. ¶ 26. The information in the Letter, therefore, was not inadequate to identify Jackson. The Letter notified FNBO that Jackson was represented by counsel. An FNBO employee responded to an identical letter, demonstrating receipt. FNBO therefore had actual knowledge that Jackson was represented by an attorney and continued to contact her.

***4** Jackson has established a violation of § 1788.14.

2. Violation of § 1788.11

Cal. Civ. Code § 1788.11 prohibits "[c]ausing a telephone to ring repeatedly or continuously to annoy the person called." FNBO claims it did not violate this provision because Jackson refused to pick up FNBO's calls and instead sent screenshots of the missed calls to her attorney. Opp'n at 12-13. FNBO provides no authority suggesting that Jackson had to pick up the phone to trigger liability under this section of the Rosenthal Act. The plain meaning of "caus[e] a telephone to ring" indicates that liability is created when the phone rings regardless of whether the plaintiff answers the phone.

Jackson discusses the bona fide error defense in her motion. See Mot. at 6-10. "The bona fide error defense is an affirmative defense, for which the debt collector has the burden of proof." McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 948 (9th Cir. 2011) (quoting Reichert v. Nat'l Credit Sys., Inc., 531 F.3d 1002, 1006 (9th Cir. 2008)). Regarding the bona fide error defense, FNBO states only that "any potential violation of the Rosenthal Act by First National Bank of Omaha was not in [sic] intentional and 'resulted notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation.' " Opp'n at 14 (quoting Cal. Civ. Code § 1788.30(e)).

This conclusory sentence is insufficient to meet FNBO's burden to raise a triable issue. See Reichert, 531 F.3d at 1007 ("If the bona fide error defense is to have any meaning

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in the context of a strict liability statute, then a showing of 'procedures reasonably adapted to avoid any such error' must require more than a mere assertion to that effect. The procedures themselves must be explained, along with the manner in which they were adapted to avoid the error."); see also Delalat ex rel. Delalat v. Syndicated Off. Sys., Inc., No. 10CV1273-DMS NLS, 2013 WL 8364853, at *5 (S.D. Cal. July 30, 2013) ("To benefit from the bona fide error defense, it was incumbent on Defendant to introduce evidence that it maintained procedures to prevent the error in question from occurring, explain the procedures, and show how the procedures were reasonably adapted to avoid the error.").

The required intent needed to establish a violation of Section 1788.11(d) may be inferred from the frequency, volume, and pattern of FNBO's calls. Sanchez v. Client Servs., Inc., 520 F. Supp. 2d 1149, 1161 (N.D. Cal. 2007) (granting plaintiff's motion for summary judgment as to Rosenthal Act claim after finding defendants' phone calls harassing as a matter of law); Kuhn v. Acct. Control Tech., Inc., 865 F. Supp. 1443, 1453 (D. Nev. 1994) (same with respect to analogous FDCPA claim). Between September 16, 2019 and November 26, 2019, FNBO either called, texted, or emailed Plaintiff 222 times, with the vast majority of those being calls. PSUF ¶13; dkt. 29-19 (Call Log). On numerous occasions, FNBO called several times in one day – for example, FNBO called Jackson seven times on November 13, 2019, and left a voicemail and a text message. Call Log at 4. The next day, FNBO called again several times and left a voicemail. Id.

***5** A reasonable jury certainly could find the requisite intent based on the sheer number of calls. However, the Court finds there remains a triable issue as to FNBO's intent. As noted in many previous cases, courts have differing views as to the number and pattern of calls justifying summary judgment on this issue for either side. See, e.g., Ammons v. Diversified Adjustment Service, Inc., 2:18-cv-06489-ODW (MAAx), 2019 WL 5064840 (C.D. Cal. Oct. 9, 2019). Unlike in numerous other cases, there is no suggestion that FNBO ever threatened Jackson or used abusive language in any of the calls. And not only is it undisputed that Jackson never told the caller to cease calling, but Jackson never picked up the phone at all. She merely took a screen shot and sent it to her attorney. FNBO contends that "if Plaintiff would have answered one of these calls and requested that the calls stop, First National would have notated the account and ceased calling Plaintiff." Opp'n at 13. This raises a triable issue as to whether FNBO repeatedly called Jackson in order to reach her regarding payment, rather than to annoy her. See Ammons, 2019 WL 5064840 at *7.

Jackson is not entitled to summary judgment on her claim for a violation of § 1788.11.

The undisputed facts show FNBO violated Cal. Civ. Code § 1788.14(c) by contacting Jackson after she notified it that she was a represented debtor. Jackson's motion is GRANTED as to the Rosenthal Act claim under § 1788.14 and DENIED as to the claim under § 1788.11.

B. TCPA Claim

The TCPA prohibits making a phone call using an "artificial or prerecorded voice" unless limited exceptions apply. 47 U.S.C. § 227(b)(1)(A) and (B). The TCPA also forbids calls "using any automatic telephone dialing system ... to any telephone number assigned to a paging service [or] cellular telephone service" without the "prior express consent of the called party." Facebook, Inc. v. Duguid, ––– U.S. ––––, 141 S. Ct. 1163, 1168, 209 L.Ed.2d 272 (2021) (quoting 47 U.S.C. § 227(b)(1)(A)).

Jackson argues that FNBO's calls were without Jackson's consent because she revoked consent via the Letter. Mot. at 13-15. Jackson further argues that she is entitled to treble damages because FNBO was on notice that the communication was unsolicited. Id. at 15-16. FNBO replies Jackson did not clearly express revocation, as the Ninth Circuit requires, because the Letter "was intentionally vague, omitted simple, crucial identifying information of the Plaintiff, and contained paragraphs of irrelevant, boilerplate legalese in hopes of masking the revocation attempt." Opp'n at 14.

1. Whether Jackson Revoked Consent

Consumers "have a right to revoke consent, using any reasonable method including orally or in writing." Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1047 (9th Cir. 2017) (quoting In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 F.C.C. Rcd. 7961, 7996 ¶ 64 (July 10, 2015) (2015 Order)).

A consumer may revoke consent "by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities." Id. at 1047-48. "[T]he TCPA does not permit the calling party to designate the exclusive means

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of revocation, and instead, the called party must 'clearly express his or her desire not to receive further calls.' " Id. at 1048. When assessing whether a particular means of revocation was reasonable, courts look to the "totality of the facts and circumstances surrounding that specific situation, including, for example, whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance, and whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens." 2015 Order at 64 n.233; see also ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687, 709 (D.C. Cir. 2018). A defendant's "willful and knowing" violation of the statute entitles a plaintiff to treble damages. 47 U.S.C. § 227(b)(3).

***6** Jackson's Letter stated: "Pursuant to the rights of consumers under the Telephone Consumer Protection Act and the Declaratory Ruling and Order of July 10, 2015, this letter revokes prior express consent to the extent previously given." The Letter later specified, "to the extent consent was previously given Donna Jackson revokes her consent to be contacted on her cell phone number. Please call [counsel's phone number] if you have any questions about your obligations as a result of this letter." Id.

It is difficult to imagine a clearer or more unequivocal revocation of consent. What FNBO seems to argue is that by omitting certain identifying details, the Letter could not clearly revoke consent because it did not clearly identify Jackson. But as noted above, the Letter contained sufficient identifying information, such as her cell phone number and the last four digits of her social security number. DSUF ¶ 4. This was enough information to identify Jackson, as is evidenced by FNBO's employee locating her with the same information.[4]

4 The Court agrees with FNBO that had Jackson's counsel provided more information at any point in the process, his client's concerns would have been addressed sooner, and that counsel may have engaged in tactics meant to set the case up for litigation as the Court in Wright, 2020 WL 2615441 suggested. The Court does not condone these tactics, but they do not compel a different result under the facts in this case.

2. Prerecorded Calls

FNBO does not contest that it sends pre-recorded messages to its customers, including Jackson. See Defendant's Supplemental Opposition to Plaintiff's Motion for Summary Judgment (Supp. Opp'n) at 3. The Court finds FNBO violated the TCPA with respect to its 54 pre-recorded voice messages.

3. Whether LiveVox is an Autodialer

"To qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." Id. at 1167.

Jackson argues FNBO used LiveVox as an autodialer because LiveVox's dialing system "has the capacity to use a sequential number generator to store a list of telephone numbers that were automatically dialed." Plaintiff's Supplemental Briefing in Support of Her Motion for Summary Judgment) (Supp. Mot.) at 4.[5]

5 Jackson violated the Court's order that her supplemental brief be no longer than eight pages. Future violations of the rules and orders of this Court or the Central District are likely to result in sanctions.

FNBO's Director of Recovery, Paul Osborne, explained in deposition that FNBO builds calling campaigns through LiveVox, and then LiveVox would automatically do the dialing based off of the campaign we built and the strategy we applied to the campaign." Dkt. 43-5 (Osborne Dep. 95:4-8). The phone numbers used for the calling campaigns come from FNBO's "mainframe system," TWS, which generates a file every day. Id. 95:9-17. That file is pre-programmed via a program created by FNBO's developers and the campaign occurs six days a week. Dkt. 43-7 (Osborne Dep. 102:7-20). Further, the order and format of the data in the file is the same every day; the data is ordered by account number from low to high every day. Dkt. 43-8 (Osborne Dep. 103:6-20). Once the data is in LiveVox, the program dials numbers based on the campaign criteria that were previously entered, such that the numbers are not dialed in the order in which they appeared on the pre-programmed file, but rather according to the specific calling campaign parameters. Dkt. 43-10 (Osborne Dep. 106:1-25). LiveVox "automatically know[s] not to call numbers in a particular area code or geographic area at certain times of the day" and "looks at the area code and the ZIP code for a particular record to determine whether it's within the appropriate time to call." Dkt. 43-11 (Osborne Dep. 107:18-24).

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***7** The parties dispute whether LiveVox's automatic dialing from a predetermined list of customers disqualifies it as an autodialer. FNBO cites several district court cases determining that dialing from a list of customers does not qualify a program as an autodialer. See Supp. Opp'n at 5. In Hufnus v. DoNotPay, Inc., No. 20-CV-08701-VC, 2021 WL 2585488 (N.D. Cal. June 24, 2021), the Court found the defendant had not used an autodialer because its "system targets phone numbers that were obtained in a non-random way (specifically, from consumers who provided them)." Hufnus, 2021 WL 2585488, at *1. Similarly, in Tehrani v. Joie de Vivre Hosp., LLC, No. 19-CV-08168-EMC, 2021 WL 3886043 (N.D. Cal. Aug. 31, 2021), the Court found a pre-produced list, such as a pre-existing customer database, was not a list generated by a random or sequential number generator. Tehrani, 2021 WL 3886043, at *5. Other decisions from this Circuit also follow the findings of Hufnus and Tehrani. See, e.g., Cole v. Sierra Pac. Mortg. Co., Inc., No. 18-CV-01692-JCS, 2021 WL 5919845, at *4 (N.D. Cal. Dec. 15, 2021) (denying plaintiff's motion for summary judgment on TCPA claim because defendant's system merely "use[d] randomly or sequentially generated numbers to determine the storage or dialing order of telephone numbers entered by other means.").

The Court finds that FNBO did not use a "sequential generator" because while it automatically generates a sequence of phone numbers to call based on pre-determined criteria, it obtained those phone numbers from a customer list that was not generated through a random or sequential number generator.

The undisputed facts establish FNBO used an autodialer with respect to its prerecorded calls but did not use an autodialer to call Jackson's cell phone after she clearly revoked her consent to be called. Jackson's motion is GRANTED in part and DENIED in part as to the TCPA claim.

C. Intrusion Upon Seclusion Claim

Jackson claims FNBO intruded on her seclusion by repeatedly and continuously calling her. Mot. at 16-17 (quoting Inzerillo v. Green Tree Servicing, LLC, No. 13-cv-06010-MEJ, 2014 WL 1347175, at *4 (N.D. Cal. Apr. 3, 2014)). FNBO does not respond to this claim.

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person." Taus v. Loftus, 40 Cal. 4th 683, 724, 54 Cal.Rptr.3d 775, 151 P.3d 1185 (2007) (quoting Restatement (Second) of Torts § 652B (Am. L. Inst. 1979)). An "action for intrusion has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." Shulman v. Grp. W Prods., Inc., 18 Cal. 4th 200, 231, 74 Cal.Rptr.2d 843, 955 P.2d 469 (1998), as modified on denial of reh'g (July 29, 1998).

"We ask first whether defendants 'intentionally intrude[d], physically or otherwise, upon the solitude or seclusion of another.' " Id. at 231, 74 Cal.Rptr.2d 843, 955 P.2d 469. The second element, offensiveness of the intrusion, requires consideration of "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." Miller v. Nat'l Broad. Co., 187 Cal. App. 3d 1463, 1483-84, 232 Cal.Rptr. 668 (1986).

District courts in the Ninth Circuit have found "repeated and continuous calls in an attempt to collect a debt give rise to a claim for intrusion upon seclusion." Fausto v. Credigy Servs. Corp., 598 F. Supp. 2d 1049, 1056 (N.D. Cal 2009) (quoting Panahiasl v. Gurney, No. 04-04479 JF, 2007 WL 738642, at *3 (N.D. Cal. Mar. 8, 2007)); but see Marseglia v. JP Morgan Chase Bank, 750 F. Supp. 2d 1171, 1178 (S.D. Cal. 2010) ("Although plaintiffs allege a total of fifty (50) calls were made in one week, there are no facts alleged upon which this Court could infer plaintiffs ever answered any of these calls or defendant ever made any direct contact with plaintiffs that might be construed as annoying or harassing conduct. Without such allegations, this Court is not convinced that the number of calls in itself can be considered highly offensive above a speculative level." (internal citations omitted)).

***8** None of the cases finding that repeated calls to collect debt *could* constitute offensive conduct addressed a plaintiff's motion for summary judgment or found that repeated calls to collect debt *were* offensive. The cases instead denied the defendant's motion for summary judgment or motion to dismiss. The Court finds that whether more than 200 calls made over a two-month period constitutes offensive conduct is an issue for the trier of fact. Alejandre v. GE, No. CV 12-1304-CBM-JEM, 2013 WL 12119718 at *——, 2013 U.S. Dist. LEXIS 193831 at *8 (denying defendant's motion for summary judgment on an invasion of privacy claim when defendant contacted plaintiff in fifty-nine calls over a ten-day

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period to attempt to collect a debt because whether it was offensive was an issue of fact).

Because whether FNBO's conduct was offensive is an issue to be decided by the trier of fact, Jackson's motion is DENIED as to the intrusion upon seclusion claim.

D. Damages

1. Statutory Damages

Under the TCPA, a plaintiff may recover either the actual monetary loss sustained as a result of the violation of the statute or "receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(b)(3)(B). A court may award, in its discretion, "not more than 3 times the amount available under subparagraph (B)" if the defendant willfully or knowingly violated the TCPA. A "[d]efendant knowingly or willfully violates the TCPA where Plaintiff notifies Defendant to stop calling and Defendant disregards the request." Sapan v. Auth. Tax Servs., LLC, No. 13-cv-2782 JAH, 2014 WL 12493282, at *2 S.D. Cal July 15, 2014 (citing Olney v. Progressive Cas. Ins. Co., 993 F. Supp. 2d 1220 (S.D. Cal. 2014)).

a. TCPA

FNBO placed 54 calls with prerecorded messages to Jackson in violation of the TCPA. Jackson is therefore entitled to $27,000 in statutory damages under the TCPA. The Court declines to award discretionary damages. Jackson refused to provide additional information about her claims despite being asked to do so several times. Opp'n at 3-4. Jackson never answered the phone to express her lack of consent to FNBO's calls, instead opting to send screenshots of the call history to her counsel. Id. at 13. And while FNBO did not establish bona fide error, as described above, the Court is not convinced FNBO knowingly and willfully violated the TCPA. FNBO argues it was only able to determine Jackson's identity after receiving her fourth letter on November 19, 2019, and the Call Log includes a note on November 27, 2019 that Jackson was being represented by an attorney. PSUF ¶ 25; Opp'n at 3; Call Log at 5. The last call from FNBO to Jackson occurred on that same day. Call Log at 5. Jackson has not established that FNBO knowingly or willfully called Jackson after it recorded receipt of her final letter.

b. Rosenthal Act

Under the Rosenthal Act, "[a]ny debt collector who willfully and knowingly violates this title with respect to any debtor shall, in addition to actual damages sustained by the debtor as a result of the violation, also be liable to the debtor only in an individual action, and his additional liability therein to that debtor shall be for a penalty in such amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000)." Cal. Civ. Code § 1788.30. Jackson established that after she revoked her consent with the Letter, FNBO called her 211 times, sent 10 text messages, and sent 2 letters/emails. PSUF 13, dkt. 29-19. FNBO, therefore, contacted Jackson 222 times after she revoked consent. However, for the reasons explained above, Jackson has not established this communication was knowing and willful. Jackson is therefore not entitled to statutory damages under the Rosenthal Act.

2. Punitive Damages

***9** In California, punitive damages may be awarded "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."[6] Cal. Civ. Code § 3294.6. California courts and district courts in the Ninth Circuit have recognized punitive damages may be appropriate for common law invasion of privacy claims. See Fausto, 598 F. Supp. 2d at 1057 (punitive damages appropriate in context of unlawful debt collection practices) (citing Sanchez v. Client Servs., Inc., 520 F. Supp. 2d 1149, 1164-65 (N.D. Cal. 2007)); Spinks v. Equity Residential Briarwood Apartments, 171 Cal. App. 4th 1004, 1055, 90 Cal.Rptr.3d 453 (2009) ("punitive damages may be available for the torts of wrongful eviction, trespass, invasion of privacy, and intentional infliction of emotional distress."); Varnado v. Midland Funding LLC, 43 F. Supp. 3d 985, 994 n.9 (N.D. Cal. 2014) (citing Spinks and finding plaintiff's claim for invasion of privacy by intrusion upon seclusion "may support a claim for punitive damages").

6 Under the California Civil Code: (1) "malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others; (2) "oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights; and (3) "fraud" means an

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> intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of depriving a person of property or legal rights or otherwise causing injury. Cal. Civ. Code § 3294.

The Court agrees with the district court decisions thus far and finds FNBO's actions could "constitute oppression, malice, or fraud within the meaning of California Civil Code § 3294." Id. Whether the conduct did in fact amount to oppression, fraud, or malice is "a credibility determination appropriately reserved for the ultimate trier of fact." Sanchez, 520 F. Supp. 2d at 1164-65.

Because whether FNBO's conduct in the surviving claims amounted to oppression, malice, or fraud is an issue to be decided by the trier of fact, Jackson's motion is DENIED as to punitive damages.

IV. CONCLUSION

The Court GRANTS in part and DENIES in part Jackson's motion as to her Rosenthal Act and TCPA claims. Jackson is awarded $27,000 in statutory damages under the TCPA.

Jackson's motion is DENIED as to the intrusion upon seclusion claim and her request for punitive damages.

IT IS SO ORDERED.

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