UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BOGDAN SZUMILAS,

Plaintiff,

v.

THE CBE GROUP INCORPORATED,

Defendant.

Case No. CV 15-08595-AB (GJSx)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Pending before the Court is The CBE Group Incorporated's ("Defendant") Motion to Dismiss, filed on May 23, 2016. (Dkt. No. 27.) Defendant seeks to dismiss Bogdan Szumila's ("Plaintiff") First Amended Complaint ("FAC") under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff timely filed his Opposition on June 6, 2016, and Defendant timely filed its Reply on June 13, 2016. (Dkt. Nos. 29, 32.) The Court heard oral argument on July 18, 2016 and took the matter under submission.

For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's Motion to Dismiss under Rule 12(b)(6) and **DENIES** Defendant's Motion to Dismiss under Rule 12(b)(1).

I. BACKGROUND

Plaintiff filed his First Amended Complaint ("FAC," Dkt. No. 22) on April 11, 2016) asserting four causes of action against Defendant on behalf of himself and a class, stemming from Defendant's alleged violations of the Telephone Consumer Protection Act ("TCPA," 47 U.S.C. § 227) (Counts 1 and 2), the Fair Debt Collection Practices Act ("FDCPA," 15 U.S.C. 1692) (Count 3), and the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act." Cal. Civ. Code §§ 1788.2(e)-(f)) (Count 4). *See* FAC ¶¶ 51-67.

As alleged in the FAC, Defendant called Plaintiff's cellular telephone approximately 190 times between April and September 2015. *See* FAC ¶¶ 1, 17-18. Plaintiff received calls from Defendant between one and four times almost every day over the four-month period. *Id.* ¶ 17. In one instance, Plaintiff answered the call and spoke to one of Defendant's employees, who asked to speak to a person who Plaintiff did not know. *Id.* ¶ 18. During that same call, Plaintiff told Defendant's employee not to call him again, but the phone calls did not stop. *Id.* Plaintiff alleges that each of the calls he received from Defendant were made using an "automatic telephone dialing system" ("ATDS"), as defined by 47 U.S.C. § 227(a)(1). *Id.* ¶¶ 26, 32.

This Court dismissed Plaintiff's original Complaint without prejudice on similar allegations, concluding that Plaintiff failed to allege sufficient facts that would permit the reasonable inference that Defendant used an ATDS when calling Plaintiff. *See* Dkt. No. 21 at 6. Plaintiff's FAC now pleads that Defendant called Plaintiff's cellular telephone approximately 190 times using an "autodialer and/or prerecorded message or artificial voice." FAC ¶ 1; *compare* Compl. (Dkt. No. 1) ¶ 2 (alleging that Defendant contacted Plaintiff and class members on their cellphones using an autodialer), *with* FAC ¶ 1 (clarifying that the autodialer used to contact Plaintiff and class members employed the use of a "prerecorded message or artificial

voice"). To support this allegation, Plaintiff cites hundreds of anonymous online complaints made by others who allegedly also received telephone calls from Defendant. *See* FAC ¶¶ 27-28.

The FAC adds the allegation that the calls that Plaintiff and class members received were specifically "for the purposes of collecting a consumer debt." FAC ¶ 19; *compare* Compl. ¶ 19 (alleging that Defendant's hundreds of phone calls to Plaintiff were made "for the purposes of debt collection"), *with* FAC ¶ 19 (claiming that Defendant's phone calls to Plaintiff were "for the purposes of collecting a consumer debt"). In support of this allegation, Plaintiff includes step-by-step screenshots of Defendant's website, claiming that the website "makes it perfectly clear that . . . if Defendant calls your cellphone, it is for the purpose of collecting a consumer debt." FAC ¶ 25; *see* FAC ¶¶ 19-24.

Other than the internet content that was added, the FAC is fundamentally identical to the original complaint. Based on these facts, Plaintiff claims that "he and all members of the Classes have been harmed by the acts of Defendant," both because of the statutory violations and because he incurred charges for the incoming phone calls. FAC ¶ 44.

Defendant again moves to dismiss all four of Plaintiff's causes of action.

II. LEGAL STANDARD

A. Rule 12(b)(1) Subject Matter Jurisdiction

A motion to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(1) examines the court's subject matter jurisdiction. When a party moves to dismiss for lack of subject matter jurisdiction, "the plaintiff bears the burden of demonstrating that the court has jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). If a plaintiff lacks standing, the court lacks subject matter jurisdiction under Article III of the U.S. Constitution. *Cetacean Cmty. v. Bush*, 363 F.3d 1160, 1174 (9th Cir. 2004).

B. Rule 12(b)(6) Motion to Dismiss

Rule 8 requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The statement must provide enough detail to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotations omitted). The complaint must also be "plausible on its face," allowing the Court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Labels, conclusions, and a "formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

Under Rule 12(b)(6), a defendant may move to dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When ruling on a Rule 12(b)(6) motion, "a judge must accept as true all of the factual allegations contained in the complaint" and construe the pleading in the light most favorable to the plaintiff. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Rule 12(b)(6) also allows a court to dismiss a claim in the complaint sua sponte if it appears that the plaintiff cannot prevail on the claim as alleged. *See Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) ("A trial court may dismiss a claim sua sponte under [Rule] 12(b)(6). Such a dismissal may be made without notice where the claimant cannot possibly win relief.").

III. DISCUSSION

Defendant moves to dismiss Plaintiff's causes of action on four grounds. The first ground is that Plaintiff fails to allege facts sufficient to allow the Court to draw

a plausible inference that Defendant used an ATDS, so his First and Second Counts under the TCPA fail. *See* Mot. at 3-5. The second ground is that Plaintiff fails to sufficiently allege any facts to permit the reasonable inference that this case involves a debt sufficient to implicate the TCPA, so his First and Second Counts fail. *See* Mot. at 5-6. The third ground is that Plaintiff fails to allege any facts to support a reasonable inference that this case involves consumer debt sufficient to implicate the FDCPA or the Rosenthal Act, so his Third and Fourth Counts fail. *See* Mot. at 6-8. The fourth ground is that Plaintiff fails to allege sufficient facts to permit the reasonable inference that he has standing to sue under *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016) as to all counts. *See* Mot. 8-9.

For the reasons stated below, the Court DENIES Defendant's Motion to Dismiss all counts under Rule 12(b)(1), DENIES Defendant's Motion to Dismiss Plaintiff's Counts 1 and 2, and GRANTS Defendant's Motion to Dismiss Plaintiff's Counts 3 and 4 under Rule 12(b)(6).

A. Rule 12(b)(1) and Article III Standing

Because standing is a threshold jurisdictional question, the Court will address this issue first. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 102 (1998). To establish Article III standing, a plaintiff must demonstrate "(1) an injury-in-fact, (2) [that is] fairly traceable to the challenged conduct of the defendant, and (3) [that is] likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1543 (2016). The injury-in-fact requirement calls for a Plaintiff to demonstrate that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992).

Defendant moves to dismiss Plaintiff's FAC pursuant to Rule 12(b)(1), arguing that the FAC does not contain any allegations regarding injury, harm, or

damage to the Plaintiff and thus Plaintiff lacks Article III standing to bring the claim under any of the alleged statutes. Mot. at 8. More specifically, Defendant argues that Plaintiff "makes no effort whatsoever to allege concrete harm." *Id.* Defendant is correct in asserting that a "bare statutory violation, divorced from any concrete harm, does not satisfy the injury-in-fact requirement of Article III." *Id.*

Here, Plaintiff contends that he alleges more than statutory violations. *See* Opp'n (Dkt. No. 29) at 9. Plaintiff argues that he and "all members of the Classes have been harmed by the acts of Defendant, both through incurring charges as a result of Defendant's . . . calls and due to statutory violations." FAC ¶ 44. Plaintiff also alleges that the statutes he is suing under—the TCPA, FDCPA, and Rosenthal Act—seek to redress actual harm, including "financial [harm], invasion of privacy, and emotional [harm]." Opp'n at 9.

Although the Court acknowledges that Plaintiff's allegation of concreteness lacks detail, the Court finds that the alleged financial injury of incurring charges is akin to claims of concrete harm based on diminished mobile device resources, such as storage, battery life, and bandwidth. *See Hernandez v. Path, Inc.*, 2012 WL 5194120, *2 (N.D. Cal. Oct. 19, 2012). Furthermore, because Plaintiff claims to have received 190 telephone calls from Defendant, the Court finds that Plaintiff's financial injury is not de minimis and is sufficiently concrete. FAC ¶¶ 1, 17-18; *see Olmos v. Bank of America, N.A.*, 2016 WL 3092194, *4 (S.D. Cal. June 6, 2016) (finding that the two short text messages that plaintiff received were "insufficient to convey standing because the loss of battery life and bandwidth as a result of these two messages was de minimis.").

Findings by the Federal Communications Commission ("FCC") indicate that "automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls are costly and inconvenient. . . . [since] . . . wireless customers are charged for incoming calls whether they pay in

advance or after the minutes are paid." FAC ¶ 14. Here, based on Plaintiff's allegations of receiving 190 phone calls, Defendant's unauthorized conduct is "systemic rather than episodic." *In re Google, Inc. Privacy Policy Litig.*, 2013 WL 6248499 *7 (N.D. Cal Dec. 3, 2013). The high volume of phone calls that Plaintiff received without his prior express consent indicates that Plaintiff experienced a significant amount of nuisance and invasion of privacy.

The Court concludes that Plaintiff has alleged facts are sufficient to establish Article III standing. Accordingly, the Court DENIES Defendant's Motion to Dismiss Plaintiff's FAC under Rule 12(b)(1).

B. Rule 12(b)(6) Motion to Dismiss

1. Plaintiff's TCPA Claims

Defendant seeks dismissal of Plaintiff's First and Second Counts on two grounds. First, Defendant relies on *Silver* to assert that the TCPA is not implicated in this case because Plaintiff does not allege any facts to assert that Defendant's calls were unrelated "to any debt owed to or guaranteed by the United States." Mot. at 5-6; *see Silver v. Pa. Higher Ed. Assistance Agency*, 2016 WL 1258629 (N.D. Cal. Mar. 31, 2016). However, under 47 U.S.C. § 227(b)(1), "the three elements of a TCPA claim are that: (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). Plaintiff's claims in the FAC are based on these three elements. *See* FAC ¶¶ 1-3. Thus, the Court finds that Plaintiff does not need to allege further facts related to *Silver* to bring his suit under the TCPA.

The Court now turns to Defendant's second ground for seeking dismissal of Plaintiff's First and Second Counts. Defendant asserts that Plaintiff fails to allege sufficient facts to establish a plausible inference that Defendant called Plaintiff using an ATDS. Mot. at 3-5. As defined by the TCPA, ATDS "means equipment which

has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Flores v. Adir Int'l, LLC*, 2015 WL 4340020, at *3 (C.D. Cal. July 15, 2015) (quoting 47 U.S.C. § 227(a)(1)). As in the original complaint, Plaintiff asserts that all of the cellular phone calls he received from Defendant were made "using an autodialer and/or prerecorded message or artificial voice." FAC ¶¶ 1, 17-18. Plaintiff cites hundreds of anonymous online messages to support this allegation. *Id.* ¶¶ 27-28. The calls cited in the online complaints were made from the same outbound number and during the same time period as the calls Plaintiff received. Opp'n at 4.

In determining whether Plaintiff's complaint allows a court to draw a reasonable inference that the Defendant is liable for the misconduct alleged, this Court undertakes a context-specific task and draws on its judicial experience and common sense. *Iqbal*, 556 U.S. at 678. Like other courts, this Court recognizes "the difficulty a plaintiff faces in knowing the type of calling system used without the benefit of discovery" and finds Plaintiff's allegations, particularly those regarding the content of the call Plaintiff answered in combination with the 189 phone calls he did not answer, to be sufficient to survive a motion to dismiss. *Knutson v. Reply!, Inc.*, 2011 WL 1447756, at *1 (S.D. Cal. Apr. 13, 2011) (finding that courts can rely on details about the call to infer the use of an ATDS).

When describing the phone call he answered, Plaintiff alleges that "[w]hen the call finally connected," he told Defendant's employee that he did not know the person he was looking for and asked for the phone calls to stop. FAC ¶ 8. Thus, Plaintiff alludes to the existence of a "telltale" pause after he picked up the call and before Defendant's employee began speaking. *See Lofton v. Verizon Wireless (VAW) LLC*, 2015 WL 1254681, at *5 (N.D. Cal Mar. 18, 2015) ("Even where a plaintiff only presents conclusory allegations regarding the use of an ATDS, the allegations may be sufficient where accompanied by specific allegations which

render plausible the use of an ATDS."). Plaintiff provided sufficient contextual information to determine that he did not hear a human voice immediately, but rather heard it after a pause, which supports a plausible inference that Defendant called Plaintiff using an ATDS.

In addition to relying on the content of the phone call he answered, Plaintiff argues that the online complaints support his allegations because "the facts of this case are virtually indistinguishable from those before the court in *Brown*." Reply (Dkt. No. 32) at 5. At oral argument, Plaintiff's Counsel elaborated on this argument by stating that, although Plaintiff spoke to Defendant's employee on one occasion, there are 189 other phone calls alleged in this case that went unanswered. *See* FAC ¶¶ 1, 17-18. The sheer volume of phone calls Plaintiff alleges to have received from Defendant is indicative of the type of conduct that the TCPA is meant to discourage. In those 189 instances, Plaintiff, like the plaintiff in *Brown*, did not have "personal knowledge that the calls were placed through an [ATDS]" and cannot allege additional facts about the content of those unanswered calls. Reply at 5; *see Brown v. Collections Bureau of America, Ltd.*, 2016 WL 1734013, *2 (N.D. Cal. May 2, 2016). The cited internet complaints include reports of phone calls with pre-recorded sound bites, dead air, and silence. FAC ¶¶ 27-28. While "internet complaints by anonymous third parties likely will not be admissible evidence," other people's reports about their experience with the same outbound number allow the court to draw a reasonable inference that Defendant used an ATDS to make the 1 answered and 189 unanswered phone calls to Plaintiff. *Brown* at *2.

The combination of (1) the high volume of phone calls Plaintiff allegedly received, (2) the content of the phone call Plaintiff answered, and (3) the claims of the existence of similar phone calls made to other people, allow the Court to make a context-specific determination that Plaintiff raises a plausible inference that an automatic dialer was used. Plaintiff therefore states a plausible claim under the

TCPA. Thus, the Court DENIES Defendant's Motion concerning Plaintiff's First and Second Counts.

2. Plaintiff's FDCPA and Rosenthal Act Claims

Defendant seeks dismissal of Plaintiff's Third and Fourth Counts on the grounds that Plaintiff fails to sufficiently support his theory that Defendant's calls qualified as and were made to collect a consumer debt under either the FDCPA or the Rosenthal Act. Mot. at 6-8.

While the parties agree that Defendant is a "debt collector," the issue in this Motion is whether Plaintiff alleges sufficient facts for the Court to infer that the 190 telephone calls were made in connection with the collection of consumer debt. Mot. at 7. The FAC alleges in conclusory fashion that the phone calls were made "for the purposes of collecting a consumer debt." FAC ¶ 19. Plaintiff attempts to support this allegation with screenshots of Defendant's website, claiming that "[t]he website makes perfectly clear that, as with Plaintiff, if Defendant calls your cellphone, it is for the purpose of collecting a consumer debt." *See* FAC ¶¶ 19-24, 25. At oral argument, Plaintiff's Counsel further argued that the website's "consumer friendly" setup allowed the inference that it was "directed towards consumers."

However, the Court is not persuaded that the website content allows it to infer that Defendant called Plaintiff for the purpose of collecting consumer debt. The website screenshots only display Defendant's online debt payment and renegotiating function. *See* FAC ¶¶ 21-23. Plaintiff also provides the text of the website's "Terms of Use" and "Privacy Policy," which states that "[t]his is an attempt to collect a debt. Any information obtained will be used for that purpose. This communication is from a debt collector." FAC ¶ 24. While the website information explicitly reinforces the fact that Defendant is a debt collector, it fails to characterize the type of debt to support an inference that Defendant's calls concerned the collection of consumer debt specifically.

The Court thus agrees that Plaintiff's allegations fail to state a claim under either the FDCPA or the Rosenthal Act as currently pled. Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiff's Third and Fourth Counts WITH PREJUDICE.

IV. CONCLUSION

For the foregoing reasons, the Court:

- **DENIES** Defendant's Motion to Dismiss under Rule 12(b)(1),
- **DENIES** the Motion to Dismiss Plaintiff's Counts 1 and 2, and
- **GRANTS WITH PREJUDICE** the Motion to Dismiss Plaintiff's Counts 3 and 4.

IT IS SO ORDERED.

DATED: August 17, 2016

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE