UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.:	2:20-cv-04544 AB (AFMx)	Date:	September 23, 2020

Title: *Jason Alan v. JPMorgan Chase Bank, National Association*

Present: The Honorable	**ANDRÉ BIROTTE JR., United States District Judge**
Carla Badirian Deputy Clerk	N/A Court Reporter
Attorney(s) Present for Plaintiff(s): None Appearing	Attorney(s) Present for Defendant(s): None Appearing

Proceedings: **[In Chambers] ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS.**

I. INTRODUCTION

Pending before the Court is Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint for lack of standing and failure to state a claim upon which relief can be provided. (ECF 19.) For the reasons discussed below, Defendant's Motion is **GRANTED IN PART**. The Court grants Plaintiff leave to amend and he must do so within twenty-one (21) days of the issuance of this order.

II. BACKGROUND

On May 5, 2020, Plaintiff Jason Alan ("Plaintiff") initiated this action by filing a Complaint against Defendant JPMorgan Chase Bank, National Association ("Defendant") (collectively, the "Parties"). (ECF 1.) On June 10, 2020, Plaintiff filed a First Amended Complaint. (ECF 14.) On July 1, 2020 the parties filed a stipulation for leave to file a Second Amended Complaint ("SAC"), and on July 6,

2020, Plaintiff filed his SAC. (ECF 16, 18.) On July 27, 2020, Defendant filed its Notice of Motion and Motion to Dismiss Plaintiff's SAC. (ECF 19.)

III. ALLEGATIONS

Plaintiff's SAC alleges that Defendant violated California and federal law by contacting Plaintiff on numerous occasions between January 28, 2020 and May 15, 2020 for debt collection purposes and/or to solicit him as a customer. (SAC ¶¶ 1-3, 14.) Plaintiff states that, in April 2016, he had previously told Defendant in writing to "cease and desist communication by telephone." (SAC ¶ 5.) The SAC refers to "frequent and incessant" and "repeated" calls from Defendant (SAC ¶¶ 14, 37), but Plaintiff only specifically asserts three calls between the parties:

- **First Call**: On January 28, 2020, Defendant attempted to solicit Plaintiff, and Plaintiff asked Defendant to stop calling. (SAC ¶¶ 6, 8.)
- **Second Call**: On May 15, 2020, Defendant called Plaintiff about an alleged debt Plaintiff owed Defendant. (SAC ¶ 10.)
- **Third Call**: On July 1, 2020, Defendant contacted Plaintiff using a pre-recorded message to solicit Plaintiff about receiving a lower interest rate for a credit card. (SAC ¶ 33.)

Plaintiff alleges that Defendant used an "automatic telephone dialing system" ("ATDS") to place the calls on January 28, 2020 and May 15, 2020. (SAC ¶ 14.)

Plaintiff alleges the following five causes of action: (1) Violation of the Rosenthal Fair Debt Collection Practices Act; (2) Violation of the California Invasion of Privacy Act, Cal. Penal Code § 632; (3) Violation of the California Invasion Privacy Act, Cal. Penal Code § 632.7; (4) Negligent Violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227; and (5) Willful Violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227. (*See generally,* SAC.)

Plaintiff states that he is not a customer of Defendant nor does he have any accounts with it. (SAC ¶ 13.) He claims that Defendant never had consent to contact him and that Defendant recorded their telephone calls without giving notice at the beginning of the call. (SAC ¶¶ 11, 12.) Plaintiff claims he had a reasonable expectation of privacy on the calls and that he spoke with Defendant in a "private location away from where any other people could hear his conversation." (SAC ¶ 30.)

IV. 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

Under Federal Rule of Civil Procedure 12(b)(6), the court may dismiss a complaint if it fails to state a claim upon which relief may be granted. To withstand a motion to dismiss for failure to state a claim, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007). These "factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In considering a Rule 12(b)(6) motion, the complaint must be read in the light most favorable to the nonmoving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). When ruling on the motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (2009) (internal quotation marks omitted). While considering the merits of the claims presented on a motion to dismiss, the court can only consider matters contained within the pleadings. Fed. R. Civ. P. 12(d).

Rule 12(b)(6) also allows a court to dismiss any 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.").

Upon dismissal, leave to amend a complaint should be freely granted. *See* Fed. R. Civ. P. 15(a). However, the Court retains its discretion to deny a plaintiff leave to amend the complaint when alleging additional facts would fail to cure the original deficiency. *See Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

V. DISCUSSION

A. Plaintiff Lacks Standing to Assert a Claim Under the Rosenthal Act (First Cause of Action).

To state a claim under the Rosenthal Act, Plaintiff is required to allege the factual basis for asserting that Defendant is a debt collector, attempting to collect debts. *See Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008). Under the Rosenthal Act, a debt collector is defined as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." Cal. Civ. Code § 1788.2(c). And "debt collection" is defined as "any act or practice in connection with the collection of consumer debts." *Id.* § 1788.2(b).

However, standing is a threshold inquiry and "[o]nly the person who owes the debt or is otherwise obligated to pay the debt has standing to assert violations under the California [Rosenthal] Act and the Federal Act." *People v. Persolve, LLC*, 218 Cal. App. 4th 1267, 1272 (2013); *accord, Sanchez v. Client Servs., Inc.*, 520 F. Supp. 2d 1149, 1155 n.3 (N.D. Cal. 2007). "It is well-established that a plaintiff lacks standing to bring a cause of action under the [Rosenthal Act] when [he] does not owe or is not alleged to owe the debt." *Barvie v. Bank of Am., N.A.*, No. 18-CV-449-JLS (BGS), 2018 WL 4537723, at *4 (S.D. Cal. Sept. 21, 2018).

Plaintiff unequivocally asserts that he "is not a customer of the Defendant and has no accounts with Defendant." (SAC at ¶ 13.) Plaintiff further alleges that he "does not have a credit card or any accounts with Defendant." (*Id.* at ¶ 34.) These statements foreclose the possibility that Plaintiff "owes [a] debt or is otherwise obligated to pay the debt" to Defendant. *Persolve*, 281 Cal. App. 4th at 1272. Although Plaintiff's Opposition cites to a case in which a California Court of Appeal addressed the merits of a non-debtor's claim under the Rosenthal Act (*see Komarova v. Nat'l Credit Acceptance, Inc.*, 175 Cal. App. 4th 324 (2009)), the court did not address standing at all. Accordingly, the Court finds Plaintiff's argument unpersuasive, especially in light of the above-cited cases specifically requiring Plaintiff allege he owes a debt to have standing. *See Barvie*, 2018 WL 4537723, at *4.

Because Plaintiff has never had any accounts with Defendant nor owed Defendant any money, he lacks standing to proceed with this claim and the Court need not rule on the merits of Defendant's Motion. Amendment would be futile,

so the Court **GRANTS** Defendant's motion and **DISMISSES WITH PREJUDICE** Plaintiff's first cause of action.

B. Plaintiff Plausibly States a Claim for California Penal Code Section 632 (Second Cause of Action).

California law provides a claim for relief against any person who records or eavesdrops upon a "confidential communication" carried out through telephone. Cal. Penal Code § 632(a). A "confidential communication" includes "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto." Cal. Penal Code § 632(c). Additionally, the California Supreme Court has explained that a conversation is a "confidential communication" pursuant to § 632 "if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Flanagan v. Flanagan,* 27 Cal. 4th 766, 777 (2002).

The Ninth Circuit upheld dismissal of a Section 632 claim where (1) plaintiff's allegation that his conversation was "carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined thereto" failed to show an objectively reasonable expectation of privacy; and (2) plaintiff failed to demonstrate that the nature of the call created a plausible inference that an objectively reasonable expectation of privacy existed. *See Faulkner v. ADT Sec. Servs., Inc.,* 706 F.3d 1017, 1020 (9th Cir. 2013).

Here, Plaintiff alleges that "[d]uring the conversation between Plaintiff and Defendant, Plaintiff maintained a reasonable expectation of privacy. That is, Plaintiff had a reasonable expectation during his phone conversation with Defendant that the conversations would neither be recorded nor overheard." (SAC ¶¶ 20, 60.) Defendant argues that dismissal is warranted accordingly. (Motion at 7.) While this statement, in isolation, is a mere "[t]hreadbare recital[]" of the language of Section 632 that is prohibited by *Iqbal*, these are not the only facts Plaintiff alleges about his conversations. *Iqbal*, 556 U.S. at 678.

Plaintiff also states that he "[s]poke with Defendant from a private location away from where any other people could hear his conversation." (SAC ¶ 30.) He alleges that the conversations involved Defendant representing that Plaintiff had a credit card account and a balance due. (SAC ¶ 34.) Although the Court recognizes that Plaintiff has pled that he does not have any accounts with Defendant, it finds that Plaintiff has plausibly alleged an objectively reasonable

expectation of privacy because these conversations took place in private locations away from other individuals and involved financial matters. *See Faulkner v. ADT Sec. Servs., Inc.*, No. C-11-00968-JSW, 2011 WL 1812744, at *4 (N.D. Cal. May 12, 2011) (noting that a reasonable expectation of privacy may exist where the calls involve "personal financial affairs"). Accordingly, Defendant's motion to dismiss the second cause of action is **DENIED**.

C. Plaintiff Fails to State a Claim for California Penal Code Section 632.7 (Third Cause of Action).

California Penal Code section 632.7 prohibits "[e]very person who, without the consent of all parties to a communication, intercepts or receives and intentionally records," a communication involving a cellular phone or a cordless phone. "The statutory scheme makes it clear that these sections [Penal Code sections 632.5, 632.6, and 632.7] refer to the actual interception or reception of these radio signals by third parties and do not restrict the parties to a call from recording those calls." *Young v. Hilton Worldwide, Inc.*, No. 2:12-CV-01788-R-PJWX, 2014 WL 3434117, at *1 (C.D. Cal. July 11, 2014); *Smith v. LoanMe, Inc.*, 43 Cal. App. 5th 844, 853 (2019), *review granted*, 460 P.3d 757 (Cal. 2020) (holding that "[S]ection 632.7 clearly and unambiguously applies only to third party eavesdroppers, not to the parties to a phone call.").

Plaintiff's SAC does not allege that Defendant was a third-party eavesdropper. (*See generally* SAC.) Instead it alleges that Defendant was a party to the alleged calls, and thus Plaintiff has failed to state a claim against Defendant for violating Section 632.7. Finally, because Defendant cannot be both a party and a third-party to the calls, amendment would be futile. The Court hereby **GRANTS** Defendant's motion and **DISMISSES WITH PREJUDICE** Plaintiff's third cause of action.

D. Plaintiff Fails to State a Claim for Violation of Telephone Consumer Protection Act ("TCPA") (Fourth and Sixth[1] Causes of Action).

To state a claim for an alleged violation of the TCPA, Plaintiff must allege that the calls at issue were placed using either an "automatic telephone dialing system," or "ATDS," or a prerecorded or artificial voice message. *See* 47 U.S.C. § 227(a)(1); *Meyer v. Portfolio Recovery Assocs.*, LLC, 707 F.3d 1036, 1043 (9th Cir. 2012) (noting that the TCPA requires plaintiff to establish that an ATDS was used). "Under Rule 12(b)(6), a court may dismiss a [claim] that is grouped together with other claims in a single cause of action, without dismissing the entire cause of action." *Perez*, 2014 WL 2918421 at *2.

"[M]erely parroting this definition [of an ATDS] in the FAC is insufficient to state a claim." *Emanuel v. Los Angeles Lakers, Inc.*, No. CV 12-9936-GW SHX, 2013 WL 1719035, at *4 (C.D. Cal. Apr. 18, 2013). "As an isolated assertion, it is conclusory to allege that messages were sent 'using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.' Such a naked assertion need not be taken as true." *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010). The complaint must allege "additional factual details to show that an ATDS was used." *Freidman v. Massage Envy Franchising, LCC,* No. 3:12-CV-02962-L-RBB, 2013 WL 3026641, at *3 (S.D. Cal. June 13, 2013).

Plaintiff alleges nothing more than a "formulaic recitation of the elements of a cause of action" and does nothing more than assert speculation. *Twolmbly,* 550 U.S. at 555, 570. Specifically, Plaintiff's SAC alleges that "Defendant also used an 'automatic telephone dialing system,' as defined by 47 U.S.C. § 227(a)(1), to place its repeated collection calls to Plaintiffs seeking to collect the debt allegedly owed." (SAC ¶¶ 14, 37.) Plaintiff does not provide any additional detail or factual basis that an ADTS was used. This "naked assertion" is insufficient. *Kramer*, 759 F. Supp. 2d at 1171.

1 The Court notes that Plaintiff's Fourth and Sixth Causes of Action are identically pled and that there is no Fifth Cause of Action. (SAC at 16-17.) Upon amendment, the Court orders Plaintiff to correct the cause of action numbering and eliminate duplicative causes of action.

As this cause of action pertains to the alleged first and second calls, which Plaintiff alleges were made by ADTS, Plaintiff has insufficiently stated a cause of action as the SAC merely parrots the required elements. (SAC ¶¶ 6, 8, 10.) As this cause of action pertains to the third call, it survives because Plaintiff has sufficiently pled a factual basis by stating that "Defendant purportedly contacted Plaintiff using a pre-recorded message soliciting Plaintiff about receiving a lower interest rate for a credit card." (SAC 33.)

The Court **GRANTS** Defendant's motion to dismiss Plaintiffs' fourth and sixth causes of action. Because the Court believes it is plausible to allege a claim, these claims are **DISMISSED WITHOUT PREJUDICE**.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** Defendant's Motion to Dismiss:

Defendant's Motion to Dismiss is **DENIED** as to the second cause of action.

Defendant's Motion to Dismiss is **GRANTED** as to the remaining causes of action (one, three, four, and six).

- The first and third claims are **DISMISSED WITH PREJUDICE**.
- The fourth and six claims are **DISMISSED WITHOUT PREJUDICE**.

Plaintiff has twenty-one (21) days to amend his SAC.

IT IS SO ORDERED.