UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NICHOLAS HOROWITZ, an individual, and CHAD HAMBY, an individual, Plaintiffs, vs. GC SERVICES LIMITED PARTNERSHIP, a Delaware limited partnership doing business in California, Defendant.	CASE NO. 14cv2512-MMA (RBB) **ORDER DENYING DEFENDANT'S MOTION TO DISMISS** [Doc. No. 8]

Defendant GC Services Limited Partnership ("Defendant" or "GCS") moves to dismiss Plaintiffs Nicholas Horowitz and Chad Hamby's (collectively, "Plaintiffs") First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Doc. No. 8. Plaintiffs filed an opposition to the motion to dismiss, to which Defendant replied. Doc. Nos. 9, 10. The Court found this matter suitable for determination on the papers and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons stated below, the Court **DENIES** Defendant's motion to dismiss.

[1]Although Defendant stated that it was also moving to dismiss pursuant to Rule 12(b)(1), Defendant does not address Rule 12(b)(1) throughout its moving papers. Doc. No. 8.

BACKGROUND

This action arises out of events surrounding Plaintiff Chad Hamby's alleged outstanding debt.[2] In December 2012, Hamby purchased a Dell personal computer from the QVC shopping channel under an installment payment plan. Doc. No. 6, ¶ 8. At the time of the purchase, Hamby was living at Plaintiff Nicholas Horowitz's residence, which had a landline telephone number registered under Horowitz's name. *Id.* ¶ 9. Horowitz regularly used his telephone and paid its monthly bill. *Id.* Hamby neither used Horowitz's telephone nor received explicit permission to do so. *Id.*

In March 2013, Horowitz converted his landline telephone number to a cell phone number under Hamby's Verizon Wireless "family" plan. *Id.* ¶ 10. Once the phone converted and was under his family plan, Hamby alleges he became the "nominal owner" of the number. *Id.* Moreover, neither Horowitz nor Hamby gave any other person express consent to call the number after it became a wireless phone. *Id.*

In July 2013, GCS made three different calls to the number while attempting to collect Hamby's alleged debt.[3] *Id.* ¶¶ 11–13. Specifically, three different GCS employees called the number on July 16, July 18, and July 20, 2013, respectively. *Id.* Horowitz did not answer any of the calls so a voicemail was left on each occasion. *Id.* All three voicemail messages asked for Chad Hamby and requested a callback. *Id.* Plaintiffs allege that Defendant used an Automatic Telephone Dialing System to make each call. *Id.* ¶ 14. Plaintiffs further allege that "GCS uses a spoofing service analogous to a product called LocalTouch™ which is specifically marketed to debt collectors to make it appear that a collection call is coming from a

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[2] Because this matter is before the Court on a motion to dismiss, the Court must accept as true the allegations of the complaint in question. *See Hosp. Bldg. Co. v. Rex Hosp. Tr.*, 425 U.S. 738, 740 (1976). Thus, all facts cited herein are taken from the FAC unless otherwise noted.

[3] The FAC does not explicitly allege how Defendant GCS obtained the number.

local number." *Id.* ¶ 15.

On July 16 and July 18, 2014, Horowitz called GCS a total of seven times to investigate the lawsuit. *Id.* ¶ 16. Each time Horowitz called, GCS employees did not specify that the call was being recorded at the onset of the call. *Id.* ¶ 16–22.

On July 21, 2014, Plaintiffs filed their original complaint against Defendants GCS and Ruby Cisneros in San Diego Superior Court. On October 21, 2014, Defendant GCS removed the action to this Court and subsequently moved to dismiss the original complaint. Doc. Nos. 1, 4. On November 17, 2014, Plaintiffs filed the operative FAC against GCS only, alleging four causes of action for (1) violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*; (2) violations of the Rosenthal Act, California Civil Code section 1788 *et seq.*; (3) violations of the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. § 227 *et seq.*; and (4) violations of the California Invasion of Privacy Act ("CIPA"), California Penal Code section 631 *et seq.* Doc. No. 6.

Defendant now moves to dismiss Plaintiffs' FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that Plaintiffs have failed to state claims upon which relief can be granted. Doc. No. 8.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6),[4] a motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (internal

[4]All further citations to Rule refer to the Federal Rules of Civil Procedure unless otherwise noted.

quotations, brackets, and citations omitted).

When reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth of all factual allegations and construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). Nevertheless, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Similarly, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). In determining the propriety of a Rule 12(b)(6) dismissal, generally, a court may not look beyond the complaint for additional facts. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Thus, to survive a Rule 12(b)(6) motion to dismiss, a complaint must set forth factual allegations that, if credited, make the claims at least "plausible." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Twombly*, 550 U.S. at 560–70.

When a claim is dismissed for failure to state a claim, leave to amend should be granted "unless the court determines the allegation of other facts consistent with the challenged pleadings could not possibly cure the deficiency." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, a court may grant a motion to dismiss and dismiss the claim with prejudice where amendment would be futile. *Reddy v. Litton Indus.*, 912 F.2d 291, 296 (9th Cir. 1990).

DISCUSSION

A. Judicial Notice

Plaintiffs filed a request for judicial notice in support of their opposition to Defendant's motion to dismiss. Doc. No. 9-1 ("Plfs.' RJN"). Plaintiffs request that the Court take judicial notice that the calendar date of July 20, 2014 fell on a

Sunday. *Id.* Defendant does not address Plaintiffs' request for judicial notice. *See* Doc. No. 10.

Federal Rule of Evidence 201 governs judicial notice of adjudicative facts. Fed. R. Evid. 201(a). Specifically, courts "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Here, the Court finds that a calendar date is not subject to reasonable dispute because the accuracy of a calendar date cannot be reasonably questioned. *See Wayne v. Leal*, 2009 WL 2406299, at *4 (S.D. Cal. Aug. 4, 2009) (noting that Federal Rule of Evidence 201(b) permits a court to take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, such as an almanac, dictionary, calendar, or other similar source"). Accordingly, pursuant to Federal Rule of Evidence 201(b), the Court **GRANTS** Plaintiffs' request for judicial notice.

B. Fair Debt Collection Practices Act Claims

Plaintiffs' first cause of action alleges that Defendant GCS violated several sections of the FDCPA. Doc. No. 6, ¶¶ 23–28. GCS moves to dismiss the claims on several grounds. Specifically, Defendant GCS argues that the FDCPA's one-year statute of limitations bars Plaintiffs' claims and that Plaintiffs have not sufficiently alleged any FDCPA claims.

1. *Statute of Limitations*

As an initial matter, Defendant GCS asserts that the statute of limitations bars Plaintiffs' FDCPA claims. Defendant argues that any claim arising from the three calls is untimely because the calls at issue occurred on July 16, July 18, and July 20, 2013, but Plaintiffs did not file their initial complaint until July 21, 2014—over one-calendar year after the purported calls. In response, Plaintiffs clarify that their

FDCPA claims arise exclusively from the July 20, 2013 voicemail.[5] Plaintiffs further contend that such claims are timely under Federal Rule of Civil Procedure 6(a) because July 20, 2014 fell on a Sunday, so they had until the following Monday—July 21, 2014—to file their complaint.

The underlying purpose of the FDCPA is "to eliminate abusive debt collection practices" by prohibiting debt collectors from using any false, deceptive, or misleading representation for the collection of any debt. 15 U.S.C. § 1692(e); *see also Winter v. I.C. Sys.*, 543 F. Supp. 2d 1210, 1212 (S.D. Cal. 2008). However, for a plaintiff to recover, FDCPA claims must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Here, the purported violation occurred on July 20, 2013, so Plaintiffs had one year—until July 20, 2014—to bring a timely FDCPA claim. Plaintiffs, however, did not file their initial complaint until July 21, 2014.

Plaintiffs assert that their FDCPA claims are nonetheless timely pursuant to Federal Rule of Civil Procedure 6(a), which provides that if the last day of any calendar period falls on "a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Fed. R. Civ. P. 6(a). Courts within the Ninth Circuit have applied Rule 6(a) to the FDCPA's statute of limitations, reasoning that the FDCPA's statute of limitations is not jurisdictional. *See, e.g., Clark v. Bonded Adjustment Co., Inc.*, 176 F. Supp. 2d 1062, 1068 (E.D. Wash. 2001). In *Clark*, the court held "that the time limit in the FDCPA reads like an 'everyday, run-of-the-mill statute of limitations' and is not jurisdictional." *Id.* The court reasoned that "the presumption that statutory time limits are not jurisdictional has not been rebutted by anything in the language or legislative history of the FDCPA." *Id.* Accordingly, the court found that Rule 6(a) applies to the FDCPA's one-year time limit, and because the last day of the calendar

[5] Because Plaintiffs represent that all FDCPA claims arise exclusively from the July 20, 2013 voicemail, the Court need not consider the July 16 and July 18, 2013 calls.

year fell on a Saturday, the plaintiffs were permitted to file their FDCPA claims on the following Monday. *Id.* Further, in *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 940 (9th Cir. 2009), the Ninth Circuit subsequently "agree[d] with both the fine discussion and the conclusion in *Clark*."

Defendant, however, argues that Rule 6(a) does not apply here because the FDCPA's statute of limitations in § 1692k(d) is jurisdictional. Defendant relies on the Eighth Circuit's decision in *Mattson v. U.S. West Commc'ns, Inc.*, 967 F.2d 259, 262 (8th Cir. 1992) for the proposition that because § 1692k(d) is a jurisdictional statute, Rule 82 bars an extension to the following Monday. *See* Fed. R. Civ. P. 82 ("[R]ules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."). This argument is not well-taken based on current Ninth Circuit case law. In *Mangum*, the Ninth Circuit expressly disagreed with the Eighth Circuit's holding in *Mattson* that the language of § 1692k(d) is jurisdictional. *See Mangum*, 575 F.3d at 940 n.14 ("In any event, we do not agree that the language is jurisdictional."). Additionally, the district court cases cited by Defendant were decided pre-*Mangum* and therefore are inapposite.

Because the FDCPA's statute of limitations is not jurisdictional, the Court finds that Rule 6(a) applies. Here, the purported violation occurred on July 20, 2013, and therefore the last day of the one-year calendar period was July 20, 2014, which fell on a Sunday. *See* Plfs.' RJN. Under Rule 6(a), Plaintiffs therefore had until the following Monday—July 21, 2014—to file their complaint, which they did. Accordingly, the Court finds that Plaintiffs' FDCPA claims are timely.

2. Requirements for FDCPA Claims

As its second argument, Defendant GCS asserts that Plaintiffs have failed to allege a FDCPA violation. Specifically, GCS argues that Plaintiffs have not been subject to collection activity arising from a consumer debt, that no communications with Plaintiff Hamby have been alleged, and that Defendant has not done any acts or omissions that violate the FDCPA. In response, Plaintiffs argue

that they have sufficiently alleged all elements.

To state a FDCPA claim, the plaintiff must allege: (1) the plaintiff has been the object of collection activity arising from a consumer debt, (2) the defendant attempting to collect the debt qualifies as a "debt collector,"[6] and (3) the defendant committed some act or omission in violation of the FDCPA. *Monreal v. GMAC Mortg., LLC*, 948 F. Supp. 2d 1069, 1084 (S.D. Cal. 2013); *see also Gutierrez v. State Farm Mut. Ins. Co.* (*Gutierrez I*), 2012 WL 398828, at *5 (N.D. Cal. Feb. 7, 2012); *Janti v. Encore Capital Grp., Inc.*, 2010 WL 3058260, at *4 (S.D. Cal. Aug. 3, 2010). The Court will discuss Defendant's arguments in turn.

a. Collection Activity Arising from a Consumer Debt

First, Defendant argues that Plaintiffs have failed to plead facts supporting the existence of a consumer debt. Doc. No. 8. In response, Plaintiffs assert that they have adequately alleged a consumer debt because they allege in their FAC that "GCS's voicemails were an attempt to collect a 'consumer debt' within the meaning of 15 U.S.C. § 1692a(5) because the alleged obligation GCS was attempting to collect was primarily for personal, family, or household use." Doc. No. 6, ¶ 25. Plaintiffs also point out that their FAC states that "Hamby purchased a Dell **personal** computer from the QVC shopping television channel." *Id.* ¶ 8 (emphasis in original).

To state a claim under the FDCPA, the debt at issue must be a consumer debt. *Gutierrez I*, 2012 WL 398828, at *5. The FDCPA defines "consumer debt" as any debt where "the subject of the transaction [is] primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). The Ninth Circuit has recognized that debts incurred for business purposes do not fall under the scope of the FDCPA. *Bloom v. I.C. Sys. Inc.*, 972 F.2d 1067, 1068–69 (9th Cir. 1992) ("The FDCPA protects consumers from unlawful debt collection practices. Consequently, the Act

[6] The Court notes that Defendant does not argue that Plaintiffs have failed to characterize GCS as a debt collector.

applies to consumer debts and not business loans.").

Here, Plaintiffs allege in their FAC that Plaintiff Hamby incurred the debt by purchasing a Dell personal computer from the QVC shopping channel. Doc. No. 6, ¶ 25. Plaintiffs further allege that the debt at issue "was primarily for personal, family, or household use." *Id.* ¶ 8. Construing these allegations together and in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have sufficiently alleged a consumer debt under § 1692a(5) of the FDCPA.

b. Communication

Defendant next moves to dismiss on the grounds that Plaintiffs fail to allege any communication between GCS and Hamby. In particular, Defendant asserts that Plaintiffs do not allege that Hamby actually received the July 20, 2013 voicemail, which was left on Horowitz's telephone, or had any other communication with GCS. In response, Plaintiffs assert that voicemails are "communications" within the meaning of the FDCPA regardless of whether the consumer receives them.

Under the FDCPA, a "communication" is "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). Courts have routinely recognized that "voicemails are communications that must conform to the disclosure requirements of the FDCPA." *Lensch v. Armada Corp.*, 795 F. Supp. 2d 1180, 1189 (W.D. Wash. 2011); *see also Costa v. Nat'l Action Fin. Servs.*, 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007); *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005).

Recently, the Ninth Circuit addressed whether a consumer must, in fact, receive the debt collector's communication to have standing to bring a claim under the FDCPA.[7] *See Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1118 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014). In

[7] The Court framed the issues as follows: "The question, then, is whether the 'use [of] any false, deceptive, or misleading representation . . . with respect to any person' entails a corollary requirement that the person to whom the representation was addressed actually have received it." *Id.* at 1117.

Tourgeman, although the consumer admittedly never received the collection letters, he eventually brought claims under § 1692e against the debt collector who sent the letters. The defendant asserted that because the consumer never actually received the letter, he lacked standing to raise a claim under the FDCPA.[8] The Ninth Circuit, however, held the consumer had standing under the FDCPA regardless of the fact that he did not actually receive the collection letters. The court explained:

> A debt collector who addresses a misleading dunning letter to a consumer as a means of collecting that consumer's debt 'use[s]' an unlawful practice 'with respect to' the consumer, regardless of whether some interceding condition—such as non-receipt of the letter, or the consumer's failure to read it, or the fact that the consumer is savvy enough not to be misled by it—renders the practice ineffective.

Id. at 1117. The court further reasoned that the fact that the FDCPA is a remedial statute that "should be construed liberally in favor of the consumer" further supported the court's conclusion that "a consumer such as Tourgeman, who did not actually receive a dunning letter directed toward him at the time it was sent, nonetheless may bring an action challenging the lawfulness of that letter under the Act." *Id.* at 1118.

Here, Defendant argues that Plaintiff Hamby cannot maintain a cause of action under the FDCPA because the FAC does not allege that he actually received the July 20, 2013 voicemail. However, the Ninth Circuit made clear in *Tourgeman* that a consumer such as Hamby may challenge the lawfulness of the voicemail targeted at him under the FDCPA, even if he did not actually receive it. The Court finds that Plaintiffs have sufficiently alleged a communication and therefore **DENIES** Defendant's motion to dismiss on this ground.

c. An Act or Omission in Violation of the FDCPA

Plaintiffs allege that Defendant GCS violated the FDCPA through several acts and omissions. Specifically, Plaintiffs allege that Defendant violated the following

[8] The defendant also argued that he lacked Constitutional standing under Article III. *See id.*

FDCPA provisions: (1) § 1692d(6) for failing to disclose the name of the collection agency, (2) § 1692e(11) for failing to disclose that the debt collector is attempting to collect a debt, (3) § 1692e(10) for using deceptive means in an attempt to collect an alleged debt, and (4) § 1692f(5) for causing charges to be made to Plaintiffs' cell phone bill. Doc. No. 6. In response, Defendant GCS argues Plaintiffs' § 1692e(11) and § 1692f(5) claims should be dismissed because the claims are not sufficiently alleged. Doc. No. 10. Moreover, GCS asserts that Plaintiffs'§ 1692d(6) and § 1692e(10) claims fail as a matter of law. *Id.*

To allege a FDCPA claim, a defendant must have committed some act or omission in violation of the FDCPA. *Robinson v. Managed Accounts Receivables Corp.*, 654 F. Supp. 2d 1051, 1057 (C.D. Cal. 2009). Thus, a plaintiff making such an allegation must sufficiently plead facts that a defendant has violated the FDCPA. Each of Defendant's grounds for dismissal will be discussed in turn.

i. Section 1692d(6)

First, Plaintiffs allege that GCS violated 15 U.S.C. § 1692d(6) by "fail[ing] to meaningfully identify the legal name of the collection agency" for the voicemail message left on July 20, 2013. Doc. No. 6, ¶ 26. Specifically, Plaintiff alleges that on July 20, 2013, a GSC employee left the following voicemail on the telephone number:

> Hello this message is for Chad Hamby. My name is Ruby Cisneros. Appreciate if you'd return my phone call. You can reach me at (866) 862-2789. Thank you.

Id. ¶ 13.

Defendant does not appear to dispute that Plaintiffs have sufficiently stated a claim under § 1692d(6). Instead, Defendant claims that Plaintiffs' § 1692d(6) claim fails as a matter of law because Plaintiff Horowitz is not the consumer but a third party, and therefore § 1692(b) applies and exempts the voicemail from the meaningful disclosure requirement. Doc. No. 8.

Section 1692d of the FDCPA provides that "a debt collector may not engage

in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. In addition to this general ban, this subsection also prohibits certain conduct, including "[e]xcept as provided in section 1692(b) of this title, the placement of telephone calls without meaningful disclosure of the caller's identity." 15 U.S.C. § 1692d(6). Section 1692b, in turn, provides in relevant part:

> Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—
>
> > (1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
> >
> > . . .
> >
> > (3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

15 U.S.C. § 1692b.

Here, Defendant asserts that Plaintiffs' claim fails as a matter of law because Plaintiff Horowitz is not the consumer but instead a third party, and therefore § 1692b exempts Defendant from disclosing its identity or line of business on the July 20, 2013 voicemail. Although Defendant cites to various cases in support of its argument, all were decided on summary judgment—not at the pleading stage of litigation. Accordingly, although the exception set forth in § 1692b may very well apply here as Defendant contends, the Court need not make that determination at this early stage of the litigation. The Court therefore **DENIES** Defendant's motion to dismiss Plaintiffs' § 1692d(6) claim.

ii. Section 1692e(10)

Next, Defendant moves to dismiss Plaintiffs' 15 U.S.C. § 1692e(10) claim on the grounds that Plaintiffs do not allege that a false name or number was displayed on Horowitz's Caller ID during GCS's call and that other courts considering

Plaintiffs' claim have "found such claims to fail as a matter of law."[9] Doc. No. 8. Plaintiffs oppose asserting that "GCS's use of [a] spoofing service is misleading because it might induce a consumer to answer a call it might otherwise reject." Doc. No. 9.

Section 1692e of the FDPCA prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Section 1692e(10) specifically prohibits "the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. § 1692e(10).

The Ninth Circuit applies "the least sophisticated debtor" standard to determine whether an act violates § 1692e(10). *Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098, 1099–1100 (9th Cir. 1996). That is, courts look to see whether the least sophisticated debtor would likely be misled by a communication from a debt collector. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 934 (9th Cir. 2010); *Swanson v. S. Or. Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988). To determine whether a consumer would likely be misled, the inquiry is whether the misrepresentation could "frustrate a consumer's ability to intelligently choose his or her response" to an attempted debt collection. *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1034 (9th Cir. 2010).

Here, Plaintiffs allege that "GCS uses a spoofing device . . . which is specifically marketed to debt collectors to make it appear that a collection call is coming from a local number to trick the recipient into thinking the call is from a local caller." Doc. No. 6, ¶ 15. In their FAC, Plaintiffs allege that they were informed that the call was made from GCS's call center in San Antonio, Texas although a local San Diego number appeared on the Caller ID. *Id.* Plaintiffs further

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[9] In its reply, Defendant also raises a motion to dismiss Plaintiffs' § 1692e(11) claim for the first time on the grounds that a debt collector's duty under § 1692e(11) runs to the consumer only and requires consumer status to bring a claim. Doc. No. 10. However, issues that are not raised in an opening brief may not properly be raised in a reply. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1176 & n.4 (9th Cir. 1995).

allege that Defendant "us[ed] a deceptive caller ID number to conceal the true purpose of the call." *Id.* ¶ 27. Based upon these allegations, the Court finds Plaintiffs have sufficiently alleged facts to show that the "least sophisticated debtor" would likely be misled by the communication. Although Defendant argues that Plaintiffs were not misled by the false area code, courts applying the "least sophisticated debtor" standard find it is immaterial how the actual plaintiff responds to a defendant's deceptive actions. *See Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1062 (9th Cir. 2011) ("Arrow is also correct that faced with ambiguous language, an unusually savvy consumer (such as Gonzales) would seek clarification of whether his debt could be reported. We are not, however, to read the language from the perspective of a savvy consumer . . . ."). Moreover, although Defendant primarily relies on *Scheffler v. Integrity Fin. Partners, Inc.*, 2013 WL 9768539 (D. Minn. Oct. 28, 2013) to support its assertion, the case was decided on summary judgment rather than at the pleading stage, and therefore is inapposite for the purposes of this motion. Accordingly, the Court **DENIES** Defendant's motion to dismiss Plaintiffs' § 1692e(10) claim.

iii. Section 1692f(5)

Next, Defendant GCS moves to dismiss Plaintiffs' 15 U.S.C. § 1692f(5) claim on the grounds that "[a] single allegation that a defendant caused charges to be made to plaintiff's cell phone is insufficient to state a claim" under the provision. Doc. No. 8. Plaintiffs argue that their FAC adequately alleges that the July 20, 2013 voicemail violates § 1692f(5) because Hamby was charged for the message. Doc. No. 9. Plaintiffs point out that their FAC alleges:

> In March 2013, Horowitz ported the Receiving Number from a landline to Hamby's Verizon Wireless "family" plan with three total lines and 2000 minutes per month; and
>
> . . .
>
> Further, by using a deceptive caller ID number to conceal the true purpose of the call, GCS violated 15 U.S.C. § 1692f(5) by causing charges to be made to Plaintiffs' cell

phone bill.

Doc. No. 6, ¶¶ 10, 27.

Section 1692f of the FDCPA provides that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. In particular, "[c]ausing charges to be made to any person for communications by concealment of the true purpose of the communication" is prohibited, which is "not limited to, collect telephone calls and telegram fees." 15 U.S.C. § 1692f(5).

Here, Plaintiffs allege in their FAC that Horowitz converted his landline phone number to a cell phone number under Hamby's Verizon Wireless plan, which is limited to "2000 minutes per month." Doc. No. 6, ¶ 10. Plaintiffs also allege that Defendant GCS "caus[ed] charges to be made to Plaintiffs' cell phone bill." *Id.* ¶ 27. Construing Plaintiffs' allegations together and in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have sufficiently alleged that GCS incurred charges to Plaintiffs' cell phone bill in the form of lost minutes. The Court therefore **DENIES** Defendant's motion to dismiss Plaintiffs' § 1692f(5) claim.

C. Rosenthal Act Claims

Plaintiffs' second cause of action alleges that Defendant GCS violated the Rosenthal Act. The Rosenthal Act is California's version of the FDCPA, as it "mimics or incorporates by reference the FDCPA's requirements . . . and makes available the FDCPA's remedies for violations. *Riggs v. Prober & Raphael*, 681 F.3d 1097, 1100 (9th Cir. 2012); *see* Cal. Civ. Code § 1788 *et seq.* Accordingly, whether an act "violates the Rosenthal Act turns on whether it violates the FDCPA." *Riggs*, 681 F.3d at 1100. Rosenthal Act violations and FDCPA violations are viewed identically. Thus, for the same reasons set forth above, the Court finds Plaintiffs have sufficiently alleged claims for violations of the Rosenthal Act and therefore **DENIES** Defendant's motion to dismiss Plaintiff's Rosenthal Act claims.

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D. Telephone Consumer Protection Act Claim

For their third cause of action, Plaintiffs allege Defendant GCS violated 47 U.S.C. § 227(b)(1)(A)(iii) of the TCPA. Doc. No. 6. Specifically, Plaintiffs allege that GCS violated the TCPA because Plaintiffs never provided GCS with express consent to call Horowitz's cellular phone and GCS did not call for emergency purposes. *Id.* ¶¶ 38–39. Defendant moves to dismiss Plaintiffs' TCPA claim arguing "only one plaintiff can have standing to file the claim for alleged violation of the TCPA, not both." Doc. No. 8 at 21. Defendant argues that Plaintiff Hamby lacks standing under the TCPA because he was not the regular user of the phone and did not receive GCS's voicemail. Alternatively, Defendant GCS argues that Plaintiff Horowitz lacks standing to sue because he is not the subscriber. Plaintiffs assert that at least one plaintiff has standing to bring a TCPA claim, but "take no position as to which [standing] test the Court should apply." Doc. No. 9 at 29.

The purpose of the TCPA is to protect the privacy interests of telephone users by placing restrictions on unsolicited, automated telephone calls. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). Section 227(b)(1)(A)(iii) of the TCPA specifically prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice–(iii) to any telephone number assigned . . . to the cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii).

The Court finds *Olney v. Progressive Casual Insurance Company*, 993 F. Supp. 2d 1220, 1225 (S.D. Cal. 2014) instructive. There, the defendant moved to dismiss the plaintiff's TCPA claims based on lack of standing. The court rejected both the defendant's argument that only the intended recipient has standing and the plaintiff's argument that "any person or entity" has standing to sue for TCPA violations. Instead, the court held that "it is the subscriber of the telephone number called who has standing to sue for violations of the TCPA." *Id.* at 1225; *see also*

Gutierrez v. Barclays Grp., No. 10CV1012 DMS BGS, 2011 WL 579238, at *5 (S.D. Cal. Feb. 9, 2011) ("[T]he TCPA is intended to protect the telephone subscriber, and thus it is the subscriber who has standing to sue for violations of the TCPA."). Moreover, in *Olney*, the court found that the term "subscriber" was not limited to the account holder but also included the regular user of the phone. *Olney*, 993 F. Supp. 2d at 1225–26. The court noted that "[t]he thrust . . . is that a plaintiff's status as the 'called party' depends not on such technicalities as whether he or she is the account holder or the person in whose name the phone is registered, but on whether the plaintiff is the regular user of the phone and whe[ther] the defendant was trying to reach him or her by calling the phone." *Id.* at 1225 (quoting *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 683 (S.D. Fla. 2013)).

As alleged in the FAC, Plaintiff Hamby is both the nominal account holder of the phone number and the person whom Defendant GCS was trying to reach by calling the phone, whereas Plaintiff Horowitz is the regular user of the phone. Thus, based on the reasoning set forth in *Olney*, Plaintiff has sufficiently alleged standing at this stage in the litigation with respect to both Plaintiffs Hamby and Horowitz. While Plaintiff fails to cite to any authority for the proposition that more than one Plaintiff may simultaneously have standing under the TCPA, even if ultimately both Plaintiffs may not recover for TCPA violations arising from the same telephone call, the Court finds that for purposes of this motion, Plaintiffs have sufficiently alleged standing of Plaintiff Hamby and/ or alternatively Plaintiff Horowitz. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively . . ."); *see also MB Fin. Grp., Inc. v. U.S. Postal Serv.*, 545 F.3d 814, 819 (9th Cir. 2008) ("[A] plaintiff is generally entitled to plead alternative or multiple theories of recovery on the basis of the same conduct on the part of the defendant."). Defendant GCS does not otherwise dispute that Plaintiffs have sufficiently alleged a TCPA claim based on GCS's use of an auto-dialing system. Accordingly, the Court **DENIES** Defendant's motion to dismiss Plaintiffs' TCPA

claim.

E. California Invasion of Privacy Act Claim

For their fourth cause of action, Plaintiffs allege Defendant GCS violated California Penal Code section 632.7 of the CIPA. Doc. No. 6. In particular, Plaintiffs allege that Horowitz used his cellular phone to make seven calls to GCS and that GCS violated the CIPA when it recorded those phone conversations without Horowitz's prior consent. *Id.* ¶ 43. Defendant GCS moves to dismiss Plaintiffs' CIPA claim on the grounds that section 632.7 claims are restricted to third party interceptions, and Plaintiffs have made no allegations of any third party interception or recordings. Doc. No. 8.

Section 632.7 of the CIPA imposes penalties on "[e]very person who, without the consent of all parties, intercepts *or receives* and intentionally records . . . a communication transmitted between . . . a cellular radio telephone and a landline . . . ." Cal. Penal Code § 632.7(a) (emphasis added). In *Brown v. Defender Sec. Co.*, 2012 WL 5308964, at *4–5 (C.D. Cal. Oct. 22, 2012), the court denied the defendant's motion to dismiss and rejected the notion that section 632.7 only applies to third parties. The court reasoned that "the statute uses the terms 'receives' and 'intercepts' disjunctively, which suggests that these terms are meant to apply to distinct kinds of conduct." *Id.* at *5. Moreover, "[s]ince 'intercepts' is most naturally interpreted to refer to conduct whereby an unknown party secretly accesses a conversations [sic], 'receives' is naturally read to refer to something other than access to a conversation by an unknown interloper." *Id.*

The Court finds the reasoning in *Brown* persuasive. Plaintiffs' section 632.7 claim is not restricted to third party interceptions. Accordingly, based on the "clear and unambiguous language" of the statute and "the fact that the statute uses the terms 'receives' and 'intercepts' disjunctively," the Court finds that section 632.7 grants a wider range of protection to phone conversations involving a cellular phone. *Id.* In their FAC, Plaintiffs have alleged that Defendant GCS *received*

communications via Horowitz's cellular phone and that GCS recorded the calls without Horowitz's consent. *See, e.g.*, Doc. No. 6, ¶¶ 16–22. Taking Plaintiffs' allegations as true and in the light most favorable to them, Plaintiffs have sufficiently alleged a violation of the CIPA.

Although Defendant cites to *Young v. Hilton Worldwide, Inc.*, 2014 WL 3434117 (C.D. Cal. July 11, 2014) to support its contention that section 632.7 is restricted to third party interceptions, the Court is not persuaded. Contrary to *Young*, most district courts in the Ninth Circuit have found section 632.7 applies both to parties of a communication as well as third parties. *See, e.g., Brown*, 2012 WL 5308964, at *4–5; *see also Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1017–18 (C.D. Cal. Sept. 8, 2014) (finding that section 632.7 "prevents a party to a cellular telephone conversation from recording it without the consent of all parties to the conversation" and is not limited to third parties); *Simpson v. Vantage Hospitality Grp., Inc.*, 2012 WL 6025772, at *6 (N.D. Cal. Dec. 4, 2012) (rejecting the defendant's argument that section 632.7 only applies to third parties); *Simpson v. Best W. Int'l, Inc.*, 2012 WL 5499928, at *9 (N.D. Cal. Nov. 13, 2012) ("Interpreting section 632.7 to only apply to third parties would defeat the Legislature's intent.").

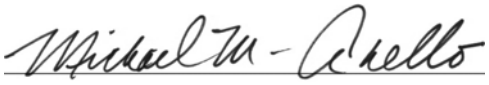
Defendant GCS does not otherwise dispute the sufficiency of Plaintiffs' section 632.7 claim. Accordingly, the Court **DENIES** Defendant's motion to dismiss Plaintiffs' CIPA claim.

CONCLUSION

For the reasons set forth above, the Court **DENIES** Defendant's motion to dismiss Plaintiffs' First Amended Complaint.

IT IS SO ORDERED.

DATED: April 28, 2015



Hon. Michael M. Anello
United States District Judge