

1 (*Id.* at ¶¶ 20-21.) Plaintiff attempted to obtain a modification of his loan, but Defendant Saxon
2 declined to provide the requested modification. (*Id.* at ¶ 22.) Instead, it chose to pursue foreclosure.
3 (*Id.* at ¶ 27.) In that pursuit, a Trustee’s Sale of Plaintiff’s home was scheduled for June 2, 2009.

4 Plaintiff filed the present case on May 27, 2009, along with an *ex parte* application for a
5 temporary restraining order (“TRO”) to prevent the Trustee’s Sale. The Superior Court issued the
6 TRO, and set a hearing on an order to show cause why a preliminary injunction should not issue. Two
7 days before that hearing was scheduled to occur, Plaintiff filed a First Amended Complaint. The day
8 before the hearing, Defendant Saxon removed the case to this Court.

9 In the First Amended Complaint, Plaintiff alleges Defendant Saxon is a party to a contract with
10 Fannie Mae, specifically, a Servicer Participation Agreement for the Home Affordable Modification
11 Program (“HAMP”). Plaintiff alleges he is a third party beneficiary of this contract, and Defendant
12 Saxon is in breach. Plaintiff also alleges Defendants Saxon and Countrywide placed continual phone
13 calls to his home, work and cell phones in an attempt to collect payments on the loans. (*Id.* at ¶ 44.)
14 Based on that conduct, Plaintiff alleges claims for violation of the Rosenthal Act, invasion of privacy,
15 and violation of the Telephone Consumer Protection Act (“TCPA”). Plaintiff also alleges a claim for
16 violation of California Business and Professions Code § 17200.

17 After the case was removed, Defendant Saxon filed the present motion to dismiss. Defendant
18 Countrywide has also filed a motion to dismiss, which is addressed in a separate order.

19 **II.**

20 **DISCUSSION**

21 Defendant Saxon moves to dismiss Plaintiff’s First Amended Complaint for failure to state a
22 claim. It argues Plaintiff has failed to allege the necessary elements of his breach of contract claim.
23 It also asserts it is not a debt collector, nor did it engage in debt collection activities, therefore
24 Plaintiff’s Rosenthal Act claim must be dismissed. Defendant asserts Plaintiff’s invasion of privacy
25 claim must be dismissed because Plaintiff has failed to allege a legally protected privacy interest or
26 conduct constituting a serious invasion of privacy. Defendant contends Plaintiff’s TCPA claim fails
27 because it had consent to call Plaintiff, and none of the calls involved advertising. Absent these

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1 claims, Defendant insists Plaintiff's § 17200 claim must also be dismissed. Plaintiff disputes each of
2 these arguments.

3 **A. Standard of Review**

4 In two recent opinions, the Supreme Court established a more stringent standard of review for
5 12(b)(6) motions. *See Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v.*
6 *Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss under this new standard, "a complaint
7 must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on
8 its face.'" *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility
9 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that
10 the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

11 "Determining whether a complaint states a plausible claim for relief will ... be a context-
12 specific task that requires the reviewing court to draw on its judicial experience and common sense."
13 *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). In *Iqbal*, the Court began this
14 task "by identifying the allegations in the complaint that are not entitled to the assumption of truth."
15 *Id.* at 1951. It then considered "the factual allegations in respondent's complaint to determine if they
16 plausibly suggest an entitlement to relief." *Id.* at 1951.

17 **B. Breach of Contract**

18 The first claim alleged in this case is for breach of contract. Plaintiff does not allege that he
19 was a party to a contract with Defendant Saxon, but instead alleges that he is a third party beneficiary
20 of a contract between Defendant Saxon and Fannie Mae, specifically a Servicer Participation
21 Agreement for the HAMP. (First Am. Compl. at ¶¶ 30, 55.) Defendant Saxon moves for dismissal
22 of this claim on the grounds that Plaintiff has failed to allege he is an intended beneficiary of the
23 contract, and he has failed to allege that he performed his obligations under the contract.

24 Contrary to Defendant's assertion, Plaintiff has alleged sufficient facts to support his third
25 party beneficiary theory. Plaintiff identifies the contract at issue, and attaches a copy of the contract
26 to his Complaint. Arguably, one of the purposes of the contract is to assist homeowners, like Plaintiff,
27 who are facing foreclosure. These facts are sufficient to state a plausible claim for breach of contract
28 under a third party beneficiary theory.

1 Next, Defendant Saxon asserts that Plaintiff has failed to allege his own performance under
2 the contract. However, Defendant fails to cite any authority that requires Plaintiff, an alleged third
3 party beneficiary of the contract, to so allege. In the absence thereof, the Court declines to dismiss
4 this claim.

5 **C. Rosenthal Act Claim**

6 The next claim at issue alleges Defendant Saxon violated the Rosenthal Act. Defendant raises
7 several arguments in support of dismissal of this claim. First, it argues it is not a “debt collector”
8 under the statute. Second, Defendant asserts that foreclosure activities are not “debt collection” under
9 the statute. Third, Defendant contends it did not engage in unreasonable behavior. Finally, Defendant
10 declares it did not make any deceptive or misleading representations.

11 In support of its argument that it is not a “debt collector” under the Rosenthal Act, Defendant
12 Saxon relies on the federal Fair Debt Collection Practices Act (“FDCPA”), and federal cases
13 interpreting that statute. (*See* Mot. at 5-6.) Defendant acknowledges that the federal and state statutes
14 define “debt collector” differently. *Compare* 15 U.S.C. § 1692a(6) with Cal. Civ. Code § 1788.2©).
15 Specifically, the FDCPA excludes from the definition of “debt collector” “any person collecting or
16 attempting to collect any debt owed or due or asserted to be owed or due another to the extent such
17 activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement[.]” 15
18 U.S.C. § 1692a(6)(F)(i). The Rosenthal Act defines “debt collector” more broadly as “any person
19 who, in the ordinary course of business, regularly, and on behalf of himself or herself or others,
20 engages in debt collection.” Cal. Civ. Code § 1788.2©). Nevertheless, Defendant fails to apply the
21 proper definition to the facts of this case. Accordingly, this argument does not warrant dismissal of
22 this claim.

23 Defendant Saxon’s second argument is that foreclosure activity does not amount to “debt
24 collection.” However, Plaintiff’s Rosenthal Act claim does not rely on Defendant’s foreclosure
25 activities. Rather, this claim relies on Defendant’s continuous and repeated phone calls to Plaintiff’s
26 home, work and cell phones, its deceptive and misleading representations, and its failure to provide
27 the notice required by California Civil Code § 1812.700. (First Am. Compl. at ¶ 61.) Defendant
28 asserts the volume and pattern of its calls to Plaintiff was not unreasonable, but that question is not

1 amenable to resolution on a motion to dismiss. Defendant also contends it did not make any deceptive
2 or misleading representations in violation of California Civil Code § 1788.17. Here, the Court agrees
3 with Defendant. Although Plaintiff alleges Defendant Saxon cannot produce the Note and Deed of
4 Trust, he fails to allege any facts that connect this allegation to a violation of Section 1788.17.
5 Defendant Saxon's final argument on this claim is that Plaintiff fails to identify which calls were made
6 by which Defendant. Although Defendant is correct, it fails to cite any authority that requires that
7 level of specificity in the complaint. As currently pleaded, both Defendants "contacted Plaintiff, five
8 days a week at his home, cell, and work phone numbers, generally multiple times a day." (*Id.* at ¶47.)
9 These allegations are sufficient to state a plausible claim for violation of the Rosenthal Act. *See, e.g.*,
10 Cal. Civ. Code § 1788.11(d) (stating debt collectors shall refrain from "[c]ausing a telephone to ring
11 repeatedly or continuously to annoy the person called[.]")

12 In sum, the Court grants the motion to dismiss the Rosenthal Act claim to the extent Plaintiff
13 alleges a violation of § 1788.17. In all other respects, the motion to dismiss this claim is denied.

14 **D. Invasion of Privacy Claim**

15 Next, Plaintiff alleges a claim for invasion of privacy. Defendant Saxon argues Plaintiff has
16 failed to establish the elements of this claim, therefore it must be dismissed. Defendant also asserts
17 the claim must be dismissed because the parties' relationship sounds in contract, not tort.

18 Defendant Saxon's first argument goes to the merits of Plaintiff's claim rather than the
19 pleading requirements. Accordingly, this argument does not warrant dismissal pursuant to Rule
20 12(b)(6).

21 Defendant Saxon's second argument is likewise unpersuasive. That argument states that when
22 the relationship between the parties is contractual, the remedies should be limited to contract, not tort.
23 However, the cases cited to support this argument are distinguishable from this case. *See Applied*
24 *Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503 (1994) (addressing whether a contracting
25 party can be held liable in tort for conspiracy to interfere with its own contract); *Hunter v. Up-Right,*
26 *Inc.*, 6 Cal. 4th 1174, 1180 (1993) (discussing scope of remedies for wrongful termination); *Foley v.*
27 *Interactive Data Corp.*, 48 Cal. 3d 654, 696 (1988) (discussing employment contract). Defendant fails
28 to cite any authority that limits a plaintiff to contract remedies when the defendant's alleged wrongs

1 are unrelated to the subject matter of the contract. Therefore, Defendant’s motion to dismiss this claim
2 is denied.

3 **E. TCPA Claim**

4 Plaintiff’s next claim alleges Defendant Saxon violated the TCPA. Defendant argues this
5 claim should be dismissed because Plaintiff consented to the calls and because the calls did not
6 involve unsolicited advertising.

7 The specific legal basis for this claim is 47 U.S.C. § 227(b)(1)(A)(iii), which states:

8 It shall be unlawful for any person within the United States, or any person outside the
9 United States if the recipient is within the United States- -

10 (A) to make any call (other than a call made for emergency purposes or made with the
11 prior express consent of the called party) using any automatic telephone dialing system
12 or an artificial or prerecorded voice- - ...

13 (iii) to any telephone number assigned to a paging service, cellular telephone service,
14 specialized mobile radio service, or other radio common carrier service, or any service
15 for which the called party is charged for the call[.]

16 47 U.S.C. § 227(b)(1)(A)(iii). As with the claims discussed above, the factual bases for this claim are
17 Plaintiff’s allegations that Defendant “frequently made calls to Plaintiff’s cell phone using an
18 automatic telephone dialing system (including an automated dialing machine, dialer, and auto-dialer)
19 and an artificial or prerecorded voice[.]” and that Plaintiff was forced to bear the expense of these
20 calls. (First Am. Compl. at ¶¶ 49, 72(a).)

21 As indicated in the statute, making these kinds of calls is not unlawful if the calls are “made
22 with the prior express consent of the called party.” Defendant Saxon asserts that Plaintiff consented
23 to its calls, but that argument is a defense to Plaintiff’s claim. See FCC Declaratory Ruling 07-232
24 (Dec. 28, 2007) (“To ensure that creditors and debt collectors call only those consumers who have
25 consented to receive autodialed and prerecorded message calls, we conclude that the creditor should
26 be responsible for demonstrating that the consumer provided prior express consent.”) It does not
27 defeat the elements of Plaintiff’s claim, all of which have been properly pleaded.

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1 Defendant's only other argument in support of dismissal of this claim is that its calls did not
2 involve unsolicited advertisements. However, that is not an element of the specific statute upon which
3 Plaintiff relies to support his claim. Accordingly, this argument does not warrant dismissal.¹

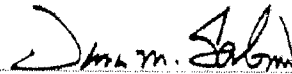
4 **III.**

5 **CONCLUSION**

6 In light of the above, Defendant's motion to dismiss Plaintiff's Complaint is granted in part
7 and denied in part. Specifically, the Court grants the motion to dismiss Plaintiff's Rosenthal Act claim
8 to the extent it alleges a violation of California Civil Code § 1788.17. The remainder of the motion
9 is denied. Plaintiff is granted leave to file a First Amended Complaint that cures the pleading
10 deficiencies set out above and is consistent with this Order. Plaintiff shall file his First Amended
11 Complaint on or before **November 13, 2009**. If Plaintiff's Second Amended Complaint fails to
12 address the pleading deficiencies outlined above, it will be dismissed with prejudice and without any
13 further leave to amend.

14 **IT IS SO ORDERED.**

15 **DATED: November 5, 2009**

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17 **HON. DANA M. SABRAW**
18 **United States District Judge**

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¹ Defendant Saxon argues Plaintiff's UCL claim must be dismissed because it relies on the other claims, none of which are valid. Because the Court finds otherwise, it also rejects Defendant's motion to dismiss Plaintiff's UCL claim.