

1  
2  
3  
4  
5  
6 IN THE UNITED STATES DISTRICT COURT  
7  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
9

10 VARINDER SUDHIR,

11 Plaintiff,

No. C 16-06088 WHA

12 v.

13 PHH MORTGAGE CORPORATION  
14 and DOES 1–25, inclusive,

15 Defendants.  
16 \_\_\_\_\_/

**ORDER GRANTING  
LEAVE TO FILE SECOND  
AMENDED COMPLAINT**

17 **INTRODUCTION**

18 In this action challenging mortgage company's debt collection and credit reporting  
19 practices, plaintiff seeks leave to file a second amended complaint. For the reasons set forth  
20 herein, the motion is **GRANTED**.

21 **STATEMENT**

22 The background facts of this action are set forth in a previous order and need not be  
23 repeated here (Dkt. No. 27). Pertinent to the present motion is the amended complaint's  
24 allegation that defendant PHH Mortgage Corporation violated the Rosenthal Act by calling  
25 plaintiff Varinder Sudhir 3,300 times in calendar year 2015 to demand payment on his loans  
26 even though plaintiff's accounts were current.

27 On June 2, Matthew Sheldon from the firm Goodwin Procter, LLP, which replaced  
28 Katten Muchin Rosenman, LLP, as defendant's firm in this action in May, phoned plaintiff's

1 counsel, Mark Anderson, informing him that the Rosenthal Act did not apply to the facts of this  
2 action because defendant's alleged collection calls related to business loans, for which the  
3 Rosenthal Act provides no basis of recovery. Attorney Sheldon asked plaintiff to voluntarily  
4 dismiss his Rosenthal Act claim.

5 Four days later, Attorney Anderson sent defendant a proposed stipulation seeking to  
6 delete the Rosenthal Act claim and add a claim for invasion of privacy based on the allegation  
7 that defendant's collection calls interfered with plaintiff's life and caused him emotional distress.  
8 Defendant refused to so stipulate. Plaintiff then filed this motion for leave to file a second  
9 amended complaint (Dkt. No. 43). While this motion was pending, Attorney Anderson realized  
10 the allegation that defendant called plaintiff 3,300 times was erroneous and based on a log  
11 reflecting the *total* number of calls plaintiff received that year. The parties stipulated that  
12 plaintiff will delete that allegation from the amended complaint if this motion were to succeed.  
13 This order follows full briefing and oral argument.

#### 14 ANALYSIS

15 Defendant objects only to plaintiff's motion to the extent it would add a new California  
16 state law claim for invasion of privacy (Dkt. No. 45 at 1). Plaintiff's motion to delete the  
17 Rosenthal Act is therefore **GRANTED**.

18 This order now considers whether to modify the scheduling order's March 31 deadline  
19 to allow plaintiff to plead an invasion of privacy claim. Where, as here, the district court files a  
20 pretrial scheduling order establishing a deadline for amendment of pleadings, "the schedule may  
21 only be modified for good cause and with the judge's consent." FRCP 16(b)(4). The good cause  
22 inquiry primarily focuses on the diligence of the party seeking modification. *Johnson v.*  
23 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Moreover, "[t]he district court  
24 is given broad discretion in supervising the pretrial phase of litigation and its decisions regarding  
25 the preclusive effect of a pretrial order . . . will not be disturbed unless they evidence a clear  
26 abuse of discretion." *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985).

27 Plaintiff brought this motion more than two months after the scheduling order's March 31  
28 deadline for amendments, seeking to add a claim for intrusion upon seclusion, which requires

1 (1) an intentional intrusion into plaintiff's private place, conversation, or matter, (2) in a manner  
2 highly offensive to a reasonable person. *Taus v. Loftus*, 40 Cal.4th 683, 725 (2007). To satisfy  
3 the first factor, the plaintiff must have had an objectively reasonable expectation of seclusion or  
4 solitude in the place, conversation or data source. *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th  
5 200, 231–32 (1998).

6 Notwithstanding plaintiff's late request, this motion comes before the August 31  
7 discovery deadline and the proposed invasion upon seclusion claim is anchored in pestering  
8 conduct so outrageous that the interests of justice supply the good cause needed to grant  
9 amendment. Specifically, plaintiff alleges that defendant called him incessantly on his home  
10 phone, which he also uses as his business line, to collect a debt he did not owe. At oral  
11 argument, the undersigned judge inquired about the actual number of calls, which plaintiff had  
12 mistakenly stated to be 3,300 in the amended complaint. Plaintiff's counsel estimated that  
13 defendant called plaintiff two or three times per day, amounting to at least several hundred  
14 calls that year. A reasonable jury could find defendant's actions to be inhumane and  
15 oppressive — especially under our exceptional facts, where plaintiff was never in default on  
16 his loans, was at most a little late in providing proof of insurance and, even after supplying the  
17 proof, continued to be bombarded by defendant's dunning phone calls (Dkt. No. 46 at 2–3).  
18 Plaintiff's motion to amend is therefore **GRANTED**.

19 Under our exceptional facts, the considerations defendant raises do not compel a different  
20 result. Defendant contends that plaintiff cannot state a claim for intrusion upon seclusion  
21 because defendant called him on a business line and in relation to business loans (Dkt. No. 45  
22 at 5). True, California courts have never addressed whether a reasonable expectation of personal  
23 privacy exists in the context of calls to collect business loans. But, a reasonable jury could find  
24 plaintiff had an expectation against receiving harassing collection calls when he was, in fact,  
25 current on his accounts. Plaintiff has therefore set forth enough to show that amendment is not  
26 futile and ultimate resolution of this issue should await a more complete evidentiary record.  
27 *See Contreras v. Portfolio Recovery Assocs., LLC*, No. 15 00104, 2017 WL 2964012, at \*5 (N.D.  
28

1 Cal. July 12, 2017) (Judge Jacqueline Scott Corley) (a claim for invasion of privacy on the basis  
2 of incessant collection calls would benefit from a more complete record).

3 Defendant further argues that it will be prejudiced by plaintiff's late amendment because  
4 it would have to re-depose plaintiff on the invasion of privacy claim. Plaintiff's proposed claim,  
5 however, is based on allegations of defendant's harassing, incessant debt collection calls, which  
6 also formed the basis of the mistaken Rosenthal Act claim (Dkt. No. 43 at 2). The undersigned  
7 judge has already acknowledged that where, as here, the basic fact pattern will remain the same  
8 after amendment, the additional cost and effort to defendant is a marginal argument at best and  
9 does not bar leave to amend. *Navarro v. Eskanos & Adler*, No. C 06 02231 WHA, 2006 WL  
10 3533039, at \*3 (N.D. Cal. Dec. 7, 2006). Nevertheless, plaintiff is now ordered to sit for another  
11 deposition before the discovery cutoff, this one two hours in length (exclusive of breaks), to deal  
12 with the aftermath of the amendment.

### 13 CONCLUSION

14 For the reasons stated above and on the foregoing condition, plaintiff's motion for leave  
15 to file a second amended complaint is **GRANTED**. Plaintiff must file the second amended  
16 complaint by **AUGUST 1, 2017**.

17  
18 **IT IS SO ORDERED.**

19  
20 Dated: July 24, 2017.

  
\_\_\_\_\_  
21 WILLIAM ALSUP  
22 UNITED STATES DISTRICT JUDGE  
23  
24  
25  
26  
27  
28