UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ERIK MATTSON,

Plaintiff,

v.

QUICKEN LOANS INC.,

Defendant.

Case No. 3:18-cv-00989-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

Plaintiff Erik Mattson ("Mattson"), individually and on behalf of all other persons similarly situated, alleges that Quicken Loans Inc. ("Quicken Loans") made telephone solicitations concerning its residential mortgage lending business in violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). Mattson asserts that calls, made to a cellular telephone number ending in -1930 (the "subject number") in September 2017 and November 2017, violated regulations promulgated by the Federal Communication Commission ("FCC") under the TCPA. In the first count, Mattson claims that Quicken Loans violated the FCC's regulations set forth in 47 C.F.R. § 64.1200(c) because the subject number was on the national Do Not Call Registry ("DNCR"). Compl. ¶¶ 91-92, ECF #1. In the second count, Mattson alleges that Quicken Loans violated 47 C.F.R. § 64.1200(d)(3) by initiating calls to the

subject number without having instituted procedures for maintaining an internal do-not-call list of persons who request not to be called again. *Id*. ¶¶ 96-98.

Quicken Loans has filed for summary judgment on both counts. ECF #51. For the reasons discussed below, the motion should be granted in its entirety.[1]

STANDARDS

Under F.R.C.P. 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party does so, the nonmoving party must "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citing F.R.C.P. 56(e)).

In determining what facts are material, the court considers the underlying substantive law regarding the claims. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Otherwise stated, only disputes over facts that might affect the outcome of the suit preclude the entry of summary judgment. *Id*. A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Id.* at 248-49. A "scintilla of evidence" or "evidence that is merely colorable or not significantly probative" is insufficient to create a genuine issue of material fact. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

[1] Given the exhaustive briefing by the parties, the court finds this matter suitable for decision without oral argument pursuant to L.R. 7-1(d)(1).

The court "does not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999). "Reasonable doubts as to the existence of material factual issue are resolved against the moving parties and inferences are drawn in the light most favorable to the non-moving party." *Addisu,* 198 F.3d at 1134.

FINDINGS

I. Undisputed Material Facts

Mattson's claims are based on telephone calls and text messages sent to the subject number by Quicken Loans, or its authorized agent Rock Connections, LLC, in September 2017 and November 2017. Compl. ¶¶ 45-52, ECF #1. It is undisputed that Mattson used the subject number to place both personal calls and business calls as a principal/president and co-owner of Westland Investors ("Westland"), a commercial real estate investment company. Dep. of Erik Mattson ("Mattson Dep.") 119:16-121:21, ECF #66-3; Decl. of Erik Mattson ("Mattson Decl.") ¶ 3, ECF #64-4. Mattson regularly used the telephone assigned to the subject number to place business calls and allowed colleagues to use the line for conference calls in the course of Westland's business. Mattson Dep. 102:17-103:7, ECF #53-5; Mattson Dep. 119:16-21, ECF #66-3. He also used the subject number on a zoning development application that Westland submitted to a city government. ECF #53-7. Additionally, Mattson's wife, Jessica Mattson, referred to the subject number as Mattson's "work phone." Dep. of Jessica Mattson ("J. Mattson Dep.") 35:17-19, ECF #53-8.

Throughout the relevant time period, the subject number was included in a shared unlimited talk, text, and data plan—a "Verizon Plan Unlimited"—that covered numbers used by other Westland employees. ECF #53-4, at 4; ECF #53-6, at 3-4. Also included in the plan was

an Internet "booster," used exclusively at the Westland corporate office to provide better cellular service for employees, and an iPad Air used by a Westland employee in connection with her work. ECF #53-4, at 22; Mattson Dep. 105:17-108:22, ECF #53-5. At the time of the challenged calls, the monthly invoices for the Verizon account, including the subject number and the numbers of other Westland employees, was sent directly to Westland's corporate business address and paid by a Westland employee using funds from a Westland corporate checking account. ECF #53-3, at 3; ECF #53-4; Mattson Dep. 115:19-117:3, ECF #53-5; ECF #53-12; Mattson Dep. 73:11-16, ECF #66-3.[2] For each of the participating employees, including Mattson, Westland paid for unlimited calls and for the smartphone devices in installments over 24 months.[3] ECF #53-4. Westland also paid for insurance protection on each of the devices. *Id*. at 4. At his deposition, Mattson assumed that Westland deducted the payments on the Verizon account as a business expense, and there is no evidence to the contrary. Mattson Dep. 102:5-16, ECF #53-5.

Around the end of 2017, the Mattsons were looking to purchase property in Portland, Oregon.[4] J. Mattson Dep. 25:15-21, 74:9-23, ECF #53-8; Mattson Dep. 56:17-58:24, ECF #53-5. Mrs. Mattson testified that she looked up mortgage information online and searched for

[2] Mattson alleges that the Verizon account is classified as a "personal account," but the bill terms it a "new Verizon Plan Unlimited," making no reference to whether it is personal. ECF # 53-4, at 4; Mattson Decl. ¶¶ 3-4, ECF #64-4.

[3] Mattson contends that he purchased his own phone in 2007; however, the Verizon account documents show that Westland was making payments on the Moto Z Force device assigned the subject number used by Mattson at the time of the challenged calls in September and November 2017. Mattson Decl. ¶ 3, ECF #64-4; ECF #53-4, at 6; Mattson Dep. 107:17-24, ECF #53-5.

[4] The Mattsons purchased this property in December 2017. J. Mattson Dep. 25:19-21, ECF #53-8, at 3; Mattson Dep. 56:17-21, ECF #53-5. They previously sold another property in April 2017. Mattson Dep. 56:15-21, ECF #53-5.

property listings on Google.com, sometimes clicking on the resulting links.[5] J. Mattson Dep. 25:22-26:10; 45:5-11, 74:9-23, ECF #53-8.

On September 1, 2017, a sales lead using the subject number was initiated on MinuteMortgageQuotes,com. Dep. of William Emerson ("Emerson Dep.") 58:13-18, ECF #57-6; ECF #57-4, at 4-5; ECF # 57-5, at 4-5. A lead is generated, among other ways, "when a customer visits a website and fills out a form, entering their personal information," and requests mortgage information. ECF #57-5, at 3. In addition to the subject number, the lead included Mattson's wife's name, an email address, and the Mattson's previous home address, all of which had been entered on MinuteMortgageQuotes.com. ECF #57-4, at 4-5; ECF 57-5, at 5; Mattson Dep. 56:12-14, ECF #66-3.

At the time the lead was generated, the MinuteMortgageQuotes.com website included the following consent disclosure:

> By clicking "see results," you electronically agree to the terms of service and privacy policy, to share your information with minutemortgagequotes, up to 4 lenders (*potentially including Quicken Loans*) with whom you have been matched and/or other business partners and consent (not required as a condition to purchase a good/service) for them to contact you through automated means (e.g. autodialing, text and pre-recorded messaging) via telephone, mobile device (including SMS and MMS) and/or email, even if it is a cellular phone number or other service for which the called person(s) could be charged for such call and even if your telephone number is currently listed on any state, federal or corporate do not call registry.

ECF #53-9, at 5 (emphasis added); ECF #53-10, at 3.

Following the submission, MinuteMortgageQuotes.com passed the Mattson lead to one of Quicken Loans' third-party lead providers, GuidetoLenders (also sometimes identified in the

[5] In opposition to the motion for summary judgment filed in *Mattson v. New Penn Financial, LLC*, No. 3:18-cv-00990, Mattson argues that "Mrs. Mattson never entered personal data for mortgages on any website in September 2017," and that he, "not his wife[,] handled the mortgages." Mattson does not expressly assert such an argument here.

factual record as QuinStreet). Emerson Dep. 58:13-18, ECF #57-6; ECF #57-4, at 4-5. GuidetoLenders, in turn, passed the Mattson request to Quicken Loans. *Id.*; Decl. of Amy ("Courtney Decl.") ¶ 5, ECF #52.

The record reflects that, upon receipt of the Mattson request and prior to calling the subject number, Quicken Loans followed its routine TCPA compliance procedures. Courtney Decl. ¶ 6, ECF #52; Decl. of Gary Weingarden ("Weingarden Decl.") ¶¶ 5, 8, ECF #54; ECF #53-9, at 6-9; Emerson Dep. 55:6-20, ECF #57-6; ECF #66-5, at 3-4. Through these procedures, Quicken Loans identified the phone number as being listed on the DNCR, confirmed that consent for it to call the number had been obtained, and ensured that the contact information that it received for the lead (including the subject number) matched the information provided online at MinuteMortgageQuotes.com. Courtney Decl. ¶ 6, ECF #52; Emerson Dep. 12:21-14:5, ECF #57-6; Weingarden Decl. ¶ 8, ECF #54; ECF #57-5, at 4. Among other methods, Quicken Loans used Jornaya, a neutral verification platform, to confirm the third-party data lead. *See* ECF #57-5, at 3; Emerson Dep. 12:21-14:5, ECF #57-6.

Thereafter, Quicken Loans attempted to call the subject number eight times between September 3, 2017, and November 20, 2017, in response to the online inquiry. Courtney Decl. ¶ 7, ECF #52; ECF #52-1. Mattson answered the call placed on September 6, 2017. A Quicken Loans representative stated she was calling to speak to Mrs. Mattson regarding the refinancing that the Mattsons "were looking into recently." Courtney Decl. ¶ 9, ECF #52; ECF #52-3. In response, as shown by a transcript of the call recording, Mattson stated "I think we're *probably not interested*, but I appreciate the call. Thank you." ECF #52-3 (emphasis added); Mattson

Dep. 164:17-22, ECF #53-5.[6] Mattson did not specifically ask Quicken Loans to stop calling the subject number.

Transcripts from the second and third calls, which Mattson also answered, on November 16 and 20, 2017, show that Mattson again told the caller that he was "not interested." Courtney Decl. ¶¶ 13-14, ECF #52; ECF #52-7; ECF #52-8. Mattson confirms that "on each of those calls . . . I believe I said I'm not interested." Mattson Dep. 159:3-8, ECF #66-3. The remaining calls resulted in voicemails or, in one instance, disconnection without leaving a message. Courtney Decl. ¶¶ 7-15, ECF #52.

Prior to and at the time of the challenged calls, Quicken Loans maintained an internal do-not-call list of telephone numbers associated with individuals who have requested not to receive further calls from Quicken Loans. Courtney Decl. ¶ 17, ECF #52. Mattson filed a law suit against Quicken Loans on November 16, 2017. *See Mattson v. Quicken Loans, et al.*, 3:17-cv-01840-YY. The subject number was added to Quicken Loans' internal do-not-call list on November 28, 2017. Courtney Decl. ¶ 19, ECF #52.

II. Grounds for Summary Judgment

Mattson's First Cause of Action alleges that the challenged calls were in violation of 47 C.F.R. § 64.1200(c) because the subject number was on the DNCR. Compl. 22, ECF #1. The Second Cause of Action pleads a violation of 47 C.F.R. § 64.1200(d)(3) based on Quicken

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[6] At his deposition, Mattson testified:

> Q: Okay. You said we're probably not interested; is that correct?
> A: That's what I said at that time, yes.

Mattson Dep. 164:20-22, ECF #53-5.

Loans' alleged failure to maintain internal procedures to stop calling those who request it. *Id.* at 23.

Quicken Loans moves for summary judgment on both counts because (1) the subject number is a business number, not a residential number, to which the regulations do not apply; (2) the claims are foreclosed by the safe harbor provisions codified in 47 C.F.R. § 64.1200(c)(2)(i); (3) Mattson never made a specific request that Quicken Loans stop calling or texting him; and (4) Quicken Loans implemented and followed procedures for honoring do-not-call requests in compliance with 64.1200(d)(3). Mot. Summ. J. 2-4, ECF #51.

A. Business Number

The TCPA was enacted to protect the privacy interests of residential telephone subscribers.[7] 47 U.S.C.A. § 227(c)(1) (authorizing the promulgation of rules to address the "need to protect residential telephone subscribers' privacy rights"); *Moser v. F.C.C.*, 811 F. Supp. 541, 544 (D. Or. 1992) (recognizing that the "asserted purpose of the TCPA" is "enhanced residential privacy"). The FCC's procedures relating to recording and honoring do-not-call requests likewise were designed "to protect residential telephone subscriber privacy." *In re Rules and Regulations Implementing the TCPA of 1991*, 18 FCC Rcd. 14014, at 14065 (July 3, 2003); *see also* 47 C.F.R. § 64.1200(c)(2) ("No person or entity shall initiate any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number" on the DNCR.). As such, the national do-not-call rules do not prohibit calls to business numbers. *Id*. at 14039-40; *In re Rules and Regulations Implementing the TCPA of 1991*, 23 FCC

[7] While the TCPA does not define "call," the FCC has defined it to "encompass[] both voice calls and text calls to wireless numbers." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009). There is no authority that a cellphone is presumptively a residential or business line and the parties do not dispute that a cellphone can be either.

Rcd. 9779, at 9785 (June 17, 2008) ("the National Do Not Call Registry applies to 'residential subscribers' and does not preclude calls to businesses"); *Satterfield*, 569 F.3d at 954 (noting that the TCPA protects "residential phone subscribers"); *Clauss v. Legend Securities, In*c., No. 4:13-cv-00381-JAJ, 2014 WL 10007080, at *2 (S.D. Iowa 2014) ("This regulation unambiguously applies only to residential telephone subscribers.") (citation omitted).

Although there is little guidance on the applicability of the TCPA to phones used both for business and personal purposes, there are several factors that compel the conclusion that Mattson's phone is a business phone exempt from the protections of the TCPA. First, as detailed above, the phone and its service are paid for by Mattson's employer, Westland. ECF #53-3, at 3; ECF #53-4; Mattson Dep. 115:19-117:3, ECF #53-5; ECF #53-12. The employees share the account, and the bill, which is sent directly to Westland, is paid by an employee using funds from the company's checking account. *Id*. The expectation of privacy in this billing arrangement is not commensurate with a residential line, as the bill contains details for all of the calls. *See, e.g.*, ECF # 57-1, at 8-13.

Second, Mattson's belief that Westland deducts the cost of his phone and phone service as business expenses is irreconcilable with his assertion that the phone is for personal use. Mattson Dep. 102:11-16, ECF #53-5; *see also* 26 U.S.C. § 262 (prohibiting tax deductions for personal expenses). Mattson's argument that because he is a partner/principle in Westland, he is paying for the phone himself is unavailing. Mattson Decl. ¶ 3, ECF # 64-4. Factually, Mattson is a one-third owner, so at most, only one-third of the company's bank account from which the funds are drawn to pay the Verizon bill could be said to "belong" to him. ECF #53-6; Mattson Dep. 102:2-10, ECF #53-5. Moreover, by taking this position, Mattson is asking this court to sanction his alleged use of company funds for his personal expenses, which the court cannot do.

See O.R.S. 67.060 ("Property acquired by a partnership is property of the partnership and not of the partners individually.").

Third, the FCC's determination not to exempt "home-based businesses" from the do-not-call rules is inapplicable. In support of his argument that mixed-used phone numbers have been considered residential and subject to the TCPA's do-not-call provisions, Mattson relies on a series of cases that involve businesses based out of plaintiffs' homes. In *Southwell v. Mortgage Investors Corp. of Ohio, Inc.*, for example, evidence showed that the plaintiff occasionally used his cellphone to sell sheep from his farm to his friends. No. C13–1289 MJP, 2014 WL 4057166, at *3 (W.D. Wash. Aug. 14, 2014). The court held that this type of "home-based business" did not disqualify plaintiff as a "residential telephone subscriber." *Id.*; *see also Clauss*, 2014 WL 10007080, at *2-3 (declining to grant summary judgment where business use was in connection with a home-based business).[8]

The additional cases on which Mattson relies are inapplicable as they pertain to motions to dismiss under FRCP 12(b)(6), in which the courts permitted discovery to discern the nature of the alleged home-based business use. *See Blevins v. Premium Merchant Funding One, LLC*, Case No.: 2:18-cv-377, 2018 WL 5303973, at *2-3 (S.D. Ohio Oct. 25, 2018); *Owens v. Starion Energy, Inc.*, Case No. 3:16-cv-01912 (VAB), 2017 WL 2838075, at *3 (D. Conn. June 30, 2017); *Baker v. Certified Payment Processing, L.P.*, No. 16-cv-03002, 2016 WL 3360464, at *2 (C.D. Ill. June 1, 2016). In this case, there is no allegation that Westland is "home-based" and no

[8] Mattson's reliance on *Warnick v. Dish Network LLC*, No. 12–cv–01952–WYD–MEH, 2014 WL 12537066, at *10 (D. Colo. Sept. 30, 2014) is unavailing, as that court interpreted the language of 47 U.S.C. § 227(b). Count One of this action is brought under 47 U.S.C. § 227(c), and the regulations promulgated under this section specifically apply to residential telephone subscribers only. 47 C.F.R. § 64.1200(c).

authority compelling an expansion of the "home-based business" exception to other business uses.

Mattson contends that his registration on the DNCR entitles him to the presumption that the subject number is residential. Opp. 12, ECF #65. To the contrary, a 2008 FCC order provides that "[t]o the extent that some business numbers have been inadvertently registered on the national registry, calls made to such numbers will not be considered violations of our rules." *See In re Rules and Regulations Implementing the TCPA of 1991,* 23 FCC Rcd. 9779, at 9785 (June 17, 2008). Courts have rejected any such presumption and held that on summary judgment, plaintiffs have the burden of proof on the issue of whether they are residential telephone subscribers. *Lee v. Loandepot.com, LLC*, Case No. 14-CV-01084-EFM, 2016 WL 4382786, at *6 (D. Kan. Aug. 17, 2016) (granting summary judgment where plaintiff failed to establish that his cellular number was used for residential purposes); *United States v. Dish Network, LLC*, 80 F. Supp. 3d 917, 922 (C.D. Ill., 2015) (citing *Celotex*, 477 U.S. at 322); *see also* 18 F.C.C. Rcd. at 14039 (stating "that in the case of an enforcement action, the complainant had the burden to prove that the wireless number was used as a residential number"). Further, Mattson's unsupported assertion that he used the subject number primarily for personal reasons does not raise a genuine issue of material fact. *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997), *as amended* (Apr. 11, 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.") (citations omitted); Mattson Decl. ¶ 3, ECF #64-4.

In sum, Mattson's unsupported assertion that he used the subject number primarily for personal reasons fails to create a genuine issue of material fact. *See F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997), *as amended* (Apr. 11, 1997) ("A conclusory,

self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.") (citations omitted); Mattson Decl. ¶ 3, ECF #64-4. Mattson has failed to rebut evidence that his employer, Westland, purchased the phone, paid for the service on an account shared by multiple employees, and apparently deducted the payments as a business expense. Mattson's use of the subject number for personal calls does not automatically transform it into a residential line for purposes of the TCPA. *See Shelton v. Target Advance LLC*, No. 18-2070, 2019 WL 1641353, at *5–6 (E.D. Pa. Apr. 16, 2019) (finding that plaintiff's cellphone was business phone despite being used for both business and personal calls). Where Mattson has "failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof," summary judgment must be granted. *Celotex*, 477 U.S. at 323.

B. Safe Harbor

Quicken Loans also contends that it is entitled to summary judgment on the first claim pursuant to 47 C.F.R. § 64.1200(c)(2)(i). Under this section, a defendant can avoid liability for calling an individual on the DNCR if it can (1) demonstrate that the violation is the result of error, and (2) establish that it had adequate procedures in place to avoid mistakenly calling individuals on the registry. 47 C.F.R. § 64.1200(c)(2)(i); *Lushe v. Verengo Inc.*, No. CV13–07632 AB (RZ), 2014 WL 5794627, at *8 (C.D. Cal. Oct. 22, 2014). Courts have referred to subsection (c)(2) as one of the TCPA's "safe harbor" provisions. *Southwell*, 2014 WL 4057166, at *1; *Lushe*, 2014 WL 5794627, at *8; *United States v. Dish Network LLC*, 75 F. Supp. 3d 916, 925 (C.D. Ill. 2014). "The assertion of non-liability based on compliance with the safe harbor provisions may be properly classified as an affirmative defense." *Simmons v. Charter Commc'n, Inc.*, 222 F. Supp. 3d 121, 131 (D. Conn. 2016).

Here, the court need not consider Quicken Loans' "safe harbor" defense because, as discussed above, Mattson has failed to establish that the calls were made to a residential line.

C. No Specific Request to Stop Calling

The undisputed evidence, including transcripts of the challenged calls and Mattson's own deposition testimony, establishes that Mattson never requested Quicken Loans to stop calling the subject number. Mattson contends his statement that he was "not interested" in Quicken Loans' products was intended to be a polite request not to call again. Opp. 31-32, ECF # 65.[9] However, such statements are insufficient as a matter of law. Both the FCC and the Ninth Circuit require that do-not-call requests "clearly express[] a desire not to receive further messages." *In re Matter of Rules & Regulations Implementing the TCPA of 1991*, 30 F.C.C. Rcd. 7961, at 7996 ¶ 63 (July 10, 2015); *Van Patten v. Vertical Fitness Grp. LLC*, 847 F.3d 1037, 1048 (9th Cir. 2017) ("Revocation of consent must be clearly made and express a desire not to be called or texted. That was not done here.").

Mattson relies on *Dixon v. Monterey Fin. Srvcs., Inc*., No. 15-cv-03298-MMC, 2016 WL 3456680, at *3 (N.D. Cal. June 24, 2016), to support his claim that "there are no magic words [for revoking consent] under the law," and argues that his statements that he was "not interested" in Quicken Loan's products should be enough to revoke consent to be called. But in *Dixon*, the plaintiff expressly stated, "I am asking you not to call me anymore." *Id*. at *3. Here, it is undisputed that Mattson made no such request.[10] Further, *Dixon* held that a plaintiff's subjective intent to revoke consent is irrelevant to determining whether consent was, in fact, revoked. *Id.*

[9] Mattson does not raise a fact issue with respect to the sufficiency of the consent, but argues instead that he was called after he revoked the consent. Opp. 25, ECF #65.

[10] Mattson's wife even testified that Mattson's use of the phrase "not interested" was insufficient to convey a clear request for the calls to stop. J. Mattson Dep. 46:13-18, ECF #53-8.

The Ninth Circuit has already rejected the argument that a refusal of offered services is tantamount to a do-not-call request. *Van Patten*, 847 F.3d at 1048. In *Van Patten*, the plaintiff argued that by cancelling his gym membership, he sufficiently communicated his desire to no longer be contacted. The court disagreed, finding no evidence in the record to suggest that Van Patten "clearly express[ed] his desire" that defendants cease contacting him. *Id.* A clear revocation could have included "plainly telling Defendants not to contact him on his cell phone when he called to cancel his gym membership or to message 'STOP' after receiving the first text message." *Id.* Under *Van Patten*, a clear and express do-not-call request cannot be inferred from Mattson's statement that he was "not interested" in Quicken Loans' services.

Mattson further argues that revocation of consent is a factual issue to be resolved by a jury. Opp. 34-35, ECF #65. Here, however, there is no dispute as to the facts—both parties agree Mattson told Quicken Loans that he was "not interested"—and there is only a legal question as to whether such language suffices as a revocation.

The decisions upon which Mattson relies are unavailing. For example, Mattson cites *Self-Forbes v. Advanced Call Center Tech., LLC*, 754 F. App'x. 520, 522 (9th Cir. 2018), in which the Ninth Circuit reversed an order granting summary judgment, finding that the plaintiff had presented sufficient evidence to raise a factual issue as to whether she revoked her consent. In that case, the plaintiff claimed that she told the defendant to stop calling her, but the defendant's call logs did not document these alleged conversations. *Id.*; *see also Herrera v. First Nat'l Bank of Omaha, N.A.*, No. 2:17-cv-01136-RSWL-SKA, 2017 WL 6001718, at *4 (C.D. Cal. Dec. 4, 2017) (finding a factual dispute as to whether a statement to "stop calling" was a clear and express revocation of consent where evidence indicated the call was answered by a minor); *Singer v. Las Vegas Athletic Clubs*, 376 F. Supp. 3d 1062, 1074-75 (D. Nev. 2019)

(finding ambiguity in statement to debt collector "stop calling me. I don't have the money right now" where the parties to the call then agreed to push out the due date). None of this authority is persuasive here, where the parties do not dispute that Mattson merely told Quicken Loans that he was "not interested," and there is no claim that Mattson told Quicken Loans to "stop calling."

D. Inferences Concerning Do-Not-Call Procedures

Mattson asks this court to infer from the fact that he was called after expressing he was "not interested" that Quicken Loans lacks the requisite procedures for tracking internal do-not-call requests. Opp. 36, ECF #65. TCPA regulations provide that "[n]o person or entity shall initiate any call for telemarketing purposes to a residential subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity." 47 C.F.R. § 64.1200(d)(3). Persons or entities making telemarketing calls are required to record requests not to receive calls and to "honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made." *Id*. This period may not exceed 30 days from the date of the do-not-call request. *Id*.

Mattson concedes that Quicken Loans has presented evidence that it has practices and procedures in place for maintaining the internal do-not-call lists required by 47 C.F.R. § 64.1200(d)(3). Opp. 36, ECF #65 ("Quicken Loans has presented this Court with documents allegedly evidencing that it has established and implemented reasonable practices and procedures to prevent the illegal telephone solicitations at issue in this case."). Quicken Loans' written policy for recording do-not-call requests is in the record, as are the details of its compliance with its policy. *See* ECF #54-1; Weingarden Decl., ECF #54; Emerson Dep. 66:1-21, ECF #57-6.

Without identifying any deficiency, Mattson contends that the policies must not have been followed because Quicken Loans ignored his requests not to be called. Opp. 36, ECF #65. As this court previously acknowledged in its ruling on a motion to strike during the pleading stage, "[c]ourts have inferred that internal do-not-call procedures are deficient when calls to an individual who has requested not to be called continue." *Mattson v. Quicken Loans, Inc.*, Case No. 3:18-CV-00989-YY, 2018 WL 5255228, at *3 (D. Or. Oct. 22, 2018); *see also Rorty v. Quicken Loans Inc*, No. CV 12-00560 GAF (VBKx), 2012 WL 12886842, at *7 (C.D. Cal. July 3, 2012) (denying motion to dismiss section 64.1200(d)(3) claim where plaintiff specifically requested that he not be called again); Kazemi v. Payless Shoesource Inc., No. C 09–5142 MHP, 2010 WL 963225, at *3 (N.D. Cal. Mar. 16, 2010) ("In addition, plaintiff alleges that he continued to receive unsolicited text messages from defendants after requesting removal of his telephone number from their calling list. Taken as true, this allegation supports a plausible inference that defendants failed to institute procedures for maintaining lists of individuals who request not to receive solicitation calls in violation of a regulation prescribed under section 227(c)."). Here, contrary to what Mattson alleged in his complaint, discovery has revealed that Mattson did not "clearly express his desire" not to receive further calls from Quicken Loans. *Van Patten*, 847 F.3d at 1048. Absent evidence of a legally sufficient request not to be called, there can be no inference drawn concerning Quicken Loans' policies and procedures from its repeated calls to Mattson.

Ignoring this legal reality, Mattson attempts to raise a fact issue by arguing that Quicken Loans did not act with reasonable speed to record his do-not-call requests made during the November 16, 2017, and November 20, 2017 calls. But, as discussed above, no such request was

made as a matter of law. The reasonableness of Quicken Loans' response to a request that was never made cannot give rise to a disputed issue of fact and forestall summary judgment.

Even if this court were to interpret the filing of the lawsuit on Thursday, November 16, 2017, as an express request not to call—a reasonable assertion, although one not made by Mattson—it should not conclude that a single call four days later on Monday, November 20, 2017, is sufficient evidence that Quicken Loans did not have the proper procedures in place for recording internal do-not-call requests under 47 C.F.R. § 64.1200(d)(3). There is no basis for Mattson's claims that Quicken Loans, by virtue of its size, should be required to process requests immediately when the statute allows up to thirty days. In fact, in the case that Mattson relies on for this proposition, the court specifically rejected the idea, noting it was not persuaded that the "request should be processed immediately simply because Comcast is a large corporation." *Martin v. Comcast Corp.*, No. 12 C 6421, 2013 WL 6229934, at *6 (N.D. Ill. Nov. 26, 2013). In the only case on point in this circuit, the court found that the plaintiff failed to state a claim where the only call placed after a do-not-call request was within what it termed the thirty-day "safe harbor." *Orsatti v. Quicken Loans, Inc*., Case No. 2:15–cv–09380–SVW–AGR, 2016 WL 7650574, at *1 (C.D. Cal. Sept. 12, 2016).

RECOMMENDATION

For the reasons discussed, Quicken Loans' Motion for Summary Judgment (ECF #51) should be GRANTED in its entirety.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Thursday, November 21, 2019. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED November 7, 2019.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge