NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KARMEN SELF-FORBES, Plaintiff-Appellant, v. ADVANCED CALL CENTER TECHNOLOGIES, LLC, Defendant-Appellee.	No. 17-15804 D.C. No. 2:16-cv-01088-JCM-PAL MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted August 16, 2018
San Francisco, California

Before: SCHROEDER, SILER,** and GRABER, Circuit Judges.

Plaintiff Karmen Self-Forbes challenges the district court's decision to grant summary judgment in favor of defendant Advance Call Center Technologies, LLC ("ACT"). For the following reasons, we **reverse** and **remand**.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eugene E. Siler, Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

In 2012, Self-Forbes opened a GE Money Bank QVC credit card account. Shortly thereafter, she defaulted on her credit card payments. As a result, GE Money Bank assigned Self-Forbes's account to ACT to collect the unpaid balance. Between January and April 2013, ACT placed 530 calls to Self-Forbes's cellphone, often calling her several times a day. Self-Forbes sued, asserting that ACT knowingly, and/or willfully, placed automated calls to her cell phone without her consent in violation of the TCPA, which prohibits any call using an automatic telephone dialing system ("ATDS") or prerecorded voice to a cellphone without prior express consent by the person being called. *See* 47 U.S.C. § 227(b)(l)(A)(iii); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

The parties filed cross-motions for summary judgment. ACT argued that Self-Forbes consented to the contact when she opened her credit card account. Moreover, ACT stated that none of its calls resulted in direct contact with Self-Forbes and that she never expressly revoked her consent. In response, Self-Forbes filed a sworn declaration stating that she had repeatedly asked an ACT representative to stop calling, but the calls continued.

The evidence revealed that ACT's call logs were partially incorrect because they mislabeled Self-Forbes's phone as a landline rather than a cellphone. Additionally, ACT's call logs indicated that, on seventeen occasions—including twice on January 23, 2013—ACT's equipment suspected that a live person had

answered the call, meaning that Self-Forbes likely answered the phone. Those calls were routed to a live agent.

In her declaration and deposition, Self-Forbes testified under oath that she received a phone call from a female agent of ACT twice in one day. Although she did not recall the exact date, Self-Forbes estimated that the call was shortly before the birth of her daughter on February 5, 2013. Self-Forbes recited in detail that she told the representative, "Please stop calling, I've asked you to stop calling nicely. Is this really necessary to call this many times in one day[?] I can't even get on my phone." ACT records confirmed that Self-Forbes was connected to a female representative on January 23, 2013, but ACT claims that the call did not result in direct contact with Self-Forbes.

Despite this conflicting evidence, the district court granted ACT's motion for summary judgment, ruling that Self-Forbes's declaration "merely restate[d] the allegations set forth in the complaint" and that she could not "avoid summary judgment by relying on conclusory allegations unsupported by factual data."

We review de novo the district court's grant of summary judgment. *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). "We determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (quoting *Wallis v. Princess Cruises,*

Inc., 306 F.3d 827, 832 (9th Cir. 2002)). "By definition, summary judgment may be granted only when there are no disputed issues of material fact . . . . Thus, where the district court has made a factual determination, summary judgment cannot be appropriate." *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 989-90 (9th Cir. 2016) (en banc) (per curiam) (citation and internal quotation marks omitted).

We have recognized three elements for a TCPA violation: (1) the defendant called a cellular telephone number (2) using an ATDS or an artificial or prerecorded voice (3) without the recipient's prior express consent. *See, e.g.*, *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). In this case, ACT does not dispute its use of an ATDS to call Self-Forbes's cellphone. Self-Forbes does not dispute that she applied for a QVC credit card and agreed to the terms and conditions, thereby expressly consenting to phone calls for debt collection purposes. Rather, the sole issue is whether Self-Forbes orally revoked her consent as she alleges.

Although the TCPA does not explicitly grant consumers the right to revoke their prior express consent, we have recently held that consumers may revoke consent without temporal limitations. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1047-48 (9th Cir. 2017).

In this case, ACT claimed that its call logs establish that it never spoke with Self-Forbes. The district court accepted ACT's claim and disregarded Self-Forbes's conflicting testimony—that she spoke with a female representative in early 2013 and told that individual to stop calling her. The district court improperly weighed the evidence and found ACT's evidence to be more credible. This factual determination—at the summary judgment stage—was premature, and the district court usurped the role of the factfinder at trial.

Self-Forbes presented sufficient evidence to establish a genuine dispute of fact as to whether she revoked her consent. Her declaration and deposition contained detailed facts—the approximate date of the alleged phone calls, what she allegedly told the ACT representative, and that the ACT agent was female—all of which were corroborated by ACT's call logs. Furthermore, ACT lacked an incentive to document Self-Forbes's alleged revocation of consent because it had erroneously classified her number as a landline rather than a cellphone. Accordingly, the district court erred in granting summary judgment.

REVERSED and **REMANDED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....*(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk