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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARGARET A. RUIZ, Cross-complainant and Respondent, v. HUNT & HENRIQUES, Cross-defendant and Appellant.	D075286 (Super. Ct. No. 37-2018-00004757-CU-CL-CTL)

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed in part and reversed in part.

Kurtiss A. Jacobs and Donald Sherrill for Cross-defendant and Appellant.

Legal Aid Society of San Diego, Alysson Snow and Mika Wilbur for Cross-complainant and Respondent.

Capital One Bank, N.A. (Capital One) sued Margaret Ruiz to collect a credit card debt of $5,616.81. Capital One was represented by the law firm Hunt & Henriques (Hunt). Ruiz cross-complained against Capital One, Hunt, and another entity. The only issues before us concern Ruiz's claims against Hunt. Ruiz alleged Hunt violated the federal Fair Debt Collection Practices Act (FDCPA), the federal Telephone Consumer

Protection Act (TCPA), and California's Unfair Competition law (UCL).[1] Ruiz's claims against Hunt involve mainly its actions as a debt collector under the federal statutes.

Hunt filed an anti-SLAPP motion requesting dismissal of each claim against it. After briefing and a hearing, the court found the causes of action were based on activities protected by the anti-SLAPP statute, but Ruiz met her burden to show a probability of prevailing on each claim. The court thus denied Hunt's motion.

On appeal, Hunt contends the court erred in finding Ruiz's claims are factually and legally supported. Ruiz does not dispute her causes of action are subject to the anti-SLAPP statute, but contends she met her statutory burden to show her claims have sufficient merit to defeat an anti-SLAPP motion.

We affirm in part and reverse in part. The court properly denied Hunt's anti-SLAPP motion on all causes of action except Ruiz's TCPA claim.

FACTUAL AND PROCEDURAL SUMMARY

Background

Sometime before September 2015, Ruiz opened a Capital One credit card account. She claims her card was lost or stolen in late 2015, and fraudulent charges were made to her card. She did not pay the remaining balance because of health and financial difficulties.

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1 The FDCPA is contained at 15 United States Code section 1692 et seq. The TCPA is contained at 47 United States Code section 227. The UCL is contained at Business and Professions Code section 17200 et seq. All unspecified statutory references are to Title 15 of the United States Code.

After initially seeking to collect the unpaid amount, Capital One placed Ruiz's account with Firstsource Advantage, LLC (Firstsource), a collections entity. When Firstsource was unsuccessful, on September 29, 2017, Capital One placed Ruiz's account with Hunt, a debt collection law firm.

On October 19, 2017, Hunt attorney Anthony DiPiero sent a letter (known as a validation letter (§ 1692g)) to Ruiz regarding the claimed credit card debt.[2] The letter identified Capital One, stated the balance due was $5,616.81, and referenced the last four numbers of her credit card account. The letter then stated in part:

> "As a result of your default on the above identified account, our client [Capital One] has engaged this law firm to attempt to collect the outstanding balance due on your account.
>
> "Federal law gives you 30 days after you receive this letter to dispute the validity of the debt or any portion thereof. If you do dispute the validity of the debt or any portion thereof, in writing, we will obtain verification of the debt or a copy of the judgment against you, if any, and mail a copy of such a verification or judgment to you."

The letter also stated: "This communication is from a debt collector. The letter is an attempt to collect a debt and any information obtained may be used for that purpose."

Three weeks later, on November 9, Ruiz sent Hunt a responsive letter:

> "This letter is my official notification to you that I dispute the above referenced account with Capital One Bank as it pertains to the

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[2] Under section 1692g, a debt collector must send a validation notice with detailed information within five days of the initial contact with a debtor. (§ 1692g(a)(1)-(5).) If the consumer timely disputes the debt in writing, the debt collector must provide information and cease debt collection on disputed amounts. (§ 1692g(b).) However, "the failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer." (§ 1692g(c).) Ruiz did not allege Hunt violated section 1692g.

> charges and balance owed. My card was lost/stolen when the account was active and there are several charges that appeared that I did not make. I brought this to the attention of Capital One Bank several times in the past but they failed to follow-up or investigate the charges. I don't recall the exact amount of illegitimate charges but it was over $1,000.
>
> "In addition to the fraudulent charges in dispute, I had attempted to make monthly payments to Capital One Bank . . . however, my health became such that I required several surgeries and can no longer work. As of March 2012, I was found 100% disabled by the Social Security Administration, so I live on a very small fixed income, I do not possess the means to pay this debt that has since been charged off.
>
> "I would like a copy of any/all documentation that Capital One Bank has submitted to you that relates to this account. You can email this to me at: [email address] or regular mail to: [home address]."

Five days later, on November 14, Hunt attorney DiPiero wrote a letter to Ruiz, attaching Ruiz's credit card statements from October 2015 to October 2016. The letter also stated:

> "In your letter, you indicated that you may be a victim of identity theft. In order to proceed with the fraud investigation, [can you] please . . . identify the dates, dollar amounts, and merchant names for any transactions that you claim are fraudulent. In addition, please provide a date or time frame of your last use of the credit card. [¶] Please provide the requested information within 10 days of the date of this letter. [¶] This firm is a debt collector."

Ruiz denies receiving the letter, and never responded to the letter.

On January 8, 2018, Hunt attorney DiPiero wrote again to Ruiz, identifying the same account balance ($5,616.81) and stating the "purpose of this letter is to advise you that our firm intends to file suit against you on behalf of our client [Capital One]. Legal action could result in a judgment against you that would include the costs and necessary

disbursements . . . ." The letter concluded: "This communication is from a debt collector."

Complaint and Cross-complaint

Two weeks later, Capital One (represented by Hunt) filed a collection action for $5,616.81 against Ruiz. The complaint is not contained in the appellate record.

Ruiz filed a cross-complaint against Capital One, Hunt, and Firstsource, alleging "the amount of $5,616.81 is misleading, inaccurate and fraudulent." She claimed her Capital One credit card was lost or stolen in 2015, and was "used to purchase various goods and services that [she] did not authorize" or "benefit from."

According to Ruiz's amended cross-complaint, she "promptly informed [Capital One] of the fact that the card was lost or stolen, including verbally disputing the fraudulent charges. [¶] [She] received a letter from [Capital One], notifying her of a refund of one of the fraudulent charges, a CA FINGERPRINTING . . . charge for $68.95. [¶] Ruiz continued to dispute the other fraudulent charges. However, [she] never received any other acknowledgements of her other disputes."

With respect to Capital One and Firstsource, Ruiz alleged these entities made numerous attempts to collect on her account, despite her repeated notices to each entity that she was disputing various "fraudulent charges" on the account and that they were prohibited from continuing to contact her about her account. Ruiz also alleged she repeatedly informed these entities of her inability to pay the amounts because of medical and financial issues.

With respect to Hunt, Ruiz alleged she received Hunt's October 19 letter identifying the $5,616.81 debt amount; she sent the responsive November 9 letter disputing the debt and asking for documentation; but she never received any response to this letter. She acknowledged receiving Hunt's January 8 letter.

Ruiz also alleged she received various collection phone calls, including that "Cross-Defendants initiated [some of] the . . . calls using an 'autodialer,' as that term is defined under the [TCPA]." She also alleged facts pertaining to her son receiving a phone call in Fall 2017, during which the caller told her son that she owed money, in "an attempt to embarrass" her in violation of the FDCPA.

As against Hunt, Ruiz alleged three causes of action.

First, Ruiz alleged that Hunt violated the FDCPA in two ways: (1) "conveying information regarding [her] debt" to her son in violation of section 1692b(2); and (2) falsely representing the amount of the debt and attempting to collect an amount not legally owed in violation of sections 1692e(2)(a) and 1692f(1).

Second, Ruiz alleged that Hunt violated the TCPA by calling her "using an autodialer system." (See 47 U.S.C. § 227(b)(1)(A).)

Third, Ruiz alleged that Hunt's actions violated California's UCL statute. (Bus. & Prof. Code, § 17200 et seq.)

Hunt's Anti-SLAPP Motion

Hunt moved to dismiss the three causes of action under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) Hunt argued that each cause of action was based on its exercise of its constitutional speech and petition rights, and Ruiz could not show a

probability of prevailing on the merits of the claims because (1) she failed to allege facts supporting a cause of action; (2) the alleged facts are false; (3) the cited statutes do not prohibit the alleged conduct; and (4) as a matter of constitutional law, Hunt's actions and communications cannot give rise to liability.

Hunt submitted the lengthy declaration of Donald Sherrill, a Hunt attorney, who said he is "a custodian of [Hunt's] business records." As detailed below, Sherrill confirmed Capital One placed Ruiz's account with the law firm for debt collection on September 29, 2017; denied the Hunt firm used autodialing equipment after January 2017; and denied that anyone from his firm ever spoke with Ruiz or her son.

With respect to written communications, Sherrill attached Hunt's October 19, November 14 (with the accompanying billing statements), and January 8 letters, and Ruiz's November 9 letter. Sherrill said that after receiving Ruiz's November 9 letter, Hunt "immediately . . . put a 'hold' on the account to prevent any further communication with Ruiz until after the debt had been validated." He also said Hunt's "business records reflect that an attorney employed by [Hunt] mailed validation of the debt to Ruiz on November 14, 2017; that the validation was accompanied by 13 months of billing statements . . . ; and that the letter was not returned as undeliverable."

Sherrill also addressed the disputed fingerprinting charge. Sherrill said Hunt obtained from Capital One, "a copy of the fingerprint merchant's evidence . . . regarding Ruiz's [prior] dispute of [the] $68.95 [fingerprinting] charge." Sherrill attached this evidence, which included an unsigned typed page stating Ruiz was the person who utilized the fingerprint services; a fingerprint log with Ruiz's name; and a receipt signed

by an "M. Ruiz" on December 17, 2015. Sherrill also submitted information showing Ruiz is a notary public and is required to submit fingerprints every four years.

Ruiz's Opposition to Anti-SLAPP Motion

In opposing the anti-SLAPP motion, Ruiz argued her causes of action did not arise from protected activity. She alternatively argued she could demonstrate a probability she would prevail on the merits of each cause of action

In support of the latter contention, Ruiz proffered her declaration describing that she used the Capital One credit card "primarily" for consumer goods and services: "I opened a [Capital One] account for personal, household, and/or family purposes to purchase consumer goods and services such as food and gas. [¶] I primarily used the account to purchase consumer goods and services."

Regarding her allegations that the claimed debt amount was inaccurate, she said:

> "6. In late 2015, my card was lost or stolen and fraudulent charges were then made to my card.
>
> "7. I verbally notified Capital One that I disputed the fraudulent charges.
>
> "8. At the time, one of the charges I disputed was a $68.95 charge for CA Fingerprinting. [¶] 9. This charge was related to a class that I was taking at the time, and I disputed it because CA Fingerprinting had not properly completed the services promised. [¶] 10. I am a notary, but the fingerprinting charge was not related to the renewal of my notary license in any way.
>
> "11. I have reviewed the alleged billing statements [attached to Sherrill's declaration] and have identified several charges which I believe are fraudulent, including charges for a restaurant in Temecula ('Richie's Real American'), the Home Depot, Michaels Stores, ECSBUDGETPETCARE.COM, Starbucks and Trader Joe's, among others.

> "12. The alleged billing statements also reflect that several other charges that I disputed from the same time period were reversed by Capital One, including charges for Fry's Electronics, Best Buy, and Wal-Mart."

With respect to her written communications with Hunt, Ruiz said she received Hunt's October 19 letter identifying the $5,616.81 debt amount, and she responded by mailing the November 9 letter disputing this amount, asserting the existence of fraudulent charges and requesting account documentation. She denied receiving a response to this request. But she acknowledged receiving Hunt's January 8 letter.

With respect to the alleged collections phone calls, Ruiz stated:

> "I received collection calls related to the account on my cell phone through October 2017 even though I had previously revoked my consent to receive calls on multiple occasions [in January through May 2017]. [¶] I answered some of the calls and some of them had pre-recorded messages that appeared to be collection calls. The message said that they were attempts to collect a debt. [¶] I believe these calls were from Hunt . . . but I hung up before I had the chance to speak with anyone."

With respect to the call received by her son (Son), Ruiz stated, "In Fall 2017, my son called to tell me that he had received a call on his cell phone during which it was disclosed that the call was an attempt to locate me and that I owed a debt. At the time my son received the call, I had no other outstanding debts." She also submitted Son's declaration, stating: "In the fall of 2017, I received a phone call on my cell phone regarding a debt owed by my mother. They were attempting to locate my mother and informed me that she owed a debt. [¶] After getting the call, I called my mother to let her know about the call."

Ruiz also presented her attorney's declaration, who attached the homepage of Hunt's website (viewed in June 2018). The homepage states Hunt uses automatic dial calls as part of its collection services.

Hunt's Reply

In reply, Hunt reasserted its arguments that Ruiz's evidence did not support a viable cause of action. As discussed in more detail below, Hunt also raised numerous evidentiary objections to Ruiz's declaration, Son's declaration, and Ruiz's attorney's declaration. Most of these objections reflected challenges to the relevancy and weight of Ruiz's evidence.

Court's Order

After a hearing, the court denied Hunt's anti-SLAPP motion. The court agreed with Hunt that Ruiz's claims arose from protected activity because Hunt's alleged wrongful conduct concerned activities preparatory to a lawsuit, such as phone calls and letters in anticipation of litigation. (Code Civ. Proc., § 425.16, subd. (e)(1).) But the court found Ruiz met her burden to show a probability of prevailing on each claim.

In reaching this conclusion, the court overruled Hunt's evidentiary objections. With respect to Ruiz's declaration, the court stated in part:

> "[The objections] are not presented in the form required by CRC 3.1354, *and* many of the objections are not valid assertions under the Evidence Code but [are] just argument about the import or weight of the objected-to paragraphs. The court also notes that some of the evidentiary objections are precisely what the Supreme Court had in mind when it wrote (in a different context): [¶] '[I]t has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. . . . To counter that disturbing trend, we

> encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion,' " citing *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532. (Italics added.)

With respect to Hunt's objections to Son's declaration, the court stated: "[Son] is entitled to testify regarding a call he received. The timing alone raises a permissible inference that the call was from someone on behalf of Capital One."

With respect to Ruiz's attorney's declaration, the court said, "The website excerpt is admissible to undercut the law firm's assertion that it abandoned robo-calls."

The court on its own motion also ruled that portions of Sherrill's declaration were inadmissible on lack-of-foundation grounds (to be discussed below).

DISCUSSION

I. *Review Standards Applicable to Anti-SLAPP Motions*

California's anti-SLAPP statute "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*); Code Civ. Proc., § 425.16.) "Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by [the statute]. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, at p. 384.)

We apply a de novo review to a court's rulings on whether the parties met their respective burdens. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788 (*Monster*).) We thus evaluate the court's conclusions and not its reasoning. (*Robles v.*

Chalilpoyil (2010) 181 Cal.App.4th 566, 573.) Evidentiary rulings, however, are generally subject to an abuse of discretion standard. (*Winslett v. 1811 27th Avenue, LLC* (2018) 26 Cal.App.5th 239, 246.)

On appeal, it is undisputed Ruiz's claims against Hunt arose from protected activity and satisfy the first step of the anti-SLAPP analysis. Thus, the sole issue is whether the court properly found she met her burden to show a probability of prevailing on the merits of her claims. (*Monster, supra*, 7 Cal.5th at pp. 788-789.) To satisfy this standard, "[t]he plaintiff need only state and substantiate a legally sufficient claim. [Citation.] The plaintiff's evidence is accepted as true; the defendant's evidence is evaluated to determine if it defeats the plaintiff's showing as a matter of law. [Citation.] The procedure is meant to prevent abusive SLAPP suits, while allowing 'claims with the requisite minimal merit [to] proceed.' " (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420.)

In considering whether the plaintiff met this "minimal merit" standard, we evaluate "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).) We do not weigh credibility, nor do we evaluate the evidence's weight. Instead, we accept as true all evidence favorable to the plaintiff; infer all reasonable inferences to support this evidence; and "assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700; accord *Monster, supra,* 7 Cal.5th at p. 795.)

However, we need not consider speculative inferences unsupported by the evidence. (*Monster*, at 796.)

II. *Specificity in Pleading*

Before reaching the issues on the merits, we briefly address Hunt's contention the court erred in denying the anti-SLAPP motion because Ruiz did not plead the facts with "sufficient particularity."

Generally, if pleadings are not adequate to support a cause of action, the plaintiff has failed to carry her burden at the second stage of the anti-SLAPP analysis. (See *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31.) In California, a complaint or cross-complaint must contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language." (Code Civ. Proc., § 425.10, subd. (a)(1).) Under this "fact-pleading" rule, allegations need only provide fair notice of the claim and must be liberally construed. (*Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 886 (*Medical Marijuana*); see *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5.) The plaintiff satisfies this burden by alleging ultimate (rather than evidentiary) facts that " 'as a whole apprise[ ] the adversary of the factual basis of the claim. [Citations.]' " (*Medical Marijuana*, at p. 886.)

Hunt acknowledges these general rules, but argues Ruiz was required to satisfy a higher pleading standard (alleging facts "with particularity") applicable to statutory tort causes of action, citing *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780 and *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71. Ruiz responds that this rule applies only to statutory torts against public entities and not private entities.

We need not resolve this issue because even assuming Hunt is correct that courts have applied a higher pleading standard to statutory claims against private entities (see, e.g., *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407), the rule is applied flexibly in this context (see *Randall v. Ditech Financial, LLC* (2018) 23 Cal.App.5th 804, 810-811; see also *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 473-474). In *Randall*, this court rejected the argument that a particularity-pleading rule applied to the plaintiff's FDCPA allegations. (*Randall*, at pp. 810-811.) We reasoned that the "particularity required of a pleading varies given the parties' relative knowledge of the facts in issue. . . . '[L]ess particularity is required where the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff. . . . Ultimately, the complaint is sufficient if " ' "the adversary has been fairly apprised of the factual basis of the claim against him." ' " (*Id.* at p. 810.)

Consistent with *Randall*, we determine Ruiz's complaint was sufficient to satisfy pleading standards. As in *Randall*, Hunt was in at least as good a position as Ruiz to know the details of its actions and communications regarding Ruiz's claimed debt. Further, many of the allegations involve a fact-intensive inquiry inappropriate for resolution at the pleading stage based on a claim the allegations were too general. Finally, even if a heightened pleading standard applied, Ruiz's complaint met that standard. Ruiz's allegations described facts and did not merely parrot the statutory language. The complaint's allegations provided Hunt with sufficient notice to defend against the claims.

We now turn to determine whether Ruiz met her burden to show a probability of prevailing on each of her three statutory claims: FDCPA, TCPA, and UCL.

III. *FDCPA*

A. *General Principles*

The FDCPA strictly regulates a debt collector's activities and imposes affirmative obligations on debt collectors. (§ 1692 et seq.) The statutory purpose is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." (§ 1692(e).) " 'A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve "the right to be treated in a reasonable and civil manner." ' " (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 996 (*Heritage Pacific*).)

The FDCPA "is a remedial statute" and must " 'be construed liberally in favor of the consumer.' " (*Heritage Pacific, supra,* 215 Cal.App.4th at p. 996; see *McAdory v. M.N.S. & Associates, LLC* (9th Cir. 2020) 952 F.3d 1089, 1092; *Beane v. RPW Legal Services, PLLC* (W.D.Wash. 2019) 378 F.Supp.3d 948, 953.) Violations are assessed from the perspective of the " 'least sophisticated consumer.' " (*Beane,* at p. 953.) Generally, a plaintiff can establish a prima facie case even without proof that the defendant's conduct was intentional or even negligent. (*Tourgeman v. Collins Financial Services, Inc.* (9th Cir. 2014) 755 F.3d 1109, 1119.) The FDCPA provides for statutory

damages of $1,000, plus costs and attorney fees, even if the plaintiff has not shown actual damage. (§ 1692k.)

" '[T]o prevail on an FDCPA claim, a plaintiff must prove that (1) [s]he was the object of collection activity arising from consumer debt, (2) the defendant is a debt collector within the meaning of the statute, and (3) the defendant engaged in a prohibited act or omission under the FDCPA. [Citation.]' " (*O'Neil-Rosales v. Citibank (South Dakota) N.A.* (2017) 11 Cal.App.5th Supp. 1, 7; accord *Heritage Pacific*, *supra*, 215 Cal.App.4th at p. 997; *Barbato v. Greystone Alliance, LLC* (3d Cir. 2019) 916 F.3d 260, 265.)

We consider whether Ruiz met her burden on each of these elements.

B. *Element One: Consumer Debt*

Under the FDCPA's first element, the plaintiff must show the collection activity involved a consumer debt. A " 'consumer' " is "any natural person obligated or allegedly obligated to pay any *debt*." (§ 1692a(3), italics added.) A " '*debt*' " is a consumer's obligation to "pay money arising out of a transaction" in which "the subject of the transaction [is] *primarily for personal, family, or household purposes*, whether or not such obligation has been reduced to judgment." (§ 1692a(5), italics added.)

Ruiz stated in her declaration that she "primarily used the [Capital One] account to purchase consumer goods and services." This statement is supported by the credit card statements attached to attorney Sherrill's declaration reflecting that most of the purchases were consumer-type transactions, including at grocery stores, doctor visits, and retail stores. This evidence satisfied Ruiz's burden to show a probability of proving her claim

that the transactions underlying the alleged debt were "primarily for personal, family, or household purposes." (§ 1692a(5).)

In arguing Ruiz did not meet this burden, Hunt notes that Ruiz did not use the word "primarily" in her complaint and instead alleged only that she "used the card to purchase consumer goods and services such as food and gas." It argues that without including this word in her complaint, Ruiz's declaration on this point was inadmissible and/or insufficient to defeat an anti-SLAPP motion.

The argument is without merit. The omission of the word "primarily" from her pleading did not preclude Ruiz from submitting proof on this issue. Ruiz's allegation that she used her credit card to "purchase consumer goods and services" supports a reasonable inference that all or primarily all of the purchases pertained to consumer goods and services. Put otherwise, the absence of the word "primarily" broadens—rather than limits—the reach of the sentence. Further, where, as here, the plaintiff submits *evidence* that the transactions underlying the alleged debt were *primarily for personal, family, or household purposes*, it would be improper to grant an anti-SLAPP motion on the FDCPA claim solely on this basis. The purpose of an anti-SLAPP motion is to weed out meritless claims at the outset of the litigation, and not to preclude causes of action based solely on an easily curable evidentiary or pleading deficiency. (See *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 945, 949 (*Sweetwater*).)

C. *Element Two: Debt Collector*

On the second element, Ruiz was required to show Hunt acted as a debt collector under the FDCPA. Hunt acknowledges Ruiz met her burden on this issue. This is

consistent with the United States Supreme Court's holding in *Heintz v. Jenkins* (1995) 514 U.S. 291 (*Heintz*) that the phrase "debt collector" in the FDCPA "applies to a lawyer who 'regularly' *through litigation* tries to collect consumer debts." (*Id.* at pp. 292, 299.) The evidence showed Hunt regularly acts as a debt collector, and did so during the underlying events.

D. *Element Three: Prohibited Act or Omission*

On the third FDCPA element, the plaintiff must prove the defendant engaged in an act or omission prohibited by the FDCPA. On this element, Ruiz alleged two categories of prohibited conduct: (1) Hunt's alleged communications with Ruiz's son in violation of 1692b(2); and (2) Hunt's misrepresentation or misstatement of the amount owed allegedly in violation of sections 1692e(2)(A) and 1692f(1). Because each ground amounts to a separate "claim" under the anti-SLAPP statute, we must examine whether Ruiz met her burden on both grounds. (See *Baral*, *supra*, 1 Cal.5th at p. 395.)

1. *Third-party Communications*

The FDCPA prohibits a debt collector from communicating with a third party except to acquire location information for the debtor. (§§ 1692c, 1692b(2).) During any permitted third-party conversation, the debt collector "*shall* [¶] *not* state that such consumer owes any debt." (§ 1692b(2), italics added.)

To support her claim that Hunt violated this section, Ruiz submitted her declaration and the declaration of her son. In his declaration, Son said he received a call in the Fall 2017 "regarding a debt owed by my mother." He said, "They were attempting to locate my mother *and informed me that she owed a debt*." (Italics added.) In her

declaration, Ruiz stated that in Fall 2017, Son told her that someone called him and told him that she owed a debt. Ruiz said she had no other outstanding debts during this time.

This evidence is sufficient to support that *if* a Hunt attorney or other Hunt employee made the call to Son, Hunt violated the FDCPA. (§ 1692b(2).) Hunt does not challenge this conclusion, but argues there is insufficient evidence showing it was responsible for the call.

Based on the record before us, we agree with the trial court that a fair inference can be made that Hunt made the call. It is undisputed that Capital One assigned Ruiz's account for collections to Hunt on September 29, 2017. Son said he received the call in the Fall 2017 and Ruiz says Son told her about the call in Fall 2017. Ruiz said she had no other outstanding debts at the time. Although the inference is somewhat attenuated, it is not unreasonable or illogical to conclude from the timing of the calls that Hunt was responsible for the call.

In reaching this conclusion, we emphasize that only minimal proof is required to successfully oppose an anti-SLAPP motion. Because anti-SLAPP motions are filed very early in the case and before discovery, courts are particularly rigorous in indulging every legitimate favorable inference that can be drawn from the evidence. At this step of the anti-SLAPP analysis, courts must provide plaintiffs "a certain degree of leeway in establishing a probability of prevailing on its claims." (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 530; see also *Monster*, *supra*, 7 Cal.5th at p. 793; *Sweetwater*, *supra*, 6 Cal.5th at p. 945.)

Hunt contends the inference that it was responsible for the call is speculative because the record establishes Capital One and Firstsource also attempted to collect the debt. However, the evidence shows that these entities engaged in debt collections *before* Hunt was assigned the account. Based on the evidence that Ruiz's collections account was placed with Hunt in the Fall 2017 (September 29), and that it continued to handle the claim through the time the complaint was filed, it is reasonable to infer that when the call was made, Hunt was the sole debt collector taking actions on the account.

Hunt also relies on Sherrill's declaration stating he is a custodian of records for Hunt; Hunt maintains detailed electronic records of all outgoing telephone calls; and based on his review of these records, "[Hunt's] personnel made 11 outgoing calls to Margaret Ruiz; that *all* of the calls were manually dialed; and that all 11 calls resulted in either no answer, or reaching an outgoing recording with no message left." Sherrill also said Hunt's "business records do not reflect that any [Hunt] personnel ever spoke to Margaret Ruiz, her son, or anybody else regarding her debt to Capital One or any other subject."

The court (on its own motion) found Sherrill's statements inadmissible because there was insufficient information in Sherrill's declaration that he had personal knowledge of the asserted facts about Hunt's telephone calls and records. Hunt challenges this ruling. We need not reach this issue because even assuming the court erred in this evidentiary ruling, Sherrill's declaration does not defeat Ruiz's evidence as a matter of law.

Once a plaintiff presents evidence supporting a claim, the moving anti-SLAPP party has the burden to show as a matter of law the plaintiff cannot prevail. (*Baral*, *supra*, 1 Cal.5th at pp. 384-385; *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1274-1275.) This burden is not met by evidence merely contradicting the plaintiff's showing. (*Ulkarim*, at pp. 1274-1275.) Even assuming Sherrill provided sufficient foundation for his assertion that the Hunt firm made no phone calls to Son, Sherrill's statements rebut Ruiz's evidence but do not completely negate it. A factfinder could reasonably conclude that Son was credible; the timing shows Hunt made the call; and that Sherrill's business records did not accurately reflect that no calls were made to Son. A court does not weigh the relative credibility of the parties' evidence. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

2. *Claims of Misrepresenting Debt Amount or Attempting to Collect Amounts Not Owed*

The second ground for Ruiz's FDCPA's cause of action is Ruiz's claim that Hunt overstated the amount of her debt in violation of two subsections: section 1692e(2)(A) (prohibiting "the false representation of . . . the character, *amount*, or legal status of any debt," italics added) and section 1692f(1) (prohibiting "the collection of any amount . . . unless *such amount* is expressly authorized by the agreement creating the debt or permitted by law," italics added).

Ruiz sought to show a probability of prevailing on this claim primarily through evidence that (1) Hunt sent the October 2017 letter falsely stating she owed $5,616.81, particularly when she had previously disputed that amount; (2) Hunt sent the January 2018 letter reiterating the improper $5,616.81 amount due and stating that Hunt intends

to file suit against Ruiz; and (3) paragraph 11 of her declaration identifying fraudulent charges included within the asserted $5,616.81 amount for which she says she cannot be held liable under the credit card agreement.

Hunt counters that Ruiz did not adequately plead, or present admissible evidence, that the $5,616.81 was an inaccurate amount of the debt owed. Hunt alternatively argues that even if this amount was not accurate, Hunt's attempts to collect this amount did not violate the FDCPA, and in any event, its actions as an attorney were protected under the First Amendment through the *Noerr-Pennington* doctrine and/or were privileged under California's litigation privilege statutes.

We consider each of these contentions below.

2.a. *Pleadings and Factual Support*

Ruiz alleged in her complaint that "the amount of $5,616.81 is misleading, inaccurate, and fraudulent." She claimed her credit card was lost or stolen in late 2015, and unauthorized charges were made from which she did not obtain any benefit. She alleged she "promptly informed Capital One of the fact that her card was lost or stolen, including verbally disputing the fraudulent charges"; she received a letter in March 2016 notifying her of a refund of one of the fraudulent charges (the $68.95 fingerprinting charge); she "*continued to dispute the other fraudulent charges*"; and *she* "*never received any other acknowledgements of her other disputes*." (Italics added.)

Under liberal pleading standards, these allegations were sufficient to state a viable claim that the $5,616.81 amount owed was an improper statement of the outstanding debt.

With respect to Ruiz's proffered evidence to support this claim, in paragraph 11 of her declaration, Ruiz stated that although Capital One had reversed several previously disputed amounts, several charges included within the $5,616.81 identified debt amount were "fraudulent" (e.g., for a Temecula restaurant, Home Depot, Michaels, a pet care entity, Starbucks, and Trader Joe's). In paragraphs 8 through 10, she also said she was disputing the fingerprinting charge (which apparently had been reinstated) because the fingerprint company had not "properly completed the services promised."

The trial court found these facts were sufficient to support that the $5,616.81 identified debt was not the correct amount owed on Ruiz's Capital One account. In challenging this conclusion on appeal, Hunt acknowledges Ruiz's statement in paragraph 11 of her declaration that several of the charges "were fraudulent," but Hunt contends the court erred in overruling its evidentiary objections to this paragraph.

Hunt raised numerous objections to Ruiz's declaration. The court did not rule on each objection and instead gave several collective grounds for overruling all of the objections, including that the objections were not in a proper form; they constituted primarily argumentative assertions pertaining to substantive issues; and Hunt raised voluminous objections without highlighting the key evidentiary issues.

In its appellate briefing, Hunt challenges each of these grounds. We need not reach these arguments because Hunt failed to show the court's error was prejudicial, i.e., that Ruiz's statements on this subject *were in fact inadmissible*. (See *Litinsky v. Kaplan* (2019) 40 Cal.App.5th 970, 988; *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119.)

Hunt argues Ruiz's identified "fraudulent" charges in her declaration were inadmissible to support her FDCPA claim because Ruiz (1) had not told Hunt in writing that any of these specific charges were disputed; and (2) did not identify these specific charges in her complaint (other than the fingerprinting charge).

These arguments are unavailing. Hunt cites no rule that a consumer must notify a debt collector of the specific disputed charges before the consumer can recover under the FDCPA for an attempt to collect an overstated debt amount. In fact, as discussed in Part III(D)2(b), *post*, most courts have ruled to the contrary. Likewise, Hunt cites no authority supporting that a plaintiff must specifically identify each disputed charge *in her complaint* to state a viable FDCPA claim. Such rule is inconsistent with our state's liberal pleading standards as discussed in Part II, *ante*. This is particularly true when reviewing an anti-SLAPP motion.

Hunt also contends Ruiz's statement in her declaration that Capital One had reversed several disputed charges is inadmissible because it *contradicts* the allegation in her complaint that other than the fingerprint charge, she "*never received acknowledgment of any of her* [*other*] *disputes*." (Italics added.) However, it is not clear *when* Ruiz was notified that Capital One had reversed these charges, and thus whether these assertions are truly inconsistent. Moreover, even if Ruiz's statements can be viewed as contradictory, this fact goes to the weight of Ruiz's testimony and not to its admissibility, particularly at the preliminary anti-SLAPP stage.

We likewise find unhelpful Hunt's reliance on Ruiz's changed description of the fingerprinting charge from "fraudulent" to unsatisfied "with the service." Without more,

and given the other identified alleged fraudulent charges, this different characterization raises a factual issue and is not the basis for a dismissal under the anti-SLAPP statute.

2.b. *Legally Actionable*

Hunt alternatively contends that even assuming Ruiz met her burden to factually show $5,616.81 overstated the debt amount, this overstatement was not legally actionable.

In evaluating these arguments, we are mindful of the remedial nature of the FDCPA, the broad rights accorded debtors under the FDCPA, the fact this case is at an early stage of the litigation, and it is Hunt's burden to establish trial court error. On the latter point, an appellant must affirmatively demonstrate error *through citation to supporting legal authority and reasoned argument and analysis*. (See *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655-656; *Sporn v. Home Depot USA, Inc*. (2005) 126 Cal.App.4th 1294, 1305.) It is not an appellate court's job to independently develop issues and answers to unsettled legal questions if the appellant has not adequately briefed them, particularly where the appellant is a law firm with substantial experience and expertise in the subject matter of the appeal.

2.b.i. *FDCPA Legal Principles Applicable to Erroneous Debt Amount Statement*

Ruiz contends Hunt violated FDCPA subsections prohibiting "[t]he false representation of the character, *amount,* or legal status of any debt" (§ 1692e(2)(A), italics added), and the collection of any amount "*unless such amount* is expressly authorized by the agreement creating the debt or permitted by law" (§ 1692f(1), italics added).

Interpreting the plain meaning of these subsections, courts have recognized that a debt collector can violate the FDCPA by sending a letter or filing a complaint seeking to collect an erroneous *amount* of debt from the consumer. (See *Afewerki v. Anaya Law Group* (9th Cir. 2017) 868 F.3d 771, 774-777 [finding "overstatement of the principal due in the state court complaint, exacerbated by the statement of an inflated interest rate," stated a viable claim under section 1692e(2)] (*Afewerki*); *Hunt v. Check Recovery Sys., Inc.* (N.D.Cal. 2007) 478 F.Supp.2d 1157, 1168-1169 [demanding unauthorized debt amount in letter violated § 1692e(2)(A) and § 1692f(1)]; *Canace v. Lucas* (D.Conn. 1990) 775 F.Supp. 502, 505-506 [overstatement of debt amount in defendant's letters to debtor violated FDCPA]; *White v. First Step Group LLC* (E.D.Cal. Sep. 19, 2017, No. 2:16-CV-02439-KJM-GGH) 2017 WL 4181121, at p. *8 (*White*); *Gonzalez v. Cullimore* (Utah 2018) 417 P.3d 129, 142-143 (*Gonzalez*); see also *Fatemi v. Northland Group, Inc.* (D.Or., Feb. 11, 2016, No. 3:15-CV-00371-ST) 2016 WL 2905498, at pp. *2-*4.)

Most courts have also held a debt collector can be held liable under the FDCPA for seeking an overstated amount even if the error was unintentional and/or was based on the creditor's information. (*Clark v. Capital Credit & Collection Servs.* (9th Cir. 2006) 460 F.3d 1162, 1175-1176 [agreeing with the Second and Seventh Circuits that " '§ 1692e applies even when a false representation was unintentional' "]; *White*, *supra*, 2017 WL 4181121, at p. *9 [debt collector's "argument that it was entitled to reasonably rely on the debt amount as reported to it by [the creditor] . . . is unavailing in the face of the FDCPA as a strict liability statute"]; *Gonzalez*, *supra*, 417 P.3d at pp. 139-140 ["overwhelming majority of jurisdictions . . . have almost unanimously held that the FDCPA is a strict

liability statute [and] most of these courts have explicitly stated that § 1692e is a strict liability provision"; " 'a consumer need not show intentional conduct by the debt collector to be entitled to damages' "]; *Bell v. Northland Group* (E.D.Mich., Apr. 16, 2018, No. 17-12746) 2018 WL 1792368, at p. *2 ["debt collector *can* violate provisions of the FDCPA, including § 1692e and § 1692f, even if it relies in good faith on the original creditor"].)

The broad reach of these provisions is tempered by the existence of a "bona fide error" affirmative defense under section 1692k(1). (*McCollough v. Johnson, Rodenburg & Lauinger, LLC* (9th Cir. 2011) 637 F.3d 939, 948; see *Heintz, supra*, 514 U.S. at p. 295*; Malone v. Accounts Receivable Resources, Inc.* (S.D.Fla. 2019) 408 F.Supp.3d 1335, 1345-1346 (*Malone*); *Smith v. Transworld Systems, Inc.* (6th Cir. 1992) 953 F.2d 1025, 1032.) Hunt did not rely on the bona fide defense in bringing its anti-SLAPP motion (or raise the issue on appeal), and therefore Ruiz did not have the burden to negate this affirmative defense in the anti-SLAPP proceedings.[3] (See *Long Beach Unified School Dist. v. Margaret Williams, LLC* (2019) 43 Cal.App.5th 87, 100.)

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3 The FDCPA's broad scope is also limited by the requirement that a debtor must prove the false statement was "material," e.g., "likely to mislead the least sophisticated consumer." (*Afewerki*, *supra*, 868 F.3d at p. 775; see also *Van Hoven v. Buckley & Buckley* (6th Cir. 2020) 947 F.3d 889, 894.) Hunt did not argue below, nor on appeal, *or cite supporting authority*, that Ruiz failed to meet her burden on this materiality element, and therefore any such assertion is forfeited for purposes of the anti-SLAPP motion.

2.b.ii. *Analysis*

Ruiz argues Hunt violated sections 1692e(2)(A) and 1692f(1) by sending the October 19 and January 8 letters with an overstated debt amount.

Hunt counters that neither of these letters can be the basis for a section 1692e(A)(2) or 1692f(1) cause of action because both letters are legally required communications (the former required by section 1692g, and the latter a prerequisite to recovering costs in a limited jurisdiction action). However, Hunt does not cite any relevant authority supporting that a FDCPA claim cannot be based on a legally required document. And many courts have reached contrary conclusions. Courts have recognized that any communication seeking to collect a debt—including a legally required document—can be the predicate for a section 1692e(2)(A) or 1692f(1) claim. (See, e.g., *Afewerki, supra,* 868 F.3d at pp. 774-777; *McLaughlin v. Phelan Hallinan & Schmieg, LLP* (3rd Cir. 2014) 756 F.3d 240, 245-247 (*McLaughlin*); *Eide v. Colltech, Inc.* (D.Minn. 2013) 987 F.Supp.2d 951, 955, 959-965; see also *Heritage Pacific, supra,* 215 Cal.App.4th at pp. 997-998.)

Hunt alternatively argues that Ruiz cannot recover under section 1692e(2)(A) or 1692f(1) for a claimed overstatement of the debt amount because Ruiz "did not bring *any* specific disputes to [Hunt's] attention" and Capital One did reverse some of the disputed charges. It argues that "where it is undisputed that a debtor does not contest the debt, she cannot assert an FDCPA cause of action based upon an attempt to collect a debt later asserted to be invalid." In support, Hunt cites *Palmer v. I.C. Systems, Inc.* (N.D.Cal., Nov. 8, 2005, No. C-04-03237 RMW) 2005 WL 3001877 (*Palmer*).

In *Palmer*, the debt collector sent the plaintiff two collection letters seeking an amount for returned checks; the debt amount had been provided by the creditor. (*Palmer*, *supra*, 2005 WL 3001877.) The plaintiff did not respond to the letters or otherwise dispute the charges, and instead filed an FDCPA action against the debt collector, alleging violations of 1692e(2)(A) and 1692f(1) because the amount allegedly included unauthorized charges. (*Palmer*, at p. *2.) The federal district court found she could not recover on her cause of action because section 1692g entitles the creditor to assume the debt is valid absent a dispute. (*Palmer*, at pp. *3-*5.) The court additionally found relevant that the defendant debt collector had "successfully established the bona fide error [affirmative] defense as to plaintiff's allegations under [sections 1692e and 1692f]." (*Palmer*, at p. *8.) Considering both grounds together, the court dismissed the plaintiff's claim. (*Ibid.*)

This case is distinguishable because Ruiz *did* dispute the debt in response to Hunt's initial section 1692g letter (in her November 9 letter), and Hunt did not rely on the bona fide defense in bringing its anti-SLAPP motion. Additionally, the majority of federal and state courts have explicitly rejected the notion that a plaintiff is barred from recovering on a FDCPA claim under sections 1692e(2)(A) and/or 1692f(1) if the plaintiff does not dispute the debt before filing suit, including after receiving the 1692g validation letter. (See *McLaughlin*, *supra*, 756 F.3d at pp. 247-248 & fn. 11 [disagreeing with *Palmer*, and stating "there is no statutory support for th[e] view" that the FDCPA "require[s] a consumer to dispute a debt" before filing the claim challenging the collection of an invalid debt]); *Russell v. Absolute Collection Servs., Inc.* (4th Cir. 2014)

763 F.3d 385, 392-394 [debtor not required to dispute debt as a condition to filing suit under section 1692e]; *Malone*, *supra*, 408 F.Supp.3d at p. 1345 ["The Court agrees with the Second Circuit finding that neither the statutory text nor the legislative intent of the FDCPA support a waiver of legal rights for failing to comply with a debt validation procedure. Therefore, [plaintiff] did not waive any right to bring legal action . . . when he failed to dispute the referred debt."]; see also *Vangorden v. Second Round, L.P.* (2d Cir. 2018) 897 F.3d 433, 440-441.)

On a more fundamental level, Hunt argues that applying the FDCPA against a lawyer for stating a wrong amount in a complaint is inconsistent with United States Supreme Court authority because it means that any debt collector's attorney who is unsuccessful in proving the debt amount in a lawsuit against the debtor would necessarily be liable under the FDCPA.

In support, Hunt relies on *Heintz*, *supra*, 514 U.S. 291. In *Heintz*, a consumer defaulted on a bank loan, and the bank's law firm (on behalf of the bank) sued the consumer to recover the balance due. (*Id.* at p. 293.) During the litigation, a bank lawyer wrote to the consumer's lawyer offering to settle for a sum that included the defaulted loan amount plus an insurance payment. (*Ibid.*) The consumer then sued the attorney under sections 1692e(2)(A) and 1692f(1), alleging the insurance payment was not recoverable under the parties' agreement, and "[h]ence, [the attorney's] 'representation' about the 'amount' of her 'debt' was 'false'; amounted to an effort to collect an 'amount' not 'authorized' by the loan agreement; and thus violated the [FDCPA]." (*Heintz*, at pp. 293-294.)

The specific legal issue before the high court was whether the FDCPA applied to attorneys involved in litigation matters. (*Heintz, supra*, 514 U.S. at p. 292.) In finding in the affirmative, the court relied on the broad statutory definition of "debt collector" and the fact that in 1986 Congress had repealed an earlier exemption for attorneys. (*Id.* at pp. 294-295.) The court also rejected the attorney's arguments that " 'anomalies' " would result if the FDCPA was construed to apply to litigating attorneys. (*Id.* at p. 295.) As an "example," the court noted the concern that the provision prohibiting debt collectors from " 'threat[ening] to take action[s] that cannot be legally taken' " (§ 1692e(5)) would "make liable any litigating lawyer" who unsuccessfully "brought . . . a claim against a debtor." (*Heintz*, at p. 295.) In dismissing this concern, the court noted that the FDCPA contains a bona fide error affirmative defense, and therefore "even if we were to assume that the suggested reading of § 1692e(5) is correct, we would not find the result so absurd as to warrant implying an exemption for litigating lawyers." (*Heintz*, at p. 295.) The court then observed: "In any event, . . . we do not see how the fact that a lawsuit turns out . . . unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.' " (*Id.* at pp. 295-296.)

Quoting this last sentence, Hunt argues that sections 1692e and 1692f should not be interpreted as permitting liability against an attorney merely for filing a lawsuit where the attorney recovers only a part of the claimed debt. However, *Heintz* itself involved liability based on an inaccurate statement of a portion of the amount owed (although in a settlement letter, not the complaint). Moreover, federal courts have interpreted *Heintz* to mean that a complaint overstating the debt amount or other factual misstatement can fall

within the scope of FDCPA liability. (See *Marquez v. Weinstein, Pinson & Riley, P.S.* (7th Cir. 2016) 836 F.3d 808, 810-812 (*Marquez*); *Eichman v. Mann Bracken, LLC* (W.D.Wis. 2010) 689 F.Supp.2d 1094, 1100 (*Eichman*); *Reyes v. Kenosian & Miele, LLP* (N.D.Cal. 2008) 619 F.Supp.2d 796, 801-804 (*Reyes*); *Guevara v. Midland Funding NCC-2 Corp.* (N.D.Ill., June 20, 2008, No. 07C5858) 2008 WL 4865550, at p. *5; see also *Murphy v. Stupar, Schuster & Bartell, SC* (W.D.Wis. 2018) 337 F.Supp.3d 837, 840-844.)[4]

On the other hand, we agree with those federal courts that have recognized *Heintz* should not be stretched to absurd lengths. (See *Eichman*, *supra*, 689 F.Supp.2d at pp. 1100-1101; *Wehrheim v. Secrest* (S.D.Ind., Aug. 16, 2002, No. IP 00-1328-C-T/K) 2002 WL 31242783, at pp. *3-*4.) "*Heintz* assumes that the FDCPA applies to the filing of a state court complaint, *but encourages a reading of the statute that does not inhibit ordinary, lawful litigation.*" (*Reyes*, *supra*, 619 F.Supp.2d at p. 804, italics added.) Under this principle, the *Eichman* court held that where the consumer bases his or her action solely on a court pleading, the consumer "must allege that [the debt collector's claims] are frivolous, based on blatant lies or misrepresent a key fact." (*Eichman*, at pp. 1100-1101.)

We agree that, without more, an attorney does not violate the FDCPA merely by representing a client who sues for an overstated debt amount. But we need not decide the

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4 After *Heintz*, Congress amended the FDCPA to exempt "formal pleadings" from coverage of certain portions of the act, but these amendments did not apply to sections 1692e(2) or 1692f. (See § 1692e(11); *Marquez*, *supra*, 836 F.3d at p. 811.)

outer limits of attorney FDCPA liability because Ruiz did not rely on Hunt's filing of the complaint to support her FDCPA claim. Instead, she grounded her claim principally on Hunt's actions, as a debt collector, in sending the October 19 and January 8 letters that sought to collect an overstated amount of debt, particularly after she allegedly repeatedly communicated her challenges to this amount to the creditor, to the second debt collector, and to Hunt (in her November 9 letter). In ruling on an anti-SLAPP motion, a court must focus on whether the *particular claim* is supported by sufficient facts, and need not explore every possible theory underlying that claim. (See *Cuevas-Martinez v. Sun Salt Sand, Inc.* (2019) 35 Cal.App.5th 1109, 1119.) Additionally, Hunt has not cited helpful federal or state authority on the issue, except for the dicta in *Heintz*, decided more than two decades ago. Under these circumstances, we conclude Ruiz met her burden on the FDCPA claim even assuming the complaint itself could not serve as a basis for a FDCPA claim. (See *Young v. Three for One Oil Royalties* (1934) 1 Cal.2d 639, 647-648 [an appellate court generally will not address an issue unnecessary to the resolution of the appeal].)

Finally, we briefly address Hunt's contentions regarding the effect of Ruiz's claim that she never received its November 14 letter. We assume for purposes of this issue that Sherrill's declaration was admissible to establish that Hunt mailed the letter to Ruiz.

Generally, there is a statutory presumption that a letter correctly addressed and properly mailed was received. (Evid. Code, § 641; *Bear Creek Master Assn. v. Edwards* (2005) 130 Cal.App.4th 1470, 1486.) However, if (as in this case) the opposing party denies receipt, the presumption is rebutted and the issue whether the letter was received is

one for the factfinder. (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 422.) Hunt argues that Ruiz's denial did not rebut this presumption because section 1692g(a) requires only that the notice *be sent*, and not that the debt collector ensure it has been received.

We agree with Hunt's reading of section 1692g. (See *Mahon v. Credit Bureau of Placer County Inc.* (9th Cir. 1999) 171 F.3d 1197, 1201; *Taylor v. Quall* (C.D.Cal. 2007) 471 F.Supp.2d 1053, 1061.) But Ruiz did not allege Hunt violated section 1692g. The issue here is therefore different; it is whether a consumer is foreclosed from recovering *under sections 1692e(2)(A) and 1692f(1)* as a result of failing to dispute the debt in writing. (See *Meyer v. Credit Management, LP* (N.D.Cal., Feb. 13, 2013, No. 12-CV-04842 JSC) 2013 WL 567758, at pp. *5-*6.) Based on prevailing authority, Ruiz was not foreclosed from recovery under these sections even if it is true that Hunt complied with section 1692g by mailing the November 14 letter.

2.c. Noerr-Pennington *Doctrine*

Hunt alternatively contends Ruiz did not meet her burden on the FDCPA claims because they are barred by the First Amendment through the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine derives from the First Amendment's petition clause, and provides that "those who petition . . . the government for redress are generally immune from statutory liability for their petitioning conduct." (*Sosa v. DIRECTV, INC.* (9th Cir. 2006) 437 F.3d 923, 929.) Under this rule, courts "must construe federal statutes . . . to avoid burdening conduct that implicates the protections afforded by the Petition Clause *unless the statute clearly provides otherwise*." (*Id.* at 931, italics added.)

Numerous courts have rejected arguments that the *Noerr-Pennington* doctrine precludes liability under the FDCPA for petitioning conduct. (See *Michelo v. National Collegiate Student Loan Trust 2007-2* (S.D.N.Y. 2019) 419 F.Supp.3d 668, 693; *Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC* (N.D.Ill. 2009) 632 F.Supp.2d 842, 845-846 (*Basile*); *Linder v. Eason* (C.D.Cal., June 29, 2018, No. SACV 17-1294-DOC (JDEX)) 2018 WL 3816763, at pp. *8-*9 (*Linder*); *Sial v. Unifund CCR Partners* (S.D.Cal., Aug. 28, 2008, No. 08CV0905JM(CAB)) 2008 WL 4079281, at p. *3 (*Sial*); see also *Reyes*, *supra*, 619 F.Supp.2d at p. 804.)

Some of these courts have relied on *Heintz*, finding that although the high court did not explicitly reach the issue, its holding that the FDCPA applies to an attorney's litigation conduct strongly suggests it would view the *Noerr-Pennington* doctrine as inapplicable. (See *Basile*, *supra*, 632 F.Supp.2d at pp. 845-846; *Sial*, *supra*, 2008 WL 4079281, at p. *3.) The courts have also found the FDCPA provisions reflecting Congress's intent to regulate litigation activity means the FDCPA falls under the " 'unless the statute clearly provides otherwise' " exception to the *Noerr-Pennington* doctrine. (*Sial*, at p. *4.) Additionally, courts have concluded the *Noerr-Pennington* doctrine is inapplicable because the FDCPA does not *prohibit* the filing of a lawsuit or engaging in litigation. (See *Linder*, *supra*, 2018 WL 3816763, at p. *8.)

We find the reasoning of these courts persuasive and reject Hunt's contentions that Ruiz's FDCPA claims are barred by the *Noerr-Pennington* doctrine.

2.d. *Litigation Privilege*

In its reply brief, Hunt suggests Ruiz's claims based on its litigation or prelitigation activities are barred by the litigation privilege. (Civ. Code, § 47, subd. (b)(2).) Generally, a party forfeits arguments made for the first time in a reply brief. (*Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576, 583.) Even if we were to reach the merits, we would find the defense inapplicable.

California and federal courts have long held California's litigation privilege is not a defense against claims under the FDCPA or its state counterpart, the Rosenthal Fair Debt Collections Act. (*Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 337-340 [Rosenthal Act]; *People v. Persolve, LLC* (2013) 218 Cal.App.4th 1267, 1274-1276 [FDCPA/UCL]; *Izett v. Crown Asset Management, Inc.* (N.D.Cal., Dec. 14, 2018, No. 18-CV-05224-EMC) 2018 WL 6592442.) In carefully scrutinizing these statutes, the *Komarova* and *Persolve* courts concluded that application of the litigation privilege would negate the more specific consumer protective provisions of the state and federal debt collection laws, and therefore the privilege does not apply to these statutory schemes. (*Komarova*, at pp. 337-340; *Persolve*, at pp. 1274-1276; see *Izett*, at p. *4 ["Nearly all federal district courts since *Komarova* have agreed with its analysis."].) We concur with this reasoning and reject Hunt's arguments to the contrary.

IV. *TCPA*

Ruiz alleged Hunt violated the TCPA by making calls to Ruiz's cell phone using an automated dialing system.

The TCPA prohibits parties from making or authorizing phone calls to a cell phone using an automated dialing system without the cell phone owner's consent. (47 U.S.C. § 227(b)(1)(A); see *Meyer v. Portfolio Recovery Associates, LLC* (9th Cir. 2012) 707 F.3d 1036, 1043.)

In her declaration, Ruiz said: "I received collection calls related to [my Capital One] account on my cell phone through October 2017 even though I had previously revoked my consent to receive those calls on multiple occasions, including on January 27, 2017, March 1, 2017, and in May 2017. [¶] I answered some of the calls *and some of them had pre-recorded messages that appeared to be collection calls. The messages said that they were attempts to collect a debt.* [¶] *I believe these calls were from [Hunt] but I hung up before I had the chance to speak to anyone*." (Italics added.)

This evidence is insufficient to support that Hunt violated the TCPA by making calls to Ruiz using an automatic dialer. Although Ruiz said she received calls on her cell phone from January 2017 through October 2017 and that "*some of them* had pre-recorded messages" (italics added), she did not state or suggest the calls she received from the end of September through October 2017 (when Hunt was the debt collector on the account) were those that had prerecorded messages. Her statement that she "believed these calls were from Hunt . . ." is conclusory and without factual support, and therefore is insufficient to sustain her burden to oppose the anti-SLAPP motion.

Likewise, Ruiz's counsel's attachment of a page from Hunt's website stating that the firm "utilize[s] several auto-dial systems with high volume capabilities . . . in accordance with client-specific needs and instructions" is insufficient to show Hunt in

fact used this system when it called Ruiz. Although we must liberally construe a plaintiff's evidence, reading Ruiz's declaration in a fair and reasonable manner does not support a logical inference that the alleged calls with prerecorded messages were initiated during the time Hunt had collection responsibilities on the account.

Based on this conclusion, we do not reach the issue whether the court properly overruled Hunt's objections to the declarations of Ruiz and her attorney on this subject, and/or whether the court properly found inadmissible Sherrill's declaration stating that Hunt terminated its use of autodialing equipment on January 28, 2017. Because Ruiz did not meet her burden to show Hunt made automatic-dialed calls to her cell phone while it was the debt collector on the account (beginning on September 29, 2017), Hunt had no obligation to present evidence that it did not make these calls.

V. *UCL Claim*

Hunt contends the court erred in concluding Ruiz met her burden to show a probability of prevailing on her UCL claim. (Bus. & Prof. Code, § 17200.)

A. *Background*

The UCL " 'prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. [The law] covers a wide range of conduct. It . . . "borrows" violations from other laws by making them independently actionable as unfair competitive practices. [Citation.]' " (*Medical Marijuana, supra*, 46 Cal.App.5th at p. 896.) Conduct can violate the UCL even if it is not unlawful. "Unfair and fraudulent practices are alternate grounds for relief." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.)

In her UCL cause of action, Ruiz named all cross-defendants (Capital One, Hunt, and Firstsource) and alleged both unfair and unlawful conduct. Specifically, in Paragraph 76, Ruiz alleged cross-defendants engaged in *unfair* acts:

> "Cross-Defendants acts and practices as alleged herein are unfair because the utility of the conduct is outweighed by the gravity of the harm it causes. Further, Cross-Defendants' conduct is unfair because if offends established public policy or is immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers. As detailed above . . . Cross-defendants breached their own agreement and violated the Federal Truth in Lending Act and Regulation Z and the California Commercial Code. Cross-Defendants' conduct also violates the spirit of these laws, and otherwise significantly threatens or harms consumers."

In Paragraph 77, Ruiz alleged cross-defendants engaged in *unlawful* acts:

> "Cross-Defendants' actions constitute unlawful competition because they engaged in the following acts: [¶] Violating the California Rosenthal Act, sections 1788 et seq. [¶] Violating the California Consumer Credit Reporting Act, sections 1785 et seq; [¶] Violating the [FDCPA]; and [¶] Violating the [TCPA]."

B. *Analysis*

Hunt recognizes Ruiz's UCL claim is potentially viable under the unlawful-act theory in Paragraph 77 if we find (as we have) that Ruiz met her burden to prove an FDCPA violation. But Hunt argues we should strike Paragraph 76 because it pertains to "unfair" acts rather than "unlawful" acts.

Under *Baral*, the unfair-prong allegations arguably constitute a separate claim underlying the UCL cause of action. (*Baral*, *supra*, 1 Cal.5th at p. 395.) However, we find Ruiz met her minimal anti-SLAPP burden on this issue. Hunt contends "the 'unfair' claim fails because [its] actions caused no harm" and because Ruiz did not allege the

claim with sufficient particularity. On the first point, Ruiz's declaration contains sufficient facts to support her claim of harm (for purposes of opposing the anti-SLAPP motion). On the second point, we find the allegations were sufficiently detailed to provide adequate notice of the claim. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1261 [UCL claims "must be stated with reasonable particularity, which is a more lenient pleading standard than is applied to common law fraud claims"]; see also *Randall*, *supra*, 23 Cal.App.5th at pp. 810-811.)

Hunt also requests that we strike Paragraphs 15 through 17 contained in the Background section of Ruiz's amended complaint. These paragraphs state:

> "15. Ms. Ruiz received a letter from [Capital One], dated March 17, 2016, notifying her of a refund of one of the fraudulent charges, a CA FINGERPRINTING 180031 charge for $68.95.
>
> "16. Ms. Ruiz continued to dispute the other fraudulent charges. However, Ms. Ruiz never received any other acknowledgements of her other disputes.
>
> "17. On information and belief, Cross-Defendants continue to attempt to collect these fraudulent charges form Ms. Ruiz; charges she did not incur, authorize, or benefit from."

This argument is forfeited because it was not adequately raised below. Hunt argues it properly preserved the issue by challenging the entire amended complaint in its anti-SLAPP motion. But it did not specifically raise the issue of striking these particular paragraphs. A reviewing court generally will not consider arguments made for the first time on appeal that could have been, but were not, asserted in the trial court. (See *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1526; *DiCola v. White Brothers*

Performance Products, Inc. (2008) 158 Cal.App.4th 666, 676.) Making an exception here would be unfair to both the trial court and to Ruiz.

In any event, there are no grounds under the anti-SLAPP statute to strike these paragraphs. Although a court may strike allegations that constitute a "claim" within a cause of action (*Baral*), the anti-SLAPP procedure does not authorize a court to strike individual factual paragraphs in a complaint that merely provide context and factual support for the viable causes of action. To the extent Hunt believes these paragraphs are factually unsupported, it retains its right to raise these issues on remand.

DISPOSITION

The court shall vacate its order on Hunt's anti-SLAPP motion, and enter a new order (1) granting the anti-SLAPP motion on the Fourth Cause of Action (TCPA) against Hunt and striking that cause of action against Hunt from the amended cross-complaint, and (2) denying the anti-SLAPP motion on all other grounds. Appellant Hunt & Henriques shall bear respondent's costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.