



1 138; Fee Opp'n, ECF No. 137. For the reasons set forth below,  
2 the Court DENIES Plaintiff's Motion for Treble Damages and GRANTS  
3 Plaintiff's Motion for Attorney Fees.

#### 4 I. FACTUAL AND PROCEDURAL BACKGROUND

5 Plaintiff sued Credit One and its contracting vendors after  
6 receiving over a hundred calls in which the vendors sought to  
7 collect on a debt owed to Credit One by a third-party. Plaintiff  
8 reached settlements before trial with all three vendors and  
9 proceeded to trial only against Credit One. After three days of  
10 trial, the jury returned a verdict that found (1) Credit One  
11 violated the TCPA through the calls made by all three of its  
12 vendors; (2) Credit One violated Plaintiff's rights under the  
13 Rosenthal Act; and (3) Credit one did not invade Plaintiff's  
14 privacy by intruding upon his seclusion. Verdict Form at 1-3.  
15 The jury awarded Plaintiff \$1,000 in statutory damages under the  
16 Rosenthal Act. Id. at 3.

#### 17 II. OPINION

18 Plaintiff filed two post-trial motions. In the first  
19 motion, Plaintiff asks the Court to treble his TCPA damages. See  
20 Damages Mot. In the second motion, Plaintiff seeks attorneys'  
21 fees, costs, and expenses as a prevailing party on his Rosenthal  
22 Act claim. See Fee Mot.

##### 23 A. Treble Damages

24 Plaintiff seeks treble damages based on the theory that  
25 after Plaintiff told a Credit One vendor to stop calling on  
26 February 22, 2017, the subsequent 183 calls were willful  
27 violations of the TCPA.

28 The TCPA provides that a person may "recover for actual

1 monetary loss from such a violation, or to receive \$500 in  
2 damages for each such violation, whichever is greater.” 47  
3 U.S.C. § 227(b) (3). A court may award up to three times this  
4 amount, however, if it finds that the defendant committed the  
5 violation “willfully or knowingly.” Id. (“If the court finds  
6 that the defendant willfully or knowingly violated this  
7 subsection or the regulations prescribed under this subsection,  
8 the court may, in its discretion, increase the amount of the  
9 award to an amount equal to not more than 3 times the amount  
10 available under subparagraph (B) of this paragraph.”). In this  
11 case, there were material disputes of fact on issues of knowledge  
12 and intent. Those disputes were answered at trial by weighing  
13 the evidence and credibility of witnesses.

14 The jury found for Plaintiff on strict liability claims  
15 under the TCPA and Rosenthal Act. Yet in opposing treble  
16 damages, Credit One continues to argue that it cannot be held  
17 responsible for TCPA violations because it disagrees with the  
18 Ninth Circuit’s holding in Marks v. Crunch San Diego, LLC, 904  
19 F.3d 1041 (9th Cir. 2018), cert. dismissed, No. 18-995, 2019 WL  
20 368840 (U.S. Feb. 27, 2019). See Damages Opp’n at 1-2. Credit  
21 One’s view of the Marks case does not negate the law-of-the-  
22 circuit rule, by which district courts are bound by prior circuit  
23 decisions unless those decisions are “clearly irreconcilable with  
24 intervening Supreme Court precedent.” Biggs v. Sec’y of Cal.  
25 Dep’t of Corr. & Rehab., 717 F.3d 678, 689 (9th Cir. 2013)  
26 (citing Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003)  
27 (en banc)). The Court is bound by Marks and will follow it.

28 Credit One’s stronger argument is that the evidence

1 presented at trial does not show by a preponderance of the  
2 evidence that Credit One's vendors "knowingly" and "willfully"  
3 continued to call Plaintiff after he requested they stop. See  
4 Damages Opp'n at 6. Although Credit One is incorrect that  
5 Plaintiff must show that callers knew they were violating the  
6 TCPA, id. at 6-7, Plaintiff must show more than what was required  
7 for strict liability. For the calls to have been deliberate  
8 violations, Plaintiff needed to demonstrate that the  
9 representatives calling after February 22, 2017 should have known  
10 that they were calling a person who did not provide prior express  
11 consent.

12 Plaintiff did not carry this burden by a preponderance of  
13 the evidence. Unlike in the cases Plaintiff cited, here there  
14 were numerous factual disputes regarding when and how Plaintiff  
15 told Credit One's vendors to stop calling. It was unclear  
16 whether the vendor representative heard or understood Plaintiff's  
17 cease-call request, after which the representative neglected to  
18 mark the account notes with a Block/DNC designation. Trial  
19 testimony suggested that Credit One's vendor failed to take  
20 proper care and follow Credit One's policy by not documenting  
21 Plaintiff's singular request that the calls stop. This failure  
22 is more indicative of negligence than willfulness.

23 In summary, the evidence at trial did not show that Credit  
24 One or its vendors continued to call Plaintiff with the knowledge  
25 that he had requested the calls cease. The Court, in its  
26 discretion, does not find that treble damages are appropriate in  
27 this case.

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1           B.    Attorneys' Fees

2                   1.    Legal Standard

3           Under Eastern District of California Local Rule 293, a  
4 prevailing party has twenty-eight (28) days after entry of a  
5 final judgment to move for an award of attorneys' fees. E.D.  
6 Cal. L.R. 293(a). "[T]he fee applicant bears the burden of  
7 establishing entitlement to an award and documenting the  
8 appropriate hours expended and hourly rates." Hensley v.  
9 Eckerhart, 461 U.S. 424, 437 (1983).

10           The Ninth Circuit requires a district court to calculate an  
11 award of attorneys' fees by first calculating the "lodestar."  
12 See Caudle v. Bristow Optical Co. Inc., 224 F.3d 1014, 1028 (9th  
13 Cir. 2000). "The 'lodestar' is calculated by multiplying the  
14 number of hours the prevailing party reasonably expended on the  
15 litigation by a reasonable hourly rate." Id. at 1028 (citing  
16 Morales v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996)).  
17 The lodestar is presumptively reasonable unless some exceptional  
18 circumstance justifies deviation. Quesada v. Thomason, 850 F.2d  
19 537, 539 (9th Cir. 1998). As the Ninth Circuit has indicated, "a  
20 district court should exclude from the lodestar amount hours that  
21 are not reasonably expended because they are 'excessive,  
22 redundant, or otherwise unnecessary.'" Van Gerwen v. Guarantee  
23 Mutual Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000) (quoting  
24 Hensley, 461 U.S. at 434). The Court is under an independent  
25 duty to reach its own "lodestar" value. Hensley, 461 U.S. at  
26 433.

27           After computing the lodestar, the district court assesses  
28 whether additional considerations enumerated in Kerr v. Screen

1 Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), abrogated on  
2 other grounds by City of Burlington v. Dague, 505 U.S. 557  
3 (1992), require the court to adjust the figure. Caudle, 224 F.3d  
4 at 1028. The factors laid out in Kerr, along with the  
5 substantially overlapping criteria enumerated in Local Rule 293,  
6 include: (1) the time and labor required; (2) the novelty and  
7 difficulty of the questions involved; (3) the skill requisite to  
8 perform the legal service properly; (4) the preclusion of other  
9 employment by the attorney due to acceptance of the case; (5) the  
10 customary fee; (6) whether the fee is fixed or contingent;  
11 (7) time limitations imposed by the client or the circumstances;  
12 (8) the amount involved and the results obtained; (9) the  
13 experience, reputation, and ability of the attorneys; (10) the  
14 “undesirability” of the case; (11) the nature and length of the  
15 professional relationship with the client; (12) awards in similar  
16 cases; and (13) such other matters as the Court may deem  
17 appropriate under the circumstances. Kerr, 526 F.2d at 70; E.D.  
18 Cal. L.R. 293(c).

## 19 2. Calculation of Attorneys’ Fees

20 Plaintiff argues the total lodestar is \$169,375.00, based on  
21 372.9 hours billed by Yitzchak Zelman at \$350 per hour and 132.2  
22 hours billed by Ari Marcus at \$450 per hour. Fee Mot. at 5-12.  
23 Plaintiff’s counsel does not seek a lodestar enhancement. See  
24 id. Plaintiffs also seek costs and expenses in the amount of  
25 \$18,146.86. Id. at 23.

26 Credit One opposes Plaintiff’s requested attorneys’ fees,  
27 costs, and expenses, raising four objections to the attorneys’  
28 fee motion. See Fee Opp’n at 2. First, Credit One takes issue

1 with Plaintiffs' counsel designating 53.9 hours for nonbillable  
2 work on the TCPA and Invasion of Privacy claims, compared to 559  
3 hours on billable work for trial and Rosenthal claim. Id.  
4 Second, Credit One contends that their \$1,001.00 settlement  
5 offer, exclusive of reasonable fees and costs, constitutes a Rule  
6 68 offer that bars recovery of fees incurred after January 16,  
7 2019. Id. Third, Credit One argues that Plaintiff's counsel has  
8 double-billed their fees and expenses since they recovered  
9 \$29,405.70 in attorneys' fees and \$12,985.75 in expenses from  
10 settling with Credit One's vendors. Id. Fourth, Credit One  
11 argues that Marcus should not be able to bill \$450 per hour  
12 because he served as second chair at trial. Id.

13 a. No Valid Rule 68 Offer

14 Credit One's argument that Plaintiff should not recover  
15 attorneys' fees incurred after January 16, 2019 based on Federal  
16 Rule of Civil Procedure 68, Fee Opp'n at 4-5, is incorrect as a  
17 matter of law.

18 "Under Rule 68, if a plaintiff rejects a defendant's offer  
19 of judgment, and the judgment finally obtained by plaintiff is  
20 not more favorable than the offer, the plaintiff must pay the  
21 costs incurred subsequent to the offer." UMG Recordings, Inc. v.  
22 Shelter Capital Partners LLC, 718 F.3d 1006, 1033 (9th Cir.  
23 2013). The offer must be made at least 14 days before trial.  
24 Fed. R. Civ. P. 68(a). Rule 68 applies to attorneys' fees if the  
25 underlying statute included fees as part of awardable "costs."  
26 Marek v. Chesny, 473 U.S. 1, 9 (1985) ("[W]here the underlying  
27 statute defines 'costs' to include attorney's fees, we are  
28 satisfied such fees are to be included as costs for purposes of

1 Rule 68.”).

2 The first problem with this argument is that January 16,  
3 2019 was not “[a]t least 14 days before the date set for trial,”  
4 which began on January 28, 2019. See Fed. R. Civ. P. 68(a).  
5 Second, Credit One has not attempted to show that the Rosenthal  
6 Act includes attorneys’ fees as a component of awardable costs.  
7 Such an attempt is futile since the statute treats costs and  
8 attorneys’ fees as distinct entities. Cal. Civ. Code  
9 § 1788.30(c). While either party may receive costs as a  
10 prevailing party, the Rosenthal Act treats attorneys’ fees  
11 differently. Id. Reasonable attorneys’ fees are mandatory for a  
12 prevailing debtor, whereas a prevailing creditor may only recover  
13 fees where the debtor brought or continued the action in bad  
14 faith. See id. Plaintiff is the prevailing party under the  
15 Rosenthal Act and shall be awarded reasonable attorneys’ fees not  
16 limited by Credit One’s invalid Rule 68 offer.

17 b. Hours Reasonably Expended

18 Under both California and federal law, determining whether  
19 Plaintiff’s attorneys’ fees are reasonable begins by calculating  
20 the lodestar: the reasonable hourly rates multiplied by the  
21 number of hours reasonably spent. See, e.g., Hensley, 461 U.S.  
22 at 433; Taylor v. Nabors Drilling USA, LP, 166 Cal. Rptr. 3d 676,  
23 693 (Ct. App. 2014).

24 Plaintiff’s counsel submitted detailed and comprehensive  
25 time entries. See Time Entries, ECF No. 134-3. Credit One’s  
26 primary argument—that Plaintiff should only receive the 53.9  
27 hours not billed for time spent exclusively on TCPA and invasion  
28 of privacy claims, rather than the 505.10 hours billed for



1 Rosenthal Act and related work—is legally unsupported. The  
2 Supreme Court has instructed that “[t]he mere fact that  
3 plaintiffs do not prevail on every claim does not preclude an  
4 award of fees for all work reasonably performed,” especially  
5 where “various claims are essentially part and parcel of a single  
6 attempt to establish and vindicate the plaintiffs’ rights.”  
7 Hensley v. Eckerhart, 461 U.S. 424, 452-53 (1983). The  
8 substantial overlap in Plaintiff’s closely related claims does  
9 not support limiting Plaintiff’s recovery of attorneys’ fees on  
10 this ground.

11 Credit One’s secondary argument that Plaintiff’s fee  
12 recovery should be limited by settlements with other defendants  
13 also lacks merit. Plaintiff’s counsel received contingency fees  
14 as a condition of settling TCPA claims with Credit One’s vendors,  
15 a statute without an attorneys’ fee provision; however, Credit  
16 One chose to proceed to trial on claims including the Rosenthal  
17 Act, which requires the Court to award reasonable attorneys’ fees  
18 to prevailing debtors. Credit One has not presented the Court  
19 with any specific billing entries that were already compensated,  
20 and thus has not established that Plaintiff would be “double  
21 recovering” by receiving reasonable attorneys’ fees required by  
22 the Rosenthal Act.

23 The Court finds that the hours worked by Marcus & Zelman are  
24 appropriate, considering the quality of representation on cross-  
25 motions for summary judgment, pretrial motions, post-trial  
26 motions, and at trial. While Plaintiff’s counsel billed for  
27 their cross-country travel from New Jersey to California, they  
28 reduced their billing rate for this travel by half. In light of

1 that proactive rate reduction, the Court does not find it  
2 necessary to reduce the time billed for travel. See Gauchat-  
3 Hargis v. Forest River, Inc., No. 2:11-cv-02737-KJM, 2013 WL  
4 4828594, at \*8 (E.D. Cal. Sept. 9, 2013) ("Thus, so long as the  
5 amount of time spent traveling is reasonable, and the meeting or  
6 event to which the attorney is traveling is necessary to the  
7 case, the court will award compensation of travel time at the  
8 attorney's full hourly rate.").

9 The Court makes only one minor change to the total hours  
10 billed by Plaintiff's counsel. The Court reduces the 505.10  
11 hours requested by 1.8 hours to account for an unbilled time  
12 entry by Zelman on April 30, 2018. See Time Entries at 6. The  
13 new time total is 503.3 hours. These hours amount to the total  
14 time that reasonably competent counsel would have billed in this  
15 case.

#### 16 c. Reasonable Hourly Rate

17 The Court next turns to determining a reasonable hourly  
18 rate. Cases direct the Court to compare the requested rates with  
19 the "prevailing market rate," which is the rate "prevailing in  
20 the community for similar services of lawyers with reasonably  
21 comparable skill, experience, and reputation." Blum v. Stenson,  
22 465 U.S. 886, 896 n.11 (1984). The relevant market in this case  
23 is rate prevailing in the Eastern District of California.

24 Zelman graduated from the Benjamin N. Cardozo School of Law  
25 in June 2012 and has been licensed to practice in New Jersey  
26 since 2012. Zelman Decl., ECF No. 134-1, p. 1. He has appeared  
27 in consumer law matters in 25 states and three federal courts of  
28 appeals. Id. at 1-2. The Court finds Zelman's requested hourly

1 rate of \$350 per hour to be within the acceptable range in  
2 Sacramento for an attorney with Zelman's years of experience in  
3 consumer law. For Zelman's work, the Court awards 303.1 legal  
4 hours billed at \$350 per hour and 68 travel hours billed at \$175  
5 hour, for a total of \$117,985.00.

6 Marcus graduated from Brooklyn Law School in June 2010 and  
7 has been licensed to practice in New Jersey since 2010. Marcus  
8 Decl., ECF No. 134-2, p. 1. He has appeared in consumer law  
9 matters in nine states and two federal courts of appeals. Id. at  
10 1-2. The Court, however, reduces Marcus's billed rate from \$450  
11 per hour to \$400 per hour, within the acceptable range in  
12 Sacramento for an attorney with Marcus's years of experience in  
13 consumer law. For Marcus's work, the Court awards 96.2 legal  
14 hours billed at \$400 per hour and 36 travel hours billed at \$200  
15 per hour, for a total of \$45,680.00.

16 d. The Kerr Factors and Local Rule 293(c)

17 Finally, the Court considers whether circumstances justify  
18 deviating from the lodestar. See Quesada, 850 F.2d at 539.  
19 Although there is a "strong presumption" that a lodestar  
20 calculation is sufficient compensation, "that presumption may be  
21 overcome in those rare circumstances in which the lodestar does  
22 not adequately take into account a factor that may properly be  
23 considered in determining a reasonable fee." Perdue v. Kenny A.  
24 ex rel. Winn, 559 U.S. 542, 553-54 (2010).

25 Here, the Court finds that none of the Kerr factors weigh in  
26 favor of adjusting the lodestar. The Court analyzed the time and  
27 labor above, determining the appropriate totals. These totals  
28 take into account the preclusion of other employment by the

1 attorney, customary rates, the experience and reputation of the  
2 attorneys, and are in line with awards for other cases of this  
3 nature. Although these types of consumer cases are common and  
4 not particularly undesirable, this case presented factual  
5 disputes resolved by a jury trial. Plaintiff's counsel  
6 demonstrated a high level of skill and competence in this  
7 practice area. Although Plaintiff did not achieve all the  
8 damages he sought at trial, he prevailed on two claims and  
9 received more than nominal damages. Additionally, Plaintiff and  
10 his counsel signed a hybrid agreement, allowing for contingency  
11 fees on non-fee-shifting claims and court-awarded fees for fee-  
12 shifting claims. Finally, Plaintiff and his counsel do not have  
13 an ongoing professional relationship outside of this case, but  
14 counsel had to spend additional time and care to communicate with  
15 Plaintiff because he is a child.

16 In sum, the Kerr factors do not warrant an upward or  
17 downward departure. The Court awards Plaintiff a combined total  
18 of 399.3 legal hours and 104 travel hours, for a total of  
19 \$163,665.00 in attorneys' fees.

20 C. Additional Request for Costs and Expenses

21 With his Motion for Attorneys' Fees, Plaintiff also requests  
22 recoverable costs and expenses in the amount of \$18,146.86. Fee  
23 Mot. at 16-17. In its opposition, Credit One challenges  
24 Plaintiff's request for costs and expenses, arguing that  
25 Plaintiff has already recovered some of his costs and expenses  
26 through settlements with Credit One's vendors. See Fee Opp'n at  
27 6-8. The Court agrees with Defendant and as further explained  
28 below awards Plaintiff \$5,429.25 in costs and expenses.

1 First, pro hac vice fees in the amount of \$450 must be  
2 subtracted from any award of costs. Kalitta Air L.L.C. v. Cent.  
3 Texas Airborne Sys. Inc., 741 F.3d 955, 958 (9th Cir. 2013)  
4 (holding that the Ninth Circuit does not allow for an award of  
5 pro hac vice fees as costs).

6 Second, the Court finds that awarding Plaintiff the full  
7 amount of the remaining costs he seeks would constitute a double  
8 recovery of costs. Accordingly, the Court reduces the \$18,865.00  
9 costs requested by the \$12,985.75 in costs already recovered.  
10 The balance of \$5,879.25, becomes \$5,429.25 after the \$450 in pro  
11 hac vice fees are subtracted. This amount is unopposed by Credit  
12 One. See Fee Opp'n at 7-8.

13 III. ORDER

14 For the reasons set forth above, the Court DENIES  
15 Plaintiff's Motion for Treble Damages and GRANTS Plaintiff's  
16 Motion for Attorney Fees. The Court awards Plaintiff \$163,665.00  
17 in attorneys' fees and \$5,429.25 in costs and expenses.

18 IT IS SO ORDERED.

19 Dated: March 28, 2019

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22 JOHN A. MENDEZ,  
23 UNITED STATES DISTRICT JUDGE  
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