IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:22-CV-00296-RJC-DSC

HEATHER GAKER, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**MEMORANDUM AND RECOMMENDATION**
Q3M INSURANCE SOLUTIONS D/B/A FINAL EXPENSE ASSISTANT AND TZ INSURANCE SOLUTIONS LLC,	)	
Defendants.	)	

THIS MATTER is before the Court on Defendants' "Motion to Dismiss or, in the Alternative, Motion to Strike," Doc. No. 19, filed November 8, 2022.

The Motion has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and is now ripe for consideration.

Having fully considered the arguments, the record, and the applicable authority, the undersigned respectfully recommends that Defendants' Motion to Dismiss be **GRANTED** and the Motion to Strike be **DENIED**.

I. FACTUAL BACKGROUND

Accepting the factual allegations in the Complaint as true, Plaintiff is a former schoolteacher and pharmacy technician residing in Palm Beach County, Florida. Defendant Q3M Insurance Solutions is a telemarketer that sells burial insurance on behalf of insurers. Defendant

TZ Insurance Solutions is an insurance broker that sells life insurance and burial insurance. It primarily relies on telemarketers to generate business.

Plaintiff has a personal cell phone which she registered on the National Do Not Call Registry on November 15, 2019, to avoid unwanted telemarketing calls. Doc. No. 16, at ¶¶ 21–22. After her name and phone number were purportedly entered into a "sweepstakes" in January 2020, she began receiving unsolicited telemarketing calls.[1] Id. at ¶¶ 27–28. In the early months of 2020, Plaintiff received six calls where a live agent attempted to sell her "final expense insurance." Id. at ¶¶ 28–31. During several of those calls, Plaintiff stayed on the line and engaged with the caller to ascertain who originated the calls. Id. at ¶ 31. During one of those calls, Defendant Q3M transferred her to Defendant TZ, who attempted to sell final expense insurance policies. Id.

Plaintiff brings a cause of action under the Telephone Consumer Protection Act, 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c)(2). She seeks to hold Defendant TZ vicariously liable as an agent of Defendant Q3M.

II. DISCUSSION

1. 12(b)(6) Standard of Review

In reviewing a Rule 12(b)(6) motion, "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). The plaintiff's "[f]actual allegations must be enough to raise a right of relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at

[1] Plaintiff asserts she does not recall entering a sweepstakes.

563. A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

In Iqbal, the Supreme Court articulated a two-step process for determining whether a complaint meets this plausibility standard. First, the court identifies allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Id. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Twombly, 550 U.S. at 555) (allegation that government officials adopted challenged policy "because of" its adverse effects on protected group was conclusory and not assumed to be true). Although the pleading requirements stated in "Rule 8 [of the Federal Rules of Civil Procedure] mark[] a notable and generous departure from the hyper-technical, code-pleading regime of a prior era . . . it does not unlock the doors of discovery for a Plaintiff armed with nothing more than conclusions." Id. at 678–79.

Second, to the extent there are well-pleaded factual allegations, the court should assume their truth and then determine whether they plausibly give rise to an entitlement to relief. Id. at 679. "Determining whether a complaint contains sufficient facts to state a plausible claim for relief 'will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" Id. "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]' 'that the pleader is entitled to relief,'" and therefore should be dismissed. Id. (quoting Fed. R. Civ. P. 8(a)(2)).

The sufficiency of the factual allegations aside, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." Sons of Confederate Veterans v. City of Lexington, 722 F.3d 224, 228 (4th Cir. 2013) (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)). Indeed, where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations, a claim must be dismissed." Neitzke, 490 U.S. at 328; see Stratton v. Mecklenburg Cnty. Dept. of Soc. Servs., 521 F. App'x 278, 293 (4th Cir. 2013)). The court must not "accept as true a legal conclusion couched as a factual allegation." Anand v. Ocwen Loan Servicing, LLC, 754 F.3d 195, 198 (4th Cir. 2014).

a. TCPA Claim

Section 227(c) of the TCPA and the corresponding regulations prohibit businesses from placing "telephone solicitation" calls to a "residential telephone subscriber" who has placed her phone number on the National Do Not Call Registry. 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2). A person who receives more than one call within a twelve-month period that violates those regulations may bring a private cause of action under section 227(c). 47 U.S.C. § 227(c)(5). Defendants argue the TCPA applies only to residential telephones and based upon the statutory language and structure, does not extend to cell phones.

In 2003, the Federal Communications Commission interpreted "residential subscribers" to include those who register their cell phone numbers on the NDNCR. See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014 (2003). The FCC concluded that "[t]he rules set forth in section[] 64.1200(c) are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers . . . ." Id. at 14148.

The Fourth Circuit has not addressed whether cell phone owners are considered "residential telephone subscribers." Courts that have addressed the issue are split as to whether the TCPA extends to wireless telephone numbers. Compare Boger v. Citrix Sys., Inc., No. 8:19-cv-01234-PX, 2020 WL 1939702, at *4 (D. Md. Mar. 3, 2020) ("[T]he Complaint does not foreclose that [the plaintiff's] cell phone functioned as a residential telephone number for the purposes of the statute."), with Cunningham v. Politi, No. 4:18-cv-362, 2019 WL 2526536, at *4 (E.D. Tex. Apr. 26, 2019) ("Recent courts considering [similar] claims . . . have found [the TCPA] does not encompass . . . cellular phones." (collecting cases)).

The FCC's interpretation at issue does not preclude this Court from applying the clear text of the TCPA. "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring); see also Gorss Motels, Inc. v. Safemark Sys., LP, 931 F.3d 1094, 1106 (11th Cir. 2019) (Pryor, J., concurring) ("The Hobbs Act, correctly construed, does not require district courts adjudicating cases within their ordinary jurisdiction to treat agency orders that interpret federal statutes as binding precedent."). The structure and language of the TCPA controvert coverage of cell phones.

The FCC's rulemaking authority under section 227(c) extends only to unwanted telephone solicitations directed at "residential telephone subscribers." 47 U.S.C. § 227(c)(1). "[T]he language of the TCPA specifically provides that the regulations implemented pursuant to Subsection 227(c) concern only 'the need to protect residential telephone subscribers' privacy rights." Cunningham v. Sunshine Consulting Grp., LLC, No. 3:16-cv-2921, 2018 WL 3496538, at *6 (M.D. Tenn. July 20, 2018) (quoting 47 U.S.C. § 227(c)(1)). "Residential" is defined as "'used as a residence or by residents,' and 'resident' is defined as 'living in a place for some

length of time,' or 'one who resides in a place.'" Shelton v. Fast Advance Funding, LLC, 378 F. Supp. 3d 356, 363 n.7 (E.D. Pa. 2019) (quoting Residential, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/residential; Resident, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/residents).

Notably, Congress referenced "cellular telephone" in other provisions of the statute. See 47 U.S.C. § 227(b)(1)(A)(3); 47 U.S.C. § 227(b)(2)(C); 47 U.S.C. § 227(b)(2)(H). "[T]he TCPA specifically mentions 'cellular telephone service' in § 227(b) and § 64.1200(a)(1)(iii), evidencing that both Congress and the FCC were aware of the distinction between a cellular telephone and a residential telephone and purposely protected only 'residential telephone subscribers' under § 227(c), § 64.1200(c) and (d)." Shelton, 378 F. Supp. 3d at 363 n. 7. "[E]xpressing one item of [an] associated group or series excludes another left unmentioned." United States v. Vonn, 535 U.S. 55, 65 (2002). "The expressio unius canon applies only when 'circumstances support[] a sensible inference that the term left out must have been meant to be excluded." N.L.R.B. v. SW General, Inc., 580 U.S. 288 (2017) (quoting Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 81 (2002)).

Cell phones do not present the same concerns as residential telephones. The Eleventh Circuit noted the distinctions between a cell phone and residential phone in accordance with the statutory purpose of the TCPA. "[T]he findings in the TCPA show a concern for privacy within the sanctity of the home . . . cell phones are often taken outside of the home and often have their ringers silenced, presenting less potential for nuisance and home intrusion." Salcedo v. Hanna, 936 F.3d 1162, 1168–69 (11th Cir. 2019). Cell phones' mobility and functionality to silence or decline calls alleviate the concerns inherent with a home telephone. Plaintiff alleges no facts showing where she was when she received the calls or whether her phone was on silent. She did

not answer four of the six calls she allegedly received, thus diminishing any claim that such calls invaded her privacy. In sum, the authority rests with Congress to amend the TCPA and bring cell phones within its protections.

For those reasons, the undersigned respectfully recommends that Defendants' Motion to Dismiss be granted.

III. RECOMMENDATION

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that Defendants' Motion to Dismiss be **GRANTED** and that Defendants' Motion to Strike be **DENIED**.

IV. NOTICE OF APPEAL RIGHTS

The parties are hereby advised that, pursuant to 28 U.S.C. § 636(b)(1)(c), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within fourteen days after service of the same. Failure to file objections to this Memorandum with the Court constitutes a waiver of the right of de novo review by the District Judge. Diamond v. Colonial Life, 416 F.3d 310, 315–16 (4th Cir. 2005); Wells v. Shriners Hosp., 109 F.3d 198, 201 (4th Cir. 1997); Snyder v. Ridenour, 889 F.2d 1363, 1365 (4th Cir. 1989). Moreover, failure to file timely objections will also preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140, 147 (1985); Diamond, 416 F.3d at 316; Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003); Wells, 109 F.3d at 201; Wright v. Collins, 766 F.2d 841, 845–46 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to counsel for the parties and to the Honorable Robert J. Conrad, Jr.

SO ORDERED.

Signed: February 7, 2023

David S. Cayer
United States Magistrate Judge