

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK W. DOBRONSKI,
an Individual,

Plaintiff,

v.

CASE NO: 2:25-cv-10169

Hon. Nancy G. Edmunds

ALEXIS FRANCIS DARAUJO,
an Individual; UNITED OF OMAHA
LIFE INSURANCE COMPANY,
a Nebraska corporation; and DOE
TELEMARKETER, an unknown
person,

Defendants.

**DEFENDANT UNITED OF OMAHA LIFE INSURANCE COMPANY'S
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT
UNDER FRCP 12(b)(1) AND 12(b)(6)**

Defendant United of Omaha Life Insurance Company (“United”) respectfully requests that this Court dismiss Plaintiff Mark W. Dobronski’s (“Plaintiff” or Dobronski”) First Amended Complaint (ECF No. 20) under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In support of this Motion, United incorporates the accompanying brief.

LR 7.1 STATEMENT OF CONFERRAL

In accordance with LR 7.1(a), counsel for United certifies that he contacted Plaintiff on May 20, 2025, explained the nature of the relief sought by way of this motion, sought concurrence in the relief, and such concurrence was not received.

Respectfully submitted,

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Life Insurance Company

May 20, 2025

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**BRIEF IN SUPPORT OF DEFENDANT UNITED OF OMAHA LIFE
INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT UNDER FRCP 12(b)(1) AND 12(b)(6)**

STATEMENT OF QUESTIONS PRESENTED

1. Should this Court dismiss Plaintiff's First Amended Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure, because Plaintiff suffers no injury in fact sufficient for Article III standing?

United's Answer: YES

Plaintiff's Answer: NO

2. Should this Court dismiss Plaintiff's First Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, because Plaintiff fails to sufficiently plead direct or vicarious liability against United, fails to state a claim under any of his causes of action against United, and fails to allege willfulness with plausible facts against United?

United's Answer: YES

Plaintiff's Answer: NO

3. Should this Court dismiss Plaintiff's Florida Telemarketing Sales Act claim under Rules 12(b)(6) as it may relate to United, because Plaintiff has failed to make any allegations against United relating to that claim.

United's Answer: YES

Plaintiff's Answer: NO

MOST CONTROLLING AUTHORITY

Fed. Rules of Civil Procedure

- Fed. R. Civ. P. 12(b)(1)
- Fed. R. Civ. P. 12(b)(6)

Statutes

- Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*
- The Michigan Home Solicitation Sales Act, M.C.L. § 445.101, *et seq.*
- The Florida Telemarketing Sales Act, Fla. Sta. § 501.059

Case Law

- *Dobronski v. Total Ins. Brokers, LLC*, No. 21-10035, 2021 WL 4452218 (E.D. Mich. Sept. 29, 2021)
- *Howard v. City of Detroit*, 40 F.4th 417 (6th Cir. 2022)
- *Hagy v. Demers & Adams*, 882 F.3d 616 (6th Cir. 2018)
- *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
- *Directv, Inc. v. Treesh*, 487 F.3d 471 (6th Cir. 2007)
- *Lujan v. Defenders of Wildlife*, 54 U.S. 555 (1992)
- *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016)
- *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021)
- *Leyse v. Bank of Am., Nat'l Ass'n*, No. CV117128SDWSCM, 2020 WL 1227410 (D.N.J. Mar. 13, 2020)
- *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782 (W.D. Pa. 2016)
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- *In the matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois, N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act Rules*, 28 F.C.C. Rcd. 6574 (2013)
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- *Friedman v. Massage Envy Franchising, LLC*, No. 3:12-cv-02962-L-RBB, 2013 WL 3026641 (S.D. Ca., June 13, 2013)
- *Reo v. Caribbean Cruise Line, Inc.*, No. 1:14 CV 1374, 2016 WL 1109042 (N.D. Ohio Mar. 18, 2016)
- *Bank v. All. Health Networks, LLC*, No. 15-CV-213, 2015 WL 4645317 (E.D.N.Y. Aug. 4, 2015)
- *Panacci v. AI Solar Power, Inc.*, No. 15-CV-532, 2015 WL 3750112 (N.D. Cal. June 15, 2015)
- *Lucas v. Telemarketer Calling from (407) 476-5680*, No. 18-3633, 2019 WL 3021233 (6th Cir. May 29, 2019)
- *Keating v. Peterson's Velvet, LLC*, 615 Fed. Appx. 365 (6th Cir. 2015)
- *Duchene v. OnStar, LLC*, No. 15-cv-13337, 2016 WL 3997031 (E.D. Mich. July 26, 2016)
- *Chapman v. Nat'l Health Plans & Benefits Agency, LLC*, No. 22-10229, 2022 WL 3130225 (E.D. Mich. Aug. 4, 2022)
- *Dobronski v. Kelly, et al.*, 2:23-CV-10257
- *Cabrera v. Gov't Emps. Ins. Co.*, 452 F. Supp. 3d 1305 (S.D. Fla. 2014)
- *Capital Dredge & Dock Corp. v. City of Detroit*, 800 F.2d 525 (6th Cir. 1986)

Other

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INTRODUCTION

Plaintiff Dobronski brings his 51-page First Amended Complaint (“Complaint”) asserting purported violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, *et seq.*, the Michigan Home Solicitation Sales Act (“MHSSA”), M.C.L. § 445.101, *et seq.*, the Michigan Telephone Companies as Common Carriers Act (“MTCCCA”), M.C.L. § 484.101, *et seq.*, the Florida Telemarketing Sales Act (“FTSA”), Fla. Stat. § 501.059, and the Michigan Consumer Protection Act (“MCPA”), M.C.L. § 445.001, *et seq.*, against an individual, a purportedly unknown call center and United relating to calls he received to telephone numbers he contends are on the National Do Not Call Registry. Plaintiff’s Complaint is part of a serial pattern of over thirty-five complaints he has filed in the Eastern District of Michigan in the last five years alleging violations of the TCPA and similar statutes.¹ The present case is particularly vexatious as it relates to United because Plaintiff only alleges one **uninvited** call where United was even mentioned by the telemarketer (ECF No. 20, PageId. 216-19, ¶¶98-117), with the remainder of calls only occurring after Plaintiff feigned interest in the insurance products being sold under a false identity he provided to the telemarketer. *Id.*

¹ See ECF No. 8, PageId. 61-62, n.1 (listing Plaintiff’s cases filed in this District).

More specifically, on the first call that Plaintiff received, the telemarketer allegedly advised Plaintiff that he was with “Allstate Insurance Company” at which point Plaintiff provided false identifying information to set his “canary trap.” *Id.* Even accepting the Plaintiff allegations as true, only then did the telemarketer to whom Plaintiff was transferred on the same call attempt to solicit him to purchase a United policy. On each subsequent call identified in the Complaint, Plaintiff failed to make a do-not-call demand during the call but instead claims that he attempted to call back thereafter to make such a demand but was unsuccessful in doing so. ECF No. 20, PageID. 216-230, ¶¶113, 123, 149, 160 and 166. The vexatious nature of Plaintiff’s Complaint is further demonstrated by the fact that Plaintiff is alleging that United is liable for calls (Calls 6-9) that bear no conceivable relationship to United, as United was not even identified or otherwise mentioned on the calls. ECF No. 20, PageID. 223-26, ¶¶150-169.

On the above basis alone, Plaintiff’s TCPA claims should be dismissed because the TCPA requires that a person receive more than one telephone call within any 12-month period on behalf of the same entity in violation of the regulations for a private right of action to exist. *See* 47 U.S.C. § 227(c)(5).²

² 47 U.S.C. § 227(c)(5) states that “[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State – (A) an action based on a violation of the regulations prescribed under

Moreover, under Fed. R. Civ. P. 12(b)(6), Plaintiff does not and cannot sufficiently allege direct or vicarious liability against United as is required by the TCPA and related state statutes. There are no allegations in the Complaint that United directly contacted Plaintiff and, therefore, United cannot be directly liable. While Plaintiff alleges that United was aware of the “illegal telemarketing” (ECF No. 20, PageID. 214-15, ¶¶92-93) to plead vicarious liability, threadbare allegations of awareness of “illegal telemarketing” alone are wholly insufficient to create an agency relationship for the purposes of vicarious liability.

And lastly, under Fed. R. Civ. P. 12(b)(6), Plaintiff’s Complaint fails to state a claim for treble damages because it fails to adequately plead that United violated the TCPA and related state statutes knowingly or willfully.

For all the foregoing reasons, which are set forth in detail below, Plaintiff’s Complaint against United should be dismissed with prejudice.

BACKGROUND

On May 6, 2025, Plaintiff filed his First Amended Complaint alleging sixteen causes of action against three Defendants, including United, under the TCPA, MHSSA, MTCCCA, FTSA and MCPA. Plaintiff alleges that the calls violating

this subsection to enjoin such violations, (B) an action to recover for actual monetary loss from such violations, or to receive up to \$500 in damages for each such violation, whichever is greater, or (C) both such actions.”

these statutes were made to his residential and cellular telephone numbers listed on the National Do Not Call Registry. ECF No. 20, PageID. 215, ¶94.

Plaintiff contends that United is liable for the alleged calls because it facilitates the scheme by providing Defendant Alexis Francis Daraujo (“Daraujo”) and Defendant Doe Telemarketer “with use of [United’s] trademark and access to [United’s] computer systems so that the product and pricing information may be provided to the called consumers and the consumer’s insurance applications may be completed onto [United’s] application forms and input directly ... into [United’s] computer system.” ECF No. 20, PageID. 214, ¶91. Plaintiff further contends, without any particularized evidence, that United “knew (or reasonably should have known) of the overall scheme and that the insurance applications being received from their authorized agents, such as Daraujo, have been obtained through use of unlawful telemarketing methods, and that the authorized agents have falsely certified same, but [United] elects to consciously disregard or engage in willful blindness to said illegal conduct due to the financial benefits which Omaha reaps from same.” ECF No. 20, PageID. 214-215, ¶92. Defendant also alleges that “United is well aware of the overall scheme, as [United] has been sued by multiple plaintiffs (including this Plaintiff) on multiple prior occasions wherein the identical scheme was followed, but [United] takes no action to curtail the unlawful telemarketing methods or to terminate the producing agents ...” ECF No. 20, PageID. 215, ¶93.

Plaintiff does not allege that United, itself, made any of the subject calls, so the only theory that Plaintiff appears to pursue is that United is vicariously liable for the actions of Defendant Daraujo, who he claims is an authorized agent of United (ECF No. 20, PageID. 211, ¶75). Plaintiff claims that United was working in concert with Defendant Daraujo and Defendant Doe Telemarketer to facilitate the scheme. (ECF No. 20, PageID. 211-12, ¶76).

Plaintiff only alleges one **uninvited** call where United was even mentioned by the telemarketer (ECF No. 20, PageId. 216-19, ¶¶98-117), with the remainder of pleaded calls only occurring after Plaintiff feigned interest in the insurance products being sold under a false identity he provided to the telemarketer, a technique he refers to as a “canary trap.” ECF No. 20, PageID. 215, ¶¶93, 103. Specifically, in the first call he allegedly received (Call 1), Plaintiff alleges that he provided the caller, who was allegedly calling on behalf of “Allstate Insurance Company,” with “controlled identifying information including a *faux* name of Bruce Maxwell Carter (a name which Plaintiff made up on the spur of the moment and had not used prior), a controlling mailing address, a false date of birth, a controlled email address, the name of the sole beneficiary being Vincent Carter (a hat tip to a character on the 1960’s TV sitcom Gomer Pyle), a random *faux* Social Security Number, and Plaintiff’s banking information including a legitimate bank name, a legitimate bank routing number, and *faux* account number” ECF No. 20, PageID. 216-17, ¶103.

Plaintiff alleges that, only then, was he was transferred to a “supervisor ... who verified the identifying information which Plaintiff had provided, and then advised he was transferring the call to the “insurance agent” and that he was ultimately transferred to “a live telemarketer ... [who] solicited Plaintiff for \$20,000 final expense insurance policy issued by [United].” ECF No. 20, PageID. 217, ¶¶104-05. The remaining calls only occurred after Plaintiff feigned interest in the insurance products, and several of the alleged calls (Calls 6-9) bear no conceivable relationship to United, as United was not even identified or otherwise mentioned on the call. ECF No. 20, PageID. 223-26, ¶¶150-169.

Plaintiff does not allege in the Complaint that any of the calls were placed by United. Plaintiff does not allege in the Complaint that United directly engages in phone solicitations or employs anyone that does. Plaintiff does not allege in the Complaint any particularized facts that United was aware of any violations of the TCPA or Michigan or Florida statutes, instead relying upon bare boilerplate allegations in attempt to plead awareness. And Plaintiff does not allege anywhere in the Complaint particularized facts sufficiently establishing an agency relationship between United and the other Defendants.

LEGAL STANDARD

Fed. R. Civ. P. 12(b)(1). If the Court determines that it lacks subject matter jurisdiction, it “must dismiss the action.” Fed. R. Civ. P. 12(b)(1). Motions for lack

of subject matter jurisdiction under Rule 12(b)(1) can either be “factual” or “facial.” *Howard v. City of Detroit*, 40 F.4th 417, 422 (6th Cir. 2022); *see also* Fed. R. Civ. P. 12(b)(1). A facial attack – like United’s here – questions “the sufficiency of the pleadings.” *Id.* In making the determination, “the doctrine of supplemental jurisdiction does not alter Article III’s standing requirements [for subject matter jurisdiction] ... [which] apply to state-law claims in federal court.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

Fed. R. Civ. P. 12(b)(6). Courts must also dismiss claims under Rule 12(b)(6) if a complaint does not “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, [however] do not suffice.” *Id.* The Court “need not accept as true legal conclusions or unwarranted factual inferences.” *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

ARGUMENT

I. PLAINTIFF DOES NOT HAVE STANDING TO PURSUE HIS CLAIMS AGAINST UNITED

Plaintiff bears the burden of establishing Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996). Standing “limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The Supreme Court in *Spokeo* made clear that “[w]here

... a case is at the pleading stage, the plaintiff must ‘clearly allege facts demonstrating’ each element [of standing].” *Id.* Injury-in-fact is an “irreducible constitutional minimum” of Article III standing. *Lujan*, 54 U.S. at 560. Thus, a “bare procedural violation’ of the TCPA alone cannot constitute injury-in-fact sufficient to satisfy Article III, and instead constitutional standing “requires a concrete injury even in the context of a statutory violation.” *Spokeo*, 578 U.S. at 340-341. To have standing to sue under Article III, a plaintiff must demonstrate that they have suffered “injury in fact,” which requires a showing “that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and actual or imminent, not conjectural or hypothetical.” *Id.* at 339.

Plaintiff’s Complaint should be dismissed because he must – but cannot – demonstrate that he suffered a nuisance, invasion of privacy, or other related injury sufficient to confer Article III standing. *Spokeo*, 578 U.S. at 337. A plaintiff does not automatically satisfy this requirement “whenever a statute grants [] a statutory right and purports to authorize [the plaintiff] to sue to vindicate that right.” *Id.* at 341. Rather, to qualify as an injury in fact under Article III, the statutory right must bear “a close relationship to harms traditionally recognized as providing a basis for lawsuits.” *TransUnion LLC. v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

While the TCPA and state law equivalents provide a right to sue grounded in the traditionally recognized harms of “nuisance and invasion of privacy,” multiple

courts have rejected claims like Plaintiff's on Article III standing grounds. *Leyse v. Bank of Am., Nat'l Ass'n*, No. CV117128SDWSCM, 2020 WL 1227410, *4 (D.N.J. Mar. 13, 2020), *aff'd*, 856 F. App'x 408 (3d Cir. 2021). For example, in *Leyse*, the Court ruled that the plaintiff could not assert any evidence to show that he suffered an injury in fact related to his TCPA claim because he “welcomed such calls ... in the preparation of TCPA lawsuits.” *Id.* Specifically, the Court found that “[n]o other plausible inference [could] be drawn from the 20+ follow-up calls he made to [the defendant], the types of questions he asked [the defendant's] representatives, his use of a false name and employer, [and] his secret recording of calls.” *Id.*

Similarly, in *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 800 (W.D. Pa. 2016), the Court held that the plaintiff did not show injury related to her TCPA claim because “her only purpose in using her cell phones [was] to file TCPA.” *Id.* Specifically, the Court noted that the plaintiff had nearly thirty-five cell phones and filed at least eleven other TCPA lawsuits. *Id.* at 788.

As was the case in both *Leyse* and *Stoops*, there is no plausible inference that can be drawn other than Plaintiff invites these phone calls for the purposes of manufacturing and prosecuting TCPA claims. Plaintiff admits in various lawsuits filed in this District that he maintains multiple different residential and cellular phone numbers. Plaintiff also admits that he uses “sophisticated telephone answering and recording equipment” to record calls and sets a “canary trap” by

providing false names and information to persons for the purpose of encouraging call backs, so that he can establish TCPA violations and bring lawsuits. *See, e.g., Dobronski v. Family First Life, LLC et al.*, No. 22-cv-12039 (E.D. Mich. filed Aug. 31, 2022) (ECF No. 65 at 4 and ECF No. 99, PageID 1022-23, ¶¶99-100); ECF No. 1, PageID 21-22, 24, ¶¶84, 94 and 110.

But most importantly, except for Call No. 1, the remaining calls alleged were either follow-up calls resulting from Plaintiff's feigned interest in the insurance products being sold or calls entirely unrelated to United and, therefore, did not cause injury in fact. As such, Plaintiff lacks standing. *See Dobronski v. Total Ins. Brokers, LLC*, No. 21-10035, 2021 WL 4452218, at *4 (E.D. Mich. Sept, 29, 2021) (concluding that the plaintiff (Dobronski) gave "implied consent" to calls when he "engaged in conduct [that was] designed to encourage" additional calls). In the present case, in Call No. 1, Dobronski alleges that he provided false information with the intent of discerning the identity of the caller who identified himself as calling on behalf of "Allstate Insurance Company," which resulted in his receipt of the follow-up calls. Moreover, he did not make a do-not-call demand in any of those follow-up calls, instead claiming that he called back thereafter to make such a demand but was unsuccessful in doing so. Hence, he provided implied consent which renders him without standing to pursue claims relating to those calls.

Plaintiff alleges in his Complaint that the TCPA requires “express consent” for a call to be allowed under the statute. ECF No. 20, PageID. 206, ¶53 (“Consent cannot be ‘presumed.’ The TCPA and Commission’s rules plainly require express consent, not implied or ‘presumed consent. *In re Rules and Regulations Implementing the TCPA*, 300 FCC Rcd. 7961, 7991, 2015 WL 4387780, at *20, ¶52 (FCC. 2015)”). However, this has no effect upon whether Plaintiff has separate non-statutory standing to pursue his claims. For phone calls that Plaintiff encouraged by offering fake identifying information while feigning interest in the insurance products being sold, he cannot claim injury-in-fact.

Moreover, Plaintiff’s TCPA claims fail because he ignores another exception to the TCPA’s guidelines, which is that a “telephone solicitation” does not include a call “to any person with whom the caller has established a business relationship.” 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(14)(ii). Courts have found that an established business relationship exists where a call recipient feigns interest in a product to identify a caller. *See Charvat v. Southard Corp.*, No. 2:18-CV-190, 2019 WL 13128407, at *4 (S.D. Ohio Sept. 30, 2019) (“It may be true that Plaintiff has trouble discerning the identity of telemarketers in order to bring lawsuits against them unless he feigns interest in their services, but this does not make an otherwise voluntary conversation involuntary.”); *Hamilton v. Spurling*, No. 3:11-CV-00102, 2013 WL 1164336, at *10 (S.D. Ohio Mar. 20, 2013) (“Setting up the appointment

constitutes an ‘inquiry’ or ‘application’ regarding chiropractic services offered at Chiropractic Therapy West. Thereafter, ... [the plaintiff’s] second, third, and fourth calls following up regarding the missed appointment do not meet the definition of a ‘telephone solicitation’ under the TCPA Regulations.”); *Morris v. Copart*, No. 4:15-CV-724, 2016 WL 6608874, at *9 (E.D. Tex. Nov. 9, 2016) (stating that “the [p]laintiff’s false affirmation that he had a vehicle to donate established a business relationship, excusing subsequent calls made in furtherance of that business relationship, and for the stated purpose of that relationship—to effectuate the [p]laintiff’s donation of a car.”). Thus, Plaintiff has failed to establish statutory standing regarding any follow-up calls, because in Call No. 1, the caller was given reason to believe that Plaintiff was interested in purchasing insurance products.

Therefore, consistent with the above precedent, Plaintiff has suffered no injury in fact under Article III. To the contrary, the facts alleged and Plaintiff’s other serial filings of TCPA litigation in this District, demonstrate that Plaintiff manufactures the very violations of which he complains in attempt to create artificial statutory damages and then attempts to force nuisance settlements, which is exactly what he did here. This is clearly evidenced by the fact that he did not make a do-not-call demand during the follow-up calls made to him, instead asserting that he called back thereafter to attempt to make such a demand but was unsuccessful in doing so.

And finally, Plaintiff’s Complaint does not demonstrate Article III standing with respect to United, because the Complaint only alleges one **uninvited** call where United was referenced, which does not satisfy the statutory requirement that the person receives more than one telephone call within any 12-month period on behalf of the same entity in order to have a private cause of action. *See* 47 U.S.C. § 227(c)(5).

The Court should dismiss Plaintiff’s Complaint in its entirety because Plaintiff suffered no injury sufficient for Article III standing.³

II. PLAINTIFF FAILS TO STATE A CLAIM AGAINST UNITED UNDER THEORIES OF DIRECT OR VICARIOUS LIABILITY

Plaintiff’s claims must be dismissed under Fed. R. Civ. P. 12(b)(6) because he fails to sufficiently allege that United is either directly or vicariously liable.

A. Plaintiff’s Allegations are Insufficient Given the Law Governing Direct Liability

With respect to direct liability, as the Michigan Court of Appeals explained in one of Plaintiff’s prior TCPA cases, *Dobronski v. NPS, Inc.*, No. 356617, 2022 WL 1194212, at *4 (Mich. Ct. App. Apr. 21, 2022), a “seller is not directly liable for a violation of the [TCPA] unless it initiates a call but may be held vicariously liable

³ “For the same reason that [Plaintiff] lack[s] standing to bring the federal [TCPA] claim[s], [he] lack[s] standing to bring the state-law claims, which rely on incorporating the federal law wholesale.” *Hagy v. Demers & Adams*, 882 F.3d 616, 624 (6th Cir. 2018)

under federal common law agency principles for a [TCPA] violation by a third-party telemarketer.” *Id.* Here, Plaintiff has not alleged that United made any telemarketing calls and, therefore, United cannot be directly liable.

B. The Law Governing Allegations of Vicarious Liability Requires More Than the Type of Conclusory Allegations Plaintiff Asserts

With respect to vicarious liability, the FCC has professed that the “TCPA contemplates that a seller may be vicariously liable under agency principles for violations of section 227(b) notwithstanding the absence of ‘on behalf of’ liability available for do-not-call violations under section 227(c).” *In the matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois, N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act Rules*, 28 F.C.C. Rcd. 6574, 6582 ¶24, 6594 n. 124 (2013) (“*Dish Network*”). Courts have also explained that vicarious liability requires a demonstration that the caller was acting as an agent of the purported defendant. *Id.* at 6584 ¶28 (observing that the question turns on the “federal common law principles of agency.”). In *Dish Network*, the FCC explained:

The classic definition of “agency” contemplates “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control.” Potential liability under general agency-related principles extends beyond classical agency, however. A principal may be liable in circumstances where a third party has apparent (if not actual) authority. Such “[a]pparent authority holds a

principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation by the principal." Other principles of agency law may support liability in particular cases. For example, a seller may be liable for the acts of another under traditional agency principles if it ratifies those acts by knowingly accepting the benefits. Such ratification may occur "through conduct justifiably only on the assumption that the person consents to be bound by the act's legal consequences."

Id. at 6586-87; *see also Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 448 (9th Cir. 2018) (holding that "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); *Melito v. Am. Eagle Outfitters, Inc.*, No. 14-CV-02440 (VEC), 2015 WL 7736547, at *5 (S.D.N.Y. Nov. 30, 2015) (in dismissing a vicarious liability claim, explaining that "to plead vicarious liability under the TCPA in accordance with traditional tort principles, Plaintiffs must allege some facts regarding the relationship between an alleged principal and agent ... and cannot simply allege general control in a vacuum.").

Consequently, TCPA complaints that fail to plausibly plead the existence of an agency relationship fail to state a claim. Several cases throughout the country hold so. *See Jackson v. Caribbean Cruise Line, Inc.*, 88 F. Supp. 3d 129, 138–39 (E.D.N.Y. 2015) (holding that "the [p]laintiff's non-conclusory allegations with regard [to] the agency relationship ... fail[ed] to 'nudge' his [TCPA] claims ... 'across the line

from conceivable to plausible.’”); *Smith v. State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d 765, 776–78 (2014) (dismissing a vicarious liability claim alleging that a caller was acting for various insurance companies but which failed to allege any facts to support agency); *Childress v. Liberty Mutual Insurance Company*, No. 17-CV-1051 MV/KBM, 2018 WL 4684209, at *4 (D.N.M., Sept. 28, 2018) (observing that the Complaint lacked “any factual content regarding the relationship between the initial caller and Defendant” and concluding that “[m]ere conclusory allegations that the ‘robot machine’ belonged to Defendant, coupled with allegations that the initial call was transferred to Defendant’s in-house telemarketer, are insufficient to establish that Defendant had the right to control the initiation of the telephone call to Plaintiff, [such that] Plaintiff’s allegations fail[ed] to plead any relationship, let alone an *agency* relationship, between Defendant and any other individual or entity sufficient to allege vicarious liability under Section 227(b)(1)(A)(iii).”); *Friedman v. Massage Envy Franchising, LLC*, No. 3:12-cv-02962-L-RBB, 2013 WL 3026641, at *3 (S.D. Ca., June 13, 2013) (allegation that message sender “acting as an agent and/or employee of Defendants” was insufficient to establish an agency relationship); *Reo v. Caribbean Cruise Line, Inc.*, No. 1:14 CV 1374, 2016 WL 1109042, at *5 (N.D. Ohio Mar. 18, 2016) (dismissing TCPA vicarious liability claim where “the sparse allegations made ... [did] not allege any facts that show that [the defendant] ... had any power to give interim instructions or otherwise had any control over the

performance of” alleged third-party callers); *Bank v. All. Health Networks, LLC*, No. 15-CV-213, 2015 WL 4645317, at *1 (E.D.N.Y. Aug. 4, 2015), aff’d, 669 F. App’x 584 (2d Cir. 2016) (holding that complaint in which the plaintiff “allege[d] merely that the calls at issue were made ‘by, or on behalf of, or with the authorization of the defendants’” was insufficient to state a vicarious liability claim); *Panacci v. AI Solar Power, Inc.*, No. 15-CV-532, 2015 WL 3750112, at *7 (N.D. Cal. June 15, 2015) (dismissing complaint for failure to state a TCPA vicarious liability claim where the plaintiff did not allege that the defendant “controlled, authorized, or even knew about [the third party’s] ... phone calls or that [the defendant] ... had any control over” the third-party caller and had “virtually no allegations regarding the relationship between [the defendant] ... and ... [the third party]”).

C. Plaintiff’s Allegations are Insufficient Given the Law Governing Pleading Vicarious Liability

Plaintiff’s Complaint fails to allege the sort of facts necessary to establish that the individual defendants were acting as United’s agent with respect to the **ONLY** uninvited call where United was mentioned (ECF No. 20, PageID. 216-19, ¶¶98-117), much less the remainder of the calls which were either follow-up calls after Plaintiff feigned interest in the insurance products being sold or bear no relationship to United whatsoever. Plaintiff only makes conclusory allegations that Defendant Daraujo, Defendant United and Defendant Doe Telemarketer “are engaged in a concerted scheme to market final expense insurance” (¶74); (ii) that Defendant

Daraujo “is an authorized agent of [United] (§75); (iii) that United is liable for the alleged calls because it facilitates the scheme by providing Defendant Daraujo and Defendant Doe Telemarketer “with use of [United’s] trademark and access to [United’s] computer systems so that the product and pricing information may be provided to the called consumers and the consumer’s insurance applications may be completed onto [United’s] application forms and input directly into [United’s] computer system.” (§91); (iv) that United “knew (or reasonable should have known) of the overall scheme and that the insurance applications being received from their authorized agents, such as Daraujo, have been obtained through use of unlawful telemarketing methods, and that the authorized agents have falsely certified same, but [United] elects to consciously disregard or engage in willful blindness to said illegal conduct due to the financial benefits which [United] reaps from same” (§92); and (v) that United “is well aware of the overall scheme, as [United] has been sued by multiple plaintiffs (including this Plaintiff) on multiple prior occasions wherein the identical scheme was followed, but [United] takes no action to curtail the unlawful telemarketing method or to terminate the producing agent ...” (§93). Plaintiff fails to make any specific allegations establishing that an agency relationship exists, which is fatal to his Complaint. *See* Restatement (Third) of Agency § 101 cmt. G (“Performing a duty created by contract may well benefit the

other party [,] but the performance is that of an agent only if the elements of agency are present.”).

In the present case, Plaintiff pleads no facts plausibly establishing that United controls Defendant Daraujo or the unidentified telemarketer, Defendant Doe Telemarketer, or the contents of their alleged calls to Plaintiff, such that United should be held vicariously liable for those calls. The Complaint does not include any specific allegations that United approved, wrote or reviewed the other defendants’ telemarketing scripts. The Complaint does not include any allegations that the other defendants have the power to alter the legal relations between United and the third parties. The Complaint does not contain any allegations that the other defendants are fiduciaries of United regarding matters within the scope of their agency. And the Complaint does not allege that United has the right to control the agent’s conduct of matters entrusted to them. Without these allegations, Plaintiff utterly fails to plead the necessary agency relationship to sustain a claim for vicarious liability against United. *See Gen. Ret. Sys, of Detroit*, 14-cv-10032, 2015 WL 7756153, at *2 (E.D. Mich. Dec. 2, 2015) (explaining that, to establish an agency relationship, a party must show “(1) the agent has the power to alter the legal relations between the principal and third parties; (2) the agent is a fiduciary of the principal regarding the matters within the scope of the agency; and (3) the principal has the right to control the agent’s conduct of matters entrusted to him.”); *Lucas v.*

Telemarketer Calling from (407) 476-5680, No. 18-3633, 2019 WL 3021233, at *5-6 (6th Cir. May 29, 2019) (holding that “knowingly assisting telemarketers,” did not create vicarious liability under the TCPA).

Moreover, Plaintiff has not pled any facts that would demonstrate apparent authority. The Restatement (Third) of Agency, § 2.03 defines “apparent authority” as “the power held by an agent or actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has the authority to act on behalf of the principal and the belief is traceable to the principal’s manifestations.” Stated differently, under the theory of apparent authority, “a principal will incur liability for the acts of an ‘agent’ if the principal ‘held the agent out to third parties as possessing sufficient authority to commit the particular act in question, and there was reliance upon the apparent authority.” *Keating v. Peterson’s Velvet, LLC*, 615 Fed. Appx. 365, 374 (6th Cir. 2015) (quoting *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 965 (6th Cir. 1998)). Thus, “[t]he apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent ...” *Id.* (quoting *Brainard v. Am. Skandia Life Assurance Corp.*, 432 F.3d 655, 663 (6th Cir. 2005)).

In applying the law above on apparent authority, Plaintiff’s Complaint does not make any allegations that can be reasonably construed to indicate that United

held out to Plaintiff that any individual defendant was authorized to make calls in manners that violated the TCPA or related state statutes.

Moreover, any attempt by Plaintiff to support vicariously liability through ratification would fail for the same reasons. *See Dobronski v. Kelly, et al.*, 2:23-CV-10257, ECF No. 23, PageID. 16-20 (dismissing Plaintiff Dobronski's Complaint for failing to plead sufficient facts to plausibly demonstrate that United was vicariously liable for alleged violations of the TCPA and MHSSA). In dismissing Plaintiffs Dobronski's case, which included the same type of allegations he makes here, this Court determined that not only did Plaintiff fail to plead sufficient facts that the co-defendants had United's actual or apparent authority to make the telemarketing calls in question, but also that he could not support his claims through a theory of ratification for the same reasons. Specifically, this Court found that there were "no facts suggesting that United accepted the applications with knowledge that they were obtained through unlawful conduct. *Id.* at PageID. 186, citing *Cabrera v. Gov't Emps. Ins. Co.*, 452 F. Supp. 3d 1305, 1320 (S.D. Fla. 2014) (listing the elements a plaintiff must show to prove vicarious liability through ratification in a TCPA action, including "that they principal accepted the benefits of the unauthorized act ... with full knowledge of the facts under circumstances demonstrating the intent to adopt the unauthorized agreement"); *Capital Dredge & Dock Corp. v. City of Detroit*, 800 F.2d 525, 530 (6th Cir. 1986)(citing *Langel v. Boscaglia*, 48 N.W.2d 119, 121 (Mich,

1951); *Restatement (Second) of Agency* §§ 91, 98 (“[O]ne essential prerequisite to a principal’s ratification of an authorized act is that at the time of the ratification the principal has knowledge of all material facts.”).

Moreover, United expects that Plaintiff will attempt to rely upon *Dobronski v. Family First Life, LLC*, WL 1342668 (E.D. Mich. 2024) to support the proposition that he has adequately pled an agency relationship in this case, but such reliance would be misplaced because that case involved a specifically identified telemarketer, Family First Life, with whom United had a relationship and whom was allegedly involved in dozens of calls allegedly violating the TCPA and related state statutes. *Id.* at 10.

Because Plaintiff has failed to sufficiently plead direct or vicarious liability on behalf of United, the Court should dismiss the Complaint in its entirety.

III. COUNTS I – XVI EACH INDIVIDUALLY FAIL TO STATE A CLAIM FOR RELIEF

A. Count I through XII

Counts I through XII allege violations of the TCPA and the FCC’s implementing regulations with respect to Calls 1-3 and 6-14 (Count I – Automated Calls); Calls 7-9 and 12-14 (Count II – Hang Up Call); Calls 1-3, 6-9 and 11-13 (Count III – Abandon Call); Calls 1-3, 6-9 and 11-13 (Count IV – No Message); Calls 1-3, 6-9 and 11-13 (Count V – No Opt-Out Mechanism); Calls 1-14 (Count VI – Do Not Call Registry); Call 14 (Count VII – Prohibited Hours); Calls 1-14 (Count

VIII – NO DNC Policy); Call 5 (Count IX – Failure to Provide Policy); Calls 11-14 (Count X – Failure to Disclose); Call 4 (Count XI – Failed to Record/Honor DNC Request); and Calls 1-3 and 5-14 (Count XII – Invalid Caller Identification). ECF No. 20, PageID. 231-38.

These Counts must be dismissed with respect to United because, as described more fully above, Plaintiff: (i) does not have Article III standing to assert the claims given that he invited all but one call at issue in his Complaint and several of the calls (Calls 6-9) bear no conceivable relationship to United; (ii) cannot sustain the claim because one call is insufficient to plead liability under the TCPA;⁴ and (iii) cannot sufficiently plead that United was either directly or vicariously liable for the subject calls.

B. Counts XIII, XIV and XVI

Counts XIII, XIV and XVI alleges violations of the MHSSA (MCL § 445.111(a)(5), (b)(1) and (b)(3)), MTCCCA (MCL § 484.125(2)(b), and MCPA (MCL § 445.903(1)), respectively. ECF No. 20, PageId. 238-241. These Counts should all be dismissed as Plaintiff fails to state a claim against United under the

⁴ As described above, these sections were promulgated under a provision of the TCPA that only affords a private right of action to Plaintiffs that can plead they “received *more than one* telephone call within any 12-month period by or on behalf of the same entity.” 47 U.S.C. § 227(c)(5) (emphasis added); *see also Chapman v. Nat’l Health Plans & Benefits Agency, LLC*, No. 22-10229, 2022 WL 3130225, at *7 (E.D. Mich. Aug. 4, 2022) (stating same).

MHSSA, MTCCCA and MCPA because “[a]gency law in Michigan mirrors federal law” and, as described above, he fails to sufficiently plead direct or vicarious liability.” *NPS*, 2022 WL 1194212, at *6; *see also Visser v. Caribbean Cruise Line, Inc.*, No. 1:13-cv-1029, 2020 WL 415847, at *8 (W.D. Mich. Jan. 27, 2020) (dismissing MHSSA claim against defendant because complaint failed to allege that defendant “was involved in, or otherwise, was responsible for, the telephone calls.”).

C. Count XV

Count XV alleges violations of the FTSA but does not mention United or make any allegations against United. Indeed, the only allegations made appear to relate to the actions of Defendant Daraujo and an individual by the name of “Shawn Murphy” who is not named as a Defendant in the Complaint. Therefore, this Count should be dismissed against United under Fed. R. Civ. P. 12(b)(6), because Plaintiff has failed to state a claim upon which relief can be granted against United.

IV. PLAINTIFF FAILS TO STATE A CLAIM FOR WILLFULLNESS TO WARRANT TREBLE DAMAGES UNDER THE TCPA

For all his TCPA claims, Plaintiff alleges that United violated the TCPA “willfully or knowingly,” entitling him to treble damages (47 U.S.C § 227(b)(3)). This Court, however, has already precluded this exact argument as to Plaintiff. In one of Dobronski’s prior TCPA cases, the Court held that his technique of “encouraging call[s]” precluded him from treble damages, because the additional calls were not

“willful.” *See Dobronski v. Total Ins. Brokers, LLC*, No. 21-10035, 2021 WL 4452218, at *4 (E.D. Mich. Sept. 29, 2021).⁵ The Court should do the same here.

CONCLUSION

For all of the foregoing reasons, Plaintiff’s Complaint as it relates to United should be dismissed with prejudice.

Respectfully submitted,

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May 20, 2025

⁵ Plaintiff has not only failed to plead that United called him, but he also fails to sufficiently plead that it did so willfully. In general, this Court denies claims for willfulness when plaintiffs do not notify defendants that they wish not to be called. *See Duchene v. OnStar, LLC*, No. 15-cv-13337, 2016 WL 3997031, at *7 (E.D. Mich. July 26, 2016) (“[A] willful or knowing violation of [the] TCPA requires that Plaintiff has to plead that Defendant was made aware of/notified that Plaintiff did not consent to calls from Defendant ... Plaintiff must also show that Defendant knew that Plaintiff did not consent to the phone calls.”).

CERTIFICATE OF SERVICE

I state that on May 20, 2025, the foregoing paper was filed with the Court via the ECF system which will send notification to all attorneys of record and via U.S.

Mail to:

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With sufficient postage thereon.

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