UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROBERT A. DOANE, **Plaintiff,** **v.** **PYTHON LEADS, LLC et al.** **Defendants**	**Civil Action No. 1:24-CV-12947-JEK**

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Now comes Plaintiff, **ROBERT A. DOANE,** by and through undersigned counsel, and for his opposition to Defendant Jacquelyn Levin's Motion to Dismiss (ECF #9) respectfully submits the following:

INTRODUCTION

Levin's motion is confounding. Ignoring the standard governing Rule 12(b)(6), Levin asks this Court to turn the standard on its head by disregarding the allegations in the Complaint and accepting as true *her* false and disparaging allegations concerning Plaintiff. To this end, she claims, without support of any kind, that Plaintiff in some manner activity solicits telemarketing calls and therefore, by her twisted logic, lacks standing under the TCPA and MTSA. After once again ignore the standard, Levin likewise asks this Court to make a factual finding that Plaintiff is also barred by the terms of settlement agreement with Levin without so much as submitting any proof that Levin is actually covered by this agreement.

After attempting to introduce her own and untruthful version of the facts, Levin, ignoring the allegations of the Complaint altogether, next asks this Court to find that Plaintiff did not plead that Defendants were responsible for the calls. False. A plain reading of the Complaint

demonstrates that Plaintiff has pled in detail that Defendants are directly responsible for the calls at issue.

To top it off, after filing a motion which can only generously be described as baseless and without making any effort to conference this matter in accordance with the Local Rules, Levin brazenly asks that Defendant be sanctioned under Rule 11 for asserting his legal rights. This, like Levin's previous arguments, is entirely frivolous.

FACTUAL BACKGROUND

1. In order to generate leads for insurance products and services through their illegal Pakistan based telemarketing activities and by the use of fraudulently manufactured consents. One of Defendants victims, Plaintiff, Robert A. Doane ("Plaintiff") brings this complaint against Defendants seeking actual, statutory, and punitive damages for knowing and willful violations of the Telephone Consumer Protection Act, 47 U.S.C. §227, et seq. ("TCPA"), the Massachusetts Telemarketing Solicitation Act, M.G.L. c. 159C (the "MTSA"), and violations of the Massachusetts Consumer Protection Act, G.L. c. 93A, et seq. ("MCPA").

2. Plaintiff filed suit on November 26, 2024. By way of the Complaint, Plaintiff has alleged in relevant part as follows:

A. At all relevant times, Defendants owned and operated lead generation call centers focusing on generating Medicare and final expense insurance leads. (Complaint at ¶ 10).

B. In order to generate live transfer leads for her customers, in approximately 2019, Levin partnered with Defendant Ali Raza ("Raza") to establish call centers in Islamabad and Rawalpindi, Pakistan, to make unsolicited outbound telemarketing calls to U.S. consumers, including residents of the Commonwealth of Massachusetts. (Id. at ¶ 12).

C. Python, at the direction of Levin and Raza and in order to generate sales of final expense insurance, Python illegally placed millions of calls from its Pakistani call centers to

consumers nationwide, including Massachusetts consumers, utilizing caller-id spoofing (a process that displaces the actual caller identification with a fake local caller identification), robocalls, and prerecorded messages. (Id. at ¶ 19).

D. At all times relevant, acting alone and in concert with Defendant Raza, Levin formulated, directed, controlled, had the authority to control, and actively and personally participated in the illegal acts and practices set forth in this Complaint. (Id. at ¶ 3). Among other things, Levin wrote the scripts used by Python's telemarketers, set up Python's call centers in Pakistan, personally trained Python's Pakistan-based telemarketers, devised and implemented the illegal telemarketing practices described herein, oversaw contracts with telephone service providers, and managed Python's sales, advertising, finances, and bank accounts. (Id.).

E. As part of their illegal marketing scheme, Defendants directly contacted Plaintiff without his consent from their Pakistani call center on his cellular telephone on at least **twenty-three (23)** occasions while Plaintiff's cellular phone number (781-XXX-1522) was registered on the federal do not call list and the Massachusetts Do Not Call Registry. (Complaint at ¶¶ 31, 37-53).

F. Defendants' responsibility for the calls complained of was directly acknowledged by Defendants customer Final Expense Direct[1]. (Complaint at ¶ 54).

ARGUMENT

A. Standard of Review

Motions to dismiss under Rule 12(b)(6) are viewed under a standard deferential to the non-moving party. *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 16 (1st Cir. 1998). When viewing a motion under Rule 12(b)(6), the court must take the factual allegations of the

[1] Final Expense Direct is a sole proprietorship based in Texas which is engaged in the sale of final expense insurance policies.

complaint as true and draw every reasonable inference in favor of letting the lawsuit proceed. *Tompkins v. United Healthcare of New England, Inc*., 203 F.3d 90, 93 (1st Cir. 2000) (citing *Langadinos v. American Airlines, Inc*., 199 F.3d 68, 69 (1st Cir. 2000)). In order for the lawsuit to proceed, a plaintiff must provide "only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Courts faced with the task of adjudicating motions to dismiss under 12(b)(6) must apply the notice pleading requirements of Rule 8(a)(2). Under that rule, a complaint need only include a short and plain statement of the claim showing that the pleader is entitled to relief. Great specificity is ordinarily not required to survive a 12(b)(6) motion." *Pearce v. The Duchesneau Group, Inc*., 392 F. Supp.2d 63, 67 (D. Mass. 2005) (quotations and citations omitted).

B. The MTD Should Be Denied for Failing to Comply with Local Rule 7.1

Rule 7.1(a)(2) of the Local Rules of this Court plainly states that "no motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue." Further, it is well settled that "Rule 7.1 is no trifle, and that the court expects compliance with both the letter and spirit of its requirements." *Converse Inc. v. Reebok Int'l, Ltd*., 328 F. Supp. 2d 166, 170 (D. Mass. 2004) (emphasis added). In this case, however, Levin did not comply with either the letter or the spirit of that Rule, as (i) there is no Rule 7.1 certificate on the Motion to Strike, and (ii) Levin did not even seek to have a Rule 7.1 conference with Plaintiff. Given Levin's failure to comply with Rule 7.1, the MTD should be denied on this basis alone

C. This Court Should Not Consider Levin's Purported "Facts"

It is black letter law that on a motion to dismiss for failure to state a claim, the district court may properly consider only facts and documents that are part of or incorporated into the complaint; if matters outside the pleadings are considered, the motion must be decided under the

more stringent standards applicable to a motion for summary judgment. *Trans-Spec Truck Service, Inc. v. Caterpillar, Inc.,* 524 F. 3d 315, 321 (1st Cir. 2011); *Garita Hotel Ltd. P'ship v. Ponce Fed. Bank, F.S.B*., 958 F.2d 15, 17 (1st Cir.1992). In accordance with this standard, Plaintiff submits that Levin's disparaging insinuations concerning Plaintiff's previous lawsuits and scope of the settlement agreement must be disregarded at this stage[2]. *See Lerner v. Sinovac Biotech Ltd.* 691 F. Supp. 3d 326, 332 (D. Mass. 2023); *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011). Levin will have ample opportunity to raise the facts that she contends are pertinent—that time, however, is not now in the context of a Rule 12(b)(6) motion.

D. Plaintiff Has Standing to Bring this Action

Although Levin characterizes the MTD as a motion under Rule 12(b)(6), she is in essence challenging Plaintiff's standing to bring a claims under the TCPA, MTSA and MCPA under Rule 12(b)(1). As Courts have consistently held, a plaintiff may have standing "solely by virtue of statues creating legal rights, the invasion of which creates standing". *In re Horizon Healthcare Servs, Inc. Data Breach Litig*., 846 F. 3d 625, 636 (3d. Cir. 2017) (citation and internal quotation marks omitted) (emphasis in original). In accordance A concrete injury has been pled when one sues under a statute alleging the "very same injury [the statute] is intended to prevent". *Susinno v. Work Out World*, 862 F. 3d 346, 351 (3d. Cir. 2017) (citation and internal quotation marks omitted.

Plaintiff has sufficiently alleged injury-in-fact. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that "[u]nrestricted telemarketing …can be an intrusive invasion of privacy[,]" and found that "[b]anning such automated or prerecorded telephone calls … is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Telephone Consumer

[2] It should be noted that these statements are false.

Protection Act of 1991, Pub. L. No. 102-243, §§ 2(5), 2(14) (1991) (codified at 47 U.S.C. § 227). Some of the TCPA's most stringent restrictions pertain to calls placed to cell phones. The statute categorically bans the making of any non-emergency call using an automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a cellular telephone service, unless with the "prior express consent" of the called party. See 47 U.S.C. § 227(b)(1)(A)(iii); see also *Soppet v. Enhanced Recovery Co*., 679 F.3d 637, 638 (7th Cir. 2012) ("An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.").

When enacting the TCPA, Congress stated that it was motivated by "outrage[ ] over the proliferation of intrusive, nuisance calls to [consumers'] homes from telemarketers" to "[b]an such automated or prerecorded telephone calls to the home." TCPA, Pub. Law No. 102-243, § 2(6), (12), 105 Stat. 2394 (1991). Plaintiff has alleged that he received 23 such unsolicited and harassing telemarketing calls to his phone when his number was listed on the Federal do-not-call list and, as a result, suffered nuisance, annoyance and emotional upset. These are the very injuries that the statute was intended to prevent. See *Suinno*, 862 F. 3d at 351-52 ("[I] n asserting 'nuisance and invasion of privacy' resulting from even a single prerecorded call, [plaintiff's] complaint asserts 'the very harm that Congress sought to prevent", arising from prototypical conduct prescribed by the TCPA."); *Abramson v. CWS Apt. Homes, LLC*., No. 16-426, 2016 U.S. Distr. LEXIS 146627 at * 6 (W.D. Pa. Oct. 24, 2016) (finding that plaintiff adequately alleged injury-in-fact under the TCPA because he received automated calls in violation of the TCPA).

Similarly, the MTSA and the regulations promulgated under the authority of the MTSA, impose strict pre-conditions, limitations and restrictions on unsolicited telephonic sales calls made to Massachusetts residents, and any such calls not in compliance with any of these pre-conditions, limitations and restrictions are prohibited. The MTSA provides that "[a] person that

receives more than 1 unsolicited telephonic sales call within a 12-month period by or on behalf of the same person or entity in violation of [c. 159C] may … bring an action to recover for actual monetary loss from such knowing violation or to receive not more than $5,000 in damages for such knowing violation, whichever is greater …" (emphasis added). The harm that Plaintiff has alleged is the exact harm that the Massachusetts legislature was attempting to prohibit.

Whether this is the first case that Plaintiff has filed or one of many is at the juncture of no moment. Each call that Plaintiff has received constitutes, as Plaintiff has unequivocally alleged, a nuisance and has caused Plaintiff harm. Accordingly, it is clear from the four corners of the Complaint that Plaintiff has alleged sufficient facts to demonstrate standing.

E. Plaintiff Has Alleged that Defendants are Directly Responsible for the Calls Complained Of

Levin devotes a good portion of her motion to the proposition that Levin is not responsible for actions of third-party telemarketers. That is not what Plaintiff alleged. Plaintiff alleged that all calls at issue were made by **Defendants' call center in Pakistan.** It is therefore not necessary to determine at this juncture whether Defendants are "vicariously liable" or "ratified" the actions of a third-party. Defendants are directly liable as Defendants' call center made the calls directly.

It bears noting that assuming for sake of argument only, that the Defendants were able to demonstrate at some later juncture that the calls at issue were made by a third-party telemarketer made the aforementioned calls on their behalf, they are still plainly liable under the TCPA. Specifically, a person or entity can be liable for calls made on their behalf in violation of the TCPA, even if that person or entity did not directly dial such calls. See, e.g., *In re Rules & Regs. Implementing the TCPA*, 10 FCC Rcd. 12391, 12397 ¶ 13 (1995) (explaining that the FCC's "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any [TCPA] violations"). The FCC has "repeatedly acknowledged the

existence of vicarious liability under the TCPA." *Gomez v. Campbell-Ewald Co*., 768 F.3d 871, 878 (9th Cir. 2014)). In May 2013, the FCC issued a binding declaratory ruling clarifying that sellers "may be held vicariously liable under federal common law principles of agency for TCPA violations committed by third-party telemarketers ... under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification." *In re Joint Petition Filed by DISH Network, LLC et. al for Declaratory Ruling Concerning the TCPA Rules*, 28 FCC Rcd. 6574, 6584 ¶ 28 (2013). Accordingly, Defendants can be liable under the TCPA for prohibited calls made on their behalf even if the Defendants did not make the calls themselves.

Additionally, Defendants are also liable under the MTSA whether they made the calls directly or the calls were made on their behalf. As the MTSA makes clear, a "Telephone Solicitor" is defined as an individual or entity "who makes or **causes to made** a telephone sales call". M.G.L. c. 159C, § 1 (emphasis added). Like the TCPA, therefore, Defendants can be liable under the MTSA whether they made the calls from their Pakistani call center or whether they directed the calls to be made.

F. Plaintiff has Adequately Alleged Damages

Mischaracterizing the allegations in the Complaint once again, Levin argues that Plaintiff has not alleged damages. This is false as well. Paragraph 60 of the Complaint reads as follows:

> As a direct and proximate result of Defendants' aforementioned illegal telemarketing activities, Plaintiff has suffered actual harm, including but not limited to, invasion of privacy, loss of concentration, loss of productivity, annoyance, aggravation, emotional distress, diminished value and utility of his cell phone and subscription services, wear and tear to his cell phone, the loss of battery charge and battery life, and per-kilowatt electricity cost required to recharge his cellular telephone as a result of increased usage of his cellular services.

Clearly Plaintiff has in fact alleged damages. Further, contrary to Defendant's suppositions, the harm alleged is not "legally insufficient" as it is the very harm that both statutes were specifically designed to prevent[3].

G. Plaintiff is Not Required to Mitigate His Statutory Damages

Grasping at straws, Levin next argues that Plaintiff is required to mitigate his statutory damages as he did not take affirmative steps to prevent the calls from occurring. There is no authority for this. There is no requirement under either the TCPA or the MTSA that a plaintiff takes affirmative action to attempt to prevent illegal telemarketing. Even if there where, mitigation of damages is an **affirmative defense** on which the defendant has the burden of proof. *Barter v. Columbia Farms Distrib., Inc*., 912 F. Supp. 16, 18 (D. Mass. 1996); see *Millen Industries, Inc. v. Flexo-Accessories Co., Inc.* 5 F. Supp. 2d 72, 74 (D. Mass. 1998).

If Levin believes that Plaintiff failed to mitigate his damages she may raise this as an affirmative defense if and when she files her answer—a step that she seeks to delay by her frivolous motion practice

H. Plaintiff's Request for Injunctive Relief is Not "Moot"

Plaintiff has alleged in the Complaint that Levin has continued to engage in illegal telemarketing activity. In the MTD, Levin claims that despite that Python "no longer operates"[4]. This like many of Levin's assertions creates a contested issue of fact which is not appropriate for resolution at this juncture.

I. Plaintiff is Not Seeking Excessive Damages

[3] Contrary to Levin's suggestions, Plaintiff has not sought to "expand TCPA Liability". As noted above, Plaintiff is seeking the very damages to which he is entitled under the terms of the TCPA, MTCA and Chapter 93A.

[4] It should be noted that Python continues to file annual reports with the Florida Secretary of State. Copies of these reports are attached to the Declaration of Richard B. Reiling submitted in support of Plaintiff's opposition to Levin's Motion to Dismiss for Lack of Personal Jurisdiction.

Levin claims that the damages that Plaintiff is seeking are "excessive" and "may run afoul of the Excessive Fines Clause of the Eighth Amendment." There is no support for this proposition either. As noted above, Plaintiff is seeking the damages that he is entitled to seek under the statutes—damages that the federal and state legislatures intended victims of illegal telemarketing to recover. If, contrary to the clear legislative intent, Levin believes that the subject statutes are unconstitutional, she may raise that this as an affirmative defense.

J. The Only Party that Should Be Sanctioned is Levin

So far Levin has attempted to represent Python without obtaining an attorney in violation of Local Rule 83.5 (c), filed motions without conferring in violation of Local Rule 7.1, ignored the standards for review under both Rule 12(b)(2) and 12(b)(6), made unverified and untrue statements, and sought to delay this matter with her baseless motions. Now Levin ridiculously contends that she is entitled to sanctions. The only party that should be sanctioned is Levin so that she can be motivated to follow the rules and cease her frivolous conduct.

CONCLUSION

Based on the foregoing, Plaintiff respectfully submits that Levin's MTD is meritless and requests that it be denied in its entirety.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate of the foregoing has been served upon counsel for Defendants by way of this Court's Electronic Notification System and email, and by Priority U.S. Mail this 31st day of March, 2025.

/s/RICHARD B. REILING
Attorney at Law