IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CRAIG CUNNINGHAM,	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. 4:20-cv-142-RWS-KPJ**
	§	
USA AUTO PROTECTION, LLC, *et al.*,	§	
	§	
Defendants.	§	
	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Plaintiff Craig Cunningham's ("Plaintiff") Motion to Dismiss Defendant's Counterclaim per FRCP Rule 12(b)(6) (the "Motion") (Dkt. 40), to which Defendant USA Auto Protection, LLC ("USA Auto") filed a Response (Dkt. 49). On October 20, 2020, the Court held a hearing, during which the parties presented oral argument on the Motion (the "Hearing"). *See* Dkt. 80. Upon consideration of the pleadings, applicable authorities, and arguments made at the Hearing, the Court recommends Plaintiff's Motion (Dkt. 40) be **DENIED**.

I. BACKGROUND

USA Auto is a Missouri limited liability company that sells vehicle service agreements. *See* Dkt. 34 at 12–13. The company is affiliated with a website, www.autocarenow.com, which contains an "opt-in form" that allows users to consent to receiving automated phone calls and text messages from USA Auto and other entities. *See id.* at 13–14.

On February 26, 2020, Plaintiff, proceeding *pro se*, filed an original complaint against USA Auto (the "Complaint") (Dkt. 1), asserting violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §§ 227(b) and (c), and Texas Business and Commerce Code § 305.053. *See* Dkt. 1. The Complaint alleges USA Auto placed at least seventeen (17) calls to Plaintiff's cell

phone, resulting in a policy issued to Plaintiff without his consent. *See id.* at 6–7. On May 4, 2020, Plaintiff filed an Amended Complaint (Dkt. 25), in which he alleges he received at least twenty-four (24) calls from USA Auto, rather than seventeen (17). *See* Dkt. 25 at 6. The Amended Complaint alleges that, due to Plaintiff's limited data plan, he suffered injuries from USA Auto's calls, as they "chip away at his monthly allotment." Dkt. 25 at 7. Plaintiff enumerates additional injuries, such as nuisance, invasion of privacy, reduced device storage space, decreased cell phone battery life, and trespass of Plaintiff's cellular phone. *See id.* at 9.

On May 18, 2020, USA Auto filed its Answer to Plaintiff's Amended Complaint (Dkt. 34), wherein USA Auto asserts counterclaims of common law fraud and fraud by nondisclosure, both arising under Texas state law. *See* Dkt. 34 at 17–18. USA Auto alleges Plaintiff is a "professional litigant" who manufactured this lawsuit. *Id.* at 12–13 ("A PACER search alone suggests [Plaintiff] has filed approximately 130 TCPA cases since 2015.").

USA Auto alleges Plaintiff, or Plaintiff's designee, filled out the opt-in form on www.autocarenow.com, giving USA Auto permission to make telemarketing calls and send text messages to Plaintiff's phone number ending in 9191. *See id.* at 13–15. USA Auto claims Plaintiff knowingly filled out the opt-in form with the following contact information: a phone number with a Tennessee area code; an address with a Canadian street name and an Arkansan zip code; an IP address associated with a device in Kentucky; and the name "Amma Butt." *See id.* at 14, 17–18. The opt-in form also stated the user owned a 2009 Chevrolet Silverado. *See id.* at 16; Dkt. 49 at 10. On information and belief, USA Auto alleges Plaintiff or his designee used "a VPN or IP-address-masking tool, such as a browser like Tor, to conceal the details surrounding where that opt-in was provided." Dkt. 34 at 14.

In addition to Plaintiff's alleged consent to receive automated calls and text messages, USA Auto avers Plaintiff called USA Auto twenty-nine (29) times, knowing his calls would induce USA Auto to return Plaintiff's communications. *See* Dkt. 34 at 15. USA Auto claims Plaintiff wanted to "driv[e] up the call count" so he could "extract a higher settlement payout for his manufactured TCPA claim." *See id.* USA Auto further alleges that its interactive voice response system ("IVR system") gives callers the option to be added to a do-not-call list if they press "2," and, according to USA Auto's records, Plaintiff never chose this option, despite its availability to him. *See id.*

On August 7, 2019, a USA Auto employee returned one of Plaintiff's calls. *See id.* at 16. Allegedly, the employee expressed his understanding that he was speaking with a "Ms. Butt," which Plaintiff ignored and "identified himself as Craig Cunningham." *Id.* Plaintiff then allegedly confirmed he owned a 2009 Chevrolet Silverado and provided his credit card information to purchase a vehicle services policy. *See id.*; Dkt. 49 at 10.

Regarding its counterclaim of common law fraud, USA Auto alleges Plaintiff made "material, and continuous false representations to USA Auto that he knew were false and that he intended USA Auto to rely upon." Dkt. 34 at 17. USA Auto alleges it relied on Plaintiff's representations to its detriment, incurring injuries of "costs for employee time and resources" and "costs associated with defending against [Plaintiff's] spurious and fraudulently induced lawsuit." *Id.*

Regarding its claim for fraud by nondisclosure, USA Auto maintains that Plaintiff owed USA Auto a duty to disclose his desire not to receive these calls. *See id.* at 19. USA Auto alleges Plaintiff breached this duty multiple times: when he took no action to correct the false information submitted with the opt-in form; and when he called USA Auto twenty-nine (29) times and failed

to press "2" to place himself on the do-not-call list. *See id.* at 19–20. As a result of these breaches, USA Auto alleges injuries in the form of "expended time and resources to fulfill its contractual obligations." *See id.*

On June 10, 2020, Plaintiff filed the present Motion (Dkt. 40) against USA Auto, arguing USA Auto has failed to state a claim upon which relief can be granted. *See* Dkt. 40 at 1. On June 24, 2020, USA Auto filed its Response (Dkt. 49). On October 21, 2020, the Court held a Hearing, during which the parties presented their arguments to the Court. *See* Dkt. 80.

II. LEGAL STANDARD

A party may seek dismissal in a pretrial motion based on any of the defenses set out in Rule 12(b) of the Federal Rules of Civil Procedure. FED. R. CIV. P. 12(b); *see also Albany Ins. Co. v. Almacenadora Somex*, 5 F.3d 907, 909 (5th Cir. 1993). Rule 12(b)(6) provides that a party may move for dismissal of an action for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). Because dismissals under Rule 12(b)(6) are viewed with disfavor, the court must accept as true all well-pled facts, "even if doubtful or suspect," contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *See Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *Peña Arita v. United States*, 470 F. Supp. 3d 663, 680 (S.D. Tex. 2020). A claim will survive an attack under Rule 12(b)(6) if it "may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). In other words, a claim may not be dismissed based solely on a court's supposition that the pleader is unlikely "to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Id.* at 563 n.8. However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555).

When considering a motion to dismiss, the court's review is limited to the complaint, any documents attached to the complaint, and any document attached to the motion to dismiss that are central to the claim and referenced by the complaint. *See Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000)).

III. ANALYSIS

A. COMMON LAW FRAUD

Plaintiff argues USA Auto has failed to sufficiently plead the elements of common law fraud. *See* Dkt. 40. He contends:

> Defendants have admitted that they don't know who made the opt in or where they obtained this alleged opt in information from. Defendants vague allegations are unclear as they seem to allege the Plaintiff or someone else acting on the Plaintiff's behalf filled in some opt-in form, but fail to identify this or allege any connection to the Plaintiff in this case.

Id. at 1. Plaintiff further argues that, given the "nonsensical" information placed into the opt-in form—the Tennessee phone number, the address with Canadian and Arkansan components, the IP address associated with Kentucky, and the name "Amma Butt"—no reasonable person would rely on this information. *See id.* at 2–3.

In response, USA Auto argues it has adequately pled the elements of common law fraud. *See* Dkt. 49. USA Auto notes dismissal is improper at this stage because, under Rule 12(b)(6), USA Auto is not required to "directly tie the opt-in to [Plaintiff]." *Id.* at 10. Further, Plaintiff's Motion does not deny the opt-in form contained two true pieces of information—that the phone number listed belongs to Plaintiff and that Plaintiff owns a 2009 Chevrolet Silverado. *See id.* USA Auto urges its counterclaim of common law fraud should survive Plaintiff's Motion. *See id.* at 4–7.

After reviewing USA Auto's pleadings, accepting USA Auto's well-pled facts as true—even if "doubtful or suspect"—and reviewing the applicable authorities, the Court finds that USA Auto has sufficiently pled a counterclaim of common law fraud.

To establish a claim for common law fraud, a party must show: (1) the defendant made a material representation; (2) the defendant knew the representation was false or made the representation recklessly without any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party's reliance on the representation; and (4) the party suffered an injury by actively and justifiably relying on that representation. *See Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011). In *Franklin v. Upland Software*, the Western District of Texas addressed the very issue before the Court—whether a defendant's counterclaim of common law fraud against a TCPA plaintiff should survive a motion to dismiss. *See* No. 1:18-cv-00236-LY, 2019 WL 433650 (W.D. Tex. Feb. 1, 2019), at *3–4, *report and recommendation adopted*, No. 1:18-cv-236-LY, 2019 WL 2745748 (E.D. Tex. Mar. 12, 2019).

In *Franklin*, the defendant alleged the plaintiff was "a frequent flyer in the court system, regularly bringing *pro se* lawsuits asserting TCPA claims throughout the United States." *See* No. 1:18-cv-00236-LY, Dkt. 12 at 7 (W.D. Tex. Apr. 18, 2018). The defendant claimed the plaintiff "falsely represented that the messages he received were unsolicited" and that the plaintiff sent text messages to a phone number, "seemingly for the purpose of receiving a number of automated responses from that number, each of which he alleges violate the TCPA and entitle him to increased damages." *Id.* at 8. The defendant then averred it was the victim of common law fraud, alleging the plaintiff intended to have the defendant rely on the plaintiff's representations and send the plaintiff text messages. *See id.* at 10.

Further, like Plaintiff in this case, the plaintiff in *Franklin* argued the counterclaim should be dismissed because the defendant could not prove what plaintiff did to prompt the phone calls. *See* 2019 WL 433650, at *4. Ultimately, the court in *Franklin* rejected the plaintiff's argument, reasoning that, at the motion to dismiss stage, the court must take the defendant's allegations as true and make inferences insofar that they are reasonable. *See id.* The court found that Rule 12(b)(6) did not require the defendant to elaborately detail how the plaintiff was tied to the fraudulent inducement, denying the plaintiff's motion to dismiss the defendant's counterclaim of common law fraud. *See id.* at *4.

Akin to *Franklin*, the Court finds USA Auto has sufficiently pled the elements of common law fraud. Like the defendant in *Franklin*, USA Auto alleges Plaintiff solicited the very phone calls he now claims were unsolicited. *See* Dkt. 34 at 14–16. Specifically, USA Auto alleges Plaintiff not only consented to receiving automated communications through the opt-in form, but he also took the affirmative act of calling USA Auto twenty-nine (29) times to induce follow-up calls. *See id.* at 15. USA Auto also alleges Plaintiff is a "professional litigant," noting a PACER search returns over one hundred thirty (130) lawsuits initiated by Plaintiff. *Id.* at 12. USA Auto's factual allegations are, therefore, squarely on point with those alleged in *Franklin*. This case warrants the same result—the denial of Plaintiff's Motion with respect to USA Auto's counterclaim of common law fraud.

B. FRAUD BY NONDISCLOSURE

Similarly, the Court also finds that USA Auto's fraud by nondisclosure claim should survive Plaintiff's Motion. Under Texas law, the elements of fraud by nondisclosure are: (1) the defendant failed to disclose facts to the plaintiff; (2) the defendant had a duty to disclose those facts; (3) the facts were material; (4) the defendant knew the plaintiff was ignorant of the facts and

the plaintiff did not have an equal opportunity to discover the facts; (5) the defendant was deliberately silent when it had a duty to speak; (6) by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting; (7) the plaintiff relied on the defendant's nondisclosure; and (8) the plaintiff was injured as a result of acting without that knowledge. *Blankinship v. Brown*, 399 S.W.3d 303, 308 (Tex. App.—Dallas 2013, pet. denied).

In *Franklin*, the court denied the plaintiff's motion to dismiss when the defendant alleged the following: the plaintiff, at some point, knew someone else filled in an opt-in form with plaintiff's information; the plaintiff knew the defendant was ignorant of this fact; the plaintiff had "intimate knowledge of the TCPA, and therefore, had a duty to speak by opting out of the text messages;" the plaintiff failed to opt out of receiving text messages; and the plaintiff intended to induce the defendant's continued communications to the plaintiff. *See* 2019 WL 433650 at *4.

The Court finds USA Auto's allegations sufficiently analogous to those asserted in *Franklin*. USA Auto alleges the following: Plaintiff "knew or had reason to know prior to his filing of this suit that he and/or his designee using the name 'Ms. Butt' affirmatively gave USA Auto consent to [make phone calls to Plaintiff.];" Plaintiff knew USA Auto was ignorant of this fact; Plaintiff is a "professional litigant" who has filed approximately one hundred thirty (130) TCPA lawsuits since 2015; Plaintiff had a duty to disclose that he did not wish to receive automated phone calls, or at least press "2" to be added to a do-not-call list; and it was Plaintiff's intention that USA Auto call Plaintiff. Dkt. 34 at 12, 14, 18–20. USA Auto's allegations for fraud by nondisclosure are on point with those made in *Franklin*, and, similarly, its counterclaim should not be dismissed for failure to state a claim. *See* 2019 WL 433650 at *4.

IV. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the Court recommends that Plaintiff's Motion to Dismiss Defendant's Counterclaim per FRCP Rule 12(b)(6) (the "Motion") (Dkt. 40) be **DENIED**.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

A party is entitled to a *de novo* review by the district court of the findings and conclusions contained in this report only if specific objections are made, and failure to timely file written objections to any proposed findings, conclusions, and recommendations contained in this report shall bar an aggrieved party from appellate review of those factual findings and legal conclusions accepted by the district court, except on grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *Id.*; *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 8th day of January, 2021.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE