

II. LEGAL STANDARD

In ruling on a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., the Court assumes as true all well-pleaded factual allegations and determines whether they plausibly give rise to an entitlement of relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim which is plausible – and not merely conceivable – on its face. *Id.* at 679-80; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In determining whether a complaint states a plausible claim for relief, the Court draws on its judicial experience and common sense. *Iqbal*, 556 U.S. at 679. The Court need not accept as true those allegations which state only legal conclusions. *See id.*; *Hall*, 935 F.3d at 1110.

A complainant bears the burden of framing its claim with enough factual matter to suggest that it is entitled to relief; it is not enough to make threadbare recitals of a cause of action accompanied by conclusory statements. *See Twombly*, 550 U.S. at 556. The complainant makes a facially plausible claim by pleading factual content from which the court can reasonably infer that the opposing party is liable for the alleged misconduct. *Iqbal*, 556 U.S. at 678. The complainant must show more than a sheer possibility that the opposing party has acted unlawfully—it is not enough to plead facts that are ‘merely consistent with’ the opposing party’s liability. *Id.* (quoting *Twombly*, 550 U.S. at 557).

A pleading which offers labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement will not stand. *Id.* Similarly, where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct, the pleading has alleged—but has not ‘shown’—that the pleader is entitled to relief. *Id.* at 679. The degree of specificity necessary to establish plausibility and fair

notice depends on context because what constitutes fair notice under Rule 8(a)(2), Fed. R. Civ. P., depends on the type of case. *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008).

Rule 9(b) of the Federal Rules of Civil Procedure requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” The purpose of Rule 9(b) is to enable a defending party to prepare an effective response to charges of fraud and to protect the defending party from unfounded charges of wrongdoing which might injure its reputation and goodwill. See *NL Indus., Inc. v. Gulf & W. Indus., Inc.*, 650 F.Supp. 1115, 1129–30 (D.Kan.1986). The Court must read Rule 9(b) in harmony with the simplified notice pleading provisions of Rule 8. See *Cayman Explor. Corp. v. United Gas Pipe Line*, 873 F.2d 1357, 1362 (10th Cir.1989).

To plead a fraud claim, the complainant must describe the circumstances of the fraud, i.e. the time, place, and content of the false representation; the identity of the person making the representation; and the harm caused by the complainant’s reliance on the false representation. *Ramada Franchise Sys., Inc. v. Tresprop, Ltd.*, 188 F.R.D. 610, 612 (D.Kan.1999). Stated differently, Rule 9(b) requires plaintiff to set forth the “who, what, where, and when” of the alleged fraud. *Nal II, Ltd. v. Tonkin*, 705 F.Supp. 522, 525–26 (D.Kan.1989).

III. THE COUNTERCLAIM FAILS TO SATISFY THE PLEADING STANDARD REQUIRED BY RULE 9(B).

Defendant’s bare-bones fraud claim fails to allege the circumstances of the alleged fraud with the particularity required by Rule 9(b). Defendant does not specify the who, what, where, or when of the alleged fraud. Instead, Defendant vaguely asserts that Plaintiff “or someone” consented at some unspecified time, in some unspecified manner, to receive unspecified calls. Moreover, Defendant fails to allege with particularity how it relied on the alleged consent. Without alleging when or how the alleged consent was given, Defendant cannot plausibly allege how or

when it was relied upon. Defendant does not even claim that it was aware of the alleged representation before purportedly relying on it.

The only reasonable inference from the facts pleaded in Defendant's counterclaim is that Defendant relied on its vendors or agents to obtain consent before making calls. There are no allegations in the counterclaim to support the inference that Defendant relied on any alleged statement by Plaintiff or "someone acting on his behalf."

IV. THE COUNTERCLAIM FAILS TO ALLEGE FACTS SUFFICIENT TO SUPPORT THE ELEMENTS OF A FRAUD CLAIM UNDER ANY PLEADING STANDARD, AND IT FAILS AS A MATTER OF LAW BECAUSE IT IS NOT BASED ON AN ALLEGED STATEMENT OF FACT.

Defendant's fraud counterclaim fails as a matter of law because it is not based on an alleged statement of fact. Further, it fails to allege the elements of fraud under any pleading. To state a claim for fraud, a claimant must allege: (1) a false statement "of existing and material fact"; (2) that was known to be false by the party making it or recklessly made without knowledge concerning it; (3) the statement was intentionally made for the purpose of inducing reliance; (4) the other party reasonably relied on the statement; and (5) the other party sustained damages as a result of that reliance. *Kelly v. VinZant*, 287 Kan. 509, 515, 197 P.3d 803, 808 (2008). Defendant fails to meet any of these elements, as detailed below.

a) Defendant fails to allege a false statement of fact.

Defendant's claim fails as a matter of law because is not based on any alleged false statement of existing fact. Instead, Defendant alleges:

"[Plaintiff] made false representations of material fact when he provided [Defendant] and its vendors express consent to call him at the Subject Number with the intention of using those calls to manufacture a TCPA lawsuit."

ECF No. 40 at 19, ¶ 15. But consent is not a statement of fact; it is an action. A factual assertion is capable of being proven true or false. By contrast, consent is a decision or agreement

to permit certain actions. Plaintiff's alleged act of giving consent cannot be characterized as a factual assertion, let alone a false one.

Even if Plaintiff gave consent with a subjective intent to later file a lawsuit, this would not transform the consent into a false statement of fact. Fraud requires a misrepresentation of fact, not an alleged ulterior motive behind a lawful action. Defendant's attempt to frame Plaintiff's consent as a "false representation" fails as a matter of law.

b) Defendant fails to allege harm caused by reasonable reliance on any false statement.

Defendant's allegation of reliance is insufficient to support a fraud claim. Defendant states:

“[Defendant] reasonably relied on [Plaintiff's] express consent so that both it and its independent contractor vendors and their sub-vendors would only contact persons legitimately interested in [Defendant's] services and comply with its obligations under the TCPA.”

Id. ¶ 17. This vague allegation of reliance does not satisfy the requirements for fraud.

First, Defendant does not allege that it, its contractors, or their sub-vendors made calls *to Plaintiff* specifically because of his alleged consent. Instead, Defendant describes a broader reliance on consent to ensure TCPA compliance and avoid contacting individuals who are not legitimate customers. This generalized reliance fails to meet the element of fraud, which requires reliance on a particular misrepresentation in taking specific actions that result in harm.

Second, even if Defendant's vague allegation is generously construed as an allegation that Defendant or its agents relied on Plaintiff's alleged consent by placing calls to Plaintiff, Defendant's reliance claim is fundamentally flawed. If Plaintiff's consent was valid, as Defendant asserts, then the calls would not violate the TCPA, and Defendant could not have been "tricked" into violating the law. In this scenario, Defendant's alleged harm—the lawsuit—does not stem

from its reliance on the consent but rather from what it claims is a meritless lawsuit. Defendant's alleged reliance does not lead to harm or damages cognizable under a fraud theory.

Defendant is merely alleging that Plaintiff committed "fraud" by filing what Defendant views as a meritless lawsuit. Defendant cannot transform the filing of a lawsuit into a fraud claim merely because it disputes the merits of Plaintiff's allegations. Such an approach would impermissibly conflate defenses to the underlying TCPA claim with the elements of a standalone fraud cause of action.

V. CONCLUSION

Defendant's counterclaim for fraud fails because it is not based on a false statement of existing and material fact, does not allege reasonable reliance on any such statement, and fails to establish damages resulting from the purported reliance. At bottom, Defendant's allegations amount to a disagreement with Plaintiff's decision to file this lawsuit, which is insufficient to sustain a fraud claim. Accordingly, the fraud counterclaim should be dismissed as a matter of law.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2024, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated December 20, 2024

/s/ Paul K. Thoma

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