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

CRAIG CUNNINGHAM,	§	
Plaintiff	§	
	§	
V.	§	**Civil Action No.**
	§	**4:19-CV-00896**
MATRIX FINANCIAL SERVICES,	§	
LLC, et al.,	§	
Defendants	§	

DEFENDANT NATIONAL CAR CURE, LLC's,
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant National Car Cure, LLC, by and through its undersigned counsel, submits this Brief in Support of its Motion to Dismiss Plaintiff's Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

The Law Offices of Craig Zimmerman

By: /s/ R. Douglas Scott

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above and foregoing was served on *pro se* Plaintiff by Certified Mail, Return Receipt Requested, at:

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on this the 11th day of June, 2020.

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I. INTRODUCTION

Plaintiff Craig Cunningham is a serial TCPA plaintiff whose pleadings repeatedly fail to survive a motion to dismiss, in this Court and others.[1] Cunningham is a "professional plaintiff", in the business of accepting telemarketing and other commercial phone calls for the express purpose of eliciting information in an attempt to cultivate a claim, and he then files suit for personal profit.[2] For example, in *Cunningham v. Credit Management*

[1] See, *e.g.*, *Cunningham v. Lifestyles Dev., LLC*, Civil Action No. 4:19-cv-00006-ALMCAN, 2019 U.S. Dist. LEXIS 154112, at *9-15 (E.D. Tex. Aug. 8, 2019) (granting motion to dismiss after finding plaintiff had not sufficiently pleaded agency theories); *Cunningham v. Kondaur Capital*, No. 3:14-1574, 2014 U.S. Dist. LEXIS 183095, at *9-13 (M.D. Tenn. Nov. 19, 2014) (same); *Cunningham v. Sunshine Consulting Grp., LLC*, No. 3:16-2921, 2018 U.S. Dist. LEXIS 121709, at *14 (M.D. Tenn. July 20, 2018) (finding "alleged actions of the [defendants] in this case do not support a plausible legal claim" for vicarious liability), report and recommendation adopted, No. 3:16-cv-02921, 2018 U.S. Dist. LEXIS 234809 (M.D. Tenn. Aug. 7, 2018); *Cunningham v. Health Plan Intermediaries Holdings*, LLC, No. 17-cv-1216, 2018 U.S. Dist. LEXIS 22921, at *19 (N.D. Ill. Feb. 13, 2018) (finding Plaintiff's "conclusory allegations fail to state a claim for vicarious liability").

[2] Pursuant to Federal Rule of Evidence 201, National Car Cure respectfully requests the Court take judicial notice of the following publicly available material describing Plaintiff's litigation scheme involving scores of profit-driven TCPA lawsuits he has brought across the country: John O'Brien, *Phoney Lawsuits: Man Has Filed 80 Lawsuits and Uses Sleuthing Skills to Track Down Defendants*, Forbes(Nov.1, 2017),available at: https://www.forbes.com/sites/legalnewsline/2017/11/01/phoney-lawsuits-man-has-filed-80 lawsuits-and-uses-sleuthing-skills-to-track-down-defendants/#618749ac6be7; Active Prospect, *Don't Call Craig Cunningham*, (Nov. 10, 2017), available at https://activeprospect.com/dont-call- craig-cunningham-tcpa/; Accounts Recovery, *Professional Plaintiff Known for Suing Collection Agencies Loses TCPA Appeal* (July 31, 2018), available at: https://www.accountsrecovery.net/2018/05/01/professional-plaintiff-known-for-suing-collection- agencies-loses-tcpa-appeal/; DNC, *A Serial Litigator's Success Story* (Sept. 5, 2017), available at https://www.dnc.com/news/80-lawsuits-serial-litigators-success-story; Charmaine Little, *Man Who Has Filed at Least 83 TCPA Lawsuit Loses One in Tennessee Court*, Legal NewsLine (Jun. 5, 2018), available at

L.P., the United States District Court for the Northern District of Texas found that Cunningham had brought his Telephone Consumer Protection Act ("TCPA") and Fair Debt Collection Practices Act ("FDCPA") claims "in bad faith and for purposes of harassment." No. 09-cv-1497, 2010 WL 3791104, at *6 (N.D. Tex. Aug. 30, 2010). The Court found it "most worrisome" that "Plaintiff repeatedly called Defendants in an attempt to multiply his claims . . . asking questions in the hope that he could construe the answer as a false misrepresentation." *Id.* The court also found that he "brought suit against numerous individual defendants, against many of whom [Cunningham] has only a cursory theory of recovery, and sometimes no theory of recovery." *Id.*

Cunningham's suit against National Car Cure is another frivolous attempt that lacks any theory of recovery whatsoever. Cunningham has done nothing more than paraphrase the relevant legal standards for the so-called claims listed in his Amended Complaint.

Cunningham's frivolous lawsuit falls far short of satisfying the pleading requirements of Fed. R. Civ. P. 8(a), as articulated in the United States Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556

https://legalnewsline.com/stories/511422467-man-who-has-filed-at-least-83-tcpa-lawsuits-loses-one-in-tennessee-court.

U.S. 662 (2009). Accordingly, the Amended Complaint should be dismissed against National Car Cure for failure to state a claim pursuant to Fed. R. Civ. P. 8(a) and 12(b)(6).

II. STATEMENT OF THE ISSUES

Cunningham is a "professional plaintiff" in the business of accepting telemarketing and other commercial phone calls for the express purpose of eliciting information in an attempt to cultivate a claim and file suit for personal profit. National Car Cure seeks to dispose of all claims asserted by Cunningham because his Amended Complaint fails to (1) meet the Pleading Requirements of *Iqbal* and *Twomey* and Rule 8(A) of the Federal Rules of Civil Procedure (2) fails to state a claim for violation of Section 227(b) of the TCPA; (3) fails to state a claim under 47 C.F.R. §64.1200(d); and (4) fails to state a claim under the Texas Business and Commerce Code Section 305.053.

III. LEGAL STANDARD

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-

harmed-me accusation." *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" in meeting the standard required by Rule 8. *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]"*Twombly*, 550 U.S. at 555 (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level…" *Twombly*, 550 U.S. at 555 (internal citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, [the complaint] 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)).

IV. ARGUMENT

A. Cunningham's Complaint Fails To Meet The Pleading Requirements Of *Iqbal* and *Twombly* And Fed. R. Civ. P. 8(A).

The allegations in Cunningham's Amended Complaint plainly fall short of Fed. R. Civ. P. 8(a)'s pleadings standards as established in *Iqbal* and *Twombly*. A plaintiff cannot state a claim for relief by relying on conclusory legal allegations or by requiring the district court to make unwarranted inferential leaps based on "naked assertions" that are devoid of "further factual development." *See Iqbal*, 556 U.S. at 678-80; *Twombly*, 550 U.S. at 555-60. Cunningham's Amended Complaint must be dismissed because that is precisely what he has done here.

Iqbal and *Twombly* set forth two fundamental principles for assessing the sufficiency of a pleading. First, a court considering a motion to dismiss should begin by determining whether a complaint contains factual allegations, as opposed to legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555)(emphasis added). Thus, in *Iqbal*, the Supreme Court required dismissal of a complaint that merely alleged the defendants' involvement in the challenged conduct, without providing any factual context, details, or support for those conclusory allegations. *Id.* at 680.

Second, a plaintiff must meet a "plausibility standard" to survive a motion to dismiss. That is, a plaintiff must do more than demonstrate the "mere possibility of misconduct." *Id.* at 678. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully. "Where a complaint pleads fact that are 'merely consistent with' a defendant's liability, it 'stops short of a line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 556). In particular, complaints that require courts to fill factual gaps or make factual assumptions in order to establish the elements of a claim should be dismissed. *See Twombly*, 550 U.S. at 557–58.

B. Plaintiff's First Cause Of Action Fails to State a Claim For Relief Under The TCPA.

Plaintiff's TCPA claim should be dismissed because Plaintiff's *own* allegations show he consented [3] to receive phone calls after August 27, 2019. *See* Am. Compl. ¶ 43; *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8769 (1992) ("persons who knowingly release their phone numbers have in effect given

[3] 47 U.S.C. § 227(b)(1)(A) (prohibiting only those calls made without the "prior express consent of the called party.")

their invitation or permission to be called at the number which they have given, absent instructions to the contrary."). The Eastern District of Texas has previously dismissed two TCPA actions for this very same reason: that is a plaintiff cannot place calls to a party and subsequently cry foul for receiving return calls. *See Morris v. Hornet Corp.*, Civil Action No.: 4:17-cv-00350, 2018 U.S. Dist. LEXIS 170945, at *18-19 (E.D. Tex. Sept. 14, 2018); *Morris v. Copart*, No. 4:15-cv-724, 2016 U.S. Dist. LEXIS 155755, at *29-30 (E.D. Tex. Nov. 9, 2016). In *Hornet* and *Copart*, the Eastern District of Texas dismissed TCPA claims for calls that occurred after the plaintiff voluntarily called the defendant and released his phone number to the defendant. *Hornet*, 2018 U.S. Dist. LEXIS 170945, at *19; *Copart*, 2016 U.S. Dist. LEXIS 155755, at *29-30. Further, the *Hornet* Court determined this to still be true *even* if the calls were made as "an attempt to get information as to the true identity and contact information of the entity calling him." *Hornet*, 2018 U.S. Dist. LEXIS 170945, at *18.

Plaintiff's Amended Complaint mistakenly attempts to hold National Car Cure liable for calls Cunningham *made*. *See* Am. Compl. ¶¶ 42-43. Indeed, like in *Hornet*, Plaintiff admits to placing calls to the defendants as he designates a majority of the calls as "outbound" in the call log chart immediately

following Paragraph 43 of the Amended Complaint. From the chart, Plaintiff started placing calls on August 27, 2019, and *continued* to place calls *after* the original Complaint was filed. Interestingly enough, the amendment is premised on calls Plaintiff allegedly received *after* the original Complaint was filed. *See* Am. Compl. ¶ 46. ("[g]iven that the calls to the phone number ending in 1812 happened after the filing of this lawsuit…"). And, out of the "140 calls" depicted in the call log chart, 15 or so calls were "inbound," and none were placed before Plaintiff's August 27, 2019 call. *See* Am. Compl. ¶ 43. Thus, by placing calls to the defendants, Plaintiff consented to receiving subsequent calls. *See Hornet*, 2018 U.S. Dist. LEXIS 170945, at *19; *Oatman v. Augusta Collection Agency, Inc.*, cv 118-089, 2019 U.S. Dist. LEXIS 213714, at *7-8 (S.D. Ga. Dec. 11, 2019) ("Plaintiff cannot recover for the calls he received after providing Defendant with his phone number…"); *Copart*, 2016 U.S. Dist. LEXIS 155755, at *29. As such, Plaintiff's Amended Complaint fails to state a claim for violation of the TCPA as a matter of law because he consented to receive the calls at issue.

C. Plaintiff's Second Cause Of Action Fails To State A Claim For Liability Under 47 C.F.R.§ 64.1200(D).

Plaintiff also alleges that he is entitled to a monetary award for the defendants' alleged violations of 47 C.F.R. § 64.1200(d), including failure to maintain a do-not-call list, failure to provide proper training, and failure to identify the name of the individual caller, and the contact information of the entity on whose behalf the call is made. Am. Compl. COUNT II ¶¶ 6-9. This claim similarly fails.

First, § 64.1200(d) only applies to entities that "initiate any call for telemarketing purposes to a residential telephone subscriber." Consistent with the plain language of the statute, this Court has found that the private right of action created by §227(c)(5) for a violation of § 64.1200(d) is "limited to redress for violations of the regulations that concern residential telephone subscribers." *Cunningham v. Politi*, No. 4:18-cv-00362-ALM-CAN, 2019 U.S. Dist. LEXIS 102449, at *10 (E.D. Tex. Apr. 30, 2019) (Nowak, J.), *report and recommendation adopted*, No. 4:18-cv-362, 2019 U.S. Dist. LEXIS 102054 (E.D. Tex. June 19, 2019). Similarly, district courts have *repeatedly* dismissed Plaintiff's claims under §227(c)(5), and found this regulation "not to encompass Plaintiff's

cellular phones." *Id.*[4]

Here, Plaintiff alleges he received calls that violated the TCPA to two cellular phone numbers ending in -1977 and -1812. *See* Am. Compl. ¶¶ 39, 42, 66. This Court previously ruled that Plaintiff's use of his cell phone "for personal, family, and household" purposes does not turn it into a residential telephone. *See, e.g. Politi*, 2019 U.S. Dist. LEXIS 102449, at *11 (collecting cases, finding that "the TCPA differentiates between calls made to cellular and residential lines") (quoting *Bates v. I.C. Sys., Inc.*, No. 09-cv-103A, 2009 U.S. Dist. LEXIS 96488, at *1 (W.D.N.Y. Oct. 19, 2009)). Because Plaintiff does not allege National Car Cure initiated calls to his residential phone lines, his second cause of action fails.

In *Politi*, this Court found that because Plaintiff did not allege that he requested (1) the defendants to stop calling him, (2) the defendants to put him on a specific company do-not-call list, or (3) a copy of the defendants' do-not-call procedures, "[a]t best, it is unclear how the provision was

[4] *See also Cunningham v. Air Voice, Inc.*, Civil Action No. 4:19-cv-00096-ALM-CAN, 2020 U.S. Dist. LEXIS 51585, at *15 (E.D. Tex. Feb. 14, 2020); *Cunningham v. Sunshine Consulting Group, LLC*, No. 3:16-2921, 2018 U.S. Dist. LEXIS 121709, at *6 (M.D. Tenn. July 20, 2018); *Cunningham v. Rapid Capital Funding, LLC*, No. 3:16-02629, 2017 U.S. Dist. LEXIS 136951, at *3 (M.D. Tenn. July 27, 2017); *Cunningham v. Spectrum Tax Relief, LLC*, No. 3:16- 2283, 2017 U.S. Dist. LEXIS 118797, at *7 (M.D. Tenn. July 7, 2017).

violated." 2019 U.S. Dist. LEXIS 102449, at *11-12. Similarly here, Plaintiff does not allege that he requested National Car Cure to provide a do-not-call policy or training manual, nor does he allege that he requested the identity of the agent and the agent's employer's contact information. Rather, Plaintiff simply parrots the language of the TCPA by alleging in conclusory fashion that "[t]he defendants did not have an internal do not call policy, did not place the Plaintiff on an internal do not call policy, in violation of 47 CFR 64.1200(d)" Am. Compl. ¶ 35, and "Defendants and/or their affiliates or agents" violated various provisions of § 64.1200(d). Am. Compl. COUNT II ¶ 7.

Because Plaintiff has not alleged *any* facts to support these conclusions, his second cause of action fails.

D. Cunningham's Amended Complaint Fails To State A Claim Under The Texas Business And Commerce Code Section 305.053.

Count III of Cunningham's Amended Complaint, under Section 305.053 of the Texas Business and Commerce Code, fails to state a claim for the same reasons his TCPA claims are subject to dismissal. Under § 305.053, a "person who receives a communication that violates [the TCPA] may bring an action in this state against the person who originates the communication." Tex. Bus. & Com. § 305.053. Because Cunningham's TCPA claims

fail, his state TCPA claim must also be dismissed. *See Cherakaoui v. Santander Consumer USA, Inc.*, 32 F. Supp. 3d 811, 815 (S.D. Tex. 2014) ("As Santander did not violate the TCPA, Santander also did not violate related Texas state law claims arising under the Texas Business and Commercial Code § 305.053 ('Texas TCPA'). The Texas TCPA proscribes only that conduct which is also prohibited by the TCPA. If no violation of the TCPA exists, there is not violation of the Texas TCPA.").

V. CONCLUSION

As explained above, Plaintiff's amended pleading lacks any of the required *factual* content that would give rise to a *plausible* claim for relief against National Car Cure; he does not allege any facts that would plausibly show that he can hold National Car Cure liable for a string of calls that *Plaintiff* initiated. For the reasons set forth above, National Car Cure respectfully moves this Court to enter an Order dismissing Plaintiff Craig Cunningham's Complaint for failure to state a claim, and for such further relief as this Court may allow.