2018 WL 4473792
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United States District Court, E.D. Texas, Sherman Division.

CRAIG CUNNINGHAM, Plaintiff,

v.

AMBER FLORIO, LAW OFFICES OF AMBER FLORIO, PLLC, GLOBAL CLIENT SOLUTIONS, LLC, COMMONWEALTH SERVICING GROUP, LLC, MONMOUTH MARKETING GROUP, LLC, TOM MORAN, DMB FINANCIAL, LLC, HAL BROWDER, and MATTHEW GUTHRIE, Defendants.

CIVIL ACTION NO. 4:17-CV-00839-ALM-CAN
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Filed 08/06/2018

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Christine A. Nowak UNITED STATES MAGISTRATE JUDGE

***1** Pending before the Court are Defendants Commonwealth Servicing Group, LLC, DMB Financial, LLC, Amber Florio, Law Offices of Amber Florio, Hal Browder, and Matthew Guthrie's Motion to Dismiss and to Strike Plaintiff's Second Amended Complaint [Dkt. 62], and Defendants Tom Moran and Monmouth Marketing Group, LLC's Motion to Dismiss and to Strike Plaintiff's Second Amended Complaint [Dkt. 80]. After reviewing the Motions to Dismiss, the Responses and Supplemental Briefing [Dkts. 73, 77, 84, 85, 86], and all other relevant filings, the Court recommends that each of Defendants' Motions to Dismiss [Dkts. 62, 80] be **GRANTED IN PART** and **DENIED IN PART**.

BACKGROUND

Plaintiff Craig Cunningham ("Plaintiff"), proceeding *pro se*, filed his Amended Complaint on December 12, 2017 against Amber Florio, the Law Offices of Amber Florio, PLLC, Global Client Solutions, LLC, Commonwealth Servicing Group, LLC, Monmouth Marketing Group, LLC, Tom Moran, DMB Financial, LLC, Matthew Guthrie, and Hal Browder [Dkt. 2]. [1] On January 11, 2018, Global Client Solutions filed a Motion to Dismiss, seeking to dismiss Plaintiff's claims under Rules 12(b)(2) and 12(b)(6) [Dkt. 27]. [2] In response, on February 9, 2018, Plaintiff filed a Second Amended Complaint [Dkt. 50]. On February 20, 2018, Plaintiff moved to amend his complaint [Dkt. 51], filing a further complaint also titled Plaintiff's Second Amended Complaint (this is the live pleading in this action) [Dkt. 52]. Plaintiff's allegations therein are sometimes confusing. Plaintiff appears to allege that Defendant Monmouth Marketing, owned by Tom Moran, called his cellular phone numerous times, for the purpose of selling debt relief services offered by Commonwealth Servicing and DMB Financial, entities which are in turn owned by Matthew Guthrie. Plaintiff contends that attorneys Hal Browder (of Tennessee) and Amber Florio (of Texas) were referred debt relief cases from Commonwealth Servicing, DMB Financial, and Global Client Solutions. Plaintiff further alleges that each of these phone calls to Plaintiff's cell phone were made in violation of the Telephone Consumer Protection Act ("TCPA") and Federal Debt Consumer Protection Act ("FDCPA") [Dkt. 52 at 3-4]. [3] Plaintiff specifically alleges that:

> In 2016, the Plaintiff received multiple automated phone calls to the Plaintiff's cell phone which were not related to any emergency purpose and without the Plaintiff's consent. The calls were from a variety of phone numbers designed to make them difficult to track, but each and every call had a familiar "Heather with card service" pre-recorded message and were selling debt relief services. The Plaintiff uses his cell phone as a residential phone and only has cell phones

in his residence. The calls had a 3-4 second delay of dead air before the line connected and there was a pre-recorded message on several of the calls, which both indicate the use of an automated telephone dialing system.

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The Plaintiff was able to identify Amber Florio and the Law Offices of Amber Florio as one of the liable parties in this case through a representation agreement that was sent via email to the Plaintiff in October 2016.

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Upon further investigation, the Plaintiff learned that the debt relief services were actually by and on behalf of the Commonwealth Servicing Group, LLC and DMB Financial, LLC two Massachusetts corporations owned by Matthew Guthrie, the real ringleader of this illegal telemarketing operation. Commonwealth Servicing Group, LLC, DMB Financial, LLC and Matthew Guthrie are vicariously and directly liable for each and every call to the Plaintiff. Some calls were directly made by Matthew's corporations to the Plaintiff.

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Upon further investigation, the Plaintiff discovered the call [sic] were being directly placed from Monmouth Marketing Group, LLC a New Jersey Corporation at the direction and with the direct, personal involvement of Tom Moran.

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Hal Browder is a Tennessee licensed attorney.... Hal Browder was referred to the Plaintiff as an attorney who would represent the Plaintiff for debt relief by Commonwealth Law Group.

[Dkt. 52 at 2-5]. Plaintiff alleges the actions described constitute violations of Sections 1692(a), (e), (g) of the FDCPA and Sections 227(b) and (c)(5) of the TCPA [Dkt. 52 at 4-5].

Defendants Commonwealth Servicing Group, LLC, DMB Financial, LLC, Amber Florio, Law Offices of Amber Florio, Hal Browder, and Matthew Guthrie filed their pending Motion to Dismiss on March 14, 2018 [Dkt. 62]. On April 2, 2018, Plaintiff filed his Response [Dkt. 73] and on April 16, 2018, Plaintiff filed "Additional Attachments to Main Document" [Dkt. 77]. On May 18, 2018, Defendants Tom Moran and Monmouth Marketing Group, LLC also filed a Motion to Dismiss [Dkt. 80].[4] Plaintiff responded to this Motion to Dismiss on June 14, 2018 [Dkt. 86]. On June 4, 2018, the Court directed the Parties to file additional briefing regarding the imposition of personal jurisdiction over Defendants [Dkt. 81]. Plaintiff and Defendants filed their additional briefing on June 14, 2018 [Dkts. 84, 85].

ANALYSIS

Defendants seek to dismiss Plaintiff's claims on three grounds, that: (1) "Plaintiff fails to plead an injury-in-fact to establish standing;" (2) the Court lacks personal jurisdiction over certain of the Defendants; and lastly (3) Plaintiff failed to state a claim upon which relief can be granted [Dkts. 62 at 1, 80 at 1].

Plaintiff's Standing

Defendants assert that Plaintiff lacks standing to bring his TCPA claim because "[t]he Plaintiff's Complaint contains no allegations of any concrete harm that is particularized and actual or imminent" [Dkts. 62 at 5, 80 at 5]. Defendants argue that Plaintiff "a notorious serial TCPA litigant" has not suffered any real harm, and in fact seeks to entrap companies into making calls to him so that he may bring lawsuits and enrich himself for any calls received.

***3** "To establish Article III standing, a plaintiff must show: (1) an injury in fact that is (2) fairly traceable to the defendant's challenged conduct, and that (3) a favorable judicial decision will likely redress the injury." *Texas v. United States*, 300 F. Supp. 3d 810, 826 (N.D. Tex. 2018) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Injury In Fact

"A plaintiff must show that it has suffered an 'injury in fact,' which is 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560)). "For an injury to be 'concrete' it must 'actually exist,' meaning it is 'real' and 'not abstract.' " *Id.* (quoting *Spokeo*, 136 S.Ct. at 1548). "For an injury to be 'particularized' it must 'affect the plaintiff in a personal and individual way.' " *Id.* (quoting *Spokeo*, 136 S.Ct. at 1548). Congress cannot convert a generalized grievance into an individual right for standing purposes. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992). But it can create "legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *RITE—Research Improves Env't, Inc. v. Costle*, 650 F.2d 1312, 1320 (5th Cir. 1981) (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). "Thus, where a statute confers new legal rights on a person, that person will have Article III standing to sue where the facts establish a concrete, particularized, and personal injury to that person as a result of the violation of the newly created legal rights." *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 781 F.3d 1245, 1251 (11th Cir. 2015). The TCPA makes it unlawful to make calls using an artificial or prerecorded voice to any telephone number assigned to a residential telephone line. 47 U.S.C. § 227(b)(1)(B). The TCPA also makes it unlawful for a caller to make telephonic solicitations to a residential telephone number listed on the federal do-not-call registry. 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c). This provides individuals with a legal right to be free from the intrusion of such calls.

"Courts considering harm in connection with TCPA claims have noted that 'one of the purposes of the TCPA was to protect telephone subscribers from the 'nuisance' of unwanted calls.' " *Morris v. Unitedhealthcare Ins. Co.*, 415CV00638ALMCAN, 2016 WL 7115973, at *5 (E.D. Tex. Nov. 9, 2016), *report and recommendation adopted*, 4:15-CV-638, 2016 WL 7104091 (E.D. Tex. Dec. 6, 2016) (Mazzant, J.) (citing *Martin v. Leading Edge Recovery Sols., LLC*, No. 11 C 5886, 2012 WL 3292838, at *4 (N.D. Ill. Aug. 10, 2012); *see also Cunningham v. Rapid Response Monitoring Services, Inc.*, 251 F. Supp. 3d 1187, 1197 (M.D. Tenn. 2017) ("Unwanted telemarketing can be a 'nuisance' and 'an intrusive invasion of privacy.' ") (quoting *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012) (quoting TCPA, 105 Stat. 2394, note following 47 U.S.C. § 227)). "In *Martin*, the district court analyzed whether the plaintiffs TCPA claims satisfied the injury-in-fact requirement of Article III. The district court found an injury in fact when the plaintiffs alleged they were forced to tend to unwanted calls—a privacy interest which Congress sought to protect." *Id.* (citing, 2012 WL 3292838, at *2; *In re Rules Implementing the Tel Consumer Prot. Act of 1991*, 30 FCC Rcd. At 7979-80).

***4** "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly... allege facts demonstrating' each element" required to establish standing. *Spokeo*, 136 S.Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Plaintiff alleges in his Second Amended Complaint that "Defendants placed multiple harassing calls to the Plaintiff [at his alleged residential phone number] which would annoy or harass a reasonable person" [Dkt. 52 at 4]—evincing an invasion of his privacy. [5] At this early stage in the proceedings, the Court finds that Plaintiff's allegations relating to the nuisance of such calls is sufficient to establish an injury in fact. *See Jamison v. Esurance Ins. Servs., Inc.*, No. 3:15-CV-2484-B, 2016 WL 320646, at *2–3 (N.D. Tex. Jan. 27, 2016) (finding an injury-in-fact at the pleading stage when plaintiff suffered an occupation of his telephone line); *Morris*, 2016 WL 7115973, at *6 (finding an injury-in-fact where Plaintiff was annoyed and harassed by unwanted telemarketing calls); *Cunningham v. Rapid Response Monitoring Services, Inc.*, 251 F. Supp. 3d 1187, 1197 (M.D. Tenn. 2017) (finding an injury-in-fact at the pleading stage when plaintiff alleged harassment and annoyance at receiving telemarketing calls).

Professional Plaintiffs and the Zone of Interest

Defendants additionally argue that Plaintiff lacks standing because:

> Plaintiff in this instance did not suffer any real harm. As a serial TCPA litigator, as evidenced by his failure to resister [sic] his number with the national do not call list and the sheer amount of TCPA lawsuits filed by the Plaintiff, the Plaintiff seeks out any opportunity to file a TCPA lawsuit so that he can make money by taking advantage of the generous penalties granted under the TCPA. Also, there is evidence, that the Plaintiff has baited the Defendants into (allegedly) calling him as he alleges that he obtained a representation agreement from the Law Offices of Amber Florio, PLLC.

[Dkts. 62 at 5, 80 at 5].

"Other federal courts have held that professional plaintiffs do not have standing to sue under the TCPA." *Morris*, 2016 WL 7115973, at *6 (citing *Stoops v. Wells Fargo Bank, N.A.*, No. CV 3:15-83, 2016 WL 3566266, at *12 (W.D. Pa. June 24, 2016); *Telephone Science Corp. v. Asset Recovery Solutions, LLC*, No. 15-CV-5182, 2016 WL 4179150, at *1 (N.D. Ill. Aug. 8, 2016)). [6] In *Stoops*, a case cited by Defendants, the court found that the plaintiff did not have standing to sue when she suffered no injury-in-fact; specifically, the court found that the plaintiff did not suffer a true nuisance or an invasion of her privacy because she admitted that her only purpose in using her cell phones was to file TCPA lawsuits. 2016 WL 3566266, at *12. The plaintiff in *Stoops*, who resided in Pennsylvania, purchased and maintained over thirty cell phones with Florida telephone numbers because she knew the locations she selected were economically depressed and included people who would be defaulting on their loans or their credit cards. *Id.* The plaintiff waited for the phones to ring; she sometimes answered the calls and told the callers to stop, but she testified her hope was that the calls would continue so she could treble her damages. *Id.* The *Stoops* plaintiff, at the time of the court's ruling, had filed at least eleven TCPA cases in Pennsylvania and sent at least twenty pre-litigation demand letters. *Id.*, *but see Fitzhenry v. ADT Corp.*, No. 14-80180, 2014 WL 6663379, at *5 (S.D. Fla. Nov. 3, 2014) ("Although Plaintiff may have created a home environment that allows him to document telemarketing calls better than most consumers, the Court is not convinced that Plaintiff is outside of the TCPA's zone of interest.").

***5** In the instant case, Defendants' bare assertions are not enough for the Court to apply the court's reasoning in *Stoops.* It is evident that Plaintiff has pursued a substantial amount of TCPA cases; however, Defendants' assertions to do not yet raise Plaintiff to the level of "professional plaintiff" as described in *Stoops*, such that he is outside the zone of interest. *See Morris*, 2016 WL 7115973, at *6; *Rapid Response Monitoring Services, Inc.*, 251 F. Supp. 3d at 1197; *Evans v. Nat'l Auto Div., L.L.C.*, No. CV 15-8714, 2016 WL 4770033, at *3 (D.N.J. Sept. 13, 2016) ("As a consumer complaining of receiving intrusive telemarketing calls, Plaintiff falls directly within the zone of interests protected by the TCPA"). The Court finds at this early stage in the litigation, Plaintiff has standing in this case.

Personal Jurisdiction

Federal Rule of Civil Procedure 12(b)(2) requires a court to dismiss a claim if the court does not have personal jurisdiction over the defendant. "After a non-resident defendant files a motion to dismiss for lack of personal jurisdiction, it is the plaintiff's burden to establish that *in personam* jurisdiction exists." [7] *Lahman v. Nationwide Provider Sols.*, No. 4:17-CV-00305, 2018 WL 3035916, at *4 (E.D. Tex. June 19, 2018) (Mazzant, J.) (citing *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990) (citing *WNS, Inc. v. Farrow*, 884 F.2d 200, 202 (5th Cir. 1989)). "To satisfy that burden, the party seeking to invoke the court's jurisdiction must 'present sufficient facts as to make out only a prima facie case supporting jurisdiction,' if a court rules on a motion without an evidentiary hearing." *Id.* (quoting *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000)). "When considering the motion to dismiss, '[a]llegations in [a] plaintiff's complaint are taken as true except to the extent that they are contradicted by defendant's affidavits.' " *Id.* (quoting *Int'l Truck & Engine Corp. v. Quintana*, 259 F. Supp. 2d 553, 557 (N.D. Tex. 2003) (citing *Wyatt v. Kaplan*, 686 F.2d 276, 282–83 n. 13 (5th Cir. 1982)); *accord Black v. Acme Mkts., Inc.*, 564 F.2d 681, 683 n.3 (5th Cir. 1977). Notably, in the instant case, no party has proffered any affidavits related to the personal jurisdiction arguments raised.

Certain of the Defendants argue they are not subject to personal jurisdiction: Defendants Commonwealth Servicing Group, Monmouth Marketing Group, Tom Moran, DMB Financial, Hal Browder and Matthew Guthrie. No personal jurisdiction argument is raised with respect to Defendants Amber Florio or the Law Offices of Amber Florio.

A court conducts a two-step inquiry when a defendant challenges personal jurisdiction: (1) "[f]irst, absent a controlling federal statute regarding service of process, the court must determine whether the forum state's long-arm statute confers personal jurisdiction over the defendant;" and (2) "second, the court establishes whether the exercise of jurisdiction is consistent with due process under the United States Constitution." *Id.* (citing *Ham v. La Cinega Music Co.*, 4 F.3d 413, 415 (5th Cir. 1993)). "The Texas long-arm statute confers jurisdiction to the limits of due process under the Constitution;" accordingly, "the sole inquiry that remains is whether personal jurisdiction offends or comports with federal constitutional guarantees." *Id.* (citing *Command-Aire Corp. v. Ont. Mech. Sales and Serv. Inc.*, 963 F.2d 90, 93 (5th Cir. 1992); *Bullion*, 895 F.2d at 216). "The Due Process Clause permits the exercise of personal jurisdiction over a non-resident defendant when the defendant has established minimum contacts with the forum state 'such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "Minimum contacts with a forum state can be satisfied by contacts that give rise to either general jurisdiction or specific jurisdiction." *Id.* (citing *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994)).

Nationwide Service

***6** As referenced earlier, "[w]hen an action invoking the court's federal-question jurisdiction is based on a statute that does not provide for nationwide service of process, the court looks to the law of the forum state governing personal jurisdiction to determine if the defendant is amenable to process in the forum state." *Davis v. Leavitt*, No. 4:12-CV-739-A, 2013 WL 1155375, at *1 (N.D. Tex. Mar. 19, 2013) (citing *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104–05 (1987)). In the instant case, Plaintiff brings certain of his claims under two federal statutes: the FDCPA and the TDCA [Dkt. 1]. On June 4, 2018, the Court ordered the Parties to file additional briefing regarding whether nationwide service was available under the FDCPA [Dkt. 38]. The Court, in conducting independent research, located contradictory authority regarding whether the FDCPA provided for nationwide service; certain recent district court cases have found the FDCPA provides for nationwide service *See, e.g., Salihu v. Mary Jane M. Elliott, PC*, No. A-16-CV-1094-RP-ML, 2017 WL 8182747, at *3 (W.D. Tex. Apr. 17, 2017), *report and recommendation adopted in part*, No. 1:16-CV-1094-RP, 2017 WL 8182828 (W.D. Tex. Sept. 27, 2017) (citing 28 U.S.C. § 3004; *Reese Bros., Inc. v. U.S. Postal Service*, 477 F. Supp. 2d 31, 38 (D.D.C. March 5, 2007)); *Holmes v. New Logic Bus. Loans Inc.*, No. 1:15-CV-164-ZJH, 2015 WL 12748311, at *2 (E.D. Tex. Oct. 7, 2015) ("The FDCPA provides for nationwide service of process.") (citing 28 U.S.C. § 3004; *Reese Bros., Inc.*, 477 F. Supp. 2d at 38).

Upon consideration of the Parties' additional briefing and reviewing all cited authorities and the statutory text, the Court finds more persuasive those cases holding that neither the FDCPA, nor the TDCA provide for nationwide service of process. *Davis*, 2013 WL 1155375, at *1 ("The court has found nothing in the language of either the FDCPA or the FCRA authorizing nationwide service of process."); *Gallegos v. Tygart*, No. CIV. 14-291 JCH/KK, 2017 WL 4872887, at *3 (D.N.M. July 20, 2017) ("The FDCPA, however, does not authorize nationwide service of process in a case such as this one."); *Howell v. Clark Cty. Collection Serv., LLC*, No. 1:14-CV-00553-TWP, 2015 WL 1210599, at *1 (S.D. Ind. Mar. 16, 2015) ("The federal statute serving as the basis for this litigation, the Fair Debt Collection Practices Act, does not authorize nationwide service of process or govern personal jurisdiction.") (citing *Maloon v. Schwartz*, 399 F. Supp. 2d 1108, 1111 (D. Haw. 2005)); *Velez v. Portfolio Recovery Assocs., Inc.*, 881 F. Supp. 2d 1075, 1081 (E.D. Mo. 2012) ("The FDCPA, however, provides neither an independent basis for personal jurisdiction nor nationwide service of process.") (citing *Thoennes v. Masari Investments, LLC*, No. 092822SC, 2009 WL 4282807, at *2 (N.D. Cal. Nov. 25, 2009) (holding that 15 U.S.C. § 1692k(d), the basis for subject matter jurisdiction under the FDCPA, does not obviate the requirement for personal jurisdiction) (citing *Sluys v. Hand*, 831 F.Supp. 321, 325 (S.D.N.Y. 1993) ("A non-restrictive approach toward forum determination under the Act is set forth in 15 USC § 1692k(d), which does not expand personal jurisdiction parameters but indicates that they should not be construed in an unduly restrictive way in cases under the Act."))); *Fried v. Surrey Vacation Resorts, Inc.*, No. 08-CV-534-BBC, 2009 WL 585964, at *2 (W.D. Wis. Mar. 6, 2009) ("Although

some federal legislation permits nationwide service of process, the Fair Debt Collection Practices Act does not."); *Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prod., Inc.*, No. CV 17-2161, 2018 WL 1377608, at *4 (E.D. La. Mar. 19, 2018) ("Because Casso's claim is based on the TCPA, which does not provide for nationwide service of process, and Louisiana's long-arm statute extends personal jurisdiction to the full limits of the due process clause, the Court's focus is solely on whether the exercise of its jurisdiction in this case satisfies federal due process requirements."). As such, the Court must analyze whether it may exercise general and/or specific jurisdiction over Defendants Tom Moran, Hal Browder, Matthew Guthrie, Commonwealth Servicing, DMB Financial, and Monmouth Marketing based upon their contacts with the forum state (Texas).

General Jurisdiction

***7** "General jurisdiction exists only when the defendant's contacts with the forum state are so " 'continuous and systematic' " as to render them essentially at home in the forum State." *Lahman*, 2018 WL 3035916, at *5 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); citing *Cent. Freight Lines v. APA Transp. Corp.*, 322 F.3d 376, 381 (5th Cir. 2003) (citing *Helicopteros*, 466 U.S. at 414 n. 8)). "Substantial, continuous and systematic contact with a forum is a difficult standard to meet and requires extensive contacts between a defendant and the forum." *Id.* (citing *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008)). "The minimum contacts required to establish general jurisdiction are 'more extensive [in] quality and nature... than those needed for specific jurisdiction.' " *Oldaker v. Johnson & Johnson, Inc.*, 3:13-CV-2159-O, 2013 WL 12126260, at *4 (N.D. Tex. Nov. 20, 2013) (quoting *Choice Healthcare, Inc. v. Kaiser Found. Health Plan of Colo.*, 615 F.3d 364, 368 (5th Cir. 2010) (citations omitted); citing *Busch v. Viacom Int'l, Inc.*, 477 F. Supp 2d 764, 773 (N.D. Tex. 2007) (citing cases establishing that "threshold contacts required for assertion of [general] jurisdiction are very substantial")). "To find general jurisdiction over the defendant, a defendant's contacts with the forum must be substantial; random, fortuitous, or attenuated contacts are not sufficient." *Id.* (quoting *Choice Healthcare*, 615 F.3d at 368). "Courts evaluate all of the defendant's contacts with the forum over a reasonable number of years, but 'vague and overgeneralized assertions' are insufficient to support general jurisdiction." *Id.* (quoting *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 610 (5th Cir. 2008) (citing *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 717 (5th Cir. 1999))); *see also Lahman*, 2018 WL 3035916, at *5 ("[V]ague and overgeneralized assertions that give no indication as to the extent, duration, or frequency of contacts are insufficient to support general jurisdiction.") (quoting *Johnston*, 523 F.3d at 609)).

Entity Defendants

Defendants Monmouth Marketing, Commonwealth Servicing, and DMB Financial (hereinafter the "Entity Defendants") assert that the Court lacks general personal jurisdiction over them [Dkts. 62 at 10, 80 at 10]. "Continuous activity within the forum state alone is not sufficient to establish general personal jurisdiction; rather a plaintiff must show that the defendant's operations in the State are 'so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.' " *Oldaker*, 2013 WL 12126260, at *4 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 318 (1945); citing *Goodyear Dunlop Tires*, 131 S. Ct. at 2856; *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 230 (5th Cir. 2012)). "Furthermore, a nonresident defendant's contacts must 'demonstrate a business presence in Texas,' and the Fifth Circuit has emphasized the distinction between 'doing business *with* Texas... [and] doing business *in* Texas.' " *Id.* (quoting *Access Telecom*, 197 F.3d at 717; citing *Johnston*, 523 F.3d at 611; *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 585 (5th Cir. 2010); *Am. Univ. Sys., Inc. v. Am. Univ.*, 858 F. Supp. 2d at 713).

Plaintiff's Second Amended Complaint contends that "the defendants transact business [in the State of Texas], and the acts and transactions occurred here. Personal jurisdiction is apparent as the defendants are making calls to the state of Texas for the purpose of soliciting Texas residents for debt relief and by contracting with and doing business with a

licensed Texas Attorney, Amber Florio and her law firm" [Dkt. 52 at 2]. This is insufficient to demonstrate that any of the Entity Defendants have the continuous and systematic contacts with the State of Texas required for general personal jurisdiction. *See Oldaker v. Johnson & Johnson, Inc.*, 3:13-CV-2159-O, 2013 WL 12126260, at *4–5 (N.D. Tex. Nov. 20, 2013) ("Plaintiff's general assertions that Ethicon LLC places its products into the stream of commerce and conducts business "within" Texas are insufficient to meet the requirements to establish general jurisdiction"); *see also Carruth v. Michot*, A-15-CA-189-SS, 2015 WL 6506550, at *7–8 (W.D. Tex. Oct. 26, 2015). Monmouth Marketing, Commonwealth Servicing, and DMB Financial are limited liability companies organized under and governed by the laws of states other than Texas [Dkt. 52 at 2]. Plaintiff incorrectly identifies these LLCs as corporations in his Second Amended Complaint. Whether an LLC or a corporation, Plaintiff has still failed to establish that the Court may exercise general personal jurisdiction over the Entity Defendants. *See My Fabric Designs, Inc. v. F+W Media, Inc.*, 3:17-CV-2112-L, 2018 WL 1138436, at *4 (N.D. Tex. Mar. 2, 2018) ("The corporate defendant's place of incorporation and principal place of business are the "paradigm" forums where it is "at home.") (citing *BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549, 1558(2017) (quoting *Daimler AG v. Bauman*, 134 S.Ct. 746, 760 (2014)); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)) (internal quotation marks omitted)); *see also Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) ("It is, therefore, incredibly difficult to establish general jurisdiction [over a corporation] in a forum other than the place of incorporation or principal place of business.") (citations omitted).

***8** Monmouth Marketing is a limited liability company organized under New Jersey law, and Commonwealth Servicing and DMB Financial are organized under Massachusetts law. Plaintiff has not alleged that any of these entities have employees, offices, or bank accounts in Texas. Further, Plaintiff's allegation that one or more of the Entity Defendants entered into a contract with a Texas individual and entity, standing alone, is insufficient to establish general jurisdiction. *See Evergreen Media Holdings, LLC v. Safran Co.*, 68 F. Supp. 3d 664, 674 (S.D. Tex. 2014) ("An out-of-state defendant that merely does business with Texas businesses or customers will not be subject to general jurisdiction if it does not have a lasting physical presence in the state.") (citing *Best Little Promohouse in Texas LLC v. Yankee Pennysaver, Inc.*, 3:14-CV-1824-BN, 2014 WL 5431630, at *3 (N.D. Tex. Oct. 27, 2014) (Horan, J.) (citing *Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 717 (5th Cir. 1999)). Notably, Plaintiff's briefing urges only the application of specific personal jurisdiction with respect to the Entity Defendants [Dkts. 73, 86]. Indeed, Plaintiff does not allege any extensive business contacts between the Entity Defendants and the State of Texas. The Court finds that Plaintiff has not established that Defendants Monmouth Marketing Group, LLC, Commonwealth Servicing Group, LLC, and DMB Financial, LLC could be considered "at home" in Texas.

Individual Defendants

Individual Defendants Tom Moran, Matthew Guthrie, and Hal Browder also assert that the Court lacks general personal jurisdiction over them [Dkts. 62 at 10, 80 at 10]. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile." *Arrow Elecs., Inc. v. Fireracker, LLC*, No. 4:17-CV-00895, 2018 WL 1761883, at *2 (E.D. Tex. Apr. 12, 2018) (Mazzant, J.) (quoting *Daimler*, 571 U.S. at 127 (citing *Goodyear*, 564 U.S. at 919)); *see also Clement Grp., LLC. v. ETD Servs., LLC.*, No. 4:16-CV-00773, 2017 WL 2972877, at *3 (E.D. Tex. July 12, 2017) (Mazzant, J.) (same); *Yasinosky v. River Oaks Farms Inc.*, No. 4:17-CV-214-A, 2017 WL 2709736, at *2 (N.D. Tex. June 22, 2017) (same). In the instant case, it is undisputed that Defendants Tom Moran, Matthew Guthrie, and Hal Browder are each domiciled in states other than Texas; Plaintiff alleges in his Second Amended Complaint: (1) "Tom Moran is a natural person and can be served at 163 Huntley Ave., Bayville, NJ 08721 or 2126 Sawmill, Lane Allenwood, NJ 08720;" (2) "Matthew Guthrie is a natrual [sic] person who can be served at 4 Surrey Lane, Danvers, MA 01923;" and (3) "Hal Browder is a Tennessee attorney who can be served at 3308 Lebanon Pike, Apt 30, Hermitage, TN 37076." [Dkt. 50 at 2]. Plaintiff does not assert the Individual Defendants are subject to the Court's exercise of general jurisdiction. Rather, Plaintiff alleges the Court has jurisdiction as a result of the calls placed to him, which give rise to this action. Plaintiff alleges no other contacts with Texas by any of the Individual Defendants. Plaintiff has not established that any

of the Individual Defendants could be considered "at home" in Texas; accordingly, the Court may not exercise general personal jurisdiction over Defendants Tom Moran, Matthew Guthrie, and Hal Browder.

Specific Jurisdiction

"Specific jurisdiction is proper when the plaintiff alleges a cause of action that grows out of or relates to a contact between the defendant and the forum state." *Lahman*, 2018 WL 3035916, at *5 (citing *Helicopteros*, 466 U.S. at 414 n. 8). "For the Court to exercise specific jurisdiction, the Court must determine[:] '(1) whether the defendant has... purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.' " *Id.* (quoting *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 378 (5th Cir. 2002) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985))). "Defendants who ' "reach out beyond one state" and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for consequences of their actions.' " *Id.* (quoting *Burger King Corp.*, 471 U.S. at 475 (citing *Travelers Health Assoc. v. Virginia*, 339 U.S. 643, 647 (1950))). "Establishing a defendant's minimum contacts with the forum state requires contacts that are more than 'random, fortuitous, or attenuated, or of the unilateral activity of another party or third person.' " *Id.* (quoting *Burger King Corp.*, 471 U.S. at 475).

Entity Defendants

***9** Commonwealth Servicing, DMB Financial, and Monmouth Marketing argue that Plaintiff's pleadings fail to establish personal jurisdiction because "Plaintiff needs to allege more facts other than 'the defendants transact business here, and that the acts and transactions occurred here.' Additionally, the Plaintiff fails to allege that any of these Defendants actually made any of the alleged calls, or that the calls were made while the Plaintiff was in the state of Texas.... Plaintiff is not a resident of the state of Texas" [Dkts. 62 at 12, 80 at 11-12]. Plaintiff responds that:

> The minimum contacts between Texas and the Defendants are the contracts between Amber Florio or her law office and DMB Financial/Commonwealth Servicing [and Monmouth]... to engage in debt relief services and the 50-200 calls soliciting the Plaintiff for debt relief services placed to the Plaintiff while in Texas. Additionally, the contract sent to the Plaintiff contains both the name and address of Amber Florio and the Commonwealth Law Group and indicates they are related entities working together....The "affidavit of Compliance states an attorney or paralegal affiliated with and under contract to the commonwealth Law Group, PLLC, The Law offices of Amber Florio, PLLC, in my role as a member, partner, employee, or independent contract of said firm (TCLG) confirm that I have conducted a personal and face-to-face meeting with Dan Cooper" [8] or "Craig Cunningham "depending on which representation agreement is being viewed. This links Amber Florio and her law firm with Commonwealth Law firm and the calls received [sic].
>
> ***
>
> Furthermore, the page titled "Communications with Commonwealth Law Firm lists the address of Amber Florio which is 420 Throckmorton Street, ste 200, Fort Worth Tx 76102, which is the address listed for Amber Florio according to Floriolawfirm.com . This links Amber Florio and her law firm with the Commonwealth Law firm and the calls received [sic].
>
> ***
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> The second nexus to Texas are the 50-200 phone calls that the Plaintiff received [sic], including the multiple phone calls that the Plaintiff received [sic]. The Plaintiff alleges that he was in Texas at all times relevant to the complaint and that the Defendants knew they were calling Texas residents. The Plaintiff has alleged that the nature of the business is debt relief services, according to the contract that was sent to the Plaintiff as a result of the calls.

[Dkts. 73 at 10-12, 86 at 12-14].

The Court finds that Plaintiff's allegations meet the prima facie burden for establishing specific personal jurisdiction over Commonwealth Servicing, DMB Financial, and Monmouth Marketing. "By entering into an agreement with a [Texas entity] that contemplates continuing activities geared towards residents of this forum, [the Court] find[s] that [Monmouth Marketing, DMB Financial, and Commonwealth Servicing] purposefully availed [themselves] to the laws and protections of [Texas]," and therefore, "engage[d] in sufficient 'minimum contacts' with this forum to warrant specific personal jurisdiction." *See Bizzare Foods, Inc. v. Premium Foods, Inc.*, CIV.A. 02-CV-9061, 2003 WL 21120690, at *5 (E.D. Pa. May 16, 2003); *see also McQueen v. Huddleston*, 17 F. Supp. 3d 248, 253 (W.D.N.Y. 2014). Plaintiff's alleges that one or more of these defendants contracted together for the promotion of a Texas individual and a Texas entity's debt relief services, Amber Florio and the Florio Law Firm. Specifically, Plaintiff alleges that this agreement contemplates that the corporate defendants would direct call-recipients to Amber Florio and the Florio Law Firm, a Texas resident and a Texas entity. In addition, Plaintiff does, contrary to Defendants' assertion, claim in his live complaint that the Entity Defendants placed the calls to him in Texas: "[s]ome calls were directly made by Matthew's corporations [Commonwealth Servicing and DMB Financial" [Dkt. 52, para 16]; "Plaintiff discovered the call [sic] were being directly placed from Monmouth Marketing Group" [Dkt. 52, para 17].

***10** Based on the record currently before the Court, imposing personal jurisdiction over Commonwealth Servicing, DMB Financial, and Monmouth Marketing comports with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 320. In determining whether specific assertions of jurisdiction are reasonable, we consider the "burden on the defendant, the forum State's interest in adjudicating the dispute, [and] the plaintiff's interest in obtaining convenient and effective relief." *Burger King*, 471 U.S. at 477. By entering into a contract with a Texas entity that creates a continuing relationship and obligation between the entities, wherein the Entity Defendants agreed to promote and refer callers to the Texas entity, in addition to being alleged to have made numerous calls to Texas, they had "fair warning" that litigation resulting from its contractual obligations could occur in this forum. *See Bizzare Foods*, 2003 WL 21120690, at *6 ("Since Bibby, by entering into the Factoring Agreement, incurred continuing obligations with residents of the forum, we do not find it unreasonable to require Bibby to submit to the burdens of litigation in this forum.") (citing *Burger King*, 471 U.S. at 472). Accordingly, Plaintiff's complaint establishes a prima facie showing of personal jurisdiction over Defendants Commonwealth Servicing, DMB Financial, and Monmouth Marketing that does not offend "traditional notions of fair play and substantial justice."

Individual Defendants

Plaintiff alleges that Defendants Tom Moran, Matthew Guthrie, and Hal Browder, either directed the allegedly violative calls to be made or benefitted from the making of such calls. Specifically, Plaintiff alleges:

> Upon further investigation, the Plaintiff learned that the debt relief services were actually by and on behalf of the Commonwealth Servicing Group, LLC and DMB Financial, LLC two Massachussets [sic] corporations owned by Matthew Guthrie, the real ringleader of this illegal telemarketing operation. Commonwealth Servicing Group, LLC, DMB Financial, LLF and Matthew Guthrie are vicariously and directly liable for each and every call to the Plaintiff. Some calls were directly made by Matthew's corporations to the Plaintiff.
>
> ***
>
> Upon further investigation, the Plaintiff discovered the call were being directly placed from Monmouth Marketing Group, LLC a New Jersey corporation at the direction and with the direct, personal involvement of Tom Moran. Momnouth [sic] Marketing Group and Tom Moran are directly liable for each and every phone call to the Plaintiff.
>
> ***

> Hal Browder is a Tennessee licensed attorney, but is not licensed to practice law in Texas. Hal Browder was referred to the Plaintiff as an attorney who would represent the Plaintiff for debt relief by Commonwealth Law Group.

[Dkt. 52 at 4].

Plaintiff does not allege the Individual Defendants themselves made the calls at issue, but rather in their various roles, caused, directed, or benefitted from the calls. The Individual Defendants contend that Plaintiff cannot establish specific jurisdiction over them because "Plaintiff fails to allege that any of these Defendants actually made any of the alleged calls, or that the calls were made while the Plaintiff was in the state of Texas....The truth of the matter is that the Plaintiff is not a resident of the state of Texas. He admitted to being a resident of Tennessee in his pleadings, and other circumstantial evidence supports this fact" [Dkts. 62 at 12-13, 80 at 11-12].

As to the latter allegation, Plaintiff avers that he was actually living in Texas at the time of the alleged calls [Dkts. 73-2 at 2, 86-1 at 1]. Plaintiff further argues in response that the Court may exercise specific personal jurisdiction over the Individual Defendants because "[a]lthough the above listed defendats [sic] are not Texas residents, they have sufficient minimum contacts within the state for the court to have personal jurisdiction as they knew they were calling Texas residents, including the Plaintiff, and contracted with a Texas business and Texas lawyer and are thus engaging in business in Texas" [Dkt. 86 at 11-12; *see* Dkt 73 at 10-11]. Plaintiff clarifies in his Responses that the Individual Defendants contracted with Texas companies, by and through the companies owned and/or operated by the Individual Defendants [Dkts. 73 at 11; 86 at 12].

Hal Browder

***11** First, the Court considers whether it may exercise personal jurisdiction over Defendant Hal Browder. Mr. Browder specifically argues that "as alleged by the Plaintiff, [he] is an attorney licensed in the state of Tennessee. There is no reason that he would be conducting business in the state of Texas as he is not a licensed in that state. The Plaintiff does not allege that Mr. Browder had any ownership in any of Defendants' businesses, or that he is licensed in the state of Texas to practice law. Nor, does the Plaintiff allege that Mr. Browder actually made any of the alleged calls. The Complaint references only that Mr. Browder's name was mentioned during the course of the calls as an attorney who might handle the debt relief services. This matter should be dismissed as to Mr. Browder for lack of personal jurisdiction [Dkt. 62 at 12]. Plaintiff's allegations against Hal Browder do not reflect any action taken by Mr. Browder himself in or directed to the State of Texas, much less that Mr. Browder "purposely directed [his] activities toward the forum state or purposely availed itself of the privileges of conducting activities there." *Lahman*, 2018 WL 3035916, at *5. These contentions are insufficient for conferring specific personal jurisdiction over Defendant Hal Browder.

Tom Moran and Matthew Guthrie

Plaintiff's allegations that Individual Defendants Tom Moran and Matthew Guthrie, in their capacity as the officers of the Entity Defendants, authorized and/or were involved with calls placed to Plaintiff's cellular phone while he resided in the forum state are also insufficient to establish personal jurisdiction.

Courts within the Fifth Circuit have held that "personal jurisdiction over individual officers and employees of a corporation may not be predicated on the federal court's jurisdiction over the corporation itself, unless the individuals are engaged in activities within the forum court's jurisdiction that would subject them to the application of the state's long-arm statute." *Cooke v. Jaspers*, CIVA H-07-3921, 2010 WL 918342, at *3 (S.D. Tex. Mar. 10, 2010) (citing 4A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1069.4 (3d ed. 2002)); *see also Skidmore Energy, Inc. v. KPMG*, CIV.A.3:03-CV-2138-B, 2004 WL 2008514, at *7 (N.D. Tex. Sept. 3, 2004); *Osborn v. Computer Scis. Corp.*, A-04-CA-158 LY, 2004 WL 5454427, at *5–6 (W.D. Tex. Oct. 25, 2004), *report and recommendation adopted in part sub nom. Osborn v. Computer Scis. Corp*, CIV. A-04-CA-158-LY, 2004 WL 5454889 (W.D. Tex. Dec. 29, 2004) ("Succinctly

paraphrased, 'jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation.' ") (quoting *Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985) (quoting *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F. Supp. 798, 803-04 (S.D.N.Y. 1975)). In the instant case, Plaintiff's allegations fail to demonstrate any individualized conduct taken in the forum state by any of the Individual Defendants. [9] Jurisdiction over the Individual Defendants cannot be predicated upon jurisdiction over Commonwealth Servicing, Monmouth Marketing, or DMB Financial. Plaintiff fails to plead with any specificity, the Individual Defendants personal involvement in the alleged calls. In addition, Plaintiff's allegations that the Individual Defendants, acting in their corporate capacities, entered into contracts with a Texas individual and Texas entity on the corporate entity's behalf does not confer personal jurisdiction over the Individual Defendants. *See 21st Century Fin. Services, Inc. v. Mandelbaum*, A-10-CA-803 LY, 2011 WL 3844209, at *8 (W.D. Tex. Aug. 30, 2011), *report and recommendation adopted as modified sub nom. 21ST Century Fin. Services, LLC v. Manchester Fin. Bank*, A-10-CA-803-LY, 2011 WL 13108099 (W.D. Tex. Oct. 7, 2011) ("Because the Individual Defendants were merely acting in their corporate capacities on behalf of Manchester Bank in their dealings with Plaintiff, the fiduciary shield doctrine prevents the Court from exercising specific jurisdiction over them... although Defendant Mandelbaum signed and executed the Agreement, he did so in his capacity as President and CEO of Manchester Bank, not in his individual capacity. Courts have rejected the exercise of personal jurisdiction over the signatory on a contract who was acting in a representative capacity for a corporation.") (citing *Pension Advisory Group, Ltd. v. Country Life Ins. Co.*, 771 F. Supp. 2d 680 (S.D. Tex. 2011) (declining to exercise personal jurisdiction over defendant where he signed the contract in his representative capacity on behalf of the corporation); *Cerbone v. Farb*, 225 S. W.3d 764,771 (Tex. App.–Houston [14th Dist.] 2007, no pet.) (holding that defendant did not purposefully avail himself of Texas jurisdiction by signing a promissory note in his corporate capacity on behalf his company)); *Tyson v. Austin Eating Disorders Partners, LLC*, A-13-CA-180-SS, 2013 WL 3197641, at *4 (W.D. Tex. June 21, 2013) ("There is no dispute McCallum had a number of contacts with Texas, though all of those contacts were in his capacity as an AED officer. Those acts are properly shielded from consideration, as McCallum was acting on behalf of the corporation, and the corporation's actions cannot be imputed to McCallum individually."); *Constr. Aggregates, Inc. v. Senior Commodity Co.*, 860 F. Supp. 1176, 1179 (E.D. Tex. 1994), *aff'd sub nom. Constr. v. Senior Commodity*, 48 F.3d 531 (5th Cir. 1995) ("The uncontroverted record shows that this contact with the state—negotiating the contract, returning the signed contract to Texas, and performing the contract—was done solely in Doyle's capacity as a corporate officer.... Thus, Doyle's contacts made in connection with the contract do not count in determining whether the court has jurisdiction over him."). The Court may not exercise specific personal jurisdiction over Individual Defendants Tom Moran or Matthew Guthrie. *See Lahman*, 2018 WL 3035916, at *5.

Failure to State a Claim

***12** In addition to Defendants' personal jurisdiction arguments asserting that dismissal is appropriate, Defendants also argue that Plaintiff's claims must be dismissed for failure to state a claim pursuant to Rule 12(b)(6). It is proper for the Court to consider, in the alternative, Defendant's arguments under both Rule 12(b)(2) and (6). *See Allen v. Noah Precision, LLC*, 4:14-CV-611, 2016 WL 6476951, at *7 (E.D. Tex. Nov. 2, 2016) (Priest-Johnson, J.) (dismissing case on Rule 12(b)(2) grounds and alternatively considering Rule 12(b)(6) arguments); *Dahlstrom v. Dawkins*, 4:15-CV-384-ALM-CAN, 2015 WL 9647521, at *6 (E.D. Tex. Nov. 20, 2015), *report and recommendation adopted*, 4:15-CV-384, 2016 WL 69905 (E.D. Tex. Jan. 6, 2016) (Mazzant, J.) (same).

A Rule 12(b)(6) motion to dismiss argues that, irrespective of jurisdiction, the complaint fails to assert facts that give rise to legal liability of the defendant. The Federal Rules of Civil Procedure require that each claim in a complaint include "a short and plain statement ... showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The claims must include enough factual allegations "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, "[t]o 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.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

The Court must accept as true all well-pleaded facts contained in Plaintiff's Complaint and view them in the light most favorable to Plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, the Court identifies conclusory allegations and proceeds to disregard them, for they are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 681. Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Id.* "This standard 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary claims or elements." *Morgan v. Hubert*, 335 F. App'x 466, 470 (5th Cir. 2009).

TCPA Claims

Section 227(b)

Section 227(b) of the TCPA makes it unlawful for any person "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service for which the called party is charged for the call," or "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A)(iii), (B). The TCPA defines "automatic telephone dialing system" as equipment with the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator" and to dial such numbers. *Id.* § 227(a). The Fifth Circuit has concluded that "[t]o be liable under the 'artificial or prerecorded voice' section of the TCPA ... a defendant must make a call and an artificial or prerecorded voice must actually play." *Ybarra v. Dish Network, LLC*, 807 F.3d 635, 640 (5th Cir. 2015).

***13** In its Motions to Dismiss, Defendants argue that Plaintiff "fails to indicate the cellular telephone numbers(s) that was allegedly called or the incoming phone numbers allegedly used by the Defendants to call the Plaintiff" [Dkts. 62 at 7, 80 at 7]. Defendants further argue that "Plaintiff is required to plead the exact number of calls alleged, the dates in which the calls were placed, the manner in which each call was placed (whether robo-call and/or pre-recorded message), whether he answered each call and details about his phone such as the type of service/data plan the Plaintiff has on his phone(s)" [Dkts. 62 at 8, 80 at 7]. Having declined to plead the above, Defendants assert Plaintiff's Complaint "should be dismissed as it has failed to state a claim for which relief can be granted. The Plaintiff in this instance merely plead labels, conclusions and a formulaic recitation of TCPA elements" [Dkts. 62 at 8, 80 at 7].

In the Amended Complaint, Plaintiff alleges that in 2016 he received between fifty (50) and two-hundred (200) calls to his cellular phone(s) and that in these pre-recorded calls, Defendants attempted to sell debt relief services to Plaintiff [Dkt. 52 at 3-4]. Plaintiff's Second Amended Complaint does not provide the date or time these calls were received beyond stating the calls were made "in 2016" [Dkt. 52 at 3]. Plaintiff does allege that the dead air time indicate that the messages were being made by an automatic telephone dialing system [Dkt. 52 at 3]. [10]

The Court finds that the Amended Complaint need not identify the specific telephone number called to sustain Plaintiff's claim. *Crawford v. Target Corp.*, 3:14-cv-0090, 2014 WL 5847490, at *3 (N.D. Tex. Nov. 10, 2014) (finding that "a plaintiff's specific telephone number is not essential to providing a defendant notice of the conduct charged"). And as to the remaining details Defendants allege are omitted from Plaintiff's complaint, the Plaintiff is expected to plead sufficient facts relating to the calls he claims to have received on his own phone to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements, such as the amount of calls and the approximate date they were received. At this early stage, the Court finds that the Amended Complaint states sufficient facts to survive dismissal.

See Augustin v. Santander Consumer USA, Inc., 43 F. Supp. 3d 1251, 1253 (M.D. Fla. 2012). Thus, the Court concludes that Plaintiff has pleaded adequate facts connecting Defendants with the alleged misconduct, and therefore, adequately asserts a claim under § 227(b) of the TCPA. Accordingly, Defendants' Motions to Dismiss under Rule 12(b)(6) Plaintiff's TCPA claim under § 227(b) should be denied.

Section 227(c)

Plaintiff alleges that "placing unsolicited automated calls to the Plaintiff's cell phone... violated the TCPA, 47 USC 227(c)(5) as they failed to maintain a do not call list and train their agents on the use of it" [Dkt. 52 at 8]. Section 227(c)(5) of the TCPA allows a private right of action for "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 prescribed regulations in 47 C.F.R. § 64.1200(d). 47 U.S.C. § 227(c)(5). 47 C.F.R. § 64.1200(d) states that "[n]o person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity." 47 C.F.R. § 64.1200(d) (emphasis added). In the instant case, Plaintiff has not adequately pleaded his TCPA claim under § 227(c)(5). Plaintiff's allegations under this specific part of the statute provide no detail whatsoever as to the nature or extent of these violations. Moreover, Plaintiff admits that he has never requested to be placed on any do not call list. Accordingly, Plaintiff is not entitled to relief under § 227(c)(5). "The regulation relates to a marketer's duty to prepare internal policies to receive and implement affirmative requests not to receive calls; Plaintiff does not allege that he made any such affirmative request to Defendants, and therefore it is not clear how the provision was violated" [*see* Dkt. 52]. *See Bailey v. Domino's Pizza, LLC*, 867 F. Supp. 2d 835, 842 (E.D. La. 2012) (court granted defendant's motion to dismiss plaintiff's claim because he did not allege that he made an affirmative request to not receive calls). Plaintiff's allegations fail to state a claim for relief under § 227(c). *See Jung v. Bank of Am., N.A.*, 3:16-CV-00704, 2016 WL 5929273, at *9 (M.D. Pa. Aug. 2, 2016) (court dismissed Plaintiff's claim under § 227(c)(5) because "Plaintiff offers no facts plausibly demonstrating that she subscribed to the National Do-Not-Call Registry or that Defendants violated the FCC's prescribed regulations for protecting the privacy of residential telephone subscribers."); *see also FRED HEIDARPOUR, ET AL., Plaintiffs, v. EMPIRE CAPITAL FUNDING GROUP INC., Defendant. Additional Party Names: Abante Rooter & Plumbing Inc.*, 18-CV-00250-YGR, 2018 WL 3455809, at *2 (N.D. Cal. July 18, 2018) (denying motion for default judgment for claims under § 227(c)(5) where "with respect to the liability and damages allegations, plaintiffs do not specifically allege facts, or provide supporting evidence, to establish when and how anyone requested that the phone numbers at issue be placed on the National Do Not Call Registry."). Defendants' Motions to Dismiss under Rule 12(b)(6) Plaintiff's TCPA claim under § 227(c) should be granted.

FDCPA Claims

***14** Plaintiff also asserts claims against Defendant under §§ 1692a, 1692e, and 1692g of the FDCPA [Dkt. 52 at 5]. The FDCPA seeks "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." *Peter v. GC Servs. L.P.*, 310 F.3d 344, 351–52 (5th Cir. 2002) (citation omitted); *see also* 15 U.S.C. § 1692(e); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010). The FDCPA prohibits a debt collector from making "false, deceptive, and misleading misrepresentations in connection with debt collection" and from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. §§ 1962e and 1962f. The Act also requires a debt collector, within five days after its "initial communication with a consumer in connection with the collection of any debt," to provide the consumer with certain disclosures, including her right to dispute or request validation of the debt. *See id.* § 1692g(a).

For purposes of the FDCPA, a "debt collector" is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempt to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6). There are two categories of debt collectors: those who collect debts as the "principal purpose" of their business, and those who collect debts "regularly." *Hester v. Graham, Bright & Smith, P.C.*, 289 F. App'x 35, 41 (5th Cir. 2008). "A person

may 'regularly' collect debts even if debt collection is not the principal purpose of his business." *Id.* "Whether a party 'regularly' attempts to collect debts is determined, of course, by the volume or frequency of its debt collection activities." *Brown v. Morris*, 243 F. App'x 31, 35 (5th Cir. 2007) (per curiam).

Plaintiff claims "[t]he Defendants in this case violated the FDCPA by attempting to collect a debt and falsely representing their names, which is a false or misleading representation. Additionally, the Defendants placed multiple harassing calls to the Plaintiff which would annoy or harass a reasonable person." [Dkt. 52 at 4]. Plaintiff's complaint also alleges that Defendants were calling Plaintiff for the purpose of "selling debt relief services [Dkt. 52].

As an initial matter, Plaintiff's allegations regarding debt collection appear to be out of context with the remaining factual allegations asserted, including specifically those assertions that Defendants were calling to offer debt relief services. Moreover, Plaintiff's complaint fails to allege that any debt was owed by him. Even had such an allegation been included, Plaintiff's assertion that Defendant undertook the role of "debt collector" is nothing more than a legal conclusion that courts are not bound to accept as true. *See Iqbal*, 556 U.S. at 678. Here, Plaintiff fails to assert facts sufficient to show that Defendants were debt collectors because they were either engaged "in [a] business the principal purpose of which [was] the collection of ... debts" or it "regularly collect[ed] or attempt[ed] to collect ... debts owed or due or asserted to be owed or *due another." See* 15 U.S.C. § 1692a(6) (emphasis added). This failure is fatal to his FDCPA claims. *See Iqbal*, 556 U.S. at 678 (holding that a plaintiff must plead sufficient factual matter to state a claim); *Guidry*, 954 F.2d at 281 (well-pleaded facts are needed to avoid dismissal); *Parker v. Buckley Madole, P.C.*, 417CV00307ALMCAN, 2018 WL 1704079, at *5 (E.D. Tex. Jan. 11, 2018) ("Plaintiffs aver only that Wells Fargo "offers services such as debt collection, management US receivables, debt collection pertaining to consumers," and is a debt collector. Such conclusory allegations are insufficient to allege that Wells Fargo is a debt collector subject to the FDCPA.") (internal citations omitted), *report and recommendation adopted*, 4:17-CV-307, 2018 WL 1625670 (E.D. Tex. Apr. 4, 2018); *Bent v. Mackie Wolfe Zientz & Mann, P.C.*, 3:13-CV-2038-D, 2013 WL 4551614, at *2–3 (N.D. Tex. Aug. 28, 2013) (finding dismissal warranted where plaintiff made the legal conclusion that the defendants were debt collectors); *Garcia v. Jenkins/Babb LLP*, No. 3:11–CV–3171–N–BH, 2012 WL 3847362, at *6 (N.D. Tex. July 31, 2012), *rec. adopted*, 2012 WL 3846539 (N.D. Tex. Sept. 5, 2012) (holding that the plaintiffs' recitation of the statutory definition of "debt collector" without any facts in support was insufficient to plausibly allege that the defendants were debt collectors under the FDCPA). In the present case, after having amended his complaint on several occasions, Plaintiff continues to merely recite the legal definition of the FDCPA and allege Defendants violated it without adducing sufficient factual evidence demonstrating how Defendants violated the FDCPA. Accordingly, Defendants' Motions to Dismiss under Rule 12(b)(6) Plaintiff's FDCPA claims should be granted.

CONCLUSION AND RECOMMENDATION

***15** Based on the foregoing, the Court recommends that Defendants Commonwealth Servicing Group, LLC, DMB Financial, LLC, Amber Florio, Law Offices of Amber Florio, Hal Browder, and Matthew Guthrie's Motion to Dismiss [Dkt. 62] and Defendants Tom Moran and Monmouth Marketing Group, LLC's Motion to Dismiss and to Strike Plaintiff's Second Amended Complaint [Dkt. 80] each be **GRANTED IN PART** and **DENIED IN PART.**

Specifically, the Court recommends that the Individual Defendants be dismissed for lack of personal jurisdiction and Plaintiff's claims under the FDCPA and § 227(c) of the TCPA be dismissed for failure to state a claim. Plaintiff's claims under § 227(b) of the TCPA against the Entity Defendants, Amber Florio, and the Law Offices of Amber Florio remain.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination

is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile 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).

SIGNED this 6th day of August, 2018.

All Citations

Slip Copy, 2018 WL 4473792

Footnotes

1 Plaintiff filed his Original Complaint on December 7, 2017 but the Complaint was marked as deficient and Plaintiff was instructed to refile his Complaint; the Amended Complaint was filed December 12, 2017 [Dkt. 1].

2 On March, 19, 2018, Global Client Solutions was dismissed from this action subsequent to reaching a settlement with Plaintiff [Dkt. 71]. As a result, the Court does not detail any of the factual allegations against such defendant herein.

3 The Court notes that Plaintiff has filed several such complaints against similar entities, complaining of similar violations, which the Court references *supra.*

4 Because the Motions to Dismiss allege essentially the same arguments, the Court addresses both Motions together.

5 "The House of Representatives Report associated with the TCPA clearly states that '[t]he purpose of the bill (H.R. 1304) is to protect residential telephone subscriber privacy rights.' The Report discusses the possibility that, in some instances, 'automatic dialing systems can "seize" a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up.' From this, the Court concludes that an individual may also suffer an injury in fact from unauthorized telephone contact when it causes an occupation of the telephone line or an invasion of privacy." *Morris v. Unitedhealthcare Ins. Co.*, 415CV00638ALMCAN, 2016 WL 7115973, at *5 (E.D. Tex. Nov. 9, 2016), *report and recommendation adopted*, 4:15-CV-638, 2016 WL 7104091 (E.D. Tex. Dec. 6, 2016) (Mazzant, J.) (quoting H.R. Rep. No. 102-317, at 5).

6 In *Telephone Science Corp.*, the court found that the plaintiff, a company who operates a service which helps consumers avoid incoming ATDS calls, did not have standing to bring suit under the TCPA because the plaintiff maintained a "honeypot" of numbers and analyzed calls made to those numbers using an algorithm that could detect "calls placed by robocallers and calls placed by non-robocallers." 2016 WL 4179150, at *1.

7 Plaintiff argues that the Individual Defendants "have failed to adequately plead and provide evidentiary support for their dismissal under 12(b)(2)" [Dkt. 27 at 1]. However, Plaintiff bears the burden of establishing personal jurisdiction over the Individual Defendants.

8 "Dan Cooper" is an alias Plaintiff used in some of the allegedly violative phone calls.

9 Allegations similar to those in Plaintiff's pleadings in the instant case have been deemed insufficient by courts in at least two of Plaintiff's previous suits. *See Cunningham v. Local Lighthouse Corp.*, 3:16-CV-02284, 2017 WL 4053759, at *1 (M.D. Tenn. Aug. 7, 2017), *report and recommendation adopted*, 3:16-CV-02284, 2017 WL 4022996 (M.D. Tenn. Sept. 13, 2017) ("While he broadly alleges that Defendants "had direct, personal participation in causing the illegal telephone calls to be made as well as they directly authorized the illegal telemarketing calls to be made," Cunningham does not make these allegations with the "reasonable particularity" required to support a prima facie showing of personal jurisdiction"); *Cunningham v. Rapid Response Monitoring Services, Inc.*, 251 F. Supp. 3d 1187, 1208 (M.D. Tenn. 2017) ("even when viewed in the light most favorable to Plaintiff, the allegations of his Second Amended Complaint do not support a finding of personal jurisdiction over the Individual Defendants," namely because "jurisdiction over individual officers of a corporation cannot be predicated merely upon jurisdiction over the corporation.").

10 The Court notes that Plaintiffs pleads additional factual allegations in his Response not contained within the Amended Complaint [*see generally* Dkt. 73]. Generally, if the Court is presented with matters outside the pleadings in deciding a 12(b)(6) motion and does not exclude them, the motion must be treated as one for summary judgment. Fed. R. Civ. P. 12(d).

Because the Court did not give notice that it would consider facts outside of the pleadings, the Court disregards those factual allegations made by Plaintiff in his Response to the extent that they are not in the Amended Complaint. Plaintiff has been given numerous opportunities to plead his best case. Even so, the allegations in Plaintiff's responses do not relate to these 2016 calls, much less provide factual support or clarity for Plaintiff's claims related to these calls.

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