Morris v. Hornet Corp.

United States District Court for the Eastern District of Texas, Sherman Division

September 14, 2018, Decided; September 14, 2018, Filed

Civil Action No.: 4:17-cv-00350

Reporter
2018 U.S. Dist. LEXIS 170945 *

GEORGE MORRIS, Plaintiff, v. HORNET CORPORATION, Defendant.

Core Terms

summary judgment, Declaration, Registry, argues, telephone, privacy, phone, deposition testimony, alleges, database, asserts, telephone number, telemarketers, do-not-call, violating, telephone solicitation, deposition, Consumer, invasion, genuine, injury in fact, RECOMMENDATION, nonmovant's, initiated, provides, unwanted, email, district court, conclusions, regulations

Counsel: **[*1]** For Mr. George Morris, Individually and as a representative of a class, Plaintiff: Chris R Miltenberger, LEAD ATTORNEY, The Law Office of Chris R. Miltenberger PLLC, Southlake, TX.

For Hornet Corporation, Defendant: Michael Cleveland Wynne, LEAD ATTORNEY, Nall Pelley & Wynne LLP, Sherman, TX.

Judges: KIMBERLY C. PRIEST JOHNSON, UNITED STATES MAGISTRATE JUDGE.

Opinion by: KIMBERLY C. PRIEST JOHNSON

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The following motions are pending before the Court:

1. Defendant Hornet Corporation's ("Defendant") Motion for Summary Judgment (the "Motion for Summary Judgment") (Dkt. 20), wherein Defendant seeks summary judgment on all of Plaintiff George Morris's ("Plaintiff") claims. Plaintiff filed a response (Dkt. 22); Defendant filed a reply (Dkt. 25); and Plaintiff filed a sur-reply (Dkt. 29);
2. Defendant's Amended Motion to Strike Plaintiff's Summary Judgment Evidence (the "Amended Motion to Strike") (Dkt. 28), wherein Defendant asks the Court to strike Exhibit B to Plaintiff's response (Dkt. 22-2). Plaintiff filed a response to the Amended Motion to Strike (Dkt. 30);

3. Plaintiff's Motion for Partial Summary Judgment (the "Motion for Partial Summary Judgment") (Dkt. **[*2]** 23), wherein Plaintiff seeks summary judgment on the individual claims contained in Count One and Count Two of the First Amended Complaint (the "Complaint") (Dkt. 19). Defendant filed a response (Dkt. 34); and Plaintiff filed a reply (Dkt. 37). Plaintiff also filed additional evidence in support of his Motion for Partial Summary Judgment (Dkt. 35-1); and
4. Plaintiff's Motion to Strike Defendant's Evidence in Support of Defendant's Response to Plaintiff's Motion for Partial Summary Judgment (the "Motion to Strike — Error Defense") (Dkt. 37), wherein Plaintiff asks the Court

to strike portions of a declaration by Defendant's corporate representative, Kim Murrell (the "Murrell Declaration") (Dkt. 34-19).

Having reviewed all four motions, the responses thereto, and all relevant filings, the Court finds: Defendant's Motion (Dkt. 20) should be **GRANTED IN PART** and **DENIED IN PART**; Defendant's Amended Motion to Strike (Dkt. 28) is **DENIED**; Plaintiff's Motion for Partial Summary Judgment (Dkt. 23) should be **GRANTED IN PART** and **DENIED IN PART**; and Plaintiff's Motion to Strike — Error Defense (Dkt. 37) is **DENIED**.

I. BACKGROUND

Plaintiff is the owner of telephone number 972-943-9799 (the "9799 Number"), **[*3]** which is registered on the federal Do Not Call Registry (the "DNC Registry"). *See* Dkt. 19 at PP 2, 22. Despite being on the DNC Registry, Plaintiff received calls from Defendant to the 9799 Number on October 12, 2015, and October 29, 2015. *See* Dkt. 19 at P 25. Thereafter, Plaintiff placed three calls to Defendant on October 30, 2015. *See* Dkt. 20-2 at 38. The first two calls placed by Plaintiff were cut short by technical issues; however, the third call lasted approximately fifteen minutes. *See* Dkt. 20-16. In the third call, Plaintiff spoke with one of Defendant's project managers who informed Plaintiff that Defendant was an "oil drilling outfit" that was seeking investors for different projects. *See id.* at 6. Plaintiff conveyed an interest in Defendant's investment opportunity and agreed to receive follow-up in the form of materials, phone calls, and emails. *See id.* at 8-12. Plaintiff shared his email address with Defendant to receive follow-up information and also confirmed his phone number so that Defendant could call back after sending Plaintiff the information via email. *See id.*

After a ten-month break in communication, including two unanswered calls on January 4, 2016, Defendant called Plaintiff **[*4]** on August 9, 2016, and Plaintiff spoke with one of Defendant's representatives for nearly six minutes. *See* Dkt. 20-15. In this call, Plaintiff again indicated he may be interested in the investment opportunity with Defendant and shared his mailing address with Defendant's representative. *See id.* at 5-7. Thereafter, Defendant called Plaintiff's 9799 Number two more times; both calls went unanswered. *See* Dkt. 19 at ¶ 25.

In total, Plaintiff received seven phone calls—which Defendant does not dispute—over the following days: October 12, 2015, October 29, 2015, January 4, 2016 (twice), August 9, 2016, August 12, 2016 (twice). *See* Dkt. 19 at ¶ 25. Plaintiff alleges that Defendant violated the *Telephone Consumer Protection Act ("TCPA")* by making these phone calls to his number being that the number was listed on the DNC Registry. *See* Dkt. 19 at 42-53. Plaintiff also alleges that Defendant violated the Texas Business and Commerce Code by virtue of violating the TCPA. *See id.* at 54-61. Additionally, Plaintiff alleges this case should proceed as a class action to cover a class of persons whose phone numbers were registered on the DNC Registry and who received similar calls from Defendant. *See id.* at 30-41. As stated in the Scheduling **[*5]** Order (Dkt. 17), the Court first considers Plaintiff's individual claims only; the class allegations will be addressed at a later date.

II. LEGAL STANDARD

Summary judgment is appropriate when, viewing the evidence and all justifiable inferences in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Hunt v. Cromartie, 526 U.S. 541, 549, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999)*. The appropriate inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *See Provident Life & Accident Ins. Co. v. Goel, 274 F.3d 984, 991 (5th Cir. 2001)*. In sustaining this burden, the movant must identify those portions of pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The moving party,

however, "need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* (en banc). The movant's burden is only to point out the absence of evidence supporting the nonmoving party's case. **[*6]** *See Stults v. Conoco, Inc., 76 F.3d 651, 655 (5th Cir. 1996)*.

In response, the nonmovant's motion "may not rest upon mere allegations contained in the pleadings but must set forth and support by summary judgment evidence specific facts showing the existence of a genuine issue for trial." *Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998)* (citing *Anderson, 477 U.S. at 255-57*). Once the moving party makes a properly supported motion for summary judgment, the nonmoving party must look beyond the pleadings and designate specific facts in the record to show there is a genuine issue for trial. *See Stults, 76 F.3d at 655*. The citations to evidence must be specific, as the district court is not required to "scour the record" to determine whether the evidence raises a genuine issue of material fact. Local Rule CV-56(d). Neither "conclusory allegations" nor "unsubstantiated assertions" will satisfy the nonmovant's burden. *See Stults, 76 F.3d at 655*. As the Supreme Court has recognized, "the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions. . . . " *Anderson, 477 U.S. at 255*.

III. ANALYSIS

A. DEFENDANT'S MOTION TO STRIKE

Defendant's Amended Motion to Strike requests that the Court strike Exhibit B to Plaintiff's response to the Motion (Dkt. 22-2). Exhibit B is the declaration provided by Plaintiff in support of his claims (the "Declaration"). **[*7]** *See* Dkt. 22-2. In support, Defendant points to *Federal Rule of Civil Procedure 56(c)(1)(A)*, which states that a party asserting that a fact is genuinely in dispute must cite to particular materials in the record, including depositions or affidavits. *See* Dkt. 28 at 1. Defendant argues the Declaration should be struck from the record because it contains information that conflicts with Plaintiff's prior deposition testimony. *See* Dkt. 28. Defendant specifically points to paragraphs 6, 11, and 14, of the Declaration and argues that the information contained therein directly contradicts Plaintiff's deposition testimony. *See id.* Other than pointing to the referenced paragraphs and stating that they "contain[] unsubstantiated conclusions that are contrary to Plaintiff's prior sworn testimony," Defendant does not elaborate on how those statements contradict the prior testimony. Additionally, Defendant does not provide citations for the portions in the deposition testimony that are allegedly contrary to the statements in the Declaration.

In response, Plaintiff points to Fifth Circuit precedent, the Local Rules, and the Federal Rules of Evidence, which all provide that a party must point the Court to inconsistent testimony if a party wishes **[*8]** to have an affidavit struck from the record. *See* Dkt. 30 at 2-5. Alternatively, Plaintiff asserts that the Declaration does not contain unsubstantiated conclusions and is not contrary to Plaintiff's deposition testimony. *See id.* at 5-13.

Pursuant to *Rule 56(c)(4)*, a declaration used to support a motion for summary judgment must be made on personal knowledge, set facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. *See Fed. R. Civ. P. 56(c)(4)*. Defendant has made no statement that Plaintiff's Declaration (Dkt. 22-2) fails on any of these requirements. Instead, Defendant provides a blanket statement that the Declaration (Dkt. 22-2) should be struck because it contains information contrary to his deposition testimony. *See* Dkt. 28 at 1-2. As Plaintiff states, Defendant has left it to the Court to determine what information in the Declaration (Dkt. 22-2) is contrary to prior deposition testimony. *See* Dkt. 30 at 3-4. Given this lack of specificity, the Court **DENIES** Defendant's Amended Motion to Strike (Dkt. 28). The Court finds no convincing reason why Plaintiff's Declaration (Dkt. 22-2) should be struck. As a result, the Court will consider this evidence in determining **[*9]** whether Plaintiff suffered a sufficient injury.

B. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant argues it should be granted summary judgment for two reasons: first, Defendant argues that Plaintiff does not have standing; and second, Defendant argues that Plaintiff established a business relationship with Defendant after the first two calls, thereby negating any of Plaintiff's claims.

1. Standing

Defendant chiefly argues that it is entitled to summary judgment because Plaintiff has failed to meet his constitutional requirement of standing. *See* Dkt. 20 at 14-17. A party has Article III standing if: (1) he has suffered a "concrete and particularized" injury that is actual or imminent rather than conjectural or hypothetical; (2) there is a causal relationship between the injury and the challenged conduct; and (3) it is likely and not merely speculative that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*; *Westfall v. Miller, 77 F.3d 868, 871 (5th Cir. 1996)*. Congress cannot convert a generalized grievance into an individual right for standing purposes. *See Lujan v. Defs. of Wildlife, 504 U.S. 555, 577, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. However, 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, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973)*).

The TCPA makes it unlawful **[*10]** for a caller to make telephonic solicitations to a residential telephone number listed on the DNC Registry. *47 U.S.C. § 227(c)(5)*; *47 C.F.R. § 64.1200(c)*. Although the Fifth Circuit has not determined what type of TCPA-related injury is sufficient to meet Article III standing requirements, other courts have noted that "one of the purposes of the TCPA [is] to protect telephone subscribers from the 'nuisance' of unwanted calls." *Martin, et al. v. Leading Edge Recovery Sols., LLC, No. 11 C 5886, 2012 U.S. Dist. LEXIS 112795, 2012 WL 3292838, at *4 (N.D. Ill. Aug. 10, 2012)*. In *Martin*, the district court analyzed whether the plaintiffs' TCPA claims satisfied the injury-in-fact requirement of Article III. *See 2012 U.S. Dist. LEXIS 112795, [WL] at *2*. 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. *See 2012 U.S. Dist. LEXIS 112795, [WL] at *2*; *see also In re Rules Implementing the Tel Consumer Prot. Act of 1991*, *30 FCC Rcd. at 7979-80*. This Court has similarly found that a plaintiff has standing under the TCPA when he or she has provided evidence of annoyance, disruption, or invasion of privacy. *See Morris v. Unitedhealthcare Ins. Co., No. 4:15-cv-638-ALM-CAN, 2016 U.S. Dist. LEXIS 168288, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016)*, *report and recommendation adopted*, *No. 4:15-cv-638-ALM-CAN, 2016 U.S. Dist. LEXIS 168118, 2016 WL 7104091 (E.D. Tex. Dec. 6, 2016)*.

At the summary judgment stage, Plaintiff must set forth by affidavit or other evidence "specific facts" of injury resulting from Defendant's conduct. *See **[*11]** Lujan, 504 U.S. at 561*. Here, the parties have presented evidence both from the Declaration and from Plaintiff's deposition. *See* Dkts. 20-2, 22-2. As previously mentioned, Defendant argues that Plaintiff's Declaration improperly attempts to assert "specific facts" of injury so that he may have standing. *See* Dkt. 28. However, the Court has denied Defendant's Amended Motion to Strike, and the Declaration is properly before the Court. Moreover, Plaintiff has pointed to specific statements from his deposition which support and affirm Plaintiff's Declaration, as cited below. *See* Dkt. 30 at 10-13. In the Declaration—and also in his deposition—Plaintiff stated that the calls to his telephone seized the 9799 Number, making it unavailable to use while processing the calls. *See* Dkts. 20-2 at 53; 22-2 at ¶ 6. Further, Plaintiff stated that he was annoyed, disturbed, and bothered by the calls. *See id.* Additionally, Plaintiff stated that the calls proved inconvenient and a nuisance because he had to check the calling party to determine if he would need to return the call. *See* Dkts. 20-2 at 53; 22-2 at ¶ 6.

Defendant argues that Plaintiff's allegations are nothing more than "conclusory statements" unsupported by the evidence. **[*12]** *See* Dkt. 20 at 16. Defendant points to other testimony from Plaintiff's deposition to support its position. *See id.* Specifically, Defendant asserts that Plaintiff: (1) testified he did not know if any of Defendant's calls engaged his phone line; (2) did not testify that the calls made him angry, distracted, woke him up, or invaded his privacy; (3) did not testify about the specific amount of electricity charge based on the calls received; (4) testified that he did not know whether he heard the calls as they were received; and (5) generally cannot quantify his

economic damages. *See id.* at 16-17. Defendant also argues that Plaintiff was receiving calls from numerous "other telemarketers" at the same time he was receiving Defendant's calls. *See id.* at 17. Defendant concedes that the combination of all calls received by Plaintiff could establish sufficient Article III harm; however, Defendant argues that Plaintiff cannot connect any harm to calls made by Defendant. *See id.* at 17. In its reply, Defendant also argues that this case is distinguishable from *Unitedhealthcare* because here, Plaintiff has not testified—as Plaintiff did in *Unitedhealthcare*—that he received Defendant's calls while he was asleep, that it affected **[*13]** his job performance, or that he injured his foot while running to answer the phone. *See* Dkt. 25 at 2.

Although Plaintiff may have given some inconsistent testimony in his deposition, the Court finds that Plaintiff remained consistent in his position that the calls were an invasion of Plaintiff's privacy by virtue of the calls made despite the 9799 Number being on the DNC Registry. *See* Dkts. 20-2 at 50-51 ("Q. And how did that call violate your privacy? A. I'm on the Do Not Call List. I'm not supposed to receive calls that disturb my peace of being, my solitude."); 22-2 at ¶ 6. As this Court has previously stated, Congress's judgment in enacting the TCPA was to protect consumers' privacy rights. *See* Holderread v. Ford Motor Credit Co., LLC, No. 4:16-cv-222-ALM, 2016 U.S. Dist. LEXIS 147933, 2016 WL 6248707, at *3 (E.D. Tex. Oct. 26, 2016) (citing *Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394-95* (codified as a note to 47 U.S.C. § 227)). Therefore, an invasion of privacy within the context of the TCPA constitutes a concrete harm that meets the injury in fact requirements. *See id.* Plaintiff did not need to testify that he suffered a physical harm, such as being woken up from his sleep or hitting his foot while running to the phone to have an injury in fact. *See* Holderread, 2016 U.S. Dist. LEXIS 147933, 2016 WL 6248707, at *3 (Finding an injury in fact **[*14]** where plaintiff only alleged an "intangible concrete harm."). Plaintiff's testimony relating to the nuisance of the calls from Defendant—despite the perceived minimal nature of the alleged injuries—constitutes sufficient evidence under existing law to establish an injury in fact. *See id.*; *see also Cunningham v. Rapid Response Monitoring Servs., Inc., 251 F. Supp. 3d 1187, 1193 (M.D. Tenn. 2017)* (Finding an injury in fact where plaintiff received unwanted calls from defendant and stating that "injuries associated with unwanted marketing calls may be comparatively slight, but they are both real and well documented. Unwanted telemarketing can be a 'nuisance' and 'an intrusive invasion of privacy.'") (citing Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 372, 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012); Fitzhenry v. ADT Corp., No. 14-80180, 2014 U.S. Dist. LEXIS 166243, 2014 WL 6663379 at *5 (S.D. Fla. Nov. 3, 2014) (Finding standing when plaintiff alleged he was injured by receiving an unwanted telemarketing call.)).

Defendant alternatively argues that Plaintiff lacks standing because Plaintiff is a "serial TCPA litigant" who has brought this claim, along with many others, with the sole intent of extracting settlements from telemarketers he claims are violating the TCPA. *See* Dkt. 20 at 7-13. In essence, Defendant argues that Plaintiff has not truly suffered an invasion of privacy, notwithstanding his deposition testimony and supporting Declaration. *See id.* In support, Defendant presents **[*15]** evidence of Plaintiff's extensive history of bringing TCPA lawsuits. *See id.* As Defendant notes, Plaintiff has "asserted between 50-150 TCPA claims, and has been involved in 20-60 TCPA lawsuits regarding [the 9799 Number]." *See* Dkt. 20 at 8. Further, Defendant asserts that Plaintiff has considered franchising his TCPA lawsuits and has taught classes showing others how to sue telemarketers. *See id.* Defendant also asserts that Plaintiff has listed himself as a Pro Se Litigant of TCPA lawsuits on his LinkedIn profile. *See* Dkt. 20 at 7-8. Plaintiff disputes each of these assertions as either incorrect or misleading. *See* Dkt. 22 at 6-9. These assertions, however, even if true, do not result in a finding that Plaintiff lacks standing to sue.

In *Unitedhealthcare*, this Court analyzed nearly identical facts (same Plaintiff and similar TCPA violations) and concluded that Plaintiff was not a "professional plaintiff" and therefore, had standing to sue. Unitedhealthcare Ins. Co., 2016 U.S. Dist. LEXIS 168288, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016). The Court primarily relied on two cases in reaching this conclusion. *See* Telephone Science Corp. v. Asset Recovery Solutions, LLC, No. 15-CV-5182, 2016 U.S. Dist. LEXIS 104234, 2016 WL 4179150, at *1 (N.D. Ill. Aug. 8, 2016); Stoops v. Wells Fargo Bank, N.A., 197 F. Supp. 3d 782, 2016 WL 3566266, at *12 (W.D. Pa. 2016). The Court concluded that Plaintiff had standing **[*16]** because defendant "proffered no evidence that the 9799 Number is a residential telephone number Plaintiff maintains purely for the purpose of filing TCPA lawsuits as in in *Telephone Science Corporation* and *Stoops* or described facts sufficiently similar to such cases." Unitedhealthcare Ins. Co., 2016 U.S. Dist. LEXIS 168288, 2016 WL 7115973, at *6. This conclusion has not changed as Defendant's evidence is essentially identical to that offered in *Unitedhealthcare*.

Moreover, since the Court's decision in *Unitedhealthcare*, other courts have analyzed similar claims and found that a plaintiff does not lose standing simply because he is a sophisticated consumer and litigant. *See, e.g., Cunningham, 251 F. Supp. 3d at 1195* (Finding that the plaintiff had standing even though he was "seasoned" and "primed and ready" to take telemarketers to court if they violated the TCPA and stating that a plaintiff's privacy interests did not "cease[] to exist merely because he realized that he could profit from suing for their invasion."); *Mey v. Venture Data, LLC, 245 F. Supp. 3d 771, 783-84* (Stating that although it is "true that the plaintiff has brought a number of TCPA cases . . . [and] has telephone answering and recording equipment . . . [these facts] do[] not deprive the plaintiff of standing."). Defendant seems to take issue with the fact that Plaintiff has a **[*17]** higher than average understanding of the TCPA and how to recover under the statute. Despite this fact, Plaintiff has not lost his right to privacy as protected by the TCPA. Indeed, as the aforementioned courts have held, such factors do not strip a plaintiff of standing. Therefore, in agreement with these courts, and as the Court held in *Unitedhealthcare*, Plaintiff has standing to sue.

2. TCPA Violations

The TCPA imposes liability on callers engaging in "telephone solicitations" with residential telephone subscribers who register their names on the federal DNC Registry. *47 U.S.C. § 227(c)*. The term "telephone solicitation" in the TCPA means "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person. . . ." *47 U.S.C. § 227(a)(4)*; *47 C.F.R. § 64.1200(f)(14)*. Certain calls, however, are exempt from the "telephone solicitation" provision of the TCPA if the calls are made "(A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization." *Id.* This Court has previously held that "persons who **[*18]** knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *See Morris v. Copart, No. 4:15-cv-724-ALM, 2016 U.S. Dist. LEXIS 155755, 2016 WL 6608874, at *8 (E.D. Tex. Nov. 9, 2016)* (citing *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, *7 F.C.C. Rcd. 8752 (1992))*.

Defendant argues that Plaintiff's claims should be dismissed because Plaintiff consented to calls between the parties on and after October 30, 2015, and because he voluntarily called Defendant, released his phone number, and ultimately initiated a business relationship. *See* Dkt. 20 at 18-21. As previously stated, on October 30, 2015, Plaintiff voluntarily called and spoke with Defendant's representative. *See* Dkt. 20-16 at 8-12. During the call, Plaintiff: confirmed his telephone number with Defendant; gave Defendant his email address; and requested additional information regarding the investment opportunity being offered by Defendant. *See* Dkt. 20-16 at 8-12. Plaintiff alleges the sole basis for disclosing this information was an attempt to get information as to the true identity and contact information of the entity calling him. *See* Dkt. 22-2 at ¶ 15.

Regardless of Plaintiff's **[*19]** alleged intentions, as this Court has previously held, by releasing his telephone number and sharing his email address, Plaintiff consented to receiving calls from Defendant on October 30, 2015. *See Morris v. Copart, No. 4:15-cv-724-ALM, 2016 U.S. Dist. LEXIS 155755, 2016 WL 6608874, at *8*. Plaintiff argues that, even though he initiated the October 30, 2015, calls, an "established business relationship" only allows a telemarketer to call a party back within the next three months without violating the TCPA. *See* Dkt. 22 at 26 (citing *47 C.F.R. § 64.1200(f)(5)*). Although this three-month post-call window is accurate for telephone solicitations under the "established business relationship" exemption (*see 47 C.F.R. § 64.1200(f)(5)*), there is no such time restriction under the "prior express invitation or permission" exemption (*see 47 C.F.R. § 64.1200(f)(14)*). In his argument, Plaintiff incorrectly assumes that his disclosures on the October 30, 2015, calls did not constitute consent. Therefore, any claim regarding TCPA violations for calls between Plaintiff and Defendant on and after October 30, 2015, should be dismissed.

The two calls initiated by Defendant on October 12, 2015, and October 29, 2015, however, occurred before Plaintiff provided consent. *See* Dkt. 22-4 at 11. Moreover, as noted, Plaintiff's 9799 Number **[*20]** was on the DNC Registry. *See* Dkt. 19 at 1. The TCPA provides that any "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 regulations" has a private right of action. *47 U.S.C. § 227(c)(5)*. Based on the evidence presented, Plaintiff's claims for TCPA violations regarding the October 12, 2015, and October 29, 2015, should not be dismissed.

3. Texas Business and Commerce Code Violation

Texas has created a cause of action which is coextensive to the TCPA. *Tex. Bus. & Com. Code § 305.053*. Pursuant to *Section 305.053 of the Texas Business & Commerce Code*, "[a] person who receives a communication that violates *47 U.S.C. Section 227* . . . may bring an action in this state against the person who originates the communication. . . ." *Id.* Plaintiff has asserted a claim under this Texas statute in conjunction with his TCPA claims. *See* Dkt. 19 at ¶¶ 54-61.

As stated above, Plaintiff's TCPA violation claims regarding the first two uninvited calls made by Defendant should not be dismissed. Accordingly, Plaintiff's claim for violation based on the coextensive Texas statute also should not be dismissed.

C. PLAINTIFF'S MOTION TO STRIKE

Plaintiff moves to strike certain portions of the Murrell Declaration (Dkt. 34-19). *See* Dkt. 37.[1] Plaintiff argues **[*21]** that the Murrell Declaration improperly attempts to prove elements of the "error" defense that Defendant asserts in its response to Plaintiff's Motion for Partial Summary Judgment. *See id.* According to Plaintiff, the Court should strike the objected-to portions of the Murrell Declaration because they violate the rules of evidence and otherwise do not meet the requirements of *Rule 56 of the Federal Rules of Civil Procedure*. *See id.* The Court has made its own independent analysis of the evidence and relies on only relevant and admissible evidence pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Moreover, the Court granted leave for Plaintiff to file additional evidence in support of his Motion for Partial Summary Judgment (*see* Dkt. 38), which directly relates to the "error" defense and which the Court has considered in deciding the pending motions. *See* Dkt. 35-1. Accordingly, Plaintiff's Motion to Strike — Error Defense (Dkt. 37) is **DENIED**.

D. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In his Motion for Partial Summary Judgment (Dkt. 23), Plaintiff requests that the Court grant him summary judgment as to Counts I and II of the Complaint (Dkt. 19).

1. TCPA DNC Registry [*22] Violation

Count I alleges a violation of the TCPA pertaining to the DNC Registry rules, *47 U.S.C. § 227(c)(5)*. *See* Dkt. 19 at ¶¶ 24-53. The corresponding TCPA regulations prohibit any person or entity from initiating a telephone solicitation to any residential telephone subscriber who has registered his telephone number on the DNC Registry. *See 47 C.F.R. § 64.1200(c)(2)*. The TCPA further provides that a plaintiff may only prevail if he has received more than one violative telephone call within a twelve-month period. *47 U.S.C. § 227(c)(5)*. There are, however, exemptions from liability for a violation if an entity can demonstrate that a violation is the result of "error" and that it meets the following standards:

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[1] The Court notes that Defendant filed what appears to be a duplicate of the Amended Motion to Strike (Dkt. 28) on the same day. *See* Dkt. 27. The only difference is that the title in the earlier submitted version does not contain the word "Amended." *Compare* Dkt. 28 *with* Dkt. 27; Accordingly, Defendant's "Motion to Strike Plaintiff's Summary Judgment Evidence" (Dkt. 27) is **DENIED AS MOOT**.

> (A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;
> (B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;
> (C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;
>
> (D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established **[*23]** pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.
> . . .
> (E) Purchasing the national do-not-call database . . . It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers. . . .

47 C.F.R. § 64.1200(c)(2)(i). Plaintiff has presented the following evidence in support of his claim: (1) email verification showing that the 9799 Number was listed on the DNC Registry on November 28, 2011 (Dkt. 23-2 at 9); (2) deposition testimony from Defendant's corporate representative admitting that Defendant called Plaintiff, unsolicited, on more than one occasion within a twelve-month period (Dkt. 23-4 at 6-7, 10-11), along with excerpts from Defendant's phone records confirming these placed calls (Dkt. 22-5); and (3) deposition testimony from Defendant's corporate representative **[*24]** admitting that Defendant was attempting to sell or market investment opportunities to Plaintiff when making calls to him (Dkt. 23-4 at 6-10), along with a copy of the sales pitch that Defendant's representatives were supposed to use when calling potential consumers like Plaintiff (Dkt. 23-6).

Rather than attempting to controvert these facts, Defendant argues that it has sufficiently complied with the "error" defense provided under the TCPA. *See* Dkt. 34 at 2-3. In support, Defendant offers the Murrell Declaration, which states that Defendant established and implemented procedures in 2010 to prevent telephone solicitations in violation of TCPA regulations. *See* Dkt. 34-19 at 2. Defendant included a copy of these policies with the Murrell Declaration. *See id.* at 5. The Murrell Declaration also provides that Defendant regularly trains its employees to comply with these written procedures. *See id.* at 3. Also attached to the Murrell Declaration is a letter from United Marketing Group ("UMG"), which Defendant represents is the company from which it purchases call lists. *See id.* at 8. The letter states that UMG identifies numbers that are on the DNC Registry and removes them from any lists they sell to Defendant. ***[*25]*** *See id.* Critically, however, Defendant has not and cannot present any evidence (*see* Dkt. 35-1 at 6) that it "purchases access to the relevant do-not-call data from the administrator of the national database" as required by the TCPA error defense regulations. *47 C.F.R. § 64.1200(c)(2)(i)(E)*. Indeed, Plaintiff has presented deposition testimony from Defendant's corporate representative, wherein she admits that Defendant does not subscribe to the National Do Not Call Database and otherwise has never purchased any database list from the administrator of the national database. *See* Dkt. 35-1 at 6. Accordingly, Defendant has not satisfied all necessary elements to rely on the "error" defense under the TCPA. The Court finds that Defendant committed a violation of the TCPA DNC Registry provisions, and therefore, Plaintiff is entitled to summary judgment on Count I for the two calls initiated by Defendant on October 12, 2015, and October 29, 2015.

2. Texas Business and Commerce Code Violation

Count II of the Complaint (Dkt. 19) alleges a violation of the Texas Business and Commerce Code, which provides a cause of action for plaintiffs who have a valid claim for a TCPA violation. *See Tex. Bus. & Com. Code § 305.053*. Because the Court has concluded that Plaintiff **[*26]** is entitled to summary judgment on his TCPA claim, Plaintiff is also entitled to summary judgment on this claim—only as to the aforementioned calls.

IV. ORDER AND RECOMMENDATION

For the foregoing reasons, the Court recommends that Defendant's Motion (Dkt. 20) be **GRANTED IN PART** and **DENIED IN PART** and Plaintiff's Motion for Partial Summary Judgment (Dkt. 23) be **GRANTED IN PART** and **DENIED IN PART**.

Further, the Court finds that Defendant's Amended Motion to Strike (Dkt. 28) is **DENIED**, Defendant's "Motion to Strike Plaintiff's Summary Judgment Evidence" (Dkt. 27) is **DENIED AS MOOT**, and Plaintiff's Motion to Strike — Error Defense (Dkt. 37) is **DENIED**.

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

A party is entitled to a *de novo* review by the district court of the findings and conclusions contained in this report only if specific objections are made, and failure to timely file written objections to any proposed findings, conclusions, and recommendations contained in this report shall bar an aggrieved party from appellate review of those factual findings and **[*27]** legal conclusions accepted by the district court, except on grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *Id.; Thomas v. Arn, 474 U.S. 140, 148, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996)* (en banc), *superseded by statute on other grounds*, *28 U.S.C. § 636(b)(1)* (extending the time to file objections from ten to fourteen days).

SIGNED this 14th day of September, 2018.

/s/ Kimberly C. Priest Johnson

KIMBERLY C. PRIEST JOHNSON

UNITED STATES MAGISTRATE JUDGE

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