IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Case No. 1:20-cv-02075-DDD-SKC

DANIEL DECLEMENTS and SAM TULI

Plaintiffs,

v.

RE/MAX LLC,

Defendant.

ORDER GRANTING DEFENDANT RE/MAX LLC'S MOTION TO DISMISS

BACKGROUND

Plaintiffs Sam Tuli and Daniel DeClements filed this suit against Defendant RE/MAX LLC, a national real estate brokerage franchisor based in Denver, for calls they received from real estate agents associated with franchisees of RE/MAX allegedly in violation of the Telephone Consumer Protection Act or TCPA, 47 U.S.C § 227. In assessing a motion to dismiss, the court accepts as true the version of facts set forth in the Plaintiffs' complaint.

Mr. Tuli and Mr. DeClements allege that, as part of a broader trend in the real estate market, agents of RE/MAX's franchisees have started "cold calling owners of properties who have had their MLS [Multiple Listing Service] listing expire or be canceled or withdrawn" using methods that violate the TCPA. Mr. Tuli and Mr. DeClements further allege that RE/MAX "directs, authorizes, or, at a minimum, ratifies" these calls

and is thus vicariously liable for its franchisees' agents' conduct. First Am. Compl. ("FAC"), Doc. 17 at ¶¶ 6–9.

How does RE/MAX direct, authorize, or ratify this this unlawful conduct, according to the complaint? First, RE/MAX allegedly endorses the use of "Landvoice, a company that sells real estate agents skip-trace based leads services and an autodialer." *Id.* at ¶ 9. "Landvoice's service includes the automatic loading of the Landvoice-generated leads lists, using a sequential number generator, into a 'Power Dialer,' an automatic telephone dialing system that 'dials leads' at a rate of 80 to 300 per hour and delivers a pre-recorded message if calls are not answered." *Id.* at ¶ 9 n.1 (alteration adopted). Second, RE/MAX allegedly promotes Landvoice at RE/MAX events to "solicit its services to RE/MAX agents." *Id.* at ¶ 9. Third, RE/MAX allegedly endorses the services of Tom Ferry who "recommends cold calling expired listing leads through services like Landvoice." *Id.* And fourth, RE/MAX allegedly provides training courses to its agents that encourage calling leads provided by Landvoice." *Id.*

According to the complaint, Mr. Tuli is the subscriber of two telephone numbers that he has registered with the federal "Do Not Call" registry. First Am. Compl. ("FAC"), Doc. 17 at ¶ 9. One number is associated with a cell phone; the other is associated with a Google Voice account. *Id.* at ¶ 10. In the summer of 2018, Mr. Tuli had a property listed for sale, but had the listing taken down for a brief period. *Id.* at ¶ 11. Between July 17 and 24, 2018, Mr. Tuli received six calls each to his Google Voice number and cell phone from RE/MAX franchisee real estate agents. *Id.* at ¶ 13. Mr. Tuli alleges that "on information and belief, many of the calls [he] received were made by an autodialer since multiple RE/MAX agencies called him, he received a high volume of calls, and RE/MAX endorses autodialer use." *Id.* at ¶ 22.

Mr. DeClements likewise had a property for sale, but then removed the listing from MLS. *Id.* at ¶ 23. The same day he de-listed his property,

Mr. DeClements received a prerecorded voicemail from a RE/MAX Excalibur agent about his property. *Id.* at ¶ 24. The following day, Mr. DeClements received a call from a different RE/MAX Infinity agent from what Mr. DeClements believes was an auto-dialer. *Id.* at ¶ 29.

Plaintiffs filed this suit on behalf of themselves and those similarly situated for RE/MAX's alleged violations of the TCPA. They intend to seek class certification of three nationwide classes: a "Prerecorded No Consent Class," comprising individuals who received pre-recorded calls from a RE/MAX franchisee; a "Autodialed No Consent Class," comprising individuals who received pre-recorded calls from RE/MAX franchisee using an auto-dialer; and a "Do Not Call Registry Class," comprising individuals who received pre-recorded calls from a RE/MAX franchisee on a cell phone number on the Do Not Call registry. *Id.* at ¶ 37. Plaintiffs assert two claims for violation 47 U.S.C. § 227(b) and one claim for violation of 47 U.S.C. § 227(c). RE/MAX's motion to dismiss argues that Plaintiffs have failed to show they have standing to bring the case, or to allege facts that would support the claim that RE/MAX is vicariously liable for the calls Plaintiffs received.

ANALYSIS

I. Motion to Dismiss

A. Standard

When presented with a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6), a court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation marks omitted). "Mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' will not suffice." *Khalik v.*

United Air Lines, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). So a court can "disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[1]

B. The TCPA and Vicarious Liability

Two provisions of the TCPA are relevant here: 42 U.S.C. § 227(b) and 42 U.S.C. § 227(c).

Section 227(b)(1) makes it "unlawful for any person . . . to make any call . . . without 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 . . ., unless such call is made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA authorizes a private right of action for enforcement of Section 227(b)(1). *See id.* § 227(b)(3). For each violation of Section 227(b)(1), the person harmed is entitled to recover "actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." *Id.* § 227(b)(3)(B). And if the violation was willful or knowing, a court may triple the damages award. *Id.* § 227(b)(3)(flush language).

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[1] RE/MAX argues that the complaint fails under either a standing theory, which would require dismissal under Rule 12(b)(1), or under the theory that it fails to state a claim on which relief can be granted, which would require dismissal under Rule 12(b)(6). Rule 12(b)(6) is the more apt provision. While failure to allege facts that would give rise to RE/MAX's vicarious liability certainly means Plaintiffs would have suffered no injury as a result of RE/MAX's conduct, this is ultimately a question of substantive liability and thus best addressed under Rule 12(b)(6).

The implementing regulations of Section 227(c) make it unlawful for any "person or entity" to "initiate any telephone solicitation to a residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry." 47 C.F.R. § 64.1200(c)(2). Section 227(c)(5) in turn creates 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 regulations" promulgated under Section 227(c)(1). *Id.* § 227(c)(5). The section uses the same penalty rubric as Section 227(b). *Id.* § 227(c)(5)(flush language).

RE/MAX moves to dismiss the complaint in full on the ground that Plaintiffs have failed to plead facts that would give rise to RE/MAX's vicarious liability for the acts of its franchisees' agents.[2] Plaintiffs complaint fails on its face. Plaintiffs have alleged no facts that would give

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[2] Though the parties proceed on the assumption that it does, the court is not fully convinced that the TCPA permits recovery on a theory of vicarious liability for these alleged violations. The presumption that it does seems to arise from the principal that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). The Federal Communications Commission relied on this in a non-binding ruling that Section 227(c)(5) (but not Section 227(b)) permits vicarious liability. *See In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois. N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (Tcpa) Rules*, 28 F.C.C. Rcd. 6574, 6585 (2013).

But there are reasons to question whether that principle creates the sort of vicarious liability among entities that is at issue here. First, the TCPA's text only creates liability for the "person" that actually engages in the prohibited conduct. And while "person" presumably includes an entity that is engaged in those acts, *see* 1 U.S.C. § 1, what is at issue here is the potential liability of a different entity, and on that the statute is silent. And in general, "a matter not covered" by the text of a statute "is to be treated as not covered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). While the

rise to liability on a principal-agent theory. Vicarious liability requires an agency relationship, and agency relationships come in two flavors. First, an agent can have actual authority, which exists if an agent "reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1251 (10th Cir. 2013) (quoting Restatement (Third) of Agency § 2.01). Second, an agent can have apparent authority, meaning "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) Of Agency § 2.03. Plaintiffs also invoke a ratification theory of vicarious liability. "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." *Id.* § 4.01.

The complaint fails to plead a theory of actual authority. Plaintiffs do not allege that RE/MAX controls the activities of its franchisees, generally, or the calls its franchisees make, specifically. Rather, all the complaint says is that RE/MAX promotes calling recently de-listed property owners using services like Landvoice as a good strategy. That might be bad advice, but promoting a particular strategy isn't enough to give rise to actual authority absent allegations of control. *See* John Glenn, et al.,

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Tenth Circuit has not directly addressed the question, the Supreme Court has at least noted that the presumption may be open to debate. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 674 (2016) ("But the Federal Communications Commission has ruled that, under federal common-law principles of agency, there is vicarious liability for TCPA violations. The Ninth Circuit deferred to that ruling, and we have no cause to question it."). This court, likewise, has no cause to resolve the question here because the motion can be resolved on other grounds.

2A Corpus Jurus Secundum Agency § 5 (June 2020) ("There are three elements that are integral to an agency relationship: the agent is subject to the principal's right of control; the agent has a duty to act, as a fiduciary, primarily for the benefit of the principal; and the agent holds the power to alter the legal relations of the principal."); *see also* Restatement (Third) Of Agency § 1.01 cmt. f (2006) ("Within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms.").

This case stands in contrast to *Hayhurst v. Keller Williams Realty, Inc.*, No. 1:19CV657, 2020 WL 4208046, at *6 (M.D.N.C. July 22, 2020), where the court ruled that a complaint adequately stated a claim for vicarious liability of a principal for violation of the TCPA by the principal's agents. There, Keller Williams wrote scripts for its agents to use to make calls, directed how the calls were to be made, and made clear that the calls that allegedly violated the TCPA were an essential aspect of its business model. *Id.* Here by contrast, Plaintiffs have merely alleged that RE/MAX promotes certain tools, which are apparently used by some of its franchisees to violate the TCPA. FAC at ¶ 8. But Plaintiffs do not allege that RE/MAX controlled the relevant conduct of its franchisees' agents, or that it could. None of the individuals who called Plaintiffs were employed by RE/MAX. So there are no allegations of actual authority in this case.

Nor does the complaint fare better on the apparent-authority front. To predicate a claim of vicarious liability on a theory of apparent authority, a complaint must allege that the principal's "manifestations" created a reasonable belief in a third party that the agent had authority to act on behalf of the principal. Restatement (Third) Of Agency § 2.03. There are no such manifestations alleged in the complaint. There are, for example, no allegations that RE/MAX ever communicated to Plaintiffs or represented that its franchisees' agents were acting on behalf of

RE/MAX. To the contrary, the complaint makes clear that the franchisees' agents generally identified themselves as agents *of the franchisees—e.g.*, RE/MAX Legacy, RE/MAX Dallas Suburbs, RE/MAX Excalibur, and RE/MAX Infinity. ¶¶ 14, 17, 26. To be sure, one of the individuals allegedly identified himself as calling on behalf of "RE/MAX," FAC at ¶ 29, but that statement isn't a manifestation of authority by RE/MAX. Indeed, the use of RE/MAX's name is the *only* potential manifestation of apparent authority Plaintiffs point to. If the court were to accept the use of a franchisor's name as the sole basis for franchisee-franchisor liability, that would mean that a franchisor would always be liable for the acts of its franchisees. While manifestations of, and reliance on, a franchisor's brand quality might be enough to create a triable issue of apparent authority, *see Patel v. Sunvest Realty Corp.*, No. CV N18C-01-185 AML, 2018 WL 4961392, at *5 (Del. Super. Ct. Oct. 15, 2018) (plaintiff adequately alleged apparent authority in fraud claim against RE/MAX where plaintiffs relied on the "brand quality" of RE/MAX in commercial transaction), the use of a franchisor's name alone isn't sufficient to state a claim of vicarious liability for franchisees' agents' phone calls on an apparent-authority theory.

And there aren't any allegations in the complaint that would, if proven, establish that RE/MAX ratified its franchisees' agents conduct. Plaintiffs don't allege that RE/MAX ever affirmed the calls allegedly made to Plaintiffs in violation of the TCPA. *See* Restatement (Third) Of Agency § 4.01 (assent or consent are necessary for ratification). At most, Plaintiffs allege that RE/MAX promoted a particular form of call solicitation. It is not enough that RE/MAX might have endorsed or encouraged use of the techniques in question. Ratification is not about approving of the conduct—it is about the alleged principal electing to give the acts in question legal effect "as if done by an agent acting with actual authority." *Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010, 1014

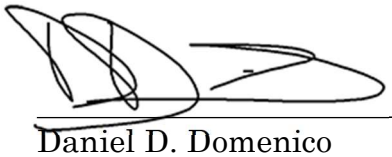
(9th Cir. 2018) (quoting Restatement (Third) of Agency § 4.01(1)). Nothing in the complaint would support that conclusion here.

Plaintiffs have thus failed to plead vicarious liability, and so their complaint must be dismissed.

CONCLUSION

The court **GRANTS** RE/MAX's motion to dismiss. Doc. 29. As a result, RE/MAX's first motion to stay, Doc. 31, is **DENIED** as moot.

Dated: October 13, 2020. BY THE COURT:



Daniel D. Domenico
United States District Judge