

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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|----------------------------|---|--------------------------|
| VINCENT LUCAS, | : | Case No. 1:12-cv-00630 |
| | : | |
| Plaintiff, | : | |
| | : | |
| vs. | : | AMENDED |
| | : | OPINION AND ORDER |
| | : | |
| TELEMARKETER CALLING FROM | : | |
| (407) 476-5680 AND OTHER | : | |
| TELEPHONE NUMBERS, et al., | : | |
| | : | |
| Defendants. | : | |

Due to clerical error, an incomplete version of the Court's signed Order was filed in this matter on August 22, 2013 (doc. 49). The Court therefore finds it necessary to VACATE such Order and re-issue this Amended Order which represents the Court's complete opinion. The result remains the same.

This matter is before the Court on the Magistrate Judge's June 6, 2013 Report and Recommendation (doc. 37), to which Plaintiff has filed objections (doc. 39) and Defendants Pacific Telecom Communications Group, Steve Hamilton, Telephone Management Corporation, International Telephone Corporation, Fred Accuardi and F. Antone Accuardi have replied (doc. 45).

In brief, Plaintiff filed an Amended Complaint against three entity Defendants, Manchester Services, Inc., Sub-Par Ventures,

LLC, and Qall Cord Philippines Ltd Co.,¹ as well as the unknown Defendant referenced in the case caption (doc. 2), alleging violations of the Federal Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), the Ohio Telemarketing Act, O.R.C. § 109.87 and Ohio Telephone Solicitation Act, O.R.C. § 4719, the Ohio Consumer Sales Protection Act, O.R.C. § 1345 ("OCSPA"), and state law tort claims of invasion of privacy, negligence and nuisance. Concomitantly, Plaintiff filed a Motion for Preliminary Injunction against the three entity Defendants (doc. 3). Plaintiff later filed a stipulation of dismissal with prejudice, however, with regard to Defendants Manchester Services, Inc. and Sub-Par Ventures, LLC (doc. 14), and, with leave of Court (see doc. 19) thereafter filed a Second Amended Complaint that added six additional named Defendants, Pacific Telecom Communications Group, Steve Hamilton, Telephone Management Corporation, Inc., International Telephone Corporation, Fred Accuardi and F. Antone Accuardi (doc. 20).² Plaintiff eventually also filed a second motion for preliminary

¹This Court notes, as did the Magistrate Judge (see doc. 37 at 2 n.2), that Plaintiff spells this Defendant's name two different ways, sometimes "Qall Cord" and other times "Qual Cord" (compare doc. 27 with doc. 39). Consistent with the choice made by the Magistrate Judge, we, too, will refer to Defendant singularly as "Qall Cord" throughout this Opinion and Order.

²With regard to Qall Cord, which remained a named Defendant, Plaintiff's Second Amended Complaint includes dates of additional calls he claims to have received since the filing of his first Amended Complaint as well as a recalculation of the damages he seeks as a result.

injunction against the six Defendants added in the Second Amended Complaint (doc. 22).³

While service had been perfected with regard to the two Defendants that were dismissed (see docs. 9, 10) and the six additional Defendants named in the Second Amended Complaint (doc. 28), it remained problematic with regard to the remaining named Defendant Qall Cord Philippines Ltd Co. ("Qall Cord"), a foreign company identified as "a business incorporated in the Philippines". At Plaintiff's request, the Clerk attempted service by international mail, return receipt requested under Fed. R. Civ. P. 4(f)(2)(C)(ii) (see docs. 13 and 17). Plaintiff next filed an ex parte motion for an order to serve said Defendant by e-mail under Fed. R. Civ. P. 4(f)(3) (see doc. 16). The Magistrate Judge granted Plaintiff's motion and very specifically instructed how the e-mails were to be worded, to what address they should be sent and by whom (the Clerk and another person designated by Plaintiff), and what steps to take in the event of an e-mail delivery failure notification (also known as an e-mail "bounce" message) (doc. 19 at 3-4). Thereafter, the Clerk sent the two e-mails it was directed to send by the Magistrate Judge; no e-mail delivery failure

³These six Defendants filed a Motion to Dismiss all of the claims asserted against them in Plaintiff's Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (doc. 35). The Magistrate Judge's June 6 Report and Recommendation does not address the merits of Defendants' motion (see doc. 37 at 1-2).

notifications occurred (see docket entries dated 02/22/2013 and 02/26/2013). Likewise, the person designated by Plaintiff also sent an e-mail according to the Court's instruction; no e-mail delivery failure notification occurred in this instance either (see doc. 21). With service thus perfected, Plaintiff made application to the Clerk for an entry of default pursuant to Fed. R. Civ. P. 55(a) (doc. 24). An Entry of Default was docketed three days later (doc. 25). Plaintiff then filed a motion for default judgment against Defendant Qall Cord pursuant to Fed. R. Civ. P. 55(b) (doc. 27).

In her June 6 Report and Recommendation, Magistrate Judge Bowman recommended that Plaintiff's first motion for preliminary injunctive relief filed (doc. 3) be denied as moot and that his second motion for preliminary injunctive relief (doc. 22) be denied on its merits. In contrast, however, she recommended that Plaintiff's motion for entry of default judgment against Defendant Qall Cord be granted. She further recommended that Defendant Qall Cord be directed to pay Plaintiff a total damages award of \$36,000 for the ten calls it placed to Plaintiff's residential telephone number containing a pre-recorded message offering to lower his interest rate. She computed the award as follows. Citing Charvat v. NMP, LLC, 656 F.3d 440, 449 (6th Cir. 2011), she noted that an aggrieved person may recover \$1,500 for

each willful or knowing violation of the TCPA's automated-call requirements (47 U.S.C. § 227(b)(3)), as well as \$1,500 for each willful or knowing violation of the TCPA's do-not-call list requirements (47 U.S.C. § 227(c)(5)), for a total of \$3,000 per call. Thus, the Magistrate Judge recommended an award of \$30,000 in federal statutory damages. With regard to Plaintiff's state statutory claims, again citing Charvat as authority, she noted that violations of the TCPA also can constitute independent violations of the OCSIPA. 656 F.3d at 451-52. She concluded that Plaintiff had alleged facts adequate to support three distinct claims,⁴ for a total of \$600 per call. Thus, the Magistrate Judge recommended an additional award of \$6,000 in state statutory damages for the same ten calls. Together, federal and state statutory damages combined for a total recommended award of \$36,000. The Magistrate Judge recommended against any damages award, under either federal or state statute, with respect to the two calls from Qall Cord in which a message was not left on Plaintiff's residential telephone answering machine.

Plaintiff does not object to the Magistrate Judge's recommendation that his first motion for preliminary injunction be denied as moot (doc. 39 at 8). Regarding the Magistrate Judge's recommendation that his second motion for preliminary

⁴In his motion for default judgment, Plaintiff initially argued that Defendant's calls violated the OCSIPA in five separate ways, but, for purposes of calculating a damage award, he was willing to assume just four (see doc. 27 at 4-6).

injunction be denied, he asks the Court to not adopt "any findings that would have an impact on the determination of permanent injunctive relief" (*id.*).⁵ Finally, he objects to the Magistrate Judge's recommendation against awarding him any federal or state statutory damages for the two calls from Qall Cord in which no message was left on his residential telephone answering machine. Rather, he believes he is entitled to receive federal statutory damages of \$1,500 per call for a total of \$3,000 and state statutory damages of \$200 per call for a total of \$400. Thus, he asks this Court to award him the \$36,000 recommended and an additional \$3,400, for a total of \$39,400.

Inasmuch as Plaintiff has filed objections to certain aspects of the Magistrate Judge's June 6 Report and Recommendation, the Court has reviewed this matter de novo, pursuant to 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b). Upon consideration, we accept the Magistrate Judge's recommended disposition to deny Plaintiff's first and second motions for preliminary injunction. A ruling that Plaintiff is not entitled to the extraordinary remedy of preliminary injunctive relief, of course, is not dispositive of whether he eventually might be entitled to permanent injunctive relief should he prevail on the

⁵The brief reply filed by the six Defendants added by Plaintiff in his Second Amended Complaint is directed only to this portion of the Magistrate Judge's June 6 Report and Recommendation and Plaintiff's objection thereto. It voices agreement with the Magistrate Judge's finding and simply asks the Court to "overrule and dismiss" Plaintiff's objection (doc. 45 at 1).

merits. We likewise accept the Magistrate Judge's recommended disposition to grant Plaintiff's motion for an entry of default judgment, but modify her recommended damages award as Plaintiff requests.

The Magistrate Judge concluded that Plaintiff could not recover for the "no message" calls because he did not allege their length, referencing a subsection within the regulations promulgated to implement the TCPA that prohibits a person or entity from disconnecting "an unanswered telemarketing call prior to at least 15 seconds or four (4) rings." See 47 C.F.R. § 64.1200(a)(6). She also concluded that it was inappropriate to infer that these calls were unlawful solicitations simply because they were made from a given telephone number, especially considering that only two were made (see doc. 37 at 11 n.4).⁶ This analysis, however, misses the mark. The language of 47 C.F.R. § 64.1200(c)(2) quite plainly states that "No person or entity shall initiate any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is

⁶We believe such an inference entirely appropriate. The telephone numbers from which the ten calls to Plaintiff containing a pre-recorded telemarketing message originated were assigned to Defendant Qall Cord on the dates in question. So, too, were the telephone numbers from which the two "no message" calls originated. Moreover, Plaintiff received calls containing the same pre-recorded telemarketing message both before and after the two "no message" calls. See Second Amended Complaint ¶¶ 18-20, 27 (doc. 20 at 6-8).

maintained by the Federal Government. . . ." (emphasis added).

The term "telephone solicitation" is defined as:

[T]he initiation of a telephone call or message for the purpose of encouraging the purchase . . . of . . . services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt non-profit organization.

Id. § 64.1200(f)(14) (emphasis added). Nowhere in these two subsections is an additional requirement that the caller leave a message in order to trigger a violation. Indeed, the definition of "telephone solicitation" twice specifically references "initiation of a telephone call or message," not "initiation of a telephone call and message." Moreover, as the Sixth Circuit observed in Chavrat, the "regulations in 47 C.F.R. § 64.1200(d) impose minimum procedures for maintaining a do-not-call list that apply to all calls—live or automated—initiated for telemarketing purposes to residential telephone subscribers." 656 F.3d at 449 (emphasis original). Thus, this Court concludes that a violation occurs upon the initiation of the call, regardless of whether a message is left. We reach the same conclusion under state law. Reference to precise phrasing is again instructive. In Charvat v. Continental Mortg. Services, Inc., as part of a consent judgment the court issued a number of conclusions of law with

regard to plaintiff's allegations of violations of the OCSPA, among them, "It is an unfair or deceptive practice for a supplier to initiate a telephone call to a consumer and fail to honor a consumer's prior Do Not Call demand by recalling that consumer's residence," and "It is an unfair or deceptive practice for a supplier to initiate a telephone call to a consumer and fail to immediately record a consumer's Do Not Call request on a supplier's Do Not Call list." No. 99CVH12-10225, 2002 WL 1270183, at *5 (Ohio Ct.C.P. June 1, 2000) (emphasis added). "No message" calls, therefore, are actionable under Ohio as well as federal law. We believe that Plaintiff is entitled to recover \$1,500 under federal law for each of these two calls, as we find them to be willful or knowing violations of the TCPA's do-not-call list requirements (47 U.S.C. § 227(c)(5)), and \$200 under state law for each of these two calls (O.R.C. § 1345.09(B)), for an additional damages award of \$3,400.

In summary, we accept the Magistrate Judge's recommended disposition with regard to Plaintiff's first and second motions for preliminary injunction. Accordingly, Plaintiff's Motion for Preliminary Injunction filed November 27, 2012 is DENIED as moot and Plaintiff's Motion for Preliminary Injunction filed March 11, 2013 is DENIED on its merits. We likewise accept the Magistrate Judge's recommended disposition with regard to whether to grant Plaintiff's motion for an entry of default judgment, but modify

her recommended damage award. Accordingly, Plaintiff's Motion for Default Judgment against Qall Cord Philippines Ltd. Co. filed April 2, 2013 is GRANTED, and Defendant Qall Cord Philippines Ltd. Co. is directed to pay Plaintiff damages in the amount of \$39,400.

SO ORDERED.

Dated: August 27, 2013

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge