**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**IN RE: MONITRONICS INTERNATIONAL, INC., TELEPHONE CONSUMER PROTECTION ACT LITIGATION**

**MDL NO. 1:13MD2493**

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**THIS DOCUMENT RELATES TO 1:14CV169**

**MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS AMENDED COMPLAINT [DKT. NO. 138 IN 1:14CV169, DKT. NO. 339 IN 1:13MD2493]**

On February 23, 2015, defendant 2GIG Technologies, Inc. ("2GIG") filed a motion to dismiss the second amended complaint filed by pro se plaintiff Craig Cunningham ("Cunningham") (Dkt. No. 138).[1] On March 19, 2015, Cunningham, by liaison counsel, filed a response, opposing 2GIG's motion (Dkt. No. 153). On April 2, 2015, 2GIG filed a reply (Dkt. No. 169). For the reasons that follow, the Court **DENIES** 2GIG's motion to dismiss Cunningham's second amended complaint.

## FACTUAL AND PROCEDURAL BACKGROUND

On March 18, 2014, Cunningham filed a complaint against Alliance Security and ten John Doe defendants in the United States District Court for the Middle District of Tennessee, alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47

[1] Unless otherwise noted, the docket numbers refer to those in 1:14CV169, Cunningham v. Alliance Security.

U.S.C. § 227, and its implementing regulations (Dkt. No. 1). On July 14, 2014, Cunningham amended his complaint (Dkt. No. 40).

On October 9, 2014, the Judicial Panel on Multidistrict Litigation directed that Cunningham's case be transferred to the multidistrict litigation ("MDL") currently pending in this district (Dkt. Nos. 52, 53). Chief United States District Judge Kevin Sharp entered an order transferring the case on October 9, 2014 (Dkt. No. 54).

On November 24, 2014, Cunningham sought leave to amend his complaint for the second time to assert additional claims and name additional defendants (Dkt. No. 80). On January 7, 2015, the Court granted Cunningham's motion, and the Clerk filed Cunningham's second amended complaint, naming 2GIG as a defendant, that same day (Dkt. No. 97).[2] Cunningham served 2GIG on February 2, 2015 (Dkt. No. 129).

In his second amended complaint, Cunningham alleges that 2GIG, an alarm system manufacturer, engaged in a scheme with alarm system

[2] In addition to 2GIG, Cunningham's second amended complaint names as defendants Jasjit Gotra, the CEO of Alliance Security, Monitronics International Inc., an alarm monitoring company, UTC Fire and America's Corporation, an alarm manufacturer, Secure 1 Systems, an alarm system dealer, and Mike Mavarro, the President of Secure 1 Systems (Dkt. No. 97 at 1-2).

dealers like defendants Alliance Security and Secure 1 Inc., and alarm monitoring companies like defendant Monitronics, in violation of the TCPA (Dkt. No. 97 at 1-2, 4-6). According to Cunningham, alarm system dealers make unsolicited telephone calls to consumers attempting to sell the alarm systems, in violation of the TCPA, "on behalf of and with [the] full knowledge of" the alarm system manufacturers and monitoring companies. Id. at 5.

Cunningham alleges that, between 2012 and 2014, he received "multiple automated calls with a pre-recorded message" on both his home and cellular telephones informing him that home break-ins are on the rise, and offering him a free security system. Id. at 3. He later discovered that defendants Alliance Security and Secure 1 Systems, both alarm system dealers, were making the calls. Id. Cunningham, who did not consent to the offending calls, alleges that they violated the TCPA in two ways: (1) the pre-recorded messages played during the calls "failed to have the mandated identification information and the do-not-call list subsection . . ." required by 47 U.S.C. § 227(c); and, (2) the automated nature of the pre-recorded calls violated 47 U.S.C. § 227(b). Id. at 3, 8.

Importantly, Cunningham alleges that 2GIG "was a knowing accessory" to the dealers' calls, and offered as proof 2GIG's

"frequently asked questions" page on its website, which is "devoted to telemarketing telephone calls, how [2GIG doesn't] sell directly to consumers . . . and responses to consumers who have received calls about their products." Id. at 5. He alleges that the offending calls "were placed with apparent authority, actual authority, and the ratification" of 2GIG, who knew of the dealers' improper conduct but "refused to exercise control or authority over Alliance Security to reduce or eliminate the improper sales methods." Id.

Allegedly, the "calls were placed on behalf of and with full knowledge of" 2GIG, who permitted the dealers to use its trade names and trademarks, and gave them access to its consumer services database and pricing information. Id. at 5-6. Cunningham contends that "formal, contractual agreements" exist between the parties "for sale and distributions [sic] of their products and services through the alarm dealers . . . ." Id. at 6. He notes that the agents of Alliance Security and Secure 1 Systems who called him mentioned 2GIG, as well as the other defendants, by name. Id. Cunningham specifically alleges an "authorized dealer" relationship between the dealers and the manufacturers, stating that manufacturers like 2GIG don't sell directly to the public, "but rather sign[] contracts for distribution" with their authorized

dealers. Id. "The agreements between the dealers and manufactures [sic] and Monitronics are dictated by the terms from the manufacturers and Monitronics." Id. Cunningham points to 2GIG's website, which states that it only sells its product to "authorized distribution channels," as proof of an authorized dealer relationship. Id. at 7.

Cunningham believes that the defendants engaged in a scheme to violate the TCPA by using lead generators to crawl the internet and compile a list of targets for their calls. Id. at 6. He specifically alleges that the dealers' calls were placed "on behalf of, and for the benefit of" 2GIG, who "authorizes dealers to place calls under their individual apparent and actual authority . . . ." Id. Furthermore, he alleges that 2GIG ratified the acts of the dealers. Id.

## LEGAL BACKGROUND

In the last several years, plaintiffs across the country have filed numerous claims against home alarm manufacturers, dealers, and monitoring companies, purportedly involved in an automated telemarketing scheme. Allegedly, the dealers market the alarm systems and monitoring services by making calls, either through use of an automated telephone dialing system or through use of an artificial or prerecorded voice, to prospective retail customers on

behalf of the more reputable manufacturers and monitoring companies. Through this arrangement, the dealers receive cash and discounts on products from the manufacturers, the manufacturers increase their sales, and the monitoring companies obtain lucrative service contracts.

**A. The TCPA**

According to the claims, the dealers' telemarketing efforts violate portions of the TCPA. The TCPA was enacted in response to "[v]oluminous consumer complaints about abuses of telephone technology." Mims v. Arrow Financial Services, LLC, 132 S.Ct. 740, 744 (2012). In Mims, the Supreme Court summarized Congress' findings on the matter:

> In enacting the TCPA, Congress made several findings . . . "Unrestricted telemarketing," Congress determined, "can be an intrusive invasion of privacy." TCPA, 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings) (internal quotation marks omitted).In particular, Congress reported, "[m]any consumers are outraged over the proliferation of intrusive, nuisance [telemarketing] calls to their homes." Ibid. (internal quotation marks omitted).

The TCPA is a remedial statute and thus entitled to a broad construction. See, e.g., Holmes v. Back Doctors, Ltd., 695 F.Supp.2d 843, 854 (S.D.Ill. 2010) ("It is true that . . . the TCPA is a remedial statute."). As such, it "should be liberally construed and should be interpreted (when that is possible) in a

manner tending to discourage attempted evasions by wrongdoers." Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). At the same time, a remedial purpose "will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.'" Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (quoting SEC v. Sloan, 436 U.S. 103, 116 (1978)). The TCPA provides in pertinent part as follows:

> (1) Prohibitions
>
> It shall be unlawful for any person within the United States . . .
>
> (A) to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice –-
>
> . . .
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call; [or]
>
> . . .
>
> (B) 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 . . . .
>
> . . .
>
> (3) Private right of action

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State –-
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 U.S.C. § 227(b).

The TCPA also authorizes the Federal Communications Commission ("F.C.C.") to establish a "single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." Accordingly, the F.C.C. established a "do-not-call registry," maintained by the Federal Trade Commission, and has promulgated the following regulation:

> (c) No person or entity shall initiate any telephone solicitation to:
>
> . . .
>
> (2) 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 maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.

47 C.F.R. § 64.1200.

The TCPA provides a cause of action to "[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" noted above. § 227(c)(5) (emphasis added). The complainant may sue for an injunction, the greater of the actual monetary loss or $500 for each violation, or both an injunction and damages. Id.

**B. Early Cases**

Neither the TCPA nor its associated regulations define the term "on behalf of," but courts that have considered the issue have applied principles of agency to determine when entities are liable for calls made by third parties. Some of these courts have relied upon the laws of the states in which they sit, while others have applied a more general agency analysis, resulting in a variety of approaches to determining the reach of "on behalf of" liability. See, e.g., United States v. Dish Network, LLC, 667 F. Supp. 2d 952, 963 (C.D. Ill. 2009) (holding that strict agency relationship is not required if entity plausibly could have benefitted from calls made by third party); Charvat v. Echostar Satellite, 676 F.

Supp. 2d 668, 675 (S.D. Ohio 2009) (applying Ohio law to determine whether entities had sufficient control over third parties who made calls); Applestein v. Fairfield Resorts, No. 0004, 2009 WL 5604429 (Md. Ct. App. July 8, 2009) (examining the "totality of circumstances" surrounding the parties' relationship).

The United States Court of Appeals for the Sixth Circuit recognized this lack of uniformity in Charvat v. EchoStar Satellite, LLC, 630 F.3d 459, 466 (6th Cir. 2010). There, the plaintiff, Phillip Charvat ("Charvat"), sued an entity, EchoStar Satellite, LLC ("EchoStar"), that did not place illegal calls to him, but whose independent contractors did. The Sixth Circuit concluded that EchoStar's liability turned on the meaning of "on behalf of" in § 227(c)(5), but that the phrase was ambiguous:

> Does § 227(c)(5) create liability for entities on whose behalf calls are made even when the calls are placed by independent contractors rather than by agents or employees? And does § 225(c)(5) create liability for entities on whose behalf calls are made even though the section is labeled only as a private right of action and even though individuals still must sue for violations of regulations? The regulations contain a similar ambiguity. Just one of the relevant regulations explicitly creates liability for entities on whose behalf calls are made, 47 C.F.R. § 64.1200(d)(3), while the others concern entities who make or initiate calls, see, e.g., id. § 64.1200(d)(1), (d)(6).

Id. at 465. The court observed that, as a result of this ambiguity, courts had announced a variety of different measures for

determining whether a third party acts on behalf of an entity, and that this lack of uniformity "heighten[ed] the risk that individuals and companies will be subject to decisions pointing in different directions." Id. at 466.

Concluding that "[t]he answers to these questions implicate the F.C.C.'s statutory authority to interpret the Act, to say nothing of its own regulations," the Sixth Circuit invited the F.C.C. to file an amicus brief offering its views on the case. In its brief, the F.C.C. "made clear that a person can be liable for calls made on its behalf even if the entity does not directly place those calls," and that, "[i]n those circumstances, the person or entity is properly held to have 'initiated' the call within the meaning of the statute and the Commission's regulations." Brief for the F.C.C. and the United States as Amici Curiae, No. 09-4525, 2010 WL 7325986, at *9-10 (Oct. 15, 2010). The F.C.C. also asserted that "although § 227(c)(5) may incorporate agency principles, there are compelling reasons to conclude that it does not incorporate principles of state agency law." Id. (emphasis in original). Before it could offer further interpretation, however, the F.C.C. averred that a referral under the primary jurisdiction doctrine would be necessary.

The Sixth Circuit agreed that a referral to the F.C.C. under the doctrine of primary jurisdiction was proper because it would advance regulatory uniformity and answer a question within the agency's discretion and technical expertise. Charvat, 630 F.3d at 466, 467 (citing In re StarNet, Inc., 355 F.3d 634, 639 (7th Cir. 2004) ("Only the F.C.C. can disambiguate the word[s] [on behalf of]; all we could do would be to make an educated guess.")) Accordingly, the Sixth Circuit referred the case to the F.C.C., which, on April 4, 2011, issued a public notice seeking comment on the matter. Public Notice, CG Docket No. 11-50, 26 F.C.C.R. 5040 (Apr. 4, 2011).

**C. The F.C.C.'s Declaratory Ruling**

On May 9, 2013, the F.C.C. issued its Declaratory Ruling as to the scope of "on behalf of" liability under the TCPA. The F.C.C. stated that "while a seller does not generally 'initiate' calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers." F.C.C. Declaratory Ruling, ¶ 1. The F.C.C., however, made plain that "on behalf of" liability does not require a formal agency relationship. Id. at ¶ 28. Instead, a plaintiff

proceeding under 47 U.S.C. § 227(c) could also use principles of ratification and apparent authority to establish the seller's vicarious liability for the illegal acts of a third-party telemarketer. Id. Armed with the F.C.C.'s guidance, the Court turns to the pending motion.

## STANDARD OF REVIEW

In reviewing the sufficiency of a complaint, a district court "'must accept as true all of the factual allegations contained in the complaint.'" Anderson v. Sara Lee Corp., 508 F.3d 181, 188 (4th Cir. 2007) (quoting Erickson v. Pardus, 551 U.S. 89, 94 (2007)). While a complaint need not contain detailed factual allegations, a plaintiff is obligated to provide the grounds of his entitlement to relief with more than mere labels and conclusions; a formulaic recitation of the elements of a cause of action will not do. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Indeed, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan, 478 U.S. at 286 (1986).

In considering whether the facts alleged are sufficient, a court must consider whether "a complaint . . . contain[s] 'enough facts to state a claim to relief that is plausible on its face.'" Anderson, 508 F.3d at 188 (quoting Twombly, 550 U.S. at 547). "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). This requires "more than a sheer possibility that a defendant has acted unlawfully." Id.

**ANALYSIS**

On February 23, 2015, 2GIG filed a motion to dismiss Cunningham's second amended complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) (Dkt. No. 138). 2GIG argues that Cunningham failed to allege a prima facie case under the TCPA because 2GIG is not a "seller," and, even if it were, Cunningham cannot plead sufficient facts to support a claim of vicarious liability (Dkt. No. 139 at 1-2).

On March 19, 2015, Cunningham, by liaison counsel Jonathan R. Marshall, filed a response opposing 2GIG's motion and contending that this Court's decision in Mey v. Monitronics Int'l, Inc., 959 F.Supp.2d 927 (N.D.W. Va. 2013), is controlling. There, this Court explained that determining if an entity is a "seller" under the TCPA depends on whether a telephone solicitation is made on that entity's behalf. It held that, at the summary judgment stage, the fact that a third-party telemarketer is permitted to hold itself out as an "authorized dealer" could lead a reasonable jury to conclude that the seller is vicariously liable. Id. at 932.

On April 2, 2015, 2GIG filed a reply, reiterating its argument that it is not a "seller" for purposes of TCPA liability because it sold alarm systems to third-parties, who then resold the systems on their own account, rather than "on behalf of" 2GIG (Dkt. No. 169 at 2-4). It further argues that, unlike Mey, the parties here did not have an "authorized dealer" relationship, and 2GIG cannot be held liable under the principle of apparent authority because it did not represent that Alliance Security was acting on its behalf. Id. at 5-6.

**A. 2GIG's Status as a "Seller"**

The Court must first address whether 2GIG is a "seller," as that term is defined by the TCPA. The F.C.C.'s regulations define a "seller" as "the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. 64.1200(f)(9). In Mey, this Court addressed the same argument 2GIG raises here–that a "manufacturer" is not a "seller" under the TCPA, and is therefore immune from liability–and rejected it, noting that "the argument cannot withstand a plain reading of the F.C.C.'s rules." 959 F.Supp.2d at 933. The issue, then, is whether Cunningham has pleaded sufficient facts that the dealers'

telemarketing calls were made "on behalf of" 2GIG to characterize it as a "seller" within the meaning of the TCPA.

2GIG contends that any telemarketing calls made by its co-defendants were not made on its behalf, but, rather, to benefit themselves (Dkt. No. 169 at 3-4). As a result, it argues, the F.C.C. Declaratory Ruling distinguishing between a "telemarketer" and a "seller" squarely apply. Id. at 4.

In its Declaratory Ruling, the F.C.C. noted that situations where a manufacturer produces and sells a product to dealers, who turn around and re-sell the product to consumers, would not result in liability for the manufacturer because the middleman dealer sells the product on its own account. F.C.C. Declaratory Ruling, ¶ 45. The F.C.C. also stated, however, that it saw no reason "that a seller should not be liable under [either section 227(c) or 227(b)] for calls made by a third-party telemarketer when it has authorized that telemarketer to market its goods or services." F.C.C. Declaratory Ruling, ¶ 47.

In his second amended complaint, Cunningham alleges that the dealers placed telemarketing calls "on behalf of and with full knowledge" of 2GIG, which "permitted" the dealers to use its trade names and trademark, and gave the dealers access to its customer service database (Dkt. No. 97 at 5). He further alleges that 2GIG

"authorizes dealers to place calls" on its behalf, and signed a contract with the dealers for distribution. Id. at 6. At the motion to dismiss stage, the Court is required to view these well-pleaded facts as true. Anderson, 508 F.3d at 188.

2GIG strenuously argues that the dealers were not "authorized dealers," and urges the Court to consider its website, which states that its "sales/tracking cycle stops" with its distributors (Dkt. No. 169 at 4-5). Even if the website were integral to Cunningham's complaint, the Court is still obligated to accept the allegations in the second amended complaint as true. Anderson, 508 F.3d at 188. Once the Court does so, it is clear that Cunningham has alleged sufficient facts to support his theory that the dealers, manufacturers, and alarm monitoring companies engage in a mutually profitable telemarketing scheme, notwithstanding 2GIG's representations to the contrary on its website (Dkt. No. 97).

In Mey, the Court found it important that "both entities have agreements . . . that enable [the dealer engaging in telemarketing] to hold itself out as an 'authorized dealer'" of the alarm monitoring company and the manufacturer. 959 F.Supp.2d at 932. That case, however, had progressed to the summary judgment stage, and the parties had the benefit of fulsome discovery before

presenting evidence of their authorized dealer relationship to the Court.

In this case, at the motion to dismiss stage, Cunningham's second amended complaint plausibly alleges that Alliance Security and Secure 1 were acting "on behalf of" 2GIG, therefore making it a "seller" within the F.C.C.'s definition. See Anderson, 508 F.3d at 188; Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

**B. Vicarious Liability**

2GIG next argues that, even if the Court does find it to be a "seller" under the TCPA, Cunningham has failed to plead sufficient facts to show vicarious liability (Dkt. No. 139 at 7). "Although Plaintiff is on the third version of his complaint, Plaintiff fails to plead the elements of agency or ratification sufficient to support the many conclusions of law contained in his amended complaint." Id. Specifically, 2GIG emphasizes that the dealers never had apparent authority to market on its behalf because 2GIG never manifested any intent for the dealers to do so (Dkt. No. 169 at 5-6).

In response, Cunningham contends that he plausibly alleged vicarious liability under the TCPA when he pleaded facts showing that an "authorized distributor" relationship existed between 2GIG

and the dealers (Dkt. No. 153 at 5). Cunningham argues that the Court's decision in Mey is controlling here.

In Mey, the Court emphasized that, under the F.C.C.'s Declaratory Ruling, "on behalf of" liability "does not require a formal agency relationship," and could exist based on "principles of ratification and apparent authority." 959 F.Supp.2d at 932. The Court defined apparent authority as holding "a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and traceable to a manifestation of the principal." Id. at fn. 1 (quoting F.C.C. Declaratory Ruling, ¶ 34). It held that, when a seller enters into an agreement with a telemarketer that enables the telemarketer to hold itself out as an authorized dealer, that fact alone is sufficient to state a claim based on the principle of apparent authority.[3] Id. at 932.

Cunningham has pleaded that an authorized dealer relationship exists between 2GIG and the dealers (Dkt. No. 97 at 6). His second amended complaint contains the following facts to support that allegation: (1) that the dealers placed telemarketing calls "on behalf of and with full knowledge" of 2GIG; (2) that 2GIG

[3] To the extent 2GIG urges a reassessment of the decision in Mey, the Court declines to do so. See Dkt. No. 169 at 5-6.

"permitted" the dealers to use its trade names and trademark, and gave the dealers access to its customer service database; (3) that 2GIG "authorizes dealers to place calls" on its behalf, and contracted with the dealers for distribution; (4) that the dealers mentioned 2GIG by name during their calls; and, (5) that 2GIG has "known for years" that the dealers have been the subject of complaints from consumers and government agencies (Dkt. No. 97 at 5-6).

Despite 2GIG's argument to the contrary, Cunningham's factual allegations that 2GIG authorized dealers to (1) place calls on its behalf, (2) use its trademark and trade name, and (3) access its customer database, are sufficient to plausibly allege an apparent agency relationship, particularly if the Court considers 2GIG's online statements that it only distributes through authorized channels. Id. at 5-7. See Restatement (Third) of Agency § 2.03, cmt. c.

For the reasons discussed, the Court finds that Cunningham has plausibly alleged sufficient facts that an authorized dealer relationship existed between 2GIG and the dealers, and that 2GIG is vicariously liable for the telemarketing calls made by the dealers. The Court therefore **DENIES** 2Gig's motion to dismiss (Dkt. No. 138).

It is so **ORDERED**.

**MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS AMENDED COMPLAINT [DKT. NO. 138 IN 1:14CV169, DKT. NO. 339 IN 1:13MD2493]**

The Court directs the Clerk to transmit copies of this Order to counsel of record and to the pro se plaintiff by certified mail, return receipt requested.

DATED: April 30, 2015.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE