

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

MARK FITZHENRY, individually and on)
behalf of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
VACATION CONSULTING SERVICES, LLC,)
BRIAN JAY SCROGGS and JOHN DOES 1-10,)
)
Defendants,)
)
v.)
)
SIGNATURE GETAWAYS, LLC,)
JJ&C MARKETING, LLC,)
ROGELIO MENDOZA, JR., d/b/a MENDOZA)
MARKETING and MENDOZA)
MARKETING, LLC,)
)
Third-Party Defendants.)

No. 4:17CV774 RLW

MEMORANDUM AND ORDER

This matter is before the Court on Third-Party Defendant JJ&C Marketing, LLC’s Motion to Dismiss for Failure to State a Claim (ECF No. 34). Third-Party Plaintiffs Vacation Consulting Services, LLC and Brian Jay Scroggs (collectively “Third-Party Plaintiffs”) have filed a response in opposition. JJ&C’s reply brief was due on June 20, 2017. On December 28, 2018, the Court ordered Third-Party Defendant JJ&C Marketing, LLC to file a file a reply to Third-Party Plaintiffs’ Response in Opposition to JJ&C’s Motion to Dismiss First Amended Third-Party Complaint no later than January 5, 2018. (ECF Nos. 74, 76) However, JJ&C did not timely comply with this Court’s Order.

Background

On December 5, 2016, Plaintiff Mark Fitzhenry filed a putative class action suit in state court alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”) against Defendants Vacation Consulting Services, LLC (“VCS”), Brian Jay Scroggs (“Scroggs”), and John Does 1-10. (Petition [hereinafter “Compl.”], ECF No. 6) Plaintiff alleges that VCS and Scroggs violated the TCPA during a May 25, 2016 automated telephone call. (*Id.* at ¶ 25; *see also* Pl.’s Mot. to Am. by Interlineation ¶3, ECF No. 21) Plaintiff also seeks class certification for persons called on or after June 12, 2013 on residential or cellular telephone lines by or on behalf of Defendants VCS and/or Scroggs in violation of the TCPA. (Compl. ¶ 23) Defendant VCS removed the case to federal court on February 21, 2017 (ECF No. 1)

VCS and Scroggs filed a Third-Party Complaint and an Amended Third-Party Complaint against several Third-Party Defendants, including JJ&C Marketing, LLC (“JJ&C”). (ECF Nos. 16, 33) In the First Amended Complaint and specific to JJ&C, Third-Party Plaintiffs allege that VCS entered into an oral contract with JJ&C to provide marketing services. (First Am. Compl. [“FAC”] ¶ 26, ECF No. 33) Third-Party Plaintiffs further allege that any telephone calls made to Plaintiff Fitzhenry or other members of the purported class were made by Third-Party Defendants or agents acting on their behalf without the knowledge or control of Third-Party Plaintiffs. (FAC ¶¶ 40-44) Third-Party Plaintiffs raise claims of breach of contract; implied contractual and equitable indemnity; and contribution. On May 17, 2017, JJ&C filed a motion to dismiss the First Amended Third-Party Complaint for failure state a claim, along with an Answer. (ECF Nos. 34, 35) Third-Party Plaintiffs filed a response in opposition on June 13, 2017. (ECF No. 40) JJ&C did not timely file a reply brief within seven days in accordance with

Rule 4.01 of the Local Rules of the United States District Court for the Eastern District of Missouri. Further, over one month has passed, and JJ&C has not complied with the Court's Order of December 28, 2018 or otherwise responded or requested additional time.

The Court finds that JJ&C's failure to comply with this Court's Order and failure file a reply brief renders it impracticable for the Court to properly address JJ&C's motion to dismiss and the Third-Party Plaintiffs' well-briefed response in opposition. Therefore, the Court will deny JJ&C's motion without prejudice. The Court notes that JJ&C has also filed an Answer, and the Court entered a Case Management Order on September 7, 2017. JJ&C is free to renew the motion to dismiss; however, the Court cautions JJ&C that to receive Court consideration, any motion to dismiss must be fully briefed.

Accordingly,

IT IS HEREBY ORDERED that Third-Party Defendant JJ&C Marketing, LLC's Motion to Dismiss for Failure to State a Claim (ECF No. 34) is **DENIED** without prejudice. Dated this 7th day of February, 2018.



RONNIE L. WHITE
UNITED STATES DISTRICT JUDGE