UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMUEL BARRERA, individually and on behalf of all others similarly situated,

Plaintiff,

v.

GUARANTEED RATE, INC.,

Defendant.

Case No. 17-cv-5668

Judge John Robert Blakey

ORDER

Plaintiff Samuel Barrera, individually and on behalf of all others similarly situated, has sued Defendant Guaranteed Rate, Inc., alleging violation of the Telephone Consumer Protection Act (TCPA). Defendant moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) and (6). *See* [13]. For the reasons explained below, the motion is denied. Consistent with the parties' initial status report, written discovery shall issue by 11/20/17. The status hearing previously set for 11/29/17 stands; the parties should be prepared at that time to set case management dates, including a fact discovery completion deadline.

STATEMENT

Plaintiff alleges that Defendant, a mortgage company that originates mortgages for residential homes, owns and operates a website devoted to offering consumers mortgage quotes over the Internet. Complaint [1], ¶¶ 2, 3. Consumers who visit the website provide information, including a preferred telephone number, to receive a mortgage quote. *Id.,* ¶ 3. The landing page where consumers provide their information features a statement indicating that, by clicking the "Get your free quote" button, the consumer is providing

> express consent to receive calls from or on behalf of Guaranteed Rate, our family of companies, or one of its third party associates to any telephone number you entered, even if it is a cellular phone number or other paid service for which the called or messaged person(s) could be charged for such call or text message. You provide your express written consent for Guaranteed Rate, Inc. to contact you via any means, including by use of an automated telephone dialing system[] and artificial, pre-recorded voice messaging in connection with calls; or texts (SMS and MMS) made to any telephone number you provided,

> even if your telephone number is currently listed on any do not contact E-mail list, internal, corporate, state, or federal Do Not Contact list.

Id., ¶ 32.

Plaintiff alleges that this statement is "inconspicuously hidden in barely legible font at the bottom of the Ad Page far beneath the 'Get your free quote' button." *Id.,* ¶ 35. Thus, as a practical matter, the only way a consumer "could conceivably discover the purported autodialer authorization" is if the consumer–who has no reason to suspect that he is agreeing to be contacted via autodialed calls– "scrolls down and examines the Lilliputian language at the bottom of the webpage before clicking 'Get your free quote.'" *Id.*, ¶¶ 35-36. Plaintiff further alleges, once a consumer provides the requested information and clicks on the "Get your free quote" button, he is immediately bombarded with telemarketing calls from Defendant, using an automatic telephone dialing system. *Id.,* ¶ 4.

More specifically, Plaintiff alleges that he visited Defendant's website on July 5, 2017, provided his personal information (including his cell phone number) in the various fields, and then clicked "Get your free quote." *Id.*, ¶¶ 40-41. Beginning the next day, Plaintiff received autodialed telemarketing calls from a Guaranteed Rate representative. *Id.,* ¶¶ 42-43. Plaintiff alleges that the calls were annoying and harassing and invaded his privacy. *Id.,* ¶ 46.

Defendant moved to dismiss the complaint under both Rule 12(b)(6) for failure to state a claim and Rule 12(b)(1) for lack of standing.

A motion under Rule 12(b)(6) tests the sufficiency of the complaint under the plausibility standard, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), not the merits of the suit, *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). To meet the plausibility standard, the complaint must supply enough facts to raise a "'reasonable expectation that discovery will reveal evidence' supporting the plaintiffs allegations." *Indep. Trust corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012) (quoting *Twombly*, 550 U.S. at 556). In deciding a Rule 12(b)(6) motion, this Court must accept as true all well-pleaded facts in a plaintiffs complaint and must draw all reasonable inferences in his favor. *Burke v. 401 N. Wabash Venture, LLC*, 714 F.3d 501, 504 (7th Cir. 2013). These same standards apply when evaluating a facial challenge to subject matter jurisdiction under Rule 12(b)(1). *Silha v. ACT, Inc.,* 807 F.3d 169, 174 (7th Cir. 2015) (citations omitted).

Under the express language of the TCPA, an automated call made to a cell phone is not unlawful if made "with the prior express consent of the called party." 47 U.S.C. § 227(b)(A)(iii). Consistent with FCC regulations, for automated telemarketing calls to cell phones, the prior express consent must be written. 47 C.F.R. § 64.1200(a)(2). To be effective, such consent also must "include a ***clear and conspicuous*** disclosure informing the person signing that: (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an

artificial or prerecorded voice; and (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property goods, or services." § 64.1200(f)(8)(i) (emphasis added). "Clear and conspicuous" in this context means "a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures." § 64.1200(f)(3).

Here, Plaintiff alleges that the calls he received from Defendant were telemarketing calls, that express written consent was required to make the calls legal, and that Defendant's purported consent agreement was deficient to authorize the calls. At this point in the proceedings, this Court agrees on all accounts.

Defendant argues that Plaintiff pleaded himself out of court by admitting that he provided his cell phone number to Defendant, acknowledging the statement on the website indicating that clicking the "Get your free quote" button constituted prior written consent, and admitting that he clicked "Get your free quote." Defendant cites *Williams v. Capital One Bank (USA), N.A.*, 682 F. App'x 467, 468 (7th Cir. 2017), for the proposition that "prior express consent is satisfied when an individual provides her cell phone number to a business." But simply providing a phone number is not enough. The Court in *Williams* noted the FCC's ruling that "giving a creditor a cell phone number 'as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt,'" *Id.* (citations omitted); but here, Plaintiff did not complete a credit application or otherwise execute a written consent; he requested a mortgage quote, a preliminary overture short of submitting a credit application. Defendant cites no authority suggesting that providing a phone number in this context makes all subsequent telemarketing calls legal.

Defendant's protestations to the contrary notwithstanding, these were telemarketing calls. The FCC defines "telemarketing" as "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." § 64.1200(f)(12). Plaintiff alleges that Defendant called him in an attempt to sell him mortgage services. Thus, express written consent was required. And, at least according to the allegations of the complaint, which the Court accepts as true at this stage, the purported consent agreement was deficient.

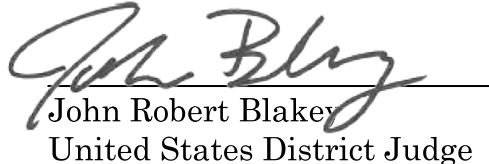
In *Sullivan v. All Web Leads, Inc.*, Judge Leinenweber denied an almost identical motion to dismiss because the defendant's website failed to disclose that quotes would be given by phone and failed to alert users that legal disclosures appeared below the "submit" box. No. 17 C 1307, 2017 WL 2378079, at *8 (N.D. Ill. June 1, 2017). That reasoning applies with equal force here. As Plaintiff has alleged, the placement of the disclosures and the use of a tiny font made it unlikely that Plaintiff knew, when he clicked on the quote button that he was actually opening the door to a barrage of autodialed telemarketing calls to his cell phone. The TCPA requires that the consent agreement be clear and conspicuous. *E.g.,*

Sullivan, 2017 WL 2378079, at *2-3. Plaintiff alleges that Defendant's was neither. At this stage, his allegations suffice. Accordingly, the Court will not dismiss for failure to state a claim.

Nor will the Court dismiss Plaintiff's complaint for lack of standing under Rule 12(b)(1). Defendant argues that Plaintiff failed to allege any injury-in-fact. Not so. Plaintiff alleges that Defendant's unwanted telemarketing calls were annoying and harassing and violated his right to privacy. "Such alleged injury falls squarely within the body of cases where courts have found sufficient injury to meet the injury requirement to bring a TCPA claim." *Franklin v. Depaul Univ.*, No. 16 C 8612, 2017 WL 3219253, at *2-3 (N.D. Ill. July 28, 2017) (collecting cases). *See also Intersol Indus., Inc. v. Magna Chek, Inc.*, No. 16 CV 5789, 2016 WL 7550983, at *2 (N.D. Ill. Dec. 29, 2016) ("*Spokeo* clarified that even a risk of real harm could demonstrate a concrete injury": unlawful telemarketing calls "form concrete injuries"; they are "a disruptive and annoying invasion of privacy, as they wake people up, interrupt meals, and force the sick and elderly out of bed.") (quoting *Krakauer v. Dish Network L.L.C.*, 168 F. Supp. 3d 843, 845 (M.D.N.C. 2016) and citing *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016)).

Dated: October 23, 2017

Entered:



John Robert Blakey
United States District Judge