IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROSE SALAIZ,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CAUSE NO. EP-23-CV-423-KC**
	§	
VSC OPERATIONS LLC,	§	
	§	
Defendant.	§	

ORDER

On this day, the Court considered Defendant VSC Operations LLC's Motion to Dismiss ("Motion"), ECF No. 4. For the reasons set forth below, the Motion is **DENIED**.

I. BACKGROUND

This case involves Plaintiff Rose Salaiz's allegation that she received a series of unwanted telemarketing calls advertising Defendant VSC Operations LLC's ("VSC") vehicle service contracts.[1] *See* Compl. ¶¶ 1–2, 5–8, ECF No. 1. The following facts are derived from the Complaint and are taken as true to adjudicate this Motion. *See Calhoun v. Hargrove*, 312 F.3d 730, 733 (5th Cir. 2002) (citing *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992)).

Plaintiff's personal cell phone number ending in -0895 has been registered on the National Do-Not-Call Registry since May 31, 2021. Compl. ¶¶ 1, 23. Between June 14, 2023, and July 19, 2023, Plaintiff received three calls "to her phone ending in -0895 by one of Defendant's sellers named Gold Standard Protection ("GSP")." Compl. ¶¶ 33, 36, 42. During two of the three calls, GSP "spoofed their Caller ID . . . [by] using plaintiff's area code (915) . . .

[1] Plaintiff alleges that VSC's trade name is North American Auto Care and refers to Defendant as "NAAC." *See generally* Compl. For clarity, however, the Court refers to Defendant as VSC throughout this Order.

to trick Plaintiff into thinking the calls were local." Compl. ¶ 35. During the third call, Plaintiff "feigned interest in a [vehicle service contract] in order to ascertain who was responsible for the alleged calls." Compl. ¶ 44. The representative then transferred Plaintiff to another GSP representative, Raul, who "confirmed Plaintiff's vehicle information and solicited Plaintiff for a [vehicle service contract] on behalf of Defendant [VSC]." Compl. ¶¶ 47–48. Raul told Plaintiff that GSP "works for" VSC and that VSC "is the administrator of the" vehicle service contract being sold. Compl. ¶ 50. Plaintiff later received the vehicle service contract in the mail. Compl. ¶ 51. The contract identified the policy's "seller" as GSP and the policy's "administrator" as VSC. *Id.*

Plaintiff alleges that VSC directed GSP to make the calls, "instructed GSP on what states to call, what hours to call, and what to say when the phone calls were answered," set "the qualifications required for each customer[,] and supplied GSP with the hardware and software used to enter those qualifications." Compl. ¶¶ 76–78.

Plaintiff filed her Complaint on November 17, 2023, bringing claims for violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, and similar provisions of Texas state law. *See generally* Compl. VSC filed its Motion on February 5, 2024, to which Plaintiff filed a Response, ECF No. 5. VSC did not file a reply, and the time to do so has elapsed. *See* W.D. Tex. Local Rule CV-7(e)(2).

II. DISCUSSION

A. Standard

A motion to dismiss pursuant to Rule 12(b)(6) challenges a complaint on the basis that it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, "the court must accept all well-pleaded facts as true and view them in the

light most favorable to the plaintiff." *Calhoun*, 312 F.3d at 733; *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Though a complaint need not contain "detailed" factual allegations, a plaintiff's complaint must allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Colony Ins. Co. v. Peachtree Constr., Ltd.*, 647 F.3d 248, 252 (5th Cir. 2011). "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).

"[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation and internal quotation marks omitted); *Colony Ins. Co.*, 647 F.3d at 252. Ultimately, the "[f]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted). Nevertheless, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

The Court holds pro se pleadings "to less stringent standards than formal pleadings drafted by lawyers." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (quoting *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981)). Nevertheless, pro se litigants must set forth either "direct allegations on every material point necessary to sustain a recovery" or "allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995)

(quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1216 (2d ed. 1986)).

B. Analysis

Plaintiff brings three claims against VSC for: (1) telephone solicitations made to Plaintiff's cell phone, which had been registered on the National Do-Not-Call Registry for at least thirty-one days, in violation of 47 U.S.C. § 227(c)(3)(F) and 47 C.F.R. § 64.1200(c)(2) ("Do-Not-Call claim"); (2) violations of section 305.053 of the Texas Business and Commerce Code, which prohibits the same conduct prohibited by the TCPA ("section 305.053 claim"); and (3) failure to obtain a telephone solicitation registration certificate, in violation of section 302.101 of the Texas Business and Commerce Code ("section 302.101 claim"). Compl. ¶¶ 98–109.

VSC argues that all of Plaintiff's claims against it must be dismissed because Plaintiff "fails to provide any factual allegations that [VSC] placed these calls," and "states no facts to support a violation of either" of her state-law claims. Mot. 3–4. VSC further argues that Plaintiff's Do-Not-Call claim fails because cell phones are not residential phone numbers and thus cannot support a § 227(c) claim. Mot. 8.

1. Direct or vicarious liability

First, VSC argues that Plaintiff failed to allege that VSC is directly or vicariously liable for the unwanted communications she received because "nowhere in the Complaint does Plaintiff allege that [VSC] made any telemarketing calls to her." *See* Mot. 9. Plaintiff responds that common-law agency principles apply, such that "the conduct of the telemarketer who makes the calls can be imputed to the seller if the telemarketer is an agent of the seller." Resp. 3 (citations omitted). Plaintiff states that she alleged that VSC "knowingly and actively directed the phone

calls in th[e] Complaint be made," and that VSC "effected the solicitations because it brought about and made them happen by employing or authorizing GSP to make the telephone solicitations and paying them to do so." Resp. 3–4 (citing Compl. ¶ 76).

An entity may be directly liable for TCPA violations when it "'initiates' a telephone call" that violates the TCPA. *Hunsinger v. Dynata LLC*, No. 22-cv-136, 2023 WL 2377481, at *5 (N.D. Tex. Feb. 7, 2023) (citing *In re Dish Network, LLC*, 28 FCC Rcd. 6574, 6582 (2013)), *adopted*, 2023 WL 2386710 (Mar. 4, 2023). An entity may also be vicariously liable "for TCPA violations committed by third-party telemarketers . . . . under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification." *Dish Network*, 28 FCC Rcd. at 6584; *see Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 168 (2016) (finding "no cause to question" the *Dish Network* holding "that, under federal common-law principles of agency, there is vicarious liability for TCPA violations"). Courts applying this guidance from the Federal Communications Commission ("FCC") have relied on the Restatement of Agency for the relevant agency principles. *See, e.g.*, *Bilek v. Fed. Ins. Co.*, 8 F.4th 581, 587 (7th Cir. 2021) (citing Restatement (Third) of Agency § 2.01 (Am. L. Inst. 2006)); *Callier v. Nat'l United Grp., LLC*, No. EP-21-cv-71-DB, 2021 WL 5393829, at *5 (W.D. Tex. Nov. 17, 2021) (citing Restatement (Third) of Agency § 1.01).

The law of agency pertains to "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Nat'l United Grp.*, 2021 WL 5393829, at *5 (quoting Restatement (Third) of Agency § 1.01). Many courts have recognized that issues of authority and control turn largely on the nature of internal communications between the purported principal and agent, of which TCPA plaintiffs cannot be expected to have knowledge

before filing suit. *Id.* at *6 (citing *Cunningham v. Foresters Fin. Servs., Inc.*, 300 F. Supp. 3d 1004, 1016 (N.D. Ind. 2018)); *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1302 (D. Nev. 2014) ("[T]he information necessary to connect all the players is likely in Defendants' sole possession." (citations omitted)). Some courts have thus allowed TCPA vicarious liability claims to proceed on no more than allegations of some connection between the telemarketer and the other defendant—for instance, that the telemarketer was selling the other defendants' services. *See Kristensen*, 12 F. Supp. 3d at 1302.

Other courts, however, have insisted on non-conclusory allegations of authority and control. *See, e.g.*, *Jackson v. Caribbean Cruise Line, Inc.*, 88 F. Supp. 3d 129, 139 (E.D.N.Y. 2015). The Court finds the latter position persuasive—as with any other claim, to survive a Rule 12(b)(6) motion, TCPA plaintiffs must allege facts that plausibly satisfy all elements of their claim and they may do so on information and belief rather than personal knowledge when certain information is "peculiarly within the possession and control of the defendant." *See Innova Hosp. San Antonio, Ltd. P'ship. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 730 (5th Cir. 2018) (quoting *Arista Recs., LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)).

a. Control

To establish the existence of an agency relationship, "the principal's right to control the agent's actions" is "essential." *Doane v. Benefytt Techs., Inc.*, No. 22-cv-10510, 2023 WL 2465628, at *8 (D. Mass. Mar. 10, 2023) (quoting Restatement (Third) of Agency § 1.01 cmt. f). "The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents." *Id.* (quoting Restatement (Third) of Agency § 1.01 cmt. f.). Thus, "[f]or example, when a company wishes to

place an advertisement in a circular, the publisher of the circular does not become the agent of the company." *Warciak v. Subway Rests., Inc.*, 949 F.3d 354, 357 (7th Cir. 2020).

In the TCPA context, courts consider whether defendants "maintained control over the content, timing, and recipients" of the calls or text messages sent by the telemarketer. *Id.*; *see Toney v. Quality Res., Inc.*, 75 F. Supp. 3d 727, 743 (N.D. Ill. 2014) (considering the extent to which the defendant "had the right to, and did, control the manner and means of . . . telemarketing"). For instance, the *Toney* court found a plausible agency relationship where the defendant developed a script, required the telemarketer to use that script, directed the telemarketer to provide a certain call-back number, and imposed guidelines for handling customer information and obtaining customer acceptance of terms and conditions. *Toney*, 75 F. Supp. 3d at 743. A court in this District has similarly allowed claims to proceed against a defendant who allegedly gave the telemarketer "scripts and pricing information to use on [the] calls." *Salaiz v. Pelican Inv. Holdings Grp., LLC*, No. EP-22-cv-29-FM, 2022 WL 17813229, at *2 (W.D. Tex. Nov. 10, 2022).

Here, as in *Toney* and *Salaiz*, Plaintiff alleges that VSC "had day-to-day control over the actions of GSP," and "instructed GSP on what states to call, what hours to call, and what to say when the phone calls were answered." Compl. ¶¶ 77, 80. VSC also allegedly "directed GSP on the qualifications required for each customer and supplied GSP with the hardware and software used to enter those qualifications." Compl. ¶ 78. These instructions were given not only at the beginning of the relationship between VSC and GSP, but also allegedly on an ongoing basis. Compl. ¶ 81 (alleging that VSC "gave interim instructions to GSP by providing lead-qualifying instructions and lead volume limits"). These allegations plausibly establish that VSC retained

the power to control the telemarketing activities that GSP conducted on its behalf, sufficient to establish an agency relationship. *See Toney*, 75 F. Supp. 3d at 743.

b. Authority

When an agency relationship is established, the principal may be held vicariously liable for actions taken by its agents within the scope of their authority, or which the principal later ratifies. Restatement (Third) of Agency § 1.01 cmt. c. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Id.* § 2.01. Actual authority may be either expressly conferred or implied by the principal's manifestations. *Doane*, 2023 WL 2465628, at *8 (citing Restatement (Third) of Agency § 2.01 cmt. b).

The same allegations that plausibly establish that VSC retained the right to control GSP's telemarketing activities also establish that VSC expressly authorized GSP to conduct telemarketing activities on its behalf, by instructing GSP when, where, and how to do so. *See Toney*, 75 F. Supp. 3d at 743. Plaintiff has therefore pleaded a plausible basis for holding VSC vicariously liable for GSP's telemarketing activities under a theory of actual authority, and the Motion is denied to the extent that VSC seeks dismissal because Plaintiff does not allege that VSC itself placed the calls. *See* Mot. 3–4, 6, 8–9. The Court need not consider whether Plaintiff has adequately pleaded a basis for vicarious liability against VSC under theories of apparent authority or ratification. *Cf. Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1076 (9th Cir. 2019) (declining to reach actual authority question by holding that TCPA defendant could be held liable for telemarketer's actions under a ratification theory).

2. Do-Not-Call claim

VSC makes two additional arguments for dismissal of Plaintiff's TCPA claim. However, VSC's first argument appears to misconstrue Plaintiff's Do-Not-Call claim, brought under § 227(c) of the TCPA, as a claim brought under § 227(b). *See* Mot. 3–8. Subsection (b) regulates telephone solicitation using an automatic telephone dialing system or an artificial or prerecorded voice. *See* 47 U.S.C. § 227(b)(1). But, as Plaintiff notes in her Response, she does not "seek relief under Section 227(b)," nor does she allege "that the calls were made using an [automatic telephone dialing system] or an artificial or prerecorded voice message." Resp. 2; *see* Compl. ¶¶ 98–109. Because Plaintiff has pleaded no § 227(b) claim, VSC's arguments based on § 227(b) are irrelevant.

Thus, VSC's only remaining argument to dismiss Plaintiff's Do-Not-Call claim is that § 227(c) applies to calls made to "residential telephone subscribers," but not to cell phones like Plaintiff's. Mot. 8. Plaintiff responds that "[t]his Court has routinely recognized that 'cell phones are residential' if used for residential purposes and registered on the National Do Not Call Registry," and argues her cell phone meets these criteria. Resp. 2–3.

Unlike other portions of the TCPA, regulations implemented under § 227(c) apply to "residential telephone subscribers" only. *Strange v. ABC Co.*, No. 19-cv-1361, 2021 WL 798870, at *3–4 (W.D. La. Mar. 1, 2021); *see also* 47 C.F.R. § 64.1200(c)(2) (prohibiting calls to "a residential telephone subscriber" on the National Do-Not-Call Registry). Some courts have concluded that this language categorically excludes claims based on calls to cell phones, reasoning that no cell phone can be a residential line.[2] *Strange v. Doe #1*, No. 19-1096, 2020

[2] Indeed, this Court once rejected § 227(c) claims on the grounds that the "[p]laintiff [did] not cite—and the Court [was] not aware of—any authority that ha[d] found [another regulation promulgated under § 227(c)] applicable to cellphones." *Callier v. GreenSky, Inc.*, No. EP-20-cv-304-KC, 2021 WL

WL 2476545, at *3 (W.D. La. May 12, 2020) (collecting cases). Other courts have reasoned that cell phones can be residential, so long as they are used for residential purposes. *Callier v. Momentum Solar LLC*, No. EP-23-cv-377-KC-RFC, 2024 WL 1813446, at *2–3 (W.D. Tex. Apr. 25, 2024) (collecting cases), *adopted*, 2024 WL 2120257 (May 10, 2024); *ABC Co.*, 2021 WL 798870, at *4 (collecting cases).

The Court finds the latter view persuasive for at least four reasons. First, it appears to represent a majority position. *Tsolumba v. SelectQuote Ins. Servs.*, No. 22-cv-712, 2023 WL 6146644, at *5 n.3 (N.D. Ohio Sept. 20, 2023) ("This Court therefore joins the majority of courts throughout the country who have held that cell phones like [plaintiff's] are entitled to the TCPA's protection as residential telephones." (quoting *Tessu v. AdaptHealth, LLC*, No. 23-364, 2023 WL 5337121, at *5 (D. Md. Aug. 17, 2023))). Second, the Fifth Circuit has rejected a narrow reading of "residential telephone subscribers" in a related TCPA context. *See Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 689–91, 693 (5th Cir. 2021). Third, the FCC has long maintained that cell phones are presumptively residential, for purposes of the TCPA's Do-Not-Call Registry provisions. *Myrick v. Adapthealth, LLC*, No. 22-cv-484, 2023 WL 5162396, at *2 (E.D. Tex. June 26, 2023), *adopted*, 2023 WL 4488848 (July 12, 2023) (citing *In re Rules & Reguls. Implementing the TCPA of 1991*, 18 FCC Rcd. 14014, 14039 (2003) [hereinafter "2003 FCC TCPA Order"]). Finally, many households no longer maintain a residential landline. Instead, they use cell phones for residential purposes. Thus, construing "residential" to entirely exclude cell phones would be inconsistent with the TCPA's core purpose of protecting people

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2688622, at *6 (W.D. Tex. May 10, 2021). That conclusion was confined to and informed by the plaintiff's briefing and allegations in that case. *See id.* To the extent that *Greensky* stands for a broader holding that the residential telephone regulations can never apply to calls made to cell phones, the Court concludes it was incorrectly decided for the reasons stated in this Order.

from harassing telephone calls in their homes. *See Chennette v. Porch.com, Inc.*, 50 F.4th 1217, 1223 (9th Cir. 2022) (citing 2003 FCC TCPA Order).

Here, Plaintiff alleges that her cell phone has been registered on the National Do-Not-Call Registry since May 31, 2021. Compl. ¶ 23. Plaintiff states that she uses her cell phone for "personal, family, and household" purposes, and "primarily relies on her cellular phone to communicate with friends and family," because she does not have a landline phone. Compl. ¶ 97. Plaintiff further alleges that she "uses her cell phone for navigation purposes, sending and receiving emails, timing food when cooking, and sending and receiving text messages." *Id.* Based on these allegations, the Court concludes that Plaintiff has sufficiently alleged that she uses her cell phone for residential purposes. *See Momentum Solar*, 2024 WL 1813446, at *3. The Motion is therefore denied as to Plaintiff's Do-Not-Call claim.

3. State-law claims

VSC generally argues that Plaintiff fails to allege facts in support of her state-law claims. Mot. 9–10. As to Plaintiff's section 305.053 claim, VSC's only argument for dismissal is that Plaintiff fails to allege VSC is directly liable for the telemarketing calls she received. Mot. 9. But, as the Court has already concluded, Plaintiff has adequately alleged that VSC is vicariously liable for the calls she received. The Motion is thus denied as to Plaintiff's section 305.053 claim.

Plaintiff's section 302.101 claim asserts that VSC is liable for GSP's telephone solicitations on VSC's behalf because VSC lacked the necessary registration certificate. Compl. ¶¶ 107–09; *see* Compl. ¶ 62 (alleging that neither VSC nor GSP were registered at the time of the calls). VSC argues that this claim fails for two seemingly interrelated reasons: first, because Plaintiff "fails to explain why a lack of registration [under section 302.101] matters or how this

relates to the allegations in the Complaint"; and second, because "Plaintiff does not, and cannot, allege that Defendant . . . is . . . a seller of anything as it only administers vehicle service contracts for various companies." Mot. 9. As best the Court can tell, VSC's argument appears to be that its lack of registration is irrelevant because it did not place the calls itself and because VSC is not a seller but an administrator of vehicle service contracts. *See id.* Similarly, VSC appears to argue that GSP's lack of registration is irrelevant because Plaintiff has not named GSP as a defendant in this lawsuit. *See* Mot. 3–4.

Section 302.101 prohibits sellers from making telephone solicitations in Texas without a registration certificate for the business from which the solicitation is made. Tex. Bus. & Com. Code § 302.101(a). For purposes of the telephone solicitation provisions, "seller" is defined as "a person who makes a telephone solicitation on the person's own behalf." Tex. Bus. & Com. Code § 302.001(5).

Although VSC may not have made the alleged solicitations itself, agency principles apply to Plaintiff's state-law claims too, so GSP's conduct as VSC's agent "can be imputed to" VSC. *Guadian v. Progressive Debt Relief, LLC*, No. EP-23-cv-235-FM-RFC, 2023 WL 7393129, at *4 (W.D. Tex. Nov. 8, 2023) (citations omitted) (collecting cases), *adopted*, 2023 WL 8242475 (Nov. 28, 2023); *see Clewett v. Coverage One Ins. Grp., LLC*, No. 23-cv-4461, 2024 WL 1962895, at *2 (S.D. Tex. May 3, 2024) (collecting cases); *Johnson v. Palmer Admin. Servs., Inc.*, No. 22-cv-121, 2022 WL 17546957, at *5, 9 (E.D. Tex. Oct. 20, 2022) (finding the defendant-administrator of vehicle service contracts was a "seller" and recommending denying motion to dismiss section 302.101 claim), *adopted*, 2022 WL 16919786, at *1 (Nov. 14, 2022) (overruling objection to finding that defendant-administrator was a "seller"). GSP's telephone solicitations on VSC's behalf may therefore be imputed to VSC, making VSC a "seller" that

must "hold[] a registration certificate for the business location from which the telephone solicitation is made" to avoid liability. Tex. Bus. & Com. Code § 302.101(a). Plaintiff alleges that although VSC "was registered at one point in time," its registration "is now suspended." Compl. ¶¶ 62, 64. Plaintiff has therefore plausibly alleged that VSC violated section 302.101 and VSC's Motion is denied as to that claim.

III. CONCLUSION

For the foregoing reasons, VSC's Motion, ECF No. 4, is **DENIED**.

SO ORDERED.

SIGNED this 10th day of July, 2024.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE