

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MICHAEL GRANT,

Plaintiff,

vs.

COMMONWEALTH EDISON COMPANY,

Defendant.

Case No. 1:13-cv-08310

Honorable Gary S. Feinerman

**DEFENDANT COMMONWEALTH EDISON COMPANY'S
REPLY IN SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

The legal principles on which this case should be dismissed were well stated by the FCC in its very first TCPA Order, where the Commission stated that outage-related communications by power companies are “within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent.” *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8777-78 (Oct. 16, 1992) (“1992 TCPA Order”). This observation was rooted in the legislative history of the TCPA itself. 137 Cong. Rec. H. 11307-01, *H11310 (Nov. 26, 1991) (The “term ‘emergency purposes’ [was] . . . intended to include any automated telephone call that notifies consumers of impending or current power outages, whether these outages are for scheduled maintenance, unscheduled outages caused by storms, or power interruptions for load management programs.”). Plaintiff has sought to obscure by an artful pleading game both the fact that he gave his consent to be contacted on his cell phone and the public safety purpose of the text he challenges, all as part of an overall strategy to skirt the flaws inherent in this case.

But the pleading rules neither compel this Court to countenance Plaintiff's tactics, nor prevent this Court from considering the obvious. As discussed herein, this Court is not required to ignore the fundamental issue of consent or the public safety purpose of the challenged text, because those facts are evident from the Complaint itself. Nor can Plaintiff save his Complaint by his new and unsupportable argument that the text at issue was a "telemarketing" text requiring advance *written* consent under the FCC's new telemarketing rules. For the reasons stated in our opening brief, and further supported herein, Plaintiff's Complaint must be dismissed for the very reasons enunciated so well by the FCC in its 1992 Order. Power outage-related communications are either covered by the consent inherent in the customer's provision of his or her phone number to the power company or they are permitted under the TCPA by the emergency purpose exemption.

II. ARGUMENT

A. ComEd Did Not Violate Section 227 Because Plaintiff Consented To Be Called On His Wireless Telephone

1. **Consent Is an Element of Plaintiff's TCPA Claim**

In his response brief, Plaintiff contends that (1) the Complaint does not set forth the facts establishing the "affirmative defense" of prior express consent, and (2) ComEd cannot properly assert the consent defense on a motion to dismiss. Relying on the well settled principle that facts well pleaded in the Complaint should be taken as true on a motion to dismiss, Plaintiff takes ComEd to task for allegedly introducing new facts and information in the motion to dismiss.

But whether a person consented to receive calls is fundamental to a TCPA claim. Significantly, as Plaintiff admits in his response, courts are not in agreement on how to treat the central issue of consent in TCPA actions, with a large number of courts, including courts in this District, having found "lack of prior express consent" to be an element of a plaintiff's TCPA

claim. See, e.g., *Hanley v. Green Tree Servicing, LLC*, 934 F. Supp. 2d 977, 982 (N.D. Ill. 2013) (noting that “[t]o state a cause of action under the TCPA, a plaintiff must allege that: (1) a call was made; (2) the caller used an ATDS or artificial or prerecorded voice; (3) the telephone number called was assigned to a cellular telephone service; and (4) the caller did not have the prior express consent of the recipient,” and granting motion to dismiss where plaintiff failed to plead a plausible entitlement to relief that defendant lacked consent to call his cell phone); *Holt v. MRS BPO, LLC*, No. 12-2571, 2013 WL 5737346, at *2 (N.D. Ill. Oct. 21, 2013) (noting lack of consent as an element of TCPA plaintiff’s claim).¹

As discussed in detail in ComEd’s opening brief, the FCC has made plain that, where a person provides his wireless number as a point of contact in a business relationship (as Plaintiff did here), he consents to receive calls relating to the business relationship, including text messages, at that number. Tellingly, nowhere in his Complaint does Plaintiff allege that ComEd improperly obtained his cell phone number or that he did not voluntarily provide his number to ComEd. And, it would have been easy for Plaintiff to plead this basic fact if he could do so truthfully. But he did not do so in his Complaint, nor does he anywhere in his 15-page response to ComEd’s motion to dismiss, which specifically challenges Plaintiff on this point. Instead,

¹ Significantly, the Seventh Circuit has not discussed the elements of a claim under the TCPA. The Ninth Circuit, however, recently weighed in on the issue in *Meyer v. Portfolio Recovery Associates, LLC* and stated that the “three elements of a TCPA claim are: (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) ***without the recipient’s prior express consent.***” 707 F.3d 1036, 1043 (9th Cir. 2012) (emphasis added). *Meyer* has been widely followed in the Ninth Circuit and other jurisdictions. See, e.g., *Gragg v. Orange Cab Co.*, No. 12-0576, 2014 WL 494862, at *2 (W.D. Wash. Feb. 7, 2014) (following *Meyer* and finding lack of consent to be an element of the plaintiff’s claim); *Smith v. Microsoft Corp.*, -- F.R.D. --, No. 11-1958, 2014 WL 323683, at *7 (S.D. Cal. Jan. 28, 2014) (same); *Fields v. Mobile Messengers Am., Inc.*, No. 12-05160, 2013 WL 6073426, at *3 (N.D. Cal. Nov. 18, 2013) (same); *Emanuel v. L.A. Lakers, Inc.*, No. 12-9936, 2013 WL 1719035, at *2 (C.D. Cal. Apr. 18, 2013) (same); *Steinhoff v. Star Tribune Media Co., LLC*, No. 13-1750, 2014 WL 1207804, at *2 (D. Minn. Mar. 24, 2014) (same); *Jones v. FMA Alliance Ltd.*, No. 13-11286, 2013 WL 5719515, at *1 (D. Mass. Oct. 17, 2013) (same).

Plaintiff pled and continues to maintain that he “never enrolled in the Outage Alert Program” and he “never consented to receive text messages sent from or on behalf of ComEd.” Compl. ¶ 23.

Courts routinely refuse to countenance such “hide-the-ball” tactics at the motion to dismiss stage. *See, e.g., O’Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) (“A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.”); *Jackson v. Marion Cnty.*, 66 F.3d 151, 154 (7th Cir. 1995) (“The trickiest cases are those in which the plaintiff alleges extensive facts but leaves out one fact that is critical to his claim, from which the court is apt to infer that the fact is adverse to the plaintiff.” (citing *Palda v. Gen. Dynamics Corp.*, 47 F.3d 872 (7th Cir. 1995) (affirming dismissal of complaint where plaintiff carefully alleged compliance with all but one of the conditions entitling him to benefits under a contract))). Plaintiff’s continued silence on this issue speaks volumes. Plaintiff’s Complaint fails to plead lack of consent, a necessary element of his case, and the Complaint should be dismissed for this reason.

2. Alternatively, Because Plaintiff Expressly Raised the Issue of Consent in his Complaint, the Court May Consider it on ComEd’s Motion to Dismiss

Even if the Court were to find that prior express consent is an affirmative defense as Plaintiff argues, this does not mean that the Court cannot address the issue on ComEd’s Motion to Dismiss. The Seventh Circuit has repeatedly found that “a plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts.” *Jackson*, 66 F.3d at 153 (citing *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251-52 (7th Cir. 1995)); *see also Tregenza v. Great Am. Commc’ns Co.*, 12 F.3d 717, 718 (7th Cir. 1993) (“The statute of limitations is an affirmative defense, and a plaintiff is not required to negate an affirmative defense in his complaint Of

course if he pleads facts that show that his suit is time-barred or otherwise without merit, he has pleaded himself out of court.”); *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992) (“Of course a plaintiff can plead himself out of court. If he alleges facts that show he isn’t entitled to a judgment, he is out of luck.”(internal citations omitted)); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992) (“Plaintiffs can plead themselves out of court. By alleging that the promise to give him credit for extra years of service was oral, Lister opened a trap door under his case, for ERISA does not allow oral variances of pension plans.”).

Here, Plaintiff insists that lack of consent is not an element of his claim and all he must do to sufficiently assert a claim under the TCPA is to allege three things: “(1) [ComEd] sent text messages (2) using an automatic telephone dialing system (3) to Plaintiff’s and other consumers’ cell phones.” Pl.’s Response at 1. Yet despite this, he specifically presents his theory of lack of consent to the Court in his Complaint: “Plaintiff Grant *never enrolled* in the Outage Alert program and *never consented to receive text messages* sent from or on behalf of ComEd.” Compl. ¶ 23 (emphasis added). But opting in to receive a particular type of communication is not the standard for determining consent under the TCPA. Rather, the FCC has made plain that, where a person provides his wireless number as a point of contact in a business relationship (as Plaintiff did here), he consents to receive calls and texts relating to the business relationship at that number. *See, e.g.*, 1992 TCPA Order, 7 FCC Rcd. at 8769.²

² Plaintiff argues that ComEd’s reliance on the FCC’s 1992 Order, instead of its more recent 2012 Ruling, is misplaced. However, the FCC’s 2012 Ruling only altered the meaning of “prior express consent” for *telemarketing calls*, not informational calls, which are at issue in this case. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Report and Order ¶ 3 (Feb. 15, 2012) (“2012 FCC Report and Order”) (“None of our actions change requirements for prerecorded messages that are non-telemarketing, informational calls . . . Such calls continue to require some form of prior express consent under the TCPA and the Commission’s rules, if placed to wireless numbers . . .”).

Plaintiff asserted his theory of lack of consent in his Complaint “but le[ft] out the one fact that is critical to his claim.” The Court may “infer that the fact is adverse” to the Plaintiff, *Jackson*, 66 F.3d at 154, and should dismiss the infirm pleading.

3. The Text Message at Issue Is an Informational Message, Not a Telemarketing Message Requiring Prior Express Written Consent

Perhaps recognizing his predicament on the issue of consent, Plaintiff lobs in an alternative theory in his response brief. He argues that even if he provided his cell phone number to ComEd, the mere provision of his cell phone number is not enough to evidence consent to receive the text message at issue. Specifically, Plaintiff asserts that the text message at issue constituted a “telemarketing” message because it was supposedly part of an effort by ComEd to “bolster customer satisfaction,” *see* Pl.’s Response at 12, and it therefore required prior express *written* consent under the FCC’s 2012 rule change to the TCPA.

Plaintiff is simply wrong on this point. The FCC has held that a message is an advertisement and constitutes telemarketing only if “the call is intended to offer property, goods, or services *for sale* either during the call, or in the future.” *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14098 (July 3, 2003). Following the FCC’s guidance, courts in this Circuit and others have flatly rejected Plaintiff’s argument that a determination of the purpose of the call (advertising or informational) should be based on something other than the content of the message alone, such as some potential to derive a benefit (i.e. customer satisfaction) from sending the message. *See, e.g., Alleman v. Yellowbook*, No. 12-1300, 2013 WL 4782217, at *6 (S.D. Ill. Sept. 6, 2013) (rejecting the plaintiff’s argument that message confirming receipt of the Yellowbook phone directory was commercial and constituted telemarketing because “[o]n its face, the call [was] not part of a marketing campaign to sell additional products or services.” (emphasis added));

Physicians Healthsource, Inc. v. Janssen Pharm., Inc., No. 12-2132, 2013 WL 486207, at *4 (D.N.J. Feb. 6, 2013) (“[T]he potential to gain some benefit from sending information, without the presence of additional commercial statement in the message, is insufficient to transform an informational message to an advertisement.”).

In this case, Plaintiff cannot credibly allege that anything in the text message itself constitutes telemarketing. Indeed, the message simply confirmed Plaintiff’s subscription to ComEd’s Program, provided other basic details regarding the Program, and gave instructions on how to unsubscribe or text for more information:

You are now subscribed to ComEd outage alerts. Up to 21 msgs/mo. Visit ComEd.com/text for details. T&C:agent511.com/tandc. STOP to unsubscribe. HELP for info.

Compl. ¶ 21. Nothing in the message itself “advertised, promoted, contemplated, alluded to, or encouraged” a sale of goods or services. *Alleman*, 2013 WL 4782217, at *6. Plaintiff doesn’t even try to make that argument. Rather, he asserts that information found outside the message itself – information purportedly on ComEd’s vendor’s website which does not specifically discuss ComEd’s Program in any way – should lead the Court to conclude that the text was a telemarketing message. *See* Pl.’s Response at 2 n.1. This is exactly the sort of attenuated leap that courts have rejected and even refused to sanction discovery on. *See Alleman*, 2013 WL 4782217, at *6; *Physicians Healthsource, Inc.*, 2013 WL 486207, at *4.

Indeed, the very notion that the presence of a motive to improve “customer satisfaction” might itself transform an informational text about an outage alert program into a “telemarketing” text would sweep in the very sort of informational texts (*e.g.*, airline alerts about flight delays, package delivery notifications) the FCC expressly emphasized would be preserved, and would not be subject to the written consent requirements under the new rules. *See* 2012 FCC Report

and Order ¶ 28. Plaintiff's new telemarketing argument would thwart one of the FCC's principal policy objectives in formulating the new regulations.

Accordingly, because the text message at issue was clearly informational and not a telemarketing message, ComEd was not required to obtain written consent before sending the message. Plaintiff's Complaint should be dismissed.

B. ComEd Did Not Violate Section 227 Because The Text Message At Issue Is Covered By The Emergency Purpose Exemption

Plaintiff argues that it is improper for the Court to decide ComEd's emergency purpose argument on a motion to dismiss because his Complaint does not set forth the facts establishing the emergency purpose exemption and he takes issue with a number of facts, which he asserts were "wrongly" added by ComEd in its Motion. *See* Pl.'s Response at 2-4. These added "facts" include:

- "The wave in recent years of extreme weather conditions across the country leading to mass, prolonged power outages," which led ComEd to develop the Outage Alert Program. ComEd Mot. to Dismiss at 1;
- In the fall of 2013, "in advance of what has turned out to be an unprecedented winter storm season," ComEd rolled the Program out as part of its standard electric service. *Id.*;
- The Program, "through two-way text messaging, enables customers to stay informed regarding power outages and restoration efforts and in fact to provide outage information to ComEd so that restoration can begin more quickly." *Id.* at 13;
- The Program serves the public interest "by keeping the public informed of critical updates regarding power". *Id.* at 5; and
- The Program provides "important, potentially life-saving information" to "millions of ComEd customers." *Id.* at 6.

But the Court may consider the above details regarding ComEd's Program. Such information is contained on ComEd's website,³ which Plaintiff expressly references in his Complaint. *See* Compl. ¶ 18, n.1. Because Plaintiff relied on ComEd's website in framing his Complaint, the Court may consider it on ComEd's Motion to Dismiss. *See, e.g., In re Corus Bankshares, Inc.*, 503 B.R. 44, 46 (Bankr. N.D. Ill. 2013) ("The court also must consider documents attached to the complaint, documents that are critical to the complaint *and referenced to in it*" (emphasis added) (citation omitted)); *Knieval v. ESPN, Inc.*, 223 F. Supp. 2d 1173, 1176 (D. Mont. 2002) (considering defendant's contents of the expn.com website where plaintiff referenced and attached portions of the website to his complaint). Moreover, the Court is certainly not barred from recognizing the extreme weather events that surrounded the creation of the Outage Alert Program. *See, e.g., Kolowski v. Metro. Life Ins. Co.*, 35 F. Supp. 2d 1059, 1062 n.7 (N.D. Ill. 1998) (taking judicial notice of the general "very, if not extremely cold" weather conditions in Chicago in February). The notion that the Court should review the text message in a vacuum extracted from its entirely relevant context is not what the law requires.

Substantively, Plaintiff's argument that the emergency purpose exemption should only include messages notifying of "impending or current power outages" impermissibly narrows the broad exemption. Pl.'s Response at 13-14. Specifically, the FCC defines emergency purpose calls in its rules as "calls made necessary in any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4). Furthermore, the FCC has expressly stated that the emergency purpose exemption is meant to be a "broad exemption." 1992 TCPA Order, 7 FCC Rcd. at 8778. As ComEd explained in its opening brief,

The text message at issue in this litigation was a necessary and logical first step in [ComEd's] communication chain. It introduced [] customers to the

³ *See* Outage Alert Program Information, currently available at www.ComEd.com/text (last visited on Apr. 11, 2014).

Program and offered each with the opportunity to opt-out, thereby directly serving the emergency purpose of the Program by providing the necessary information to customers as to the means of future communication so that they would be well prepared to receive or originate outage information.

ComEd Mot. to Dismiss at 14 (footnotes omitted). Sensitizing its customers to the manner and means of future emergency power-related communication certainly constitutes a “necessary” message “affecting the health and safety of consumers.” 47 C.F.R. § 64.1200(f)(4). Accordingly, as ComEd has stated, Plaintiff’s effort to extract the initial text message from the context of the broader Program is nothing more than an artful pleading device aimed at obscuring the true emergency purpose of the Program. This effort should fail, and Plaintiff’s Complaint should be dismissed.

III. CONCLUSION

For all of the foregoing reasons, ComEd respectfully requests that the Court grant its Motion to Dismiss.

Dated: April 11, 2014

Respectfully submitted,

/s/ Leslie D. Davis

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CERTIFICATE OF SERVICE

I, Leslie D. Davis, hereby certify that, on the date set forth above, I caused a true and correct copy of the foregoing *Reply in Support of Motion to Dismiss* to be served via ECF filing upon the following parties and counsel of record:

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