

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

PETER LUNDSTEDT ,

Plaintiff,

v.

I.C. SYSTEM, INC.,

Defendant.

CIVIL ACTION NO. 3:15-cv-00824 (JAM)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT I.C. SYSTEM, INC.'S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

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### **PRELIMINARY STATEMENT**

Defendant I.C. SYSTEM, INC. (“Defendant” or “ICS”), respectfully submits this memorandum of law in support of its motion for judgment on the pleadings for Plaintiff Peter Lundstedt’s (“Plaintiff” or “Lundstedt”) failure to state a cause of action for which relief may be granted pursuant to Federal Rule of Civil Procedure (“FRCP”) 12(c) and 12(h)(2).

Plaintiff claims he is entitled to damages based on ICS’ alleged “wrongful conduct”. *See* the Affirmation of Nicholas A. Corsano (“Corsano Aff.”) Exhibit 1, ¶1. Plaintiff alleges that ICS has violated the Telephone Consumer Protection Act (“TCPA”) 47 U.S.C. §227 *et seq.* and Connecticut Public Act No. 14-53, codified C.G.S.A. §42-288a (“CPA”). *See* Corsano Aff., Ex. 1, ¶¶ 20-35. Therefore, Plaintiff claims he is entitled to damages amounting to \$20,000.00 per call. *See* Corsano Aff., Ex. 1, ¶ 2(f).

However, Defendant ICS has neither violated the TCPA nor the CPA nor committed any other act against Plaintiff for which Plaintiff may recover damages. Therefore, Plaintiff’s claims must be dismissed and judgment awarded in favor of ICS on the pleadings.

### **STATEMENT OF FACTS**

Plaintiff is a resident of Fairfield County, Connecticut. *See* Corsano Aff., Ex. 1, ¶ 3. Plaintiff claims that I.C. System, Inc., is “inter alta a rogue debt collector who called the Plaintiff multiple times.” *See* Corsano Aff., Ex. 1, ¶ 4. Plaintiff claims that ICS is a debt collector and attempted to collect a debt owed to Verizon for approximately \$160.00. *See* Corsano Aff., Ex. 1, ¶ 2(b). Plaintiff alleges that Defendant called him at his residence attempting to collect the debt owed to Verizon. *Id.*

Plaintiff alleges that on the first call he told the Defendant to stop calling him because he was disputing the debt and to take him off its list. *See* Corsano Aff., Ex. 1, ¶ 2(c). Plaintiff claims that despite him telling the Defendant to take him off “its list”, ICS proceeded to call

Plaintiff. *See* Corsano Aff., Ex. 1, ¶ 2(d). Therefore, Plaintiff claims that Defendant's actions were terrorizing, unfair, deceptive, negligent, and a willful violation of statutory standards which resulted in Plaintiff being damaged and suffering emotional distress. *See* Corsano Aff., Ex. 1, ¶ 12-18.

## ARGUMENT

### POINT I

#### STANDARD OF MOTIONS FOR JUDGMENT ON THE PLEADINGS

Rule 12(h)(2) states that "a defense of failure to state a claim upon which relief can be granted...may be made in any pleading permitted...or by motion for judgment on the pleadings, or at the trial on the merits." Fed.R.Civ.P. 12(h)(2). Thus, the defense of failure to state a claim is not waivable. 5A Wright & Miller, Federal Practice and Procedure, §1361 (2d ed. 1990) ("Under Rule 12(h) the [the defense] of failure to state a claim upon which relief can be granted, Rule 12(b)(6), [is] preserved from the waiver mechanism in Rule 12(h)."). Therefore, ICS' motion for judgment on the pleadings has been properly brought under FRCP 12(h).

The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim. *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001), *citing Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998). In both postures, the district court must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor. *Id.* The court will not dismiss the case unless it is satisfied that the complaint cannot state any set of facts that would entitle the plaintiff to relief. *Patel*, 259 F.3d at 126, *citing Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994).

Even if the allegations asserted in the Complaint are taken as true for purposes of this motion, the Plaintiff still fails to state a claim for which relief may be granted and therefore, the Court should grant ICS' motion for judgment on the pleadings.

**POINT II**

**DEFENDANT ICS DID NOT VIOLATE PUBLIC ACT 14-53,  
CODIFIED C.G.S.A. §42-288A**

Plaintiff claims that Defendant ICS violated C.G.S.A. §42-288A by calling the Plaintiff multiple times when the Plaintiff was already registered on the "DO NOT CALL list." *See* Corsano Aff., Ex. 1, ¶ 24 and Ex. B. However, Plaintiff's claim against Defendant ICS for an alleged violation of C.G.S.A. §42-288A fails on its face. Plaintiff claims that ICS is a debt collector and attempted to collect a debt owed to Verizon for approximately \$160.00. *See* Corsano Aff., Ex. 1, ¶ 2(b). C.G.S.A. §42-288A specifically carves out an exception for telephone calls made primarily in connection with an existing debt. Therefore, any calls made to Plaintiff in association with the alleged debt to Verizon, do not constitute violations of C.G.S.A. §42-288A.

C.G.S.A. §42-288A(12)(c) states in relevant part: "No telephone solicitor may make or cause to be made any unsolicited telephonic sales call to any consumer (1) if the consumer's name and telephone number or numbers appear on the then current quarterly "no sales solicitation calls" listing made available by the department under subsection (b) of this section..." It is Plaintiff's claim that his number was registered on the "DO NOT CALL" list as proscribed under subsection (b) of C.G.S.A. §42-288A. *See* Corsano Aff., Ex. 1, ¶ 24 and Ex. B. Therefore, Plaintiff asserts Defendant violated C.G.S.A. §42-288A by calling Plaintiff.

However, "'unsolicited telephonic sales call' means any telephonic sales call *other* than a telephonic sales call made:...(B) primarily in connection with an existing debt or contract,

payment or performance of which has not been completed at the time of the telephonic sales call.” C.G.S.A. §42-288A(11). Therefore, if ICS is a debt collector and attempted to collect a debt owed to Verizon for approximately \$160.00 as Plaintiff claims, any calls made to Plaintiff regarding said debt do not constitute “unsolicited telephonic sales calls” under C.G.S.A. §42-288A. As such, Plaintiff cannot assert a cause of action under C.G.S.A. §42-288A or claim any damages associated therewith, against Defendant ICS. Therefore, Plaintiff’s first cause of action alleging Defendant violated C.G.S.A. §42-288A should be dismissed with prejudice.

### POINT III

#### DEFENDANT ICS DID NOT VIOLATE THE TCPA 47 U.S.C. § 227 ET SEQ.

Plaintiff alleges that Defendant ICS violated the TCPA, 47 U.S.C. §227 et seq. *See* Corsano Aff., Ex. 1, ¶ 26. Plaintiff claims that ICS “in the conduct of their business, used a repetitive pattern of terrorizing acts and practices with automatic telephone dialing systems such as defined by 47 U.S.C. §277(a)(1)(A) to communicate with Plaintiff over and over again. *See* Corsano Aff., Ex. 1, ¶ 34. Further, Plaintiff alleges that “the Defendant(s) are debt collectors...attempting to collect a debt allegedly owed to Verizon for about \$160.00 who called the Plaintiff *at his residence* without prior express consent...” *See* Corsano Aff., Ex. 1, ¶2(b).

Section 227(b) of the TCPA prohibits (in relevant part): “any person within the United States” from making “any call (other than...with the prior express consent of the called party) using any automatic telephone dialing system or artificial or prerecorded voice ... to any telephone number assigned to a ...**cellular telephone service** ... or any other radio common carrier service, or any service for which the called party is charged for the call.” 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff alleges that Defendant ICS called the Plaintiff “at his residence” without prior express consent. Further, the number provided by Plaintiff in Exhibit C of the Complaint, representing “Plaintiff’s call record provided by Optimum,” is a landline phone



number and that of his residence. *See* Corsano Aff., Ex. 1, ¶ 30, Ex. C. A call to Plaintiff's residence is not a violation of the TCPA. 47 U.S.C. § 227(b)(1)(A)(iii); *Ghawi v. Law Offices of Howard Lee Schiff, P.C.*, Civil No. 3:13-cv-115 (JBA), 2014 WL 6885141 at \*3 (D. Conn. Dec. 1, 2014).

The TCPA expressly says that it is a violation to call a cellular telephone service using any automatic telephone dialing system or artificial or prerecorded voice. Therefore, any telephone call made to Plaintiff's residence or a number not assigned to a cellular telephone service lies outside the scope of the TCPA. As such, Plaintiff's second cause of action alleging Defendant's violation of the TCPA must be dismissed with prejudice.

#### **POINT IV**

#### **DEFENDANT ICS' ACTS AND PRACTICES DO NOT VIOLATE CONN. GEN. STAT. 42-110B ET SEQ.**

Plaintiff does not bring a formal cause of action alleging that Defendant ICS' acts and practices violate the Connecticut Unfair Trade Practices Act ("CUTPA") Conn. Gen. Stat. 42-110b. However, Plaintiff asserts a claim that ICS violated Conn. Genn. Stat. 42-110b *et seq.* under his third cause of action for "Willfulness." Plaintiff alleges that Defendant "engaged in the act when they knew or should have known, that their conduct was unfair or deceptive in violation of Conn. Gen. Stat. §42-110b(a)." *See* Corsano Aff., Ex. 1, ¶ 36.

CUTPA bars any person from "engaging in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." C.G.S.A. §42-110b(a). A practice is considered to be "unfair or deceptive" if it: offends public policy; is immoral, unethical, oppressive, or unscrupulous; and/or causes substantial injury to consumers. *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 119-20 (2d Cir. 2004). The plaintiff must demonstrate that he has "suffered an ascertainable loss of money or property, real or personal, as a result of

the use or employment of a method, act or practice prohibited by section 42-110b.” C.G.S.A. §42-110g. The Connecticut Supreme Court has explained: “Ascertainable means capable of being discovered, observed or established’ and “ ‘loss’ necessarily encompasses a broader meaning than the term ‘damage’ ... [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known.” *Hinchliffe v. Am. Motors Corp.*, 184 Conn. 607, 613-14, 440 A.2d 810 (1981).

Plaintiff baldly alleges that the Defendant engaged in acts or practices that were unfair and deceptive. *See Corsano Aff.*, Ex. 1, ¶ 16. Plaintiff generally claims that Defendant’s acts were terrorizing, oppressive, unethical, immoral and unscrupulous, patently outrageous and therefore violate C.G.S.A. §42-110b *et seq.* *See Corsano Aff.*, Ex. 1, ¶ 23. While Defendant denies such allegations are true, Plaintiff fails to allege or claim any ascertainable loss or damage suffered by Plaintiff in association with Defendant’s alleged violations of C.G.S.A. §42-110b *et seq.* As stated above, the Plaintiff must demonstrate that he has “suffered ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b.” C.G.S.A. §42-110g. Here, Plaintiff in no way claims he suffered loss of money or property in association with Defendant’s alleged violations of C.G.S.A. §42-110b *et seq.* Therefore, Plaintiff’s third cause of action and all claims against Defendant alleging violations of C.G.S.A. §42-110b must be dismissed with prejudice.

#### POINT V

#### **PLAINTIFF’S CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IS INSUFFICIENT AND SHOULD BE DISMISSED WITH PREJUDICE**

Plaintiff’s fourth cause of action for negligent infliction of emotional distress is insufficient as against Defendant ICS and should be dismissed with prejudice. Plaintiff baldly asserts that Defendant “engaged in negligent conduct or a willful violation of a statutory standard

resulting in emotional distress.” See Corsano Aff., Ex. 1, ¶ 38. However, Plaintiff more definitively states that “the Defendants [*sic*] committed terrorizing tortuous acts and caused Negligent Infliction of Emotional Distress upon the Plaintiff *because the Plaintiff had been called hundreds if not thousands of times by other debt collectors*. See Corsano Aff., Ex. 1, ¶ 17. Even as alleged, Plaintiff’s emotional distress was not due to the acts of Defendant ICS, it was preexisting and caused by numerous other debt collectors as Plaintiff clearly sets forth in the Complaint. Therefore, Plaintiff’s cause of action for negligent infliction of emotional distress should be dismissed with prejudice as Plaintiff has not suffered any ascertainable loss as required by statute.

To prove negligent infliction of emotional distress a plaintiff must prove the following elements: (1) the defendant’s conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff’s distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant’s conduct was the cause of the plaintiff’s distress. *Carrol v. Allstate Ins., Co.*, 262 Conn. 433, 444 (2003). Here, the Plaintiff admits that the Defendant’s conduct was not the cause of Plaintiff’s emotional distress. In fact, any emotional distress suffered by Plaintiff was due to the “hundreds if not thousands” of calls to Plaintiff by “other debt collectors.” See Corsano Aff., Ex. 1, ¶ 17. Plaintiff’s emotional distress, (if any), was simply not the result of any of Defendant’s conduct. Further, Plaintiff fails to allege that any emotional distress suffered by Plaintiff might result in illness or bodily harm. Plaintiff only baldly states that he has suffered “emotional distress.” See Corsano Aff., Ex. 1, ¶ 17. Such an assertion is insufficient to establish emotional distress under the requisite standards. For the foregoing reasons, Plaintiff’s cause of action for emotional distress is insufficient under the law and should be dismissed with prejudice.

**POINT VI**

**DEFENDANT'S CONDUCT WAS NOT HARASSING UNDER THE FDCPA**

It is Defendant's position, that Plaintiff does not sufficiently state a cause of action for any alleged violation of the Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. §1692 *et seq.* To bring a claim under the FDCPA, the Plaintiff must allege that the debt owed was a consumer obligation; more specifically, for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. 15 U.S.C. §1692a(5); *Machado v. Southern New England Telephone*, No. CV 044000577S, 2004 WL 3130546 at \*2 (Dec. 22, 2004); *citing Franklin Credit Management Corp. v. Nicholas*, Superior Court, judicial district of New London, Docket No. CV 98 0546721 (April 27, 1999, Parker, J). Here, Plaintiff has failed to plead for what purpose the "Alleged Debt" was incurred and if the "Alleged Debt" is a "consumer obligation," as required by statute. 15 U.S.C. §1692a(5). For this reason, any potential cause of action under the FDCPA must be dismissed due to Plaintiff's insufficient pleading of the same.

Moreover, 15 U.S.C. §1692(d) proscribes debt collectors from "engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C.A. §1692(d). It is Plaintiff's claim that Defendant called him multiple times. *See Corsano Aff.*, Ex. 1, ¶ 2(b). Plaintiff baldly claims that he felt harassed, oppressed and abused by the Defendant's actions due to these phone calls. *See Corsano Aff.*, Ex. 1, ¶ 29. Plaintiff also claims that Defendant continued to call him after Plaintiff told the Defendant to stop calling him regarding the Alleged Debt because it was injurious to the Plaintiff. *See Corsano Aff.*, Ex. 1, ¶ 35.

15 U.S.C. §1692g(b) provides that "if the consumer notifies the debt collector in writing within thirty days of receiving a notice of debt from the debt collector that the debt, or any portion thereof, is disputed ... the debt collector shall cease collection of the debt, or any

disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment ... and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.” 15 U.S.C. §1692g(b). Plaintiff claims that he notified the Defendant over the phone that the alleged debt was being disputed, not in writing as required by statute, to force the debt collector to cease communication with the alleged debtor, or in this case, Plaintiff. 15 U.S.C. §1692g(b); *Ghawi*, 2014 WL 6885141 at \*3.

In evaluating whether repeated phone calls were made “with intent to annoy, abuse, or harass,” courts generally consider the volume and pattern of calls. *Chavious v. CBE Group, Inc.*, 2012 WL 113509 at \*2, (E.D.N.Y. 2012)<sup>1</sup>. Courts have awarded defendants summary judgment where the volume and pattern of calls demonstrates an intent to contact debtors rather than an intent to annoy, abuse, or harass them. *Id.*, citing *Carman v. CBE Group, Inc.*, 782 F.Supp.2d 1223, 1232 (D.Kan. 2011).

In this case, Plaintiff alleges that Defendant called him multiple times over a one month period. *See Corsano Aff.*, Ex. 1, ¶ 29. Further, Plaintiff points to a call log that supposedly represents the calls made to Plaintiff by Defendant. *See Corsano Aff.*, Ex. 1 at Ex. C. Without confirming the accuracy of Plaintiff’s call log, it nonetheless shows that all alleged calls were made during the reasonable hours of 8:00 a.m. and 6:00 p.m. and no calls were made continuously on the same day. Thus, the number of calls do not amount to harassment in violation of the FDCPA.

As aforementioned, Plaintiff does not assert a formal cause of action for alleged violation of the FDCPA on the part of Defendant, therefore, Defendant contends that it has sufficiently established Plaintiff’s failure to state a cause of action upon which relief may be granted based

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<sup>1</sup> A copy of the referenced case has been attached as Exhibit A for the Court’s convenience and review.

on Points I-V of this Memorandum of Law. As such, Plaintiff's action should be dismissed with prejudice.

**CONCLUSION**

For the foregoing reasons, Defendant ICS requests that the Court grant its motion for judgment on the pleadings and dismiss Plaintiff's action with prejudice for failing to state a cause of action for which relief may be granted and for such other and further relief as this Court may deem just.

Respectfully submitted,  
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By: Its Attorneys

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Dated: August 25, 2015

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**CERTIFICATE OF SERVICE**

I, Nicholas A. Corsano, hereby certify that the documents filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on August 25, 2015.

*/s/ Nicholas A. Corsano*

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