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WHAT'S INSIDE

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CRIMINAL LAW

Tellers admit scamming Georgia bank out of $1.6 million

Two former bank tellers are facing up to 30 years in prison after admitting in federal court to embezzling more than $1.6 million from a Georgia bank and falsifying records to cover the thefts.

United States v. Mize et al., No. 18-cr-16, plea agreements filed, 2018 WL 6444968, 2018 WL 6445179 (M.D. Ga. Dec. 4, 2018).

Brandy Mize and Vicky Martin appeared before U.S. District Judge Tillman E. Self of the Middle District of Georgia on Dec. 4 and pleaded guilty to one count of conspiracy to defraud a financial institution, U.S. Attorney Charles Peeler said in a statement the next day.

Mize and Martin admitted that while working at Eatonton, Georgia-based The Peoples Bank they took cash from their teller drawers, issued themselves cashier's checks, transferred bank funds into their own accounts and made fake ledger entries to hide the thefts.

Mize also admitted she stole cash from the vault, Peeler said.

Mize, as the head teller, and Martin, as the assistant head teller, were responsible for

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Director: Nadia Abadir

Editors:
Catherine Tomasko
Cath.Tomasko@thomsonreuters.com

Tricia Gorman

Desk Editors:
Jennifer McCreary, Elena Neuzil,
Abbie Sarfo, Maggie Tacheny

Graphic Designers:
Nancy A. Dubin, Ramona Hunter

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Banks and short-term, small-dollar loans: Is now the time?

By Robert M. Jaworski, Esq.
Holland & Knight

Recent financial news reports announced a new short-term, small-dollar consumer loan offering by U.S. Bank that appears intended to compete with traditional payday loan products. Will it be successful? Is the time ripe for other banks to develop such products? Can technological innovations make these products feasible for banks to offer? What hurdles will banks face?

PAYDAY LOANS

Paydays loans offered by nondepository institutions are generally marketed as a way for consumers to bridge unexpected financial shortfalls they face while awaiting the receipt of paychecks, benefits or other sources of income. They provide consumers ready access to funds for a short period of time with very limited underwriting. In return, consumers pay a set fee based on the amount borrowed.

Most payday loans are repayable in two weeks by means of a single balloon payment. The average fee is $15 per $100 borrowed, which works out to an annual percentage rate of almost 400 percent. Customers who cannot repay the loan by the due date can usually have the deadline extended for additional two-week periods, i.e., have the loan "rolled over," but they must pay an additional fee for each rollover.

Online payday lenders, which tend to charge higher fees than their storefront counterparts, require customers to agree to repay the loans through the ACH network by means of an automatic debit from their checking account. If an automatic debit is transmitted to but rejected by a customer's bank because there are insufficient funds in the account, the customer may have to pay additional fees to the bank.

Borrowers can typically qualify for a storefront payday loan by providing some verification of income (typically a pay stub) and evidence of a personal deposit account. Online payday lenders are more concerned about fraud and typically require borrowers to verify their identity and the existence of a bank account in good standing.

Payday lenders do not generally consider borrowers' other financial obligations or require collateral for the loan.

Payday lenders do not generally consider borrowers' other financial obligations or require collateral for the loan. Nor do they typically obtain traditional credit reports or credit scores on borrowers before making a loan, or report information about borrowers' payday loan borrowing history to any of the nationwide consumer reporting agencies. Moreover, the process of applying for and obtaining a payday loan is typically simple and fast, two attributes that make it very attractive to consumers who need money in a hurry.

Until the passage of the Dodd-Frank Act and the creation of the Consumer Financial Protection Bureau, the federal government essentially ceded regulation of payday loans to the states.

The states took different approaches to regulating payday loans. Some states essentially banned them, believing they harmed consumers by leading them into a cycle of debt that is often difficult and costly to escape.

Others attempted to regulate some of the loans' most onerous aspects by limiting rollovers, setting limits on fees and taking other similar steps. Still others allowed the free market to operate with respect to payday loans.[1]

DEPOSIT ADVANCE PRODUCTS

More than a decade ago, several banks tried to tap into the short-term, small-dollar market by offering deposit advance products. DAPs are small-dollar, short-term credit products, typically open-end lines of credit, that are offered to customers who maintain a deposit account (or deposit-related vehicle such as a reloadable prepaid card) and use direct deposit. They allow customers to obtain funds in advance of their next direct deposit based on their history of recurring deposits.

Like payday loan fees, DAP fees are typically charged as a set dollar amount that is based on the amount borrowed. Repayment occurs when the next qualifying direct deposit is made to the customer's account. If no such deposit is made within 35 days following the advance, the customer's account is debited by the amount due (even if that results in the account being overdrawn).

Since the repayment date is not set at the time of the advance and will vary depending on the amounts and timing of the customers' direct deposits, the fee cannot be used to calculate an APR when the credit is extended.

Qualifications for a DAP typically include a deposit account with the bank that is in good standing and has been open for a specified

Robert M. Jaworski, an attorney in **Holland & Knight**'s Philadelphia office, has over 25 years of private practice experience. As a member of the firm's financial services regulatory team, he provides banks and other financial institutions with day-to-day advice and counsel on federal and state compliance and regulatory issues, including issues arising under the federal consumer credit protection laws, such as TILA, ECOA, FCRA, SCRA, CRA, GLBA, RESPA, HMDA, as well as state licensing and lending laws. He can be reached at Robert.jaworski@hklaw.com. The author wishes to thank Len Bernstein, co-chair of the firm's financial services regulatory team, for the substantial assistance he provided in the preparation of this article.

period, a history of recurring direct deposits above a minimum amount, and additional requirements that the bank may impose. Credit limits are generally set as a percentage of the total monthly direct deposits made to the account.[2]

HOSTILITY TOWARD PAYDAY LOANS AND DAPS

Over the years, payday loans' negative aspects have attracted considerable attention from state and federal legislators and regulators as well as consumer advocacy groups. This attention has focused on, among other things, the extremely high APRs attached to payday loans, internet payday lenders' widespread use of lead generation companies to funnel consumers to their websites, the fact that many payday loan customers are financially unsophisticated, the ease with which consumers can obtain and extend payday loans, and the often-harsh consequences suffered by borrowers when their accounts lack sufficient funds to cover checks or payment requests presented to their bank (often multiple times) by the lender.

In response, states have passed laws prohibiting or restricting payday loans, regulatory enforcement actions have been undertaken against payday lenders and federal bank regulators have attempted to dissuade banks from being involved in this type of lending.[3]

THE U.S. BANK LOAN PRODUCT

Against this backdrop, U.S. Bank has introduced a new offering called the "Simple Loan." It is described on the bank's website as a "high-cost product," but it appears to be significantly more consumer-friendly than a typical payday loan.

The fee is $12 per $100 borrowed (which works out to an APR of approximately 70 percent) for customers who agree to use autopay to make their payments. If autopay is not used, the fee is $15 per $100 borrowed (which is an APR of approximately 88 percent).[4] The maximum loan amount is $1,000.

Repayment is required in three monthly installments (which cannot exceed 5 percent of the customer's gross monthly income), and the loan cannot be rolled over. There must be at least a 30-day cooling off period between the time one loan is paid off and the customer applies for another one.

Only consumers who maintain a checking account with U.S. Bank and have a credit history are eligible, and U.S. Bank has indicated that it intends to report data about the loans to credit agencies so borrowers can build up their credit profile.[5]

PROSPECTS FOR OTHER BANKS DEVELOPING SIMILAR PRODUCTS

Recent actions by the CFPB and the Office of the Comptroller of the Currency signify a less hostile attitude toward bank involvement in short-term, small-dollar lending, and this development may encourage other banks to consider similar programs.

To be successful, they will likely need to streamline the processes they use to originate these types of loans, partly by embracing the use of technology. Nevertheless, hurdles will remain.

CFPB PAYDAY LOAN RULE

The CFPB adopted its final Payday, Vehicle Title and Certain High Cost Installment Loans Rule in October 2017, shortly before then-Director Richard Cordray resigned from the bureau to campaign for governor of Ohio.[6]

The significance of the Payday Rule, assuming it is not materially revised by the bureau or overturned by a court before its August 2019 effective date, lies in the fact that it imperils the existing payday loan origination model.

The Payday Rule declares that it is an unfair and abusive practice for nonbank lenders to make short-term, small-dollar loans to consumers without reasonably determining that they have the financial capacity to make the required loan payment(s) while also fulfilling their major financial obligations and paying for their basic living expenses.

Moreover, the Payday Rule requires lenders to adhere to specific policies and procedures when making this determination, including that they:

- Obtain a written statement of the consumer's net income and the amount the consumer must pay to meet his/her major financial obligations.
- Verify, from their own records, a national consumer report or a report from a registered information system, the consumer's net monthly income and major debt obligations.
- Determine ability to repay based on projections of the consumer's monthly residual income or debt-to-income ratio and the required (highest) monthly loan payment.
- Ensure that, within 30 days before applying for the loan, the customer has not had a sequence of three short-term, small-dollar (or longer-term balloon payment) loans (defined to include rollovers), each of which was paid off less than 30 days before applying for the next one. (The Payday Rule requires a 30-day cooling off period before a consumer can obtain an additional short-term, small-dollar loan under such a circumstance.)

Alternatively, under the Payday Rule lenders may offer some consumers a closed-end "principal step-down" short-term, small-dollar loan. Such a loan may not exceed $500. The amount of a second or third short-term, small-dollar loan obtained by the borrower within 30 days after payoff of the principal step-down loan may not exceed two-thirds and one-third, respectively, of the amount of the initial loan.

The lender may not take a security interest in the consumer's motor vehicle. And the lender must provide the consumer with a written disclosure explaining these restrictions, both at the time of the initial loan and before the lender makes a third loan in a sequence.

Adherence to the Payday Rule's mandates will necessitate a drastic overhaul of the loan origination model presently utilized by most, if not all, payday lenders and will entail considerable effort and expense on their part. The result of any such overhaul, moreover, will be a more time-consuming, involved and expensive process going forward.

Over the years, payday loans' negative aspects have attracted considerable attention from state and federal legislators and regulators as well as consumer advocacy groups.

By making it more difficult and costly for payday lenders to operate, the Payday Rule — which does not apply to depository institutions — may create an opening for such institutions to develop competitive products.

OCC actions

Almost immediately after the CFPB adopted the Payday Rule, the OCC announced it was rescinding its 2013 guidance concerning DAPs.[7] That guidance, together with similar guidance issued by the Federal Deposit Insurance Corp. in 2007,[8] had effectively stifled the DAP lending programs then being operated by several banks and discouraged other institutions from entering the market.

The OCC's rescission of this guidance sent a signal — though an ambiguous one — that the agency may have changed its mind concerning the appropriateness of banks offering DAPS and perhaps other types of short-term, small-dollar loans as well.

In May 2018 the OCC put out a much clearer signal to that effect in OCC Bulletin 2018-14, announcing its Core Lending Principles for Short-Term, Small-Dollar Installment Lending.[9] The OCC Bulletin encouraged national banks to consider developing plans to offer short-term, small-dollar loans with maturities greater than 45 days, no required balloon payments, and reasonable pricing and repayment terms.

The bulletin also recommended that banks develop these plans in consultation with their OCC portfolio manager, examiner-in-charge or supervisory office, particularly in cases where entering into such a program would constitute a substantial deviation from the bank's existing business plans.

In addition, the OCC Bulletin instructed banks choosing to develop such a lending program to adhere to the following core lending principles:

- All products should be consistent with safe and sound banking, treat customers fairly, and comply with applicable laws and regulations.
- Banks should effectively manage the risks associated with the products they offer, including credit, operational, compliance and reputation risks.
- All credit products should be underwritten based on reasonable policies and practices, including guidelines governing the amounts borrowed, frequency of borrowing and repayment requirements.

Further, the OCC Bulletin indicated that, in the agency's view, reasonable policies and practices for a short-term, small-dollar installment lending program would generally include the following characteristics:

- Loan amounts and repayment terms that promote the fair treatment and access of applicants and support borrower affordability and successful repayment of principal and interest in a reasonable time frame.
- Loan pricing that complies with applicable state laws and reflects overall returns reasonably related to product risks and costs.
- Analysis that uses internal and external data sources, including deposit activity and nontraditional credit data, to assess a consumer's creditworthiness and effectively manage credit risk. Transparent, accurate and consumer-friendly marketing and disclosures that comply with applicable consumer protection laws and regulations.
- Loan servicing processes and workout strategies that help customers avoid continuous cycles of debt and costs disproportionate to the amounts borrowed.
- Timely reporting of borrowers' repayment histories to credit bureaus, so that borrowers can build positive credit profiles and transition into mainstream financial products.

Finally, the OCC stated in the bulletin that it would not look favorably at entities partnering with banks if their sole objective in doing so is to evade a lower interest rate cap to which they would be subject if they made the loans themselves.

The role of technology

Some of the principal reasons people use payday lenders to meet their short-term credit needs include the ease with which they can obtain the loans, the flexibility the loans afford them and the convenient locations in which storefront payday lenders operate (mostly in inner cities where bank offices are few and far between).[10] As indicated above, if applicants can supply a pay stub or verification of identity and evidence of a bank account, they can obtain a payday loan very quickly and with very little fuss.

Many payday lenders, including virtually all online payday lenders, perform virtually instantaneous checks to make sure the loan applications are not fraudulent and the applicants are who they say they are, and then approve the loans and tender or deposit the funds into the customers' bank account within minutes. If borrowers are unable to repay their loans when due, many payday lenders allow them to extend their loans for an additional period or periods, each time by simply paying another fee.

> The Payday Rule declares that it is an unfair and abusive practice for nonbank lenders to make short-term, small-dollar loans to consumers without reasonably determining that the borrowers have the financial capacity to make the required loan payments.

To gain significant market share, banks will need to rely on technology to a great extent to make their loan application and funding processes as efficient and user-friendly as possible. Otherwise, customers are likely to stay with the payday lender (or lenders) they have used in the past, even if those loans are more expensive.

However, no matter how banks streamline their processes, the regulatory regime under which they operate will likely prevent those processes from being as simple, easy and flexible for consumers as the processes currently employed by payday lenders. This is where the Payday Rule, if retained in its present form, may help banks bridge this gap because it requires payday lenders to make their processes more rigorous.

Continuing hurdles

The FDIC's 2007 Financial Institution Letter, which has not been withdrawn or revised, continues to be an impediment to the development by state-chartered banks of short-term, small-dollar installment lending programs.

While the letter encouraged banks "[a]s permitted by state law, to offer small-dollar credit," it also strongly urged them to ensure that the APR on these loans be no greater than 36 percent and to utilize sound underwriting criteria focused on a borrower's history with the institution and ability to repay the loan. These conditions are likely to negatively impact the profitability and market share any such program may achieve.

In addition, some states and states' rights advocates oppose the CFPB's Payday Rule, believing that regulation of payday lending is best left to the states.[11]

Also, consumer advocacy groups and representatives have expressed concerns on behalf of their constituencies about both the U.S. Bank Simple Loan and the OCC's Bulletin. They have argued that the APR on U.S. Bank Simple Loans is too high, i.e., that it should not exceed 36 percent, and that the OCC Bulletin should contain more substantial guardrails around ability to repay and price.[12]

These reactions, coupled with the possibility of negative press reports and the reputation risk that such reports can generate, might discourage other banks from following U.S. Bank's lead.

CONCLUSION

It seems clear that the introduction of banks into the short-term, small-dollar loan market has the potential to improve the financial well-being of a sizable segment of the nation's population. The loans banks would offer would likely be less costly than those currently offered by payday lenders, and banks are in a better position to help customers migrate to more mainstream bank products and services.

However, it also seems clear that a rigid regulatory regime can stifle banks' efforts to develop innovative new products, processes and procedures that might enable them to compete effectively with payday lenders.

For example, if regulators were to heed consumer advocates' calls for interest rate caps that would render the risk/reward relationship for banks unpalatable or require banks to undertake unduly burdensome ability-to-repay analyses before making these types of loans, banks would likely find it difficult to convince their directors and stockholders to support such initiatives.

Needless to say, it will be interesting to see how all of this plays out during the coming months and years. WJ

NOTES

1 The information provided in this section about payday loans can be found in the preamble to the Consumer Financial Protection Bureau's final Payday, Vehicle Title and Certain High-Cost Installment Loans regulation published at 82 Fed. Reg. 54472, 54474-54503 (Nov. 17, 2017).

2 *See* CFPB report entitled Payday Loans and Deposit Advance Products – A White Paper of Initial Data Findings (April 2013), *available at* https://bit.ly/NssoJ1, at p.11.

3 *See, e.g.*, discussion in the preamble to the Payday Rule at pp. 54474-54503 concerning state regulation of payday lending and state and federal enforcement actions involving payday lenders; FDIC FIL Guidelines for Payday Lending, (Revised Nov. 2015), available at https://bit.ly/2QjSK5f, discouraging bank partnerships with payday lenders; Consumer Federation of America's information resource on payday lending for consumers and advocates, *available at* https://bit.ly/2SCOlXL.

4 Section 85 of the National Bank Act, 12 U.S.C.A. § 85, together with OCC regulations, specifically, 12 CFR 7.4001, authorize national banks to charge interest at the maximum rate permitted by the law of the state in which the national bank is located.

5 The information provided in this section about the U.S. Bank Simple Loan was obtained from the bank's website at https://bit.ly/2Qj0xjM.

6 *See* note 1. The Payday Rule is not scheduled to become effective until August 2019 (21 months after publication in the Federal Register). However, the CFPB announced Oct. 26, 2018, that it will issue a Notice of Proposed Rulemaking in January 2019 to reconsider the Payday Rule's ability-to-repay provisions and address its compliance date. The announcement is available at https://bit.ly/2EJWGGZ. In addition, the Payday Rule has been challenged in court. *See, e.g.*, *Cmty. Fin. Servs. Ass'n of Am. Ltd. v. Consumer Fin. Prot. Bureau*, No. 18-cv-295, *complaint filed* (W.D. Tex. Apr. 9, 2018).

7 OCC Press Release (Oct. 5, 2017), *available at* https://bit.ly/2yIG3Hn.

8 FDIC FIL-50-2007, *available at* https://bit.ly/2AYtWoD.

9 The bulletin can be found at https://bit.ly/2AYExjv.

10 *See, e.g.*, How Payday Loans Work, John Barrymore, available at https://bit.ly/2UqLhzu ("Ease and convenience fuel the allure of payday loans. One of the biggest advantages that payday lenders have over banks is their flexibility. Payday lenders have more locations and longer hours than most banks. Some lenders, such as some Currency Exchange locations in Illinois, are open 24 hours a day. … Payday lenders rarely check your credit. Coupled with the privacy and expediency of the process, this open-mindedness makes payday lenders very attractive to people with poor credit. In addition, the loan application process is fast. You can usually be out the door, off the phone or away from your keyboard in less than half an hour. Furthermore, you get the money in no time — if the lender doesn't hand you a check when you apply, the money is usually electronically deposited in your account within a day.").

11 *See* the discussion in the preamble to the final Payday Rule concerning such submitted in response to the BCFP's proposed rule, beginning at 82 Fed. Reg. 54515.

12 *See, e.g.*, American Banker (Oct. 4, 2018), R. Borne, High-cost bank loans a step in the wrong direction, 2018 WLNR 30584094.

3 main considerations when obtaining assignments of lawsuits or judgments as a judgment collection tool

By Charles B. Jimerson, Esq.
Jimerson & Cobb

Obtaining a judgment is only half the battle. The victorious party still needs to collect on that judgment.

When garnishing bank accounts doesn't work and assets aren't readily available to seize, clever creditors attorneys have obtained the debtor's interest in other litigation to help settle the outstanding debt.

The following are three important considerations to be made when trying to obtain an assignment of lawsuit or judgment as a judgment collection tool.

1. A DEBTOR'S PENDING LAWSUIT OR POTENTIAL CLAIM IS PROPERTY THAT CAN BE RECOVERED UNDER § 56.29

When a creditor wants to obtain a debtor's interest in a different lawsuit, the creditor seeks to be an assignee of a "chose in action." A chose in action is a claim brought to establish the creditor's right to bring an action to recover on a debt. When a court grants a creditor's chose in action right, it can order any non-exempt property to be levied upon and applied toward the satisfaction of a judgment debt. *See* Fla. Stat. § 56.29.

Florida appellate courts have concluded that "property" includes a debtor's interest in pending and impending lawsuits. For example, in *MYD Marine Distrib. v. Int'l Paint Ltd.*, 201 So. 3d 843 (Fla. 4th DCA 2016), the trial court granted a creditor's seizure of a debtor's interest in a claim against a third party.

The debtor appealed to the Florida Fourth District Court of Appeal and argued the assignment of the lawsuit was inequitable because the third party claim was allegedly larger than the amount owed to the creditor.

The appellate court affirmed the trial court, holding that the claim could be transferred. The appellate court concluded that § 56.29 included choses in action because "property" was entitled to a broad, expansive definition, and that other analogous areas of the law had long since classified certain types of property as seizable assets.

> A chose in action is a claim brought to establish the creditor's right to bring an action to recover on a debt.

While the debtor argued the transfer was inequitable due to the discrepancy in size between the amount owed and the third party claim it held, the court emphasized that the debtor did not offer any evidence at the trial level to show the actual value of the third party suit.

MYD Marine demonstrates that third party claims are assignable under § 56.29, but the opinion does infer that a creditor can be estopped from being assigned the debtor's interest if the debtor is able to produce facts showing the third party claim is substantially larger than the debt.

Therefore, if a creditor is considering bringing a § 56.29 claim to take a creditor's interest in a third party suit, you need to consider the value of that suit as it compares to the outstanding debt.

2. A CREDITOR IS NOT ENTITLED TO A DEBTOR'S INTEREST IN PERSONAL TORT CLAIMS

Normally, only claims for injuries affecting property interests are assignable. For instance, in *MYD Marine* the creditor was assigned an interest in a breach of contract lawsuit. Personal torts, such as personal injuries, negligence claims and claims that are not simply injuries to property interests, are not assignable property under § 56.29.

There is some precedent that holds that fraud claims revolving around the mishandling of business interests, even against family members, are not considered personal torts and thus assignable under § 56.29. *Craft v. Craft*, 757 So. 2d 571 (Fla. 4th DCA 2000). Thus, when attempting to obtain a debtor's interest in a potential lawsuit, the creditor must be able to argue the third party suit is related to property rather than personal.

Lastly, it should be noted that under *Donan v. Dolce Vita Sa, Inc.*, 992 So.2d 859 (Fla. 4th DCA 2008), Fla. Stat. §56.29 does not permit judgment creditors to acquire claims against themselves in satisfaction of existing judgments.

3. A JUDGMENT CREDITOR CAN GARNISH A THIRD PARTY IF THE DEBTOR HAS A JUDGMENT AGAINST THAT THIRD PARTY

The case law previously discussed dealt with a creditor stepping into the shoes of a debtor during a pending litigation. However, in the event the claim has been liquidated to a judgment, creditors can also take it a step further and garnish directly from the third party if the settlement has not yet been fully paid. *See* Fla. Stat. § 77.01.

Charles B. Jimerson is the founder and managing shareholder of **Jimerson & Cobb** in Jacksonville, Florida. He leads a team of attorneys focusing on business litigation, construction law, financial services law, corporate transactions and operations, and eminent domain law. He has significant experience in all stages of litigation, including alternative dispute resolution, settlement negotiation and the handling of multifaceted commercial matters up through and including trial. He can be reached at cjimerson@jimersoncobb.com. This expert analysis was first published Oct. 17, 2018, on the firm's Florida Business Litigation blog. Republished with permission.

In most instances, the funds dispersed to a debtor can be obtained through the normal garnishing of the debtor's or the third party's bank accounts. Even funds dispersed to a debtor attorney's trust account can be subject to garnishment.

For instance, the Florida Supreme Court in *Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc.,* 982 So. 2d 628, 630 (Fla. 2008) held that client creditors can access and make claims against funds or other property in a lawyer's custody, including trust accounts.

CONCLUSION

Debtors can find creative ways to avoid their creditors, so it is imperative that creditors counter with even more creativity. While this article is not exhaustive, creditors who understand these three main considerations will already be ahead of the curve when trying to collect on their outstanding judgments. When it comes to creditor's rights litigation, the squeaky wheel almost always gets the grease. WJ

TELEPHONE CONSUMER PROTECTION ACT

Debt collector ignored requests to stop harassing robocalls, man says

A Michigan man says a debt collection firm violated a federal consumer protection law by making more than 200 automated calls with prerecorded messages to his cellphone about an auto loan after he told the company to stop.

Berg v. Credit Acceptance Corp., No. 18-cv-13671, complaint filed, 2018 WL 6204362 (E.D. Mich. Nov. 26, 2018).

Brian Berg, of Wexford County, Michigan, alleges that Credit Acceptance Corp.'s robocalls willfully violated the Telephone Consumer Protection Act, 47 U.S.C.A. § 227, which prohibits the use of automatic dialing systems or artificial or prerecorded messages to call a phone without the recipient's prior consent.

> Even after the plaintiff told the company representative to stop calling him, he received more than 200 calls, the suit alleges.

In a complaint filed in the U.S. District Court for the Eastern District of Michigan, Berg says the defendant has called his cellphone "hundreds of times" in an attempt to collect on an auto loan debt.

Berg knew the Southfield, Michigan-based company made some or all the calls using an automated dialing system because he either heard a pause before an employee came on the line or the company left a prerecorded message, the complaint says.

200 CALLS?

Even after Berg told a CAC representative earlier this year to stop calling him, he received more than 200 calls, the suit alleges.

The plaintiff told the company to stop contacting him several more times but the calls did not stop, the complaint says.

CAC made the "exorbitant" number of calls knowing it did not have Berg's consent, he claims.

ALLEGED POLICY TO HARASS

Berg claims the defendant has a policy of using an automatic dialing system that lacks a way for parties to remove their phone numbers from the system.

The company also has a policy of harassing and abusing people while knowing they do not want to be contacted, Berg says.

He alleges that CAC's calls tied up his cellphone line and made it unavailable for legitimate incoming and outgoing calls. The calls also drained the phone's battery power and caused him to waste his time dealing with them, the complaint says.

The suit alleges the calls invaded the plaintiff's privacy and caused him stress, aggravation and annoyance.

Berg is seeking an award of unspecified damages, punitive damages, and an injunction preventing the defendant from making further statutory violations. WJ

Attorneys:
Plaintiff: Octavio Gomez, Morgan & Morgan, Tampa, FL

Related Filings:
Complaint: 2018 WL 6204362

See Document Section B (P. 26) for the complaint.

SCOTUS sets hearing to decide FDCPA impact on nonjudicial foreclosure

By Meg Gerrity

The U.S. Supreme Court will hear argument Jan. 7 in a case that asks whether banks and their agents that foreclose on mortgage borrowers out of court are subject to the regulatory strictures placed on debt collectors.

Obduskey v. McCarthy & Holthus LLP et al., No. 17-1307, oral argument scheduled (U.S. Nov. 28, 2018).

The decision could have a broad impact in the more than 30 states that allow nonjudicial foreclosure if the court says mortgage lenders must abide by the requirements of the Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692.

The court granted certiorari in June to Dennis Obduskey, a Colorado borrower who defaulted on his $330,000 mortgage and later sued loan servicer Wells Fargo and McCarthy & Holthus, a law firm Wells Fargo hired to conduct nonjudicial foreclosure proceedings.

Obduskey alleged the defendants violated the FDCPA by not responding to his request for validation of the debt as required by the FDCPA, 15 U.S.C.A. § 1692g.

The U.S. District Court for the District of Colorado granted the defendants' motions to dismiss the case, finding that Wells Fargo was not a "debt collector" within the meaning of the act and that the statute did not cover nonjudicial foreclosure proceedings. *Obduskey v. Wells Fargo*, No. 15-cv-1734, 2016 WL 4091174 (D. Colo. July 19, 2016).

The 10th U.S. Circuit Court of Appeals affirmed the District Court's rulings but acknowledged a circuit split as to whether nonjudicial foreclosure proceedings are subject to the FDCPA. *Obduskey v. Wells Fargo*, 879 F.3d 1216 (10th Cir. 2018).

The Supreme Court agreed to hear the case to resolve the split.

The 12 amicus briefs filed indicate great interest and support on both sides of the question. The amici supporting Obduskey include the NAACP and nine members of Congress. Pro-industry amici include the Mortgage Bankers Association, the U.S. Chamber of Commerce and the U.S. Consumer Financial Protection Bureau.

Wells Fargo is no longer a party because Obduskey did not challenge the 10th Circuit's ruling that it is not a debt collector.

CIRCUIT SPLIT OVER FDCPA

Congress enacted the FDCPA to "eliminate abusive debt collection practices by debt collectors."

The act prohibits unfair practices by a debt collector, which is defined as "any person … who regularly collects or attempts to collect, directly or indirectly, debts owed or due … another."

"Debt" is defined in the statute as "any obligation … to pay money."

Relying on the plain language of these provisions, the 10th Circuit panel said McCarthy & Holthus was not a debt collector because it did not try to collect money from Obduskey. Rather, the firm attempted to enforce a security interest in real property, the panel said.

Nonjudicial foreclosure is not debt collection because unlike a court-ordered foreclosure, the sale of the property does not preserve the lender's right to collect any deficiency in the loan amount personally against the borrower, according to the panel.

The 10th Circuit decision deepened the divide among courts that have ruled on the issue. The panel's decision agrees with the 9th Circuit's ruling in *Ho v. ReconTrust Co.*, 858 F.3d 568 (2016), but conflicts with decisions of the 4th, 5th and 6th circuits and the Colorado Supreme Court.

THE PRINCIPAL BRIEFS

In his opening brief, Obduskey argues that the enforcement of a security interest in real property through nonjudicial foreclosure is debt collection within the meaning of the FDCPA.

He notes the high court has said that to collect a debt "is to obtain payment or liquidation of it." *Heintz v. Jenkins*, 514 U.S. 291 (1995).

And other courts have said that foreclosure qualifies as debt collection because its purpose is to obtain payment for the underlying debt, Obduskey says, citing *Glazer v. Chase Home Finance LLC*, 704 F.3d 453 (6th Cir. 2013) and *Alaska Trustee LLC v. Ambridge*, 372 P.3d 207 (Alaska 2016).

Obduskey also relies on Section 1692i of the FDCPA, which requires "an action to enforce an interest in real property securing the consumer's obligation" to be filed in the district where the property is located.

McCarthy & Holthus, on the other hand, says the FDCPA's language is clear and does not support Obduskey's interpretation.

But even if the statute is ambiguous, it should not be construed to cover foreclosure proceedings because that would interfere with a "core area of state regulation": the protection of title to property, the law firm argues.

In addition, the firm says, Congress has long recognized the distinction between debt collection and enforcement of security interests, and the FDCPA reflects that recognition.

"The FDCPA repeatedly refers to the 'collection' of debts, but refers only to the 'enforcement' of security interests. … The use of different verbs underscores that Congress understood the collection of debts and the enforcement of security interests to be distinct concepts," the law firm's brief says.

McCarthy & Holthus notes that most of the "unfair" practices identified in the FDCPA involve ways of obtaining or demanding payment of money, such as the prohibition on accepting a debtor's post-dated check in Section 1692f(2). WJ

Attorneys:
Petitioner: Daniel L. Geyser, Geyser P.C., Dallas, TX

Respondent: Kannon K. Shanmugam, Masha G. Hansford, Joel S. Johnson and Michael J. Mestitz, Williams & Connolly, Washington, DC

Related Filings:
Petitioner's brief: 2018 WL 4348239
Respondent's brief: 2018 WL 5840498
10th Circuit opinion: 879 F.3d 1216
District Court opinion: 2016 WL 4091174

Judge tosses privacy class action targeting Quicken Loans, data broker

By Dave Embree

Quicken Loans Inc. and data broker NaviStone Inc. have convinced a New Jersey federal judge to throw out a proposed class action accusing them of violating federal privacy law by secretly tracking website visitors' keystrokes and clicks for marketing purposes.

Allen v. Quicken Loans Inc. et al., No. 17-cv-12352, 2018 WL 5874088 (D.N.J. Nov. 9, 2018).

U.S. District Judge Esther Salas of the District of New Jersey dismissed the suit Nov. 9 partly because the Wiretap Act, 18 U.S.C.A. § 2510, did not require Quicken to obtain the website visitors' consent before sharing their real-time data with NaviStone.

NaviStone markets a small parcel of computer code that allows partner businesses to identify otherwise anonymous website visitors by capturing their IP addresses and tracking their keystrokes and clicks in real time, according to the first amended complaint.

The code then exports that data to NaviStone's servers, where the firm matches it to information from a comprehensive database of U.S. consumers, the complaint said.

Plaintiff Michael Allen said Quicken partnered with NaviStone and embedded the tracking code into its website, quickenloans.com, without adequately notifying visitors that it would share their data with third parties.

The complaint alleged intrusion upon seclusion and violations of the Electronic Communications Privacy Act, also known as the Wiretap Act, and the Stored Communications Act, 18 U.S.C.A. § 2701.

Allen visited and interacted with Quicken's website several times in 2017 but did not buy any of the lender's products or services, the suit said.

He sought to represent a nationwide class of consumers whose data NaviStone wrongfully intercepted from Quicken's website, in addition to a New Jersey subclass.

MOTION TO DISMISS

Both companies moved to dismiss the suit in February, arguing Allen's claims under the Wiretap Act fell short because the statute does not apply if a party to the communication — in this case Quicken — consents to its interception.

The defendants also asked the court to dismiss Allen's Stored Communications Act claims because the statute prohibits unauthorized access only to a "facility" that stores electronic communications, and a personal computer does not qualify as a facility.

Finally, NaviStone argued the court lacked supplemental jurisdiction over Allen's state law tort claims because each of his federal claims failed as a matter of law.

Judge Salas accepted the defendants' arguments and dismissed the suit in a Nov. 9 opinion.

"Whether website visitors were aware of NaviStone is immaterial," Judge Salas wrote. "The ECPA is a one-party consent statute, and so long as one of the parties to the communication has given prior consent to such interception, no liability exists."

The judge also pointed to a decision from the 3rd U.S. Circuit Court of Appeals that said a personal computer does not qualify as a "facility" for purposes of the Stored Communications Act. *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125 (3d Cir. 2015).

Finally Judge Salas ruled that she lacked jurisdiction to hear Allen's claim for intrusion upon seclusion because the first amended complaint did not specify the amount of damages tied to that claim. WJ

Attorneys:
Plaintiff: Frederick J. Klorczyk III, Bursor & Fisher, Walnut Creek, CA

Defendants: Jeffrey D. Vanacore, Perkins Coie LLP, New York, NY; Jamie P. Clare, Cole Schotz, Hackensack, NJ

Related Filings:
Opinion: 2018 WL 5874088
Memo supporting NaviStone's motion to dismiss: 2018 WL 1950671
Memo supporting Quicken's motion to dismiss: 2018 WL 1950674
Amended complaint: 2018 WL 5905131

See Document Section C (P. 30) for the opinion.

Lawyers get $126 million from swaps price-fixing settlement

By Peter H. Hamner, Esq.

Lawyers for plaintiffs in a 2014 antitrust lawsuit have been awarded $126.3 million in fees out of a $504 million settlement involving allegations that more than a dozen global investment banks had rigged interest-rate swap prices.

Alaska Electrical Pension Fund et al. v. Bank of America Corp. et al., 14-cv-7126, 2018 WL 6250657 (S.D.N.Y. Nov. 29, 2018).

U.S. District Judge Jesse M. Furman of the Southern District of New York said in a Nov. 29 ruling that the attorneys had provided "exceptional" legal representation in a complex case but he nevertheless lowered the fees from the requested 28.5 percent of the gross fund, or about $143.7 million, to 26 percent of the net fund.

Lead counsel in the case were Quinn Emanuel Urquhart & Sullivan, Robbins Geller Rudman & Dowd, and Scott+Scott.

The law firms represented several pension funds and municipalities alleging that 14 global banks and a securities brokerage violated the Sherman Act, 15 U.S.C.A. § 1, by manipulating ISDAfix, a benchmark index used to price interest-rate swaps and related financial products.

The judge said the fees were reasonable because lead counsel had spent almost four years and more than 158,000 billable hours on a case that was "one of the most complicated — if not the most complicated — that this court has handled."

In trimming the requested amount, Judge Furman noted that 26 percent still is slightly higher than the percentage range allowed in similar cases. The judge also said that a calculation based on the net amount of the settlement fund, that is, excluding counsel's expenses, is appropriate because it "avoids the strangeness" of a fees award that includes a percentage of expenses even as those are separately reimbursed.

The judge acknowledged that counsel's expenses of $18.4 million were "reasonable and necessary" in the circumstances of the case.

ALLEGED RATE-RIGGING

The defendants included Bank of America Corp., Barclays PLC, BNP Paribas SA, Citigroup Inc., Credit Suisse Group AG, Deutsche Bank AG, Goldman Sachs Group Inc., HSBC Holdings PLC, JPMorgan Chase & Co., Morgan Stanley, Nomura Holdings Inc., Royal Bank of Scotland Group PLC, UBS AG and Wells Fargo & Co. and ICAP Capital Markets LLC.

In an interest-rate swap, parties hedge against the risk of rate fluctuations by agreeing to exchange periodic fixed-rate payments for variable-rate payments, or vice versa, based on a changing market index.

According to the complaint, the banks coordinated to set ISDAfix, favoring their positions over the plaintiffs' in their interest-rate swap agreements.

ICAP Capital calculates the ISDAfix rate using financial information supplied by banks, the complaint said, and publishes the rate at 11 a.m. each day.

According to the suit, the banks manipulated the rate by artificially inflating or depressing submissions to ICAP in order to benefit their swap positions.

The complaint also accused the banks of "banging the close," or making a high number of trades rapidly before ICAP publicized a new rate.

ICAP facilitated the scheme by processing a large number of trades before releasing the new rate and agreeing on occasion to delay publicizing the rate at the banks' request, the complaint says. The broker received commissions on the trades in return, the suit alleged.

DISMISSAL ATTEMPT

The defendants tried unsuccessfully in 2016 to have the suit dismissed, claiming the investors lacked antitrust standing. *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44 (S.D.N.Y. 2016).

Judge Furman ruled in March 2016 that the plaintiffs had standing because they sufficiently claimed the defendants' manipulation caused harm.

"Plaintiffs have alleged that they were directly harmed by defendants' anti-competitive conduct by having to pay higher prices (or earning lower profits) from instruments tied to ISDAfix," the judge's opinion said. WJ

Related Filings:
Opinion: 2018 WL 6250657

SEC can’t get injunction without showing digital tokens are ‘securities’

By Katie Pasek

The Securities and Exchange Commission did not meet standards for a preliminary injunction in a cryptocurrency fraud lawsuit because it failed to show that a San Diego man’s digital tokens were “securities” within the agency’s regulatory authority.

Securities and Exchange Commission v. Blockvest LLC et al., No. 18-cv-2287, 2018 WL 6181408 (S.D. Cal. Nov. 27, 2018).

U.S. District Judge Gonzalo P. Curiel of the Southern District of California ruled Nov. 27 that the Securities and Exchange Commission failed to prove defendant Reginald B. Ringgold III and his San Diego-based company Blockvest LLC violated and would continue to violate federal law by selling unregistered digital “BLV tokens.”

The SEC sought the preliminary injunction after the judge issued a temporary restraining order Oct. 5, freezing bank and digital accounts controlled by Ringgold, also known as Rasool Abdul Rahim El.

The TRO also halted Blockvest’s planned December “initial coin offering,” the SEC said in an Oct. 11 statement.

Initial coin offerings are a means of crowdfunding for blockchain companies, allowing digital currency entrepreneurs to raise money quickly by creating and selling digital “tokens.”

Blockchain refers to a computerized accounting technology that allows users to validate transactions in cryptocurrencies without the need for a third party to process or store payments.

TOKENS OR SECURITIES

There are disputed issues of fact precluding a determination of whether the BLV tokens are securities as defined by the U.S. Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), Judge Curiel said.

According to the SEC’s Oct. 3 complaint, Blockvest began selling the BLV tokens for $1 each March 30 and claimed it raised more than $2.5 million in pre-ICO sales.

REUTERS/Jim Bourg

In Nov. 2 memo opposing a preliminary injunction, the defendants said social media posts citing that amount were “overly optimistic” because it was tied to a single transaction that later “collapsed.”

Ringgold testified in a Nov. 6 deposition that the BLV tokens were used strictly for testing by 32 known participants who did not buy any of the digital coins because the site was not “live.”

The SEC failed to show that the participants had an expectation of profit as required under *Howey*, Judge Curiel said.

NO ‘REASONABLE LIKELIHOOD’ OF FUTURE WRONGDOING

The agency also had not demonstrated the defendants’ likelihood of continuing to violate federal securities laws, the judge said.

According to the SEC, Ringgold, despite the TRO, continued to falsely claim that his purported digital securities regulatory agency, “Blockchain Exchange Commission,” was registered with the SEC and the National Futures Association and that he had partnered with public accounting firm Deloitte Touche Tohmatsu Ltd.

But Judge Curiel said the SEC had not shown a “reasonable likelihood that the wrong will be repeated.”

“While there is evidence that Ringgold made misrepresentations shortly after the complaint was filed and prior to having retained counsel, Ringgold, with counsel, now asserts he will not pursue the ICO and will provide SEC’s counsel with 30 days’ notice in the event they decide to proceed,” the judge said.

Related Filings:
Order: 2018 WL 6181408

See Document Section D (P. 40) for the order.

Barclays investors lose bid to revive subprime mortgage suit

By Peter H. Hamner, Esq.

A federal appeals court has declined to revive a 2009 lawsuit accusing Barclays Bank PLC of concealing its troubled capital condition and exposure to risky financial products tied to the housing market.

In re Barclays Bank PLC Securities Litigation, No. 17-3293, 2018 WL 6040846 (2d Cir. Nov. 19, 2018).

In a Nov. 19 order, a 2nd U.S. Circuit Court of Appeals panel affirmed a trial judge's summary judgment in the bank's favor, finding that shareholders did not experience losses when the bank fully disclosed its exposure.

U.S. District Judge Paul A. Crotty of the Southern District of New York dismissed the suit last year, saying Barclays had no duty to disclose all its assets tied to the housing market. *In re Barclays Bank PLC Sec. Litig.*, No. 09-cv-1989, 2017 WL 4082305 (S.D.N.Y. Sept. 13, 2017).

But the appeals panel affirmed the dismissal on loss-causation grounds while noting that there may have been a duty to disclose the assets.

DISCLOSURES AND THE FINANCIAL CRISIS

According to class-action complaint, London-based Barclays sold 100 million of the Series 5 American depositary shares April 8, 2008, at the inflated price of $25 each.

In documents marketing the shares, Barclays allegedly failed to disclose the extent of its holdings of mortgage-backed securities and other housing-related financial instruments and a resulting shortage of capital reserves.

Mortgage-backed securities pay dividends drawn from principal and interest payments made by borrowers whose loans have been pooled into a trust and distributed to investors.

The loans underlying the securities defaulted en masse during the 2008 financial crisis, causing a significant drop in their value and the value of other financial products tied to the housing market.

Barclays announced in November 2008 that, contrary to its prior statements assuring investors the bank was well-capitalized, it was in fact undercapitalized because of impaired credit assets tied to the subprime mortgage market, the suit said.

On that news, the price of Barclays' preferred shares collapsed to less than $10 each, the investors said.

The suit named as defendants Barclays, 18 executives and numerous investment banks that underwrote the offering of the shares.

The plaintiffs alleged the defendants violated the Securities Act of 1933, 15 U.S.C.A. § 77a, by filing documents with the Securities and Exchange Commission that misrepresented and concealed the bank's financial condition.

DUTY TO DISCLOSE?

Both sides moved for summary judgment.

In his ruling Judge Crotty determined that the defendants did not have a duty to disclose its complete credit market positions, but even if it did, Barclays had disclosed that market conditions were deteriorating and provided investors with a table showing its assets and holdings in the credit markets.

"Given these disclosures, a reasonable investor would infer how continued credit market dislocation 'might reasonably be expected to have a material impact on future revenues,'" the judge said, quoting *Panther Partners Inc. v. Ikanos Communications Inc.*, 681 F.3d 114 (2d Cir. 2012).

The plaintiffs also failed to show that the alleged misstatements and omissions, and not other market factors such as the ongoing financial crisis, were responsible for the share price drops.

LOSS CAUSATION

Investor Dennis Askelson appealed the decision, saying Barclays only partially told the truth when it disclosed its exposure to the housing and credit markets in an August 2008 regulatory filing.

The 2nd Circuit panel disagreed.

The chart provided by the bank in the August 2008 filing contained the detailed

REUTERS/Toby Melville

information that Askelson claimed the bank had "hidden," the panel's order said.

Barclays, pointing to its expert's event study, argued that it was not liable for the alleged damages because the corrective disclosure did not cause the investors' claimed losses.

The panel ruled the event study demonstrated that Barclays' share price did not significantly change during the three weeks after the disclosure.

"The evidence shows virtually no market reaction — and certainly no statistically significant market reaction — to the revelation" of the allegedly hidden assets, the order said. WJ

Related Filings:
Order: 2018 WL 6040846

DERIVATIVES

U.S. Bank, BNY Mellon shake $370 million MBS suit appeal

By Peter H. Hamner, Esq.

U.S. Bank NA and Bank of New York Mellon Corp. do not have to face a 2016 lawsuit accusing them of breaching their obligations as trustees for pools of mortgage-backed securities that lost more than $370 million in value, a federal appeals court has ruled.

Triaxx Prime CDO 2006-1 Ltd. et al. v. U.S. Bank NA et al., No. 18-939, 2018 WL 6016547 (2d Cir. Nov. 16, 2018).

In a March decision, U.S. District Judge Naomi Reice Buchwald of the Southern District of New York determined that a group of Cayman Island investment funds had relinquished their standing to sue the banks in an assignment of rights more than a decade ago. *Triaxx Prime CDO 2006-1 Ltd. v. Bank of N.Y. Mellon*, No. 16-cv-1597, 2018 WL 1417850 (S.D.N.Y. Mar. 8, 2018).

In a short order, a 2nd U.S. Circuit Court of Appeals panel agreed with the judge's ruling, calling it "thorough and thoughtful."

SECURITIES AND TRUSTEE DUTIES

According to the suit, the funds, known as Triaxx Prime CDO 2006-1 Ltd., Triaxx Prime CDO 2006-2 Ltd. and Triaxx Prime CDO 2007-1 Ltd., bought 45 trusts in 2006 and 2007 consisting of $4.3 billion worth of residential mortgage-backed securities. U.S. Bank is trustee for 33 of the trusts and BNY Mellon is trustee for the remainder, the suit said.

Mortgage-backed securities pay dividends drawn from borrowers' periodic principal and interest payments.

The Triaxx funds, which were structured as "collateralized debt obligations," then issued notes to investors, the suit said.

REUTERS/Brendan McDermid

Most of the underlying mortgages defaulted during the 2008 financial crisis, causing the notes to drop in value by $371 million, the suit said.

The funds sued the trustees, claiming they failed to protect investor interests because they did nothing despite knowing that the loans did not meet their promised underwriting characteristics.

The trustees allegedly breached their fiduciary duties under New York law and breached the contracts by not promptly enforcing the investors' rights.

The funds' suit originally also named JPMorgan Chase & Co. as a defendant, but the parties stipulated to dismiss the bank in April 2017.

STANDING PROBLEM

U.S. Bank and BNY Mellon moved to dismiss the suit, arguing the funds did not have standing to sue because they had assigned their alleged rights to the banks as trustees.

Judge Buchwald agreed, finding that the trust agreements designated the banks as the only party eligible to sue on behalf of investors. She also tossed the fiduciary-duty claims after the plaintiffs agreed at oral argument to abandon them.

The funds appealed the decision, claiming Judge Buchwald ignored "on-point" New York appellate cases on similar contractual issues that looked at the entire agreements and not just one provision.

According to the plaintiffs, a New York appellate court held that a trustee of a CDO trust holds legal title to the collateral but the issuer and collateral manager retain equitable ownership. *Natixis Real Estate Capital Tr. 2007-HE2 v. Natixis Real Estate Holdings LLC*, 149 A.D.3d 127 (N.Y. App. Div. 1st Dep't 2017).

The 2nd Circuit panel rejected the argument in a short affirmance of Judge Buchwald's ruling. WJ

Related Filings:
Order: 2018 WL 6016547

Teller scam

CONTINUED FROM PAGE 1

ensuring that the cash counts for the tellers' drawers and the bank's vault were balanced, according to the March 2018 indictment.

Each day, Mize and Martin corrected any financial errors indicated by the bank's Branch Capture Correction Account quality control system, which alerts employees to one-sided transactions. They also oversaw the bank's Teller Plus cash accounting system, which monitors the accuracy of cash balances held in tellers' drawers, and ordered cash from the Federal Reserve Bank, prosecutors said.

EMBEZZLEMENT SCHEME

According to prosecutors, the pair's scheme took place between April 2014 and at least March 2016.

The defendants hid their transactions by correcting any errors found by the BCCA and Teller Plus systems. They also inflated the vault's balance on the bank's records and ordered more cash from the Federal Reserve Bank to cover up the accounting discrepancies, Peeler said.

> The plaintiffs admitted that while working at the bank, they took cash from their teller drawers, issued themselves cashier's checks, transferred bank funds into their own accounts and made fake ledger entries to hide the thefts.

The Peoples Bank started an investigation into the defendants' activities in March 2016 after other employees found suspicious transactions listed on the institution's general ledger. Bank staff also noticed a substantial increase in BCCA alerts beginning in April 2014, according to prosecutors.

The bank suspended the defendants two weeks later, and Mize admitted to the institution's president that she had been stealing for a period of several years, the U.S. attorney said.

Judge Self will sentence Mize and Martin on March 5, 2019. They face up to 30 years in prison followed by a five-year term of supervised release, as well as a maximum fine of $1 million, prosecutors said. WJ

Related Filings:
Mize plea agreement: 2018 WL 6445179
Martin plea agreement: 2018 WL 6444968
Indictment: 2018 WL 6444969

See Document Section A (P. 17) for the indictment.

CASE AND DOCUMENT INDEX

MIZE

2018 WL 6444969 (M.D.Ga.) (Trial Pleading)
United States District Court, M.D. Georgia.
Macon Division

UNITED STATES OF AMERICA,
v.
Brandy MIZE, and Vicky Martin.

No. 5:18CR00016.
March 13, 2018.

Indictment

Charles E. Peeler, United States Attorney.
Paul C. McCommon III, Assistant United States Attorney.

SEALED

CRIMINAL NO. 5:18-CR-16-LJA
VIOLATIONS: 18 U.S.C. § 1349
18 U.S.C. § 656
18 U.S.C. § 1005
18 U.S.C. § 981(a)(1)(C)
18 U.S.C. § 982(a)(2)(A)
28 U.S.C. § 2461(c)

THE GRAND JURY CHARGES:

COUNT ONE
THE CONSPIRACY TO DEFRAUD A FINANCIAL INSTITUTION – 18 U.S.C. § 1349

A. *INTRODUCTION*

At all times relevant to this indictment:

1. Peoples Bankshares, Inc., doing business as The Peoples Bank, Eatonton, Georgia ("The Peoples Bank" or "Bank"), was a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation.

2. BRANDY MIZE ("MIZE") was an employee and Head Teller at the Bank.

3. VICKY MARTIN ("MARTIN") was an employee and Assistant Head Teller at the Bank.

4. The "Branch Capture Correction Account" ("BCCA") was a quality control system used by the Bank to reveal one-sided transactions and thereby prevent mistakes or fraud. It was the responsibility of MIZE and MARTIN to correct mistakes indicated by the BCCA system.

5. The "Teller Plus" system was a central cash accounting system used by the Bank to accurately monitor the accuracy of teller drawer cash balances.

6. As Head Teller and Assistant Head Teller, MIZE and MARTIN were the employees at the Bank whose job it was to insure on a daily basis that the cash counts in the teller drawers and bank vault balanced and were not the objects of theft. It was also the

responsibility of MIZE and MARTIN to oversee that operation of the BCCA and Teller Plus system to insure the accuracy of the Bank's cash balances and records.

B. *THE CONSPIRACY AND ITS OBJECTS*

Beginning on or about April 30, 2014, and continuing to on or about March 14, 2016, the exact dates being unknown to the grand jury, in the Macon Division of the Middle District of Georgia and elsewhere within the jurisdiction of this Court, the defendants,
BRANDY MIZE, and

VICKY MARTIN,
did knowingly combine, conspire, confederate, and agree with each other and with others known and unknown to the grand jury, to commit an offense against the United States, that is, to knowingly and willfully devise and execute a scheme and artifice to defraud the The Peoples Bank, a financial institution, in violation of Title 18, United States Code, Sections 1344 and 2.

C. *MANNER AND MEANS OF THE CONSPIRACY*

The manner and means whereby the conspiracy was sought to be accomplished were as follows:

1. MIZE and MARTIN used their positions to embezzle and misapply money of the Bank by transferring Bank funds into their bank accounts or to the accounts of family members, to take cash from their teller drawers and the vault, and to issue cashier's checks for their benefit, all without valid checks or cash being deposited to the Bank to support the transactions and resulting in a total loss to the Bank in the approximate amount of $ 1,663,205.25. They would initially use the scanner at the teller station instead of the teller validator to process their transactions. This process of using the scanner only to process their fraudulent transactions would create "one-sided" transactions (transfers of funds or cash withdrawals with no corresponding deposit) that would generate a General Ledger Correction Debit to the BCCA in the amount of each one-sided transaction, but would bypass their teller drawer and would therefore not indicate to Bank officers and other employees an immediate problem in their teller drawer balances.

2. MIZE and MARTIN would use their positions to conceal their thefts by correcting the errors indicated by the BCCA by fraudulent credits to their teller drawers, and by using the Bank's systems and records to move the false credits to the vault cash balance. MIZE and MARTIN were able to hide the accumulating losses from their thefts by inflating the vault cash balance because they were the employees responsible for counting the cash in the vault and ordering the cash from the Federal Reserve Bank to replenish the supply of cash in the vault.

3. MIZE and MARTIN worked together in correcting errors indicated by the BCCA and the Teller Plus System, in falsifying the cash counts of the vault to indicate more cash than was actually present, in ordering additional cash shipments from the Federal Reserve Bank to perpetuate the fraud, and generally coordinating their efforts to conceal the thefts and to perpetuate the scheme.

All in violation of Title 18, United States Code, Sections 1349 and 2.

COUNT TWO
[False Entry in Bank Records – 18 U.S.C. § 1005]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about March 14, 2016, in the Macon Division of the Middle District of Georgia, the defendants,
BRANDY MIZE, and

VICKY MARTIN,
aided and abetted by one another, with intent to injure and defraud The Peoples Bank, did knowingly and willfully make and cause to be made a material false entry in a report of the Bank, in that defendants completed a Teller Cash Count form stating and certifying that there was cash in the vault at the downtown branch in the amount of $1,371,546.00, when in truth and fact and as defendants then well knew, there was $68,514.00 in the vault, in violation of Title 18, United States Code, Sections 1005 and 2.

COUNT THREE
(Theft by a Bank Employee – 18 U.S.C. § 656)

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about March 14, 2016, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
being an employee of The Peoples Bank, with intent to injure and defraud the Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $24,900.20 of the moneys and funds of the Bank, in that defendant took cash money from her teller drawer, converted the money to her own use and benefit, and caused false and fraudulent entries to be made to the bank's records to conceal and perpetuate the theft of money, in violation of Title 18, United States Code, Section 656.

COUNT FOUR
(Theft by a Bank Employee – 18 U.S.C. § 656)

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about March 14, 2016, in the Macon Division of the Middle District of Georgia, the defendant,
VICKY MARTIN,
being an employee of The Peoples Bank, with intent to injure and defraud the Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $10,228.65 of the moneys and funds of the Bank, in that defendant took cash money from her teller drawer, converted the money to her own use and benefit, and caused false and fraudulent entries to be made to the bank's records to conceal and perpetuate the theft of money, in violation of Title 18, United States Code, Section 656.

COUNT FIVE
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about March 10, 2016, in the Macon Division of the Middle District of Georgia, the defendants,
BRANDY MIZE, and

VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $375,000.00 of the moneys and funds of the Bank, in that defendants without authority or permission used their positions as tellers to take $375,000.00 in cash from a delivery of cash that had been received by the Bank from the Federal Reserve Bank, in violation of Title 18, United States Code, Sections 656 and 2.

COUNT SIX
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about March 3, 2016, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $5,000.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $5,000.00 from the Bank without authority or permission, she converted the money to her own use and benefit to pay rent for her house, and she concealed the theft by making a deposit to her personal checking account at the Bank which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT SEVEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about February 3, 2016, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE, and

VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $25,191.15 of the moneys and funds of the Bank, in that defendants used their positions as tellers to take $25,191.15 from the Bank without authority or permission by converting the money to their own use and benefit to fund a cashier's check for the benefit of an associate of MIZE for the purchase of a house, and they concealed the theft by making a deposit to the teller drawer of MARTIN which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Sections 656 and 2.

COUNT EIGHT
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about January 14, 2016, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $4,800.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $4,800.00 from the Bank without authority or permission, she converted the money to her own use and benefit to make a purchase for the benefit of an associate, and she concealed the theft by making a deposit to her personal checking account at the Bank which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT NINE
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about January 11, 2016, in the Macon Division of the Middle District of Georgia, the defendant,
VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,100.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $1,100.00 from the Bank without authority or permission, she converted the money to her own use and benefit, and she concealed the theft by making a deposit to the checking account at the Bank of an individual whose identity is known to the grand jury and which deposit was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT TEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about January 7, 2016, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $2,500.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $2,500.00 from the Bank without authority or permission, she converted the money to her own use and benefit to pay rent for her house, and she concealed the theft by making a deposit to her personal checking account at the Bank which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT ELEVEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about January 5, 2016, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,700.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $1,700.00 from the

Bank without authority or permission, she converted the money to her own use and benefit to make a payment on a loan, and she concealed the theft by making a deposit to her personal checking account at the Bank which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT TWELVE
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about December 21, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $30,754.19 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $30,754.19 from the Bank without authority or permission by converting the money to her own use and benefit to fund a cashier's check for the benefit of an associate of MIZE for the purchase of a house, and she concealed the theft by making a deposit to her teller drawer that was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Sections 656 and 2.

COUNT THIRTEEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about December 15, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,200.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $1,200.00 from the Bank without authority or permission, she converted the money to her own use and benefit to purchase a drone, and she concealed the theft by making a deposit to her personal checking account at the Bank which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT FOURTEEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about November 10, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $3,850.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $3,850.00 from TPB without authority or permission, she converted the money to her own use and benefit to pay for a personal trip to Biloxi, Mississippi, and she concealed the theft by making deposits to her personal checking account at the Bank which were not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT FIFTEEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about October 27, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE, and

VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $28,541.00 of the moneys and funds of the Bank, in that defendants used their positions as tellers to take $28,541.00 from the Bank without authority or permission by converting the money to their own use and benefit to purchase a kitchen trailer for the benefit of an associate of MIZE, and they concealed the theft by making a deposit to the teller drawer of MIZE and a withdrawal of cash from

the teller drawer of MARTIN which were not supported by any legitimate corresponding deposits of cash or checks, in violation of Title 18, United States Code, Sections 656 and 2.

COUNT SIXTEEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about September 3, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,750.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $1,750.00 from the Bank without authority or permission, she converted the money to her own use and benefit to pay rent for her house, and she concealed the theft by making a deposit to her personal checking account at the Bank which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT SEVENTEEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about August 18, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,500.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $1,500.00 from the Bank without authority or permission, she converted the money to her own use and benefit, and she concealed the theft by making a deposit to the checking account at the Bank of an individual whose identity is known to the grand jury and which deposit was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT EIGHTEEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about July 29, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $2,440.00 of the moneys and funds of The Peoples Bank, in that defendant used her position as a teller to take $2,440.00 from the Bank without authority or permission, she converted the money to her own use and benefit in part to pay rent for her house, and she concealed the theft by making deposits to her personal checking accounts at the Bank which were not supported by any legitimate corresponding deposits of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT NINETEEN
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about July 16, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $3,000.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $3,000.00 from the Bank without authority or permission, she converted the money to her own use and benefit to make a payment for service on her car, and she concealed the theft by making a deposit to her personal checking account at the Bank which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT TWENTY
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about June 29, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE, and

VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,500.00 of the moneys and funds of The Peoples Bank, in that defendants used their positions as tellers to take $1,500.00 from the Bank without authority or permission by converting the money to their own use and benefit to purchase airline reservations for MARTIN and another whose identity is known to the grand jury, and they concealed the theft by making a deposit to the account of an individual whose identity is known to the grand jury which was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Sections 656 and 2.

COUNT TWENTY-ONE
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about and between June 12, 2015, and June 17, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $88,000.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $88,000.00 from the Bank without authority or permission, she converted the money to her own use and benefit to purchase a BMW automobile, and she concealed the theft by making cash withdrawals from her teller drawer at the Bank which were not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT TWENTY-TWO
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about April 17, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,350.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $1,350.00 from the Bank without authority or permission, she converted the money to her own use and benefit, and she concealed the theft by making deposits to the checking accounts at the Bank of individuals whose identities are known to the grand jury and which deposits were not supported by any legitimate corresponding deposits of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT TWENTY-THREE
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about April 15, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,400.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $1,400.00 from the Bank without authority or permission, she converted the money to her own use and benefit, and she concealed the theft by making deposits to the checking account at the Bank of an individual whose identity is known to the grand jury and which deposits were not supported by any legitimate corresponding deposits of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT TWENTY-FOUR
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about March 14, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE, and

VICKY MARTIN,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $1,700.00 of the moneys and funds of The Peoples Bank, in that defendants used their positions as tellers to take $1,700.00 from the Bank without authority or permission by converting the money to their own use and benefit for the purchase of a motorcycle for MIZE, and they concealed the theft by making deposits to the account of MIZE which were not supported by any legitimate corresponding deposits of cash or checks, in violation of Title 18, United States Code, Sections 656 and 2.

COUNT TWENTY-FIVE
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about February 5, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,

with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $5,500.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $5,500.00 from the Bank without authority or permission, she converted the money to her own use and benefit to pay for a trip to Las Vegas for herself and another, and she concealed the theft by making deposits to her accounts at the Bank which were not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Section 656.

COUNT TWENTY-SIX
[Theft by a Bank Employee – 18 U.S.C. § 656]

1. Section A of Count One of this indictment is incorporated by reference herein.

2. On or about October 19, 2015, in the Macon Division of the Middle District of Georgia, the defendant,
BRANDY MIZE,
with intent to injure and defraud The Peoples Bank, did knowingly and willfully misapply and cause to be misapplied the sum of $45,000.00 of the moneys and funds of the Bank, in that defendant used her position as a teller to take $45,000.00 from the Bank without authority or permission by converting the money to her own use and benefit to fund a cashier's check for the benefit of an associate of MIZE to purchase a house, and she concealed the theft by making a deposit to her teller drawer that was not supported by any legitimate corresponding deposit of cash or checks, in violation of Title 18, United States Code, Sections 656 and 2.

FORFEITURE NOTICE
(18 U.S.C. § 982(a)(2)(A), 18 U.S.C. § 981(a)(1)(C), and 28 U.S.C. § 2461(c) – Criminal Forfeiture)

1. The allegations contained in Counts One through Twenty-Six of this Indictment are hereby re-alleged and incorporated by reference into this Notice for the purpose of alleging forfeiture to the United States of America, pursuant to the provisions of Title 18, United States Code, Section 982(a)(2)(A), and Title 18, United States Code, Section 981(a)(1)(C), in conjunction with Title 28, United States Code, Section 2461(c).

2. Upon conviction of the offense(s) in violation of Title 18, United States Code, Section 1349 set forth in Count One; Title 18, United States Code, Section 1005 set forth in Count Two; and/or Title 18, United States Code, Section 656 set forth in Counts Three through Twenty-Six of this Indictment, the defendant(s),
BRANDY MIZE, and

VICKY MARTIN,

shall forfeit to the United States of America pursuant to Title 18, United States Code, Section 981(a)(1)(C), in conjunction with Title 28, United States Code, Section 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offense(s), or a conspiracy to commit such offense; and/or any property, real or personal, involved in such offense(s), or any property traceable to such property, pursuant to Title 18, United States Code, Section 982(a)(2)(A), including, but not limited to, a money judgment in an amount to be determined.

3. If any of the property subject to forfeiture, as a result of any act or omission of the defendant(s):

(a) cannot be located upon exercise of due diligence;

(b) has been transferred, sold to or deposited with, a third person;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1), and Title 28, United States Code, Section 2461(c), through Title 18, United States Code, Section 981(a)(1)(C).

All pursuant to 18 U.S.C. § 982, 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

A TRUE BILL.

s/FOREPERSON OF THE GRAND JURY

Presented by:

CHARLES E. PEELER
UNITED STATES ATTORNEY

<<signature>>

PAUL C. McCOMMON III
ASSISTANT UNITED STATES ATTORNEY
Filed in open court this 13th day of March, 2018.

<<signature>>

Deputy Clerk

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BERG

2018 WL 6204362 (E.D.Mich.) (Trial Pleading)
United States District Court, E.D. Michigan.
Southern Division

Brian BERG, Plaintiff,
v.
CREDIT ACCEPTANCE CORP., Defendant.

No. 2:18-cv-13671-DML-APP.
November 26, 2018.

Complaint and Demand for Jury Trial

Octavio "Tav" Gomez, Esquire, Florida Bar #: 0338620, Morgan & Morgan, Tampa, P.A., One Tampa City Center, 201 N. Franklin Street, Suite 700, Tampa, FL 33602, Telephone: (813) 223-5505, Facsimile: (813) 559-4845, tgomez@forthepeople.com, fkerney@forthepeople.com, snazario@forthepeople.com, for plaintiff.

COMES NOW, Plaintiff, Brian Berg (hereinafter "Plaintiff"), by and through the undersigned counsel, and sues Defendant, Credit Acceptance Corp. (hereinafter "Defendant"), and in support thereof respectfully alleges violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA").

INTRODUCTION

1. The TCPA was enacted to prevent companies like Defendant from invading American citizen's privacy and to prevent abusive "robo-calls."

2. "The TCPA is designed to protect individual consumers from receiving intrusive and unwanted telephone calls." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).

3. "Senator Hollings, the TCPA's sponsor, described these calls as 'the scourge of modern civilization, they wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall.'' 137 Cong. Rec. 30, 821 (1991). Senator Hollings presumably intended to give telephone subscribers another option: telling the auto-dialers to simply stop calling." *Osorio v. State Farm Bank, F.S.B.*, 746 F. 3d 1242 (11th Cir. 2014).

4. According to the Federal Communications Commission (FCC), "Unwanted calls and texts are the number one complaint to the FCC. There are thousands of complaints to the FCC every month on both telemarketing and robocalls. The FCC received more than 215,000 TCPA complaints in 2014." *Fact Sheet: Wheeler Proposal to Protect and Empower Consumers Against Unwanted Robocalls, Texts to Wireless Phones*, Federal Communications Commission, (May 27, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-333676A1.pdf.

JURISDICTION AND VENUE

5. Jurisdiction and venue for purposes of this action are appropriate and conferred by 28 U.S.C. § 1331, Federal Question Jurisdiction, as this action involves violations of the TCPA.

6. Subject matter jurisdiction, federal question jurisdiction, for purposes of this action is appropriate and conferred by 28 U.S.C. § 1331, which provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States; and this action involves violations of 47 U.S.C. § 227(b)(1)(A)(iii). See *Mims v. Arrow Fin. Servs., LLC*, S.Ct. 740, 748 (2012) and *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1249 (11th Cir. 2014).

7. Venue is appropriate with this Court under 28 U.S.C. § 1391(b)(2), as the Defendant's headquarters are located within this District, in Oakland County, Michigan.

FACTUAL ALLEGATIONS

8. Plaintiff is a natural person, and citizen of the State of Michigan, residing in Wexford County, Michigan.

9. Plaintiff is the "called party." See *Breslow v. Wells Fargo Bank, N.A.*, 755 F. 3d 1265 (11th Cir. 2014) and *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014).

10. Defendant is a corporation with its principal place of business located at 25505 West 12 Mile Road, Southfield, Michigan 48034, and which conducts business in the State of Michigan through its registered agent, CSC-Lawyers Incorporating Service, located at 601 Abbot Road, East Lansing, Michigan 48823.

11. Defendant has called Plaintiff hundreds of times in an attempt to collect a debt associated with an auto loan.

12. Upon information and belief, some or all of the calls Defendant made to Plaintiff's cellular telephone number were made using an "automatic telephone dialing system" which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator (including but not limited to a predictive dialer) or an artificial or pre-recorded voice; and to dial such numbers as specified by 47 U.S.C § 227(a)(1) (hereinafter "auto-dialer calls"). Plaintiff will testify that he knew it was an auto-dialer because of the vast number of calls he received and because he heard a pause when he answered his phone before a voice came on the line, which is a common indicator of the use of an ATDS to place a call. Furthermore, Plaintiff received pre-recorded messages from Defendant.

13. Plaintiff is the subscriber, regular user and carrier of the cellular telephone number 231-***-6264and was the called party and recipient of Defendant's calls.

14. Defendant placed an exorbitant number of automated calls to Plaintiff's aforementioned cellular telephone number in an attempt to collect on an auto loan.

15. On several occasions in 2018, Plaintiff has instructed Defendant's agent(s) to stop calling his cellular telephone.

16. In or around the spring of 2018, Plaintiff first requested the calls to his cellular telephone stop. Plaintiff subsequently received over 200 auto-dialer calls from Defendant.

17. Defendant has a corporate policy to use an automatic telephone dialing system or a pre-recorded or artificial voice to individuals just as they did to Plaintiff's cellular telephone in this case.

18. Defendant has a corporate policy to use an automatic telephone dialing system or a pre-recorded or artificial voice, just as they did to the Plaintiff's cellular telephone in this case, with no way for the consumer, Plaintiff, or Defendant's own agents, to remove the number.

19. Defendant's corporate policy is structured so as to continue to call individuals like Plaintiff, despite these individuals explaining to Defendant they do not wish to be called.

20. Defendant has numerous other federal lawsuits pending against them alleging similar violations as stated in this Complaint.

21. Defendant has numerous complaints against it across the country asserting that its automatic telephone dialing system continues to call despite being requested to stop.

22. Defendant has had numerous complaints against it from consumers across the country asking to not be called, however Defendant continues to call these individuals.

23. Defendant's corporate policy provided no means for Plaintiff to have Plaintiff's number removed from Defendant's call list.

24. Defendant has a corporate policy to harass and abuse individuals despite actual knowledge the called parties do not wish to be called.

25. Not one of Defendant's telephone calls placed to Plaintiff were for "emergency purposes" as specified in 47 U.S.C. § 227(b)(1)(A).

26. Defendant willfully and/or knowingly violated the TCPA with respect to Plaintiff.

27. From each and every call placed without express consent by Defendant to Plaintiff's cellular telephone, Plaintiff suffered the injury of invasion of privacy and the intrusion upon his right of seclusion.

28. From each and every call without express consent placed by Defendant to Plaintiff's cellular telephone, Plaintiff suffered the injury of the occupation of his cellular telephone line and cellular telephone by unwelcome calls, making the cellular telephone unavailable for legitimate callers or outgoing calls while the cellular telephone was ringing from Defendant's call.

29. From each and every call placed without express consent by Defendant to Plaintiff's cellular telephone, Plaintiff suffered the injury of unnecessary expenditure of his time. For calls he answered, the time he spent on the call was unnecessary as he repeatedly asked for the calls to stop. Even for unanswered calls, Plaintiff had to waste time to unlock the cellular telephone and deal with missed call notifications and call logs that reflect the unwanted calls. This also impaired the usefulness of these features of Plaintiff's cellular telephone, which are designed to inform the user of important missed communications.

30. Each and every call placed without express consent by Defendant to Plaintiff's cellular telephone was an injury in the form of a nuisance and annoyance to the Plaintiff. For calls that were answered, Plaintiff had to go to the unnecessary trouble of answering them. Even for unanswered calls, Plaintiff had to waste time to unlock the cellular telephone and deal with missed call notifications and call logs that reflected the unwanted calls. This also impaired the usefulness of these features of Plaintiff's cellular telephone, which are designed to inform the user of important missed communications.

31. Each and every call placed without express consent by Defendant to Plaintiff's cellular telephone resulted in the injury of unnecessary expenditure of Plaintiff's cellular telephone's battery power.

32. Each and every call placed without express consent by Defendant to Plaintiff's cellular telephone where a voice message was left which occupied space in Plaintiff's cellular telephone or network.

33. Each and every call placed without express consent by Defendant to Plaintiff's cellular telephone resulted in the injury of a trespass to Plaintiff's chattel, namely his cellular telephone and his cellular telephone services.

34. As a result of the calls described above, Plaintiff suffered an invasion of privacy. Plaintiff was also affected in a personal and individualized way by stress, nervousness, anger, frustration, embarrassment, annoyance, and aggravation.

COUNT I
(Violation of the TCPA)

35. Plaintiff fully incorporates and re-alleges paragraphs one (1) through thirty-four (34) as if fully set forth herein.

36. Defendant willfully violated the TCPA with respect to Plaintiff, specifically for each of the auto-dialer calls made to Plaintiff's cellular telephone after Plaintiff notified Defendant that Plaintiff wished for the calls to stop,

37. Defendant repeatedly placed non-emergency telephone calls to Plaintiff's cellular telephone using an automatic telephone dialing system or pre-recorded or artificial voice without Plaintiff's prior express consent in violation of federal law, including 47 U.S.C § 227(b)(1)(A)(iii).

WHEREFORE, Plaintiff respectfully demands a trial by jury on all issues so triable and judgment against Credit Acceptance Corp. for statutory damages, punitive damages, actual damages, treble damages, enjoinder from further violations of these parts and any other such relief the court may deem just and proper.

Respectfully submitted,

/s/Octavio Gomez

Octavio "Tav" Gomez, Esquire
Florida Bar #: 0338620
Morgan & Morgan, Tampa, P.A.
One Tampa City Center
201 N. Franklin Street, Suite 700
Tampa, FL 33602
Telephone: (813) 223-5505
Facsimile: (813) 559-4845
tgomez@forthepeople.com
fkerney@forthepeople.com
snazario@forthepeople.com
Counsel for Plaintiff

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ALLEN

2018 WL 5874088
Only the Westlaw citation is currently available.
Not for Publication
United States District Court, D. New Jersey.

MICHAEL ALLEN, individually and on behalf of all others similarly situated, Plaintiff,
v.
QUICKEN LOANS INC. AND NAVISTONE, INC., Defendants.

Civil Action No. 17-12352 (ES) (MAH)

Filed 11/09/2018

OPINION

Esther Salas, U.S.D.J.

***1** Before the Court are Defendant Quicken Loans Inc.'s ("Quicken") and Defendant NaviStone, Inc.'s ("NaviStone") (collectively, "Defendants") motions to dismiss (D.E. Nos. 19 & 20), Plaintiff Michael Allen's ("Allen" or "Plaintiff") Amended Complaint. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. The Court has considered the parties' submissions (D.E. Nos. 18-20, 25, 27-28, & 33-35) and decides the motions without oral argument under Federal Rule of Civil Procedure 78(b). For the reasons set forth below, the Court GRANTS Defendants' motions to dismiss.

I. BACKGROUND[1]

Allen filed the instant lawsuit on February 9, 2018. (*See* D.E. No. 18, Amended Complaint ("Am. Compl.")). At the heart of this controversy is Quicken's and NaviStone's implementation and execution of a JavaScript code (the "Code") on a web server whose domain points to "www.quickenloans.com" ("Quicken's Website"). (*Id.* ¶¶ 1, 4 & 11). Allen alleges that on June 20, 2017, gizmodo.com, a technology news website, published an article describing how NaviStone's Code works to unmask anonymous website visitors. (*Id.* ¶ 18). Allen states that he visited and interacted with Quicken's Website "[o]n several occasions within the 6 months prior to filing of this lawsuit," but did not purchase any of Quicken's services or products. (*Id.* ¶¶ 2, 4 & 44). Quicken's Website provides visitors with information about its products and services related to mortgages, and offers prospective customers the ability to apply for a mortgage, or to calculate refinancing terms. (*See id.* ¶¶ 13, 23, 26, 29, 33-35 & 39). Quicken's Website provides this functionality through an on-line form. (*See id.* ¶¶ 13, 23, 34 & 44).

NaviStone is a marketing company and data broker that offers the Code to e-commerce companies such as Quicken to help them identify who visits their websites. (*Id.* ¶ 11). NaviStone does this by maintaining a database containing the names and mailing addresses of various U.S. consumers. (*Id.* ¶ 14). NaviStone attempts to identify live-time website visitors by matching their internet protocol ("IP") addresses, and other personally identifiable information ("PII") they provide, to information on NaviStone's databases. (*Id.* ¶¶ 13-14). The task of identifying visitors is handled by NaviStone's Code, which runs in the background of websites and can intercept the electronic communications of visitors, such as their "keystroke[s] and mouse click[s]." (*Id.* ¶ 13).

NaviStone provides this functionality to web services through voluntary partnerships, whereby the web service agrees to insert the Code onto its websites. (*Id.* ¶ 11). The Code sits on individual webpages and acts as a "back door" to retrieve and execute more complex code stored on other "remotely hosted [ ] servers" managed by NaviStone. (*Id.* ¶ 15). In the process, the Code collects a "visitor's IP address and other PII," which is then "sent to NaviStone in real-time." (*Id.* ¶ 13). NaviStone's Code is also capable of scanning a visitor's computer for "tracking files" employed by other websites capable of de-anonymizing the visitor. (*Id.* ¶ 32; *see also id.* ¶¶ 1-2, 13, 16 & 22).

***2** Allen alleges that because NaviStone has partnered with hundreds of e-commerce websites, it can identify and track consumers across those partner websites. (*Id.* ¶ 15). He alleges that Quicken, one of NaviStone's voluntary partners, embeds the NaviStone

Code onto its website to scan visitors' computers for files that can be used to identify who they are, intercept their electronic communications, and obtain their de-anonymized PII. (*Id.* ¶ 16). The Amended Complaint further alleges that NaviStone's Code is concealed "through dummy domains" in an attempt to "obfuscate the wiretap codes," and that the Code loads simultaneously with Quicken's Website. (*Id.* ¶ 17). Thus, NaviStone—and the partnering website—can "intercept[ ] the communication[ ] in real time … even if [a user doesn't] hit submit." (*Id.* ¶ 21). In addition, Allen alleges that the NaviStone Code intercepts information that a visitor types into a webform, such as when a visitor enters "the balance of his or her mortgage, the total value of his or her home" in an attempt to model hypothetical financing options. (*Id.* ¶ 23). Because "NaviStone's wiretaps are deployed on hundreds of e-commerce websites," and because "NaviStone maintains and correlates its back-end database of User Data and PII across these hundreds of websites," NaviStone can identify website visitors. (*Id.* ¶ 24).

Allen alleges that the security and privacy policy maintained on Quicken's Website ("Quicken's Privacy Policy") is "false and/or misleading," because Quicken "does in fact share visitor's information with NaviStone for NaviStone's marketing purposes and promotional use." (*Id.* ¶ 41). Further, Allen alleges that Quicken's Privacy Policy misleadingly and fraudulently states that: (1) "[Quicken] does not share your personal information with outside companies for their promotional use without your consent"; (2) "[Quicken] will not ask you for personally identifiable information to use these features, and [does] not attribute the information that you provide to you as an individual"; and (3) "[Quicken does] not track URLs that you type into your browser [or] track you across the Internet once you leave [the] site." (*Id.* ¶¶ 37-41).

Allen alleges that when Defendants "implemented the wiretaps" they "intended to commit tortious acts including disclosures of the intercepted information which violated Quicken's Privacy Policy, violated the [Stored Communications Act], violated the confidentiality provisions of the Gramm-Leach-Bliley Act ["GLBA"], and several New Jersey privacy torts." (*Id.* ¶ 45).

He seeks to represent a nationwide class of persons affected by Defendants' alleged practices, and also seeks to represent a New Jersey subclass. (*Id.* ¶ 48). The Amended Complaint alleges that Defendants' practices violated: (Count I) 18 U.S.C.§ 2511(1)(a) of the Electronic Communications Privacy Act ("ECPA") by intentionally intercepting, endeavoring to intercept, and procuring another to intercept electronic communications; (Count II) 18 U.S.C. § 2511(1)(c) by intentionally disclosing electronic communications intercepted in violation of § 2511(1)(a); (Count III) 18 U.S.C. § 2511(1)(d) by intentionally using or endeavoring to use the contents of electronic communications intercepted in violation of § 2511(1)(a); (Count IV) 18 U.S.C. § 2511(1)(a) by intentionally procuring another to intercept or endeavor to intercept electronic communications; (Count V) 18 U.S.C. § 2512 by creating wiretap codes, possessing wiretaps, by advertising them, and by distributing them; (Count VI) the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.*, by intentionally accessing stored files without authorization or by exceeding authorization; and (Count VII) the New Jersey common-law tort of intrusion upon seclusion by intentionally intruding on Plaintiff's solitude or seclusion in a highly offensive manner. (*Id.* ¶¶ 55-74).

II. LEGAL STANDARD

To withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A successful claim presents "factual allegations sufficient to raise a right to relief above the speculative level" *Twombly*, 550 U.S. at 545, and does not hide behind "labels and conclusions," or "formulaic recitation[s] of the elements of a cause of action" *Iqbal*, 556 U.S. at 678 (*Twombly*, 550 U.S. at 555). Thus, "[w]hen reviewing a motion to dismiss all allegations in the complaint must be accepted as true, and the plaintiff must be given the benefit of every favorable inference to be drawn therefrom," but a court is not required to accept as true "mere conclusory statements." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (internal quotations omitted); *Iqbal*, 556 U.S. at 678.

III. DISCUSSION

***3** All parties make a number of arguments in favor of their respective positions. The Court addresses only arguments relevant to the disposition of Defendants' motions.

A. ECPA Claims

Allen's Amended Complaint alleges five violations of the ECPA, 18 U.S.C. § 2510 *et seq.*; four under section 2511 and one under section 2512. The Court discusses each in turn.

1. Section 2511 Claims: Counts I-IV

Plaintiff brings claims under subsections (a), (c), and (d) of section 2511(1) of the ECPA. Since claims under subsection (c) and (d) are predicated on a violation of subsection (a), the Court considers all section 2511 claims together. *See* 18 U.S.C. 2511(1)(a), (c) & (d); *see also Walsh v. Krantz*, 386 F. App'x 334, 340 (3d Cir. 2010) ("Inasmuch as Dr. Krantz did not 'intercept' the telephone call, logically he could not have 'disclosed' the content of the call to a third person, or 'used' any information disclosed during the call for any purpose, 18 U.S.C. § 2511(1)(c), (d).").

The federal Wiretap Act makes it unlawful for "any person" to, among other things, intentionally intercept an electronic communication, or procure any other person to intercept an electronic communication. 18 U.S.C. § 2511(1)(a). Liability premised under § 2511(1)(a) relies on the definitions of "electronic communication" and "intercept" set forth in 18 U.S.C. § 2510. An "electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photoopical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). The Third Circuit has understood "electronic communication" to include a diverse set of digital communications, such as web cookies, URLs, and emails. *See In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274-75 (3d Cir. 2016); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 137 (3d Cir. 2015).

As noted above, another prerequisite to liability under section 2511(1)(a) is demonstrating that the electronic communication in question was "intercepted." Section 2510(4) defines "intercept[ion]" as the "acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." Under the statute, one cannot intercept electronic communications if the electronic communication does not contain content. *Id.* Thus, to fulfill § 2511(1)(a)'s "intercept[ion]" requirement, a plaintiff must sufficiently allege that the electronic communications in question contained content. *See* 18 U.S.C. § 2510(4). The statute defines "content" as "any information concerning the substance, purport, or meaning of that communication." *Id.* § 2510(8).

Thus, "[a] plaintiff pleads a prima facie case under the [section 2511] by showing that the defendant (1) intentionally (2) intercepted ... (3) the contents of (4) an electronic communication, (5) using a device." *In re Google*, 806 F.3d at 135 (internal quotation marks omitted). However, section 2511(2)(d) makes the interception lawful when the person intercepting "is a party to the communication or where one of the parties to the communication has given prior consent to such interception." As explained below, Allen's section 2511 claims fail because Allen cannot show that Defendants unlawfully intercepted the communications.

a. Defendants' Interception Was Lawful

***4** Defendants argue that Allen's claims fail because the liability exception under section 2511(2)(d) permitted the alleged interception. Particularly, Quicken argues that Allen "admits that any allegedly intercepted communications were made on QuickenLoans.com website" making Quicken a party to the communication. (D.E. No. 20, Memorandum of Points and Authorities in Support of Defendant Quicken Loan's Motion to Dismiss Plaintiff's First Amended Complaint ("Def. Quicken's Mov. Br.") at 11). Both Defendants also argue that Allen admits in his Amended Complaint that "Quicken Loans and NaviStone intercepted these communications '[p]ursuant to an agreement,' " and as a result Allen concedes that Quicken consented to NaviStone's interception of his communications. (*Id.* at 12 (citing Am. Compl. ¶ 16)); *see also* D.E. No. 19, Memorandum of Defendant NaviStone, Inc. in Support of Its Motion to Dismiss the Amended Complaint ("Def. NaviStone's Mov. Br.") at 14).

In opposition, Allen only counters that NaviStone was not a party to the communication because Allen and "an extreme supermajority of website visitors" do not know of NaviStone's involvement with Quicken. (D.E. No. 25, Plaintiff's Memorandum of Law in Opposition to Defendants Quicken Loans Inc. and NaviStone, Inc.'s Motions to Dismiss the Amended Complaint ("Pl. Opp. Br.") at 9-10).

Section 2511(2)(d) makes interception under § 2511(1)(a) lawful if the person carrying out the interception "is a party to the communication or where one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(d). As the Amended Complaint plainly admits, all relevant communications occurred on Quicken's Website, making Quicken the intended recipient (and a party) to the communications. (*See* Am. Compl. ¶¶ 1-4, 13, 23, 26, 33-34 & 45);[2] *see also In re Google*, 806 F.3d at 142-43 ("Because the defendants were the intended recipients of the transmissions at issue ... we agree that § 2511(2)(d) means the defendants have done nothing unlawful under the Wiretap Act."). Indeed, Allen waived any argument to the contrary by failing to respond to Defendants' arguments in his brief. (*See* Pl. Opp. Br. (not disputing Defendants arguments that Quicken was a party to the communication)); *see also Leisure Pass N. Am., LLC v. Leisure Pass Grp., Ltd.*, No. 12-03375, 2013 WL 4517841, at *4 (D.N.J. Aug. 26, 2013) ("Plaintiff has waived its opposition to this argument by failing to respond to it.").

***5** Similarly, Allen's argument that NaviStone was not a party to the communication because "an extreme supermajority of website visitors" do not know of NaviStone's involvement with Quicken is irrelevant. (*See* Pl. Opp. Br. at 9-10). Whether website visitors were aware of NaviStone is immaterial; the ECPA is a one-party consent statute, and so long as "one of the parties to the communication has given prior consent to such interception," no liability exists under section 2511. *See* 18 U.S.C. § 2511(2)(d); *In re Nickelodeon Consumer Privacy Litig.*, No.12-7829, 2014 WL 3012873, at *13 (D.N.J. July 2, 2014). Here, Allen admits that Quicken, one of the parties to the communication, gave prior consent to NaviStone's interception "[p]ursuant to an agreement." (*See* Am. Compl. ¶ 16). Therefore, NaviStone's interception is not unlawful under the ECPA.

Further, Allen's reliance on *United States v. Eady*, 648 F. App'x 188 (3d Cir. 2016), is misplaced. *Eady* involved an individual who surreptitiously recorded conversations between two other individuals without the knowledge or consent of *any* party to that communication. 648 F. App'x at 189-90. Eady argued that he was a party to the communication because he could have spoken during the phone calls he intercepted. *Id.* at 191. Thus, the court in *Eady* interpreted the meaning of the first part of 2511(2)(d)—"where such as person is a party to the communication"—which "will always consist of at least two parties: the speaker and/or sender, and at least one intended recipient." *In re Google*, 806 F.3d at 143. However, *Eady* says nothing about the second part of the exception, which only requires that "*one of the parties* to the communication" give consent to the outsider. For this part of the exception, the non-consenting party's knowledge of the interception by the outsider is irrelevant. Consequently, Defendants' are entitled to the liability exception under section 2511(2)(d).

b. The Exception To The Exception

Allen attempts to circumvent the liability exception by invoking the "exception to the exception." (*See* Pl. Opp. Br. at 7). Particularly, section 2511(2)(d) reinstates liability if "such communication is intercepted *for the purpose* of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." (emphasis added).

Allen advances three arguments for why Defendants should not be entitled to the liability exception. He contends that 1) Defendants committed the New Jersey tort of intrusion upon seclusion, 2) that Defendants violated Quicken's Privacy Policy, and 3) that Defendants violated the confidentiality provisions of the GLBA by intercepting his communications and searching his computer for files. (Pl. Opp. Br. at 7-8). Allen argues that as a result, Defendants should not be entitled to the liability exception under section 2511(2)(d) because that section "provides an 'exception to the exception' where the underlying act is criminal or tortious." (Pl. Opp. Br. at 7). But this assertion misapprehends the language of the statute and the controlling case law in this Circuit.

For liability to be reinstated under section 2511(2)(d), this Circuit requires that the "plaintiff ... plead sufficient facts to support an inference that the offender intercepted the communication for the *purpose* of a tortious or criminal act that is *independent* of the intentional act of [intercepting]." *In re Google*, 806 F.3d at 145 (quoting *Caro v. Weintraub*, 618 F.3d 94, 100 (2d Cir. 2010) ("Congress chose the word 'purpose' for a reason. Therefore, the offender must have as her objective a tortious or criminal result.") (emphasis added); *see also Sussman v. Am. Broad. Companies, Inc.,* 186 F.3d 1200, 1202–03 (9th Cir. 1999) ("Under section 2511, the focus is not upon whether the interception itself violated another law; it is upon whether the *purpose* for the interception—its intended use—was criminal or tortious .... Where the purpose is not illegal or tortious, but the means are, the victims must seek redress elsewhere."). Thus, the plaintiff must plead that the defendant intercepted the communications "for the *purpose* of facilitating some further impropriety, such as blackmail," not merely that the interception itself (or the means of interception) is tortious or criminal. *Sussman*, 186 F.3d at 1203 (emphasis added).

***6** Under this statutory scheme, Allen's arguments plainly fail because the alleged tortious or criminal activities are not independent from the intentional act of intercepting; they are the interception itself. *See In re Google*, 806 F.3d at 145 ("[T]he plaintiffs point to no legal authority providing that the exception to § 2511(2)(d) is triggered when, as here, the tortious conduct is the alleged wiretapping itself."). First, Allen's argument that Defendants' alleged violation of the New Jersey tort of intrusion upon seclusion permits liability under 2511 is unpersuasive. (*See* Pl. Opp. Br. at 8 & 20; Am. Compl. ¶¶ 1, 4, 41 & 71-74). Allen admits that the *purpose* of Defendants' interception was for "marketing purposes and promotional use," and not to commit a tort or crime. (Am. Compl. ¶ 41). Thus, Allen's intrusion upon seclusion claim is about the means (the use of the NaviStone Code to "de-anonymize" Allen), not the purpose of the interception. *See In re Nickelodeon Consumer Privacy Litig.*, 2014 WL 3012873, at *13 (refusing to use intrusion upon seclusion tort allegation to reinstate liability under 2511(2)(d) because "courts have almost uniformly found that the 'criminal or tortious act' exception applies only where defendant has 'the intent to use the illicit recording to commit a tort or crime beyond the act of recording itself.' ") (quoting *Caro*, 618 F.3d at 101 ("Invasion of privacy through intrusion upon seclusion presents a problem for Caro—it is a tort that occurs through the act of interception itself.").

The same holds true for Allen's reliance on Defendants' alleged violation of Quicken's Privacy Policy. Put in the best light, Allen's argument merely restates his section 2511 interception claims. (*Compare* Pl. Opp. Br. at 8, *with id.* at 2-3). Further, even if this was not the case, Allen cites no law that would support his assertion that a mere violation of a website's privacy policy by itself constitutes a "criminal or tortious act" under section 2511(2)(d). And to the extent this violation is the basis for his intrusion upon seclusion claim, that does not change the analysis outlined above.

Finally, Allen's reliance on the GLBA—contained in two conclusory statements in the Amended Complaint—is also misplaced. The GLBA was enacted to "provid[e] consumers with new protections with respect to the transfer and use of their nonpublic personal information by financial institutions." H.R. Conf. Rep. 106–434 (1999), 106th Cong., 1st Sess. 1999, 1999 U.S.C.C.A.N. 245, 265. Accordingly, the GLBA sets forth both "affirmative and continuing obligation[s]" on the part of financial institutions to "respect the privacy of [their] customers and to protect the security and confidentiality of ... nonpublic personal information," 15 U.S.C. § 6801(a), as well as criminal penalties to prevent private individuals, from "obtain[ing] ... customer information of a financial institution" through fraudulent means, 15 U.S.C. §§ 6821(a)(3); 6823(a).

Allen argues that he "alleges that Defendants' conduct 'violated the confidentiality provisions of the [GLBA].' " (Pl. Opp. Br. at 8 (quoting Am. Compl. ¶ 45); *see also* D.E. No. 34 at 2 (arguing that section 2511(d)(2) reinstates liability "where the underlying act is criminal or tortious")). In effect, Allen argues that a mere alleged violation of the GLBA gives rise to liability under Section 2511(2)(d). But this ignores the plain language of the statute and this Circuit's precedent; the question is not whether Defendants' interception violated the GLBA, but "whether the *purpose* for the interception—its intended use—was" to facilitate an independent criminal activity. *Sussman*, 186 F.3d at 1203 (emphasis added); *In re Google*, 806 F.3d at 145 ("[P]laintiff must plead sufficient facts to support an inference that the offender intercepted the communication for the purpose of a tortious or criminal act that is independent of the intentional act of recording."). As explained above, Allen fails to do that here and instead only alleges that Quicken used NaviStone's Code to intercept the communications and de-anonymize Allen for the purpose of facilitating marketing. (*See* Pl. Opp. Br. at 5). Indeed, there are "no facts pleaded to indicate that the interceptions in this case were motivated by anything other than Defendants' desire to monetize Plaintiffs' [use of the Quicken Website], and thus the 'criminal or tortious act' exception embodied in § 2511(2)(d) is inapplicable." *See In re Nickelodeon Consumer Privacy Litig.*, 2014 WL 3012873, at *13; *see also Cohen v. Casper Sleep Inc.*, No. 17-9325, 2018 WL 3392877, at *3 (S.D.N.Y. July 12, 2018) ("[C]ollecting data to de-anonymize consumers was not Defendants' primary motivation for installing the Code. Rather, it was the means Defendants used to achieve their real purpose—marketing.").

***7** Allen cites two cases from sister district courts to support his argument that a violation of a criminal statute is sufficient to reinstate liability. (*See* D.E. 34 at 2 (citing *United States v. Lam*, 271 F. Supp. 2d 1182 (N.D. Cal. 2003), *Hawaii Reg'l Council of Carpenters v. Yoshimura*, No. 16-00198, 2016 WL 4745169 (D. Haw. Sept. 12, 2016)). But both of these cases support the contrary position. In *Lam*, the alleged interception was done for the purpose of "keeping business records for [the party's] unlawful gambling activities." *Lam*, 271 F. Supp. 2d at 1184. Similarly, in *Yoshimura* the interception was done for the purpose of "covering up [the party's] breaches of fiduciary duties and extorti[on]...." *Yoshimura*, 2016 WL 4745169, at *8. Thus, in both cases the alleged tortious or criminal purpose was independent from the intentional act of intercepting; the interception was done for the purpose of facilitating unlawful gambling and extortion. By contrast, Allen here offers nothing to show that Defendants intended facilitate some further impropriety, or even intended to violate the GLBA.

Finally, Allen's reliance on the GLBA to reinstate liability is also misplaced for two additional reasons. First, the GLBA does not apply to NaviStone because Allen has not alleged that NaviStone is a financial institution as defined by the statute, or is otherwise subject to it. *See* 15 U.S.C. § 6809(3). As to Quicken, Allen concedes that he was not a consumer for purposes of the GLBA, and thus, he has not alleged that either Defendant obtained his nonpublic personal information in violation of the statute. The relevant portion of the GLBA prohibits financial institutions from disclosing "nonpublic personal information." 15 U.S.C. § 6802. Although section 6802(4)(A) defines nonpublic personal information as information "provided by a consumer to a financial institution," section 6809(9) defines a consumer as "an individual who *obtains*, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes ...." (emphasis added). Because Allen's Amended Complaint concedes that he "never procured financial services from Quicken" (Am. Compl. ¶¶ 2 & 4), he is not a consumer and the information that he alleges Defendants misused is not protected by the GLBA. The GLBA simply does not apply here, and any argument that rests on an assumption that it does must fail.

Because Allen's section 2511 claims fail as a matter of law, Counts I through IV are dismissed *with prejudice*. *See In re Nickelodeon*, 827 F.3d at 275 (affirming district court's dismissal of ECPA claims with prejudice when plaintiff's allegations gave rise to the conclusion that the defendants lawfully intercepted the communications under section 2511(2)(d)).

2. Section 2512 Claim: Count V

Allen also charges Defendants with violating 18 U.S.C. 2512. (Am. Compl. ¶¶ 64-67). Allen's claim is implicitly based on his supposition that 18 U.S.C. § 2520(a), which authorizes the recovery of civil damages under some sections of the ECPA, provides for a private right of action for violations of section 2512. Defendants maintain that no such private right of action exists under a plain interpretation of the statute. (Def. Quicken's Mov. Br. at 25-26). The Court agrees with Defendants.

Section 2512 imposes criminal liability for any person who manufactures, distributes, possesses, or advertises a device the design of which renders it primarily useful for surreptitiously intercepting electronic communications. 18 U.S.C. § 2512(1). Such conduct is classified as a felony and is punishable, under the statute, by imprisonment of up to five years, or a fine, or both. *Id.* Strikingly absent from this provision is any mention of a civil remedy.

In turn, section 2520(a) establishes a private right of action for violations of certain provisions of the ECPA. The plain text of § 2520(a) makes clear that "any person whose wire, oral, or electronic communication is *intercepted, disclosed*, or intentionally *used* in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged *in that violation* such relief as may be appropriate." 18 U.S.C. § 2520 (emphasis added). As the Third Circuit found, this language closely tracks section 2511, which makes it unlawful to intentionally *intercept, disclose*, or *use* the contents of an electronic communication. 18 U.S.C. § 2511(1)(a),(c)-(d); *DIRECTV, Inc. v. Pepe*, 431 F.3d 162, 167 (3d Cir. 2005) ("The linguistic interlock between the two provisions could not be tighter, nor more obviously deliberate: § 2511(1)(a) renders unlawful the unauthorized interception of electronic communications, including encrypted satellite television broadcasts, while § 2520(a) authorizes private suit against those who have engaged in such activities."). But when drafting section 2520(a) Congress chose to omit any mention of an avenue to seek civil redress for manufacturing, possessing, distributing, or advertising a wiretap device. *See* 18 U.S.C. § 2520.

***8** Still, Allen argues that section 2520 gives rise to civil liability under section 2512 when the defendant who possesses the wiretap device engaged in "more than mere possession." (*See* Pl. Opp. Br. at 17 ("Plaintiff alleges 'more than mere possession' of a wiretapping device.")).

Courts that have previously addressed arguments that section 2520 opens the door for civil liability under section 2512 have come to inconsistent conclusions, giving rise to three separate interpretations: 1) a broad view, 2) a plain language view, and 3) a hybrid view. The first line of cases involves a number of district courts that have adopted a broad reading of section 2520 by concluding that the section gives rise to a private cause of action against anyone who violates the ECPA, regardless of whether that violation was specifically an interception, disclosure, or use of a communication. *See, e.g., DIRECTV, Inc. v. Dougherty*, No. 02-5576, 2003 WL 24046760, at *2-3 (D.N.J. Oct. 8, 2003) (noting, at the time, that "the majority position, and the better view, is that the ECPA allows for recovery of civil damages against one who possesses an intercepting device in violation of § 2512"); *DIRECTV, Inc. v. Kitzmiller*, No. 03-3296, 2004 WL 692230, at *4 (E.D. Pa. Mar. 31, 2004) (agreeing with *Dougherty* that "anyone who violates a provision of the ECPA is a potential defendant" and stating that "this newly-developed majority view is the better approach").

Since 2004, however, an overwhelming majority of courts around the country, including district courts in this Circuit, have adopted a plain language interpretation. These courts hold that section 2520 provides a private cause of action only against those defendants who violate the plain language of section 2520(a), i.e. those who unlawfully intercept, disclose, or use a communication, all of which are within the ambit of section 2511. Consequently, no private cause of action exists for possessing, manufacturing, distributing, or advertising a wiretapping device. *See e.g., DirecTV, Inc. v. Treworgy*, 373 F.3d 1124, 1127 (11th Cir. 2004) ("The phrase 'which engaged *in that violation*' makes apparent the intent of Congress to limit liability to a certain class of defendants. Congress chose to confine private civil actions to defendants who had 'intercepted, disclosed, or intentionally used a communication in violation of ... [the ECPA.]' ") (emphasis in original) (citations and some alterations omitted)); *DIRECTV Inc. v. Robson*, 420 F.3d 532, 539 & n.31 (5th Cir. 2005) (reaching the same conclusion and collecting cases that have found "no merit in [the] assertion that § 2520 expressly provides a private cause of action for [all] violations of the criminal proscriptions of § 2512") (cleaned up); *see also Byrd v. Aaron's, Inc.*, No. 11-101, 2012 WL 12887775, at *11 (W.D. Pa. Feb. 17, 2012) (collecting Third Circuit district court cases and noting that "this Court will join the growing number of district courts within the Third Circuit in concluding that 18 U.S.C. § 2520(a) does not provide a private cause of action for violations of 18 U.S.C. § 2512"); *DIRECTV Inc. v. Cignarella*, No. 03-2384, 2005 WL 1252261, at *4-5 (D.N.J. May 24, 2005) (examining the legislative history of the ECPA and concluding that "not only does the plain language of the statute demonstrate that no civil liability exists for a violation of § 2512, but the legislative history also supports this conclusion").

***9** More recently, the Sixth Circuit applied a sort of hybrid interpretation, indicating that "a defendant ... —which allegedly violates § 2512(1)(b) by manufacturing, marketing, and selling a violative device—is subject to a private suit under § 2520 only when that defendant also plays an active role in the use of the relevant device to intercept, disclose, or intentionally use a plaintiff's electronic communications." *Luis v. Zang*, 833 F.3d 619, 637 (6th Cir. 2016). In reaching this conclusion, the Sixth Circuit agreed with the majority view concluding "that those other courts that have adopted a narrow reading of § 2520 have the better end of this debate. This is because the phrase 'engaged in that violation' plainly refers back to the earlier clause defining the 'violation' as an 'intercept[ ], disclos[ure], or intentional[ ] use[ ].' " *Id.* at 636 (citing 18 U.S.C. § 2520) (alterations in original). However, the Sixth Circuit then primarily relied on a factual analysis to distinguish its case from *Treworgy* to conclude that violations of section 2512 could still give rise to civil liability. *Id.* at 637. Particularly, the Sixth Circuit emphasized that unlike *Treworgy*, the defendant in its case "manufactured, marketed, and sold [the wiretap device] with knowledge that it would be primarily used to illegally intercept electronic communications" and then "remained actively involved" by operating the server where the intercepted communications were stored. *Id.* Thus, because the defendant "actively manufactured, marketed, sold, and operated the device" that it knew was used to intercept, disclose, or intentionally use communications, the Sixth Circuit concluded that the defendant had " 'engaged in' a violation of the Wiretap Act...." *Id.*

Having considered these different interpretations, the Court joins the majority of courts which have applied a plain language interpretation. As a starting point, the plain language of section 2520(a) permits plaintiffs to seek civil relief only when the "electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter...." 18 U.S.C. 2520(a). The statute, as drafted by Congress, does not include language that would permit a plaintiff to seek civil redress from a defendant who manufactures, possesses, distributes, or advertises the wiretap device. Indeed, the plain language of the section limits liability only to defendants who "engaged *in that violation*," meaning defendants who intercepted, disclosed, or intentionally used the communications in "violation of this chapter." *See id.*; *Treworgy*, 373 F.3d at 1127 ("[A]s a matter of grammar and sentence structure, the phrase 'that violation' refers to the interception, disclosure, or intentional use of communications mentioned earlier in the sentence, and not to the possession[, manufacturing, or distribution] of prohibited devices.") (citations omitted).

In this respect, the Court finds Allen's arguments and the Sixth Circuit hybrid interpretation unpersuasive. In finding that section 2520 extends civil liability to section 2512, the Sixth Circuit held that because the plaintiff had alleged that the defendant had "actively manufactured, marketed, sold, and *operated* the device" that was used to intercept, disclose, or intentionally use communications, then defendant had " 'engaged in' *a violation* of the Wiretap Act...." *Luis*, 833 F.3d at 637 (noting that civil liability under 2512 exists when the "defendant also plays an active role in *the use of the relevant device* to intercept, disclose, or intentionally use a plaintiff's electronic communications") (emphasis added).

Respectfully, this Court submits that this analysis "confuses ... alleged violations of § 2512 with violations of § 2511." *Luis*, 833 F.3d at 644 (Batchelder, J. dissenting). First, section 2512(1) only makes it illegal for a person to (a) send through the mail or carry in interstate commerce, (b) manufacture, assemble, possesses, or sell, or (c) disseminate or advertise a wiretap device when it is known that the device is primarily useful for surreptitious interception of electronic communications. Section 2512 says nothing about a person "operating" or using such a device. *See* 18 U.S.C. § 2512. Section 2511(b), however, does make it plain that it is illegal for a person to "intentionally use" a wiretap device in the manner prescribed by subsections (i) through (v). 18 U.S.C. § 2511(1)(b); *see also* § 2511(1)(d) (making it unlawful to intentionally use the contents of an electronic communication). Clearly then, only section 2511, not 2512, applies when a person "operates" or "plays an active role in the use" of a wiretap device.

***10** Second, the Sixth Circuit's choice of words is also telling. It found that the plaintiff had established that the defendant had " 'engaged in' *a violation* of the Wiretap Act...." But as the Sixth Circuit's opinion had noted just three paragraphs earlier, section 2520(a) does not permit civil liability for "*a* violation" of the ECPA; it only permits civil liability when a defendant "engaged in *that violation*," namely the interception, disclosure, or intentionally use of communications in violation of the statute. *See Luis*, 833 F.3d at 636 ("This is because the phrase 'engaged in that violation' plainly refers back to the earlier clause defining the 'violation' as an 'intercept[ ], disclos[ure], or intentional[ ] use[ ].' ") (citing 18 U.S.C. § 2520) (alterations in original). And as noted earlier, section 2511, not 2512, defines when an interception, disclosure, or intentional use of an electronic communication occurs "in violation of this chapter."

To be sure, if a defendant both possesses a wiretap device and then uses the device to intercept or disclose an electronic communication (or intentionally uses the contents of said communication which were acquired by an interception using said device), then logically the defendant would be in violation of both section 2511 and section 2512. However, he would still be liable for civil penalties only as to the section 2511 violations. The mere fact that he committed both violations does not suddenly transform the plain statutory language of section 2520 to provide an avenue for civil relief under section 2512, when none exists otherwise. After all, Congress "does not, one might say, hide elephants in mouseholes." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).[3]

In short, until the Third Circuit holds otherwise, or until Congress explicitly establishes a private right of action for violations of § 2512, Allen does not have a viable legal pathway for pursing a claim for an alleged violation of § 2512. Count V of Allen's Amended Complaint is dismissed *with prejudice*.

B. Stored Communications Act Claim: Count VI

The Amended Complaint alleges that Defendants "intentionally accessed stored files on Allen's and Class members' computers and devices without authorization or by exceeding authorization." (Am. Compl. ¶ 70). Defendants argue that under this Circuit's precedent, "an individual's computer is not a 'facility through which an electronic communication service is provided' and, thus, a plaintiff does not plead a claim under the SCA by alleging access to a person's computer (or other personal device)." (Def. Quicken's Mov. Br. at 27 (citing *In re Google*, 806 F.3d at 146)).

Allen does not respond to this argument, and in fact, his brief appears to abandon the claim entirely by not mentioning it at all. (*See generally* Pl. Opp. Br.). In any event, the Court finds that this claim fails as a matter of law because Allen cannot allege that Defendants accessed a "facility."

To establish a *prima facie* claim for the violation of 18 U.S.C. § 2701, a plaintiff must show that the defendant: "(1) intentionally access[ed] without authorization a *facility* through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that *facility*; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system." *In re Google*, 806 F.3d at 145-46 (emphasis added). Crucial here is whether Allen has sufficiently alleged that Defendants unlawfully accessed a "facility through which an electronic communication service is provided." *Id.* He has not.

***11** The Third Circuit has held that "an individual's personal computing device is not a facility through which an electronic communications service is provided." *Id.* at 146 (internal quotations omitted). Allen alleges that "Defendants intentionally accessed stored files on Plaintiff's and Class members' computers and devices ...." (Am. Compl. ¶ 70). Because under the SCA an individual's personal computer or device is not a facility through which an electronic communications service is provided, Allen's SCA claim fails. And because amendment would be futile, Count IV of Allen's Amended Complaint is dismissed *with prejudice. See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002).

C. Intrusion Upon Seclusion: Count VII

1. Jurisdiction

Defendant NaviStone requests that the Court exercise its discretion to decline supplemental jurisdiction over the intrusion upon seclusion claim pursuant to 28 U.S.C. § 1367(c)(3). (Def. NaviStone's Mov. Br. at 23). Allen's Amended Complaint alleges that the basis of this Court's jurisdiction is federal question under 28 U.S.C. § 1331, for the alleged violations of the ECPA and SCA. (Am. Compl. ¶¶ 7-8). NaviStone points that Allen has not alleged any other basis for this Court to exercise jurisdiction over the New Jersey intrusion upon seclusion claim. (Def. NaviStone's Mov. Br. at 24). Allen responds that the Court has diversity jurisdiction over Plaintiff's state-law claim pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). (Pl. Opp. Br. at 23). He argues that the Amended Complaint has sufficiently alleged that diversity exists, and that he meets the amount in controversy requirement. (*Id.* (citing Am. Compl. ¶¶ 4-6 & 74)). In reply, NaviStone counters that the Amended Complaint lacks allegations establishing that the damages arising from Count VII for the New Jersey class exceed $5,000,000, because Allen has not alleged any harm for the intrusion and Allen offers nothing concerning the size of the New Jersey class that would permit a rough computation of potential damages. (D.E. No. 27 at 13-14).

Section 1332(d)(2) provides federal district courts with "original jurisdiction" over a case when three requirements are met: (1) an amount in controversy that exceeds $5,000,000; (2) minimally diverse parties; and (3) a class consisting of at least 100 or more members. *Standard Fire Ins. Co. v. Knowles*, 68 U.S. 588, 133 (2013). "In order to determine whether the CAFA jurisdictional requirements are satisfied, a court evaluates allegations in the complaint." *Judon v. Travelers Prop. Cas. Co. of Am.*, 773 F.3d 495, 500 (3d Cir. 2014). "The burden of establishing federal jurisdiction rests with the party asserting its existence." *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006)). Indeed, "CAFA does not change the proposition that the plaintiff is the master of her own claim." *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006). Thus, the plaintiff must allege the jurisdictional facts upon which subject matter jurisdiction is based. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936).

Here, Allen sufficiently alleges diversity. (*See* Am. Compl. ¶¶ 4-6) (alleging that Allen is a New Jersey citizen, Quicken is a Michigan citizen, and NaviStone is a Delaware citizen); 28 U.S.C. § 1332(d)(2)(A) (stating that diversity is satisfied if "any member of a class of plaintiffs is a citizen of a state different from any defendant"). Similarly, Allen alleges that the entire national class "number[s] in the millions" (Am. Compl. ¶ 49), thus it could be reasonably inferred that at least 100 of those class members are part of the New Jersey subclass. However, the Amended Complaint fails to sufficiently allege that the amount in controversy for the New Jersey subclass exceeds the $5,000,000 requirement. Allen points Defendants, and the Court, to the section of his Amended Complaint labeled "relief sought." (Pl. Opp. Br. at 23). However, that does not help him because the only damages quantified are statutory damages arising from the ECPA and SCA claims, which have been dismissed. Omitting these statutory damages, the section simply reads:

***12** WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks a judgment against Defendants as follows:

A. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class and Plaintiff's attorneys as Class Counsel to represent the Class;

....

C. For an order finding in favor of Plaintiff and the Class on [the intrusion upon seclusion claim] asserted herein;

....

F. For all remedies specified under New Jersey's privacy torts;

G. For prejudgment interest on all amounts awarded;

H. For an order of restitution and all other forms of equitable monetary relief;

I. For injunctive relief as pleaded or as the Court may deem proper;

J. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit; and

K. Grant any and all such relief as the Court deems appropriate.

(Am. Compl. at 26).

These allegations fail to sufficiently state the amount Allen reasonably seeks for the intrusion upon seclusion claim—or the loss any putative New Jersey class member—in a way that would permit the Court to estimate the total amount of the controversy. Consequently, the Amended Complaint does not properly plead the amount in controversy requirement under CAFA. *See Golden v. Golden*, 382 F.3d 348, 354 (3d Cir. 2004) ("Where a federal cause of action is based on diversity jurisdiction, the complaint must allege an amount in controversy between the parties in excess of the statutory minimum."); *Sunshine v. Reassure Am. Life Ins. Co.*, No. 10-1030, 2011 WL 666054, at *2 (E.D. Pa. Feb. 22, 2011), *aff'd*, 515 F. App'x 140 (3d Cir. 2013) ("Neither compensatory nor punitive damages are quantified in the complaint. The complaint does not state the amount of Mr. Sunshine's actual loss, nor the actual loss of any putative class members .... The complaint does not satisfy [CAFA's] amount in controversy requirement."); *Hyman v. WM Fin. Servs., Inc.*, No. 06-4038, 2007 WL 1657392, at *5 n.4 (D.N.J. June 7, 2007) ("Plaintiffs, though, have not alleged damages of any particular amount in their complaint. Therefore, they have failed to meet the pleading standards under the CAFA.").

The Court, however, is not ready to completely dismiss this case because it appears that Allen might be able to allege sufficient facts for this Court to exercise original jurisdiction over his intrusion upon seclusion claim. Therefore, the Court denies NaviStone's request and dismisses Count VII *without prejudice*.[4]

D. Leave to Amend

***13** Defendants also request that the Court dismiss Allen's Amended Complaint without leave to amend. Defendants argue that Allen amended his original Complaint after previewing NaviStone's arguments in its first motion to dismiss, yet Allen only chose to add "bogus" claims and allegations that he readily abandoned during briefing. (*See* D.E. No. 27 at 14; D.E. No. 28 at 15). Thus, Defendants argue that this has caused them great expense and that further amendments will prejudice them. (*Id.*).

The Court is cognizant that the allegations here indicate that Allen began visiting Quicken's Website almost immediately after the gizmodo.com article was published on June 20, 2017, and that Allen visited Quicken's Website "[o]n several occasions within the 6 months prior to filing of this lawsuit," but never actually acquired any Quicken service or product. (Am. Compl. ¶¶ 2, 4 & 18). The inference could be drawn that Allen visited Quicken's Website, not as an unsuspecting potential customer seeking services, but simply to start the instant lawsuit. However, at a motion to dismiss stage the Court must draw all reasonable inferences in favor of the plaintiff, and thus, Allen must be given the benefit of the doubt.

Whether to grant leave to amend is at the discretion of the Court. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); Fed. R. Civ. P. 15(a). But "[i]n the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." *Lorenz* *v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993). And at this juncture, the Court is not yet ready to rule that amending the complaint, particularly as to the intrusion upon seclusion claim, would be futile. Therefore, the Court will permit Allen to amend his complaint, but he is forewarned that this will be his last bite of the proverbial apple.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motions to dismiss. Counts I through VI of Allen's Amended Complaint are dismissed *with prejudice*. Count VII is dismissed *without prejudice*. Allen may file a final amended complaint within 20 days, but failure to do so shall constitute dismissal of the entire action *with prejudice*.[5] An appropriate Order accompanies this Opinion.

All Citations

Slip Copy, 2018 WL 5874088

Footnotes

1 The Court must accept Plaintiff's factual allegations as true for purposes of resolving Defendants' motions to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bistrian v. Levi*, 696 F.3d 352, 358 n.1 (3d Cir. 2012) ("As such, we set out facts as they appear in the Complaint and its exhibits.").

2 In a single paragraph, Plaintiff also alleges that "at least some of the communications" were "communications with [Plaintiff's] Internet service provider [("ISP")]" rather than with Defendants. (Am. Compl. ¶ 44). However, Plaintiff's opposition brief appears to abandon this allegation. In any event, this allegation fails to hold any water, 1) because it is contradicted by the rest of Plaintiff's Amended Complaint which states that all the communications occurred when he and similarly situated putative class members visited Quickens' Website, and 2) because ISPs are intermediaries who facilitate electronic communications, not recipients of such communications. *See United States v. Ackerman*, 831 F.3d 1292, 1294 (10th Cir. 2016) (explaining that an email never reached its "intended recipient" because AOL, the ISP, had a filter which thwarted its transmission); *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010) ("An ISP is the intermediary that makes email communication possible. Emails must pass through an ISP's servers to reach their intended recipient. Thus, the ISP is the functional equivalent of a post office or a telephone company."); *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 613 (E.D. Pa. 2004) ("A hypothetical [electronic] communication ... might originate on the user's computer, travel through ... a regional ISP's network ... and finally to the computer of the intended recipient of the communication."). As NaviStone aptly puts it, Plaintiff's "claim of an intention to communicate solely with his ISP is nonsensical. It is akin to a person claim[ing] that, in calling a retailer's telephone number, it was his intention to speak with the phone company." (NaviStone Mov. Br. at 11).

3 Even if this Court were to apply the interpretation espoused by the Sixth Circuit, Plaintiff would still have no claim under section 2512. In *Luis*, the Sixth Circuit found that the plaintiff had established that the defendant had violated section 2511. *See Luis*, 833 F.3d at 626. Here, as outlined above, Plaintiff fails to do so because the interceptions were lawful under the statute. Thus, at best, Plaintiff has only alleged that Defendants unlawfully possessed and advertised a wiretap device, which under *Luis*, is not enough to give rise to civil liability.

4 Even assuming jurisdiction was properly pleaded, the Court finds that Count VII must be dismissed for failure to state a claim. New Jersey "explicitly recognizes a right to informational privacy." *In re Nickelodeon Consumer Privacy Litig.*, 2014 WL 3012873, at *18 (internal quotations omitted). An "intrusion upon seclusion occurs whenever a plaintiff can show (i) an intentional intrusion (ii) upon the seclusion of another that is (iii) highly offensive to a reasonable person." *In re Nickelodeon*, 827 F.3d at 293.

Here, Plaintiff has failed to properly plead that Defendants' conduct is highly offensive to a reasonable person. Particularly, Allen's Amended Complaint alleges that "Defendants' intentional intrusion on Plaintiff's solitude or seclusion is highly offensive to a reasonable person in that Defendants' conduct violated federal and state civil and criminal statutes designed to protect individual privacy." (Am. Compl. ¶ 73). However, as outlined above, Allen failed to establish that Defendants violated the ECPA, the SCA, or even the GLBA. Eliminating those bases, the Amended Complaint simply concludes that "Defendants' intentional intrusion on Plaintiff's solitude or seclusion is highly offensive to a reasonable person ...." (*Id.*). Because this allegation is "entirely conclusory," it is "properly disregarded on a motion to dismiss for failure to state a claim." *In re Nickelodeon Consumer Privacy Litig.*, 2014 WL 3012873, at *19.

5 If Plaintiff "does not desire to amend, he may file an appropriate notice ... asserting his intent to stand on the complaint, at which time an order to dismiss the action would be appropriate." *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000).

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SEC

2018 WL 6181408
Only the Westlaw citation is currently available.
United States District Court, S.D. California.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,
v.
BLOCKVEST, LLC and REGINALD BUDDY RINGGOLD, III a/k/a RASOOL ABDUL RAHIM EL, Defendants.

Case No.: 18CV2287-GPB(BLM)

11/27/2018

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [Dkt. No. 30]

***1** Before the Court is Plaintiff's order to show cause why a preliminary injunction should not issue after the Court granted Plaintiff's ex parte application for a temporary restraining order freezing assets, prohibiting the destruction of documents, granting expedited discovery, requiring accounting and order to show cause why a preliminary injunction should not be granted on October 5, 2018.[1] (Dkt. No. 6.) The Court granted the parties' two joint motions to extend the temporary restraining order and hearing on the order to show cause to November 16, 2018. (Dkt. Nos. 15, 17.)

In compliance with the temporary restraining order, Defendants filed Ringgold's Declaration of Accounting on October 26, 2018, and a First Supplemental Declaration of Ringgold on November 2, 2018. (Dkt. Nos. 18, 21.) Defendants filed a response to the order to show cause on November 2, 2018. (Dkt. Nos. 23, 24, 25.) On November 7, 2018, Plaintiff filed a reply. (Dkt. Nos. 27, 28.)

A hearing was held on November 16, 2018. Amy Long, Esq., Brent Wilner, Esq., and David Brown, Esq. appeared on behalf of the SEC. (Dkt. No. 37.) Stanley Morris, Esq. and Brian Corrigan, Esq. appeared on behalf of Defendants. (Id.) Based on the review of the briefs, the supporting documentation and the applicable law, the Court DENIES Plaintiff's motion for preliminary injunction.

Factual Background

Plaintiff Securities and Exchange Commission ("SEC" or "Plaintiff") filed a Complaint against Defendants Blockvest, LLC and Reginald Buddy Ringgold, III a/k/a Rasool Abdul Rahim El alleging violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act') and Rule 10b-5(b); violations under Section 10(b) of the Exchange Act and Rule 10b-5(a) and Rule 10b-5(c); fraud in violation of Section 17(a)(2) of the Securities Act of 1933 ("Securities Act"), fraud in violation of Sections 17(a)(1) and 17(a)(3) of the Securities Act; and violations of Sections 5(a) and 5(c) of the Securities Act for the offer and sale of unregistered securities. (Dkt. No. 1, Compl.)

Defendant Reginald Buddy Ringgold, III ("Ringgold"), is the chairman and founder of Defendant Blockvest, LLC ("Blockvest") (collectively "Defendants"), a Wyoming limited liability company that was set up to exchange cryptocurrencies but has never become operational. (Dkt. No. 24, Ringgold Decl. ¶ 4.) Blockvest Investment Group, LLC owns 100% of Blockvest LLC. (Id.) Ringgold owns 51% of the membership interests of Blockvest Investment Group, LLC, 9% are unissued, 20% is owned by Michael Shepperd, and the remaining 20% is owned by Ringgold's mother. (Id.)

The complaint alleges that Defendants have been offering and selling alleged unregistered securities in the form of digital assets called BLV's. It involves an initial coin offering ("ICO"), which is a fundraising event where an entity offers participants a unique digital "coin" or "token" or "digital asset" in exchange for consideration, often in the form of virtual currency—most commonly Bitcoin and Ether—or fiat currency. (Dkt. No. 1, Compl. ¶ 18.) The tokens are issued on a "blockchain" or cryptographically secured ledger. (Id. ¶ 19.) The token may entitle its holders to certain rights related to a venture underlying the ICO, such as rights to profits, shares of assets, rights to use certain services provided by the issuer, and/or voting rights. (Id. ¶ 21.) These tokens may also be listed on online trading platforms, often called virtual currency exchanges, and tradable for virtual or fiat currencies. (Id.) ICOs are typically announced and promoted through online channels and issuers usually release a "whitepaper" describing the project and the terms of the ICO. (Id. ¶ 22.) To participate, investors are generally required to transfer funds (often virtual currency) to the issuer's address, online wallet, or other account. (Id.) After the completion of the ICO, the issuer will distribute its unique "tokens" to the participants' unique address on the blockchain. (Id.)

***2** According to the complaint, Blockvest conducted pre-sales of BLVs in March 2018. According to the whitepaper, the BLVs are being sold in several stages: 1) a private sale (with a 50% bonus) that ran through April 30, 2018; 2) currently, a "pre-sale" (with a 20% bonus) from July 1, 2018 through October 6, 2018; and 3) the $100 million ICO launch on December 1, 2018. (Dkt. No. 1, Compl. ¶ 30; Dkt. No. 3-12, Wilner Decl., Ex. 10 at p. 93; Dkt. No. 3-13, Wilner Decl., Ex. 11 at p. 127.) On May 6, 2018, Blockvest claimed it raised $2.5 million in 7 days, (Dkt. No. 3-12, Wilner Decl., Ex. 10 at p. 96; Dkt. No. 3-19, Ex. 44 at p. 479), and by September 17, 2018, it had sold 18% of the tokens being offered or around 9 million tokens. (Id.) Blockvest purports to be the "First Licensed and Regulated Tokenized Crypto Currency Exchange & Index Fund based in the US". (Dkt. No. 3-23, Suppl. Wilner Decl., Ex. 1 at p. 3.)

According to the SEC, Blockvest and Ringgold falsely claim their ICO has been "registered" and "approved" by the SEC and using the SEC's seal on the website. (Dkt. No. 3-18, Wilner Decl., Ex. 41 at p. 416; Dkt. No. 3-23, Suppl. Wilner Decl., Ex. 1 at p. 2.) But the SEC has not approved, authorized or endorsed Defendants, their entities or their ICO. They also falsely claim their ICO has been approved or endorsed by the Commodity Futures Trading Commission ("CFTC") and the National Futures Association ("NFA") by utilizing their logos and seals and stating "Under the helpful eye of the CFTC and the NFA...the Fund will be managed by Blockvest Investment Group, LLP, a commodity pool operator registered with the Commodity Futures Trading Commission and a member of the National Futures Association...." (Dkt. No. 3-23, Suppl. Wilner Decl., Ex. 1 at p.1; id. at p. 2.) But the CFTC and NFA have not approved their ICO. Defendants further falsely assert they are "partnered" with and "audited by" Deloitte Touche Tohmatsu Limited ("Deloitte) but that is also not true. (Dkt. No. 3-3, Barnes Decl. ¶ 7.) In order to create legitimacy and an impression that their investment is safe, Defendants also created a fictitious regulatory agency, the Blockchain Exchange Commission ("BEC"), creating its own fake government seal, logo, and mission statement that are nearly identical to the SEC's seal, logo and mission statement. (Dkt. No. 3-13, Wilner Decl., Exs. 13-19 at p. 149-67.) Moreover, BEC's "office" is the same address as the SEC's headquarters. (Dkt. No. 3-13, Wilner Decl., Ex. 14.)

In response, Ringgold asserts that Blockvest has never sold any tokens to the public and has only investor, Rosegold Investments LLP, ("Rosegold") which is run by him where he has invested more than $175,000 of his own money. (Dkt. No. 24, Ringgold Decl. ¶ 5.) Blockvest utilized BLV tokens during the testing and development phase and a total of 32 partner testers were involved. (Id.)

During this testing, 32 testers put a total of less than $10,000 of Bitcoin and Ethereum onto the Blockvest Exchange where half of it remains today. (Id. ¶ 6.) The other half was used to pay transactional fees to unknown and unrelated third parties. (Id. ¶ 7.) No BLV tokens were ever released from the Blockvest platform to the 32 testing participants. (Id. ¶ 6.) The BLV tokens were only designed for testing the platform and the testers would not and could not keep or remove BLV tokens from the Blockvest Exchange. (Id.) Their plan was to eventually issue a "new utility Token BLVX on the NEM Blockchain for exclusive use on the BlockVest Exchange." (Id.) Ringgold never received any money from the sale of BLV tokens. (Id. ¶ 7.) The deposits are from digital wallet addresses and individuals that are not easily identifiable, but Ringgold believes that only affiliated persons would have deposited Bitcoin or Ethereum on the exchange and received nothing without complaining. (Id.) The Blockvest Exchange platform was never open for business. (Id.)

***3** Ringgold is also a principal in Master Investment Group and a trustee of Rosegold Investment Trust, partners of Rosegold Investment, LLP, a Delaware limited liability partnership formed in April 2017. (Id. ¶ 10.) Rosegold manages Blockvest and finances Blockvest's activities, as Blockvest, itself, has no bank accounts or assets, other than the work-in-progress development of a cryptocurrency exchange of unknown value. (Id.) The Rosegold bank account was opened in September 2017. (Id.)

Ringgold personally invested over $175,000 in Rosegold and Michael Sheppard, Blockvest's CFO invested about $20,000. (Id. ¶ 11.) Other investors in Rosegold are his friends and family and Sheppard's friends and family. (Id.) At times, these investors loaned Ringgold or Sheppard money personally and they in turn, invested the money into Rosegold as their personal investment. (Id.) 17 individuals have loaned or invested money in Rosegold Investments. (Id. ¶ 12; id., Ex. 2.) Most of these individuals confirm they did not buy BLV tokens or rely on any of the representations the SEC has alleged were false.[2] (Id.) Ringgold claims he never received anything of value from the offer or sale of BLV tokens to anyone. (Id. ¶ 13.)

Ringgold recognizes that mistakes were made but no representations or omissions were made in connection with the sale and purchase of securities. (Id. ¶ 14.) They were in the early stages of development as the Chief Compliance Officer had not yet reviewed all the materials. (Id. ¶ 16.) Ringgold states it was his intention to comply with "every possible regulation and regulatory agency." (Id.) Currently, he has ceased all efforts to proceed with the ICO and agrees not to proceed with an ICO until he gives SEC's counsel 30 days' notice. (Id. ¶ 17.) He claims that because all his assets are frozen, he is unable to pay his counsel or third party professionals for defending this litigation and to compensate Mike Sheppard and himself for living expenses and also to support his small children as he is their primary source of funds for living expenses. (Id. ¶¶ 18, 19.) Currently, the only assets Ringgold has is Rosegold's bank account which has less than $40,000. (Id. ¶ 18; see Dkt. No. 21-1, Ringgold First Suppl. Decl., Ex. 1.)

In reply, the SEC argues that Defendants admit to receiving funds from at least 32 investors in exchange for anticipated BLV tokens. While Defendants' accounting claims that less than $10,000 were received for BLV tokens from third parties, the documents shows transactions in excess of $180,000. (Dkt. No. 27-16, Brown Decl., Ex. 15.) The SEC claims that Defendants also admit that Rosegold, which "manages Blockvest and finances Blockvest's activities" had 17 other investors during the pre-ICO solicitations and at least eight investors wrote "coins" or "Blockvest" on the checks. (Dkt. No. 27-21, Brown Decl., Ex. 19.)

Discussion

A. Preliminary Injunction

The legal standard that applies to a motion for a TRO is the same as a motion for a preliminary injunction. See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001). The party moving for an injunction bears the burden to demonstrate the factors justifying relief. Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 441 (1974). Because the SEC is a governmental agency acting as a "statutory guardian charged with safeguarding the public interest in enforcing the securities laws", SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975), courts have adopted a two part factor test requiring the SEC to show "(1) a prima facie case of previous violations of federal securities laws, and (2) a reasonable likelihood that the wrong will be repeated." SEC v. Unique Fin. Concepts, Inc., 196 F.3d 1195, 1199 n. 2 (11th Cir. 1999) (citing Mgmt. Dynamics, Inc., 515 F.2d at 806–07; SEC v. Manor Nursing Ctrs, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972)); see also SEC v. Schooler, 902 F. Supp. 2d 1341, 1345 (S.D. Cal. 2012) (using the two-part standard when determining whether to issue a preliminary injunction requested by the SEC); SEC v. Capital Cove Bancorp LLC, SACV 15-980-JLS(JCx), 2015 WL 9704076, at *5 (C.D. Cal. Sept. 1, 2015) (same).

***4** "The grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged in except in a case clearly warranting it….[O]n application for preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact." Dymo Indus., Inc. v. TapePrinter, Inc., 326 F.2d 141, 143 (9th Cir. 1964) (citation omitted); see also Mayview Corp. v. Rodstein, 480 F.2d 714, 719 (9th Cir. 1973) (reversing grant of preliminary injunction based on existence of disputed factual issues).

B. Prima Facie Case of Past Securities Violations

Plaintiff alleges Defendants violated the registration requirements under Sections 5(a) and 5(c) of the Securities Act of 1933[3] as well as the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rules 10b-5(a), (b) and (c), and Sections 17(a)(1), (2), and (3) of the Securities Act of 1933.[4] (Dkt. No. 1, Compl.) In their opposition, Defendants solely challenge the SEC's claims arguing that the test BLV tokens are not "securities" as defined under the federal securities law. Because they are not securities, Plaintiff's causes of action fail. Defendants do not dispute the other elements for alleged violations of Sections 5 and 17 of the Securities Act and Section 10(b) of the Securities Exchange Act and Rules 10b-5.

1. Whether the BLV Token is a "Security" Subject to Securities Law

***5** Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Securities Exchange Act define "security" as *inter alia*, a "note, stock, treasury stock, bond, [or] investment contract." 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 78c(a)(10). Although the definition of a "security" in the Securities Act of 1933 is slightly different than the Securities Exchange Act of 1934, the two definitions have been held to be "virtually identical." Amfac Mort. Corp. v Arizona Mall of Tempe, Inc., 583 F.2d 426, 431 (9th Cir. 1978) (citing Tcherepnin v. Knight, 389 U.S. 332, 335-336 (1967)); United California Bank v. THC Financial Corp., 557 F.2d 1351, 1356 (9th Cir. 1977) ("The two definitions, however, are considered functional equivalents.").

In its moving papers, the SEC claims that under the three-part test articulated in SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946), the BLV tokens are "securities." Defendants argue that the BLV tokens are not "securities" as defined under Howey.

Congress defined "security" to be "sufficiently broad to encompass virtually any instrument that might be sold as an investment" but did not "intend to provide a broad federal remedy for all fraud." Reves v. Ernst & Young, 494 U.S. 45, 61 (1990) (internal quotations omitted). Courts should look not to the form but to the "economic realities of the transaction." United Hous. Fdn. v. Forman, 421 U.S. 837, 838 (1975).

In Howey, the Court defined whether an investment contract is a security under the Securities Act and held that an investment contract is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946). The Court noted that the Securities Act prohibits not only the sale but also the offer of an unregistered, non-exempt security so the fact that purchasers choose not to accept the full offer is not relevant. Id. at 300-01. Although Howey's holding was limited to "investment contracts," the Supreme Court later found that this three-prong test "embodies the essential attributes that run through all of the Court's decisions defining a security." Forman, 421 U.S. at 852; but see Reves, 494 U.S. at 64 (establishing approach to determine whether a "note" is a "security" and rejecting circuit court's analysis of note under Howey test as the instrument in Howey being an "entirely different variety of instrument").

Howey's three-part test requires "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." SEC v. Rubera, 350 F.3d 1084, 1090 (9th Cir. 2003) (internal quotation marks omitted); SEC v. Shavers, Case No. 13cv416, 2014 WL 12622292, at *6 (E.D. Texas Aug. 26, 2014) (district court found investment in Bitcoin Savings and Trust to be an investment contract under Howey).

In granting Plaintiff's ex parte TRO application, the Court found that the SEC had presented a prima facie showing based on Defendants' marketing and advertising through its websites and media posts of Blockvest and its ICO, that BLV tokens were "securities." (Dkt. No. 5 at 8-9.) Based on Defendants' postings on the internet, the SEC asserted that Blockvest raised more than $2.5 million from investors, there was a "common enterprise" because Blockvest claimed that the funds raised will be pooled and there would be a profit sharing formula. (Id.) Finally, as described on its website and whitepaper, the investors in Blockvest would be passive investors and they would depend entirely on Defendants' efforts. (Id.)

***6** In opposition, Defendants present a different rendering of facts than the SEC. They explain that they did not raise $2.5 million from the public but instead the $2.5 million was supposed to be based on a transaction with David Drake. (Dkt. No. 24, Ringgold Decl. ¶ 15.) However, the transaction eventually collapsed and they admit the social media posts were overly optimistic. (Id.) They assert they have not sold any BLV tokens to the public but instead used the BLV tokens for purposes of testing during the development phase. (Dkt. No. 24, Ringgold Decl. ¶ 5.) During this phase, 32 testers put a total of less than $10,000 of Bitcoin and Ethereum onto the Blockvest Exchange. (Id. ¶ 6.) The BLV tokens were only designed for testing the platform and no tokens were released to the 32 testing participants. (Id.) In the future, they intended to issue a new utility Token BLVX on the NEM Blockchain for exclusive use on the Blockvest Exchange. (Id.) Moreover, Defendants argue there is no common enterprise and the tokens do not represent an interest in or obligation of a corporation or other business. Therefore, Defendants argue the BLV token is not a "security."

In reply, Plaintiff contends that Defendants marketed Blockvest ICO as a securities offering and while they argue BLVs were utility tokens, their intent of the offering was to fund Blockvest's future business. Moreover, Defendants admit that tokens were sold on Blockvest's website for money or ether and whether investors received the tokens is not relevant in determining whether the tokens are securities.

The first "investment of money" prong of Howey "requires that the investor 'commit his assets to the enterprise in such a manner as to subject himself to financial loss.' " SEC v. Rubera, 350 F.3d 1084, 1090 (9th Cir. 2003) (quoting Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976) (per curiam)). In Rubera, the investors "turned over substantial amounts of money…with the hope that [the investment managers' efforts] would yield financial gains." Id. "At the outset, we note that, while the subjective intent of the purchasers may have some bearing on the issue of whether they entered into investment contracts, we must focus our inquiry on what the purchasers were offered or promised." Warfield v. Alaniz, 569 F.3d 1015, 1021 (9th Cir. 2009). The focus on this "investment of money" prong is "what the purchasers were offered or promised." Id. (courts frequently examine promotional material associated with the transaction); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352–53 (1943) ("The test [for determining whether an instrument is a security]…is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect."). As explained in Hocking, before applying the Howey test, "we must determine what exactly [the defendant] offered to [the plaintiff]." Hocking v. Dubois, 885 F.2d 1449, 1457 (9th Cir. 1989) (concerning sale of real estate). The Ninth Circuit in Hocking explained, "[c]haracterization of the inducement cannot be accomplished without a thorough examination of the representations made by the defendants as the basis of the sale. Promotional materials, merchandising approaches, oral assurances and contractual agreements were considered in testing the nature of the product in virtually every relevant investment contract case." Id. (quoting Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1039-40 (10th Cir. 1980)).

The SEC argues that Blockvest's website and whitepaper presented an offer of a unregistered security in violation of Sections 5 of the Securities Act; however, its argument presumes, without evidentiary support, that the 32 test investors reviewed the Blockvest website, the whitepaper and media posts when they clicked the "buy now" button on Blockvest's website.[5]

***7** At his deposition, Ringgold explained that the Blockvest website was available to the public for pre-registration for the upcoming exchange. (Dkt. No. 27-18, Brown Decl., Ex. 17, Ringgold Depo. at 131:6-9.) There were also testers working on the functionality of the exchange. (Id. at 131:10-14.) The "buy now" button on the website did not disclose that it was only for testors and management but once a person moved forward, he or she could not buy any coins because the platform was not "live." (Id. at 131:15-20.) But the "buy now" button was accepting cryptocurrency and 32 "internal" people who were sophisticated investors helped Defendants with managing the different functions needed to test the platform. (Id. at 132:4-14.) Ringgold states he knows the identity of the 32 investors. (Id. at 132:15-20.) He indicated it was clear to the 32 testers that they were testing the platform so Defendants did not obtain any earnings statements from them. (Id. at 132:21-133:4.) Ringgold explains that the 32 investor were vetted and chosen based on Defendants' prior relationship with them. (Id. at 133:11-18; 135:1-23.) During the vetting process, Defendants collected their name, email, address and their level of sophistication. (Id. at 135:1-6.) They held several conferences and a webinar where Ringgold explained his requirements for the group of test investors. (Id. at 136:3-18.) Ringgold also testified that there was also a time when the credit card function with the "buy now" button on the Blockvest website was being tested but after four transactions with people Defendants knew or referred to them by somebody on the team, they shut it down because there were issues with the functionality. (Id. at 136:24-137:10.)

Plaintiff and Defendants provide starkly different facts as to what the 32 test investors relied on, in terms of promotional materials, information, economic inducements or oral representations at the seminars, before they purchased the test BLV tokens. Therefore, because there are disputed issues of fact, the Court cannot make a determination whether the test BLV tokens were "securities" under the first prong of Howey.

As to the second prong of Howey, Plaintiff has not demonstrated that the 32 test investors had an "expectation of profits." While Defendants claim that they had an expectation in Blockvest's future business, no evidence is provided to support the test investors' expectation of profits. "By profits, the Court has meant either capital appreciation resulting from the development of the initial investment…or a participation in earnings resulting from the use of investors' funds." Forman, 421 U.S. at 852.

At this stage, without full discovery and disputed issues of material facts, the Court cannot make a determination whether the BLV token offered to the 32 test investors was a "security." Thus, Plaintiff has not demonstrated that the BLV tokens purchased by the 32 test investors were "securities" as defined under the securities laws.[6]

The SEC also argues that Defendants have identified 17 individuals who invested money in Rosegold. Defendants present the declarations of nine individuals who assert that they did not buy BLV tokens or rely on any representations that the SEC has alleged are false. In reply, Plaintiff notes that eight individuals wrote "Blockvest" or "coins" on their checks and Defendants admitted to providing some of them the Blockvest ICO whitepaper.

Ringgold testified that he raised around $150,000 through friends and family that invested in Rosegold. (Dkt. No. 27-18, Brown Decl., Ex. 17, Ringgold Depo. at 82:11-19.) Ringgold, himself, also invested $200,000 in Rosegold. (Id. at 83:1.) His friends and family, as well as Mike Sheppard's friends and family who invested in Rosegold did not care what they were investing in because they trusted them based on their long-time familial and friend relationship. (Id. at 86:3-6; 87:4-9; 89:1-3.) He admitted he showed the Blockvest whitepaper to his family and close friends to get an honest opinion on the design and content of it but not to solicit an investment. (Id. at 98:24:88:15; 90:5-18.) He testified that none of the close friends and family who he shared the whitepaper with invested because they did not have the means. (Id. at 92:20-93:1.)

***8** Here, there is a disputed issue of fact whether the 17 individuals who invested in Rosegold purchased "securities' as defined under the federal securities law. Merely writing "Blockvest" or "coins" on their checks is not sufficient to demonstrate what promotional materials or economic inducements these purchasers were presented with prior to their investments. See Warfield, 569 F.3d at 1021. Accordingly, Plaintiff has not demonstrated that "securities" were sold to the 17 individuals.

In sum, the Court concludes that Plaintiff has not demonstrated a prima facie showing that there has been a previous violation of the federal securities laws.

C. Reasonable Likelihood that the Wrong will be Repeated

On the second factor for injunctive relief, in determining a reasonable likelihood of future violations, the court must look at the totality of the circumstances concerning Defendants and their violations. See SEC v. Murphy, 626 F.2d 633, 655 (9th Cir. 1980). Past violations "may give rise to an inference that there will be future violations" and courts should factors such as "degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the likelihood, because of defendant's professional occupation, that future violations might occur; and the sincerity of his assurances against future violations." Id.

Here, it is disputed whether there have been past violations of the securities laws as it is disputed whether the "sale" or "offer" of the BLV token was a security. Ringgold acknowledges mistakes were made and states he has ceased all efforts to proceed with the ICO. (Dkt. No. 24, Ringgold Decl. ¶ 17.) He states he always intended to comply with all regulations and will not proceed until his securities compliance counsel is capable of ensuring compliance with every press release and filing and give SEC's counsel at least 30 days' notice. (Id. ¶ 16.) In response, the SEC claims that despite the TRO, Ringgold, on October 11, 2018, continued to make representations that the "exchange...is registered with the SEC and NFA". (Dkt. No. 27-5, Brown Decl., Ex. 4 at p. 38.) He also acknowledged they are not partners with Deloitte but once launched, they falsely assert they will be using "Stratnum Indigo Trace Platform powered by Deloitte." (Id., Ex. 4 at p. 41.[7]) Also, they stated "[w]e cannot make up our registrations and affiliations with SEC NFA or any other regulatory authority as you can see our due diligence efforts to be in compliance with them since launching BlockVest." (Id., Ex. 4 at p. 40.[8]) Ringgold also referenced the token sale as "BlockVest Private Token sale." (Id., Ex. 4 at 34.[9]) These representations by Ringgold are from Telegram Chat dated October 8-11, 2018. (Dkt. No. 27-1, Brown Decl. ¶ 5.) The Court notes Defendants were not served with the Complaint until October 10, 2018 and had not yet retained counsel in this matter. Plaintiff has not presented any misrepresentations by Defendants since they have retained counsel.

While there is evidence that Ringgold made misrepresentations shortly after the complaint was filed and prior to having retained counsel, Ringgold, with counsel, now asserts he will not pursue the ICO and will provide SEC's counsel with 30 days' notice in the event they decide to proceed. By agreeing to stop any pursuit of the ICO, Plaintiff does not oppose the preliminary injunction concerning compliance with federal securities laws. Therefore, Plaintiff has not demonstrated a reasonable likelihood that the wrong will be repeated.

***9** Because Plaintiff has not demonstrated the two factor test to warrant a preliminary injunction, the Court DENIES Plaintiff's motion for preliminary injunction.

D. Evidentiary Objections

Defendants filed evidentiary objections to the entirety of the Wilner Declaration in support of the ex parte temporary restraining order as well as the Grasso and Roche declarations. (Dkt. No. 25.) Plaintiff filed an opposition and its own objections to Defendants' evidence. (Dkt. No. 28.)

"[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981); Disney Enters., Inc. v. VidAngel, Inc., 224 F. Supp. 3d 957, 966 (C.D. Cal. 2016), aff'd, 869 F.3d 848 (9th Cir. 2017) ("[T]he Federal Rules of Evidence do not strictly apply to preliminary injunction proceedings...."); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984); Citizens for Quality Education San Diego v. Barrera, No. 17-cv-1054-BAS-JMA, --F. Supp. 3d--, 2018 WL 4599700, at *3 n.2 (S.D. Cal. Sept. 25, 2018) (summarily overruling evidentiary objections on preliminary injunction application). "The form of the evidence simply impacts the weight the evidence is accorded in assessing the merits of equitable relief." Barrera, 2018 WL 4599700, at 3 n.2.

Accordingly, based on the more lenient standard in considering evidence on a motion for preliminary injunction, the Court overrules both parties' evidentiary objections.

E. Defendants' Ex Parte Motion for an Evidentiary Hearing and Seeking Leave of Court to File Supplemental

Declarations and Plaintiff's Supplemental Declaration of David Brown

On November, 13, 2018, Defendants' filed an ex parte motion for an evidentiary hearing and sought leave to file supplemental declarations. (Dkt. Nos. 30, 31, 32.) On November, 14, 2018, the SEC filed an opposition to both the evidentiary hearing and allowing supplemental declarations past the court's scheduling deadlines. (Dkt. No. 35.) Because the Court DENIES the preliminary injunction based on the evidence presented to the Court under the scheduling order, the Court DENIES Defendants' ex parte motion for an evidentiary hearing and DENIES their request for permission to file supplemental declarations as moot. On November 19, 2018, the SEC filed a supplemental declaration of David Brown without leave of court. (Dkt. No. 39.) On November 20, 2018, Defendants filed an opposition and response to the supplemental declaration. (Dkt. No. 40.) Because the parties did not seek leave of court to file a supplemental declaration and response, the Court strikes these documents from the docket.

Conclusion

Based on the above, the Court DENIES Plaintiff's motion for preliminary injunction. The Court also DENIES Defendants' ex parte motion for evidentiary hearing and leave of court to file supplemental declarations. (Dkt. No. 30.) The Court also STRIKES Plaintiff's Supplemental Declaration of David Brown and Defendants' Opposition and Response. (Dkt. Nos. 39, 40.)

IT IS SO ORDERED.

Dated: November 27, 2018

All Citations

Slip Copy, 2018 WL 6181408

Footnotes

1 The Court also granted Plaintiff's motion to seal all documents "until two business days after the Court issues its ruling on the TRO Application." (Dkt. No. 4.)

2 Of the 17 individuals, nine individuals signed declarations asserting that they did not buy BLV tokens or rely on any representations by Defendants that the SEC asserts were false. (Dkt. No. 24, Ringgold Decl., Ex. 2.) The SEC points out that the remaining eight individuals wrote "Blockvest" and/or "coins" on their checks.

3 Sections 5(a) and 5(c) of the Securities Act prohibit the interstate sale of unregistered securities. 15 U.S.C. §§ 773(a) & (c). "In order to establish a Section 5 violation, [plaintiff] must point to evidence that: (1) no registration statement was in effect as to the securities; (2) [defendant] sold or offered to sell the securities; and (3) the sale or offer was made through interstate commerce." SEC v. Phan, 500 F.3d 895, 908 (9th Cir. 2007) (quoting Berckeley Inv. Group, Ltd. v. Colkitt, 455 F.3d 195, 212 (3d Cir. 2006)).

4 Section 17(a) provides,

It shall be unlawful for any person in the offer or sale of any securities…by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q.

Section 10(b) provides that it is unlawful "[t]o use of or employ, in connection with the purchase or sale of any security… any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). Relatedly, Rule 10b–5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b–5.

5 While the SEC argues that an "offer" is sufficient to demonstrate a violation of Section 5, the Court notes an "offer or sale" is not a factor under Howey; it is a factor to determine violations of the federal securities laws. The Court must first determine whether the offer involved a "security."

6 Plaintiff also asserts that Defendants made the same misrepresentations to a third party, Stoks.Market with whom Blockvest contracted for services and paid the vendor 250,000 BLV tokens with no indication they were "test" tokens." (Dkt. No. 27-22, White Decl.) However, the SEC, at the hearing, conceded that the there was no sale or offer of a security to Stoks.Market but explained it provides first- hand knowledge of Defendants' misrepresentations. However, misrepresentations made to Stoks. Market do not demonstrate that the test BLV tokens were "securities."

7 The SEC incorrectly cites to Exhibit 5 of the Brown Declaration. (Dkt. No. 27 at 5.)

8 The SEC incorrectly cites to page 42 of Exhibit 4. (Dkt. No. 27 at 4.)

9 The SEC incorrectly cites to page 38 of Exhibit 4. (Dkt. No. 27 at 4.)

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