

United States District Court
Middle District of Tennessee
Nashville Division

Federal Trade Commission, *et al.*,

Plaintiffs,

v.

United States Benefits, LLC, *et al.*,

Defendants.

Case No. 3:10-0733

Nixon/Bryant

**Opposition to Kennan Dozier’s Motion to Dismiss
the Amended Complaint’s New Claim Against Her**

I. Summary

Plaintiffs respectfully request that the Court deny Kennan Dozier’s motion to dismiss. Despite Dozier’s contention that Plaintiffs have not asserted facts in support of their claim against her, the Amended Complaint contains multiple, specific factual allegations depicting Defendants’ telemarketing scheme to sell bogus health insurance in violation of the Federal Trade Commission Act (“FTC Act”), Telemarketing Sales Rule (“TSR”), and Tennessee Consumer Protection Act (“TCPA”), and describing Dozier’s specific role in the fraud. The allegations include that Dozier was an owner and officer of U.S. Benefits, contracted with benefits associations on behalf of U.S. Benefits, hired and trained telemarketers, and reaped millions of dollars in payments from benefits associations by defrauding consumers (Doc. No. 83 at ¶¶ 9, 30). Beyond a simple recitation of

legal elements, these allegations provide concrete examples of Dozier's authority to control, participation in, and knowledge of U.S. Benefits' unlawful acts or practices.

Taken together and accepted as true, the allegations in the Amended Complaint provide fair notice to Dozier of Plaintiffs' claim against her and the grounds on which the claim rests. Accordingly, Plaintiffs have shown that they are entitled to relief against Dozier. Moreover, from the allegations, the Court can readily draw a reasonable inference, based on the context of this case, judicial experience, and common sense, that Dozier, like her husband Timothy Thomas, is personally liable for violations of the FTC Act, TSR, and TCPA because she had authority to control, participated in, and had knowledge of U.S. Benefits' unlawful conduct. Thus, Plaintiffs' claim against Dozier is plausible on its face and satisfies the pleading requirements prescribed by *Ashcroft v. Iqbal*. For these reasons, Dozier's motion should fail.

II. Argument

A. Standard

Federal Rule of Civil Procedure 8(a)(2) provides that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Judith Kerns v. Int'l Union, UAW*, 583 F. Supp. 2d 885, 895 (M.D. Tenn. 2008). Although a complaint must contain more than "labels and conclusions, and a formulaic recitation of a cause of action's element," Rule 8 does not require "detailed factual allegations." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 555); *see also In Re Nissan North Am., Inc., Odometer Litig.*, 664 F. Supp. 2d 873, 881 (M.D. Tenn. 2009).

When reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court “must take all factual allegations in the complaint as true,” but need not do so with legal conclusions. *Iqbal*, 129 S. Ct. at 1949-50; *see also Juana Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 901 (M.D. Tenn. 2009) (“[When] there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.”) (citation and internal quotations omitted). The motion should fail if the complaint alleges enough facts to “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 570. The plausibility standard is not a “probability requirement,” and a plaintiff need only plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949 (citation omitted). A court’s plausibility determination is “context-specific” and based on “judicial experience and common sense.” *Id.* at 1950.

In the instant case, Plaintiffs have fulfilled their pleading obligations because (1) the Amended Complaint shows that Plaintiffs are entitled to relief against Dozier, and (2) the claim is plausible on its face.

B. The Amended Complaint Shows that Plaintiffs Are Entitled to Relief Against Dozier.

The Court should deny Dozier’s motion because the Amended Complaint demonstrates that Plaintiffs are entitled to relief against Dozier. Although Dozier purports that Plaintiffs have failed to allege any facts justifying their claim (Doc. No. 89 at 2), the Amended Complaint specifically sets forth multiple, specific factual allegations concerning Defendants’ telemarketing scam and Dozier’s involvement in it. For example, it details how Defendants defrauded

consumers by misrepresenting that they sold health insurance in violation of the FTC Act and TCPA, and placed numerous unlawful phone calls to consumers in contravention of the TSR. (Doc. No. 83 at ¶¶ 11-27). It likewise specifies Dozier's role in the scheme by alleging that she was an owner, managing officer, and registered agent of U.S. Benefits (*id.* at ¶ 9), contracted with benefits associations on behalf of U.S. Benefits to sell memberships (*id.* at ¶ 30), hired and trained telemarketers (*id.*), and received millions of dollars in payments from benefits associations for U.S. Benefits' sale of memberships (*id.*).¹ Based on these allegations, the Amended Complaint asserts that Dozier had authority to control, participated in, and had knowledge of U.S. Benefits' unlawful acts or practices, and thus, is personally liable for violations of the FTC Act, TSR, and TCPA (*id.* at ¶¶ 9, 31). Taken together and accepted as true, the allegations in the Amended Complaint plainly apprise Dozier of Plaintiffs' claim and the grounds on which it rests. Consequently, she is not entitled to dismissal of the claim.

C. Plaintiffs' Claim Against Dozier Is Plausible on Its Face.

The Court should deny the motion because Plaintiffs' claim against Dozier is plausible on its face. To satisfy the plausibility requirement in *Ashcroft v. Iqbal*, Plaintiffs must plead only enough facts to allow the Court to draw a reasonable inference, based on the context of this case, judicial experience, and common sense, that Dozier is personally liable for the misconduct charged in the Amended Complaint. The Court may hold Dozier liable for injunctive relief for U.S. Benefits' unlawful acts or practices if Plaintiffs establish that she had authority to control or participated directly in the acts or practices. *See, e.g., FTC v. Gem Merch. Corp.*, 87 F.3d 466,

¹ Plaintiffs have already filed some evidence in support of the allegations against Dozier in the exhibits in support of their motion for an *ex parte* temporary restraining order (Doc. No. 3) and request for entry of proposed preliminary injunction (Doc. No. 25).

470 (11th Cir. 1996). She may be held liable for monetary relief if Plaintiffs prove that she had some knowledge of U.S. Benefits' unlawful acts or practices, including a reckless indifference to the truth or falsity of the company's representations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth. *See, e.g., FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

Here, the factual allegations against Dozier, taken together and accepted as true, are sufficient to enable the Court to freely draw a reasonable inference that she is personally liable for injunctive and monetary relief for U.S. Benefits' violations of the FTC Act, TSR, and TCPA because she had authority to control, participated in, and had knowledge of the company's unlawful acts or practices.² *See, e.g., FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 387 (D. Md. 2009) (denying motion to dismiss when complaint alleged that defendant was an officer of the corporate defendant, was instrumental in establishing and maintaining relationships with third parties that were important to the defendants' scheme, and received millions of dollars in ill-gotten proceeds). Therefore, Plaintiffs' claim against Dozier is plausible on its face and meets *Iqbal's* pleading standard.

Contrary to Dozier's protests, Plaintiffs' allegations are not akin to the allegations rejected

² In fact, proof of such allegations alone would provide a sufficient legal and factual basis to hold Dozier liable. *See, e.g., FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1996) (upholding individual liability based on defendant's status as president of corporate defendant and authority to sign documents on behalf of the corporation); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1205 (10th Cir. 2005) (upholding liability of individual defendant evidenced by meeting attendance, control over hiring and marketing campaigns, and status as controlling shareholder of a closely held corporation); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 575 (7th Cir. 1989) (upholding personal liability of defendant demonstrated by status as principal shareholder and officer of the corporate defendant, writing telemarketing scripts, and hiring personnel).

in *Iqbal* (Doc. No. 89 at 3). *Iqbal* upheld the dismissal of a complaint that merely alleged that an individual defendant “knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,” was a “principal architect” of the policy, and was “instrumental” to adopting and executing it. 129 S. Ct. at 1951 (internal quotations omitted). By contrast, the Amended Complaint, as described in Section II.B. above, asserts multiple, precise factual allegations against Dozier, which flesh out her authority to control, participation in, and knowledge of the fraud, and exceed the scope of allegations at issue in *Iqbal*. Hence, Dozier’s comparison is unavailing and does not justify dismissal of Plaintiffs’ claim.

III. Conclusion

The motion to dismiss before the Court constitutes a misreading of the Amended Complaint. Counter to Dozier’s arguments, Plaintiffs have asserted ample, specific factual allegations in support of their claim against Dozier. These allegations clearly give Dozier fair notice of the claim and the grounds on which it rests, and therefore, illustrate that Plaintiffs are entitled to relief against her. What is more, because the Court can confidently draw from the allegations a reasonable inference that Dozier is personally liable for violations of the FTC Act, TSR, and TCPA, Plaintiffs claim against Dozier is plausible on its face and satisfies the pleading standard articulated by *Ashcroft v. Iqbal*. For these reasons, the Court should deny Dozier’s motion.

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Dated: December 23, 2010

Respectfully submitted,

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Certificate of Service

I hereby certify that on December 23, 2010, I electronically filed Plaintiffs' Opposition to Kennan Dozier's Motion to Dismiss the Amended Complaint's New Claim Against Her with the Clerk of the Court using CM/ECF. I also certify that the document was served that day, December 23, 2010, on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

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