UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GORSS MOTELS, INC., plaintiff/ counterclaim defendant	:	
v.	:	
ILLEN PRODUCTS LTD., d/b/a/ IMPRINT PLUS, AND CCL INDUSTRIES INC., defendants/ counterclaim plaintiffs,	:	Civil No. 3:18-CV-01052 (AVC)
v.	:	
STEVEN GORSS, counterclaim defendant.	:	

RULING ON THE COUNTERCLAIM PLAINTIFFS' MOTION TO DISMISS

This is an action for damages and other relief in which the counterclaim plaintiffs, Illen Products Ltd., d/b/a Imprint Plus, and CCL Industries Inc. ("Imprint Plus"), alleges that the counterclaim defendants, Gorss Motels' Inc. and Steven Gorss (hereinafter collectively "Gorss"), committed fraudulent misrepresentation, and/or, in the alternative, negligent misrepresentation by "engag[ing] in a multi-year, coordinated effort to solicit and collect faxes for the sole purpose of filing frivolous TCPA[1] claims for profit" by making "both affirmative false representations and fraudulent omissions to

[1] Telephone Consumer Protection Act of 1991 ("TCPA"), as amended by the Junk Fax Prevention Act of 2005, 47 U.S.C. § 227. Under the TCPA it is "unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . . ." 47 U.S.C. § 227(b)(1)(C).

Wyndham and its approved suppliers[,]" including Imprint Plus. The court has jurisdiction pursuant to 28 U.S.C. § 1332[2] and 28 U.S.C. § 1367.[3]

Gorss has filed a motion to dismiss the counterclaim (document no. 40) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Imprint Plus's counterclaim should be dismissed for failure to state a claim upon which relief can be granted.

The issues presented are whether: 1) the counterclaim is premature because the allegations are "thinly veiled" vexatious litigation or abuse of process claims; 2) the allegations in the counterclaim were sufficient to plead fraud under Rule 9(b); and 3) the allegations in the complaint are sufficient to meet the elements of a fraudulent or negligent misrepresentation claim.

For the following reasons, the motion to dismiss Imprint Plus's counterclaim is denied.

---

[2] 28 U.S.C. § 1332 states in relevant part that the "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between (1) citizens of different states. . . ."

[3] 28 U.S.C. § 1367 provides in relevant part: "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . ."

FACTS

An examination of the counterclaim and the accompanying exhibits disclose the following material facts:

In October 1988, Gorss entered into a twenty-year franchise agreement with Super 8 Motels, Inc. to operate a Super 8 Motel in Cromwell Connecticut. The franchise agreement was dated and signed on October 3, 1988, by Steven Gorss, on behalf of Gorss Motels, and signed on October 14, 1988, by a representative of Super 8 Motels, Inc.

As a condition of opening the franchise, Gorss agreed that they would abide by the System Standards, including that they would "abide by the rules of operation, however, denominated, as are from time to time adopted by FRANCHISOR, and to furnish motel accommodations, services and conveniences of the same high quality and distinguishing characteristics as provided at Super 8 Motels in and around the United States. . . ." Gorss further "agree[d] to operate its motel at all times in strict compliance with the System. . . ." Gorss further agreed that the:

> [S]pecifications and quality of items of personal property to be used in the franchised motel are established by FRANCHISOR from time to time to insure operation in accordance with FRANCHISOR'S standards and further, agrees to purchase from FRANCHISOR, or from such other vendor as FRANCHISOR may approve from time to time, or from any other source whose supplies and equipment have been approved in writing by

FRANCHISOR. . . .[4]

In 2006, Super 8 Motels became part of the Wyndham Worldwide family of lodging brands, and it has been a Wyndham motel chain since that time.

On March 11, 2009, Steven Gorss signed an amendment to extend Gorss Motels' franchise term through August 15, 2014, which "supplement[ed]" the 1988 Franchise Agreement and "extended [the term] for an additional five years." The 2009 Amendment stated that "[e]xcept as expressly stated in this Amendment, no further additions, modifications or deletions to the License Agreement or Guarantee Agreement are intended by the parties or made by this Amendment" and that "[t]o the extent of any conflict between the Franchise Agreement and this Amendment, the Amendment shall control."

To help the franchisees comply with their obligations to purchase certain products and services from Wyndham-approved suppliers, Wyndham operates a "Fax Program" through which it sends faxes that advertise the products and services of Wyndham-

[4] The paragraph further lists items which are typically found in motel rooms. The paragraph further indicates that the "FRANCHISEE agrees that FRANCHISOR shall at all times remain in unfettered control of the use of its trade name, trademarks, and other features of FRANCHISOR'S System . . . ." The franchise agreement also requires the franchisor "to furnish specifications for standardized signs, letterheads, registration cards, statements, rate folders, and other similar materials, all to conform with the Trademark Identity Manual or similar rules as are from time to time published." Imprint Plus sells name badges and accessories.

approved suppliers only to franchisees that have provided a fax number for participating in the program.[5]

On January 20, 2010, Gorss submitted a "Site Contact Form" to Wyndham which confirmed Gorss Motels' fax number in four separate places and was signed by Steven Gorss.[6]

Gorss received fax advertisements from Wyndham about the products and services of Wyndham-approved suppliers. Gorss did not call the toll-free number or e-mail address on the faxes to stop receiving future faxes. Gorss "never contacted Wyndham to tell [it] that they no longer wanted to receive faxes from Wyndham about Wyndham-approved suppliers."

On October 13, 2010, Gorss began consulting with their attorneys about the possibility of generating litigation based on the faxes Gorss Motels received from Wyndham-approved suppliers.

A November 29, 2010 Worldwide Sourcing Agreement between Wyndham and Imprint Plus indicates that a "[v]endor may rely upon any action taken, consent given or demand made by WSSI as binding upon and enforceable against each Affiliate and Participant without further action of the parties."

[5] Imprint Plus alleges that Gorss knew about and wanted to be part of the Fax Program.

[6] Imprint Plus alleges that the purpose of submitting the site contact form is to comply with Gorss Motels' branding obligations to Wyndham under the 1988 franchise agreement, as extended by the 2009 amendment. The form indicates that it should be returned by mail to Wyndham Hotel Group to the attention of Brand Services, Systems & Applications, or by e-mail or fax. The defendants allege that Gorss submitted the form by fax.

In January 2011, Steven Gorss "began a regular practice of collecting faxes that Gorss Motels received and then periodically sending a bundle of faxes by Federal Express to his attorneys. . . ."

In April 2012, Wyndham Hotel Group hosted a global conference, at which Wyndham-approved suppliers set up booths and promotional displays for their products and services. Gorss registered for the conference and provided Gorss Motels' fax number. Gorss "continued to collect faxes from Wyndham in connection with the fax program and periodically sent bundles of faxes to his attorneys. . . ."[7]

On July 22, 2014, Steven Gorss applied to Wyndham Hotel Group to continue operating Gorss Motels' Super 8 as a Wyndham-based franchise. Also on July 22, 2014, Steven Gorss signed a receipt dated April 1, 2014, acknowledging that he received a copy of the disclosure documents which included a Super 8 Worldwide, Inc. franchise agreement ("Super 8 Franchise Agreement"). The Super 8 Franchise Agreement indicates that the franchisee "will purchase or obtain certain items [Wyndham] designate[s] as proprietary or that bear or depict the Marks, such as signage, only from suppliers we approve." The Super 8

[7] Imprint Plus provided 5 examples of fax advertisements, which were sent to Gorss as part of the Fax Program between March 2013 and June 3, 2014, that advertised the products of other Wyndham-approved suppliers. Gorss did not follow the opt-out instructions on the faxes to stop further faxes and instead sent the faxes to their attorneys, which resulted in Gorss's filing of putative class actions against the other Wyndham-approved suppliers.

Franchise Agreement further indicates that Wyndham "may offer optional assistance to you with purchasing items used at or in the Facility" and further provides that "affiliates may offer this service on [Wyndham's] behalf."

On August 26, 2014, Steven Gorss signed the Super 8 Worldwide, Inc. Property Improvement Plan ("PIP") on behalf of Gorss Motels.[8] By signing the PIP, Gorss "acknowledge[d] and agree[d] that select pieces of the PIP may be provided to our approved vendors for the purpose of their offering you products and services that are required to complete this PIP. Only information necessary for the vendor to offer their products and services will be provided, including contact information. . . ."[9]

On September 10, 2014, Gorrs executed a twenty-year franchise agreement with Super 8 Worldwide, Inc.[10] The 2014 franchise agreement incorporated the PIP as an addendum. Gorss's contact information including address, fax number, and

[8] The PIP indicates that it is void 180 days after the inspection date unless the franchise or license agreement becomes effective.

[9] As noted on the signature page, the PIP "identifies specific items inspected at the Facility and were not in compliance with brand standards and need to be corrected. It is the responsibility of the Owner/Franchisee to review the Brand Standards Manual for a complete description of all standards . . . ."

[10] Imprint Plus alleges that the 2014 franchise agreement signed by Gorss was identical to the franchise agreement attached to the July 22, 2014 disclosure. Imprint alleges that Gorss had "had nearly two months to review the franchise agreement before executing it." In executing the 2014 franchise agreement, Gorss also agreed that "[a]ny judicial proceeding directly or indirectly arising from this agreement shall be considered unique as to its facts and may not be brought as a class action."

e-mail address are listed in the 2014 franchise agreement related to legal notices.

Gorss continued to receive fax advertisements from Wyndham about the products and services of Wyndham-approved suppliers.[11] However, Gorss "did not use the Wyndham email address or toll-free number to opt-out of future faxes, nor did Gorss Motels or [Steven] Gorss contact Wyndham through any other means to tell Wyndham that they no longer wished to receive fax advertising offers regarding Wyndham-approved suppliers" through Wyndham's Fax Program. Instead, "Gorrs continued to collect faxes from Wyndham in connection with the Fax Program and periodically sent bundles of faxes to his attorneys by Federal Express at his attorneys' expense."

On November 24, 2015, Steven Gorss signed and submitted a "Contact Form" which included Gorss Motels' fax number in two separate locations.[12]

On May 16, 2016, Gorss received a fax from Wyndham and Imprint Plus, advertising Imprints Plus's products.

---

[11] Imprint Plus provided 2 more examples of fax advertisements, which were sent to Gorss as part of the Fax Program on January 12, 2015 and August 13, 2015, that advertised the products of other Wyndham-approved suppliers. Gorss did not follow the opt-out instructions on the faxes to stop further faxes and instead sent the faxes to their attorneys, which resulted in Gorss's filing of putative class actions against two other Wyndham-approved suppliers.

[12] Imprint Plus alleges, that Gorss submitted the 2015 Contact Form to Wyndham by facsimile transmission for the purpose of complying with Gorss Motels' branding obligations to Wyndham set forth in the 2014 franchise agreement.

Imprint Plus alleges that Gorss knew about and wished to be part of Wyndham's Fax Program for the purpose of complying with Gorss Motels' branding obligation to Wyndham. Imprint Plus further alleges that "[e]ach time [Steven] Gorss provided Gorss Motels' fax number to Wyndham, he did so knowing that Gorss Motels would receive fax advertising offers from Wyndham and/or Wyndham-approved suppliers about the products and services. . . ." Imprint Plus alleges that "[a]t no time did Gorss Motels or [Steven] Gorss contact Wyndham to tell Wyndham that they no longer wished to receive faxes from Wyndham or Wyndham-approved suppliers. . . ." Instead, Gorss repeatedly ignored opt-out language and instead collected, bundled, and sent more than 2,000 pages of faxes to their attorneys.

STANDARD

Under Fed. R. Civ. P. 12(b)(6), a court must grant a motion to dismiss if a plaintiff fails to establish a claim upon which relief may be granted. Such a motion "assess[es] the legal feasibility of the complaint, [but it does] not . . . assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When ruling on a 12(b)(6) motion, the court must "accept the facts alleged in the complaint as true, and draw all reasonable

inferences in favor of the plaintiff." Broder v. Cablevision Sys. Corp., 418 F.3d 187, 196 (2d Cir. 2005).

"To survive a motion to dismiss, 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 Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678; see also Twombly, 550 U.S. at 555 (stating that a complaint must provide more than "a formulaic recitation of the elements of a cause of action"). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.

The court may consider only those "facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

I. Premature Vexatious Litigation or Abuse of Process Claims

Gorss argues that Imprint Plus's counterclaim is "at its essence, a claim of vexatious litigation or abuse of process." Specifically, Gorss argues that neither claim may be brought as

a counterclaim "in the same action in which the alleged retaliation occurred." Gorss states that the court should not allow a premature claim for vexatious litigation or abuse of process to masquerade as a counterclaim of fraud and/or negligent misrepresentation.

Imprint Plus responds that it is not "currently asserting a claim for vexatious litigation or abuse of process" and it pled sufficient facts to support the elements of its fraudulent and negligent misrepresentation claims.

Gorss replies that Imprint Plus failed to respond to their argument that the counterclaims are claims for vexatious litigation and abuse of process and have "thus conceded the point."

Imprint Plus argues in its sur-reply that it has conceded to nothing, as it is not asserting claims for vexatious litigation or abuse of process at this time. Specifically, it argues that it has asserted facts supporting its claims for fraudulent and/or negligent misrepresentation and addressed Gorss's Rule 9(b) argument.

Gorss argues in their rejoinder that Imprint Plus's "apparent position, that simply contradicting [its] vexatious litigation and abuse of process arguments, is somehow a 'response' is simply wrong and again underscores [its]

misunderstanding of the erroneous basis upon which [its] fraud and negligent misrepresentation counterclaims mistakenly rest."

The court underscores the fact that it is deciding a motion to dismiss Imprint Plus's claims for fraudulent and/or negligent misrepresentation. "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009). "[T]he pleading standard Rule 8 announces does not require detailed factual allegations. . . ." Id. at 678. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. This is "in order 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, 545 (2007) (citation omitted).

Gorss attempts to recharacterize Imprint Plus's counterclaims by citing cases that discuss when vexatious litigation and abuse of process claims can be raised and the elements of those claims. However, Gorss provided no case law which supports the prospect that this court can or should

convert Imprint Plus's fraudulent and negligent misrepresentation claims into claims for vexatious litigation or abuse of process and then, dismiss them as premature. While Gorss attempts to undermine the validity of Imprint Plus's counterclaims, by recharacterizing the claims and then arguing the merits of those claims, "[t]he function of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. . . ." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." Lorenzi v. Connecticut Judicial Branch, 620 F. Supp. 2d 348, 352 (D. Conn. June 4, 2009) (citations omitted).

Therefore, if Imprint Plus's counterclaims for fraudulent and negligent misrepresentation are properly pled under Fed. R. Civ. P. 8 and satisfy Fed. R. Civ. P. 12(b)(6), the claims will survive a motion to dismiss. The motion to dismiss, with respect to dismissing these claims as premature vexatious litigation or abuse of process claims, is denied.

II. Sufficiency of Claims

(a) Rule 9(b)

Gorss first argues that Rule 9(b)'s heightened pleading standard requires allegations of facts that give rise to a strong inference of fraudulent intent in claims of fraudulent and/or negligent misrepresentation.[13] Specifically, Gorss argues that a "strong inference" of fraud may be established by (a) alleging facts to show motive and opportunity to commit fraud, or (b) alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. Gorss states that conclusory allegations such as "knew or should have known" or "intentionally concealed" do not satisfy the requirements of Rule 9(b).

Imprint Plus responds that malice, intent, knowledge, and other conditions of a person's mind may be alleged generally under Rule 9(b). Specifically, Imprint Plus responds that "allegations that [Gorss] 'knew or should have known' do satisfy

[13] Gorss cites to several district court cases in this circuit to argue that Rule 9(b) has been consistently applied to claims for negligent misrepresentation, as well as fraud. However, in Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 188 (2d Cir. 2004), the second circuit noted that "[r]ule 9(b) may or may not apply to a state law claim for negligent misrepresentation. District court decisions in this Circuit have held that the Rule is applicable to such claims . . . but this Court has not adopted that view[,]" instead concluding that the "claim fail[ed] under the liberal pleading standards of Rule 8 and, *a fortiori*, the strictures of Rule 9(b)." This court is not bound by those district court cases. In addition, the cases cited by Gorss were specific to the facts pled and the allegations made in those cases and do not stand for the general proposition that, in all cases, Rule 9(b) is applicable to claims for negligent misrepresentation.

the Rule 9(b) pleading requirement for the knowledge element of fraudulent misrepresentation" because it also pled extensive facts to establish each element of its claims. Imprint Plus states that it also expressly pled that Gorss "knew the representations were untrue because they intended to collect the faxes for the sole purpose of manufacturing TCPA litigation."

Gorss replies that, in a case for common-law fraud under Connecticut law, Imprint Plus's allegations that Gorss "knew or should have known is insufficient" to satisfy Rule 9(b) and allegations that Gorss "knew a representation was false" are wholly conclusory."[14]

Imprint Plus argues in its sur-reply that it pled each element of negligent misrepresentation with sufficient particularity to satisfy even the Rule 9(b) standard based on the factual allegation that Gorss continued to represent that they wanted to receive faxes pursuant to Wyndham's fax program.

[14] Gorss cites to Shields v. Citytrust Bancorp., Inc., 25 F.3d 1124, 1129 (2d Cir. 1998)(recognizing that in a security fraud case, "knew or should have known" is not enough to satisfy Rule 9(b) "where there are no particularized facts to support the inference that the defendants acted recklessly or with fraudulent intent"); Nazmi v. Patrons Mut. Ins. Co., 280 Conn. 619, 628 (Conn. 2006) (holding that a statement by plaintiff that the defendant "knew, or should have known" was not enough to prove the first two elements of a fraud action without a alleging that the document contained a statement of fact that the defendant knew to be untrue); and Sturm v. Harb Dev., LLC, 298 Conn. 124, 142 (Conn. 2010) (holding that the plaintiff failed to allege that the defendant knew that his representations were untrue when he made them because the plaintiff failed to allege that the defendant made statements that were knowingly untrue). In this case, the court concludes that Imprint Plus provided particularized facts to support the inferences presented.

Rule 9(b) of the Federal Rules of Civil Procedure indicates that "[i]n alleging fraud or mistake, a party must state with particularity the *circumstances* constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b) (emphasis added). A plain reading indicates that "[r]ule 9(b) requires only the *circumstances* of fraud to be stated with particularity; knowledge itself can be alleged generally." In re DDAVP Direct Purchaser Antitrust Litigation, 585 F.3d 677, 695 (2d Cir. 2009). "Although Rule 9(b) permits knowledge to be averred generally, plaintiffs must still plead the events which they claim give rise to an inference of knowledge." Id. (citing Devaney v. Chester, 813 F.2d 566, 568 (2d Cir. 1987)).

While Gorss cites to security fraud cases[15] to argue that fraud claims need to be pled with facts that give rise to a "strong inference of fraudulent intent," this approach for pleading was codified in securities fraud actions when Congress enacted the Private Securities Litigation Reform Act. See 5A Fed. Prac. & Proc. Civ. § 1301 (4th ed.); ESG Capital Partners, LP v. Stratos, 828 F.3d 1023, 1032 (9th Cir. 2016) (noting that

[15] Gorss cited to security fraud cases such as Acito v. IMCERA Group, Inc., 47 F.3d 47 (2d Cir. 1995) and Shields v. Citytrust Bancorp., 25 F.3d 1124 (2d Cir. 1998). Gorss also cited to one second circuit case involving fraud on the court, which applied the heightened standard articulated in Shields v. Citytrust Bancorp., 25 F.3d 1124 (2d Cir. 1998). See Space Hunters, Inc. v. U.S., 500 F. App'x 76, 79 (2d Cir. 2012). Gorss argues that the same standard applies to common law fraudulent and negligent misrepresentation claims.

"the federal standard is thus higher than the Rule 9(b) standard for common law fraud allegations, which requires that a plaintiff plead with particularity only the circumstances constituting fraud, while other circumstances, such as intent, may be stated generally").

However, the court need not determine whether Imprint Plus can plead intent generally or with the higher standard applicable to security fraud cases. Assuming *arguendo* that Imprint Plus must establish a "strong inference" of fraud, the court concludes that Imprint Plus's allegations are supported by sufficient facts. The complaint sufficiently alleges motive and opportunity to commit fraud and facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness, thereby meeting the "strong inference of fraudulent intent" standard as discussed *supra*.

(b) Fraudulent Misrepresentation

Gorss argues that Imprint Plus's allegations that Gorss "knew or should have known" is insufficient to satisfy Rule 9(b) and the elements of fraud under Connecticut law.[16] Specifically,

[16] Gorss argues that the documents provided by Imprint Plus, which are "expressly incorporated into the counterclaim[,]" do not support Imprint Plus's allegations. Specifically, Gorss argues that none of the documents provided by Imprint Plus "says [any]thing about [Imprint Plus] or Wyndham being permitted to send fax advertisements. . . nor does it include consent to receive offers about products and services available through Wyndham-approved suppliers. . . ." Gorss appears to argue that "there can be no 'strong inference' of fraudulent intent" without direct evidence that Gorss agreed to participate in the Fax Program and that Gorss provided the fax number for that specific purpose. However, assuming *arguendo* that Imprint

Gorss argues that there was no false statement of material fact and thus no showing of reasonable reliance because Imprint Plus does not allege that it has ever communicated with Gorss, that it was aware that Gorss provided their fax number to a Wyndham entity, or that Gorss did not "opt out" of fax advertisements. Gorss also makes numerous arguments that attempt to incorporate their claim under the TCPA into this motion to dismiss by arguing that Imprint Plus failed to show elements of a fraudulent misrepresentation claim due to its failure to meet provisions of the TCPA.[17]

Imprint Plus responds that it has pled extensive facts to establish each element of a fraudulent misrepresentation claim against Gorss.[18] Imprint also responds that Wyndham and Imprint

---

Plus must establish the higher standard, or "strong inference of fraudulent intent" applicable to security fraud cases, Imprint Plus would need to allege facts to show motive and opportunity to commit fraud, or facts that constitute strong ***circumstantial*** evidence of conscious misbehavior or recklessness. See Acito v. IMCERA Group, Inc., 47 F.3d 47 (2d Cir. 1995); Shields v. Citytrust Bancorp., 25 F.3d 1124 (2d Cir. 1998); Novak v. Kasaks, 216 F.3d 300, 307 (2d Cir. 2000). The court concludes that Imprint Plus has met the heightened standard.

[17] For example, Gorss argues that Imprint Plus failed to show that there was consent or ***prior express permission***. As defined in the TCPA, "[t]he term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person ***without that person's prior express invitation or permission, in writing or otherwise.***" 47 U.S.C. § 227(a)(5) (emphasis added).

[18] Specifically, Imprint Plus responds that it pled facts to show that: (1) Gorss made false material representations to Wyndham and Wyndham-approved suppliers that they wanted to receive fax advertising offers from approved suppliers, including Imprint Plus, to comply with Gorss Motels' branding obligations to Wyndham under the franchise agreement; (2) Gorss wanted to receive fax advertisements to comply with the system standards and "concealed the fact that they intended to collect the faxes [from Wyndham-approved

Plus reasonably relied on the fact that Gorss provided their fax number for such purposes, failed to opt-out of the faxes, and never contacted Wyndham or Imprint Plus to indicate that they no longer wished to receive faxes. Imprint Plus states that, while Gorss "attempts to require it to allege elements of a TCPA claim-or lack thereof-in order to state a claim for fraudulent or negligent misrepresentation," this is inappropriate because its counterclaims "do not hinge on that result," since neither consent nor express permission are elements in either counterclaim.

"The essential elements of a cause of action [for] [fraudulent misrepresentation] are: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon the false representation to his injury." Phillips v. Phillips, 101 Conn.App. 65, 71 (2007) (citing Cadle Co. v. Ginsberg, 70 Conn.App. 748, 769, cert. denied, 262 Conn. 905, (2002) (internal quotation marks deleted)).

---

suppliers] for the sole purpose of manufacturing TCPA litigation" by continually providing their fax number without informing Wyndham that they did not want to receive faxes pursuant to the fax program; (3) Gorss made the false material representation to induce Wyndham and the approved suppliers to send fax advertisements about its products and services under the fax program; and (4) Wyndham and Imprint Plus actually and reasonably relied on the fact that Gorss was aware of the Wyndham-approved supplier program since 1988 when they signed the franchise agreement and then Steven Gorss reaffirmed his knowledge by signing the 2009 amendment and the 2014 franchise agreement.

While Gorss argues that Imprint Plus's allegations that they "knew or should have known" is insufficient to show a strong inference of fraudulent intent, Imprint Plus did not solely rely on these allegations. Imprint Plus supported its allegations with facts regarding the circumstances constituting fraud.

Imprint Plus attached copies of franchise agreements signed by Steven Gorss, on behalf of Gorss Motels, and a representative from Wyndham to the complaint.[19] By signing the franchise agreements, Gorss agreed to abide by Wyndham's brand obligations by purchasing items approved by the Franchisor or from Wyndham-approved vendors, including Imprint Plus. Imprint Plus further alleges that Wyndham had a fax program where it sent faxes that advertised the products and services of Wyndham-approved suppliers to franchisees that provided fax numbers, to help the franchisees comply with their brand obligations. Gorss provided their fax number to Wyndham on at least five different occasions and Gorss received fax advertisements from Wyndham about the products of Wyndham-approved providers.

Imprint Plus alleges that Gorss did not follow the opt out instructions on the faxes to stop receiving future faxes and

[19] "Although a court considering a motion to dismiss for failure to state a claim is limited to the facts stated in the complaint, the complaint includes any written instrument attached to it as an exhibit and any statements or documents incorporated into it by reference." Paulemon v. Tobin, 30 F.3d 307, 308-9 (2d Cir. 1994) (citing Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

never contacted Wyndham to inform them that it did not want to receive faxes through its fax program, from Imprint Plus or other Wyndham-approved suppliers. Instead, beginning in 2010, Gorss consulted with their attorneys and began to regularly collect faxes from Wyndham-approved suppliers and send bundles of faxes to their attorneys "for the sole purpose of manufacturing TCPA claims." Indeed, Gorss did file TCPA claims against Imprint Plus and other Wyndham-approved suppliers.

Based on these facts, Imprint Plus alleges each time Gorss agreed to abide by the branding obligations, provided their fax number, failed to follow the opt-out instructions on the fax advertisement, and failed to contact Wyndham, Gorss made a false material representation that they welcomed receipt of the fax advertisements. Imprint Plus alleges that they did rely on Gorss Motels' false representations, thereby causing the May 16, 2016 fax to be sent, resulting in damages and diminished goodwill between Imprint Plus and Wyndham.

While Gorss makes numerous arguments[20] that attempt to incorporate the elements of a TCPA claim into this motion to

[20] Specifically, Gorss argues that: 1) there is no false statement of material fact because the provision of a fax number was not enough to show consent to receive faxes or ***prior express permission***; 2) the defendants are taking their affirmative defense of ***prior express permission***, on which they bear the burden of proof, and impermissibly converting it into a counterclaim for fraud/negligent misrepresentation; 3) the permission provided to Wyndham cannot be derivatively relied upon by the defendants under 47 C.F.R. 641200(f)(10); and 4) there is no duty to "opt out" of the faxes or duty to call the sender of fax advertisements and ask them to stop before filing suit under the TCPA.

dismiss, as noted by Imprint Plus, its counterclaims for fraudulent and/or negligent misrepresentation do not hinge on the results of Gorss's TCPA cause of action.[21] The term "unsolicited advertisement" in the TCPA, is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person ***without that person's prior express invitation or permission, in writing or otherwise.***" 47 U.S.C. § 227(a)(5) (emphasis added). However, Imprint Plus does not have to show consent or prior express permission, as defined in the TCPA, because neither consent nor express permission are elements in either counterclaim. Further, the burden of proof in a TCPA claim is irrelevant in a claim for fraudulent or negligent misrepresentation under common law. Also, whether there is a duty to "opt out" of the faxes before filing suit under the TCPA is unrelated to Imprint Plus's counterclaims. The court concludes that Imprint Plus alleged sufficient facts to support its allegation that Gorss's failure to either follow the opt-out instructions on the fax advertisements or call Wyndham to notify them that they no longer wanted to participate in the Fax Program was done to induce Wyndham and its approved suppliers to

---

[21] Imprint Plus reiterates that the fact that it separately moved for judgment on the pleadings in Gorss's TCPA claim "has no bearing on whether [it] has stated a claim for fraudulent and/or negligent misrepresentation. The court agrees.

continue to send fax advertisements related to Gorss's branding obligations.

Finally, Gorss argues that because no statement of any kind was made to Imprint Plus directly, Imprint Plus is precluded from showing reasonable reliance because Imprint Plus is "essentially alleging claims on behalf of a Wyndham entity, but [it] lack[s] standing to assert such a claim on behalf of Wyndham." In so far as Gorss is arguing that neither an established business relationship ("EBR") nor prior express permission can be transferred under the FCC regulations, the court concludes that these terms under the FCC regulations are not relevant to these counterclaims. The court concludes that the Imprint Plus provided sufficient facts to support its allegation that it "did so act upon the false representation to its injury."[22]

Accepting the facts alleged in the counterclaim as true, as the court must at this early stage of the pleadings, and drawing all reasonable inferences in favor of Imprint Plus, the court concludes that Imprint Plus has stated a claim for relief that is plausible on its face because the court can reasonably infer that Gorss is liable for the misconduct alleged. See Ashcroft

[22] Imprint Plus provided sufficient facts to support their allegation that they relied on their World-Wide Sourcing Agreement with Wyndham and Gorss' representation that they agreed to participate in the Fax Program.

v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

Therefore, based on the foregoing, Gorss's motion to dismiss the defendants' fraudulent misrepresentation counterclaim is denied.

(c) Negligent Misrepresentation

Gorss argues that Imprint Plus failed to meet the elements of a negligent misrepresentation claim. Specifically, Gorss argues that Imprint Plus failed to plead sufficient facts to support their allegations that Gorss "knew or should have known" that their representation was false and to establish reasonable reliance on the misrepresentation.[23]

Imprint Plus responds that they pled sufficient facts to establish the elements of a negligent misrepresentation claim. Specifically, Imprint Plus responds that it pled each element of negligent misrepresentation with sufficient particularity to satisfy even the Rule 9(b) standard.

The Connecticut supreme court "has long recognized liability for negligent misrepresentation. . . . [E]ven an innocent misrepresentation of fact may be actionable if the declarant has the means of knowing, ought to know, or has the duty of knowing the truth. . . . Traditionally, an action for

[23] Gorss further argues that Rule 9(b) has been consistently applied to claims for negligent misrepresentation, as well as fraud and Imprint Plus failed to meet that standard. The court previously addressed this argument.

negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result. . . .” Coppola Const. Co., Inc v. Hoffman Enterprises Ltd. Partnership, 309 Conn. 342, 486-7 (2013) (citations omitted, internal quotation marks omitted).

Based on the factual allegations discussed in the previous section, the court concludes that Imprint Plus provided sufficient facts to support its allegations that each time Gorss agreed to abide by the branding obligations, provided their fax number, failed to follow the opt-out instructions on the fax advertisement, and failed to contact Wyndham, Gorss made a false material representation that they welcomed receipt of the fax advertisements. Imprint Plus alleges that they did rely on Gorss Motels’ false representations which caused the May 16, 2016 fax to be sent to Gorss and resulted in damages and diminished goodwill between Imprint Plus and Wyndham.

Accepting the facts alleged in the counterclaim as true and drawing all reasonable inferences in favor of Imprint Plus, the court concludes that Imprint Plus also stated a claim for relief that is plausible on its face because the court can reasonably

infer that Gorss is liable for the misconduct alleged.[24] Therefore, Gorss's motion to dismiss the defendants' negligent misrepresentation claim is denied.

CONCLUSION

For the foregoing reasons, Gorss's motion to dismiss (document no. 40) is DENIED. It is so ordered this 17th day of September 2019, at Hartford, Connecticut.

/s/
Alfred V. Covello
United States District Judge

[24] Gorss argues that Imprint Plus incorporated its allegations of intent from the fraudulent misrepresentation claim into the negligent misrepresentation claim. However, Imprint Plus also alleged that the material representations were "made at least negligently or recklessly." The court notes that Rule 8(d)(2) and (3) allow for alternative and inconsistent claims, respectively.