

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION**

NATHAN CHENNETTE, et. al.,

Plaintiffs,

vs.

PORCH.COM, INC, et. al.,

Defendants.

Case No.: 1:20-cv-00201-SRB

ORDER

Before this Court is Defendants' Motion to Dismiss (Doc. #18). For the reasons discussed below, Defendants' Motion to Dismiss is granted.

I. BACKGROUND

Plaintiffs bring this suit pursuant to the Telephone Consumer Protection Act ("TCPA"). Defendants argue for several reasons this case must be dismissed, including that Plaintiffs are not consumers, but businesses. According to Defendants, the fact that Plaintiffs are businesses takes them outside of the zone of interests protected by the TCPA, and therefore lack standing. Plaintiffs allege that Defendant GoSmith sent 7,527 text messages to Plaintiffs using an Automatic Telephone Dialing System. Doc. #2, ¶ 10. Plaintiffs also allege "these are residential phone numbers which Plaintiffs use in their home-based-businesses." Doc. #2, ¶ 11. "The business model of GoSmith and Porch.com is to sell leads to home improvement contractors." Doc. #2, ¶ 13. Plaintiffs allege they are contractors who were being sold leads for potential business. Doc. #2, ¶ 33-35.

II. LEGAL STANDARD

Defendants move for dismissal on numerous grounds, but this Court must first address standing issues.¹ “Subject matter jurisdiction is a ‘threshold matter’ which a court must determine before proceeding to the merits.” *Am. Indep. Mines and Minerals Co. v. U.S. Dept. of Agric.*, 733 F. Supp. 2d 1241, 1249-50 (D. Idaho 2010)(quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). “There are three types of standing: statutory, constitutional, and prudential. Statutory standing is simply statutory interpretation: the question it asks is whether Congress has accorded *this* injured plaintiff the right to sue the defendant to redress his injury. Constitutional and prudential standing are about, respectively, the constitutional power of a federal court to resolve a dispute and the wisdom of so doing.” *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp.3d 782, 796 (W.D.Pa. 2016) (internal citations and quotations omitted).

While Defendants argue Plaintiffs lack prudential standing, the Supreme Court notes that “prudential standing is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons has a right to sue under this substantive statute.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (internal citations and quotations omitted). “In other words, we ask whether [plaintiff] has a cause of action under the statute.” *Id.* at 128. The Supreme Court notes that “a statutory cause of action extends only to plaintiffs whose interests fall with the zone of interests protected by the law invoked.” *Id.* at 129 (internal citations and quotations omitted). “The

¹ This Court has relied upon the decision by U.S. District Judge Beth Labson Freeman’s decision in *Cain, et al. v. Porch.com, Inc.*, et al., 20-cv-00697, Doc. #34 (N.D.Cal. 2020). Judge Freeman correctly found that each Plaintiff failed to meet their burden of pleading Article III standing by alleging facts showing an injury in fact and allowed Plaintiffs leave to amend. This Court assumes for purposes of this motion that Plaintiff can plead Article III standing and skips to the second prong of standing based upon the zone of interests analysis.

purpose of the zone of interests test is ‘to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.’” *Am. Indep. Mines*, 733 F. Supp. 2d at 1250 (quoting *Clarke v. Secs. Indus. Ass’n*, 479 U.S. 388, 397 n. 12, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)).

III. DISCUSSION

In this case, Plaintiffs are contractors who have sued for a violation of the TCPA.

The TCPA establishes the substantive right to be free from certain types of phone calls and texts absent consumer consent. Congress identified unsolicited contact as a concrete harm, and gave *consumers* a means to redress this harm. . . . Congress aimed to curb telemarketing calls to which *consumers* did not consent by prohibiting such conduct and creating a statutory scheme giving damages if that prohibition was violated. . . . Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients.

Van Patten v. Vertical Fitness Group, LLC, 847 F.3d 1037, 1043 (9th Cir. 2017) (emphasis added). “The TCPA was enacted to ‘protect the privacy interests of *residential* telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers.’” *Satterfield v. Simon & Schuster, Inc.* 569 F.3d 946, 954 (9th Cir. 2009) (quoting S.Rep. No. 102–178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968)(emphasis added).

“It is unfathomable that Congress considered a consumer who files TCPA actions as a business when it enacted the TCPA” *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 805 (W.D.Pa. 2016). Plaintiffs argue that the TCPA “cover residential home based-businesses subscribers,” citing to the Federal Communications Commission’s (“FCC”) Second Order on Reconsideration. Plaintiffs’ Memo. In Opp. To Mot. To Dismiss, page 6 (Doc. #20-1) (citing 20 FCC Rcd. 3788, ¶ 14). A careful reading of paragraph 14 results in the opposite conclusion.

In addition, we disagree with the DMA that the rules should be revised to expressly exempt calls to business numbers. The *2003 TCPA Order* provided that the national do-not-call registry applies to calls to “residential subscribers” and does not preclude calls to businesses. To the extent that some business numbers have been inadvertently registered on the national registry, calls made to such numbers will not be considered violations of our rules. We also decline to exempt from the do-not-call rules those calls made to “home-based businesses”; rather, we will review such calls as they are brought to our attention to determine whether or not the call was made to a residential subscriber.

Id.

This Court views the FCC’s intent is for the TCPA to apply to consumers, not business numbers like cell phones used by contractors. Since Plaintiffs allege they are contractors operating as a business, they are not covered under the TCPA. As such, this Court determines that the Plaintiffs do not fall within the zone of interests of this statute and lack standing to sue.

IV. CONCLUSION

Accordingly, the Defendants’ Motion to Dismiss (Doc. #18) is granted and the case is dismissed with prejudice.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: September 2, 2020