



Dated: August 31, 2021
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
James Banks and
Elaine Howell-Banks
Debtors

Case No. 19-27543
Chapter 13

James Banks and
Elaine Howell-Banks for the
Bankruptcy Estate,
Plaintiffs,
v.

Adv. Proc. No. 20-00058

Freedom Debt Relief, LLC,
National Litigation Law Group, LLP, and
National Litigation Law Group, PLLC,
Defendants.

**MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' TENNESSEE CONSUMER PROTECTION ACT CLAIM**

Before the Court is the Motion of National Litigation Law Group, LLP and National Litigation Law Group, PLLC (collectively "Defendants" or "NLLG") to Dismiss Count VII of

James and Elaine Banks' ("Plaintiffs") Third Amended Complaint [DE 101], alleging violations of the Tennessee Consumer Protection Act of 1977 ("TCPA"), Tenn. Code Ann. §§ 47-18-101 *et seq.*, Defendants' Memorandum of Law in Support [DE 102], Plaintiffs' Response [DE 113], and Defendants' Reply [DE 117]. The Court heard oral arguments on August 17, 2021. Based on the pleadings, counsel arguments, and the entire record before this Court, this Court finds that Defendants' Motion to Dismiss Plaintiffs' TCPA claim is denied as provided herein.

This Court has jurisdiction to decide pretrial matters, such as a motion to dismiss, in accordance with 28 U.S.C. §§ 1334(b) and 157(b)(1). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The following constitutes the Court's findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FACTUAL SUMMARY AND PROCEDURAL BACKGROUND

Plaintiffs, Debtors in Chapter 13 Bankruptcy Case No. 19-27543, commenced this adversary proceeding against Defendants on behalf of the Chapter 13 bankruptcy estate¹ seeking damages and other remedies arising from the Defendants' alleged misconduct and breach of the parties' Debt Resolution Agreement.

In search of an alternate route to relieve their financial problems and avoid bankruptcy, the Plaintiffs sought the services of Freedom's debt relief and credit repair program. [Third Amended Complaint ¶ 45; DE 97]. As alleged in the Third Amended Complaint, the Plaintiffs "were told their debts could be resolved by Freedom's debt relief and credit repair program." *Id.* ¶ 47.

¹ Debtors allege derivative standing to bring this action on behalf of the estate pursuant to the terms of the Order Confirming Chapter 13 Plan entered on December 23, 2019. The Order provides, in pertinent part: "All property shall remain property of the Chapter 13 estate under 11 U.S.C. § 541(a) and 1306(a) and shall revert in the Debtor(s) only upon discharge pursuant to §1328(a), conversion of the case, or specific order of the Court which states otherwise. The debtor(s) shall remain in possession of and in control of all property of the estate not transferred to the Trustee, and shall be responsible for the protection and preservation of all such property, pending further orders of the Court." [*In re Banks*, Case No. 19-27543, DE 31].

Plaintiffs “paid approximately \$20,000 in fees and deposits to [Freedom Debt Relief, LLC] for services Freedom promised to provide in connection with their [sic] debt relief and credit repair program.” *Id.* ¶ 3. Those fees included Defendants’ legal services. *Id.* ¶ 50. The Third Amended Complaint further alleges that Freedom’s program failed to resolve the Plaintiffs’ debt problems, forcing them to seek relief in bankruptcy. *Id.* ¶ 5.

Defendants “partner with Freedom to provide a range of legal services to consumers.” *Id.* ¶ 18. Plaintiffs “trusted Freedom and [NLLG] to provide the promised services . . . but did not receive the promised services.” *Id.* ¶¶ 51, 53. According to Plaintiffs, Defendants “caused [Plaintiff James Banks] to lose valuable resources, such as the loss of use of funds,” a judgment lien was placed on Plaintiffs’ home, and at least two creditors enrolled in the debt relief and credit repair program sued the Plaintiffs. *Id.* ¶¶ 55, 56. Plaintiffs further allege the Defendants breached their duty owed to Plaintiffs when Defendants failed to provide legal services after receiving the complaints and that breach caused Plaintiffs’ damages. *Id.* ¶¶ 58, 60, 61.

Based on these allegations, Plaintiffs assert Defendants “falsely passed off its services as providing legal services” . . . “as independent of Freedom” in violation of Tenn. Code § 47-18-101 *et seq.* *Id.* ¶¶ 131, 132, 141. Plaintiffs further assert that Defendants “caused confusion and misunderstanding as [to] its affiliation with Freedom,” Defendants “falsely represented that it would represent and defend the [Plaintiffs] in any collection action for debts enrolled in the Freedom program;” and that Defendants “made misleading representations to the Plaintiffs concerning its services: its benefits, quality and effectiveness.” *Id.* ¶¶ 134-36. Plaintiffs allege they “were sued by at least two of the creditors enrolled into the Freedom program,” . . . they sent the complaints to the Defendants and the Defendants “did not provide any legal services.” *Id.* ¶¶ 137, 138. These “misleading and deceptive practices of [Defendants], caused the [Plaintiffs] to

suffer the loss of property and things of value.” *Id.* ¶ 139. Plaintiffs specifically assert that they are consumers and persons, and that Defendants fall within the statutory definition of persons as defined under Tenn. Code Ann. § 47-18-103. *Id.* ¶¶ 129, 130. Therefore, Defendants violated the TCPA, Tenn. Code Ann. §§ 47-18-101 *et seq.* *Id.* ¶ 141.

Plaintiffs assert that, as a result of the Defendants’ practices, the bankruptcy estate has been unjustly deprived of funds that could otherwise be distributed to creditors. *Id.* ¶ 6. Plaintiffs seek a return of the funds paid for debt settlement and service fees, so that those fees may be paid to creditors in addition to other remedies that the Court may allow based on the Defendants’ allegedly unlawful conduct. *Id.* ¶¶ 11, 69.

STANDARD OF REVIEW

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must “(1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true.” *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009)(citation omitted). “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, (1957)).² “[O]nly a

² Generally, misrepresentation claims under the TCPA are subject to the Rule 9(b) particularity requirement. *Bridgestone Ams., Inc. v. Int’l Bus. Machines Corp.*, 172 F. Supp. 3d 1007, 1019 (M.D. Tenn. 2016); *see also Harding v. BMW of N. Am., LLC*, No. 3:20-CV-00061, 2020 WL 5039439, at *2 (M.D. Tenn. Aug. 26, 2020) (explaining that the Sixth Circuit applies the Rule 9(b) particularity requirement to “any claims sounding in fraud”) (quoting *Smith v. Bank of Am. Corp.*, 485 F. App’x 749, 751 (6th Cir. 2012)). Therefore, “[o]rdinarily, then, this Court would apply Rule 9(b) when deciding a Rule 12(b)(6) motion directed at a TCPA claim.” *Harding*, 2020 WL 5039439, at *3. However, many courts have either stated or held that, “[i]f the failure to plead with particularity under Rule 9(b) is not raised in the first responsive pleading or in an early motion, the issue will be deemed waived.” *Id.* (citations omitted). Defendants originally focused on the Plaintiffs’ failure to comply with Rule 8 in its Motion to Dismiss Plaintiffs’ Third Amended Complaint. Defendants did not assert that the Plaintiffs failed to comply with Rule 9(b) in Defendants’ Motion to Dismiss, but instead later seemed to raise the particularity requirement

complaint that states a plausible claim for relief survives a motion to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Twombly*, 550 U.S. at 556.

DISCUSSION

Defendants argue Plaintiffs’ TCPA claim is subject to dismissal because the (1) the Plaintiffs lack standing to assert a claim under the TCPA for violations alleged under Tenn. Code Ann. § 47-18-125; (2) fail to identify any specific statutory provision pointing to Defendants’ unlawful conduct as alleged; (3) and Plaintiffs’ claims fall outside the purview of the TCPA because the Act does not apply to the practice of law. [Adv. Proc. No. 20-00058, DE 102].

Failure to State a TCPA Claim

Defendants aver that Plaintiffs “do not allege any specific violation of any of the 51 separate acts declared unlawful under the TCPA” nor do Plaintiffs “identify any specific provision of the [TCPA],” [DE 102] and alleging general liability by citing to Tenn. Code Ann. § 47-18-101 *et seq.* without more is not enough to survive Defendants’ dismissal challenge.

The TCPA is a remedial statute, which courts liberally construe in favor of consumers. Tenn. Code Ann. § 47–18–115; *see also Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005); *Am. Addiction Centers, Inc. v. Nat’l Ass’n of Addiction Treatment Providers*, 515 F. Supp. 3d 820, 852 (M.D. Tenn. 2021)(citation omitted). The Act provides a private cause of action to

[a]ny person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice described in § 47-18-104(b) and declared to be unlawful by this part.

in its reply to Plaintiffs’ response to Defendants’ Motion to Dismiss, while still not explicitly stating that Plaintiffs failed to comply with Rule 9(b). Because Defendants did not raise Rule 9(b) in its Motion to Dismiss, this Court will only consider the Plaintiffs’ allegations pursuant to Rule 8.

Tenn. Code Ann. § 47-18-109(a)(1). “[A]nyone affected by a violation of this part” may bring an action to recover damages as well as for declaratory relief. Tenn. Code Ann. § 47-18-109(b).

To state a claim under the TCPA, a plaintiff must establish two elements: “(1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant’s conduct caused an ‘ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated’” *Tucker*, 180 S.W.3d at 115 (quoting Tenn. Code Ann. § 47-18-109(a)(1)). “A deceptive act or practice is one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact.” *Morrison v. Allen*, 338 S.W.3d 417, 439 (Tenn. 2011) (quoting *Tucker*, 180 S.W.3d at 116). “Section 47-18-104(b) provides a lengthy, non-exclusive list of practices that are ‘unfair or deceptive’ under the TCPA.” *Id.* Whether an act is unfair or deceptive is a question of fact. *Miolen v. Saffles*, No. E2018-00849-COA-R3-CV, 2019 WL 1581494, at *9 (Tenn. Ct. App. Apr. 12, 2019)(citation omitted). Relevant here, “falsely passing off goods or services as those of another,” Tenn. Code. Ann. § 47-18-104(b)(1), “causing likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, another,” Tenn. Code. Ann. § 47-18-104(b)(3), and “advertising goods or services with the intent not to sell them as advertised,” Tenn. Code. Ann. § 47-18-104(b)(9), are specific unfair or deceptive acts identified under the TCPA. Tenn. Code Ann. § 47-18-104(b)(1), (3), (9).

“Courts applying the TCPA have held that a plaintiff must plead with particularity the circumstances of the unfair or deceptive conduct.” *Peoples v. Bank of Am.*, No. 11–2863–STA, 2012 WL 601777, at *9 (W.D. Tenn. Feb. 22, 2012) (citations omitted); *see also Coleman v. Indymac Venture, LLC*, 966 F. Supp. 2d 759, 772 (W.D. Tenn. 2013) (failing to assert with particularity defendant’s deceptive conduct surrounding a loan modification); *Great Am.*

Opportunities, Inc. v. Cherry Bros., LLC, No. 3:17-CV-01022, 2019 WL 632670, at *10-11 (M.D. Tenn. Feb. 14, 2019) (committing “unfair and deceptive acts or practices ... by operating the Stock Plans” was conduct that “[did] not fall within one of the privately enforceable prohibitions of the TCPA”).

Construing the Third Amended Complaint liberally, as the TCPA mandates, this Court finds that although the Third Amended Complaint does not specifically point to one or more of the 51 enumerated unlawful practices, the Third Amended Complaint sufficiently asserts specific allegations that Defendants engaged in conduct held to be unlawful under TCPA provisions Tenn. Code. Ann. § 47-18-104(b)(1), (3), and (9). The Third Amended Complaint [DE 97] specifically alleges that Defendants “caused confusion and misunderstanding as its affiliation with Freedom” ¶ 136; Defendants “falsely passed off its services as providing legal services” . . . “independent of Freedom” ¶¶ 131-132; Defendants “falsely represented that it would represent and defend the [Plaintiffs] in any collection action for debts enrolled in the Freedom program” ¶ 134; and that Defendants made misleading representations to the Plaintiffs concerning its services: its benefits, quality and effectiveness.” ¶135. Plaintiffs further assert that after they “were sued by at least two of the creditors enrolled into the Freedom program,” they sent the complaints to Defendants and Defendants “did not provide any legal services.” ¶ 137, 138. In addition to suits filed against them by creditors enrolled in the program, these “misleading and deceptive practices of [Defendants], caused [Plaintiffs] to suffer the loss of property and things of value,” such as the loss of use of funds as well as judgment liens placed on Plaintiffs’ home. ¶¶ 139, 140. This Court finds that the facts as alleged are sufficiently specific to state a claim under the TCPA and describe Defendants’ alleged unlawful conduct with the TCPA’s requisite particularity. Accepting these allegations as true, Plaintiffs have sufficiently alleged a cause of action against Defendants under the TCPA.

Further, case law does not support the Defendants' proposition that the requisite particularity of the TCPA mandates that a plaintiff must list one of the specific acts enumerated in the statute; only that the plaintiff allege conduct conforming to one of the 51 enumerated acts, which are non-exclusive. *Morrison v. Allen*, 338 S.W.3d 417, 439 (Tenn. 2011) ("Section 47-18-104(b) provides a lengthy, *non-exclusive list* of practices that are 'unfair or deceptive' under the TCPA.") (emphasis added). This Court finds that the TCPA requires particularity as to the conduct surrounding the specific unlawful acts alleged, and not the specific statutory provisions.

Additionally, Defendants aver that if the Plaintiffs generally rely on the Tenn. Code Ann. § 47-18-104(b)(27) catchall provision, this reliance is misplaced because the provision does not confer a private cause of action. Instead, this cause of action belongs solely to the Tennessee Attorney General. The Third Amended Complaint does not specifically reference the catchall provision, and this Court does not read the complaint as alleging that Plaintiffs rely on the catchall provision. Therefore, this argument is moot and need not be addressed further.

Applicability of the TCPA to the Practice of Law

Defendants also contend that even if this Court finds that Plaintiffs have sufficiently alleged that Defendants' practices are statutorily unlawful, Plaintiffs' TCPA claim still fails because the TCPA does not apply to the practice of law. The practice of law and the business aspects of the practice are distinguishable. *See Wright v. Linebarger Googan Blair & Sampson, LLP*, 782 F. Supp. 2d 593, 608 (W.D. Tenn. 2011). "In their business roles, lawyers are 'subject to the same antitrust and consumer protection laws as any other business.'" *See Franks v. Sykes*, 600 S.W.3d 908, 911 (Tenn. 2020) (citing *Brookins v. Mote*, 367 Mont. 193, 292 P.3d 347, 358 (2012) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787–88 (1975))).

While the practice of law itself does not fall under the TCPA, both Tennessee courts and federal courts hold that lawyers “can be held liable under the TCPA for ‘allegations of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of the entrepreneurial, commercial, or business aspect of [their] practice.’” *See In re L. Sols. Chicago LLC*, No. M2020-00411-COA-R3-CV, 2021 WL 223817, at *6 (Tenn. Ct. App. Jan. 22, 2021), *appeal denied*, (May 12, 2021) (citing *Pagliara v. Johnson Barton Proctor & Rose, LLP*, No. 3:10-CV-00679, 2010 WL 3940993, at *10 (M.D. Tenn. Oct. 6, 2010) (quoting *Constant v. Wyeth*, 352 F. Supp. 2d 847 (M.D. Tenn. 2003) (holding that defendant’s business practices of advertising legal services fell outside the practice of law and the failure to provide the legal services could result in a violation of the TCPA)). As such, lawyers’ business practices are subject to the TCPA. *Credential Leasing Corp. of Tenn., Inc. v. White*, No. E2015-01129-COA-R3-CV, 2016 WL 2937094, at *8 (Tenn. Ct. App. May 17, 2016); *see also Franks*, 600 S.W.3d at 914.

The Plaintiffs’ allegations of Defendants’ unlawful business practices concern the failing to provide the advertised legal services - not whether defendants failed to adequately defend the Plaintiffs when they were sued. Plaintiffs allege they expected to receive Defendants’ legal services as advertised. Two creditors enrolled in the debt program sued the Plaintiffs. Plaintiffs aver they sent the complaints to Defendants, and Defendants failed to provide legal services and defend Plaintiffs in those suits. Defendants allegedly falsely advertised that they would provide legal services and such advertising of services are business practices separate from the practice of law and therefore subject to the TCPA. This Court finds that for purposes of the TCPA, Defendants are subject to the Act based on Plaintiffs’ claims arising out of Defendants’ allegedly unfair and deceptive business practices of advertising legal services and failing to provide those legal services.

Protection of an “Elderly Person” under Tenn. Code Ann. § 47-18-125

Defendants’ lack of standing argument is grounded in Plaintiffs’ assertion that Defendants’ conduct also violated Tenn. Code Ann. § 47-18-125. Tennessee Code Annotated § 47-18-125(a) provides that: “[a]ny person who knowingly uses, or has knowingly used, a method, act or practice which targets elderly persons and is in violation of this part is liable to the state for a civil penalty. . . .” Plaintiffs do not allege they are entitled to relief under § 47-18-125. The Complaint only states that “Litigation Law abused an elderly person as described in Tenn. Code Ann. § 47-18-125.” Plaintiffs have sufficiently plead allegations to state a claim for relief under the TCPA in the Third Amended Complaint. Simply alleging that Defendants’ acts are also subject to liability under another provision of the Act based on Plaintiff James Banks falling within the protected statutory class of the provision does not alone subject the Plaintiffs’ TCPA claim to defeat under Rule 12(b)(6).

CONCLUSION

For the reasons set forth herein, the Defendants’ Motion to Dismiss Count VII (DE 101) is denied.

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following interested persons:

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