

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CHRISTOPHER CRANE,	)	
	)	
Plaintiff,	)	
	)	CASE NO. 2:15-cv-02886-MHW-NMK
v.	)	Assigned to: Judge Michael H. Watson
	)	Referred to: Magistrate Judge Norah
	)	McCann King
	)	
NATIONWIDE DEBT DIRECT, LLC, and	)	
JOHN DOES 1-5,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS  
PLAINTIFF’S COMPLAINT [D.E. 3]**

**I. INTRODUCTION AND BACKGROUND**

Plaintiff Christopher Crane (“Plaintiff”) seeks to allege purported violations of 15 U.S.C. §1681, *et seq.* (the “Fair Credit Reporting Act” or “FCRA”), Ohio R.C. §1345.01, *et seq.* (the “Ohio Consumer Sales Practice Act” or “CSPA”), Ohio R.C. §4712.01, *et seq.* (the “Ohio Credit Services Organization Act” or “CSOA”) and Ohio R.C. §4719.01, *et seq.* (the “Ohio Telephone Solicitors Act” or “TSA”) against Defendant Nationwide Debt Direct, LLC (“Nationwide”) in the Court of Common Pleas, Civil Division, Licking County, Ohio. Pursuant to 28 U.S.C. §1331, 1367, 1441, and 1446, Nationwide filed its Notice of Removal [D.E. 1] of this action to this Court.

Plaintiffs Complaint is lacking key necessary facts as it attempts to assert claims based on Nationwide purportedly obtaining Plaintiff’s consumer report to market and solicit Plaintiff

for alleged debt settlement services and alleged credit repair services. By way of example of the foregoing, Plaintiff fails to and cannot allege any actual damages; fails to allege facts that could possibly categorize Nationwide as a credit repair entity; fails to allege facts that could reveal Nationwide engaged in a telephone solicitation; and fails to allege facts that could support a claim that Plaintiff is a consumer or that Nationwide even engaged in consumer transactions. Plaintiff seeks to rely upon 15 U.S.C. §1681n and 1681o (FCRA claims), Ohio R.C. §§1345.01, *et seq.* (CSPA claim), 4712.01, *et seq.* (CSOA claim), and 4719.01, *et seq.* (TSA claim), but fails on all counts to allege the essential facts necessary to state a claim. Plaintiff's failure to allege facts sufficient to support any viable claim for relief against Nationwide deprives Nationwide of adequate notice of the claims and grounds on which they rest. Accordingly, each of the claims sought to be asserted against Nationwide should be dismissed in their entirety.

## II. LAW AND ANALYSIS

### A. Legal Standard

To adequately plead a claim for relief, Federal Rule of Civil Procedure 8(a) requires, in part, the complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). While the Court must accept all well-pleaded factual allegations in the complaint as true, the Court need not “accept as true a legal conclusion couched as a factual allegation.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Papason v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L.Ed.2d 209 (1986)). In assessing a motion to dismiss, the Court determines whether the complaint “contain[s] 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, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009); *see also Heinrich v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393, 403 (6th Cir.

2012). Indeed, such factual allegations “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555; *see also Trans Rail America, Inc. v. Hubbard Tp.*, 478 Fed. Appx. 986, 988 (6th Cir. 2012); *Hensley Mfg. ProPride, Inc.*, 579 F. 3d 603, 609 (6th Cir. 2009). Plaintiff bears the burden to articulate enough facts to state a claim to relief that is plausible on its face. *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678; *Trans Rail America, Inc.*, 478 Fed. Appx. at 988. Rule 8 does require more than “labels and conclusions” or “formulaic recitations of the elements of a cause of action.” *Twombly*, 550 U.S. at 555.

Indeed, *Iqbal* counsels that the courts adopt a two-pronged approach to apply these principles: (1) eliminate any allegations in the complaint that are merely legal conclusions; and (2) where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Iqbal*, 556 U.S. at 678-9. Here, much of the Complaint consists of mere legal conclusions couched as “allegations,” which must be disregarded by the Court, and the remaining allegations do not plausibly give rise to an entitlement to relief.

## **B. Plaintiff Fails to Sufficiently State His Claims**

### **1. Failure to properly or sufficiently plead any claim for a non-existent violation of 15 U.S.C. §1681n (Count One) and 15 U.S.C. §1681o<sup>1</sup> (Count Two).**

Plaintiff fails to plead sufficient facts to plausibly give rise to an entitlement to relief from Nationwide for any alleged statutory violations contained in Counts One or Two. Specifically, Count One alleges in its entirety the following:

38. Plaintiff repeats, realleges, and incorporates by reference all of the foregoing paragraphs.

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<sup>1</sup> Plaintiff titles Count Two as “Violation of...15 U.S.C. §1681n[,]” but refers to §”1681o” within the body of Count Two. *See* Complaint [D.E. 3], ¶42.

39. Defendants willfully obtained and used Plaintiff's consumer reports without a permissible purpose in violation of 15 U.S.C. §1681b and 1681n.

40. Plaintiff suffered actual damages as a result of Defendants' conduct.

Complaint [D.E. 3], ¶¶38-40.

Similarly, Count Two alleges in its entirety the following:

41. Plaintiff repeats, realleges, and incorporates by reference all of the foregoing paragraphs.

42. Defendants negligently obtained and used Plaintiff's consumer report without a permissible purpose in violation of 15 U.S.C. §1681b and 1681o.

43. Plaintiff suffered actual damages as a result of Defendants' conduct.

Complaint [D.E. 3], ¶¶41-43.

15 U.S.C. §1681n creates potential civil liability for “[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer...,” *see* 15 U.S.C. §1681n, whereas 15 U.S.C. §1681o addresses potential civil liability for “[a]ny person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer...” 15 U.S.C. §1681o. Thus, §1681n is a remedy for willful violations of the FCRA, and §1681o is a remedy for negligent violations of the FCRA.

Pursuant to §1681n, a defendant found to have willfully violated the FCRA may be liable to a plaintiff “in an amount equal to the sum of...any actual damages sustained by the consumer as a result of the [violation] or damages of not less than \$100 and not more than \$1,000[.]” 15 U.S.C. §1681n(a)(1)(A). Because of the alternative forms of relief contained in §1681n, some courts have found a plaintiff need not suffer or allege consequential/actual damages to file a claim alleging willful violations of the FCRA. *Beaudry v. TeleCheck Services, Inc.*, 579 F. 3d 702, 705-6 (6th Cir. 2009). Pursuant to §1681o, a defendant found to have negligently violated

the FCRA may be liable to a plaintiff “in an amount equal to the sum of [] actual damages....” 15 U.S.C. §16810(a)(1). Unlike a claim for willful violations of the FCRA, the statute permits a negligence claimant to recover only actual damages.

Neither Count One or Count Two of the Complaint nor a review of the “foregoing paragraphs” referenced therein reveals any factual allegations of actual damages suffered by Plaintiff. While Nationwide is aware that, generally, a consumer is not required to allege violations of the FCRA caused injury to the consumer in the form of actual damages to state a claim for willful violation of the FCRA pursuant to §1681n, *see Beaudry*, 579 F. 3d at 705-7, Nationwide is also aware that the United States Supreme Court recently granted a writ of certiorari that is set for Hearing on November 2, 2015, to answer the question of “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute,” Question presented, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. April 27, 2015) <http://www.supremecourt.gov/qp/13-01339qp.pdf> (last visited October 5, 2015). The Supreme Court’s decision in *Spokeo* may invalidate *Beaudry*’s precedential value. Nonetheless, while the Sixth Circuit Court of Appeals does not currently require Plaintiff to allege actual damages pursuant to §1681n, Plaintiff chose to use the buzz words to assert that he suffered actual damages for a purported willful violation of the FCRA. *See* Complaint [D.E. 3], ¶40 (“Plaintiff suffered actual damages as a result of Defendant’s conduct.”). This allegation alone distinguishes the instant action from *Beaudry* wherein the plaintiff did not allege actual damages but rather statutory damages.

Because Plaintiff chose to attempt to allege actual damages in Count One and Count Two, Plaintiff must factually aver the alleged actual damages because “[c]onclusory allegations

of actual damages are not sufficient.” *Rider v. HSBC Mrtg. Corp. (USA)*, No. 2:12-cv-925, 2013 WL 992510, at \*6 (S.D. Ohio March 13, 2013) (finding conclusory allegations of actual damages are insufficient to allege actual damages); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) (“At the pleading stage, general factual allegations resulting from the defendant’s conduct may suffice”) (emphasis added); *Watson v. Citi Corp.*, No. 2:07-cv-0777, 2009 WL 161222, at \*9 (S.D. Ohio Jan. 22, 2009) (“Actual damages will not be presumed under the FCRA.”). Plaintiff did not sufficiently allege actual damages, and thus those counts must be dismissed.<sup>2</sup>

Accordingly, Plaintiff’s failure to allege sufficient facts that plausibly give rise to an entitlement to relief under 15 U.S.C. §1681n and §1681o requires dismissal.<sup>3</sup> Additionally, because Plaintiff failed to state a claim for which relief can be granted, it follows that Nationwide cannot be held liable for Plaintiff’s reasonable attorneys’ fees and costs pursuant to 15 U.S.C. §1681, *et seq.*

**i. Alternatively, and to the extent the Court considers an award of actual damages as a remedy available under the FCRA and not an element of an FCRA claim, Plaintiff lacks standing to proceed.<sup>4</sup>**

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Plaintiff bears the burden of persuading the court that it

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<sup>2</sup> Plaintiff may seek to argue that the prayer for relief seeks “statutory damages as provided by the FCRA.” Complaint [D.E. 3], Prayer for Relief. However, such argument is belied by the allegations contained in Count One that specifically aver “actual damages” as opposed to statutory damages. *See* Complaint [D.E. 3], ¶¶38-40. This distinction is especially vital as to the extent Plaintiff seeks statutory damages without suffering any concrete injury (i.e. actual damage), and to the extent the Court allows Plaintiff to amend his complaint in an attempt to adequately plead his claims, Nationwide will seek to stay the instant action pursuant to the United States Supreme Court’s agreement to hear *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (U.S. April 27, 2015).

<sup>3</sup> By way of further example of the impact of Plaintiff’s failure to aver facts establishing his purported actual damage, Nationwide is deprived of the opportunity to evaluate the facts and circumstances surrounding the case and, if appropriate, make a Rule 68 Offer of Judgment to Plaintiff (“Offer”), which Offer would administer the “just, speedy, and inexpensive determination of every action and proceeding.” *See* Fed. R. Civ. P. 1.

<sup>4</sup> “Dismissal for lack of standing is proper under Rule 12(b)(1) or 12(b)(6).” *In re Dublin Securities, Inc.*, 197 B.R. 66, 69 n. 4 (S.D. Ohio May 28, 1996)

has subject matter jurisdiction.” *U.S. v. Miami University*, 91 F. Supp. 2d 1132, 1136 (S.D. Ohio 2000). “The threshold question in every federal case is whether the court has the judicial power to entertain the suit.” *National Rifle Assoc. of Am. v. Magaw*, 132 F. 3d 272, 279 (6th Cir. 1997) (citing *Warth v. Seidin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975)). Federal courts may exercise jurisdiction only where an actual “case or controversy” exists. *See* U.S. Const. art. III, §2; *see also Parsons v. U.S. Dept. of Justice*, No. 14-1848, 2015 WL 5446909, at \*5 (6th Cir. Sept. 17, 2015). A case or controversy cannot exist unless, *inter alia*, a litigant has “standing” to invoke the jurisdiction of the federal courts. *Magaw*, 132 F. 3d at 279. The following elements are necessary to establish standing:

First, Plaintiff must have suffered an injury in fact – an invasion of a legally – protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court. This, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Defenders of Wildlife*, 504 U.S. at 560-61 (internal citations and quotations omitted). A plaintiff must have standing for each claim pursued in federal court. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L.Ed.2d 589 (2006). “At its core, the doctrine of standing required the plaintiff to allege ‘a distinct and palpable injury to himself.’” *In re Dublin Securities, Inc.*, 197 B.R. at 70 (quoting *Warth*, 442 U.S. at 501). “[G]eneral factual allegations of injury resulting from the defendant’s conduct may suffice” at the pleading stage. *Parsons*, 2015 WL 5446909, at \*6 (emphasis added).

At least one sister court has held that “if no injury is alleged,” there is no case or controversy between the parties within the meaning of Article III of the Constitution, and the

plaintiff lacks standing to proceed. *Crabil v. Trans Union, L.L.C.*, 259 F. 3d 662, 665 (7th Cir. 2001); *see also Price v. Lucas*, No. 1:09-cv-118, 10-cv-1673, 2014 WL 906540, at \*2 (N.D. Ohio March 7, 2014) (motion to dismiss granted, in part, as plaintiff “lacked standing to pursue his claims because he could show no injury in fact traceable to the acts of Defendants”). As stated, *supra*, Plaintiff is not required to allege actual damages pursuant to §1681n, but Plaintiff chose to assert the legal conclusion that he “suffered actual damages.” *See* Complaint [D.E. 3], ¶40; *see also* Section II(B)(1), *supra*. Because Plaintiff chose to assert the factually starved conclusion that he “suffered actual damages,” and because “[c]onclusory allegations of actual damages are not sufficient,” Plaintiff has not alleged an injury and therefore lacks standing to prosecute Count One and Count Two. *See Crabil*, 259 F. 3d at 665.

**2. Failure to properly or sufficiently plead a violation of the Ohio Consumer Sales Practices Act (Count Three).<sup>5</sup>**

To make out a prima facie claim under the CSPA, Plaintiff must “‘show a material misrepresentation, deceptive act or omission’ that has impacted his decision to purchase the item [or service] at issue.” *Temple v. Fleetwood Enterprises, Inc.*, 133 Fed Appx. 254, 265 (6th Cir. 2005) (quoting *Mathias v. Am. Online, Inc.*, No. 79427, 2002 WL 377159, at \*5 (Ohio Ct. App., Feb. 28, 2002)); *In re Porsche Cars North America, Inc.*, 880 F. Supp. 2d 801, 868 (S.D. Ohio 2012) (“Plaintiffs bringing CSPA claims must allege that the defendant performed an act or omission that was unfair or deceptive, and that the alleged act impacted [the plaintiffs’] decision to purchase the item [or service] at issue.”) (quotations and citations omitted); *see also Ferron v. EchoStar Satellite, LLC*, 410 Fed. Appx. 903 (6th Cir. 2010); *Richards v. Beechmont Volvo*, 127 Ohio App. 3d 188, 191, 711 N.E.2d 1088, 1090 (1998) (“In order to be deceptive, and therefore

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<sup>5</sup> Plaintiff does not allege an actual statute purportedly violated by Nationwide, but rather a purported violation of the “Ohio Consumer Sales Practices Act” in general; which Act consists of seventeen subsections. *See, generally*, Complaint [D.E. 3]; *see also* R.C. §1345.01, *et seq.*

actionable, a seller's act must not only be at variance with the truth but must also concern a matter that is or is likely to be material to a consumer's decision to purchase the product or service involved.”).

Plaintiff does not allege any facts sufficient to show Nationwide engaged in any material misrepresentation, deceptive act or omission. Rather, Plaintiff simply parrots the language of the CSPA without providing factual analysis or support. *See* Complaint [D.E. 3], ¶¶45(b)-(o).<sup>6</sup> Moreover, Plaintiff does not even attempt to allege Nationwide's purported conduct deceived Plaintiff, *see Ferron v. EchoStar Satellite, LLC*, 410 Fed. Appx. 906-910, or impacted Plaintiff's decision to purchase Nationwide's services, *Temple v. Fleetwood Enterprises, Inc.*, 133 Fed Appx. at 265. Plaintiff's conclusory allegations that mechanically recite the language of a statute comes nowhere near the requisite notice of “what the...claim is and grounds upon which it rests,” *Twombly*, 550 U.S. at 555.

Further, Plaintiff neglects to allege the basic proposition that he is a “consumer” pursuant to the CSPA such that he may be able to seek damages pursuant to the CSPA. *See* Ohio R.C. §1345.09 (“For a violation of Chapter 1345 of the Revised Code, a consumer has a cause of action and is entitled to relief as follows”) (emphasis added). A “consumer” is specifically defined to be “a person who engages in a consumer transaction with a supplier.” Ohio R.C. §1345.01(D). A “supplier” is defined to be “a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transaction.” Ohio R.C. §1345.01(C). A “consumer transaction” is defined to be “a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an

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<sup>6</sup> Plaintiff's pleading practice of describing the complained of “acts and practices [of Nationwide]...including, but not limited to...” Complaint [D.E. 3] at 45 (emphasis added), is improper and objectionable as it fails to provide Nationwide with “fair notice of what the...claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555.

individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.” Ohio R.C. §1345.01(A). Because the Complaint does not aver facts seeking to allege Plaintiff is a “consumer,” let alone does the Complaint even seek to improperly allege in conclusory fashion that Plaintiff is a “consumer,” the Complaint should be dismissed for failure to state a claim as only “a consumer has a cause of action and is entitled to relief[.]” Ohio R.C. §1345.09; *see also Ferron v. Fifth Third Bank*, No. 08AP-473, 2008-Ohio-6967, 2008 WL 5423555, at \*4 (¶12) (10th Dist. Franklin Dec. 31, 2008) (granting motion to dismiss for failure to state a claim upon which relief can be granted, and noting “appellant’s above allegations in his complaint were unsupported conclusions, not mere factual allegations. Whether appellee was a supplier, appellant was a consumer, and whether the advertisements were consumer transactions were legal questions for the trial court to decide. Therefore, neither the trial court nor [the appellate court] were required to accept appellant’s statements in his complaint as true.”).

Similarly, glaringly absent from Plaintiff’s Complaint are factual allegations showing that either the document attached to the Complaint as Exhibit 1 and/or the alleged telephone calls with purported representatives of Nationwide even constitute a “consumer transaction.” Plaintiff must plead “sufficient allegations respecting the elements of a consumer transaction to survive a motion to dismiss.” *Ferron v. Zoomego, Inc.*, 276 Fed. Appx. 473, 476 (6th Cir. 2008). Instead, Plaintiff merely concludes “Defendants committed unfair, deceptive, or unconscionable acts and practices in connection with a consumer transaction, primarily for personal, family or household purposes, in violation of the Ohio Consumer Sales Practices Act.” Complaint [D.E. 3], ¶45. Plaintiff neglects to allege with sufficient facts that either the document attached to the Complaint as Exhibit 1 and/or the alleged telephone calls with purported representatives of

Nationwide were for primarily personal, family, or household purposes. *See Zoomego, Inc.*, 276 Fed. Appx. at 476 (“[w]e can find no direct or inferential allegation in his Complaint that any email solicitations to supply an award by chance were for primarily personal, family, or household purposes....Plaintiff did not allege that the award by chance was for ‘purposes that are primarily personal, family, or household’ as required to satisfy the definition of a ‘consumer transaction’ under the CSPA. Without this additional allegation, Plaintiff has not pleaded sufficiently with respect to a material element of his claim[.]”) (emphasis added).

Additionally, the mailer attached to the Complaint as Exhibit 1, as a matter of law, cannot be considered a deceptive act or practice in connection with a consumer transaction for a supplier because the mailer, in compliance with Ohio Adm. Code 109:4-3-02, states “clearly and conspicuously in close proximity to the words stating the offer any material exclusions, reservations, limitations, modifications, or conditions[.]” is “easily legible to anyone reading the advertising or promotional literature[.]” and is “sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.” The mailer attached to and incorporated into the Complaint as Exhibit 1, specifically states:

Individual results vary based on ability to save funds, type and amount of debt and historical willingness of creditors to negotiate. We do not le[nd,] assume debt, and provide tax or legal advice. Above is for illustration purposes only and assumes program completion and type of debt. Progr[am not] available in all states. Application and above illustration do not guarantee settlement or program approval. See program agreement for comple[te terms.]

Complaint [D.E. 1], Ex. A. Where the exhibit incorporated into the complaint contradicts the conclusory allegations of the complaint, the complaint is subject to dismissal pursuant to Rule 12(B)(6). *See* Fed. R. Civ. P. 12(b)(6); *see also, e.g., Williams v. CitiMortgage, Inc.*, 498 Fed. Appx. 532, 536 (6th Cir. 2012) (quoting *N. Ind. Gen & Outdoor Shows, Inc. v. City of S. Bend*,

163 F. 3d 449, 454 (7th Cir. 1998) (“[W]hen a written instrument contradicts allegation in the complaint to which it is attached, the exhibit trumps the allegations.”); *DiPaolo v. Princeton Search, LLC*, No. , 2014 WL 517476, at \*1 (N.D. Ohio February 6, 2014).

Finally, neither Count Four nor any “of the foregoing paragraphs” allege what statute Nationwide is alleged to have violated. Rather, Count Four and all “of the foregoing paragraphs” merely parrots various portions of Ohio R.C. §1345.01, *et seq.* without once advising Nationwide what section of the CSPA Nationwide purportedly violated. Moreover, the Complaint does not so much as allege Plaintiff suffered an alleged injury – actual or statutory<sup>7</sup> – as the result of Nationwide’s alleged violation of an unpled statute. Plaintiff’s failure to allege what statute Nationwide purportedly violated deprives Nationwide of “fair notice of what the...claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555

Accordingly, Plaintiff’s claim under the CSPA should be dismissed for failure to state a claim upon which relief can be granted.

**3. Failure to properly or sufficiently plead a violation of the Ohio Telephone Solicitors Act (Count Four).**

The purpose of the Ohio Telephone Solicitors Act, as the title alludes, is to “protect purchasers from telephone solicitors and salespersons that commit unfair, unlawful, deceptive, or unconscionable acts or practices and to encourage the development of reasonable and fair telephone solicitation practices.” Ohio R.C. §4719.18. Plaintiff seeks to support Count Four by asserting mere legal conclusions: “Plaintiff is a ‘purchaser’ as defined by the TSA[;]” “Defendants is [sic] a ‘telephone solicitor’ as defined by the TSA[;]...the telephone call referenced above was a ‘telephone solicitation’ as defined by the TSA[;]” and the “mailed

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<sup>7</sup> See fn. 2, *supra*.

solicitation attached as Exhibit A is a ‘communication’ as defined by the TSA.” Complaint [D.E. 3], ¶¶47-49. A “purchaser” is defined as “a person that is solicited to become or does become financially obligated as a result of a telephone solicitation.” Ohio R.C. §4719.01(5). A telephone solicitor is defined, in pertinent part, as “a person that engages in telephone solicitation directly or through one or more salespersons....” Ohio R.C. §4719.01(A)(8). A “telephone solicitation” is defined, in pertinent part, as a “communication to a person that meets both of the following criteria: (a) the communication is initiated by or on behalf of a telephone solicitor[; and] (b) the communication either represents a price or...quality or...availability of goods or services or is used to induce the person to purchase goods or services.” Ohio R.C. 4719.01(A)(7). It is undisputed that Nationwide did not initiate the purported telephone call with Plaintiff. A “communication” is defined, in pertinent part, as:

[A] written...advertisement that meets both of the following criteria, as applicable: (a) [t]he...advertisement is transmitted by or on behalf of the seller of goods or services and by or through any printed...means[; and] (b) [i]n the case of a notification or advertisement other than by telephone, either of the following conditions is met: (i) [t]he notification or advertisement is followed by a telephone call from a telephone solicitor or salesperson[; or] (ii) [t]he notification or advertisement invites a response by telephone, and, during the course of that response, a telephone solicitor or salesperson attempts to make or makes a sale of goods or services.”

Ohio R.C. §4719.01(A)(2). (Emphasis added).

Plaintiff’s Complaint fails to factually allege Exhibit A is a “communication” as the term is defined under the TSA. Plaintiff specifically alleges he responded by telephone to Exhibit A. Complaint [D.E. 3], ¶18. However, the Complaint is devoid of factual allegations that the purported “telephone solicitor or salesperson attempt[ed] to make or ma[d]e a sale of goods or services,” Ohio R.C. §4719.01(A)(2); facts necessary to properly plead a “communication” under the TSA as cited by Plaintiff. While the Complaint seeks to read into the alleged

conversations, all that is revealed is a conversation consisting of nothing more than an explanation of Nationwide's services and details of the document Plaintiff chose to attach to the Complaint as Exhibit A. Tellingly, the Complaint never once seeks to allege the telephone conversation was an attempt to sell goods or services, let alone a completed sale of goods and services.

Similarly, Count Four and its "foregoing paragraphs" fail to factually allege Nationwide is a "telephone solicitor" or the telephone call was a "telephone solicitation." While Plaintiff seeks to allege the content of the purported telephone call, the content does not constitute or support an allegation that the call was a telephone solicitation. *See* Complaint [D.E. 3], ¶¶19-27. Nowhere within Count Four or "the foregoing paragraphs" is Nationwide alleged to have represented a price, quality, availability of goods or services or induced Plaintiff to purchase goods or services. Instead, Nationwide is alleged to have provided purported details about Exhibit A and Nationwide's services, neither of which violates the statute Plaintiff seeks to rely upon. *See* Complaint [D.E. 3], ¶¶19-27.

Equally deficient, Count Four, including the "foregoing paragraphs" fails to factually allege Plaintiff is a "purchaser." The Complaint is devoid of any allegations, let alone factual allegations, that Plaintiff was solicited to become financially obligated to Nationwide, or that Nationwide obligated itself to act on behalf of Plaintiff. Plaintiff seeks to describe the content of the purported telephone call between Plaintiff and Nationwide, but the alleged content does not reveal any solicitations to Plaintiff as opposed to general information related to Nationwide's services and a description of Exhibit A.

Count Four reflects Plaintiff's improper and mechanical recitation of the statutory language of the TSA, and fails to allege any facts sufficient to support the general conclusions

contained therein.<sup>8</sup> See Complaint [D.E. 3], ¶¶50(a)-(e). By way of example for the foregoing, Plaintiff concludes Nationwide violated the TSA by “misrepresenting, both directly and by implication, materials aspects of the performance, efficacy, nature, and characteristics of the debt settlement and credit repair services[.]” Complaint [D.E. 3], ¶50(d), but does not aver facts reflecting the purported misrepresentation. Instead, Plaintiff only cites to “R.C. §4719.08(F)(3),” Complaint D.E. 3], ¶50(d), and parrots the language contained therein. Compare Complaint [D.E. 3], ¶50(d) with Ohio R.C. §4719.08(F)(3); see also Complaint [D.E. 3], ¶50(e).

Additionally and contrary to Plaintiff’s bald assertion that “[s]uch acts and practices described above have been previously determined by Ohio courts to violate the Ohio Consumer Sales Practices Act[.]” Complaint [D.E. 3], ¶51, a generalized conclusion Plaintiff seeks to use to support his infirm claim – “acting as a telephone solicitor without having first obtained a surety bond,” Complaint [D.E. 3], ¶50(c) – is not an unfair and deceptive practice. See *Ferron v. Dish Network, L.L.C.*, 195 Ohio App. 3d 686, 696, 961 N.E. 2d 705 (10<sup>th</sup> Dist. 2011) (“[R.C. 4719.14] does not, however, define a violation of R.C. 4719.04 (the surety-bond requirement) as an unfair or deceptive act or practice under R.C. 1345.02. Therefore, Ferron has not stated, and cannot state, a claim under the CSPA for Dish Networks’ alleged failure to obtain a surety bond.”). Plaintiff’s brazen failure to allege facts – as opposed to mere conclusions – renders Count Four deficient such that this Court should dismiss the Count.

Further, the TSA damages provision states “[a] purchaser injured by a violation [of the TSA] or a rule adopted under any provision of [the TSA’s sections] may bring a civil action against the telephone solicitor...for damages....” Ohio R.C. §4719.15(A). “If a court awards damages under division (A) of this section, the court shall award damages in an amount that is

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<sup>8</sup> See fn. 6, *supra*.

not less than the amount that the purchased paid to the telephone solicitor....” Ohio R.C. 4719.15(B). The Complaint does not allege Plaintiff was damaged as a result of Nationwide’s purported violation of the TSA. Indeed, the Complaint does not even make a conclusory assertion that Plaintiff was damaged as a result of Nationwide’s purported violation the TSA. Plaintiff’s failure to aver facts in support of his unpled damages also renders Count Four deficient. *See* Section II(B)(4), *infra*, *see also Thomas v. Jackson Hewitt, Inc.*, 192 Ohio App. 3d 732, 737 (¶22), 950 N.E.2d 578 (8th Dist. 2011) (discussing failure to plead actual damages under Ohio R.C. §4712.07, *et seq* – an analogous statute). Because Plaintiff does not allege any injury, Count Four must be dismissed for failure to state a claim upon which relief can be granted. *See id.*; *see also Thomas*, 192 Ohio App. 3d at 738 (¶¶24 and 25).

**4. Failure to properly or sufficiently plead a violation of the Ohio Credit Services Organization Act (Count Five).**

The CSOA, as cited by Plaintiff, addresses credit services organizations. *See* Ohio R.C. §4712.01, *et seq*. Plaintiff attempts to support Count Five by asserting the legal conclusions that “Defendants is [sic] a credit services organization” and “Plaintiff is a buyer.” Complaint [D.E. 3], ¶¶56-57. A “credit services organization” is defined, in pertinent part, as:

[A]ny person that, in return for the payment of money or other valuable consideration...sells, provides, or performs, or represents that the person can or will sell, provide, or perform, one or more of the following services: (a) [i]mproving a buyer’s credit...; (b) [o]btaining an extension of credit by others for a buyer; (c) [p]roviding adverse credit information that is accurate and not obsolete from the buyer’s credit record...; [or] (e) [a]ltering the buyer’s identification to prevent the display of the buyer’s credit record....

Ohio R.C. §4712.01(C). The CSOA further defines “buyer” as “an individual who is solicited to purchase or who purchases the services of a credit services organization for purposes other than obtaining a business loan....” Ohio R.C. §4712.01(A). “In order for a plaintiff to assert a

successful claim against a defendant under the [Ohio Credit Services Organization Act], the plaintiff must qualify as a buyer and the defendant qualify as a [credit services organization].” *Snook v. Ford Motor Co.*, 142 Ohio App. 3d 212, 216, 755 N.E.2d 380 (2nd Dist. 2001). In order to qualify as a “buyer” under the CSOA, an individual must obtain the services of a credit services organization in exchange for money or its equivalent. *Id.*

Nowhere within Count Five or “the foregoing paragraphs” does Plaintiff allege he obtained the services of Nationwide in exchange for money (or its equivalent). Because Plaintiff does not allege (because he cannot) Plaintiff purchased the services of Nationwide (for money or its equivalent), Count Five must be dismissed for failure to state a claim upon which relief can be granted. *See Snook*, 142 Ohio App. 3d at 216.

Additionally, Count Five, including the “foregoing paragraphs,” does not factually allege – as opposed to merely concluding – that Nationwide purportedly received, or solicited to receive, compensation in return for Nationwide’s services; services that are not alleged to improve a buyer’s credit record, but rather to settle Plaintiff’s debts or provide credit counseling services to Plaintiff. *See* Complaint [D.E. 3], ¶¶ 13 (“market debt settlement services on behalf of its debt settlement company”), 19 (“work to settle debts”), 25 (“negotiate with the creditors to settle the accounts”), 30 (“work directly with Plaintiff’s creditors to reduce his principal balance”), 36 (“Defendants was engaged in the business of debt adjusting, budget counseling, debt management, or debt pooling services, or holding oneself out, by words of similar import, as providing services to debtors in the management of their debt”), Exh. A. Plaintiff fails to allege any facts establishing Nationwide is a credit services organization as its services are not alleged to be credit improvement services, but rather credit counseling or debt settlement services. *Id.*

Similarly, a review of Count Five, including the “foregoing paragraphs,” reveals Plaintiff’s Complaint lacks factual allegations in which Plaintiff was solicited to purchase, let alone purchased the credit repair services of Nationwide (presumably because Nationwide does not offer such services). Accordingly, the Complaint fails to allege any facts that Plaintiff is a “buyer” entitled to seek relief under the CSOA.

As reflected throughout Plaintiff’s improperly plead Complaint, Count Five also reveals Plaintiff’s improper and mechanical recitation of the statutory language of the CSOA, and failure to allege any facts sufficient to support Plaintiff’s general conclusions. *See* Complaint [D.E. 3], ¶¶59-63. By way of example for the foregoing, Plaintiff concludes Nationwide “solicited buyers with mailed letters in order to provide the services of a credit services organization,” Complaint [D.E. 3], ¶59-63, but does not aver facts in support of such conclusion. Specifically, Plaintiff does not identify the purported “buyers,” “mailed letters,” or “credit services organization” nor does Plaintiff allege how the undescribed “mailed letters” solicit the undescribed buyers in order to provide the services of an undescribed credit services organization. *See id.*

Further, the CSOA damages provision states “[a] buyer injured by a violation [of the CSOA] may bring an action for recovery of damages.” Ohio R.C. §4712.10(A)(1). “Damages awarded under division (A)(1) of this section shall not be less than the amount paid by the buyer to the credit services organization, plus reasonable attorneys’ fees and court costs.” *Id.* The Complaint does not allege Plaintiff was damaged as a result of Nationwide’s purported violation of the CSOA. Indeed, the Complaint does not even “make a conclusory assertion that because [defendant] failed to comply with Ohio’s CSOA, [plaintiffs] were damaged. [An] unsupported conclusion [that] does not satisfy [plaintiffs’] obligation to provide grounds for their entitlement to relief.” *Thomas v. Jackson Hewitt, Inc.*, 192 Ohio App. 3d 732, 737 (¶22), 950 N.E.2d 578

(8th Dist. 2011). Plaintiff's failure to aver facts in support of his unpled damages renders Count Five deficient. "The CSOA is not a strict-liability statute, nor are damages under the CSOA presumed. The CSOA permits only a person who has been injured by a violation of its provision to bring an action for damages against the violator." *Id.* at 738 (¶23). Because Plaintiff does not allege any injury, Count Five must be dismissed for failure to state a claim upon which relief can be granted. *See id.* at 738 (¶¶24 and 25) ("The [plaintiffs'] insufficient allegation of injury is fatal to their first amended complaint; thus it cannot survive a Civ. R. 12(b)(6) motion to dismiss....Because we find that the [plaintiffs] did not sufficiently allege damages in their first amended complaint, we need not address whether [plaintiffs], in this action, are 'buyers' as defined by R.C. 4712.01(A) or whether [defendant] is a CSO as defined by R.C. 4712.01(C).").

**5. Plaintiff's requests for costs and reasonable attorneys' fees pursuant to the Ohio Telephone Solicitors Act and the Ohio Credit Services Organization Act in the Prayer for Relief are improper, insufficient, and should be stricken.**

**a. Plaintiff is not seeking damages under the Ohio Telephone Solicitors Act.**

A plaintiff who seeks and is awarded damages pursuant to Ohio R.C. §4719.15 can potentially recover an award of "reasonable attorney's fees and court costs...." Ohio R.C. §4719.15(B). Plaintiff does not allege, and therefore is not entitled to seek, damages pursuant to Ohio R.C. §4719.15. *See* Section II(B)(4), *supra*. Because Plaintiff does not allege, and therefore is not entitled to seek, damages pursuant to Ohio R.C. §4719.15, Plaintiff cannot be awarded damages under Ohio R.C. §4719.15 such that he can attempt to recover attorney's fees and costs. Rather, Plaintiff appears to rely upon Ohio R.C. §4719.14 to try to allege a violation of Ohio R.C. §1345.02. Accordingly, Plaintiffs have not and cannot plead an entitlement to attorney's fees and court costs under the TSA as none exists for the claim they seek to allege,

and the request contained in the Prayer for Relief is improper, insufficient, and should be stricken.

**b. Plaintiff is not seeking damages under the Ohio Credit Services Organization Act.**

A plaintiff who seeks damages and is awarded damages pursuant to Ohio R.C. §4712.10 can potentially recover an award of “reasonable attorney’s fees and court costs.” Ohio R.C. §4712.10(A)(2). However, Plaintiff does not allege, and therefore is not entitled to seek, damages pursuant to Ohio R.C. §4712.10. *See* Section II(B)(3), *supra*. Because Plaintiff does not allege, and therefore is not entitled to seek, damages pursuant to Ohio R.C. §4712.10, Plaintiff cannot be awarded damages under Ohio R.C. §4712.10(A)(2) such that he can attempt to recover attorney’s fees and costs. Rather, Plaintiff appears to rely upon Ohio R.C. §4712.11 to try to allege a violation of Ohio R.C. §1345.02. Accordingly, Plaintiffs have not and cannot plead an entitlement to attorney’s fees and court costs under the CSOA as none exists for the claim they seek to allege, and the request contained in the Prayer for Relief is improper, insufficient, and should be stricken.

**III. CONCLUSION**

Plaintiff’s attempts to plead claims against Nationwide are so deficient that not a single count can withstand scrutiny, and as such, the Complaint should be dismissed against Nationwide.

WHEREFORE, Defendant Nationwide Debt Direct LLC requests this Court dismiss Plaintiff’s Complaint, award attorney fees and costs to Defendant Nationwide Debt Direct LLC pursuant to the Fair Credit Reporting Act and Ohio Consumer Sales Practice Act, and award any other relief in favor of Defendant Nationwide Debt Direct LLC this Court deems just and proper.

Dated: October 14, 2015

Respectfully submitted,

**Frost Brown Todd LLC**

/s/ Katherine M. Klingelhafer

Katherine Klingelhafer, Esq.

One Columbus, Suite 2300

10 West Broad Street

Columbus, OH 43215-3484

Tel: (614) 559-7214

*Trial Attorney for Defendant Nationwide Debt Direct, LLC*

**Greenspoon Marder, P.A.**

Beth-Ann E. Krinsky

Fla. Bar No. 968412

beth-ann.krinsky@gmlaw.com

*Pro Hac Vice Admission Anticipated*

Lawren A. Zann

Fla. Bar No. 42997

lawren.zann@gmlaw.com

200 East Broward Blvd

Suite 1800

Fort Lauderdale, FL 33309

Tel: (954) 527-2427

Fax: (954) 333-4027

*Attorneys for Defendant Nationwide Debt Direct, LLC*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 14, 2015, I electronically filed the foregoing Memorandum of Law in Support of Defendant's Motion to Dismiss via transmission of Notice of Electronic Filing generated by CM/ECF, and, pursuant to S.D. Ohio Civ. R. 5.2, served the foregoing upon: Robert G. Parker, Esq. (rparker@lawLH.com), Jeremiah E. Heck, Esq. (jheck@lawLH.com), and Brian M. Garvine, Esq. (brian@garvinelaw.com).

/s/ Katherine M. Klingelhafer

Katherine M. Klingelhafer (0084901)