CAUSE NO. DC-22-14514

SAGE TELECOM,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
SEQUIUM ASSET SOLUTIONS, LLC	§	
	§	
Defendants.	§	134th JUDICIAL DISTRICT

DEFENDANT SEQUIUM ASSET SOLUTIONS LLC'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant SEQUIUM ASSET SOLUTIONS, LLC ("SAS"), by and through its undersigned counsel, and files its *Motion for Summary Judgment* as follows:

INTRODUCTION

On or about October 17, 2022, Plaintiff SAGE TELECOM, INC. filed its Petition with this Court. Defendant SEQUIUM ASSET COLUTIONS, LLC ("Sequium") timely filed its Answer on or about November 30, 2022. On December 20, 2022, this Court entered its Uniform Scheduling Order.

Plaintiff asserts the following:

> This case involves an illegal telemarketing campaign by Defendant. Defendant violated Section 302.101 of the Texas Business & Commercial Code when its representatives engaged in continuous and repetitive telephone solicitation of Plaintiff without obtaining a registration certificate from the Office of the Secretary of State."

Plaintiff's Petition at ¶ 8.

Section 302.101 of the Texas Business & Commercial Code states that "[a] seller may not make a telephone solicitation from a location in this state or to a purchaser located in this state unless the seller holds a registration certificate for the business location from which the telephone solicitation is made." Tex. Bus. & Comm. Code § 302.101.

Plaintiff's claim lacks merit for several reasons. First, Sequium does not engage in "telephone solicitation" as defined by the statute. Sequium's entire business model revolves around the recovery of consumer and commercial accounts receivables. Sequium is ***not*** in the business of telemarketing, nor does it participate in "induc[ing] a person to purchase, rent, claim, or receive an item" as is required to be liable under the statute. *Id*. at § 302.001(7).[1]

Moreover, and more relevant to this motion, Plaintiff asserts that "[f]or at least the past two years, Plaintiff's ***customers*** received at least 188 telephone solicitations (from 833-574-1910) to cell phones managed and provided by Plaintiff." Plaintiff's Petition at ¶ 8 (emphasis added). Plaintiff admits that it never received a single phone call from Sequium—rather, its customers did. As such, Plaintiff lacks both constitutional standing and capacity (otherwise known as prudential standing) to sue.

[1] If this case is not disposed of by this motion, Sequium will flesh out this argument in a second motion for summary judgment which will be filed towards the end of the discovery period in this matter. To date, no discovery has taken place and Sequium believes that this could be an argument that the Court would not want to consider until Plaintiff has been provided with an opportunity to conduct discovery on the matter. Sequium has very intentionally limited this *Motion for Summary Judgment* to issues that it believes can be resolved without the need for extensive discovery.

For these reasons, further expounded upon below, Sequium respectfully requests that this Court dismiss Plaintiff's claims with prejudice and provide any other relief the Court believes is warranted.

STANDARD OF REVIEW

The function of a summary judgment is not to deprive a litigant of the right to a full hearing on the merits of any real issue of fact, but rather to eliminate patently unmeritorious claims and untenable defenses. *Gulbenkian v. Penn*, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952). Courts decide summary judgments under the well-established standards set forth in *Nixon v. Mr. Property Management Company*, 690 S.W.2d 546, 548–49 (Tex.1985). The movant for summary judgment has the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Id.* In deciding whether there is a material disputed fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Id.* Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.*

A defendant, as movant, is entitled to summary judgment if it 1) disproves at least one element of each of the plaintiff's theories of recovery, or 2) pleads and conclusively establishes each essential element of an affirmative defense thereby rebutting the plaintiff's cause of action. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex.1979).

ARGUMENTS & AUTHORITIES

I. Plaintiff lacks constitutional standing.

Standing is implicit in the concept of subject-matter jurisdiction, and subject-matter jurisdiction is essential to the authority of a court to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). The Texas standing doctrine "derives from the Texas Constitution's provision for separation of powers among the branches of government, which denies the judiciary authority to decide issues in the abstract, and from the open courts provision, which provides court access only to a 'person for an injury done him.'" *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018) (citing TEX. CONST. art. I, § 13; Tex. Ass'n of Bus., 852 S.W.2d at 443–44).

The Texas standing requirements parallel the federal test for Article III standing which, in part, provides that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)).

The United States Supreme Court has articulated the three elements of standing, which have been adopted by this Court:

> First, the 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 ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the

> independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted); see also *Heckman*, 369 S.W.3d at 154–55 (quoting same). The Texas injury-in-fact analysis requires that the plaintiff suffer "personal" injury. *Heckman*, 369 S.W.3d at 155 (emphasis added).

To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S., at 560, 112 S.Ct. 2130 (internal quotation marks omitted). As such, for a plaintiff to establish an injury for constitutional standing purposes, there are two (2) requirements: 1) that the harm be particularized, and 2) that the harm be concrete. *Id.*

For an injury to be particularized, it "must affect the plaintiff in a personal and individual way." *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854 ("'plaintiff must allege personal injury'"); *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) ("'distinct'"); *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("personal"); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S.Ct. 752 (1982) (standing requires that the plaintiff "'personally has suffered some actual or threatened injury'"); *United States v. Richardson*, 418 U.S. 166, 177, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (not "undifferentiated"); *Public Citizen, Inc. v. National Hwy. Traffic Safety Admin.*, 489 F.3d 1279, 1292–1293 (C.A.D.C.2007) (collecting cases).

A "concrete" injury must be "de facto"; that is, it must actually exist. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016); See Black's Law Dictionary 479 (9th ed. 2009). When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—"real," and not "abstract." *Id.*; Webster's Third New International Dictionary 472 (1971); Random House Dictionary of the English Language 305 (1967).

Plaintiff's alleged injury is neither particularized nor concrete. As for particularization, courts have been consistent in holding that to have constitutional standing a plaintiff must have suffered ***personal*** harm. Here, Plaintiff's harm is not personal. In fact, Plaintiff admits that its harm is not personal. In its Petition, Plaintiff states that "[f]or at least the past two years, Plaintiff's ***customers*** received at least 188 telephone solicitations (from 833-574-1910) to cell phones managed and provided by Plaintiff." Plaintiff's Petition at ¶ 8 (emphasis added).

This is a case about alleged illegal telemarketing calls. The only person that can be personally harmed by such calls is the person who ***receives*** such calls. The alleged calls (regardless of whether they were telemarketing calls) were directed towards and received by Plaintiff's customers—not by Plaintiff. Plaintiff further makes no claim to have been personally harmed, and, for the purpose of constitutional standing, no personal harm exists. And, even assuming Sequium should have a registration certificate as required by the statute (which Sequium denies), Plaintiff fails to assert how not having one personally injured Plaintiff to the point of

conferring constitutional standing. As such, Sequium respectfully requests that Plaintiff's claim be dismissed for this reason alone.

Furthermore, Plaintiff's alleged harm is not concrete. Plaintiff complains of no "real" or "actual" harm that it suffered. Even taking Plaintiff's Petition as true—that there were 188 calls made to its customers—this does not confer real harm Plaintiff. In fact, Plaintiff's business model hinges on its customers receiving phone calls. The fact that Plaintiff's customers receive phone calls is what keeps them in business. And, if there was a "real" or "actual" injury suffered from a telemarketing call, that "real" and "actual" injury would be suffered by the person who received the call. As such, Sequium respectfully requests that Plaintiff's claim be dismissed for lack of constitutional standing.

II. Plaintiff lacks capacity (and/or lacks prudential standing).

"The Texas Supreme Court recently made clear that disputes over whether a claim belongs to the plaintiff are disputes over capacity, not constitutional standing." *Moser, Tr. of Est. of Mason v. Dillon Invs., LLC*, 649 S.W.3d 259, 270 (Tex.App.—Dallas 2022). Both capacity and standing are necessary to bring a lawsuit. *Coastal Liquids Transp., L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001).

"[C]ourts and parties have sometimes blurred the distinction between standing and capacity." *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005).

> Like jurisdiction, standing "is a word of many, too many, meanings." Texas courts, having drawn upon the standing doctrine of our federal counterparts, sometimes apply the label "standing" to statutory or prudential considerations that "do[ ] not implicate subject-matter jurisdiction" but determine whether a plaintiff "falls within the class of [persons] ... authorized to sue" or otherwise has "a valid ... cause of

> action." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (explaining why this use of the standing label can be "misleading").

Pike v. Texas EMC Mgmt., LLC, 610 S.W.3d 763, 773-74 (Tex. 2020)

"A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Id.* (quoting *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). A plaintiff lacks capacity when, as pertinent here, he "is not entitled to recover in the capacity in which he sues." TEX. R. CIV. P. 93(2); *Pike*, 610 S.W.3d at 775.

Both the Supreme Court of Texas and the Supreme Court of the United States have long held that a plaintiff must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 16 (Tex. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975)).

Here, Plaintiff is not the proper party to sue under the statute. The statute is clear that is there to govern the act of "induc[ing] a person to purchase, rent, claim, or receive an item." Tex. Bus. & Comm. Code § 302.001(7). Again, Sequium is solely in the business of recovering consumer and commercial accounts receivables. However, evening assuming that Sequium was in the business of telemarkting (which it is not), Sequium did not telemarket Plaintiff. More that than, Plaintiff admits that Sequium did not engage with Plaintiff, but rather with Plaintiff's customers.

It is an absolute requirement that a plaintiff have the capacity to sue in the state of Texas. *Coastal Liquids Transp.*, 46 S.W.3d at 884. If a plaintiff does not have capacity, such as is the case here, then the case must be dismissed. *Id*. As such, Sequium respectfully requests that Plaintiff's claim be dismissed for lack of capacity.

III. Plaintiff should not be provided leave to amend.

It is not uncommon for courts to provide a plaintiff with leave to amend their petition under certain circumstances. "However, courts do not grant leave to amend a complaint when the claims being repled are unable to overcome the deficiencies that led to their dismissal." *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 761 (Tex. App.—Beaumont 2014) (citing *Simmons v. Sabine River Auth. La.*, 732 F.3d 469, 478 (5th Cir.2013) ("Clearly, if a complaint as amended is subject to dismissal, leave to amend need not be given.")).

Plaintiff's deficiencies regarding constitutional standing and capacity cannot be overcome by amending its petition. As such, Sequium respectfully requests that, in the event this case is dismissed, it be done so without leave to amend.

CONCLUSION

Plaintiff sues under a state telemarketing statute despite admitting that it never received a single telemarketing phone call. Under these facts, Plaintiff lacks both constitutional standing and capacity. As such, Sequium respectfully requests that this Court dismiss the case with prejudice, without leave to amend, and provide whatever other relief it deems appropriate.

Dated: February 16, 2023.

Respectfully submitted,

FROST ECHOLS LLC

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been forwarded via **e-File** system to all parties entitled to notice of the same on this 16th day of February, 2023.

/s/ Cooper Walker
COOPER M. WALKER

Automated Certificate of eService

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