

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

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|-----------------------------|---|---------------|
| W.W. ROWLAND TRUCKING |) | |
| COMPANY, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | NO. 17-662-BC |
| |) | |
| INTERMODAL CARTAGE |) | |
| COMPANY, LLC; IMC GLOBAL, |) | |
| SERVICES, LLC; and NICHOLAS |) | |
| PAYNE, |) | |
| |) | |
| Defendants. |) | |

MEMORANDUM AND ORDER DENYING DEFENDANTS’
PARTIAL MOTION TO DISMISS

This lawsuit was filed by a carrier of storage containers against two companies, one of which operates a container yard used by the Plaintiff and the other which is a broker who arranges for goods to be loaded and shipped. The Plaintiff asserts that the Defendants have engaged in misconduct in the nature of using their communication channels with shipping customers to make false and disparaging statements about the Plaintiff; that the Defendants have intentionally failed to notify the Plaintiff of container arrivals at the Defendant’s container yard, and then have used the resulting shortened time to induce customers to move the service on those containers to Defendant.

The case is presently before the Court on the Defendants' partial motion to dismiss the Plaintiff's claim of violation of the Tennessee Consumer Protection Act ("TCPA") contained in Count III of the Amended Complaint.

Pursuant to Tennessee Civil Procedure Rule 12.02(6), the Defendants assert that the gravamen of the Plaintiff's TCPA claim is anti-competitive activity of the Defendants, and that Tennessee courts have held that claims based upon alleged anti-competitive activities do not support a claim for relief under the TCPA, citing *Sherwood v. Microsoft Corp.*, 2003 WL 21780975, *33 (Tenn. Ct. App. July 31, 2003); and *Bennett v. Visa USA, Inc.*, 2006, 198 S.W.3d 747 (2006).

After studying the *Sherwood* and *Bennett* cases as well as *Affinion Benefits Group, LLC v. Econ-O-Check Corp.*, 784 F. Supp. 2d 855, 879 (M.D. Tenn. 2011), cited by the Plaintiff, the Court concludes that the Defendants' motion must be denied.

As established in the briefing of Defendants, although Tennessee Code Annotated section 47-18-115 provides that the TCPA is to be interpreted and construed consistently with the Federal Trade Commission Act, Tennessee elected in its formulation of consumer protection law not to adopt the version that mirrors the FTC Act. Unlike the FTC Act which prohibits both unfair methods of competition thereby achieving antitrust as well as deceptive practice objectives, Tennessee opted instead to prohibit only unfair and deceptive acts and practices, without including the unfair methods of competition language. *Sherwood*, 2003 WL 21780975, at *31-32. *Sherwood* explains that the Tennessee general assembly

knowingly chose not to include anti-trust or anti-competitive conduct as actionable under the TCPA.

As identified by the Plaintiff, however, the TCPA includes 51 discrete prohibited acts including ones that ordinarily and naturally arise not just between a purchaser/consumer and seller but also by businesses harmed by the acts of other businesses in the marketplace in the absence of privity. One of those forms of misconduct is Tennessee Code Annotated section 47-18-104(b)(8). It prohibits disparagement of the goods, services or business of another by false or misleading statements of fact. This is the claim asserted in this case. That the Plaintiff has asserted a discrete claim under section 47-18-104(b)(8), the Court concludes, renders *Bennett* and *Sherwood* inapplicable.

The Court adopts the analysis of the Plaintiff that *Bennett* and *Sherwood* deal primarily or exclusively with the Tennessee Code Annotated section 47-18-104(b)(27) catch-all claim. Thus their decisions apply to situations involving market-wide business practices aimed at stifling competition in a general fashion as succinct from discrete acts targeted at specific plaintiffs. The Court adopts the analysis, cited by the Plaintiff, of the District Court for the Middle District of Tennessee that a plaintiff's "status as a competitor" does not deprive it of standing under section 104(b)(8). *Affinion Benefits Grp. LLC*, 784 F. Supp. at 879.

Lastly, even if *Sherwood* and *Bennett* were determined to stand for the proposition that Plaintiff's claims should be dismissed because the TCPA is inapplicable to allegations

of anti-competitive activity, Defendant IMC Global Solutions, LLC is not a competitor of Rowland. It performs the service of a broker. Additionally, Defendant Intermodal, while a competitor with the Plaintiff on hauling contracts, provides a different service with respect to operating the container yard.

For all of these reasons, it is ORDERED that the Defendants' partial motion to dismiss Plaintiff's TCPA claim is denied.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efilng as applicable to:
Eugene Bulso, Jr.
Paul Krog
William O'Bryan, Jr.
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