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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JASON DAVID BODIE
Plaintiff,
v.
LYFT
Defendants.

Case No.: 3:16-cv-02558-L-NLS

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS [ECF NO. 28]

Pending before this Court is Defendant Lyft, Inc.’s (“Lyft”) motion to dismiss Plaintiff Jason David Bodie’s (“Bodie”) First Amended Complaint (“FAC”) pursuant to Federal Rule of Civil Procedure Rule 12(b)(6). Pursuant to Civil Local Rule 7.1(d)(1), the Court decides the matter on the papers submitted and without oral argument. For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Lyft’s motion to dismiss.

Factual Background

The FAC alleges that Bodie received two unsolicited text messages back-to-back from a telephone number that belongs to or was used by Lyft on or about October 10, 2016 at approximately 2:25 p.m. Pacific Standard Time. ECF No. 23 at ¶ 9. The FAC goes on alleging that the first message instructed him to download the Lyft app onto his cellular

1 phone. *Id.* at ¶ 10. The second message included a link to download Lyft’s app from the
2 Apple app store. *Id.* at 11.

3 The FAC also alleges that a commercial text messaging system, acting as an agent
4 or vendor of Lyft, sent the text messages for Lyft’s financial benefit. *Id.* at 14. The FAC
5 alleges that the text messages were sent using “an automatic telephone dialing system
6 (‘ATDS’) as defined by 47 U.S.C. § 227(a)(1).” *Id.* at 17. It is further alleged that injury
7 was suffered as the text messaging invaded Bodie’s privacy interest, caused frustration and
8 distress due to the interruption, and “caus[ed] a nuisance and lost time.” *Id.* at ¶¶ 23-25.

9 Legal Standard

10 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the complaint’s sufficiency.
11 *See N. Star Int’l v. Ariz. Corp. Comm’n.*, 720 F.2d 578, 581 (9th Cir. 1983). A complaint
12 may be dismissed as a matter of law either for lack of a cognizable legal theory or for
13 insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749
14 F.2d 530, 534 (9th Cir. 1984). In ruling on a Rule 12(b)(6) motion, the court must assume
15 the truth of all factual allegations and “construe them in the light most favorable to [the
16 nonmoving party].” *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002). “While a
17 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
18 allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’
19 requires more than labels and conclusions, and a formulaic recitation of the elements of a
20 cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)
21 (internal citations and quotation marks omitted). Instead, the allegations in the complaint
22 “must be enough to raise a right to relief above the speculative level.” *Id.* at 1965.

23 A claim has “facial plausibility when the plaintiff pleads factual content that allows
24 the court to draw the reasonable inference that the defendant is liable for the misconduct
25 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).
26 “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it
27 stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Iqbal*,
28 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). A court need not accept “legal

1 conclusions” as true. *Iqbal*, 556 U.S. at 678. It is not proper for a court to assume that “the
2 [plaintiff] can prove facts that [he or she] has not alleged or that defendants have violated
3 the...laws in ways that have not been alleged[,]” regardless of the deference shown to
4 plaintiff’s allegations. *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of*
5 *Carpenters*, 459 U.S. 519, 526 (1983).

6 Generally, a court is free to grant leave to amend a complaint that has been
7 dismissed. Fed. R. Civ. P. 15(a)(2). However, when “the court determines that the
8 allegation of other facts consistent with the challenged pleading could not possibly cure
9 the deficiency[,]” leave may be denied. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*,
10 806 F.2d 1393, 1401 (9th Cir. 1986).

11 Discussion

12 Lyft sets forth the following contentions as to why Bodie’s complaint is insufficient:
13 (1) plaintiff’s ATDS allegations are conclusory; and (2) plaintiff fails to plausibly allege
14 that Lyft sent the texts or had an agency relationship with the sender.

15 **A. ATDS Allegations**

16 Under 47 U.S.C. § 227(a)(1), an ATDS is defined as “equipment which has the
17 capacity—(A) to store or produce telephone numbers to be called, using a random or
18 sequential number generator; and (B) to dial such numbers.” An ATDS “need not actually
19 store, produce, or, call randomly or sequentially generated telephone numbers, it need only
20 have the capacity to do it.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th
21 Cir. 2009). Courts in this district have taken two approaches when facing a motion to
22 dismiss on the grounds that the allegations of use of an ATDS are insufficient. *See Maier*
23 *v. J.C. Penney Corp.*, 2013 WL 3006415 at *3 (S.D. Cal. June 13, 2013). Under the first
24 approach, courts permit a plaintiff to make minimal allegations at the complaint stage,
25 permitting discovery to proceed on the issue of ATDS, because the information is in the
26 sole possession of the defendant. *Id.*, citing *In re Jiffy Lube Int’l Inc., Text Spam Litig.*,
27 847 F.Supp.2d 1253, 1260 (S.D. Cal. 2012). Under the second approach, factual
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1 allegations beyond mere statutory language are required which may lead to the inference
2 that an ATDS was used. *Maier*, 2013 WL 3006415 at *3.

3 Under either approach, Bodie has failed to sufficiently allege that an ATDS was used
4 in this case. The FAC merely parrots statutory definition of an ATDS alleging, “the SMS
5 text messages were sent using equipment that had the capacity to store or produce
6 telephone numbers to be called using a random or sequential number generator, and to dial
7 such numbers.” *See* ECF no. 23 at ¶17; *see also* 47 U.S.C. § 227(a)(1). The FAC also
8 alleges that, “the SMS text messages were sent using equipment that can send a text
9 message to cellular telephone numbers stored as a list or database without human
10 intervention. . . [and] has the capacity to automatically send text messages to telephone
11 numbers generated randomly or sequentially.” *See* ECF No. 23 at ¶¶ 18, 19. This falls
12 short of what is required for plausibility. *Iqbal*, 556 U.S. at 678. Despite alleging that the
13 telephone number that sent the challenged SMS messages belonged to Lyft or its agent, the
14 FAC is devoid of any facts that could support a reasonable inference that Lyft used an
15 ATDS to send the subject text messages. Accordingly, the Court GRANTS Lyft’s motion
16 to dismiss for failure to sufficiently allege use of an ATDS.

17 **B. Sender Identification**

18 A complaint alleging a violation of the Telephone Consumer Protection Act can raise
19 both direct and vicarious theories of liability. *See Thomas v. Taco Bell Corp.*, 582
20 Fed.Appx. 678 (9th Cir. 2014). “[A] defendant may be held vicariously liable for TCPA
21 violations where the plaintiff establishes an agency relationship, as defined by federal
22 common law, between the defendant and a third-party caller.” *Gomez v. Campbell-Ewald*
23 *Co.*, 768 F.3d 871, 879 (9th Cir. 2014). “An agent is one who ‘act[s] on the principal’s
24 behalf and subject to the principal’s control.’” *United States v. bonds*, 608 F.3d 495 506
25 (9th Cir. 2010) (quoting Restatement (Third) Agency § 1.01). “Apparent authority arises
26 from the principal’s manifestations to a third party that supplies a reasonable basis that
27 party to believe that the principal has authorized the alleged agent to do the act in question.”
28 *N.L.R.B. v. Dist. Council of Iron Workers of the State of Cal. & Vicinity*, 124 F.3d 1094,

1 1098 (9th Cir. 1997). Here, the FAC alleges that Lyft is vicariously liable for the subject
2 text messages as it asserts the texts were “sent via a commercial text messaging system by
3 an agent or vender hired by Lyft.” ECF No. 23 at ¶ 14. The Court finds that the FAC
4 sufficiently alleges actual authority as Bodie alleges “Lyft instructed its agent or vendor as
5 to the content of the text messages and timing of the sending of the text messages[.]” *Id.*
6 at ¶15; *see Thomas v. Taco Bell Corp.*, 879 F.Supp.2d 1079, 1085 (C.D. Cal. 2012)
7 (“Agency means more than mere passive permission; it involves [a] request, instruction, or
8 command.”). Therefore, the Court DENIES Lyft’s motion to dismiss as Bodie sufficiently
9 alleged vicariously liability to this point.

10 **Conclusion**

11 For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART
12 Lyft’s motion to dismiss without prejudice. As such, the Court dismisses Plaintiff’s
13 amended complaint and provides Plaintiff 30 days leave, from the date this order issues, to
14 amend the deficiencies of the complaint.

15 Dated: January 15, 2019

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17 Hon. M. James Lorenz
18 United States District Judge
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