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United States District Court, S.D. California.

Jason David BODIE, Plaintiff,
v.
LYFT, Defendants.

Case No.: 3:16-cv-02558-L-NLS
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Signed 01/15/2019
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Attorneys and Law Firms

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

Hon M. James Lorenz, United States District Judge

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

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

Legal Standard

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

A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). A court need not accept "legal conclusions" as true. *Iqbal*, 556 U.S. at 678. It is not proper for a court to assume that "the [plaintiff] can prove facts that [he or she] has not alleged or that defendants have violated the ... laws in ways that have not been alleged[,]" regardless of the deference shown to plaintiff's allegations. *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

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

Discussion

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

A. ATDS Allegations

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

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

B. Sender Identification

A complaint alleging a violation of the Telephone Consumer Protection Act can raise both direct and vicarious theories of liability. *See Thomas v. Taco Bell Corp.*, 582 Fed.Appx. 678 (9th Cir. 2014). "[A] defendant may be held vicariously liable for TCPA violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller." *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 879 (9th Cir. 2014). "An agent is one who 'act[s] on the principal's behalf and subject to the principal's control.' " *United States v.* bonds, 608 F.3d 495 506 (9th Cir. 2010) (quoting Restatement (Third) Agnecy § 1.01). "Apparent authority arises from the principal's manifestations to a third party that supplies a reasonable basis that party to believe that the principal has authorized the alleged agent to do the act in question." *N.L.R.B. v. Dist. Council of Iron Workers of the State of Cal. & Vicinity*, 124 F.3d 1094, 1098 (9th Cir. 1997). Here, the FAC alleges that Lyft is vicariously liable for the subject text messages as it asserts the texts were "sent via a commercial text messaging system by an agent or vender hired by Lyft." ECF No. 23 at ¶ 14. The

Court finds that the FAC sufficiently alleges actual authority as Bodie alleges "Lyft instructed its agent or vendor as to the content of the text messages and timing of the sending of the text messages[.]" *Id.* at ¶ 15; *see Thomas v. Taco Bell Corp.*, 879 F.Supp.2d 1079, 1085 (C.D. Cal. 2012) ("Agency means more than mere passive permission; it involves [a] request, instruction, or command."). Therefore, the Court DENIES Lyft's motion to dismiss as Bodie sufficiently alleged vicariously liability to this point.

Conclusion

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

All Citations

Slip Copy, 2019 WL 258050

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