2017 WL 1424637
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Jalen EPPS
v.
EARTH FARE, INC.

CV 16-08221 SJO (SSx)
|
Filed 02/27/2017

Attorneys and Law Firms

Scott J. Ferrell, Victoria C. Knowles, Pacific Trial Attorneys APC, Newport Beach, CA, for Jalen Epps.

David W. Kesselman, Kesselman Brantly Stockinger LLP, Manhattan Beach, CA, Jarod Michael Bona, Bona Law PC, La Jolla, CA, for Earth Fare, Inc.

PROCEEDINGS (in chambers): ORDER GRANTING WITHOUT LEAVE TO AMEND DEFENDANT'S MOTION TO DISMISS [Docket No. 24]

THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Defendant Earth Fare, Inc.'s ("Defendant") Motion to Dismiss ("Motion"), filed January 26, 2017, in response to Jalen Epps' ("Plaintiff") First Amended Complaint ("FAC"), filed January 12, 2017. Plaintiff filed an Opposition on February 6, 2017, to which Plaintiff replied ("Reply") on February 13, 2017. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for February 27, 2017. *See* Fed. R. Civ. P. 78(b). For the reasons stated below, the Court **GRANTS without leave to amend** Defendant's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff brings this action to redress the alleged "unlawful commercial practices employed by Defendant in negligently and/or willfully contacting Plaintiff" via text messages sent to Plaintiff's cell phone, thereby "invading Plaintiff's privacy" in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. sections 227, *et seq.* (FAC ¶ 1, ECF No. 21.) The action was filed on November 3, 2016, (Compl., ECF No. 1), and subsequently amended on January 12, 2017. In the FAC, Plaintiff alleges the following.

Sometime before October 21, 2016, Plaintiff, a Los Angeles resident, consented to receive automated commercial text messages from Defendant, a North Carolina corporation with its principal place of business in North Carolina. (FAC ¶¶ 1, 14.) The text messages were allegedly sent using an "automatic telephone dialing system" ("ATDS") as defined by 47 U.S.C. section 227(a)(1). (FAC ¶ 14.) Plaintiff alleges that she revoked her consent to receive these commercial text messages beginning on October 21, 2016 by responding with the text message: "I would appreciate [it] if we discontinue any further texts[.]" (FAC ¶ 15.) When Plaintiff continued to receive the automated text messages from Defendant, she revoked her consent four more times in October and November of 2016. (FAC ¶¶ 15-23.) Plaintiff alleges that despite these attempts to revoke consent, the messages from Defendant "continue unabated to this day." (FAC ¶ 1.) Plaintiff brings three causes of action against Defendant: (1) negligent violations of the TCPA; (2) knowing and/or willful violations of the TCPA; and (3) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.* (*See generally* FAC.) Plaintiff is seeking statutory damages in the amount of $500 for each violation of the TCPA, pursuant to 47 U.S.C. section 227(b)(3)(B); up to $1500 for each willful violation of the same, pursuant to 47 U.S.C. section 227(b)(3)(C); injunctive relief, pursuant to 47 U.S.C. section 227(b)(3)(A); and reasonable attorneys' fees and costs. (FAC Prayer for Relief.)

In the instant Motion, Defendant seeks dismissal of the FAC under Federal Rule of Civil Procedure ("Rule") 12(b)(1) for lack of standing and Rule 12(b)(6) for failure to state a claim.

II. DISCUSSION

A. Request for Judicial Notice

As a threshold matter, the Court discusses Defendant's and Plaintiff's respective Requests for Judicial Notice, (("Def.'s RJN"), ECF No. 24-3; ("Pl.'s RJN"), ECF No. 31-2), as well as the Declaration of Tim Miller in Support of Defendant's Motion and its accompanying exhibits. (Decl. of Tim Miller in Supp. Def.'s Mot. ("Miller Decl."), ECF No. 24-2.)

***2** Federal Rule of Evidence 201(b)(2) permits courts to take judicial notice of facts that are "not subject to reasonable dispute" in that they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). A court "may take judicial notice of court filings and other matters of public record." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741 n.6 (9th Cir. 2006); *In Re Icenhower*, 755 F.3d 1130, 1142 (9th Cir. 2014) (holding that "court filings and other matters of public record" are judicially noticeable).

Defendant requests judicial notice of the following documents: (1) Complaint in *Jalen Epps v. Office Depot, Inc.*, Case No. 2:16-cv-08223 DMG-JC (C.D. Cal.); (2) Complaint in *Jalen Epps v. Walgreen Co.*, Case No. 2:16-cv-08652 AB-AS (C.D. Cal.); (3) Complaint in *Jalen Epps v. Dunkin' Brands Group, Inc.*, Case No. 2:16-cv-9062 RSWL-AJW (C.D. Cal.); and (4) Log of all incoming and outgoing text messages between Defendant and Plaintiff. (Def.'s RJN Exs. 1-4.) Plaintiff objects to the complaints that Plaintiff filed in other actions ("Exhibits 1-3"), arguing that these complaints are not proper subject matter for judicial notice, that they are irrelevant to the claims at issue, and that Defendant is improperly transforming the Motion into a motion for summary judgment. (*See* Written Objections to Evidence in Supp. Opp'n ("Pl.'s Objections") 1-4, ECF No. 31-1.) Plaintiff is mistaken.

The Court takes judicial notice of Exhibits 1-3, which Defendant introduces solely for their existence and the similarity of the allegations and claims with those in this matter.[1] (Def.'s RJN 2.) These three complaints are public documents filed in the District Court for the Central District of California, which are proper matters for judicial notice. *See, e.g., In Re Icenhower*, 755 F.3d at 1142. Without considering the truth of their contents, the Court judicially notices the fact that, including the instant action, Plaintiff filed four TCPA lawsuits in district court between November 3, 2016 and December 6, 2016. (*See generally*, Defs.' RJN Exs. 1-3.) The complaints, including the instant one, each allege that: Plaintiff consented to receive automated commercial text messages from the respective defendants, the defendant sent these messages using an ATDS, and Plaintiff subsequently withdrew consent to receive further messages but continued to receive the messages.

[1] Plaintiff also objects to Exhibit B of the Miller Declaration, which contains the same three complaints that are the subject of Exhibits 1-3 of Defendant's RJN. For the same reasons as to Exhibits 1-3, as discussed herein, Plaintiff's objection to Exhibit B of the Miller Declaration is **OVERRULED**.

As for the remainder of the Miller Declaration that concerns Miller's personal knowledge of the text messaging system used by Defendant, Plaintiff's objections thereto are **SUSTAINED.** Plaintiff does not incorporate this information by reference in her FAC, nor does Miller's knowledge constitute "indisputable" facts because they are "either 'generally known' under Rule 201(b)(1) or 'capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned' under Rule 201(b)(2).' " *See United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003).

Next, the Court takes judicial notice of the text message log ("Exhibit 4"), to which Plaintiff does not object, (Pl.'s Objections 1), because Plaintiff cites excerpts from and refers to these messages in the FAC. (FAC ¶¶ 14, 16-34, 41, 53.) *See Cotto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (considering materials incorporated into the complaint on a motion to dismiss). The text message log shows that Plaintiff opted in to Defendant's messages on October 19, 2016; that since that date Defendant has sent Plaintiff 38 messages that included the instruction, "Text STOP to end, HELP for help + T&C's"; and that in response to each of Plaintiff's six "unrecognized command [s]" to discontinue further text messages, Defendant sent the response: "Our system was unable to recognize the command...." (*See generally* Def.'s RJN Ex. 4.) It is in the interest of justice for the Court to take judicial notice of the text message log because it is a full record of the messages—including Defendant's opt-out instructions, notably omitted from Plaintiff's FAC—that form the basis of Plaintiff's claims. *See, e.g., Coto*, 593 F.3d at 1038 (extending doctrine of incorporation by reference "where the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance"). The Court **OVERRULES** Plaintiff's Objections to Exhibits 1-3 and **GRANTS** Defendant's RJN in its entirety.

***3** As for Plaintiff's RJN, Plaintiff seeks judicial notice of Federal Communications Commission ("FCC") rulemaking on the TCPA. (Pl.'s RJN Exs. 1-6.) However,

judicial notice is unnecessary, as the Court defers to these administrative interpretations regardless of Plaintiff's request. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (holding that Congress delegated FCC with authority to implement the TCPA, *see* 47 U.S.C. § 227(b)(2)); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."). The Court **DENIES AS MOOT** Plaintiff's RJN.

The Court now turns to the two grounds for Defendant's Motion: dismissal under Rule 12(b)(1) for lack of standing, and Rule 12(b)(6) for failure to state a claim.

B. Rule 12(b)(1) Motion to Dismiss for Lack of Standing

Before turning to the merits of Plaintiff's TCPA claim, the Court first addresses whether Plaintiff has standing. To satisfy Article III's constitutional standing requirements, a plaintiff must show: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001). Defendant challenges that Plaintiff's interests are not within the "zone-of-interests" intended to be protected by the TCPA.[2] (Mot. 2; Def.'s Reply Br. in Supp. of Mot. ("Reply") 1 n.1, ECF No. 32.) A "statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark*, 134 S.Ct. at 1388 (citation and quotation marks omitted) (applying "traditional principles of statutory interpretation" to "determine the meaning of the congressionally enacted provision creating a cause of action").

2 Defendant clarifies that it no longer challenges Plaintiff's Article III standing based on a lack of an alleged cognizable injury-in-fact, in light of the Ninth Circuit's decision that issued three days after the Motion was filed, which held: "Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA 'need not allege any **additional** harm beyond the one Congress has identified.' " *Van Patten v. Vertical Fitness Grp., LLC*, No. CV 14-55980, 2017 WL 460663, at *4 (9th Cir. Jan. 30, 2017) (citation omitted) (emphasis in original).

Defendant characterizes its zone-of-interests challenge as one of "prudential standing." (Reply 4.) The U.S. Supreme Court recently held that " 'prudential standing' is a misnomer' as applied to the zone-of-interests analysis, which asks whether 'this particular class of persons ha [s] a right to sue under this substantive statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, —— U.S. ——, 134 S.Ct. 1377, 1388 (2014). Regardless of the misnomer, the Court discusses whether Plaintiff's interests "fall within the zone of interests protected by the law invoked." *Id.* (citation omitted).

Defendant argues that Plaintiff is a Los Angeles resident who "sought out and joined a mobile alert program from [Defendant]—even though [Defendant] does not sell products or services online and has no stores within 2,000 miles of Los Angeles"—and "chose to ignore repeated reminders that she could opt out at any time by simply texting 'STOP.' " (Mot. 10-12.) In addition, Plaintiff filed three "virtually identical copycat lawsuits" against other corporations. (Mot. 12.) Thus, Defendant argues that Plaintiff's "manufactured" lawsuit is beyond the zone-of-interests protected by the TCPA.

***4** Plaintiff has sufficiently alleged standing because she alleged an invasion of her "substantive right to be free from certain types of phone calls and texts absent consumer consent." *See Van Patten*, 2017 WL 460663, at *4. "The purpose and history of the TCPA indicate that Congress was trying to prohibit the use of ATDSs to communicate with others by telephone in a manner that would be an invasion of privacy." *Satterfield*, 569 F.3d at 954. As discussed in Section II.C.1.a., *infra*, Plaintiff's TCPA claim fails because she has not alleged that she effectively revoked consent. Nevertheless, the issue of standing is distinct from the merits of Plaintiff's claims. *See, e.g., Steel Co. v. Citizens for a Better Envm't*, 523 U.S. 83, 89 (1998) ("The absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case."). Notwithstanding Plaintiff's failure to state a claim under Rule 12(b)(6), discussed *infra*, Plaintiff's claim does not "clearly appear[ ] to be immaterial and made solely for purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous," as to lack standing. *See id.*

(citations omitted). Accordingly, the Court **DENIES** the Motion on the Rule 12(b)(1) ground.

C. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

In reviewing a motion to dismiss under Rule 12(b)(6), a court may consider the complaint, documents attached to the complaint, documents incorporated by reference in the complaint, and matters of judicial notice. *See Ritchie*, 342 F.3d at 908 (citation omitted). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A court accepts the plaintiff's factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *See Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000) (citation omitted). "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 672 F.3d 962, 969 (9th Cir. 2009)

Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To plead sufficiently, a plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "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." *Iqbal*, 556 U.S. at 678 (citation omitted).

1. Plaintiff Fails to State a TCPA Claim

The elements of a TCPA claim are: "(1) the defendant called a cellular telephone; (2) using an automatic telephone dialing system; (3) **without the recipient's prior express consent**." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (citing 47 U.S.C. § 227(b)(1)) (emphasis added). A text message is a "call" within the meaning of the TCPA. *Satterfield*, 569 F.3d at 950. Because the TCPA exempts calls (or text messages) made with the prior express consent of the party, and Plaintiff undisputedly consented to receiving these text messages, (FAC ¶ 14; Def.'s RJN Ex. 4 31 [3]), the determination of TCPA liability turns on whether Plaintiff, in fact, effectively revoked consent and continued to receive text messages. [4] As discussed below, Plaintiff did not successfully revoke consent; even if she did, Plaintiff fails to plausibly allege that Defendant's messages were sent using an ATDS.

3 For purposes of this Order, page citations refer to the pagination of the primary docket number, not the particular exhibit. For example, "Def.'s RJN Ex. 4 31" refers to page 31 of 34 in Defendant's RJN.

4 Plaintiff's consent to receiving the text messages distinguishes this action from *Keim v. ADF Midatlantic, LLC*, No. CV 12-80577, 2015 WL 11713593 (S.D. Fla. Nov. 10, 2015), on which Plaintiff relies. (Opp'n 15, ECF No. 31.) *See Keim*, 2015 WL 11713593, at *5 (finding that plaintiffs who had their phone numbers given to, and then utilized by, commercial defendants without their consent sufficiently pled the use of an ATDS).

a. Plaintiff Fails to Plausibly Allege That Her Revocation Was Effective Because Her Method of Revoking Consent Was Not Reasonable

***5** The FCC rules "require[ ] **callers give consumers a direct opt-out mechanism such as** ... **a reply of 'STOP' for text messages**. The common thread linking these cases is that consumers must be able to respond to an unwanted call ... using either a **reasonable oral method or a reasonable method in writing** ... to prevent future calls." *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7996 ¶ 64 (July 10, 2015) (emphases added); *see also Van Patten*, 2017 WL 460663, at *8-9 (holding that TCPA permits consumers to revoke prior express consent to be contacted by telephone autodialing systems); *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830 1837 ¶ 18 (Feb. 15, 2012) (requiring telemarketers to implement an "automated, interactive opt-out" method for telemarketing robocalls [5]).

5 The Court finds little merit in Plaintiff's argument that the 2012 FCC Ruling and Order's requirement of an automated, interactive opt-out mechanism is

> limited to "autodialed or prerecorded telemarketing calls," and not automated text messages. (Opp'n 19-20, ECF No. 31.) Automated telephone calls and text messages are both "calls" under the TCPA. Furthermore, the Ninth Circuit held, without distinguishing between telephone calls and text messages, that the TCPA permits consumers to revoke their prior express consent. *See Van Patten*, 2017 WL 460663, at *9.

"When assessing whether any particular means of revocation used by a consumer was reasonable," the FCC ruled that the relevant inquiry is:

> the **totality of the facts and circumstances** surrounding that specific situation, including, for example, whether the consumer had a **reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance**, and whether the caller could have implemented mechanisms to effectuate a requested revocation **without incurring undue burdens**.

30 FCC Rcd. 7961 ¶ 64 n.233 (emphases added). Here, after consenting to Defendant's text messages on October 19, 2016, Plaintiff alleges that she revoked consent via the following five text messages sent over the course of two months:

> (1) "I would appreciate [it] if we discontinue any further texts;" (2) "Thank you but I would like the text messages to stop can we make this happen;" (3) "I'm simply asking for texts to stop. I would appreciate that. Thanks;" (4) "As I requested earlier I asked that the text would stop, I would greatly appreciate it. Thank you;" and (5) "I'm simply asking for texts to stop. I would appreciate that. Thanks."

(FAC ¶¶ 15-22.)

Defendant avers that the complete text message log, paired with Plaintiff's duplicate complaints filed in other courts, evidence that this is a "manufactured" lawsuit. (Mot. 1.) Defendant believes that Plaintiff "purposely ignored the use of the STOP Command" and chose instead to respond with long sentences—ones she knew the automated system would not understand—in order to bring this suit. (*See* Mot. 4.)

The totality of the plausibly alleged facts, even when viewed in Plaintiff's favor, militate against finding that Plaintiff's revocation method was reasonable. *See Moss*, 672 F.3d at 969 ("[T]he non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."). Without explanation, Plaintiff ignored Defendant's clear instruction to stop the messages. Furthermore, although Plaintiff is correct that Defendant "may not abridge [Plaintiff's] right to revoke consent using any reasonable method," (FAC ¶ 10) (citing 30 FCC Rcd. at 7996 ¶ 64), and "may not deliberately design systems or operations in ways that make it difficult or impossible to effectuate revocations," 30 FCC Rcd. 7961 ¶ 64 n.233, Plaintiff has not plausibly alleged any such burden here. In fact, heeding Defendant's opt-out instruction would not have plausibly been more burdensome on Plaintiff than sending verbose requests to terminate the messages.[6] In sum, Plaintiff has not plausibly alleged that her revocation was effective.

[6] The FCC ruled that, with respect to package delivery text notifications, which "must include the ability for the recipient to opt out by replying 'STOP,' " these notifications "are the types of normal, expected communications the TCPA was not designed to hinder." 30 FCC Rcd 7961, 7996 ¶ 64 n.235 (citing *Matter of Cargo Airline Ass'n Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd 3432, 3438 ¶ 18 (Mar. 27, 2014)).

b. Plaintiff Fails to Plausibly Plead that Defendant Used an ATDS

***6** Even if Plaintiff did effectively revoke consent, her TCPA claim nevertheless fails because she fails to plausibly plead the second element—that Defendant used an ATDS to send Plaintiff messages. *See* 47 U.S.C. § 227(b)(1). An ATDS is defined in the statute 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." 47 U.S.C. § 227(a)(1).

Plaintiff alleges, without more, that these messages were sent using an ATDS, (FAC ¶ 14), and fruitlessly dedicates

eight pages to the definition of an ATDS.[7] (Opp'n 6-15, ECF No. 31.) Courts in the Ninth Circuit have found that text messages sent in response to a "voluntary release of a user's phone number" do not support a plausible inference that an ATDS was used. *See Weisberg v. Stripe, Inc.*, No. CV 16-00584 JST, 2016 WL 3971296, at *3 (N.D. Cal. July 25, 2016) (text messages were sent after plaintiff "**elected** to save his phone number on a participating website," which suggests "direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS") (emphasis added); *see also Duguid v. Facebook, Inc.*, No. CV 15-00985 JST, 2016 WL 1169365, *5 (N.D. Cal. Mar. 24, 2016) (because Facebook users "must add their mobile numbers to their accounts in order to receive login notifications by text message," the text messages are "**targeted** to specific phone numbers and are triggered by attempts to log in to Facebook accounts associated with those phone numbers") (emphasis added). Similarly, here, Plaintiff's voluntary opt-in to the text messages is inconsistent with her allegation that an ATDS was used.

7 The key question for what constitutes an ATDS is whether a system has the **capacity** to operate as such. *See Satterfield*, 569 F.3d at 951. To that end, Defendant's argument—that because "[Plaintiff's] mobile phone number was not stored or produced randomly or sequentially," it means that the system is not an ATDS, (*see* Mot. 1, 4)—is unpersuasive.

In sum, Plaintiff's TCPA claim fails because she fails to plausibly allege that (1) she effectively revoked consent and, alternatively, (2) Defendant used an ATDS. Although leave to amend a complaint should be freely granted as a general matter, Fed. R. Civ. P. 15(a), leave is not warranted here because "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Even if Plaintiff could allege more facts to plausibly show that Defendant used an ATDS, amendment could not cure the primary deficiency: Plaintiff's revocation method was not reasonable, as indicated by the text message log, to which Plaintiff raised no evidentiary objections. Thus, the TCPA claim is **DISMISSED without leave to amend**.

2. Without a TCPA Claim, Plaintiff's UCL Claim Also Fails

In California, the unfair competition law ("UCL") prohibits "any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue or misleading advertising...." Cal. Bus. & Prof. Code § 17200. Because Plaintiff's predicate TCPA claim fails, so must her UCL claim. *See Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000) ("By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.") (citation omitted). Plaintiff's UCL claim is **DISMISSED without leave to amend**.

III. RULING

***7** The Court **GRANTS** Defendant's Motion on the Rule 12(b)(6) ground. Plaintiff's claims are **DISMISSED without leave to amend**. This case shall close.

IT IS SO ORDERED.

All Citations

Slip Copy, 2017 WL 1424637

End of Document