UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 19-699 JVS (ADSx)	Date	August 27, 2019
Title	June Abe v. Hyundai Motor America, Inc.		

Present: The Honorable	**James V. Selna, US District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Regarding Defendant's Motion to Dismiss**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Hyundai Motor America, Inc. ("Hyundai") moved to dismiss the First Amended Complaint ("FAC") filed by Plaintiff June Abe ("Abe"). (Docket No. 22.) Abe opposed. (Docket No. 25.) Hyundai replied. (Docket No. 27.)

For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

The following facts are alleged in Abe's FAC. On or about December 25, 2018, Abe registered for a test drive of one of Hyundai's vehicles, and to receive a coupon redeemable for a $50 "reward card" in connection with Hyundai's "Hyundai National Test Drive Offer" program. (FAC ¶ 22.) A box on the web-based form Abe filled out stated, "I consent to receiving telemarketing calls or texts at this number using an automatic telephone dialing system by, or on behalf of, Hyundai and its authorized dealers." (Id. ¶ 23.) Abe did not check this box, nor did she input her phone number. (Id. ¶ 31.) Abe received a coupon issued by "Hyundai Motor America" via "HyundaiUSA.com," which stated that it may be "present[ed] . . . at Any Participating Hyundai Dealer to receive your FREE $50 Visa Prepaid Card!" (Id. ¶ 34.) The coupon included "Dealer Redemption Instructions." (Id. ¶ 32.)

In or around early January 2019, Abe visited the Russell Westbrook Hyundai of Garden Grove car dealership (the "Garden Grove Dealership") to test drive one of Hyundai 's automobiles. (Id. ¶ 36.)

Shortly after visiting the Garden Grove Dealership, Abe received multiple text messages. (Id. ¶ 37.) The first text message included the instructions "Reply YES to confirm, or reply STOP at anytime to end." (Id. ¶ 38.) A subsequent message read: "I hope all is well. It's John again from GG HYUNDAI. How is everything going with your car shopping? Thanks, hope you are doing well:)" (Id. ¶ 39.)

Abe alleges that the unsolicited text messages transmitted to her cellular device were invasive and intruded upon Plaintiff's seclusion upon receipt. (Id. ¶ 41.) As a result, Abe became distracted and aggravated. (Id.) Abe alleges that Hyundai directed, encouraged, and authorized its dealerships, including the Garden Grove Dealership, to send text messages promoting the sale of Hyundai's automobiles to Abe and other members of the proposed Class, pursuant to a common marketing scheme. (Id. ¶ 42.) Abe alleges that Hyundai or its agent(s), including the Garden Grove Dealership, transmitted these text messages in an automated fashion and without human intervention, from a telephone number used to message consumers en masse. (Id. ¶¶ 47-48.)

Abe brought this action on behalf of herself and others similarly situated, as a class action pursuant to Federal Rule of Civil Procedure 23, based on Hyundai's alleged violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. ("TCPA") (Id. ¶ 51.) The proposed class is defined as all persons to whom "Defendant or an affiliate, subsidiary, or agent of Defendant (including without limitation any of its dealerships and/or AutoHook, Urban Science, or Outsell) delivered one or more text message(s) promoting Defendant's goods or services pursuant to a common marketing campaign maintained by Defendant or by an affiliate, subsidiary, or agent of Defendant on Defendant's behalf, without having obtained such person's prior express written consent to be sent such text message(s)." (Id.)

Hyundai 's Request for Judicial Notice

Hyundai filed a request for judicial notice ("RJN") in support of its Motion to Dismiss Abe's FAC, pursuant to Federal Rules of Evidence 201. (Docket No. 23.) Hyundai's attached Exhibit allegedly includes the full exchange between "John" from "GGHYUNDAI" and Abe. (Docket No. 23-1.)

The first text in this exchange read "You came in today for the Elantra. Thank you for coming in. Please type yes, so that we can communicate via text. Please let me know

how I can help you further? Arigato Gozaimasu:) Reply YES to confirm, or reply STOP at anytime to end." Abe responded "Yes." The next text read, "Hi Jun [sic]. Did you get a chance to go [sic] your car appraised? I'm here to get you a great deal on the Elantra you drove yesterday. Have a wonderful day :) John at GG HYUNDAI." Abe responded, "Not yet. I am in Torrance." Abe received two additional messages. The first read, "Hi Jun [sic]. Just wondering if there is anything else I can do to help you? John at GG HYUNDAI for a great deal on an Elantra." The second read, "I hope all is well. It's John again from GG HYUNDAI. How is everything going with your car shopping? Thanks. Hope you are doing well:)."

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "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" if the plaintiff pleads facts that "allow[] 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).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" Id. at 678-80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

A. Hyundai 's Request for Judicial Notice

Because factual challenges have no bearing under Rule 12(b)(6), generally, the Court may not consider material beyond the pleadings in ruling on a motion to dismiss.

Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds, Galbraith v. Cnty. of Santa Clara, 307 F. 3d 1119, 1125 (9th Cir. 2002). There are, however, three exceptions to this rule that do not demand converting the motion to dismiss into one for summary judgment. Lee, 250 F.3d at 688. First, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record if the facts are not subject to reasonable dispute. Id. at 688-89; see Fed. R. Evid. 201(b). Second, the Court also may take judicial notice of documents attached to or "properly submitted as part of the complaint." Lee, 250 F.3d at 688. Third, if the documents are "not physically attached to the complaint," they may still be considered if the documents' "authenticity . . . is not contested" and the documents are necessarily relied upon by the complaint. Id.; United States v. Corinthian Colleges, 655 F.3d 984, 998–99 (9th Cir. 2011).

Abe does not dispute the authenticity of this full exchange, nor does Abe challenge Hyundai's request. Thus, the Court grants Hyundai's request for judicial notice of the full text message exchange with Plaintiff, as contained in Docket No. 23-1, as the FAC necessarily relies upon its contents.

B. Motion to Dismiss FAC

The TCPA was enacted in order to protect the privacy interests of individuals by placing restrictions on unsolicited telephone calls made with automated telephone dialing systems. Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009). The Act, in relevant part, provides:

> "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system . . . (iii) to any telephone number assigned to a . . . cellular telephone service . . . or any service for which the called party is charged for the call[.]"

47 U.S.C. § 227(b)(1). A text message is a "call" within the meaning of the TCPA. Satterfield, 569 F.3d at 954. The statutory definition of "automatic telephone dialing

system" (an "ATDS") "means equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers." 47 U.S.C. § 227(a)(1).

A valid TCPA claim requires a plaintiff to allege (1) the defendant called a cellular telephone number; (2) using an automated telephone dialing system ("ATDS"); and (3) without the recipient's prior express consent. Meyer v. Portfolio Recovery Assocs., 707 F.3d 1036, 1043 (9th Cir. 2012).

Hyundai argues Abe fails to state a claim under the TCPA because Abe: (1) fails to allege Hyundai called her, or has an agency relationship with the person or entity that made the call; and (2) fails to allege that the texts were sent with an ATDS. (Mot'n to Dismiss at 4, 7.) The Court addresses each of these arguments in turn.

1. **Abe's Allegation that Hyundai "Called" Her**

To make a call under the TCPA, the defendant must directly make the call, or have an agency relationship with the party who made the call. Gomez v. Campbell-Ewald, Co., 768 F.3d 871, 877-79 (9th Cir. 2014) (discussing the circumstances when liability can attach under the TCPA). A defendant may be vicariously liable for a TCPA violation where an agency relationship is established. Id. A person or entity "initiates" a call "when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities . . . that might merely have some role, however minor, in the causal chain that results in the making of a telephone call." DISH Network, LLC, 28 FCC Rcd. 6574, 6583 (2013). Courts are instructed to look to "the totality of the facts and circumstances surrounding the placing of a particular call" to determine "who took the steps necessary to physically place the call" and "whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA." Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7980 (2015) ("2015 FCC Order").

Hyundai argues that Abe presents no factual allegations to suggest that it sent the text messages directly to her, or that the Garden Grove Dealership was acting as its agent. (Mot'n to Dismiss at 4-5.) Further, Hyundai argues that it does not exercise control over the Garden Grove Dealership's communications with customers, because the National Test Drive Program and affiliated technology platforms are voluntary, these programs do

not use an ATDS to call or text potential customers, and Hyundai does not require potential customers who sign up for the Test Drive Program to provide their phone number. (Id. at 5-6.) Thus, Hyundai argues, it cannot be deemed to "uniformly direct, encourage, and authorize" dealerships, including the Garden Grove Dealership, to send text messages to potential customers, or dictate the method for sending text messages to customers who did not provide their phone number when signing up for the program coupon ahead of their visit to the dealership. (Id. at 6.)

Abe responds that a fact-specific analysis of "the technology and functionality of Hyundai's dialing technology used to send text messages to Plaintiff" is required. (Opp. at 7.) Abe argues it is "more than plausible" that Hyundai sent these messages, pursuant to its National Test Drive Program, because the registration form Abe filled out noted that participating customers would receive telemarketing calls or texts "using an automatic dialing system, by, or on behalf of, Hyundai." (Id. at 8.) Further, Abe argues that Hyundai "controls and automates the creation of the content in the text messages sent as part of its marketing campaign," using software programs that have the ability to mimic the language a real individual would use. (Id.) Abe also alleges that an agent of Hyundai wrote her phone number on the coupon she brought into the dealership, which lends support to Plaintiff's allegation that her phone number was ultimately added to Hyundai's national marketing software databases. (Id. at 10-11.)

Abe alleged sufficient facts giving rise to a plausible claim that Hyundai directly sent Abe the text messages at issue or, in the alternative, that the Garden Grove Dealership was acting as Plaintiff's agent when these messages were sent. Although Hyundai did not require potential customers who signed up for the Test Drive Program to provide their phone number, and Abe did not initially provide her phone number to Hyundai, Abe visited the Garden Grove Dealership pursuant to the Program. There, a dealership employee wrote down her phone number, which Hyundai plausibly accessed to contact her. Looking to the "totality of the facts and circumstances" surrounding the receipt of these text messages, it is plausible that after Plaintiff's phone number was recorded during her visit to the Garden Grove Dealership, her number was used pursuant to one of Hyundai's marketing mechanisms to follow up with her about her visit. See 2015 FCC Order at 7980. Hyundai plausibly could have been "so involved in placing the call as to be deemed to have initiated it." Id.

Alternatively, it is plausible, as Abe argues, that Hyundai prescribes the method

and means by which its dealerships send follow-up messages to customers drawn in by the National Test Drive Program, and thus, had an agency relationship with the person or entity that sent Abe these messages. Hyundai's contention that Abe failed to establish that it had an agency relationship with the dealership is unpersuasive. Because the FAC alleges that the messages were a part of an overall campaign to sell Hyundai vehicles, it reasonable at this stage of the proceedings to infer that if the messages were not directly sent by Hyundai, they were made by persons or entities, acting as Hyundai's agents, to send the messages on its behalf. See Gomez, 768 F.3d at 877-79; see also Keifer v. HOSOPO Corporation, 2018 WL 5295011, at *4 (S.D. Cal. 2018).

Thus, Abe has alleged sufficient facts to state a plausible claim that Hyundai, or a person or entity, as its agent, "called" her.

2. Abe's Allegation that Hyundai Sent the Texts Using an ATDS

The TCPA defines an automated telephone dialing system as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." 47 U.S.C. § 227(a)(1). But, "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers; it need only have the capacity to do it." Satterfield, 569 F.3d at 951.

The statutory definition of an ATDS "is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." Marks v. Crunch San Diego, 904 F.3d 1041, 1052 (9th Cir. 2018). Thus, an ATDS "means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers." Id. A device may qualify as an ATDS even with "human intervention of some sort," including "turning on the machine or initiating its functions." Id.

Hyundai argues that Abe's allegations suggest the text messages she received were "anything but random or impersonal," but rather were the result of her specific interaction at the Garden Grove Dealership. (Mot'n to Dismiss at 8.) Hyundai contends that it is implausible it or the dealership, as its purported agent, could use an ATDS to send these texts to Abe, en masse: the texts mentioned Abe's name (albeit spelled incorrectly, as "Jun," rather than "June), the car Abe allegedly test drove (an Elantra), and the Japanese

phrase for "Thank you." (Id. at 9.) Hyundai argues that "Plaintiff cites to nothing to suggest that the technology [Defendant allegedly used to send the messages] can individualize a text to the point where it includes information that would only be known by someone who actually spoke to and interacted with Plaintiff." (Reply at 7.)

Abe rejects Hyundai's contention that the content of the text messages is relevant to the ATDS analysis, at least on a motion to dismiss. (Opp. at 23.) The text messages, Abe argues, were sent using software that made "the message appear as though it was sent from a real human being." (Opp. at 39.) Further, "the messages contained pro forma instructional commands for confirming or opting-out of further messages, thus indicating the use of an autodialer." (Opp. at 47.)

Abe has alleged facts sufficient to state a plausible claim that Hyundai used an ATDS to send the text messages at issue. Abe alleged that the inclusion of automated instructions "was clear indicia of Defendant's use of an 'automatic telephone dialing system' in the transmission of the message." (FAC ¶ 38.) Moreover, Abe alleges that Hyundai used technology "so as to make the message appear as though it was sent from a real human being." (Id. ¶ 39.) Abe points out that Hyundai's National Test Drive Program asks for consent to send messages "using an automatic telephone dialing system by, or on behalf of, Hyundai and its authorized dealers." (Id. ¶ 43.) Finally, Abe alleges that Hyundai uses hardware and software programs that "have the capacity to store, produce, and dial random or sequential numbers, or to receive and store lists of telephone numbers and to then dial such numbers, *en masse*, in an automated fashion and without human intervention." (Id. ¶ 47.) These allegations plausibly fall under the definition of an ATDS, by raising the inference that the technology Hyundai uses "has the capacity . . . to store numbers to be called . . . and to dial such numbers." See Marks, 904 F.3d at 1052.

Hyundai's reliance on specific details of the exchange with Abe is irrelevant. Abe's allegation that the technology Hyundai used may automate "even the aspects of the messages that appear personalized," supports an inference that the messages were sent using an ATDS. See Duguid v. Facebook, Inc. 926 F.3d 1146, 1151 (9th Cir. 2019). This allegation, "accepted as true and construed in the light most favorable" to Abe, is sufficient at this stage of the proceedings. See id.

IV. CONCLUSION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 19-699 JVS (ADSx) Date August 27, 2019

Title June Abe v. Hyundai Motor America, Inc.

For the foregoing reasons, the Court **DENIES** the motion.

IT IS SO ORDERED.

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