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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:24-CV-00619-DOC-ADSx Date: August 12, 2024

Title: DUSTIN ANDERSEN V. NEXA MORTGAGE, LLC.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Karlen Dubon	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [17]

Before the Court is Defendant Nexa Mortgage LLC's ("Defendant" or "Nexa Mortgage") Motion to Dismiss ("Motion" or "Mot.") (dkt. 17). The Court finds this matter suitable for resolution without oral argument. *See* Fed R. Civ. P. 78(b); L.R. 7-15. For the reasons explained below, the Court GRANTS the Motion.

I. Background

A. Facts

The following facts are taken from Plaintiff's First Amended Complaint ("FAC") (dkt. 15). At the present stage of the litigation, the Court accepts these facts as true. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

In 2019, Plaintiff registered his cell phone number on the National Do-Not-Call Registry. FAC ¶ 10. Despite this registration, Defendant contacted him four times during a three-day span in March 2024. *Id.* ¶¶ 14-20.

The first three communications were text messages. The first message described Nexa Mortgage as America's largest mortgage broker and advertised that Nexa was now offering "Mortgage Banking to select Loan Officers and Branch Managers." *Id.* ¶ 14. The benefit of becoming a "Mortgage Banker," the text message relayed, was that Plaintiff could "offer better correspondent pricing and earn higher commissions" without having to disclose his compensation. *Id.* In exchange for an administrative fee to Nexa, Plaintiff could keep 100% of the commission, partner with top investors, and receive assistance from Defendant to process funding documents. *Id.*

The second text message, received that same day, displayed what Nexa's "government FHA loan pricing" was and said that it was "about the same" as "VA pricing." *Id.* ¶ 16.

The third and final text message stated:

> "NEXA Mortgage has made Mortgage Banking as easy as brokering without the broker fee restrictions. Brokers must choose between borrower and lender paid compensation and are capped at 275 bps. Lenders are not capped and can charge as much as they want without having to disclose their compensation. You choose the investor and the amount you want to make on each loan, and you keep 100% of the commission.
>
> Please reply 'Yes' for more information or 'Stop' to be removed."

Id. ¶ 18 (formatting adjusted).

The day after receiving the final text message, Defendant called Plaintiff and left him a voicemail. The voice message was from Nexa's "Recruiting Manager," and its purpose was to "follow up on the text messages" Plaintiff had received and to "give [Plaintiff] the password to our pricing engine" so he could "log in and compare our rates whenever [he'd] like." *Id.* ¶ 20.

Based on these four communications over three days, Plaintiff filed a putative class action lawsuit that alleges two violations of the Telephone Consumer Protection Act ("TCPA"). If successful, Plaintiff would be entitled to between $2,000 and $6,000, depending on whether Defendant's TCPA violations were willful. *See id.* ¶¶ 48, 50.

B. Procedural History

Plaintiff filed this lawsuit on March 22, 2024. Defendant first moved to dismiss the original complaint on June 10, 2024. First Motion to Dismiss (dkt. 11). Instead of opposing the motion, Plaintiff filed a First Amended Complaint and the Court accordingly denied the motion to dismiss the complaint as moot (dkt. 16).

Defendant then moved to dismiss the First Amended Complaint on July 8, 2024. Plaintiff filed their opposition ("Opp'n") (dkt. 19) on August 5, 2024.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, this court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

When a court dismisses a claim, it must decide whether to grant leave to amend. leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made). Dismissal without leave to amend is appropriate only when a court is satisfied that further amendment would be futile. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

III. Discussion

The FAC does not specify which provisions of the TCPA that Plaintiff alleges that Defendant violated. However, from the parties' papers, it appears that Plaintiff is pursuing three different theories of TCPA liability. The Court considers each theory in turn.

A. Telephone Solicitation Claim

The TCPA and its implementing regulations prohibit initiating more than one "telephone solicitation" to the same person within a twelve-month period. 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2).

Defendant argues that Plaintiff has not stated a claim under this provision of the TCPA because the four communications were not "solicitations." Defendant notes that courts "'have interpreted telephone solicitations….to mean calls encouraging a purchase by the consumer or user, rather than by the caller.'" Mot. at 10 (quoting *Hulsey v. Peddle, LLC*, 2017 WL 8180583, at *3 (C.D. Cal. Oct. 23, 2017). Defendant argues that the communications at issue fall outside that statutory definition, because they did not "encourage Plaintiff to buy anything from NEXA" *Id.* Instead, they were for "recruitment purposes." *Id.*

Plaintiff responds that the communications had a dual purpose. Plaintiff concedes that the communications were partly intended to recruit Plaintiff to work for Nexa, but, Plaintiff argues, they also included marketing information regarding Nexa's mortgage banking services. Opp'n at 4.

The Court agrees with Defendant that the communications were not "solicitations" within the meaning of the TCPA. A solicitation is a "telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services." 47 C.F.R. § 64.1200(f)(15). To determine whether a communication's purpose fits this statutory definition, courts must analyze the communication's content and context, along with applying a "measure of common sense." *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012). A plaintiff's characterization of a call as a "solicitation" does not make it so. *See Eggleston v. Reward Zone USA LLC*, 2022 WL 886094, at *7 (C.D. Cal. Jan. 28, 2022).

Ninth Circuit district courts generally find that communications that encourage the plaintiff to enter an employment, independent contractor, or other similar relationship with the defendant are not "solicitations," as the TCPA defines the term. For example, in *Friedman v. Torchmark Corp.*, the defendant sent messages to the plaintiff inviting them to attend a recruiting webinar to learn about defendant's products to potentially sell them to others. 2013 WL 4102201, at * 4 (S.D. Cal. Aug. 13, 2013). The court, at the motion to dismiss stage, held that this message was not a "solicitation," because it was intended to "inform [p]laintiff of the opportunity to enter into an independent contractor position with [d]efendant, and not offer goods or services for sale." *Id.* at * 6; *see also Orea v. Nielsen Audio, Inc.*, 2015 WL 1885936, at *2-4 (N.D. Cal. Apr. 24, 2015) ("[T]elephone solicitations are calls intending to encourage a purchase by the listener, not the caller. Calls asking to purchase the listener's labor, blood, or other service are not telephone solicitations.").

Here too, the primary purpose of the challenged communications was to encourage Plaintiff to enter into an independent contractor relationship with Defendant. The text messages and calls were initiated by a man who described himself as a "recruiting manager with" Defendant. FAC ¶ 20. The content of the messages also illustrate that they were not recruitments, not solicitations. The messages described the benefits of working for Nexa as a mortgage banker. *See id.* ¶ 14 ("As a Mortgage Banker, you can offer better correspondent pricing and earn higher commissions by charging what YOU want on the front and back end without having to disclose your compensation."). They also detailed how Plaintiff would be compensated for his services. *See id.* ¶ 19 ("[Y]ou keep 100% of the commission."). In other words, the text messages describe the loan products that Plaintiff would sell to others, and how he would be compensated for those sales. Thus, like the communications in *Friedman*, the purpose of the text messages was to recruit Plaintiff to work for Defendant, not to encourage Plaintiff to purchase goods from Defendant.

Plaintiff resists this conclusion by pointing out that Defendant charges an administrative fee for its services. Opp'n at 4; FAC ¶ 19. Because Defendant charges a fee for the described services, Plaintiff argues that Nexa was selling him a product. *Id.* However, the text messages stated that Plaintiff could pass the administrative fee along to potential customers. *See* FAC ¶ 14. The ability to include the administrative fee in the price Plaintiff would charge others only reinforces the conclusion that the communications sought to recruit Plaintiff to work for Defendant.

Therefore, Defendant's motion to dismiss Plaintiff's telephone solicitation claim is granted.

B. Automated Telephone Dialing System Claim

A necessary element of Plaintiff's next theory of liability is that Defendant used an "automatic telephone dialing system" when contacting Plaintiff. *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). An automated telephone dialing system ("ATDS") is a device that "generate[s] and dial[s] random or sequential telephone numbers." *Borden v. eFinancial, LLC*, 53 F.4th 1230, 1231 (9th Cir. 2022); *see also Facebook, Inc. v. Duguid*, 592 U.S. 395, 398 (2021). At the pleading stage, the plaintiff need not identify the precise technology that a defendant uses. However, they must plead sufficient facts to allow the court to reasonably infer an ATDS was used; simply parroting the statutory language does not suffice. *Flores v. Adir Int'l, LLC*, 685 F. App'x 533, 533 (9th Cir. 2017); *see also Twombly*, 550 U.S. at 555.

Here, the FAC only conclusorily alleges that Plaintiff used an ATDS; it includes no facts to support this conclusion. To the contrary, the factual allegations contained in the FAC cut against an inference that an ATDS was used. Critically, the first text included Plaintiff's name. FAC ¶ 14. The personalized nature of this message weighs against an inference that a random autodialer was used. *See Suttles v. Facebook, Inc.*, 461 F. Supp. 3d 479, 487 (W.D. Tex. 2020); *Jovanovic v. SRP Invs. LLC*, 2021 WL 4198163, at *4 (D. Ariz. Sept. 15, 2021).

Therefore, Defendant's motion to dismiss Plaintiff's ATDS claim is granted.

C. Prerecorded Call Claim

Plaintiff also alleges that the one phone call that he received from Defendant violates the TCPA because the call was "prerecorded." Defendant moves to dismiss, arguing that Plaintiff has not pled facts to indicate that the voicemail was prerecorded, as opposed to left by a real, live person.

Subject to exceptions not relevant here, the TCPA forbids a person from making "any call…using…an artificial or prerecorded voice[.]" 47 U.S.C. § 227(b)(1)(A)(iii); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2344 (2020) ("[T]he TCPA prohibit[s] almost all robocalls to cell phones."). To survive a motion to dismiss, a plaintiff must include factual allegations indicating that a prerecorded voice, as opposed

to that of a real, live person, was used. *Forney v. Hair Club for Men Ltd., Inc.*, 2017 WL 4685549, at *2 (C.D. Cal. June 26, 2017) (a plaintiff must do more than plead statutory language from the TCPA).

Here, Plaintiff alleges that there was a "long pause" before the speaker began talking and that there were several delays throughout the voicemail. FAC ¶ 19. Allegations of pauses alone, however, do not suffice to show that the message was prerecorded. *See, e.g.*, *Laccinole v. Gulf Coast Collection Bureau, Inc.*, 2023 WL 157719, at *3 (D.R.I. Jan. 11, 2023) (holding the plaintiff's "general allegations that [the defendant] used a prerecorded message, that he detected a pause before the caller spoke when he answered the phone, and heard clicks over the line are not enough to make out a TCPA claim even taking the allegations in [plaintiff's] favor at this stage of the case"); *Moffet v. Everglades Coll., Inc.*, 2024 WL 1657195, at *3 (M.D. Fla. Mar. 4, 2024) (ruling that the alleged presence of a "long pause" on a call "does not necessarily describe the allegedly prerecorded voice but rather the lack of a voice at all").

Therefore, Defendant's motion to dismiss Plaintiff's prerecorded call claim is granted.

D. Whether to Grant Leave to Amend

In response to Defendant's first motion to dismiss, Plaintiff amended his complaint to address the infirmities at issue in this motion, but he has still failed to state to claim. Thus, the Court finds that any further amendment would be futile and that dismissal with prejudice is appropriate. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

IV. Disposition

For the reasons explained above, the Court **GRANTS** Defendant's motion to dismiss. The First Amended Complaint is **DISMISSED WITH PREJUDICE**.

All future dates in this matter are **VACATED**.

The Clerk shall serve this minute order on the parties.