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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Djordje Jovanovic,

10 Plaintiff,

11 v.

12 SRP Investments LLC, *et al.*,

13 Defendants.
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No. CV-21-00393-PHX-JJT

ORDER

15 At issue is Defendants SRP Investments, LLC and Stephanie Rose Polydoroff's
16 Motion to Dismiss (Doc. 17, Mot.), to which Plaintiff Djordje Jovanovic filed a Response
17 (Doc. 18, Resp.) and Defendants filed a Reply (Doc. 19, Reply).

18 **I. BACKGROUND**

19 On March 8, 2021, Plaintiff filed his original Complaint, bringing a putative class
20 action, alleging Defendants violated the Telephone Consumer Protection Act ("TCPA")
21 47 U.S.C. § 227. (Doc. 1, Compl.) Defendants thereafter filed their first Motion to Dismiss
22 the Complaint (Doc. 11), citing the precise infirmity at issue in the instant motion—the
23 insufficiency of Plaintiff's allegations that Defendants used an automated telephonic
24 dialing system (ATDS) to text him. In response and pursuant to Rule 15(a)(1)(B), Plaintiff
25 timely filed an Amended Complaint on May 6, 2021. (Doc. 14, Am. Compl.) As Plaintiff
26 notes in his Notice of Filing First Amended Complaint (Doc. 16 at 1), the sole changes to
27 the Amended Complaint—now the operative Complaint—were additional allegations
28 regarding Defendants' use of an ATDS. Defendants thereafter filed the instant second

1 Motion to Dismiss, arguing that the Amended Complaint fails to remedy the deficiency in
2 allegations regarding use of an ATDS.

3 Plaintiff alleges that on January 19, 2021, he received an unsolicited text message
4 on his cellular phone from Defendants, sent from the telephone number (408) 613-4013.
5 (Am. Compl. ¶¶ 17-18.) The message read, “How are you Djordje? Sorry to catch you off
6 guard but would you be interested in liquidating any real estate here in Az? Thanks – Kat
7 reply STOP to end.” (Am. Compl. ¶ 19.) Plaintiff alleges Defendants sent the text message
8 via an automatic telephone dialing system (“ATDS”), with the capacity to store or produce
9 telephone numbers using a random or sequential number generator and the ability to dial
10 such numbers. (Am. Compl. ¶ 20.) Plaintiff also alleges Defendants utilized an ATDS
11 system with technology integration with public records, like property ownership and
12 cellular telephone number records, allowing the ATDS to send what appeared to be a
13 personalized message that included Plaintiff’s first name. (Am. Compl. ¶ 20.) Further,
14 Plaintiff alleges Defendants utilized ATDS with data aggregation technology integration
15 combined with cellular telephone number ownership records to randomly and sequentially
16 send automated text messages with Plaintiff’s name. (Am. Compl. ¶ 21.) And Plaintiff
17 alleges Defendant included the words “reply STOP to end” to utilize the automated
18 technology integration. (Am. Compl. ¶ 22.) Finally, Plaintiff states he was never
19 Defendants’ customer, did not provide them with his cellular telephone number, and never
20 gave Defendants his express consent to receive unsolicited text messages. (Am. Compl.
21 ¶ 25.)

22 Plaintiff brings two Causes of Action. First, he claims Defendants negligently
23 violated the TCPA. (Am. Compl. ¶ 40.) Second, Plaintiff claims Defendants knowingly
24 and/or willfully violated the TCPA. (Am. Compl. ¶ 44.) Defendants now move to dismiss
25 the complaint for failure to state a claim for relief. (Mot. at 1.)

26 **II. LEGAL STANDARD**

27 When analyzing a complaint for failure to state a claim for relief under Federal Rule
28 of Civil Procedure 12(b)(6), the well-pled factual allegations are taken as true and

1 construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d
2 1063, 1067 (9th Cir. 2009). A plaintiff must allege “enough facts to state a claim to relief
3 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Legal
4 conclusions couched as factual allegations are not entitled to the assumption of truth,
5 *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are insufficient to defeat a
6 motion to dismiss for failure to state a claim. *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108
7 (9th Cir. 2010).

8 A dismissal under Rule 12(b)(6) for failure to state a claim can be based on either
9 (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable
10 legal claim. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). “While
11 a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a
12 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more
13 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
14 will not do.” *Twombly*, 550 U.S. at 555 (citations omitted). The complaint must contain
15 “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
16 face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “[A] well-pleaded
17 complaint may proceed even if it strikes a savvy judge that actual proof of those facts is
18 improbable, and that ‘recovery is very remote and unlikely.’” *Twombly*, 550 U.S. at 556
19 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

20 **III. ANALYSIS**

21 Defendants argue that Plaintiff failed to state a claim because he did not allege
22 sufficient facts to show the text message in question was sent by ATDS. (Mot. at 4-5.)
23 Defendants also argue that the inclusion of Plaintiff’s name in the message suggests the
24 message was not sent using an ATDS. (Mot. at 5.) In response, Plaintiff, contends his
25 complaint adequately explained how the allegedly personalized message could have been
26 sent by an ATDS and that he stated a viable cause of action. (Resp. at 2.)

27 Under the TCPA, it is “unlawful for any person within the United States . . . to make
28 any call . . . using any automatic telephone dialing system . . . to any telephone number

1 assigned to a . . . cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii). The Ninth Circuit
2 has held “that a text message is a ‘call’ within the meaning of the TCPA.” *Satterfield v.*
3 *Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009). To state a TCPA claim, a plaintiff
4 must sufficiently allege that: “(1) the defendant called a cellular telephone number; (2) using
5 an automatic telephone dialing system; (3) without the recipient’s prior express consent.”
6 *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).

7 The TCPA defines an ATDS as “equipment which has the capacity—(A) to store or
8 produce telephone numbers to be called, using a random or sequential number generator;
9 and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). The United States Supreme Court
10 recently held that ATDS requires “the capacity to use a random or sequential number
11 generator to either store or produce phone numbers to be called.” *Facebook, Inc. v. Duguid*,
12 --- U.S. ----, 141 S. Ct. 1163, 1173 (2021). This decision abrogated previous Ninth Circuit
13 precedent, which had defined ATDS as “not limited to devices with the capacity to call
14 numbers produced by a ‘random or sequential number generator,’ but also includ[ing]
15 devices with the capacity to dial stored numbers automatically.” *Marks v. Crunch San*
16 *Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018).

17 This Court has “acknowledged ‘the difficulty a plaintiff faces in knowing the type
18 of calling system used without the benefit of discovery’ and . . . that courts can infer the
19 use of an ATDS from the details of the call.” *McCullough v. Maximum Title Loans LLC*,
20 2019 WL 3933754, at *2 (D. Ariz. Aug. 20, 2019) (internal citations omitted). However,
21 Plaintiff must allege sufficient facts to allow the Court to “reasonably infer” that Defendant
22 used an ATDS. *Flores v. Adir Int’l, LLC*, 685 F. App’x 533, 533 (9th Cir. 2017) (mem.
23 decision). In previous cases, “Courts have considered circumstantial or indirect
24 allegations—such as context of messages, context and manner in which they were sent,
25 frequency of messages, etc.—sufficient to ‘raise a reasonable expectation that discovery
26 will reveal evidence of the matter complained of.’” *Jance v. Homerun Offer LLC*, 2021
27 WL 3270318, at *3 (D. Ariz. July 30, 2021) (quoting *Knutson v. Reply, Inc.*, 2011 WL
28 1447756, at *1 (S.D. Cal. Apr. 13, 2011)).

1 In assessing the plausibility of an ATDS claim, courts consider factors including (1)
2 “the nature of the message” with a generic, impersonal, or promotional message suggesting
3 ATDS; (2) “the number or frequency of messages,” with “repetitive messages sent over a
4 short period of time” suggesting ATDS; (3) “[t]he ability to respond to or interact with the
5 text messages (i.e., sending ‘Stop’);” (4) “the relationship between the parties,” with a pre-
6 existing relationship weighing against ATDS; (5) whether identical messages were sent to
7 multiple numbers simultaneously; and (6) whether the message was sent from a SMS short
8 code or long code,¹ with a SMS short code suggesting an ATDS. *Schley v. One Planet Ops*
9 *Inc.*, 445 F.Supp.3d 454, 459-60 (N.D. Cal. 2020). For example, the Court has found that
10 a plaintiff provided sufficient facts to state a claim for relief when he alleged that he had
11 no prior existing relationship with the defendant and did not consent to be called, the phone
12 numbers from which he received calls were attributable to Voice over Internet Protocol
13 and misleading caller ID, there was a brief pause between answering the call and when the
14 caller started speaking, the calls were generic and did not reference the plaintiff directly,
15 and the calls continued although the plaintiff asked not to be contacted. *Jance*, 2021 WL
16 3270318, at *1. Similarly, in *Mogadam v. Fast Eviction Service*, the Court held that the
17 plaintiff stated a claim for relief when he received an unsolicited and impersonal text
18 message from a short-code number. 2015 WL 1534450, at *3 (C.D. Cal. Mar. 30, 2015).

19 Here, the Court finds that Plaintiff fails to state a claim for a violation of the TCPA.
20 While Plaintiff provides some factual support for the use of an ATDS, these allegations are
21 not enough to state a plausible claim for relief. Plaintiff alleges the text message included
22 “reply STOP to end” and that he was never Defendants’ customer, never provided his
23 cellular phone number to Defendants, and never gave his prior express consent to receive
24 unsolicited messages. However, these allegations alone are insufficient for the Court to
25 reasonably infer beyond “a sheer possibility” that Defendants used ATDS to send the text

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27 ¹ SMS stands for “Short Message Service,” and refers to standard text messages on cellular
28 devices. An SMS short code is a four to six digit telephone number used only for texting,
and most frequently for commercial marketing purposes. SMS long codes are standard ten-
digit telephone numbers including an area code, used by individual and business
subscribers alike.

1 message. *Iqbal*, 556 U.S. at 678. When a complaint “pleads facts that are ‘merely consistent
2 with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility
3 of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 555).

4 Plaintiff also alleges facts that cut against the inference that Defendants used an
5 ATDS. Most prominently, Plaintiff alleges he received a personalized message that
6 included his first name. Targeted messages “weigh against an inference that ATDS was
7 used.” *Suttles v. Facebook, Inc.*, 461 F.Supp.3d 479, 487 (W.D. Tex. 2020) (finding
8 Plaintiff did not sufficiently state a TCPA claim when he alleged that he received text
9 messages addressed to him and named third parties).² Additionally, Plaintiff alleges
10 Defendants sent only one unsolicited text message and alleges that the message was sent
11 from a long code phone number. These allegations make it less plausible that Defendants
12 used an ATDS. *See Schley*, 445 F.Supp.3d at 459-60; *Mogadam*, 2015 WL 1534450 at *3
13 (short code number indicates ATDS). Plaintiff also does not allege that Defendants sent
14 identical messages to multiple numbers simultaneously.

15 In a similar case, *Freidman v. Massage Envy Franchising, LLC*, the Court held that
16 two plaintiffs failed to state a TCPA claim in a complaint that alleged that they received
17 multiple promotional and impersonal text messages, they had no prior relationship with
18 defendants, and when one plaintiff replied “Stop” and “Remove me,” the defendant replied
19 “I am sorry, we did not understand your last message. Help? Reply HELP. Quit?” 2013
20 WL 3026641 at *1-2 (S.D. Cal. June 13, 2013). Like the plaintiffs in *Freidman*, Plaintiff
21 here received a promotional message with interactive language like “Reply Help” or “reply
22 STOP to end.” However, while the plaintiffs in *Freidman* received multiple impersonal
23 messages, Plaintiff here received only one personalized message—and despite the
24 additional facts weighing toward an inference of ATDS in *Friedman*, the court found that
25 the plaintiffs did not sufficiently state a TCPA claim. Thus, considering all facts alleged in

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27 ² Plaintiff posits that Defendants included his name in the message by utilizing ATDS
28 technology integration with public records and mobile number ownership records.
However, Plaintiff does not provide factual allegations from which the Court can infer the
use of such technology. Plaintiff’s theory does not “raise a right to relief above the
speculative level.” *Twombly*, 550 U.S. at 555.

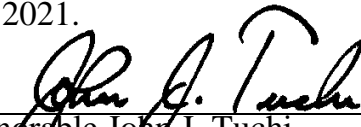
1 the complaint, Plaintiff does not allege sufficient facts to allow the court to infer that
2 Defendants used an ATDS.

3 Because Plaintiff fails to allege sufficient facts to raise a plausible claim that
4 Defendants used an ATDS, the Court will grant Defendants' Motion to Dismiss. Plaintiff
5 already has amended his Complaint once in an attempt to remedy the precise infirmity at
6 issue, but failed to do so, and the Court concludes further amendment would be futile; it
7 thus will dismiss with prejudice. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

8 **IT IS THEREFORE ORDERED** granting Defendants SRP Investment, LLC and
9 Stephanie Rose Polydoroff's Motion to Dismiss (Doc. 17). Plaintiff's claims are dismissed
10 with prejudice.

11 **IT IS FURTHER ORDERED** denying Defendants SRP Investment, LLC and
12 Stephanie Rose Polydoroff's Motion to Dismiss (Doc. 11) as moot.

13 Dated this 14th day of September, 2021.

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16 Honorable John J. Tuchi
17 United States District Judge
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