

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Brenda Whittaker,

No. CV-21-08212-PCT-DJH

10 Plaintiff,

ORDER

11 v.

12 Real Estate Heaven International
13 Incorporated, et al.,

14 Defendants.

15 Pending before the Court is Defendants' Motion to Dismiss (Doc. 12).¹ Plaintiff
16 filed a Response in Opposition (Doc. 18), and Defendants filed a Reply (Doc. 19). For the
17 following reasons, the Court denies the Motion.

18 **I. Background**

19 As alleged in the First Amended Complaint ("FAC"), Plaintiff brings this Telephone
20 Consumer Protection Act ("TCPA") class action after receiving two sets of text messages
21 from Defendants in May 2021 that offered to sell loans. (Doc. 7 ¶¶ 16–18). She alleges
22 she never consented to receive these messages and that her number is listed in the national
23 Do Not Call Registry. (*Id.* at ¶¶ 15, 19). Under the TCPA, it is unlawful for any person
24 "to initiate any telephone call to any residential telephone line using an artificial or
25 prerecorded voice to deliver a message without the prior express consent of the called party
26" 47 U.S.C. § 227 (b)(1)(B).

27 ¹ Defendants requested oral argument on their Motion. The Court finds that the issues have
28 been fully briefed and oral argument will not aid the Court's decision. Therefore, the Court
will deny the request for oral argument. *See* Fed. R. Civ. P. 78(b) (court may decide
motions without oral hearings); LRCiv 7.2(f) (same).

1 Defendants present four arguments in their Motion to Dismiss. The Court will
2 address them in the following order. First, Defendants argue the Court lacks personal
3 jurisdiction over them. Second, they argue this action must be dismissed because they have
4 provided plaintiff with “incontrovertible evidence” that she consented to the messages.
5 (Doc. 12 at 11). Third, Defendants seek to dismiss this action on the grounds that Plaintiff
6 “fails to allege she suffered an actual injury from the two (2) purported calls Plaintiff
7 alleges she received.” (*Id.*) Finally, Defendant Stone Sharp (“Sharp”) argues he cannot be
8 held personally liable for Plaintiff’s claims because he is only an employee of Defendant
9 Easy Financial, LLC (“Easy Financial”).

10 **II. Personal Jurisdiction**

11 The Court first examines its jurisdiction over the parties. There is no dispute that
12 both Defendants reside in California and that Plaintiff resides in Arizona. Because
13 Defendants have challenged the Court’s jurisdiction, Plaintiff now bears the burden of
14 showing the exercise of jurisdiction is appropriate. *See Schwarzenegger v. Fred Martin*
15 *Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

16 Federal courts have personal jurisdiction over a defendant “who is subject to the
17 jurisdiction of a court of general jurisdiction in the state where the district court is located.”
18 Fed. R. Civ. P. 4(k)(1)(A). Arizona courts may exercise personal jurisdiction “to the
19 maximum extent permitted by the Arizona Constitution and the United States
20 Constitution.” Ariz. R. Civ. P. 4.2. Due process requires “certain minimum contacts” such
21 that the lawsuit “does not offend traditional notions of fair play and substantial justice.”
22 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Since *International Shoe*, courts
23 separate personal jurisdiction into “general” and “specific” jurisdiction. *See Goodyear*
24 *Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

25 Plaintiff argues that the Court may exercise specific jurisdiction over both
26 Defendants. In the Ninth Circuit, courts use a three-prong test to analyze specific personal
27 jurisdiction:

- 28 (1) The non-resident defendant must purposefully direct his activities or

1 consummate some transaction with the forum or resident thereof; or perform
 2 some act by which he purposefully avails himself of the privilege of
 3 conducting activities in the forum, thereby invoking the benefits and
 protections of its laws;

4 (2) the claim must be one which arises out of or relates to the defendant's
 5 forum-related activities; and

6 (3) the exercise of jurisdiction must comport with fair play and substantial
 justice, i.e. it must be reasonable.

7 *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th
 8 Cir.1987)). A plaintiff need only satisfy the first two prongs to create a rebuttable
 9 presumption that the third is also satisfied. *Id.*

10 Plaintiffs argue that many courts within the Ninth Circuit have found the first prong
 11 is satisfied for TCPA claims when an out-of-state defendant directs “telemarketing
 12 activities” to plaintiffs in the forum state. (Doc. 18 at 5) (citing *Baker v. Caribbean Cruise*
 13 *Line, Inc.*, 2014 WL 880634, at *2 (D. Ariz. Mar. 6, 2014) (finding the complaint “is
 14 sufficient to establish specific jurisdiction, based on the allegation that Defendant made
 15 calls to Plaintiff’s Arizona number and the fact that those calls are the basis for Plaintiff’s
 16 claims”); *Fishman v. Subway Franchisee Advert. Fund Tr., Ltd.*, 2019 WL 6135030, at *6
 17 (C.D. Cal. Nov. 19, 2019); *j2 Glob. Commc’ns, Inc. v. Blue Jay, Inc.*, 2009 WL 29905, at
 18 *9 (N.D. Cal. Jan. 5, 2009); *Heidorn v. BDD Mktg. & Mgmt. Co., LLC*, 2013 WL 6571629,
 19 at *8 (N.D. Cal. Aug. 19, 2013)).

20 Defendants do not comment on these cases and, instead, argue that the FAC fails to
 21 allege that their activities were “targeted” towards Plaintiff, in Arizona. But this argument
 22 is unpersuasive because the Court can already infer from the FAC that Defendants’ texts
 23 were sent to Plaintiff, an Arizona resident. (Doc. 7 at ¶ 1).² The Court is satisfied with
 24 Plaintiff’s showing that Defendants have purposely directed business activities to
 25 individuals in Arizona.

26 It follows that Plaintiff’s TCPA claim is one that is directly related to the texts that
 27

28 ² Plaintiff also represents in a declaration that the Plaintiff’s phone number contains an
 Arizona area code. (Doc. 18 at 6).

1 Defendants sent, satisfying the second prong. Defendants make no counter argument on
2 this point. And because Plaintiff has demonstrated the first two prongs, she has established
3 a presumption that the exercise of jurisdiction over Defendants is reasonable. Defendants
4 make no argument to rebut this presumption. Overall, the Court finds it may exercise
5 specific personal jurisdiction over Defendants.

6 **III. Defendants' Evidence of Consent**

7 Next, the Court considers Defendants' claim that they presented Plaintiff with
8 "incontrovertible evidence" that she consented to receive the texts, and yet "Plaintiff's
9 attorney continues to pursue this matter" (Doc. 12 at 11). To the extent Defendants
10 seek to dismiss this action based upon such claimed evidence, the Court declines to do so.

11 At the pleading stage, the Federal Rules of Civil Procedure require that a complaint
12 make a short and plain statement showing that the pleader is entitled to relief. Fed. R. Civ.
13 P. 8(a)(2). It is well established that in reviewing a motion to dismiss, "all factual
14 allegations set forth in the complaint 'are taken as true and construed in the light most
15 favorable to the plaintiffs.'" *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001) (quoting
16 *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996)). Here, it is enough for
17 Plaintiff to allege that she did not "ever consent to receive text messages from Defendants."
18 (Doc. 7 at ¶ 19). The Court must accept this as true. And yet Defendants, apparently
19 frustrated that Plaintiff will not concede their point, ask the Court to take judicial notice of
20 the fact that she consented. (Doc. 12 at 13).

21 Judicial notice is reserved for facts that are "generally known" or "can be accurately
22 and readily determined from sources whose accuracy cannot reasonably be questioned."
23 Fed. R. Evid. 201(b). Defendants only support for their assertion that Plaintiff consented
24 to the messages is a declaration stating that Plaintiff signed up to receive messages on
25 September 25, 2018, when she signed up online to receive loan information.
26 (Doc. 12-2 at ¶ 8). This fact is not appropriate for judicial notice because this declaration
27 can be reasonably questioned. Therefore, the Court declines Defendants' request for
28 judicial notice.

1 The Court notes that counsel for Plaintiff have filed their FAC and signed it as
 2 required by Federal Rule of Civil Procedure 11(b), thereby representing that its claims are
 3 “nonfrivolous” and that its “factual contentions have evidentiary support” Fed. R.
 4 Civ. P. 11(b). Defendants insist that Plaintiff’s pursuit of this matter constitutes a breach
 5 of counsel’s ethical duties and warrants sanctions. With the limited record before it, it is
 6 impossible to decide here that sanctions are warranted. Defendants may, instead, pursue
 7 sanctions as dictated by Rule 11.

8 **IV. Injury in Fact**

9 Next, Defendants argue Plaintiff’s allegations fail to establish an injury in fact.
 10 (Doc. 12 at 11). The Court rejects this argument. In all cases or controversies before a
 11 federal court, a plaintiff must allege a concrete and particularized injury. *Spokeo, Inc. v.*
 12 *Robins*, 578 U.S. 330, 334 (2016). Congress may “identify[] and elevat[e] intangible
 13 harms” to injuries in fact by identifying them in statute. *Id.* at 341. Here, Plaintiff alleges
 14 that Defendants violated her rights under the TCPA as codified in 47 U.S.C. § 227(c)(5).
 15 (Doc. 7 at 8). By alleging that her statutory rights were violated by Defendants, Plaintiff
 16 has certainly demonstrated an injury in fact. Defendants’ implied argument that there must
 17 be some additional “actual injury” is clearly contrary to established law.³ “A plaintiff
 18 alleging a violation under the TCPA need not allege any additional harm beyond the one
 19 Congress has identified.” *See Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037,
 20 1043 (9th Cir. 2017) (cleaned up).

21 **V. Stone’s Liability**

22 Finally, Defendant Stone argues he cannot be held liable in a TCPA action against
 23 Easy Financial because he is just an employee. (Doc. 12 at 9).⁴ The argument appears to
 24 be that because he is just an employee, and because corporate officers with even greater
 25 authority are not liable for contracts signed on a company’s behalf, he himself should not

26 ³ The Court reminds Defendants that they, too, have a duty to present legal contentions that
 27 “are warranted by existing law or by a nonfrivolous argument” Fed. R. Civ. P. 11(b).

28 ⁴ Defendants frame this argument to assert that the Court lacks personal jurisdiction over
 him. But the central premise of his argument, which the Court rejects, is that he himself
 cannot be held liable for Plaintiff’s TCPA claim.

1 be liable for this TCPA action. (*Id.*) (citing *In re Boon Glob. Ltd.*, 923 F.3d 643, 651 (9th
2 Cir. 2019)).

3 Plaintiff cites to many cases from the Ninth Circuit holding that “[d]irect liability
4 under the TCPA does not depend on one’s status as a corporate officer (or employee).”
5 (Doc. 18 at 11) (quoting *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 960 (8th Cir. 2019)).
6 Overall, the cases show “courts that have addressed the personal-liability issue have
7 concluded that individuals acting on behalf of a corporation may be held personally liable
8 for violations of the TCPA where they ‘had direct, personal participation in or personally
9 authorized the conduct found to have violated the statute.’” *Van Sweden Jewelers, Inc. v.*
10 *101 VT, Inc.*, 2012 WL 4074620, at *8 (W.D. Mich. June 21, 2012) (quoting *Texas v. Am.*
11 *Blastfax*, 164 F.Supp.2d 892, 898 (W.D.Tex.2001)). The *Golan* court’s reasoning behind
12 this rule is instructive. It held “[t]he scope of direct liability is determined by the statutory
13 text. The TCPA makes it ‘unlawful for any person . . . to initiate any telephone call’ that
14 violates its relevant prohibitions. Thus, to be held directly liable, the defendant must be
15 the one who ‘initiates’ the call.” *Golan*, 930 F.3d at 960 (8th Cir. 2019) (internal citations
16 omitted).

17 Courts in the Ninth Circuit have addressed this question and, using similar
18 reasoning, come to the same conclusion, albeit in dicta. The Central District of California
19 determined that a “party can be held liable under Section 227(b)(1)(A)(iii) directly if it
20 personally ‘makes’ a call in the method proscribed by the statute, or vicariously, such as,
21 if it was in an agency relationship with the party that sent the text message.” *Thomas v.*
22 *Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012), *aff’d*, 582 F. App’x 678
23 (9th Cir. 2014). The *Thomas* court, however, found that a theory of vicarious liability
24 better suited the facts of that case, making direct liability inapplicable. *Id.* The Ninth
25 Circuit agreed that both direct and vicarious liability serve as “potential theories of
26 liability” and held that the District Court correctly found that vicarious liability applied to
27 its case. *Thomas v. Taco Bell Corp.*, 582 F. App’x 678, 679 (9th Cir. 2014).

28 Here, Plaintiff alleges that it was Stone himself who sent the text messages, and they

1 argue he is directly liable. Following the reasoning set out in *Golan* and by the district
2 court in *Thomas*, the Court finds that under 47 U.S.C. § 227(b), an individual who
3 “initiates” a text message may be held directly liable. Here, Stone may be held directly
4 liable.


5 **VI. Conclusion**

6 Having exhausted Defendants’ arguments, the Court will deny their Motion to
7 Dismiss.

8 Accordingly,

9 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss (Doc. 18) is
10 **DENIED.**

11 Dated this 16th day of May, 2022.

12
13
14 
15 Honorable Diane J. Humetewa
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28