UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

| Case No. | LA CV21-09048 JAK (AFMx) | Date | October 11, 2022 |
|---|---|---|---|
| Title | Jamie Blalack v. RentBeforeOwning.com | | |

| Present: The Honorable | JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE |
|---|---|

| H. Crawford | Not Reported |
|---|---|
| Deputy Clerk | Court Reporter / Recorder |
| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
| Not Present | Not Present |

**Proceedings:** **(IN CHAMBERS) ORDER RE DEFENDANT'S MOTION TO DISMISSS (DKT. 19)**

## I. Introduction

On November 18, 2021, Jamie Blalack ("Plaintiff") brought this action against RentBeforeOwning.com ("Defendant"). Dkt. 1 ("Complaint"). On February 8, 2022, Plaintiff filed a First Amended Complaint, which is the operative one. Dkt. 17 (the "FAC"). The FAC advances one cause of action, based on allegations that Defendant sent unsolicited telemarking text messages to Plaintiff's cellphone, in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(c). *Id.* at 6-8.

On February 22, 2022, Defendant filed a Motion to Dismiss. Dkt. 19 (the "Motion"). Plaintiff filed an opposition to the Motion on March 15, 2022. Dkt. 20. (the "Opposition"). Defendant filed a reply on March 29, 2022. Dkt. 21 (the "Reply").

A hearing on the Motion was held on August 1, 2022, and it was taken under submission. Dkt. 25. For the reasons stated in this Order, the Motion is **DENIED**.

## II. Factual Background

### A. The Parties

The FAC alleges that Plaintiff is a resident of Oklahoma. Dkt 17 ¶ 6. It is alleged that Defendant is a "real estate listing service, which markets rent-to-own properties to consumers" and is headquartered in Goleta, California. *Id.* ¶¶ 8, 10.

### B. Allegations in the FAC

The FAC alleges that Plaintiff has a cell phone that she registered on the Federal Do Not Call Registry ("DNC Registry") on or around April 26, 2018. It alleges that she did so, "in order to obtain solitude from invasive and harassing telemarketing calls." *Id.* ¶¶ 12-13, 15. It is alleged that Plaintiff's cell phone is "primarily used for residential purposes." *Id.* ¶ 14.

It is alleged that Defendant "engages in telemarketing in order to solicit business for its monthly subscription allowing its customers to view information on listed properties." *Id.* ¶ 17. It is alleged that, beginning around August 22, 2020, and continuing through at least September 12, 2021, Defendant sent at least 108 telemarketing texts messages to Plaintiff's cell phone to solicit Plaintiff to purchase a subscription to Defendant's services. *Id.* ¶¶ 18, 23. It is alleged that "each text message contained a link which led Plaintiff to Defendant's site to sign up for the service." *Id.* ¶ 19. It is alleged that Plaintiff did not consent to receive those text messages or communications from Defendant nor to be contacted by Defendant. *Id.* ¶¶ 20-21.

It is further alleged that Plaintiff sent Defendant a written cease and desist letter on or about August 19, 2021, but that "Defendant continued sending irritating and disruptive telemarketing text messages for almost another month." *Id.* ¶ 25. It is alleged that many of the text messages "did not offer Plaintiff the opportunity to 'opt out' of future messages or describe the proper method by which she could do so." *Id.* ¶ 26. It is alleged that as a result of these text messages, Plaintiff "experienced frustration, annoyance, irritation and a sense that her privacy had been invaded by Defendant." *Id.* ¶ 27.

C. Relief Sought

Plaintiff seeks actual damages, statutory damages of $500 per text, treble damages of $1500 per text, and injunctive relief. *Id.* at 7-8.

## III. Analysis

### A. Legal Standards

#### 1. Stating a Claim

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." The pleading must allege facts that if established would be sufficient to show that a claim for relief is plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint need not include detailed factual allegations but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Fed. R. Civ. P. 12(b)(6) permits a party to move to dismiss a cause of action that fails to state a claim in accordance with the foregoing standards. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely

conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell*, 266 F.3d at 988).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment.[1] *See, e.g.*, *id.*; *Branch v. Tunnel*, 14 F.3d 449, 453-54 (9th Cir. 1994).

If a motion to dismiss is granted, the court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Although this policy is to be applied "with extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), allowing leave to amend is inappropriate in circumstances where litigants have failed to cure previously identified deficiencies, or where an amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990).

2. TCPA Section 227(c)

Section 227(c) of the TCPA directs the Federal Communications Commission ("FCC") to implement regulations to "protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § 227(c)(1). In furtherance of these objectives, Section 227(c) authorizes the FCC to establish and operate a "national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." *Id.* § 227(c)(3).

Pursuant to Section 227(c), the FCC promulgated the following regulation:

> No person or entity shall initiate any telephone solicitation to . . .
>
> A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.

47 C.F.R. § 64.1200(c)(2).

Section 227(c) provides a private right of action to any "person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection." *Id.* § 227(c)(5). An individual may initiate an action to enjoin any such violation and recover up to $500 in damages for each violation. *Id.*

[1] Neither party filed a request for judicial notice of any documents. Therefore, the analysis in this Order is limited to a consideration of the allegations in the FAC.

B. Application

Defendant argues that, for two reasons, Plaintiff has failed to state a claim under Section 227(c): (1) the FAC does not sufficiently allege that Plaintiff's cellphone is used for residential purposes; and (2) the evidence Plaintiff submitted in support of the FAC shows that Plaintiff consented to receiving Defendant's text messages. Dkt. 19 at 10-15.

1. Whether Plaintiff Has Sufficiently Alleged a Residential Phone Number

Section 227(c) applies specifically to residential telephone subscribers. *See* 47 U.S.C. § 227(c)(1); 47 C.F.R. § 64.1200(c)(2). However, the FCC has explained that wireless telephone numbers can qualify as residential telephone numbers:

> The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02–278, FCC 03–153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

*See* 47 C.F.R § 64.1200(e).

The Commission's Report and Order (the "2003 FCC Order") states:

> [W]e believe it is more consistent with the overall intent of the TCPA to allow wireless subscribers to benefit from the full range of TCPA protections. . . . Therefore, we conclude that wireless subscribers may participate in the national do-not-call list. As a practical matter, since determining whether any particular wireless subscriber is a "residential subscriber" may be more fact-intensive than making the same determination for a wireline subscriber, we will presume wireless subscribers who ask to be put on the national do-not-call list to be "residential subscribers." Such a presumption, however, may require a complaining wireless subscriber to provide further proof of the validity of that presumption should we need to take enforcement action.

*In Re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14039 (2003). The 2003 FCC Order is binding in this Circuit. *See Baird v. Sabre, Inc.*, 636 F. App'x 715, 716 (9th Cir. 2016).

The FAC alleges that Plaintiff registered her cellphone number on the federal do-not-call registry on or around April 26, 2018, in order to "obtain solitude from invasive and harassing telemarketing calls." Dkt. 17 ¶¶ 13, 15. The FAC also alleges that Plaintiff's cellphone "is primarily used for residential purposes." *Id.* ¶ 14. Because Plaintiff has alleged that her cellphone number is on the do-not-call registry, there is a sufficient basis at this stage of the proceedings to apply the presumption that the cellphone is a residential phone number.

Defendant contends that, despite this presumption, Plaintiff must still "allege some basic facts to support her assertion that her cell number is indeed used for residential purposes." Dkt. 21 at 9. In

support of this position, Defendant cites to district cases in other circuits that have granted motions to dismiss on the ground that a plaintiff failed to plead facts showing that the cellphone at issue was used for residential purposes. *See id.* at 8-9.

This argument is not persuasive. Defendant has not cited any binding authority within this Circuit in support of its argument, and the Court has found none. Further, although not controlling, several district courts in this Circuit have held that the allegation that a cellphone number is registered on the do-not-call registry is sufficient to establish at the pleading stage to warrant the presumption that the number is a residential one. *See, e.g.*, *Sasin v. Enter. Fin. Grp., Inc.*, No. CV 17-4022-CBM-RAO, 2017 WL 10574367, at *5-6 (C.D. Cal. Nov. 21, 2017) (denying motion to dismiss because plaintiff sufficiently alleged that defendant called a cellphone registered on the DNC Registry); *Doyle v. JTT Funding, Inc.*, No. LA CV18-06145 JAK (ASx), 2019 WL 13037025, at *9 (default judgment for plaintiff because cellphone was allegedly listed on do-not-call registry); *Heidorn v. BDD Mktg. & Mgmt. Co.*, No. C-13-00229 JCS, 2013 WL 6571629, at *1, 10-11 (N.D. Cal. Aug. 19, 2013) (same). District courts in other circuits have reached similar conclusions. *See Hodgin v. Parker Waichman LLP,* No. 3:14-cv-733-DJG, 2015 WL 13022289, at *3 (W.D. Ky. Sept. 30, 2015) (presuming cellphone registered on do-not-call registry to be residential on a motion to dismiss); *Phillips v. Mozes, Inc.*, No. 2:12-cv-04033-JEO, 2014 WL 12589671, at *6 (N.D. Ala. Sept. 3, 2014), *report and recommendation adopted in relevant part by* 2015 WL 12806594 (Jan. 26, 2015) ("At the very least, [plaintiff's] allegation that his cell phone number was listed on the do-not-call registry creates a reasonable inference that he is a residential telephone subscriber with respect to that phone.").

As noted, when considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *See Cahill*, 80 F.3d at 337-38. "[D]etermining whether any particular wireless subscriber is a 'residential subscriber'" is a "fact-intensive" inquiry that is inappropriate for resolution on a motion to dismiss. *In Re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14039 (2003). Thus, the allegations that Plaintiff's cellphone number is registered on the do-not-call registry and that it is used primarily for residential purposes are sufficient to state a claim. Defendant may raise a factual challenge to both the presumption and the allegation that Plaintiff's cellphone number is a residential one that is not used for business purposes.

2. Whether Plaintiff Gave Prior Express Consent

There is no liability under 47 C.F.R. § 64.1200(c)(2) if the person or entity making the telephone solicitations "has obtained the subscriber's prior express invitation or permission. Such permission must be evidence by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed." 47 C.F.R. § 64.1200(c)(ii). There is also no liability if the call or message is "[t]o any person with whom the caller has an established business relationship." *See* 47 C.F.R. § 64.1200(f)(15)(ii). An "established business relationship . . . means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber . . ." 47 C.F.R. § 64.1200(f)(5).

Defendant argues that the text messages submitted by Plaintiff as part of the FAC demonstrate that Defendant had been given "express written consent" to contact the cellphone number at issue. The

FAC includes screenshots of several text messages received by Plaintiff. The message in the first screenshot reads "Thank You for Signing up for Property Alerts." Dkt. 17-1 at 2. The message in the second reads "Good morning, Harry. Search for properties in 74063 now." *Id.* Several of the messages also include the language "Reply HELP for HELP – STOP to stop." *Id.* at 6-7, 9-12.

Defendant does not dispute either that Plaintiff's name is not Harry, or that she does not reside within the area of zip code 74063. However, Defendant argues that these messages reflect that they were directed to a person who had signed up for Defendant's services. Defendant also argues that Plaintiff continued to receive messages, but did not elect to opt out, notwithstanding that some of the messages provided that opportunity. Defendant argues that, for these reasons, the messages demonstrate that Defendant had obtained consent to send them to the cellphone at issue.

Defendant's argument is unpersuasive. To demonstrate "prior express invitation or permission," the FCC regulations require evidence of a "signed, written agreement." 47 C.F.R. § 64.1200(c)(ii). The screenshots do not constitute such a signed agreement between Plaintiff and Defendant. Nor do they demonstrate that there was a "voluntary two-way communication" between Plaintiff and Defendant that would constitute an "established business relationship." 47 C.F.R. § 64.1200(f)(5). Plaintiff alleges that she "did not consent to receive those text messages or any communication from Defendant." FAC ¶ 20. The identification of a recipient by a different name in the text messages does not contradict this allegation. Thus, this allegation is sufficient to state the claim that Plaintiff did not provide prior permission for the communications. As noted, Defendant contends that "someone signed up for and wanted to receive these messages." Dkt. 19 at 15. However, that contention presents a factual question that cannot be resolved on a motion to dismiss.

## IV. Conclusion

For the reasons stated in this Order, the Motion is **DENIED**. As stated during the August 1, 2022 hearing, focused discovery may be appropriate to address the factual issues discussed in this Order. However, in light of the discussion of a path to a potential settlement of this action, the suggestion of counsel that an informal exchange of information may be helpful is acknowledged as a reasonable alternative.

**IT IS SO ORDERED.**

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