UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 12-cv-60171-JIC

BRANDON M. BUSLEPP, an individual, on behalf of himself and all others similarly situated

Plaintiff,

v.

IMPROV MIAMI, INC., a Florida corporation,

Defendant.
_____/

PLAINTIFF BRANDON M. BUSLEPP'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS [DE-6]

COMES NOW, Plaintiff, BRANDON M. BUSLEPP, by and through his undersigned counsel and pursuant to the Federal rules of Civil Procedure, Plaintiff files this Response and Memorandum of Law in Opposition to Defendant IMPROV MIAMI, INC.'s Motion to Dismiss [DE-6] and further states as follows:

INTRODUCTION

The instant dispute arises from Defendant's alleged use of mass text messaging in violation of 47 U.S.C. § 227 *et seq.*, the Telephone Consumer Protection Act ("TCPA"). Defendant, in its Motion to Dismiss ("MTD"), alleges that Plaintiff has failed to state a valid claim under the TCPA for several reasons. However, the grounds relied upon by Defendant have been soundly rejected by multiple other federal courts. Hence, for the reasons stated herein, Defendant's Motion to Dismiss [DE-6] should be denied.

STANDARD OF REVIEW

A complaint should not be dismissed under Rule 12(b)(6), Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). Further, the court's consideration is limited to the assertions made within the four comers of the complaint, to documents attached to the complaint as exhibits reference to matters for which judicial notice may be taken, and to documents either in the plaintiff's possession or of which plaintiff had knowledge and relied on in bringing the suit. *Brass v. American Film Tech., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). "In short, the function of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which may be offered in support thereof." *Amalgamated Bank of New York v. Marsh,* 823 F.Supp. 209, 215 (S.D. N.Y.1993).

I. Plaintiff Has Sufficiently Pleaded a Violation of the TCPA.

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, Plaintiff's Complaint need only contain a "short and plain statement of the claim showing that [they are] entitled to relief." Here, Defendant claims that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as further modified by *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), has somehow radically altered Rule 8(a)(2) and created a fact-pleading standard that Plaintiff has failed to meet. [1] [MTD, p. 3]. That is simply not the case and Defendant's argument has been rejected time and again by federal courts nationwide on similar facts involving "spam" text messaging in violation of the TCPA.

[1] Courts nationwide have noted that "In *Erickson v. Pardus*, 551 U.S. 89 (2007), decided two weeks after *Twombly*, the Court clarified that *Twombly* did not signal a switch to fact-pleading in the federal courts. *Erickson* reaffirms that under Rule 8 "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Villegas v. J.P. Morgan Chase & Co.*, No. C09-00261, 2009 WL 605833 (N.D. Cal., Mar. 9, 2009) (citing *Airborne Beepers & Video, Inc. v. AT&T Mobility* LLC, 499 F.3d 663, 667-668 (7th Cir. 2007)).

See, e.g. Kramer v. Autobytel, Inc., 759 F. Supp. 2d 1165, 1168 (N.D. Cal. 2010); *Kazemi v. Payless Shoesource Inc.*, 2010 WL 963225 (N.D. Cal. Mar. 16, 2010); *Pimental v. Google Inc.*, No. 11–2585, 2012 WL 691784, at *2 (N.D.Cal. Mar.2, 2012).

While *Twombly* and *Iqbal* did much to clarify the standard of review applicable to motions under Rule 12(b)(6), they did not, as Defendant suggests, radically alter federal pleading standards under Rule 8. Under *Twombly*, a complaint will not be dismissed under Rule 12(b)(6) if two minimum hurdles are cleared: (1) the Complaint must describe the claim in sufficient detail to give the Defendant fair notice of what the claim is and the grounds upon which it rests; and (2) the Complaint's allegations must plausibly suggest that the Plaintiff has a right to relief, raising the possibility above a level of speculation. *Twombly*, 550 U.S. at 544-55. This is consistent with the requirements of Rule 8(a)(2), which requires that a complaint "provide a 'short and plain statement of the claim showing that [he] is entitled to relief.' This is not an onerous burden. 'Specific facts are not necessary; the statement need only give the defendant[s] fair notice of what . . . the claim is and the grounds upon which it rests.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89 (2007)); *see also Coupons, Inc. v. Stottlemire*, 588 F. Supp. 2d 1069, 1073 (N.D. Cal. 2008) (citing *Twombly*, 550 U.S. 544) ("'heightened fact pleading of specifics' is not required to survive a motion to dismiss."). What's more, "[t]he defendant bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

While allegations that merely restate the elements under 47 U.S.C. § 227(b)(1)(A)(iii), in and of themselves, fall short of Rule 8(a)'s minimal pleading guidelines, additional allegations that a defendant used a third party to transmit generic, impersonal messages *"en masse"* to consumers are sufficient satisfy of federal pleading requirements for claims brought under the TCPA. *See Kramer*, 759 F. Supp. 2d at 1172; *Kazemi*, 2010 WL 963225, at *2; *Abbas v. Selling Source, LLC*, 2009 WL 4884471, at *3 (N.D.Ill.Dec.14, 2009). Consequently, for the reasons stated above, Defendant's Motion to Dismiss for failure to State a Claim must be denied

II. There is no requirement that a party be charged for the call in order to have standing under the TCPA.

Defendant alleges that the complaint at issue must fail because it does not contain an allegation that Plaintiff was charged for the call (i.e. text message). [MTD, ¶4]. Simply put, there is no such requirement and Defendant has failed to comprehend the plain meaning of the statute itself, which reads as follows:

> (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 or an artificial or prerecorded voice…
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

47 U.S.C. § 227(b)(1)(A)(iii). Defendant's apparent confusion lies with statute's use of the word "or." The word "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979); *Christl v. Swanson*, 2000 ND 74, ¶ 12, 609 N.W.2d 70; *Narum v. Faxx Foods, Inc.*, 1999 ND 45, ¶ 20, 590 N.W.2d 454. Terms or phrases separated by "or" have separate and independent significance. *Reiter*, at 338-39, 99 S.Ct. 2326. Coupled with the comma preceding "or," which indicates a separate clause, the statutory language clearly creates two distinct and independent phrases. Thus, read logically and grammatically, the statute states that there is liability for using an ATDS without prior express consent to contact a cellular telephone as well as liability for using an ATDS without prior express consent to contact a person wherein they are charged for the call. Because the statutory text is unambiguous, the inquiry into its meaning ends there. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous."). More on point, multiple federal courts have held that the

TCPA does not require plaintiff to allege that he was charged for individual collection calls to state a claim. *See, e.g., Lozano v. Twentieth Century Fox Film Corp.,* 702 F.Supp.2d 999, 2010 WL 1197884, at *9 (N.D.Ill. Mar.23, 2010) ("[T]he plain language of the TCPA does not require plaintiff to allege that he was charged for the relevant call at issue in order to state a claim pursuant to [section 227 of the TCPA]."); *Abbas v. Selling Source, LLC*, 2009 WL 4884471, at *3 (N.D.Ill.Dec.14, 2009) (same)[2]. Therefore, Defendant's motion to dismiss for failure to allege that Plaintiff was charged for the call should be denied.

III. The instant claim is completely appropriate for class action treatment.

Defendant suggests that because the TCPA is silent on the issue of class actions, it is somehow inappropriate to bring a class action under the TCPA. [MTD, pp. 4-5]. This is simply not the case. "Where a statute is silent on the availability of class relief, the Supreme Court has instructed that we presume it to be available in all 'civil actions brought in federal court.'" *Bateman v. Am. Multi–Cinema, Inc.*, 623 F.3d 708, 717 (9th Cir. 2010) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 699–700 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). As the TCPA is silent on the subject of class relief, this Honorable Court must presume its availability. It should also be noted that the Eleventh Circuit has shown its approval for class action treatment of TCPA claims. *Penzer v. Transp. Ins. Co.*, 605 F.3d 1112, 1113-14 (11th Cir. 2010) (remanding class action to district court for judgment in accord with Florida Supreme Court's ruling). Even more recently, the United State Supreme Court has held that there is federal

[2] "Not two weeks later [after the FCC issued its 1992 FCC Order], Congress amended the TCPA to provide that the FCC "may, by rule or order, exempt from the requirements of *paragraph (1)(A)(iii)* of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party." *See* Pub.L. No. 102-556, 106 Stat. 4181, 4194-95 (Oct. 28, 1992), enacted as 47 U.S.C. § 227(b)(2)(C). If uncharged calls were already exempted from the requirements of the TCPA, as the FCC's 1992 Order and [Defendants] maintain, the later congressional amendment would be wholly superfluous, as no FCC "rule or order" would be necessary to exempt such calls from the statute's purview." *Abbas*, 2009 WL 4884471, *3, 2009 U.S. Dist. Lexis 116697, *9-*10.

question jurisdiction for any private action brought under the TCPA. *Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740 (2012).

Finally, as to Defendant's contention that Plaintiff is somehow obliged to identify the basis for alleging the number of persons (i.e. more than forty-one) in the prospective class, Plaintiff responds that such argument is inappropriate for at this early stage of litigation. [MTD, ¶3]. As other courts have held, the issue of numerosity is more properly determined on a motion for class certification. *Holtzman v. Caplice*, 2008 WL 2168762, at *2-3 (N.D. Ill. 2008) (citing Wright, Miller & Kane, Federal Practice & Procedure, Civil, 3d § 1798 ("Compliance with the Rule 23 prerequisites theoretically should not be tested by a motion to dismiss for failure to state a claim[.]").

CONCLUSION

For the reasons discussed above, Defendant IMPROV MIAMI, INC.'s Motion to Dismiss [DE-6] should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 8th day of April 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this 8th day of April 2012 via U.S. mail and/or some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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