

E-Filed: October 17, 2014

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7 NOT FOR CITATION
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 JOHN LUNA,

No. C14-00607 HRL

12 Plaintiff,

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT**

13 v.

14 SHAC, LLC, dba SAPPHIRE
GENTLEMEN'S CLUB; et al.,

[Re: Docket No. 52]

15 Defendants.
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17 John Luna sues Shac, LLC, dba Sapphire Gentlemen's Club, Club Texting, Inc. and
18 CallFire, Inc. for violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.
19 CallFire and Club Texting move to dismiss the claims against CallFire under Federal Rule of Civil
20 Procedure 12(b)(6). Dkt. No. 52. Plaintiff filed an opposition and CallFire filed a reply. Dkt. Nos.
21 57, 60. All parties have expressly consented to having all matters proceed before a magistrate
22 judge. The motion is deemed suitable for determination without oral argument. The October 21,
23 2014 hearing is vacated. Civ. L.R. 7-1(b). Based on the moving and responding papers, the Court
24 denies the motion to dismiss.

25 **BACKGROUND**

26 Plaintiff brings this proposed class action against Shac, Club Texting,¹ and CallFire, alleging
27 violations of the TCPA.² In January 2014, Plaintiff received an unsolicited text message on his
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¹ Club Texting has been voluntarily dismissed from this action.

1 cellular telephone from Defendants. FAC ¶ 10. “Defendants Club Texting and Callfire were hired
2 and/or retained by Defendant Shac to send his text-message . . . on Defendant Shac’s behalf.” *Id.* ¶
3 10. “Defendants entered [Plaintiff’s] cellular-telephone number into a database and subsequently
4 used equipment capable of storing and/or producing telephone numbers, as well as capable of
5 dialing such numbers, to send the text message *en masse* to consumers, including Plaintiff.” *Id.* ¶
6 13. “Defendant Shac retained the right to control—and, in fact, did control—the content of those
7 messages, as well as to whom Defendants Club Texting and Callfire delivered the messages.” *Id.* ¶
8 10.

9 This action was filed in February 2014. The First Amended Complaint (the operative
10 complaint) asserts one claim against all Defendants: violation of the TCPA. CallFire filed the
11 present motion to dismiss on September 11, 2014. Dkt. No. 52. Plaintiff filed an opposition and
12 CallFire filed a reply. Dkt. Nos. 57, 60.

13 LEGAL STANDARD

14 A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests the
15 legal sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
16 2001). Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient
17 facts alleged to support a cognizable legal theory. *Id.* (citing *Balistreri v. Pacifica Police Dep’t*, 901
18 F.2d 696, 699 (9th Cir. 1990)). In such a motion, all material allegations in the complaint must be
19 taken as true and construed in the light most favorable to the claimant. *Id.* However, “[t]hreadbare
20 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
21 suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, “the court is not required to
22 accept legal conclusions cast in the form of factual allegations if those conclusions cannot
23 reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-
24 55 (9th Cir. 1994).

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28 ² Unless otherwise stated, the following facts are from Plaintiff’s First Amended Complaint and assumed to be true for purposes of this motion. *See* Dkt. No. 44.

1 DISCUSSION

2 A. Motion to Dismiss

3 Under the TCPA, it is “unlawful for any person within the United States . . . to make any call
4 (other than a call made for emergency purposes or made with the prior express consent of the called
5 party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any
6 telephone number assigned to a . . . cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii). To
7 “make” a call means to be the person or entity that initiates it. *See* 47 C.F.R. § 64.1200(a)(1)(iii) (it
8 is unlawful to “initiate any telephone call” via an automatic telephone dialing system to a cellular
9 telephone service without the recipient’s prior express consent). Under the TCPA, a text message is
10 a “call”. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009). If an
11 individual receives more than one call within a twelve month period from a party in violation of the
12 Federal Communications Commission (“FCC”)’s regulations, the TCPA creates a private right of
13 action for damages. 47 U.S.C. § 227(c)(5).

14 CallFire argues: (1) Plaintiff failed to allege that CallFire initiated the call; (2) CallFire could
15 not be the party that initiated the call because of the way its service works; (3) TCPA liability is
16 limited to those who initiate a call, and a common carrier that simply transmits its customers’
17 messages does not initiate calls; and (4) this case should be referred to the FCC under the primary
18 jurisdiction doctrine.

19 In regards to the first argument, the FAC alleges that CallFire initiated the calls. Plaintiff
20 alleges that “Callfire were hired and/or retained by Defendant Shac to send his text-message, along
21 with the other text messages described below, on Defendant Shac’s behalf.” FAC ¶ 10. In addition,
22 Plaintiff alleges that “Defendants entered [Plaintiff’s] cellular-telephone number into a database and
23 subsequently used equipment capable of storing and/or producing telephone numbers, as well as
24 capable to dialing such numbers, to send the text message *en masse* to consumers, including
25 Plaintiff.” *Id.* ¶ 13.

26 The second, third, and fourth arguments are nearly identical to the arguments that CallFire
27 has made in motions to dismiss filed in similar actions brought against CallFire in other districts
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1 within the Ninth Circuit. *See Couser v. Pre-Paid Legal Services, Inc.*, No. 12-CV-2575 LAB
2 (WVG), Dkt. No. 28 (S.D. Cal. Aug. 16, 2013); *Shay v. Callfire, Inc.*, No. 14-CV-1257 L (WVG),
3 Dkt. No. 4 (S.D. Cal. June 18, 2014); *Rinky Dink Inc. v. Elec. Merch. Sys. Inc.*, No. C13-1347 JCC,
4 Dkt. No. 58 (W.D. Wash. June 26, 2014); *Kauffman v. Callfire, Inc.*, No. 14-CV-1333 H (DHB),
5 Dkt. No. 5 (S.D. Cal. Aug. 15, 2014).

6 The courts in two of these cases analyzed the arguments presented here.³ This Court is
7 persuaded by the thoughtful and thorough analysis in *Couser v. Pre-Paid Legal Services, Inc.*, 994
8 F. Supp. 2d 1100 (S.D. Cal. 2014). First, *Couser* rejected CallFire’s argument that it could not be
9 the party that initiated the call because of the way its service works, reasoning that the relationship
10 between CallFire and its customers is too fact-intensive to resolve at the motion to dismiss phase.
11 *Id.* at 1103. Second, *Couser* rejected CallFire’s argument that it is a common carrier that cannot be
12 found liable under the TCPA. *Id.* at 1103-05. The court reasoned that the legislative history
13 CallFire relied on was inconclusive, the FCC rulings addressed a different TCPA rule than the one
14 at issue there, and there had not been sufficient discovery conducted to conclude that CallFire is a
15 common carrier. *Id.* Third, *Couser* rejected CallFire’s argument that the case should be referred to
16 the FCC under the primary jurisdiction doctrine, also on the basis that there had not been sufficient
17 discovery conducted to conclude that CallFire is a common carrier. *Id.* at 1105-06. This Court
18 finds the analysis in *Couser* convincing, and follows suit. *See also Rinky Dink Inc. v. Elec. Merch.*
19 *Sys. Inc.*, No. C13-1347 JCC, Dkt. No. 78 (W.D. Wash. Sept. 30, 2014) (adopting the court’s
20 reasoning in *Couser*).

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22 **B. Requests for Judicial Notice**

23 In support of its motion, CallFire requests that the Court take judicial notice of: (1) the FCC
24 Form 499 Filer Database Listing for CallFire; (2) CallFire’s Terms of Service; and (3) portions of

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26 ³ The plaintiff in *Shay* voluntarily dismissed the action against CallFire before the court ruled on the
27 motion to dismiss. *Shay v. Callfire, Inc.*, No. 14-CV-1257 L (WVG), Dkt. No. 6 (S.D. Cal. June 27,
28 2014). The court in *Kauffman* granted the motion to dismiss on the basis that the plaintiff failed to
allege that CallFire initiated the call, and declined to address the arguments that CallFire could not
be the party that initiated the call because of the way its service works, that CallFire is a common
carrier that could not be found liable under the TCPA, and that the case should be referred to the
FCC under the primary jurisdiction doctrine.

1 the declaration of Shahriyar Neman. Dkt. No. 52-4. Plaintiff opposes CallFire’s request as to the
2 second and third documents. *See* Opp. at 5-6. CallFire’s request is granted as to the first document,
3 and denied as to the second and third documents. *See* Fed. R. Evid. 201(b).

4 Plaintiff requests that the Court take judicial notice of various court documents filed in
5 *Couser, Shay, Rinky Dink, and Kauffman*. Dkt. No. 58. Plaintiff’s request is granted for the
6 purposes of noticing the existence of the lawsuits and the claims made therein. *See In re Bare*
7 *Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1067 (N.D. Cal. 2010).

8 CallFire’s request for judicial notice filed in support of its reply, Dkt. No. 61, is denied. *See*
9 *Ojo v. Farmers Grp., Inc.*, 565 F.3d 1175, 1185 n.13 (9th Cir. 2009) (“[I]t is generally improper for
10 the moving party to introduce new facts or different legal arguments in the reply brief beyond those
11 that were presented in the moving papers.” (internal quotation marks and alterations omitted)).

12 **CONCLUSION**

13 For the reasons stated above, Defendants’ Motion to Dismiss the claims against CallFire is
14 denied.

15 **IT IS SO ORDERED.**

16 Dated: October 17, 2014

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19 HOWARD R. LLOYD
20 UNITED STATES MAGISTRATE JUDGE
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