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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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STEVE MACKINNON,

No. 2:17-cv-01456-JAM-DB

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Plaintiff,

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v.

**ORDER GRANTING HOF'S HUT
RESTAURANTS, INC.'S MOTION TO
DISMISS**

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HOF'S HUT RESTAURANTS, INC.,
a California corporation,

13

Defendant.

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Plaintiff Steve MacKinnon ("Plaintiff") made a dinner reservation at a Hof's Hut Restaurants, Inc.'s ("Defendant") restaurant and provided his phone number to receive confirmation of that reservation. Defendant then sent Plaintiff a text message confirming the reservation and providing a link to "View specials". Three months later Plaintiff filed this class action lawsuit. Compl., ECF No. 1. Defendant moves to dismiss the lawsuit. Mem., ECF No. 11. Plaintiff opposes. Opp'n, ECF No. 13. For the reasons below, the Court grants Defendant's motion to dismiss with prejudice.¹

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¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for November 7, 2017. In deciding this motion, the Court takes as true all well-pleaded facts in the operative complaint.

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1 I. FACTUAL AND PROCEDURAL BACKGROUND

2 In April 2017, Plaintiff made a dinner reservation at
3 Lucille's Smokehouse Bar-B-Que in Rocklin, California, a
4 restaurant owned by Defendant. Compl. ¶¶ 4, 18. When making the
5 reservation, Plaintiff was asked for and provided his cellphone
6 number to the restaurant. See id. The restaurant later sent
7 Plaintiff a text message reading:

8 *Welcome to Lucilles Rocklin!*
9 *Your reservation for 2 is set for 6:00 pm on 4/20/2017.*
10 *View specials at hcguest.com/?r=3327914571*

11 Id. ¶ 22. In response, Plaintiff filed this class-action lawsuit
12 on July 13, 2017, alleging that Defendant violated the Telephone
13 Consumer Protection Act (the "TCPA"), 47 U.S.C. §§ 227, *et seq.*,
14 by sending the text message. Defendant moves to dismiss for
15 failure to state a claim. See Mem.

16 II. OPINION

17 Plaintiff concedes that he "likely provided express consent
18 to Defendant to alert him when his dinner reservation was ready"
19 but contends that this is insufficient to "absolve Defendant of
20 liability [under the TCPA] because Defendant's message included
21 or introduced advertising" which Plaintiff did not consent to
22 receive in writing. See Opp'n at 2-3. The Court finds
23 otherwise.

24 Under the TCPA, the three elements of a claim are: (1) the
25 defendant called a cellular phone number; (2) using an automatic
26 telephone dialing system; (3) without the recipient's prior
27 express consent. Meyer v. Portfolio Recovery Assocs., LLC, 707
28 F.3d 1036, 1043 (9th Cir. 2012) (internal citation and quotation

1 marks omitted). As for the first element, a text message
2 qualifies as a "call" within the TCPA. Satterfield v. Simon &
3 Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009).

4 For the third element, any call or text message that
5 includes or introduces an advertisement or constitutes
6 telemarketing cannot be made without the prior express written
7 consent of the called or texted party. See Larson v. Harman
8 Mgmt. Corp., No. 1:16-CV-00219-DAD-SKO, 2016 WL 6298528, at *3
9 (E.D. Cal. Oct. 27, 2016) (citing 47 C.F.R. § 64.1200(a)(2)).

10 And a message qualifies as "telemarketing" or "advertising" if
11 it is issued for the purpose of encouraging the purchase or
12 rental of, or investment in, property, goods, or services. 47
13 C.F.R. § 64.1200(f)(12). Courts approach the question of
14 whether a message constitutes advertising or telemarketing with
15 "a measure of common sense." See Chesbro v. Best Buy Stores,
16 L.P., 705 F.3d 913, 918 (9th Cir. 2012).

17 All non-advertising or non-telemarketing calls or texts
18 made with an automatic telephone dialing system require only the
19 prior express consent of the called party—without having to be
20 in writing. See Larson, 2016 WL 6298528 at *3 (citing 47 C.F.R.
21 § 64.1200(a)(1)).

22 A. Allegations of Telemarketing or Advertising

23 The Court finds that Defendant's text message confirming
24 Plaintiff's dinner reservation does not constitute telemarketing
25 or advertising because it is informative and non-telemarketing
26 in nature. See Daniel v. Five Stars Loyalty, Inc., No. 15-CV-
27 03456-WHO, 2015 WL 7454260 (N. D. Cal. Nov. 24, 2015) (finding
28 that text message regarding "free pts" to be redeemed on

1 Defendant's website did not constitute advertising or
2 telemarketing since it just informed plaintiff that joining a
3 rewards program would result in free rewards points). Also,
4 messages "whose purpose is to facilitate, complete, or confirm a
5 commercial transaction that the recipient has previously agreed
6 to enter into with the sender are not advertisements[.]" See In
7 re Rules & Regs. Implementing the Tel. Consum. Prot. Act of
8 1991, 21 FCC Rcd. 3787, 3812 ¶ 49 (F.C.C., Apr. 6, 2006); see
9 also Wick v. Twilio Inc., No. C16-00914RSL, 2017 WL 2964855
10 (W.D. Wash. July 12, 2017) (text message notifying the plaintiff
11 that his order was incomplete and included a link to complete
12 the order was not telemarketing because the message related to
13 an order the plaintiff initiated). Similarly, Defendant's text
14 message to Plaintiff confirming his dinner reservation only
15 served to confirm an expected commercial transaction (eating at
16 Defendant's restaurant) that Plaintiff had initiated. It was
17 not an advertisement.

18 In addition, the phrase "View specials" does not somehow
19 convert the text message into an advertisement. Plaintiff
20 initiated the dining transaction by making a reservation at
21 Defendant's restaurant. See Compl. ¶ 18. The link to view
22 specials (even if it worked, which is apparently debated by the
23 parties) would have facilitated Plaintiff's dining transaction
24 by allowing him to view specials on his cellphone before sitting
25 down for dinner. See In re Rules & Regs., 21 FCC Rcd. at 3812 ¶
26 49.

27 Finally, Plaintiff cites Pedro-Salcedo v. Haagen-Dazs
28 Shoppe Co., No. 5:17-CV-03504-EJD, 2017 WL 4536422 (N.D. Cal.

1 Oct. 11, 2017) in support of his argument that Defendant's text
2 message was an advertisement or telemarketing, however, the
3 case is from the Northern District of California and is not
4 binding authority. Also, the facts are distinguishable from
5 this case. In Pedro-Salcedo, the Northern District of
6 California found that the text message in that case arguably
7 constituted an advertisement because the words "Thank you for
8 joining Haagen-Dazs Rewards! Download our app here:." meant
9 that the transaction (registration for the rewards program) was
10 complete without the text message. Id. at *1-2.

11 Here, in contrast, Plaintiff received a text message that
12 confirmed a reservation for an upcoming dinner that Plaintiff
13 initiated. See Compl. ¶ 18. And the "View specials" link would
14 have facilitated the transaction that Plaintiff initiated
15 (eating dinner at Defendant's restaurant). Plaintiff's reliance
16 on Pedro-Salcedo as persuasive or binding authority is,
17 therefore, misplaced. The Court finds that Plaintiff did not
18 receive an advertisement or telemarketing text message from
19 Defendant.

20 B. Allegations Regarding Consent

21 Because the Court finds that Defendant's text message to
22 Plaintiff was not an advertisement, Plaintiff's written consent
23 was not required before he received the text message. See
24 Larson, 2016 WL 6298528, at *4. Instead, only Plaintiff's
25 express consent was required (whether written or not). See
26 Larson, 2016 WL 6298528, at *3. Plaintiff provided Defendant
27 with express consent to receive a text message regarding his
28 dinner reservation by providing his phone number to Defendant.

1 See Compl. ¶¶ 18, 20; see also Roberts v. PayPal, Inc., No. C
2 12-0622 PJH, 2013 WL 2384242, at *3-5 (N.D. Cal. May 20, 2013)
3 (finding that prior express consent to receive a call is given
4 when the called party voluntarily proffers his telephone number
5 to the calling party); see also Baird v. Sabre Inc., 995 F.
6 Supp. 2d 1100, 1102-03, 1106-07 (C.D. Cal. 2014) (finding that
7 Baird's act of providing her cellphone number was a voluntary
8 act and that, as a result, she consented to be contacted on her
9 cellphone about flight-related matters).

10 Since the Court has found that Plaintiff's allegations
11 establish that he provided the requisite consent to receive
12 Defendant's text message, the inquiry ends. The Court need not,
13 and does not, reach the issue of (1) whether Defendant used an
14 Automatic Telephone Dialing System ("ATDS") in sending the text
15 message giving rise to this lawsuit and (2) whether Plaintiff is
16 within the zone of interest that Congress intended to be
17 protected by the TCPA.

18 Finally, Plaintiff seeks leave to amend should the Court
19 grant the motion to dismiss. Opp'n at 11. But the Court need
20 not grant leave to amend where amendment would be futile.
21 Deveraturda v. Globe Aviation Sec. Servs., 454 F.3d 1043, 1049-
22 1050 (9th Cir. 2006). As explained above, Plaintiff has pleaded
23 no facts that legally support his TCPA claim. And Plaintiff has
24 not pointed to any additional facts showing that amendment could
25 save his claim. The Court denies Plaintiff's request.

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III. ORDER

For the reasons above, the Court GRANTS Defendants' motion to dismiss WITH PREJUDICE.

IT IS SO ORDERED.

Dated: November 28, 2017



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE