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4   UNITED STATES DISTRICT COURT

5   NORTHERN DISTRICT OF CALIFORNIA

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7   NOAH DUGUID,
                                                        Case No. 15-cv-00985-JST
                    Plaintiff,
8
          v.
9   **ORDER GRANTING MOTION TO
                                                        DISMISS**
     FACEBOOK, INC.,
10   Re: ECF No. 24
                    Defendant.
11

12   Before the Court is Defendant Facebook, Inc.'s Motion to Dismiss Plaintiff's Complaint

13   Pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 24. Plaintiff Noah Duguid

14   opposes the motion. ECF No. 30. For the reasons set forth below, the Court will grant the motion

15   to dismiss.

16   **I.   BACKGROUND**

17   For the purpose of deciding this motion, the Court accepts as true the following allegations

18   from Plaintiff's Complaint, ECF No. 1. See Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).

19   Defendant Facebook, Inc. ("Facebook") operates an online social network. Compl. ¶ 3.

20   As of September 2014, Facebook had 864 million daily active users and 1.35 billion monthly

21   active users. Id. Users often share private information on Facebook. Id. ¶ 4. As an "extra

22   security feature," a user may activate "login notifications" to alert her via text message when her

23   account is accessed from a new device. Id. ¶¶ 4-5. The notifications state: "Your Facebook

24   account was accessed from [internet browser] at [time]. Log in for more info." Id. ¶ 5.

25   Login notification text messages are often sent to the cellphones of persons who have not

26   authorized Facebook to contact them on their cellphones, who have requested that the notifications

27   stop, or who do not use Facebook. Id. Such messages may be sent several times a day. Id.

28   Facebook's online instructions direct users to change their account settings in order to deactivate

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login notifications, but provide no solution for persons who receive messages even though they have no Facebook account. Id. at 6, Ex. B. When someone replies "off" to Facebook's text messages, Facebook responds with a message stating, "Facebook texts are now off. Reply on to turn back on." Id. ¶ 7. Notwithstanding this response, Facebook often continues to send unauthorized text messages. Id.

Plaintiff Noah Duguid began receiving Facebook login notifications via text message on or around January 25, 2014. Id. ¶ 20. The messages were sent from an SMS short code, 326-65 ("FBOOK"), which is licensed and operated by Defendant or one of its agents. Id. ¶ 21. Although Duguid never provided his cellphone number to Facebook or authorized Facebook to send him text messages, he received repeated login notification messages. Id. ¶¶ 22-26. Several example messages are reproduced below:
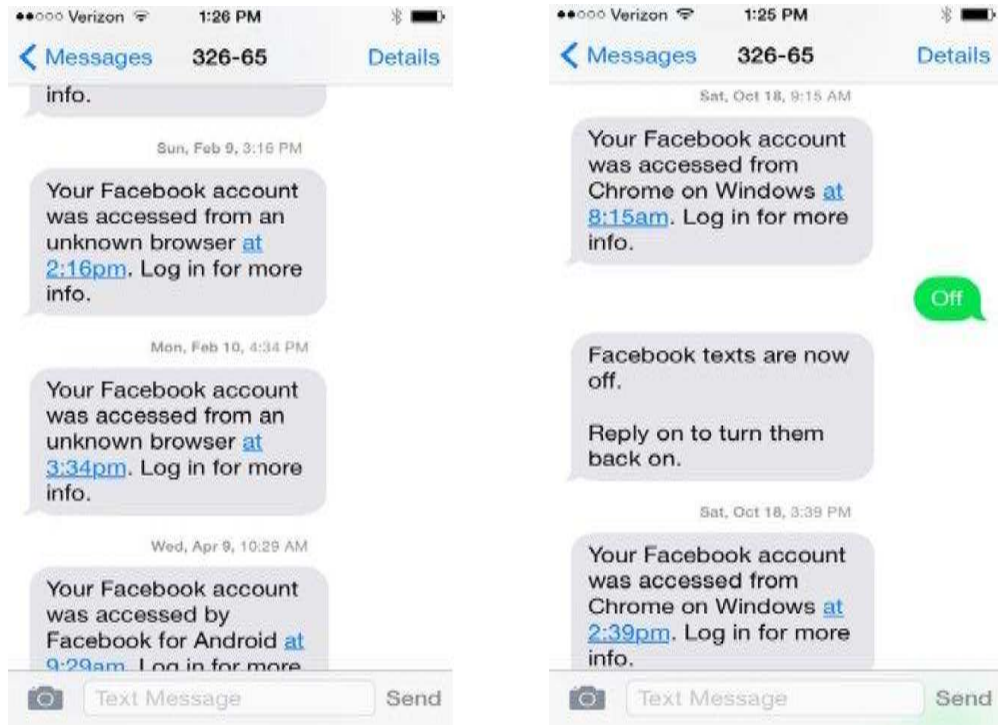
Id. ¶ 22, Ex. D. On or around April 20, 2014, Duguid sent Facebook an email message requesting that the text messages cease. Id. ¶ 27. In response, Facebook sent an automated message directing Duguid to log on to the Facebook website in order to report problematic content. Id. Duguid's efforts to deactivate the messages by responding "off" and "all off" were also unsuccessful. Id.

¶ 28.

On March 3, 2015, Plaintiff filed his complaint against Facebook, alleging violations of the Telephone Consumer Protection Act ("TCPA"). He seeks to represent the following two classes:

> Class 1: All persons within the United States who did not provide their cellular telephone number to Defendant and who received one or more text messages, from or on behalf of Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.

> Class 2: All persons within the United States who, after notifying Defendant that [they] no longer wished to receive text messages and receiving a confirmation from Defendant to that effect, received one or more text messages, from or on behalf of Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.

Id. ¶ 34.

Defendant moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and requests that the Court take judicial notice of certain publicly available webpages. ECF Nos. 24, 24-3. Plaintiff opposes the motion to dismiss. ECF No. 30.

The Court has jurisdiction over this action pursuant to 28 U.S.C. section 1331.

II.   REQUEST FOR JUDICIAL NOTICE

A.   Legal Standard

Pursuant to Federal Rule of Evidence 201(b), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Court may also "consider materials incorporated into the complaint," where "the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance." Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). The Court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2).

B.   Facebook Webpages

First, Defendant requests that the Court take judicial notice of screen shots of three

Facebook webpages: Facebook's "Statement of Rights and Responsibilities" and two Help Center

webpages titled, "How do I verify my account?" and "How do I add or remove credit card info

from my account?". ECF No. 24-3 at 2; Exs. 1-3. Defendant argues that the Court may take

judicial notice of these exhibits because they are "currently publicly available on Facebook's

website—the same website upon which Plaintiff repeatedly relies in his complaint," and "there is

no reasonable dispute regarding the information." ECF No. 24-3 at 3. Furthermore, Defendant

argues, the Court may consider these documents pursuant to the incorporation by reference

doctrine because Plaintiff's Complaint relies on and attaches Facebook webpages, and alleges

facts relating to the login notification process and the private information that Facebook users may

use login notifications to protect. ECF No. 24-3 at 4-5. Plaintiff has not filed an opposition to

Defendant's request for judicial notice, although he does argue that "Facebook's suppositions are

matters outside the pleadings and should not be considered in deciding the motion to dismiss."

ECF No. 30 at 4 n.1.

"'[F]ederal courts considering the issue have expressed skepticism as to whether it is

appropriate to take judicial notice of information or documents' from websites when the sole

justification for judicial notice is that the information or documents 'appear[] on websites that are

created and maintained by a party to the litigation.'" Punian v. Gillette Co., No. 14-cv-05028-

LHK, 2015 WL 4967535, at *5 (N.D. Cal. Aug. 20, 2015) (quoting Gerritsen v. Warner Bros.

Entm't Inc., No. 14-cv-03305 MMM (CWx), 2015 WL 4069617, at * 10 (C.D. Cal. Jan. 30,

2015)); see also Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 795 (N.D. Cal. 2011) (taking

judicial notice of document from defendant's website that was cited in the complaint, but denying

request for judicial notice as to other webpages created by the defendant). The Court finds that the

inclusion of Exhibits 1, 2, and 3 on Facebook's website "is not, standing alone, a sufficient basis

for the Court to grant the request" for judicial notice. Punian, 2015 WL 4967535, at *5.

Moreover, these documents are not incorporated by reference in Plaintiff's complaint

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1   because it neither necessarily relies on them nor alleges their contents. See Coto Settlement, 593

2   F.3d at 1038. Defendants correctly state that Plaintiff's Complaint discusses the login notification

3   process, includes some Facebook Help Center webpages as attachments, and states that users share

4   private information on Facebook. ECF No. 24-3 at 4-5. But the Complaint does not reference or

5   incorporate the account verification process, Facebook's Statement of Rights and Responsibilities,

6   or the process by which users share credit card details with Facebook. See Fraley, 830 F. Supp. 2d

7   at 795. The Court therefore denies Facebook's request for judicial notice as to Exhibits 1, 2,

8   and 3.

9   **C.   Media Reports**

10   Second, Facebook requests that the Court take judicial notice of the following media

11 reports: (1) Sharon Profis, Find out if someone's logging in to your Facebook account, CNET

12 (Dec. 10, 2011, 4:36 AM), http://www.cnet.com/au/how-to/find-out-if-someones-logging-in-to-

13 your-facebook-account/; (2) Alyssa Abkowitz, Wrong Number? Blame Companies' Recycling,

14 THE WALL STREET JOURNAL (Dec. 1, 2011), http://www.wsj.com/articles/SB10001424052970204

15 01200457707012268746258 2; (3) Alison Griswold, Venmo Money, Venmo Problems, SLATE

16 (Feb. 25, 2015, 8:10 PM), http://www.slate.com/articles/technology/safety_net/2015/02/venmo_

17 security_it_s_not_as_strong_as_the_company_wants_you_to_think.html. ECF No. 24-3 at 2, Ex.

18 4-6. Plaintiff has not filed an opposition to this request.

19   The Court "may take judicial notice of publications introduced to indicate what was in the

20 public realm at the time, not whether the contents of those articles were in fact true." Von Saher v.

21 Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2009) (internal quotation

22 marks omitted); accord Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 981 n. 18 (9th Cir.

23 1999) (taking judicial notice "that the market was aware of the information contained in news

24 articles submitted by the defendants"). The Court therefore takes judicial notice of these

25 publications "solely as an indication of what information was in the public realm at the time."

26 Von Saher, 592 F.3d at 960.

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1 **III.   MOTION TO DISMISS**

2   **A.   Legal Standard**

3   A complaint must contain "a short and plain statement of the claim showing that the

4 pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and

5 the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2); Bell Atl. Corp. v. Twombly, 550 U.S.

6 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual

7 matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal,

8 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility

9 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that

10 the defendant is liable for the misconduct alleged." Id. "Dismissal under Rule 12(b)(6) is

11 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support

12 a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th

13 Cir. 2008). The Court must "accept all factual allegations in the complaint as true and construe

14 the pleadings in the light most favorable to the nonmoving party." Knievel v. ESPN, 393 F.3d

15 1068, 1072 (9th Cir. 2005).

16   **B.   Discussion**

17   Defendant argues that Plaintiff's Complaint should be dismissed for failure to state a claim

18 for three independent reasons. ECF No. 24 at 1. First, Defendant argues that Plaintiff does not

19 adequately allege that the login notifications were sent by an automatic telephone dialing system

20 as required under the TCPA. Id. at 7-12; see 47 U.S.C. § 227(a)(1). Second, Defendant argues

21 that the login notifications fall within the TCPA's exception for calls "made for emergency

22 purposes." ECF No. 24 at 12-15; see 47 U.S.C. 227(b)(1)(A). Third, Defendant argues that

23 because the login notifications are non-commercial security messages sent to protect individual

24 consumers' privacy, they cannot be restricted under the First Amendment. ECF No. 24 at 15-18.[1]

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26 [1] In a footnote, Defendant also states that "[i]t is questionable whether Plaintiff has Article III standing for his TCPA claim" because he "does not allege that he pays incrementally for each text

27 he receives or that he in fact paid for the alleged login notifications." ECF No. 24 at 2 n.1. Defendant indicates that it may seek to bring this standing argument "at a later time." Id. The

28 Court does not address the argument in this order.

1   To state a claim for a violation of the TCPA, a plaintiff must allege that "(1) the defendant

2 called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without

3 the recipient's prior express consent." Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036,

4 1043 (9th Cir. 2012); 47 U.S.C. § 227(b)(1). A text message is a "call" within the meaning of the

5 TCPA. Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009). An "automatic

6 telephone dialing system" ("ATDS") is "equipment which has the capacity – (A) to store or

7 produce telephone numbers to be called, using a random or sequential number generator; and

8 (B) to dial such numbers." 47 U.S.C. § 227(a)(1). "[T]he clear language of the TCPA 'mandates

9 that the focus must be on whether the equipment has the capacity to store or produce telephone

10 numbers to be called, using a random or sequential number generator.'" Meyer, 707 F.3d at 1043

11 (quoting Satterfield, 569 F.3d at 951) (emphasis in original). "[A] system need not actually store,

12 produce, or call randomly or sequentially generated telephone numbers, it need only have the

13 capacity to do it." Satterfield, 569 F.3d at 951.

14   Plaintiff alleges that "[t]he text messages sent to Plaintiff's cellular phone were made with

15 an ATDS as defined by 47 U.S.C. § 227(a)(1)," and that "[t]he ATDS has the capacity to store or

16 produce telephone numbers to be called, using a random or sequential number generator." Compl.

17 ¶¶ 29-30. This conclusory allegation that Facebook used an ATDS is not, without more, sufficient

18 to support a claim for relief under the TCPA. Kramer v. Autobytel, Inc., 759 F. Supp. 2d 1165,

19 1171 (N.D. Cal. 2010) (the "naked assertion" that messages were sent "using equipment that, upon

20 information and belief, had the capacity to store or produce telephone numbers to be called, using

21 a random or sequential number generator . . . need not be taken as true"); Flores v. Adir Int'l,

22 LLC, No. 15-cv-00076-AB, 2015 WL 4340020, at *3 (C.D. Cal. July 15, 2015) ("Without more,

23 Plaintiff's conclusory allegation that Defendant used an ATDS is little more than speculation, and

24 cannot support a claim for relief under the TCPA"); see also Twombly, 550 U.S. at 555 ("a

25 plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels

26 and conclusions, and a formulaic recitation of the elements of a cause of action will not do"

27 (internal quotation marks and alterations omitted)).

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1   Because it may be difficult for a plaintiff to identify the specific type of dialing system

2   used without the benefit of discovery, courts have allowed TCPA claims to proceed beyond the

3   pleading stage where a plaintiff's allegations support the inference that an ATDS was used. For

4   example, in Kramer v. Autobytel, the court found that the complaint, read as a whole, contained

5   "sufficient facts to show that it is plausible" that the defendants used an ATDS where the plaintiff

6   alleged that he received messages from a short code registered to one of the defendants, the

7   messages were advertisements written in an impersonal manner, and the plaintiff had no other

8   reason to be in contact with the defendants. 759 F. Supp. 2d at 1171. Similarly, in Kazemi v.

9   Payless Shoesource, Inc., the court concluded that "plaintiff's description of the received messages

10   as being formatted in SMS short code licensed to defendants, scripted in an impersonal manner

11   and sent en masse supports a reasonable inference that the text messages were sent using an

12   ATDS," and the complaint therefore met federal pleading requirements. No. 09-cv-05142-MHP,

13   2010 WL 963225, at *2 (N.D. Cal. Mar. 16, 2010); see also Gragg v. Orange Cab Co., Inc., No.

14   12-cv-0576-RSL, 2013 WL 195466, at *3 n.3 (W.D. Wash. Jan. 17, 2013) ("Plaintiffs alleging the

15   use of a particular type of equipment under the TCPA are generally required to rely on indirect

16   allegations such as the content of the message, the context in which it was received, and the

17   existence of similar messages, to raise an inference that an automated dialer was utilized. Prior to

18   the initiation of discovery, courts cannot expect more."); see also Scott Dodson, New Pleading,

19   New Discovery, 109 Mich. L. Rev. 53 (2010) (arguing in favor of "limited presuit or predismissal

20   discovery to counteract the information asymmetry and overscreening caused by Twombly and

21   Iqbal").

22   Where, however, a "[p]laintiff's own allegations suggest direct targeting that is

23   inconsistent with the sort of random or sequential number generation required for an ATDS,"

24   courts conclude that the allegations are insufficient to state a claim for relief under the TCPA.

25   Flores, 2015 WL 4340020, at *4. In Flores v. Adir International, for example, the plaintiff alleged

26   that the defendant was a debt collector that sent him a number of text messages for the purpose of

27   collecting on a specific debt, each of which included the same reference number. Id. The text

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1   messages did not include the plaintiff's name and appeared to follow a generic template, and the

2   plaintiff alleged that he received immediate responses to his "Stop" texts. Id. at *3-4. The court

3   found that while these allegations might support the reasonable inference that the defendant's

4   equipment was capable of some form of automation, they did not suggest the use of an ATDS as

5   defined in the TCPA. Id. at *4-5. To the contrary, "the content of the message, the context in

6   which it was received, and the existence of similar messages all weigh[ed] against an inference

7   that Defendant used an ATDS," suggesting instead "that Defendant expressly targeted Plaintiff."

8   Id. at *5 (emphasis in original) (internal quotation marks omitted). See also Daniels v. Cmty.

9   Lending, Inc., No. 13-cv-488-WQH-JMA, 2014 WL 51275, at *5 (S.D. Cal. Jan. 6, 2014)

10   (plaintiffs did not adequately allege the use of an ATDS where the "alleged calls to Plaintiffs do

11   not appear to have been 'random,' 47 U.S.C. § 227(a)(1); instead the calls are alleged to be

12   directed specifically toward Plaintiffs").

13   Here, as in Flores, Plaintiff's allegations do not support the inference that the text

14   messages he received were sent using an ATDS. Plaintiff alleges that the login notifications are

15   designed "to alert users when their account is accessed from a new device." Compl. ¶ 4. The text

16   messages follow the following template: "Your Facebook account was accessed from [internet

17   browser] at [time]. Log in for more info." Id. ¶¶ 5, 22. Plaintiff has attached to his Complaint a

18   webpage from Facebook's online Help Center, which explains that users must add their mobile

19   numbers to their accounts in order to receive login notifications by text message. Id. Ex. A.

20   These allegations suggest that Facebook's login notification text messages are targeted to specific

21   phone numbers and are triggered by attempts to log in to Facebook accounts associated with those

22   phone numbers.[2] Although Plaintiff alleges that the operation of this system is "sloppy" because

23   messages are sent to individuals who have never had a Facebook account, have never shared their

24   phone number with Facebook, and/or who have requested deactivation of the login notifications,

25   he does not suggest that Facebook sends text messages en masse to randomly or sequentially

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27   [2] In his opposition to the motion to dismiss, Plaintiff acknowledges that "the messages are
     automatically sent when the subject Facebook account is accessed from an unknown device."
28   ECF No. 30 at 5.

1 generated numbers. Id. ¶¶ 5, 8. As in Flores, "it is at least possible that Defendant utilized a

2 system that is capable of storing or generating a random or sequential list of telephone numbers

3 and then dialing them," 2015 WL 4340020, at *4 (emphasis in original), but nothing in Plaintiff's

4 Complaint "nudge[s] [his] claims across the line from conceivable to plausible." Twombly, 550

5 U.S. at 547.[3]

6   In his opposition, Plaintiff suggests that the capacity to produce or store random or

7 sequential numbers is not a necessary feature of an ATDS, citing a 2003 order in which the

8 Federal Communications Commission ("FCC") concluded that a predictive dialer constitutes an

9 ATDS. ECF No. 30 at 7-13. The FCC described a predictive dialer as "equipment that dials

10 numbers and, when certain computer software is attached, also assists telemarketers in predicting

11 when a sales agent will be available to take calls. The hardware, when paired with certain

12 software, has the capacity to store or produce numbers and dial those numbers at random, in

13 sequential order, or from a database of numbers." In re Rules & Regulations Implementing the

14 Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14091-93 (2003). Courts in

15 this district have concluded that the reasoning of the FCC's order is not restricted to predictive

16 dialers. See Nunes v. Twitter, Inc., No. 14-cv-02843-VC, 2014 WL 6708465, at *1 (N.D. Cal.

17 Nov. 26, 2014) ("Although this language is not crystal clear, it appears to encompass any

18 equipment that stores telephone numbers in a database and dials them without human

19 intervention."); Fields v. Mobile Messengers Am., Inc., No. 12-cv-05160-WHA, 2013 WL

20 6774076, at *3 (N.D. Cal. Dec. 23, 2013) (concluding that there were genuine disputes of material

21 fact regarding whether messages were sent using an ATDS where plaintiffs alleged that the

22 equipment used functioned similarly to a predictive dialer in that it received numbers from a

23 computer database and dialed those numbers without human intervention).

24

25 [3] Plaintiff also alleges that Facebook sends automatic responses to opt-out texts. These responses
    are not actionable under the TCPA. See Derby v. AOL, Inc., No. 15-cv-00452-RMW, 2015 WL

26 3477658, at *6 (N.D. Cal. June 1, 2015) ("a single message sent in response to plaintiff's text (or
    texts) is not the kind of intrusive, nuisance call that the TCPA prohibits"); In Re Rules &

27 Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961
    ¶ 57 at *21 (2015) (describing a ruling in which the FCC "concluded that a one-time text

28 confirming a consumer's request to opt out of future calls did not violate the TCPA").

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1   But Duguid has not alleged that Facebook uses a predictive dialer, or equipment that

2   functions like a predictive dialer. The Complaint plainly alleges that the text messages were sent

3   using an ATDS that "has the capacity to store or produce telephone numbers to be called, using a

4   random or sequential number generator." Compl. ¶¶ 29-30. As discussed above, the Court

5   concludes that this claim is not plausible, and it will therefore dismiss the TCPA claims for failure

6   to adequately allege that the login notifications were sent using an ATDS.

7   Because the Court dismisses the complaint on this basis, it need not address Facebook's

8   arguments that the motion should be granted because Plaintiff's allegations establish that human

9   intervention triggered the login notifications, and because the notifications are sent for emergency

10 purposes. The Court also does not reach the argument that imposing liability on Facebook for

11 sending the login notifications would violate the First Amendment. See San Francisco Tech., Inc.

12 v. GlaxoSmithKline LLC, No. 10-cv-03248-JF NJV, 2011 WL 941096, at *2 (N.D. Cal. Mar. 16,

13 2011) ("Because it concludes that SF Tech's claims are subject to dismissal on other bases, the

14 Court need not decide the constitutional issues presented here, at least at the present time.").
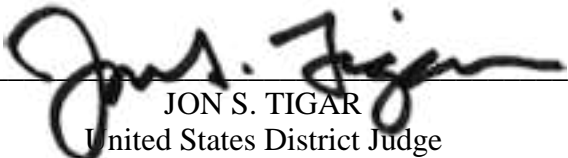
15 **CONCLUSION**

16 For the foregoing reasons, the motion to dismiss is granted without prejudice. Plaintiff

17 may file an amended complaint within 30 days of the date of this order.

18 An Initial Case Management Conference is scheduled for June 1, 2016. A Joint Case

19 Management Conference Statement is due by May 18, 2016. See ECF No. 29.

20 IT IS SO ORDERED.

21 Dated: March 24, 2016

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24 JON S. TIGAR
    United States District Judge

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