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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID WEISBERG,  
Plaintiff,  
  
v.  
  
STRIPE, INC.,  
Defendant.

Case No. 16-cv-00584-JST

**ORDER GRANTING MOTION TO DISMISS**

Re: ECF No. 21

Before the Court is Defendant Stripe, Inc.’s Motion to Dismiss Plaintiff’s First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 21. Plaintiff David Weisberg opposes the motion. ECF No. 25. For the reasons set forth below, the Court will grant the motion to dismiss.

**I. BACKGROUND**

In deciding this motion, the Court accepts as true the following allegations from Plaintiff’s First Amended Complaint. See Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).

Defendant Stripe, Inc. (“Stripe”) is a corporation that has its primary address in San Francisco, California. ECF No. 16 (“Am. Compl.”) ¶ 5. Stripe provides payment processing services for websites and mobile applications to consumers nationwide. Am. Compl. ¶ 5. Stripe’s payment volume is approximately \$20 billion per year. Id. ¶ 17.

Plaintiff David Weisberg never contacted nor conducted any business with Stripe in any fashion, nor visited Stripe’s online websites, prior to October 29, 2015. Id. ¶ 13. On October 29, 2015 Plaintiff received a text message on his cellular phone reading: “Thanks for saving your payment info! This number will be used to verify your identity at Registration and other sites using Stripe Checkout.” Id. ¶ 10. Plaintiff responded to Stripe’s text message with the reply: “Who is this?” Id. ¶ 11. Stripe replied to Plaintiff’s text message with the following message:

1 “Sorry, we cannot receive messages at this number. If you need help, please contact  
2 support@stripe.com.” Id. ¶ 12. Stripe has a webpage entitled “Why did I receive a text message  
3 from Stripe saying ‘thanks for saving your payment info?’” Id. ¶ 15. The webpage explains that  
4 users are sent a text message after saving payment information and a phone number is entered  
5 using the “Remember Me” feature during the Stripe Checkout process. Id. ¶ 15 n.1. Stripe also  
6 has a webpage entitled “Checkout.” Id. ¶ 16 n.2. Stripe claims to send these text messages when  
7 processing payments. Id. ¶ 16.

8 On February 3, 2016, Plaintiff filed his complaint against Stripe, alleging violations of the  
9 Telephone Consumer Protection Act (“TCPA”). He seeks to represent the following class: all  
10 persons within the United States who received any unsolicited text messages and/or any other  
11 unsolicited text messages from Stripe without prior express consent. Plaintiff seeks to exclude  
12 Stripe and its employees or agents from the class. Id. ¶¶ 27-28.

13 Stripe moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure  
14 12(b)(6). ECF Nos. 21, 26. Plaintiff opposes the motion to dismiss. ECF No. 25.

15 This Court has federal question jurisdiction over this action, which was brought under the  
16 TCPA, 47 U.S.C. § 227, pursuant to 28 U.S.C. § 1331. See Mims v. Arrow Fin. Servs., LLC, 132  
17 S. Ct. 740, 753 (2012).

18 **II. MATERIAL INCORPORATED INTO PLAINTIFF'S COMPLAINT**

19 Before addressing the merits of the motion, the Court must first address a separate dispute  
20 regarding the scope of its inquiry. Generally, the Court's review of a motion to dismiss is limited  
21 to the pleadings in a case. Here, Stripe has relied on information from two webpages discussed in  
22 Plaintiff's Amended Complaint, which Plaintiff argues are not properly before the Court on this  
23 motion. Stripe argues that the Court may consider these materials because they are incorporated  
24 into the complaint. Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). The  
25 doctrine of incorporation applies “in situations where the complaint necessarily relies upon a  
26 document or the contents of the document are alleged in a complaint, the document's authenticity  
27 is not in question and there are no disputed issues as to the document's relevance.” Id. However,  
28 the mere mention of the existence of a document is insufficient to incorporate its contents into the

1 complaint. Id.

2 **A. "Stripe Checkout" Webpage**

3 The first webpage discussed by Defendant is a "Stripe Checkout" webpage that presents to  
4 merchants the form and checkout process that Stripe offers for customers' use. ECF No. 26 at 8-  
5 10; ECF No. 21 at 12-15. Plaintiff argues that the Amended Complaint does not allege that  
6 Plaintiff completed the Stripe Checkout process and that this process should not be considered by  
7 the Court. ECF No. 25. at 11-12.

8 Both Plaintiff's pleading papers and his opposition to this motion, however, make clear  
9 that he is necessarily relying on the content of the "Stripe Checkout" webpage in his argument.  
10 Plaintiff's Amended Complaint states that "Defendant claims to send these text messages when  
11 processing payments" and cites to the "Stripe Checkout" page as support for this claim. Am.  
12 Compl. ¶ 16. Plaintiff explains further in his opposition that this allegation plays a role in his  
13 theory as to why he has plausibly pleaded the existence of an automatic telephone dialing system  
14 ("ATDS"): "Plaintiff further pled that Defendant's website indicated that they sent the identical  
15 message to a large number of consumers thus indicating usage of an automated system." ECF No.  
16 25 at 15. Plaintiff therefore seeks to prevent Stripe from using the webpage to argue that he fails  
17 to meet the plausibility standard, even though he relies on the very same webpage to argue that he  
18 does meet that standard. Plaintiff's position is unsustainable.

19 Plaintiff also characterizes Defendant's "Background on Stripe and the Stripe Checkout  
20 Service" section ECF No. 21 at 12-15, as containing "unchecked and unverified documents and  
21 assertions." ECF No. 25 at 11. However, he provides no evidence for these assertions and raises  
22 no reasonable suspicion that the content of the "Stripe Checkout" webpage is in any way  
23 "inauthentic," and he does not dispute its relevance. See Coto Settlement, 593 F.3d at 1038. To  
24 the contrary, Plaintiff's reliance on this webpage in alleging the use of an ATDS suggests his own  
25 belief in the legitimacy and relevance of the webpage's content. Am. Compl. ¶¶ 16, 18. Thus, the  
26 Court finds that the content of the "Stripe Checkout" webpage has been incorporated into  
27 Plaintiff's complaint and may be considered.

28



1 are merely consistent with a defendant's liability, it stops short of the line between possibility and  
2 plausibility of entitlement to relief." Id. (internal quotation marks omitted). In determining  
3 whether the Plaintiff has met this plausibility standard, the Court must accept all factual  
4 allegations in the complaint as true and construe the pleadings in the light most favorable to the  
5 Plaintiff. Knieval v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

6 **B. Discussion**

7 Plaintiff alleges that "Defendant stores a database of numbers, used in conjunction with its  
8 \$20 billion in annual transactions that it processes, and automatically, without human intervention,  
9 transmits form text messages to users whose numbers are warehoused in its system." ECF No. 25  
10 at 13; FAC at ¶¶ 9-22. He further argues that whether an ATDS was used should be addressed  
11 through merits-based discovery and that an order granting a motion to dismiss would be improper  
12 at this stage. ECF No. 25 at 14-18. Defendant offers two reasons that Plaintiff's complaint should  
13 be dismissed. ECF No. 21 at 19. First, Defendant argues that because Plaintiff has not pleaded  
14 sufficient facts to raise the plausible inference that he received the text messages using an ATDS,  
15 Plaintiff has failed to bring an actionable claim under the TCPA. Id. at 18-23; ECF No. 26 at 10-  
16 14. Second, Defendant argues that Plaintiff has not plausibly pleaded that Stripe's text messages  
17 were sent to Plaintiff without Plaintiff's express prior consent. ECF No. 21 at 23-27; ECF No. 26  
18 at 14-17. As detailed below, the Court will grant the motion to dismiss because Plaintiff fails to  
19 plead that the text messages came from an ATDS, and therefore does not address the issue of  
20 consent.

21 Under the TCPA, it is unlawful "to make any call . . . using any automatic telephone  
22 dialing system . . . to any telephone number assigned to a . . . cellular telephone service." 47  
23 U.S.C. § 227(b)(1)(A)(iii). A "call" includes both voice calls and text messages, Saterfield v.  
24 Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2012), and "automatic telephone dialing  
25 system" is defined as "equipment which has the capacity - (A) to store or produce telephone  
26 numbers to be called, using a random or sequential number generator; and (B) to dial such  
27 numbers." 47 U.S.C § 227(a)(1). To state a viable claim for violation of the TCPA, it must be  
28 shown that: "(1) the defendant called a cellular telephone number; (2) using an automatic

1 telephone dialing system; (3) without the recipient's prior express consent.” Meyer v. Portfolio  
2 Recovery Assocs., LLC, 707 F.3d 1036, 1043 (9th Cir. 2012); 47 U.S.C § 227(b)(1). In  
3 evaluating whether the equipment used by the defendant constitutes an ATDS, “the statute's clear  
4 language mandates that the focus must be on whether the equipment has the capacity to ‘store or  
5 produce telephone numbers to be called, using a random or sequential number generator.’”  
6 Saterfield, 569 F.3d at 951 (emphasis in original). Thus, the equipment used by Defendant need  
7 not actually store, produce or call randomly or sequentially generated telephone numbers; it need  
8 only have the capacity to do so. Id.

9 “Where . . . a ‘plaintiff's own allegations suggest direct targeting that is inconsistent with  
10 the sort of random or sequential number generation required for an ATDS,’ courts conclude that  
11 the allegations are insufficient to state a claim for relief under the TCPA.” Duguid v. Facebook,  
12 Inc., No. 15-cv-00985-JST, 2016 WL 1169365, \*5 (N.D. Cal. Mar. 24, 2016) (quoting Flores v.  
13 Adir Int'l, LLC, No. 15-cv-00076-AB, 2015 WL 4340020, at \*4 (C.D. Cal. July 15, 2015)). In  
14 Duguid, the plaintiff alleged that Facebook repeatedly sent him text messages regarding his  
15 Facebook account even though he had never provided Facebook his cellphone number or  
16 authorized Facebook to send him text messages. Id. at \*1. The plaintiff alleged that it could be  
17 inferred that the text messages were received using an ATDS, but the court noted that plaintiff  
18 attached to his complaint a Facebook webpage “explain[ing] that users must add their mobile  
19 numbers to their accounts in order to receive login notifications by text message.” Id. at \*5.  
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” Id. Although the plaintiff argued that Facebook’s login notification system  
23 could be “sloppy,” this contention “does not suggest that Facebook sends text messages en masse  
24 to randomly or sequentially generated numbers.” Id.

25 Here, Plaintiff has offered allegations substantially similar to those rejected in Duguid.  
26 Plaintiff alleges that Defendant sends text messages when processing payments, Am. Compl. ¶ 16,  
27 18, and incorporates the “Stripe Checkout” webpage into his complaint, which explains the  
28 process through which a customer enters and elects to save his phone number on a participating

1 website. Id. 16 n.2. Plaintiff then incorporates the “Why did I receive a text message from Stripe  
2 saying 'thanks for saving your payment info'?” webpage, which explains that once a customer has  
3 elected to save his phone number on a participating website, Stripe will send that number a text  
4 message. Id. ¶ 14 n.1. Taken together, these allegations suggest that Stripe's text messages are  
5 targeted to specific phone numbers in response to the voluntary release of a user's phone number  
6 when completing the "Remember Me" option as described in Am. Compl. ¶ 16, n. 2. Concerning  
7 the second text message sent by Defendant, Plaintiff alleges that Stripe's message notification was  
8 sent in response to Plaintiff's own message to Defendant. Id. ¶ 11-12. This, too, suggests that  
9 Stripe's second text message to Plaintiff is a targeted response to those individuals who respond to  
10 other text messages from Stripe.

11 Plaintiff contends that these allegations support the inference that Stripe has used a  
12 predictive dialer, which he describes as system that is capable of dialing a list of numbers  
13 contained in a database, and that the FCC has concluded that a predictive dialer constitutes an  
14 ATDS. ECF No. 25 at 13-14. A similar argument was also made and rejected in Duguid:

15 But Duguid has not alleged that Facebook uses a predictive dialer, or equipment  
16 that functions like a predictive dialer. The Complaint plainly alleges that the text  
17 messages were sent using an ATDS that “has the capacity to store or produce  
18 telephone numbers to be called, using a random or sequential number generator.”  
Compl. ¶¶ 29-30. As discussed above, the Court concludes that this claim is not  
plausible, and it will therefore dismiss the TCPA claims for failure to adequately  
allege that the login notifications were sent using an ATDS.

19 Duguid, 2016 WL 1169365, at \*6. Here, Plaintiff's contention must be rejected for the same  
20 reason. Plaintiff has not plausibly alleged that the text messages were sent randomly to him by an  
21 ATDS.

22 Plaintiff also relies upon In Re Jiffy Lube Intern., Inc., Text Spam Litigation, 847 F. Supp.  
23 2d 1253, 1260 (S.D. Cal. 2012) and Lee v. Stonebridge Life Ins. Co., 289 F.R.D. 292, 295 (N.D.  
24 Cal. 2013) to assert that the question of whether an ATDS was used should be addressed through  
25 discovery. ECF No. 25 at 14. Both of those cases are inapposite. In In Re Jiffy Lube, the court  
26 rejected the defendant's contention that a valid TCPA complaint must allege “(1) the text message  
27 was sent by a specific SMS short code; and (2) the content of the message was impersonal.” 847  
28 F. Supp. 2d at 1259. That is not the standard that Stripe advocates here. Lee addressed a motion

1 for class certification, and therefore the question in that case was not whether the plaintiff had  
2 plausibly pleaded a claim, but rather whether the claims were amenable to class-wide adjudication.  
3 289 F.R.D. at 295.<sup>1</sup>

4 Plaintiff further relies on the case of Harnish v. Frankly Co., in which the court held that  
5 allegations claiming that text messages were sent "en masse," had "generic" and "impersonal"  
6 content, and were sent using a "short code" that enabled mass transmission, were sufficient to  
7 infer the use of an ATDS. ECF No. 25 at 16; Harnish v. Frankly Co., No. 5:14-CV-02321-EJD,  
8 2015 WL 1064442, at \*3 (N.D. Cal. Mar. 11, 2015). Here, by contrast, the facts alleged by  
9 plaintiff do not support the same inference. Rather, the allegations suggest that Stripe's text  
10 messages were sent to an individual user of its checkout service and in response to a direct  
11 communication from Plaintiff. Am. Compl. ¶¶ 11-12, 14-18; see also McKenna v. WhisperText,  
12 No. 14-cv-00424-PSG, 2015 WL 5264750, at \*4 (N.D. Cal Sept. 9, 2015) (distinguishing Harnish  
13 on the basis that "in Harnish the complaint did not allege any actions by the Frankly App's users,  
14 and alleged only the actions taken by Frankly Co.'s automated processes.").

15 Accordingly, Plaintiff has failed to plausibly plead that Stripe used an ATDS. Because the  
16 Court dismisses the complaint on these grounds, it need not address Stripe's argument that Plaintiff  
17 gave express consent to receive the text messages at question. Though Stripe argues that further  
18 amendment would be futile, the Court concludes that leave to amend is appropriate. Leave to  
19 amend should be freely given when justice so requires, Fed. R. Civ. P. 15(a)(2), and while  
20 Plaintiff has previously amended his complaint once, this is the first Motion to Dismiss addressed  
21 by the Court in this case.

22 **CONCLUSION**

23 For the foregoing reasons, the Court hereby grant's Stripe's Motion to Dismiss Plaintiff's First  
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25 <sup>1</sup> Plaintiff also cites to the out-of-circuit case of Johansen v. Vivant, Inc., No. 12 C 7159, 2012 WL  
26 6590551, at \*3 (N.D. Ill. Dec. 18, 2012) for the proposition that "it is unreasonable to require a  
27 plaintiff in a TCPA complaint, without the benefit of discovery, to elaborate on the specific  
28 technical details of a defendant's alleged ATDS, such as what type of machines were used to make  
a call or how those machines functioned." He neglects to include the following sentence, which  
reads: "It is not unreasonable, however, to require a plaintiff to describe the phone messages he  
received in laymen's terms or provide the circumstances surrounding them to establish his belief  
that the messages were pre-recorded or delivered via the ATDS." Id. (emphasis added).

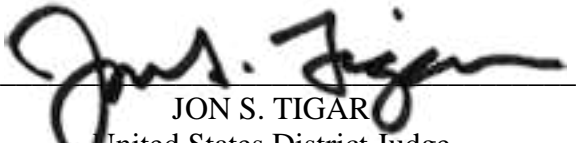


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Amended Complaint without prejudice. Plaintiff may file an amended complaint within thirty (30) days of the date of this order.

IT IS SO ORDERED.

Dated: July 25, 2016

  
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JON S. TIGAR  
United States District Judge