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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TRACY MAIER, on behalf of herself
and all others similarly situated, and
the general public,

Plaintiffs,

v.

J. C. PENNEY CORPORATION,
INC., a Delaware corporation, and
J. C. PENNEY COMPANY, INC., a
Delaware corporation,

Defendants.

CASE NO. 13cv0163 - IEG (DHB)

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

[Doc. No. 14]

Presently before the Court is the motion of Defendant J. C. Penney Corporation (“Defendant”) to dismiss the Complaint of Plaintiff Tracy Maier (“Plaintiff”) for failure to state a claim. [Doc. No. 14, Def.’s Mot.] For the following reasons, the Court **DENIES** Defendant’s motion to dismiss.

BACKGROUND

Plaintiff alleges that on June 16, 2012, she received an unsolicited text message to her wireless phone promoting Defendant’s retail business. [Doc. No. 1, Compl. ¶ 14.] Plaintiff specifically asserts that she received the following text message content from Short Message Service (“SMS”) short code 527-365:

jcp: Reply YES now to be
first to know about our
best prices, special store
events & new things

1 happening at jcp. Dtls
2 http://bit.ly/yALZuq
3 Msg&DataRatesApply

4 [Id. ¶ 15.] Plaintiff further alleges that this text message was sent by an “automatic
5 telephone dialing system” (“ATDS”) with the “capacity to store or produce and dial
6 numbers randomly or sequentially, to place telephone calls and/or SMS or text
7 messages to Plaintiff’s cellular telephone.” [Id. ¶ 16.]

8 Finally, Plaintiff asserts that she “did not provide Defendants or their agents
9 prior express consent to receive unsolicited text messages,” and that Defendant’s
10 text messages “constituted ‘calls’ under the [Telephone Consumer Protection Act
11 (“TCPA”)] that were not for emergency purposes” and “for which Plaintiff incurred
12 a charge.” [Id. ¶¶ 17, 18, 19, 21.] Based on these allegations, Plaintiff concludes
13 that “Defendants or their agents violated 47 U.S.C. § 227(b)(1).” [Id. ¶ 22.]

14 Plaintiff filed the instant action on behalf of herself and others similarly
15 situated on January 21, 2013. [Doc. No. 1, Compl.] The Complaint asserts two
16 causes of action for violations of the TCPA, 47 U.S.C. § 227 *et seq.* The first cause
17 of action is for negligent violation of the TCPA and the second is for knowing
18 and/or willful violation of the same. [Id. ¶¶ 34-38, 39-43.] Defendant subsequently
19 filed the present motion to dismiss Plaintiff’s Complaint, arguing failure to state a
20 claim upon which relief can be granted under Federal Rule of Civil Procedure
21 12(b)(6). [Doc. No. 14, Def.’s Mot.]

22 DISCUSSION

23 **I. Motion to Dismiss**

24 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
25 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
26 Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The court
27 must accept all factual allegations pleaded in the complaint as true, and must
28 construe them and draw all reasonable inferences from them in favor of the
nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.

1 1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed
2 factual allegations; rather, it must plead “enough facts to state a claim to relief that
3 is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A
4 claim has “facial plausibility when the plaintiff pleads factual content that allows
5 the court to draw the reasonable inference that the defendant is liable for the
6 misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly,
7 550 U.S. at 556).

8 However, “a plaintiff’s obligation to provide the ‘grounds’ of his
9 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic
10 recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at
11 555 (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)) (alteration in original).
12 A court need not accept “legal conclusions” as true. Iqbal, 556 U.S. at 678. In spite
13 of the deference the court is bound to pay to the plaintiff’s allegations, it is not
14 proper for the court to assume that “the [plaintiff] can prove facts that [he or she]
15 has not alleged or that defendants have violated the . . . laws in ways that have not
16 been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of
17 Carpenters, 459 U.S. 519, 526 (1983). “Where a complaint pleads facts that are
18 ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between
19 possibility and plausibility of entitlement to relief.’” Iqbal, 556 U.S. at 678 (quoting
20 Twombly, 550 U.S. at 557).

21 In determining the propriety of a Rule 12(b)(6) dismissal, a court may not
22 look beyond the complaint for additional facts. United States v. Ritchie, 342 F.3d
23 903, 908 (9th Cir. 2003). However, a court “may take judicial notice of matters of
24 public record . . . as long as the facts noticed are not subject to reasonable dispute.”
25 Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012).

26 Because both the Plaintiff’s first and second causes of action rely on the same
27 factual allegations being challenged for sufficiency under Iqbal and Twombly, both
28 causes of action are analyzed together below.

1 **A. TCPA Violation**

2 The TCPA, in relevant part, provides:

3 It shall be unlawful for any person within the United States, or
4 any person outside the United States if the recipient is within the
5 United States . . . (A) to make any call (other than a call made for
6 emergency purposes or made with the prior express consent of the
7 called party) using any automatic telephone dialing system or an
8 artificial or prerecorded voice . . . (iii) to any telephone number
9 assigned to a . . . cellular telephone service . . . or any service for
10 which the called party is charged for the call[.]”

11 47 U.S.C. § 227(b)(1). The Ninth Circuit has established that text messages (also
12 referred to as SMS) are encompassed within the term “call” as used in the TCPA
13 and are therefore subject to its restrictions. See Satterfield v. Simon & Schuster,
14 Inc., 569 F.3d 946, 952 (9th Cir. 2009).

15 47 U.S.C. § 227(a)(1) defines an ATDS as “equipment which has the
16 capacity– (A) to store or produce telephone numbers to be called, using a random or
17 sequential number generator; and (B) to dial such numbers.” Based on the clear
18 language of the TCPA, an ATDS “need not actually store, produce, or call randomly
19 or sequentially generated telephone numbers, it need only have the capacity to do
20 it.” Satterfield, 569 F.3d at 951. Due to this distinction, “the issue is not whether [a
21 defendant] *used* an ATDS, but whether its equipment had the requisite *capacity*.
22 Blair v. CBE Group Inc., No. 13-CV-134-MMA(WVG), 2013 WL 2029155, at *4
23 (S.D. Cal. May 13, 2013) (emphasis in original).

24 Defendant argues in its motion that Plaintiff’s allegations of the use of an
25 ATDS are conclusory and unsupported by sufficient factual allegations to meet the
26 requisite pleading standard established by Twombly and Iqbal. [Doc. No. 14, Def.’s
27 Mot. at 3.] In support of this argument, Defendant refers to the specific allegations
28 in Plaintiff’s Complaint containing the statutory language describing an ATDS.
 [Doc. No. 14-1, Def.’s Memo. In Support at 5.]

 While the specific requirements for an allegation of the use of an ATDS to
survive a Rule 12(b)(6) motion to dismiss have not been conclusively established by
controlling authority, persuasive authority has generally followed one of two

1 approaches. The first approach has been to allow for minimal allegations regarding
2 use of an ATDS in recognition of the fact that the type of equipment used by the
3 defendant to place the “call” is within the sole possession of the defendant at the
4 pleading stage, and will therefore only come to light once discovery has been
5 undertaken. See, e.g., In re Jiffy Lube Int’l., Inc., Text Spam Litig., 847 F. Supp. 2d
6 1253, 1260 (S.D. Cal. 2012); Blair, 2013 WL 2029155, at *4. Under this approach,
7 the allegation of receipt of a text message along with the allegation that this
8 message was sent by a machine with the capacity to store and produce random
9 telephone numbers has been held sufficient to plead a defendant’s use of an ATDS.
10 In re Jiffy Lube, 847 F. Supp. 2d at 1260. “While additional factual details about
11 the machines might be helpful, further facts are not required to move beyond the
12 pleading stage.” Id.

13 The second approach has been that a TCPA plaintiff must go beyond simply
14 using statutory language alleging the defendant’s use of an ATDS and must include
15 factual allegations about the “call” within the complaint allowing for a reasonable
16 inference that an ATDS was used. See, e.g., Kramer v. Autobyte, Inc., 759 F.
17 Supp. 2d 1165, 1171 (N.D. Cal. 2010) (providing that an isolated allegation of the
18 use of an ATDS to send text messages is conclusory and therefore does not meet the
19 requisite pleading standard under Iqbal and Twombly); Johansen v. Vivant, Inc., 12
20 C 7159, 2012 WL 6590551, at *3 (N.D. Ill. Dec. 18, 2012) (requiring further
21 information about the call or message to support a reasonable inference that it was
22 pre-recorded or delivered by an ATDS). “This approach does not burden plaintiffs
23 unduly by requiring pleading of technical details impossible to uncover without
24 discovery, rather it necessitates that they plead only facts easily available to them on
25 the basis of personal knowledge and experience.” Johansen, 2012 WL 6590551, at
26 *3.

27 Under this second approach, courts recognize that “[p]laintiffs alleging the
28 use of a particular type of equipment under the TCPA are generally required to rely

1 on indirect allegations, such as the content of the message, the context in which it
2 was received, and the existence of similar messages, to raise an inference that an
3 automated dialer [ATDS] was utilized. Prior to the initiation of discovery, courts
4 cannot expect more.” Gragg v. Orange Cab Co., Inc., No. C12-0576RSL, 2013 WL
5 195466, at *2 n.3 (W.D. Wash. Jan. 17, 2013). The following are additional
6 examples of indirect factual allegations supporting a reasonable inference of use of
7 an ATDS: (1) generic content of a message, a description of a robotic sounding
8 voice, or a lack of human response, Johansen, 2012 WL 6590551, at *3; (2)
9 impersonal advertising content of a text message received from a particular sender
10 with no reason to contact the plaintiff, Kramer, 759 F. Supp. 2d at 1171; (3)
11 “generic content and automatic generation of the message,” Hickey v. Voxernet
12 LLC, 887 F. Supp. 2d 1125, 1130 (W.D. Wash. 2012).

13 However, where factual allegations made in a plaintiff’s complaint “are
14 unsupported by any specific facts and appear less likely than the alternate inference,
15 namely that plaintiff received a customer specific text . . . through human agency,
16 rather than an ATDS” the pleading standard for this element is not met. See Gragg,
17 2013 WL 195466, at *2 (finding that alleged text message content from a service
18 provider including a unique taxi number and time of dispatch in response to a
19 plaintiff’s request for taxi service was not generic or impersonal and therefore did
20 not support a reasonable inference of use of an ATDS).

21 Defendant argues that the text message in question was sent to Plaintiff after
22 she allegedly “submitted her cell phone number to the Rewards Program website
23 and agreed to be contacted by jcpenny at that number.” [Doc. No. 17, Def.’s Reply
24 at 6.] Defendant contends that this prior contact makes use of an ATDS less
25 plausible than an alternative inference of a customer specific text through human
26 agency. Because this argument is based upon a factual allegation outside of
27 Plaintiff’s Complaint, such an allegation may not be considered for the purpose of
28 ruling on this Rule 12(b)(6) motion absent a showing that it is based on documents

1 incorporated by reference in the Complaint, or is a matter of judicial notice.
2 Ritchie, 342 F.3d at 908. As no such showing is made by Defendant, this argument
3 need not be addressed further.


4 Here, Plaintiff's Complaint alleges both that she received a "call" in the
5 form of a text message and that an ATDS, with the functional capacity required by
6 the statute, placed this message, thereby satisfying the first approach as described
7 above. [Doc. No. 1, Compl. ¶¶ 14, 16.] Further, Plaintiff supplements her ATDS
8 allegation with a factual allegation of the specific content of the text message and
9 the number from which it was received. [Id. ¶ 15.] The alleged text message
10 content does not include unique information, as in Gragg, to preclude a generic or
11 impersonal interpretation of the message. Because this Court must construe and
12 draw all reasonable inferences from factual allegations in favor of the nonmoving
13 party, Cahill, 80 F.3d at 337-38, the Court finds that the generic and impersonal
14 content of the text message supports the reasonable inference of use of an ATDS.
15 See Johansen, 2012 WL 6590551, at *3. Accordingly, Plaintiff's ATDS allegation
16 satisfies both of the prevailing approaches discussed above.

17 **CONCLUSION**

18 For the reasons above, this Court finds that the Plaintiff has sufficiently
19 pleaded the use of an ATDS. Therefore, this Court **DENIES** Defendant's motion to
20 dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6).

21 **IT IS SO ORDERED.**

22 **DATED:** June 13, 2013

23 
24 **IRMA E. GONZALEZ**
25 **United States District Judge**