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

ANTON EWING,

Plaintiff,

v.

GONOW TRAVEL CLUB, LLC, *et*
al.,

Defendants.

Case No. 19-cv-297-BAS-AGS
**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS**
[ECF No. 9]

Plaintiff Anton Ewing filed a complaint against Defendants GoNow Travel Club, LLC (“GoNow”) and Francisco Morgan. (ECF No. 1.) Both Defendants moved to dismiss, and Plaintiff timely filed a first amended complaint. (First Amended Complaint, “FAC,” ECF No. 7.) Defendant Morgan now moves to dismiss the FAC. (“Mot.,” ECF No. 9.) Plaintiff opposes the Motion. (“Opp’n,” ECF No. 11.) The Court finds this Motion suitable for determination on the papers and without oral argument. Civ. L. R. 7.1(d)(1). For the reasons stated below, the Court **GRANTS** Defendant’s Motion.

I. FACTUAL ALLEGATIONS

Plaintiff alleges Defendants violated the Telephone Consumer Protection Act (“TCPA”) under 47 U.S.C. § 227(b)(1)(A) and § 227(c)(5).

1 Plaintiff alleges Defendants have been “bombarding” him with prerecorded
2 calls (“robocalls”) and live-transfer calls using an automated dialing system
3 (“ATDS”). (FAC ¶ 2.) Plaintiff alleges this occurred from August 2018 to February
4 2019. Plaintiff alleges Defendants have “placed repeated automated telephone calls”
5 to his cell phone and home phone numbers, and “the calls exhibited signs of being
6 made with an Automated Telephone Dialing System.” (*Id.* ¶ 27.) Plaintiff states he
7 believes the calls were made using ATDS because there was a “long delay” before
8 the call was connected, and a “bubble popping” noise before the prerecorded message
9 started. (*Id.*) Plaintiff alleges in the alternative, Defendants hired a third-party
10 business to call Plaintiff. (*Id.* ¶ 29.) Plaintiff states he never consented to any calls
11 from Defendants, never visited any location operated by Defendants prior to the calls,
12 and had no prior business relationship with Defendants. (*Id.* ¶¶ 2, 24.) Finally,
13 Plaintiff alleges Defendant Morgan uses Defendant GoNow as his alter ego. (*Id.*
14 ¶ 51.)

15 II. LEGAL STANDARD

16 A complaint must plead sufficient factual allegations to “state a claim to relief
17 that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal
18 quotation marks and citations omitted). “A claim has facial plausibility when the
19 plaintiff pleads factual content that allows the court to draw the reasonable inference
20 that the defendant is liable for the misconduct alleged.” *Id.*

21 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
22 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
23 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court
24 must accept all factual allegations pleaded in the complaint as true and must construe
25 them and draw all reasonable inferences from them in favor of the nonmoving party.
26 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). To avoid a Rule
27 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather,
28 it must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell*

1 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A Rule 12(b)(6) dismissal may
2 be based on either a ‘lack of a cognizable legal theory’ or ‘the absence of sufficient
3 facts alleged under a cognizable legal theory.’” *Johnson v. Riverside Healthcare*
4 *Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police*
5 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

6 **III. ANALYSIS**

7 **A. Plaintiff’s TCPA Claims**

8 Defendant Morgan moves to dismiss Plaintiff’s TCPA claims against him.¹
9 To successfully plead a TCPA claim, a plaintiff must allege defendant (1) called a
10 cellular telephone number or any service for which the called party is charged for the
11 call; (2) using an ATDS or an artificial or prerecorded voice; (3) without the
12 recipient’s prior express consent. 47 U.S.C. § 227(b)(1); *Los Angeles Lakers, Inc. v.*
13 *Fed. Ins. Co.*, 869 F.3d 795, 804 (9th Cir. 2017) (quoting *Meyer v. Portfolio Recovery*
14 *Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012)).

15 As to the first element, to “make” a call under the TCPA the person must either
16 (1) directly make the call, or (2) have an agency relationship with the person who
17 made the call. *Gomez v. Campbell-Ewald, Co.*, 768 F.3d 871, 877–79 (9th Cir.
18 2014). Plaintiff alleges Mr. Morgan directly called Plaintiff on his cell phone. (FAC
19 ¶ 51.) This element is satisfied.

21
22 ¹ Mr. Morgan focuses much of his Motion to Dismiss on refuting Plaintiff’s allegations and
23 asserting that certain events in fact “did not happen.” (Mot. at 3.) Mr. Morgan states that Plaintiff
24 decided to attend a GoNow presentation on travel, but when he showed up, began shouting that
25 GoNow was fraudulent. (Mot. at 5.) Plaintiff was escorted out of the office, but he returned and
26 began screaming at GoNow’s receptionist. The receptionist provided Plaintiff with Mr. Morgan’s
cell phone number, which Plaintiff called and they talked the day of the presentation. (*Id.*) Mr.
Morgan states he did call Plaintiff to attempt to resolve Plaintiff’s lawsuit, but asserts that he never
robocalled Plaintiff. (*Id.* at 6.)

27 While the Court understands that Mr. Morgan wants to make it clear that his side of the
28 story is different than Plaintiff’s, at this stage, the Court must accept Plaintiff’s well-pled
allegations as true. *Liberty Mut. Ins.*, 80 F.3d at 337–38.

1 As to the second element, an ATDS is “equipment which has the capacity to
2 store or produce telephone numbers to be called, using a random or sequential
3 number generator.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th
4 Cir. 2009). Plaintiff specifically alleges Mr. Morgan called him using a “telephone
5 dialing system.” (FAC ¶ 44.) But Plaintiff admits this conclusory allegation is
6 “insufficient standing alone” and asserts he alleges “sufficient additional facts” to
7 support the conclusion. (*Id.*) Plaintiff states he knows the calls were made using
8 ATDS because the calls did not address Plaintiff personally, and Plaintiff has never
9 heard of Defendants or visited any location operated by Defendants prior to the phone
10 calls, and never provided his phone number to Defendants. (*Id.*)

11 Plaintiff is proceeding pro se and is entitled to a liberal construction of his
12 pleadings.² *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But even so, the Court
13 disagrees with Plaintiff that he has included sufficient plausible allegations to support
14 his assertion that Mr. Morgan used ATDS. Plaintiff identifies Mr. Morgan’s phone
15 number as one beginning with 949. (FAC ¶ 51.) Plaintiff also alleges he was called
16 nine times from three different numbers—none of which begin with 949. (*Id.* ¶¶ 8,
17 59, 60; *see also id.* ¶ 61 (“GoNow Travel Club, LLC placed at least 9 telemarketing
18 robocalls to Mr. Ewing” and the agents on the calls were named Dave and Robert).)
19 Throughout his Complaint, when Plaintiff refers to the “harassing and annoying
20 calls,” he does not appear to be referring to calls coming from the 949 number. And
21 when Plaintiff alleges that the calls “were marked by an unnatural click or pause at
22 the beginning” he is referring to the nine robocalls from GoNow. (*Id.*
23 ¶ 62.) Thus Plaintiff does not connect his conclusory allegation that Mr. Morgan
24

25 ² Plaintiff admits he is not an attorney but states he has received a Juris Doctorate. (FAC at 3.)
26 Judge Curiel has analyzed how to construe Mr. Ewing’s pleadings given that Mr. Ewing has
27 attended law school and is familiar with the law based on his prior litigation. *Osgood v. Main*
28 *Street Mktg, LLC*, No. 16-cv-2415-GPC (BGS), 2017 WL 131829, at *3–4 (S.D. Cal. Jan. 13,
2017). Judge Curiel determined that the Ninth Circuit has not ruled on this exact issue and therefore
determined courts should liberally construe the pleadings of such a plaintiff. The Court agrees and
does so here.

1 used ATDS with any factual allegations.

2 Indeed, it is more plausible that the alleged call from Mr. Morgan was made
3 by Mr. Morgan personally, not through ATDS. “[W]here factual allegations made
4 in a plaintiff’s complaint ‘are unsupported by any specific facts and appear less likely
5 than the alternate inference, namely that plaintiff received a customer specific text
6 [or call] . . . through human agency, rather than an ATDS’ the pleading standard for
7 this element is not met.” *Maier v. J.C. Penney Corp., Inc.*, No. 13cv163-IEG (DHB),
8 2013 WL 3006415, at *4 (S.D. Cal. June 13, 2013) (quoting *Gragg v. Orange Cty.*
9 *Cab Co.*, No. C12-0576RSL, 2013 WL 195466, at *2 (W.D. Wash. Jan. 17, 2013)).
10 Plaintiff provides a “transcript” of a phone call between him and Mr. Morgan, which
11 is a conversation between the two individuals discussing Plaintiff’s lawsuit, and is
12 not the “audio recordings of the robotic voice message[s]” that Plaintiff states he
13 received from Defendants. (Exhibit 1 to FAC; *see also* FAC ¶ 44.)³ Plaintiff states
14 the robocalls were “impersonal advertisements” that “did not address Plaintiff
15 personally” and were to “advertise Defendant GoNow Travel’s product.” (FAC
16 ¶ 44.) In contrast, the “transcript” of Plaintiff’s call with Mr. Morgan shows the call
17 was made by Mr. Morgan personally to discuss Plaintiff’s lawsuit and contradicts the
18 assertion that Mr. Morgan engaged in robotic ATDS calls. Courts are not “required
19 to accept as true allegations that contradict exhibits attached to the Complaint or . . .
20 allegations that are merely conclusory, unwarranted deductions of fact, or
21 unreasonable inferences.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th
22 Cir. 2010). Plaintiff’s FAC and its attachments, in their entirety, show that Plaintiff
23 has not plausibly alleged Mr. Morgan called him using ATDS.

24 And to the extent Plaintiff is broadly alleging “Defendants” called him using
25 an auto-dialer, such allegations are insufficient. (*See* FAC ¶ 42.) When suing
26 multiple defendants, a plaintiff must differentiate which allegations are against which

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28 ³ The Court does not accept the truth of, nor opine on the contents of, the “transcript” provided by Plaintiff. The Court merely points to the transcript to show the contradiction in Plaintiff’s pleading.

1 defendant and not lump defendants together without distinguishing the alleged
2 wrongs amongst defendants. *See* Fed. R. Civ. P. 8. The Court also notes that Plaintiff
3 is familiar with the rule requiring specific allegations for each defendant, as his
4 complaints in other cases have been dismissed for failing to distinguish the identity
5 of the defendants. *See Ewing v. Encor Solar, LLC*, 18-cv-2247-CAB-MDD, 2019
6 WL 277386, at *6 (S.D. Cal. Jan. 22, 2019); *Ewing v. Figure Dream Lifestyle, LLC*,
7 No. 18-cv-1063-AJB-AGS, 2019 WL 142589, at *5 (S.D. Cal. Mar. 29, 2019).
8 Again, Plaintiff fails to do so in this case.

9 Plaintiff appears to admit in his opposition that Mr. Morgan personally did not
10 make the ATDS calls to Plaintiff’s cell phone, instead arguing that Mr. Morgan
11 “personally hired the telemarketers and he personally controlled their actions at every
12 step of the way.” (Opp’n at 4.) But this allegation is not in the FAC, where Plaintiff
13 actually alleges GoNow “hired and controlled agents” to robocall Plaintiff. (FAC
14 ¶ 2.) Plaintiff alleges GoNow is the “lead broker” in the alleged conspiratorial
15 “telemarketing operation.” (*Id.* ¶ 52.) The Court considers only what is in the
16 complaint and therefore Plaintiff has not pled Mr. Morgan’s violation of the TCPA
17 through direct or vicarious liability.

18 The Court **DISMISSES** Plaintiff’s TCPA claims against Mr. Morgan.

19 **B. Plaintiff’s Alter Ego Claims**

20 Plaintiff also alleges Mr. Morgan is the alter ego of GoNow Travel, LLC.
21 Plaintiff alleges broadly that Mr. Morgan “does not obey the corporate formalities of
22 operation” of the LLC and that “Morgan has failed to separate his personal expenses
23 from the expenses of the GoNow Travel accounts.” (FAC ¶¶ 6, 51.) There are no
24 allegations to support these statements. “In essence all that is before the Court are
25 perfunctory and conclusory statements not supported by facts, which are insufficient
26 as a matter of law to support a finding of alter ego.” *Encor Solar, LLC*, 2019 WL
27 277386, at *5 (Judge Bencivengo’s findings regarding Plaintiff’s alter ego
28 allegations in another case). Thus, Plaintiff has not sufficiently alleged Mr. Morgan

1 is the alter ego of GoNow. The Court **DISMISSES** this allegation.

2 **C. Leave to Amend**

3 The Court finds it appropriate to grant Plaintiff leave to amend his complaint.
4 *See Lucas v. Dep't of Corr.*, 66 F.3d 245, 248–49 (9th Cir. 1995) (per curiam)
5 (holding that dismissal of a pro se complaint without leave to amend is proper only
6 if it is clear that the deficiencies cannot be cured by amendment or after the pro se
7 litigant is given an opportunity to amend).

8 Going forward, the Court reminds the parties of the professionalism rules of
9 this Court. Plaintiff's complaint and opposition are marked by extreme comments
10 about Defendant Morgan. Plaintiff alleges Mr. Morgan "lied under oath" and has
11 perjured himself, and that the Court should "refer this matter to the US Attorney for
12 perjury prosecution." (FAC at 2.) Plaintiff requests the Court sanction Mr. Morgan
13 for various reasons and strike certain portions of Mr. Morgan's pleadings. (Opp'n at
14 5.) The Court agrees that some portions of Mr. Morgan's pleadings are unrelated to
15 the TCPA issue at hand. The allegation that Plaintiff "pleaded guilty to criminal
16 felony RICO charges," "lost his CPA license," and "was convicted of stalking in
17 2010" are irrelevant to a court considering whether Plaintiff has been robocalled.
18 (*See Mot.* at 1–2.) But Plaintiff providing the details of defense counsel's every
19 experience in federal court in his career is likewise irrelevant. (Opp'n at 2 n.1.) And
20 Plaintiff telling the Court to "not be hypocritical," and "get control of [defense
21 counsel] Mr. Brasher," is equally unprofessional. The Court declines to sanction Mr.
22 Morgan or strike any part of the pleadings and urges all parties to maintain a
23 professional tone throughout their pleadings.


24 **IV. CONCLUSION**

25 In sum, because Plaintiff has not plausibly pled any allegations against Mr.
26 Morgan, the Court **GRANTS** the Motion to Dismiss and **DISMISSES** Mr. Morgan
27 from this lawsuit. However, the Court grants Plaintiff leave to amend his complaint.
28 Plaintiff may file an amended complaint on or before August 19, 2019. If Plaintiff

1 chooses not to file an amended complaint by this date, Plaintiff's case will proceed
2 against Defendant GoNow only.

3 **IT IS SO ORDERED.**

4 **DATED: July 19, 2019**


Hon. Cynthia Bashant
United States District Judge

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