

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DON HILDRE, an individual,

Plaintiff.

V.

HEAVY HAMMER, Inc., et al.,

Defendants

Case No.: 3:20-cv-00236-L-LL

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS AND
DENYING DEFENDANTS' MOTION
TO TRANSFER VENUE (DOC. NO.
5)**

Pending before the Court is Defendants' motion to dismiss and motion to transfer venue. Plaintiff filed an opposition and Defendants replied. The Court decides the matter on the papers submitted and without oral argument. *See* Civ. L. R. 7.1. For the reasons stated below, the Court **GRANTS** the motion to dismiss **WITH LEAVE TO AMEND** and **DENIES** the motion to transfer venue **WITHOUT PREJUDICE**.

1. BACKGROUND

On February 7, 2020, Plaintiff filed this civil action against Defendants. (Doc. No. 1, Complaint (“Compl.”) ¶ 1). The Court has subject matter jurisdiction pursuant to 28 U.S.C. section 1331.

1 Defendants are Maryland companies that offer marketing services to various
 2 professionals. (Compl. ¶¶ 6, 8, and 10). Plaintiff contends Defendants violated the
 3 Telephone Consumer Protection Act (“TCPA”). Specifically, Plaintiff asserts
 4 Defendants used an automatic telephone dialing system (“ATDS”) to call him without his
 5 prior consent. (*Id.* at ¶¶ 1 and 19).

6 Plaintiff relies on two phone calls to support his claim. (*Id.* at ¶¶ 15-16). On June
 7 15, 2019, Plaintiff received a call from Defendants. (*Id.* at ¶ 15). Plaintiff asked them to
 8 remove him from the call list. *Id.* On December 3, 2019, Plaintiff received another call.
 9 (*Id.* at ¶ 16). Plaintiff alleges there was a “noticeable pause” after he answered the calls.
 10 (*Id.* at ¶ 18).

11 Plaintiff has never engaged in business with Defendants. (*Id.* at ¶ 12). He also
 12 never provided them with his cell phone number. (*Id.* at ¶ 13).

13 **II. DISCUSSION**

14 **Motion to Dismiss.**

15 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
 16 sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A
 17 claim is plausible when the plaintiff pleads sufficient facts from which the court can
 18 reasonably infer that the defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*,
 19 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The
 20 court must assume the factual allegations are true and construe them in favor of the
 21 plaintiff. *Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014). However, legal
 22 conclusions need not be taken as true merely because they are couched as factual
 23 allegations. *Twombly*, 550 U.S. at 555. Similarly, “conclusory allegations of law and
 24 unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. Fed.*
 25 *Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

1 To successfully plead a TCPA claim, a plaintiff must allege the defendant called
 2 them using an ATDS without their prior consent. *See 47 U.S.C. § 227; Los Angeles*
 3 *Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 804 (9th Cir. 2017).

4 Defendants argue there are insufficient factual allegations to plausibly suggest they
 5 used an ATDS to call Plaintiff. (Doc. No. 5, Motion to Dismiss at 10). An ATDS is
 6 equipment that has the capacity “to store or produce telephone numbers to be called,
 7 using a random or sequential number generator; and to dial such numbers.” 47 U.S.C. §
 8 227(a).¹

9 It is common for a plaintiff to lack inside knowledge about a defendant’s internal
 10 operations or equipment. However, a plaintiff cannot rely on conclusory allegations. *See*
 11 *Twombly*, 550 U.S. at 555; *Armstrong v. Investor’s Bus. Daily*, 2018 U.S. Dist.
 12 LEXIS 216246, at *15 (C.D. Cal. 2018) (“allegations [that] are mere recitation of the
 13 legal definition of an ATDS” are insufficient). The complaint must contain sufficient
 14 factual allegations to state a plausible TCPA claim. *Freidman v. Massage Envy*
 15 *Franchising*, LLC, 2013 U.S. Dist. LEXIS 84250, at *7-8 (S.D. Cal. 2013).

16 Here, Plaintiff received two calls from Defendants. (Compl. ¶¶ 15-16). The first
 17 call occurred on June 15, 2019. (*Id.* at ¶ 15). The second call occurred on December 3,
 18 2019. (*Id.* at ¶ 16). Plaintiff alleges there was a pause after he answered each call. (*Id.* at
 19 ¶ 18). But given the isolated nature of the calls, that allegation does not raise the
 20 assertion that Defendants used an ATDS above a speculative level. *See Abitbol v.*
 21 *Homelink*, 2020 U.S. Dist. LEXIS 159469, at *9 (C.D. Cal. 2020) (“without more, one
 22 phone call and one pause do not support a shift from speculation to plausibility, as

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 26 ¹ The Supreme Court is set to resolve a circuit split related to the definition of ATDS.
 27 *See Facebook Inc. v. Duguid*, Docket No. 19-511 (“whether the definition of ATDS in
 28 the TCPA encompasses any device that can ‘store’ and ‘automatically dial’ telephone
 numbers, even if the device does not ‘us[e] a random or sequential number generator.’”)

1 required under the pleading standard.”); *Smith v. Aitima Med. Equip., Inc.*, 2016 U.S.
2 Dist. LEXIS 113671, at *14-15 (C.D. Cal. 2016).²

3 Plaintiff also relies on an allegation that Defendants used a California phone
4 number to mask their identity. (See Doc. No. 6, Opposition at 6). However, the Court is
5 not convinced that is relevant to whether the ATDS claim is plausible. *See Waterbury v.*
6 *A1 Solar Power Inc.*, 2016 U.S. Dist. LEXIS 74222, at *7-8 n.3 (S.D. Cal. 2016) (noting
7 when dismissing a TCPA claim that “whether [a defendant] or their equipment disguised
8 their phone number is not probative of whether [the] equipment meets the definition of an
9 ATDS under the TCPA.”) Overall, the factual allegations do not plausibly suggest
10 Defendants used an ATDS. The Court therefore grants the motion to dismiss.

11 Plaintiff might cure the above deficiencies. The Court therefore grants him leave to
12 amend. *See* Fed. R. Civ. P. 15; *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

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27 ² Plaintiff vaguely references other calls in the Complaint. (See Compl. ¶ 20). However,
28 there are no factual allegations about them. *Id.* Plaintiff also does not rely on those calls
in his Opposition. (See Doc. No. 6 at 4-5).

1 **Motion to Transfer Venue.**

2 Because the Court granted Defendants' motion to dismiss, it denies the alternative
3 motion to transfer venue without prejudice.

4 **III. CONCLUSION**

5 For the reasons stated above, the Court **GRANTS** the motion to dismiss **WITH**
6 **LEAVE TO AMEND** and **DENIES** the motion to transfer venue **WITHOUT**
7 **PREJUDICE**. Plaintiff has until **March 8, 2021** to file an amended complaint. If he
8 files that, Defendants have until the time set forth under Federal Rule of Civil Procedure
9 15(a)(3) to file a response, if any.

10 **IT IS SO ORDERED.**

11 Dated: February 24, 2021


Hon. M. James Lorenz
United States District Judge