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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JASON IBEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

TACO BELL CORP.,

Defendant.

CASE NO. 12 CV-0583-H-WVG

TACO BELL CORP.'S OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER PURSUANT TO FED. R. CIV. P. 59 AND FED. R. CIV. P. 60

Date: August 6, 2012
Time: 10:30 a.m.
Courtroom: 13
Judge: Hon. Marilyn L. Huff
Date Filed: March 8, 2012

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff has filed an improper Motion to Reconsider pursuant to Federal Rules of Civil Procedure 59 and 60 (the "Motion") asking this court to, in essence, reverse its June 18, 2012 Order (1) Granting Defendant's Motion to Dismiss and (2) Granting Plaintiff 30 Days Leave to Amend (Dkt. No. 20) (the "June 18, 2012 Order"). Plaintiff offers no legitimate grounds for reconsideration. Instead, plaintiff rehashes the exact same arguments he made in opposing Taco Bell's motion to dismiss, or, in the alternative, for summary judgment (Dkt. No. 15). Plaintiff likewise makes irrelevant policy arguments about SPAM, or bulk unsolicited messages to cellular telephones. This case has never been about SPAM, or any invasion of privacy. This case, as the allegations in plaintiff's complaint and the June 18, 2012 Order confirm, is about an alleged single reply message sent in response to an opt-out request, confirming the opt-out request had been received and processed.

This court correctly determined that the reply message, allegedly sent by Taco Bell, does not violate the Telephone Consumer Protection Act ("TCPA") and that plaintiff did not allege facts sufficient to plead that the message was sent using an Automatic Telephone Dialing System ("ATDS"). June 18, 2012 Order at 5-6. Plaintiff offers no grounds upon which this court should reconsider that ruling. There has been no clear error, mistake, inadvertence, surprise or excusable neglect, no newly discovered evidence, no fraud, no intervening changes in the controlling law, nor any other reason that would justify the relief plaintiff is seeking. Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 60(b). Accordingly, plaintiff's Motion should be denied.

II. ARGUMENT

A. Plaintiff Should Not Be Permitted To Relitigate Issues With A Motion For Reconsideration.

Plaintiff's Motion inadequately paraphrases Federal Rules of Civil Procedure 59(e) and 60(b), and the legal standard for a motion for reconsideration. Motion at 2:17-23. But the standard for reconsideration is high, and plaintiff has not met that standard here. Plaintiff has not shown any clear error or manifest injustice; instead, plaintiff's Motion merely rehashes the arguments this court rejected in its June 18, 2012 Order.

Reconsideration is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F. 3d 934, 945 (9th Cir. 2003). A "motion for reconsideration is not the proper vehicle for revisiting issues that were decided, or for a recapitulation of the cases and arguments considered by the court before rendering its original decision." *In re Worlds of Wonder Securities Litigation*. 814 F. Supp. 850, 874 (N.D. Cal. 1993), *rev'd in part on other* grounds, 35 F.3d 1407 (9th Cir. 1994) (internal citations and quotations omitted). Indeed, the "party moving for reconsideration must show more than a disagreement with the court's decision; the court should not grant the motion unless there is a need to correct a clear error of law or prevent manifest injustice." *Id.*

"Although Rule 59(e) permits a district court to reconsider and amend a previous order, . . . 'a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quoting *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). Furthermore, a "Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." (emphasis in original) *Kona Enters.*, 229 F.3d at 890.

Rule 60(b) allows the court to relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b); *see also Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 1991) ("Rule 60(b) [] provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief.") (citing *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985)). None of these potential grounds for relief is applicable here.

Where, as here, a movant has not met the standard under Rule 59(e) or Rule 60(b), a motion to reconsider may not be used to re-litigate issues that already have been rejected by this court, nor to present for the first time additional (albeit irrelevant) authority purportedly in support of previously considered arguments. *See, e.g., Kona Enters.*, 229 F.3d at 890.

B. There Are No Grounds Justifying Reconsideration Of The Court's Order.

Plaintiff appears to base his motion to reconsider on the grounds that the court's ruling was "a clear error, which should be reconsidered and the Order vacated." Motion at 7:18; *see also* Motion at 4:26. "Clear error" in the context of a motion to reconsider means a clear error of law. *All Hawaii Tours, Corp. v. Polynesian Cultural Center*, 116 F.R.D. 645, 649 (D. Haw. 1987), *rev'd in part on other grounds*, 855 F.2d 860 (9th Cir. 1988) (finding a motion for reconsideration that presents no arguments that have not already been raised in opposition must be denied). Plaintiff has not presented any new authority that requires this court to reconsider its decision. As discussed below, this court correctly determined that defendant's single confirmatory reply text message did not violate the TCPA, and that plaintiff failed to properly plead that an ATDS was used.

(1) The Court Properly Found That Plaintiff's Conclusory Allegation That Defendant Used An ATDS Was Factually Unsupported.

Plaintiff argues that because the TCPA only requires that an ATDS have "the capacity" to store or produce telephone numbers to be called using a random or sequential number generator, the court erred in finding it had not adequately pled the use of an ATDS. However, the court did not err in applying the definition of an ATDS. Rather, the court determined that plaintiff alleged only "in a conclusory manner" that defendant used an ATDS, but "neither specif[ed] that the device has the capacity to store or produced telephone numbers nor that the system uses a random or sequential number general [sic] to text message the numbers." June 18, 2012 Order at 5:28-6:3. Furthermore, the court

found that on the facts alleged, "the text message did not appear to be random but in direct response to Plaintiff's message," requesting to opt-out of receiving further messages. *Id.* at 6:5-6. The court found that plaintiff's conclusory allegation that the message was sent using an ATDS therefore failed to withstand the Rule standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Rule 12 does not allow a plaintiff to assert as "facts" statements for which there is no factual support, or indeed where the facts contradict the assertions. *See, e.g., Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (holding the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."). Plaintiff's own allegations are that he volunteered to participate in defendant's survey by sending a text message to defendant, and voluntarily provided his cell phone number to defendant. In response he alleges he received a text about the survey in which he wanted to participate. Despite plaintiff's argument that this case involves a series of SPAM messages, according to his complaint, the only text that plaintiff alleges was unsolicited and a violation of the TCPA is a single reply message allegedly received after plaintiff "had second thoughts about continuing with [the] survey" confirming plaintiff's request to opt-out of receiving further text messages from defendant. First Amended Complaint, ¶¶ 14, 18-19. Plaintiff has not alleged that he received any further unsolicited messages. Hence, the court's conclusion that plaintiff's allegation regarding the use of an ATDS (to send a single text message in reply to an opt-out request) is speculative and conclusory is not clear error of law, and there is no basis for the court to reconsider its order.

Moreover, plaintiff was given the opportunity to amend his complaint to allege facts that would meet the standards set forth in *Twombly* and *Iqbal* and to "correct the deficiencies of the complaint." June 18, 2012 Order at 6:13-14. Plaintiff, however, failed to do so, because (as set forth in Taco Bell's original motion) plaintiff cannot allege any facts that would indicate that Taco Bell used equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator.

(2) The Court Properly Considered The Legislative History Of The TCPA In Determining That The Single Reply Text Message Did Not Violate The TCPA.

Plaintiff likewise argues that the court's consideration of legislative history was improper, relying largely on *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009). Plaintiff is wrong.

First, Plaintiff's quotations from *Satterfield* are taken out of context, and are, in any event, irrelevant to the issues before this court. Taco Bell has never argued that a text message is not a call within the meaning of the TCPA, nor did the court's June 18, 2012 Order consider that argument. Motion at 6:2-22. And, *Satterfield* does not stand for the proposition that with respect to the TCPA any "inquiry begins with the statutory text, and ends there as well." Motion at 6:23-25. Indeed, the *Satterfield* court acknowledged that "the TCPA does not define 'call,'" and therefore looked outside the statutory text to resolve that issue. *Satterfield*, 569 F.3d at 952.

Second, the Ninth Circuit, "will resort to legislative history, even where the plain language is unambiguous, 'where the legislative history clearly indicates that Congress meant something other than what it said.'" *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (*en banc*) (quoting *Perlman v. Catapult Entm't, Inc.*, 165 F.3d 747, 753 (9th Cir. 1999)) (finding after an examination of legislative history that CERCLA was not intended to confer liability for the disposal of certain materials even though the statute on its face could be interpreted that way); *see also Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453 (9th Cir. 1992) ("It is naive, or disingenuous, to suggest that courts should not consider legislative history when attempting to determine the meaning of statutes. . . . Statutory construction is an area in which absolutist rules do not lead to sensible or accurate results. . . Common sense not dogma is what is needed in order to explore the actual meaning of legislative enactments.").

As this court acknowledged, "the Ninth Circuit has explained that 'the purpose and history of the TCPA indicate that Congress was trying to prohibit use of ATDSs in a manner that would be an invasion of privacy.'" June 18, 2012 Order at 5:1-4 (quoting *Satterfield*, 569 F.3d at 954). It was not a clear error of law for the court to make its decision based in part on a finding that here there is no allegation that appears "to demonstrate an invasion of privacy contemplated by Congress in enacting the

TCPA," and "[t]o impose liability under the TCPA for a single, confirmatory text message would contravene public policy and the spirit of the statute—prevention of unsolicited telemarketing in a bulk format." June 18, 2012 Order at 5:11-16.[1]

(3) The Additional Authorities Plaintiff Cites Are Irrelevant And Inapposite.

Plaintiff's Motion cites to a number of irrelevant authorities, none of which are newly decided cases, in support of his argument that the "content of text message is irrelevant to litigation." Motion at 8-10.

Plaintiff's citation to additional authority in his motion to reconsider is improper. "Motions for reconsideration are…not the place for parties to make new arguments not raised in their original briefs." *Bettencourt v. Terhune*, 2007 WL 1101475, at *1 (E.D. Cal. Apr. 12, 2007); *see also 389 Orange Street Partners,* 179 F.3d at 665 (a "Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.") All of these authorities existed at the time plaintiff filed his opposition to defendant's motion to dismiss.

Yet, even if the court considers these additional authorities, they are irrelevant because they merely support the proposition that if a call violates the TCPA, its content is irrelevant; they do not discuss or hold that a single reply message to an opt-out request confirming receipt of the request is a violation of the TCPA. *See Melingonis v. Network Communs. In'l Corp.*, 2010 U.S. Dist. LEXIS 125348, at *5 (S.D. Cal. Nov. 29, 2010) (discussing whether a call that violated the TCPA could be exempt from liability due to its status as a call for "operator services" and finding that in the absence of FCC-created exceptions, the call's content could not exempt it from liability); *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F. 3d 631, 642 (4th Cir. 2005) (finding that the content of a fax may be irrelevant if a fax can be construed as an *advertisement*); *Adamcik v. Credit Control Services,*

[1] Moreover, plaintiff's statement that the promotion at issue in *Satterfield* was "the same kind of promotional program Defendant was marketing here," is absurd. Unlike in *Satterfield*, here there is no allegation that plaintiff received a text message from an unrelated third party, who had received plaintiff's telephone number without his consent, as was the case in *Satterfield. See Satterfield*, 569 F.3d at 949. Here, plaintiff expressly consented to participate in a promotional survey with Taco Bell, and voluntarily provided his phone number to Taco Bell so that he could do so. Plaintiff's only complaint is that after he requested to opt-out from receiving further messages about the promotion he signed up for, he received a single text message from Taco Bell confirming his opt-out request. The facts in *Satterfield* are wholly inapplicable to the present case.

Inc., 832 F. Supp. 2d 744, 753 (W.D. Tex. 2011) (holding that "debt-collection calls" are subject to TCPA prohibitions on automatic dialer calls).

While plaintiff may be correct that the content of a message may be irrelevant, the context in which the message was sent plainly is not. Here, the court held that the text message at issue did not violate the TCPA because it "did not constitute unsolicited telemarketing; Plaintiff had initiated contact with Defendant." June 18, 2012 Order at 5:10-11. The court's holding, therefore, was based on the fact that the single reply message was sent after plaintiff initiated contact with defendant, and in response to plaintiff's opt-out request. The court's holding was not based on the content of the confirmatory reply message at all. This finding is not a clear error of law, and plaintiff has stated no basis for the court to reconsider it.

III. CONCLUSION

Plaintiff has failed to state any factual or legal basis as to why the court should reconsider its order dismissing plaintiff's meritless complaint. Plaintiff's Motion therefore should be denied.

Respectfully submitted,

DATED: July 23, 2012

GREENBERG TRAURIG, LLP

By: */s/ Wendy M. Mantell*
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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 1840 Century Park East, 19th Floor, Los Angeles, CA 90067-2101.

On July 23, 2012, I served the documents described as: **TACO BELL CORP.'S OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER PURSUANT TO FED. R. CIV. P. 59 AND FED. R. CIV. P. 60** as follows:

☒ **(BY ELECTRONIC SERVICE)** Pursuant to CM/ECF system, registration as a CM/ECF user constitutes consent to electronic serve through the Court's transmission facilities. The Court's CM/ECF system sends a "Notice of Electronic Filing" of the filing to the parties and counsel of record listed below who are registered with the Court's EC/ECF System.

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☒ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 23, 2012, at Los Angeles, California.

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