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1. *Keim v. ADF Midatlantic, LLC, 2015 U.S. Dist. LEXIS 159070*
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Keim v. ADF Midatlantic, LLC

United States District Court for the Southern District of Florida

November 9, 2015, Decided; November 10, 2015, Entered on Docket

CASE NO. 12-80577-CIV-MARRA

Reporter
2015 U.S. Dist. LEXIS 159070

BRIAN KEIM, an individual, on behalf of himself and all others similarly situated, Plaintiff, vs. ADF MIDATLANTIC, LLC, a foreign limited liability company, et al., Defendants,

Prior History: *Keim v. ADF Midatlantic, LLC, 586 Fed. Appx. 573, 2014 U.S. App. LEXIS 22509 (11th Cir. Fla., 2014)*

Core Terms

dialing, numbers, text message, autodialer, allegations, telemarketer, Consumer, telephone number, sequential, automatic telephone, cellphone number, cases, database, random, predictive, violations, generator, phone number, message, lists, motion to dismiss, programs, software, dialer, hired, joint venture, advertising, telephone, jointly, orders

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For ADF Midatlantic, LLC, a foreign limited liability company, American Huts, Inc., a foreign corporation, ADF Pizza I, LLC, a foreign limited liability company, ADF PA, LLC, a foreign limited liability company, (known collectively as "ADF Companies"), Defendants: David S. Almeida, David S. Almeida, LEAD ATTORNEYS, Sheppard, Mullins, Richter & Hampton, LLP, Chicago, IL.

For Pizza Hut, Inc., Defendant: David V. King, LEAD ATTORNEY, King & Chaves, LLC, West Palm Beach, FL.

Judges: KENNETH A. MARRA, United States District Judge.

Opinion by: KENNETH A. MARRA

Opinion

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on the Motion to Dismiss Second Amended Class Action Complaint by American Huts Inc. and Pizza Hut, Inc (DE 99). The motion is ripe for review. For the following reasons, the Court denies the motion.

I. Background

Defendant Pizza Hut, Inc. ("Pizza Hut") is a restaurant chain and international franchise. (DE 97 ¶ 17.) Defendants American **[*2]** Huts, Inc., ADF Midatlantic, LLC, ADF Pizza I, LLC, and ADF PA, LLC own and operate Pizza Hut franchises in various states and hold themselves out to the public as one entity called "ADF Companies." (DE 97 ¶¶ 7-11.) The ADF Companies jointly market their stores. (DE 97 ¶ 14.)

In 2009, with Pizza Hut's authorization, the ADF Companies hired text-message marketing company Songwhale, LLC ("Songwhale") to promote the Pizza Hut brand. (DE 97 ¶¶ 18, 31.) Songwhale implemented a marketing program that encouraged people to text their friends' cell phone numbers to Songwhale in exchange for Pizza Hut coupons. (DE 97 ¶ 32.) Songwhale's software program automatically stored these cell phone numbers in its text messaging database. (DE 97 ¶ 33.) Songwhale's "dialing system" then, in many instances months later, automatically sent text messages with Pizza Hut advertisements en masse to the numbers stored in its database. (DE 97 ¶ 35.) The people who originally submitted their friends' cell phone numbers to Songwhale (in exchange for coupons) had no control or involvement in the timing,

manner, or content of the text messages that Songwhale later sent to their friends. (DE 97 ¶ 38.)

Later, again with **[*3]** Pizza Hut's authorization, the ADF Companies hired text-message marketing company Cellit, LLC ("Cellit") to launch a second text-message advertising campaign. (DE 97 ¶¶ 19, 42.) Cellit sent text messages with Pizza Hut advertisements on behalf of both Pizza Hut and the ADF Companies to all the cell phone numbers that Songwhale previously collected. (DE 97 ¶ 42.) Both the Songwhale and Cellit text messages were sent via equipment "that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator as well as dial from lists in its database and to dial such numbers." (DE 97 ¶ 48.)

Plaintiff Brian Keim began receiving unwanted text messages containing Pizza Hut advertisements from Songwhale's and Cellit's short codes[1] in February 2011. (DE 97 ¶ 47.) So, he filed a class-action lawsuit against Pizza Hut and the ADF Companies alleging violations of the Telephone Consumer Protection Act ("TCPA"), *47 U.S.C. § 227 (2012)*. Defendants Pizza Hut and American Huts, Inc. moved to dismiss for failure to state a claim. (DE 99.)

II. Legal Standard

Rule 8(a) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the ground on which it rests. *Fed. R. Civ. P. 8(a)*. The Supreme Court has held that "[w]hile a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citation and alteration omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* **[*5]** (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id. at 679*. The Court must accept all of the plaintiff's factual allegations as true in determining whether a plaintiff has stated a claim for which relief could be granted. *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*.

III. Discussion

A. Automatic Telephone Dialing System

As interpreted by the FCC, the TCPA contains a "broad prohibition against sending autodialed text messages in cases where the sender has not obtained the consumer's prior express consent in the first instance." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 15391, 15398 (2012)*. Defendants argue that Keim fails to state a claim under the TCPA because the text messages he complains of were not sent using an automatic telephone dialing system. Under the TCPA, it is unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) *using any automatic telephone dialing system* . . . to any telephone number assigned to a . . . cellular telephone service." *47 U.S.C. § 227(b)(1)(A)* (emphasis added). The TCPA defines "automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential **[*6]** number generator; and (B) to dial such numbers." *Id. § 227(a)(1)*.

While the Court would usually engage in its own statutory interpretation to determine whether Keim sufficiently alleged the use of an automatic telephone dialing system, FCC orders have a heightened importance in TCPA cases. *See Mais v. Gulf Coast Collection Bureau, Inc., 768 F.3d 1110, 1119-21 (11th Cir. 2014)*. As the Eleventh Circuit explained in *Mais*,

[1] Plaintiff explains, "Most commercial SMS messages are sent from 'short codes' (also known as 'short numbers'), which are special cellular **[*4]** telephone exchanges, typically only five or six digit extensions, that can be used to address SMS messages to mobile phones." (DE 1 ¶ 24.) According to Plaintiff, a short code "conclusively reveals the originator of the SMS message" and a call from a short code indicates "that it was placed without human intervention" because people do not have cell phones with short codes. (DE 1 ¶¶ 25, 36.)

the Communications Act of 1934 and the Hobbs Act work together to divest district courts of jurisdiction to question interpretations of the TCPA in FCC orders. *Id.* ("By refusing to enforce the FCC's interpretation, the district court exceeded its power."). Because they are controlling if applicable to the facts alleged, the Court looks to the FCC's orders interpreting the term "automatic telephone dialing system." In 2003, the FCC ruled that predictive dialers fell within the definition of "automatic telephone dialing equipment."[2] *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, 14093 (2003)* [hereinafter "2003 Order"]. In most cases of predictive dialing, "telemarketers program the numbers to be called into the equipment, and the dialer calls them at a rate to ensure that when a consumer answers the phone, a sales person is available to take the **[*7]** call." *Id. at 14091*. While telemarketers had previously used dialing equipment to create and dial phone numbers arbitrarily, the industry "progressed to the point where using lists of numbers [wa]s far more cost effective." *Id. at 14092*. Even though the telemarketers programmed the numbers to be called into the equipment using a set list, rather than the equipment randomly or sequentially generating the numbers, the FCC explained that "[t]he basic function of such equipment . . . has not changed—the *capacity* to dial numbers without human intervention." *Id.*

The FCC noted that the statutory definition required only that the equipment have the "capacity" to store or produce numbers to be called. *Id. at 14092-93*. The FCC also determined that "to exclude from these restrictions equipment that use predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result." *Id. at 14092*. Furthermore, the FCC concluded that "the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented." *Id. at 14092-93*. Thus, equipment that has the capacity to store or dial random or sequential numbers falls within the TCPA's scope even if that capacity is not used and instead the telemarketer programs the equipment with a set list of numbers to be dialed.[3]

In 2008, the FCC addressed a challenge to its predictive dialer ruling. The petitioner claimed "that a predictive dialer meets the definition of autodialer[4] only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, 566 (2008)* [hereinafter "2008 Order"]. The FCC reaffirmed its prior ruling. It explained that "to find that calls to . . . wireless numbers are permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists, would be inconsistent with the avowed purpose of the TCPA and the intent of Congress in protecting consumers from such calls." *Id.* The FCC again noted that "the basic function of such dialing equipment, had not changed--the capacity **[*10]** to dial numbers without human intervention." *Id.*

Earlier this year, the FCC released its most recent order addressing the TCPA's definition of "automated telephone dialing equipment." *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961 (2015)*

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[2] "A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer." *In Re Rules & Regulations Implementing Tel. Consumer Prot. Act of 1991*, 17 F.C.C. Rcd. 17459, 17465 n.37 (2002). They "initiate phone calls while telemarketers are talking to other consumers." *Id.* at 17465. They thus "allow[] telemarketers to devote more time to selling products and services rather than dialing phone numbers" and can be used to "increase **[*8]** the probability that a customer will be on the line when the telemarketer finishes each call." *Id.* at 17465 & n.38. The downside for consumers is that they are frequently hung up on when the predictive caller calls them before the telemarketer is free to take the next call. *Id.*

[3] Also relevant here, the FCC's 2003 Order clarified that **[*9]** the TCPA's reference to "any call" is broad enough to include text messages. *Id.* at 14115. ("This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.").

[4] The FCC often uses the term "autodialer" as shorthand for automatic telephone dialing system. The terms are interchangeable.

[hereinafter "2015 Order"].[5] In its 2015 Order, the FCC endorsed a broad interpretation of the term "capacity." Several petitioners argued that equipment is not an autodialer unless it has the "'current capacity' or 'present ability' to generate or store random or sequential numbers or to dial sequentially or randomly *at the time the call is made*." *Id. at 7972* (emphasis added). The FCC rejected this "present ability" approach.

The FCC first reaffirmed its "previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the **[*11]** TCPA's definition of 'autodialer') *even if it is not presently used for that purpose, including when the caller is calling a set list of consumers*." *Id. at 7971-72* (emphasis added). It noted its prior orders found that "even when dialing a fixed set of numbers, equipment may nevertheless meet the autodialer definition" and "declined to distinguish between calls to wireless telephone numbers made by dialing equipment 'paired with predictive dialing software and a database of numbers' and calls made 'when the equipment operates independently of such lists and software packages.'" *Id. at 7973*.

Based on its 2003 and 2008 Orders, the FCC ruled that it had already "implicitly rejected any 'present use' or 'current capacity' test. In other words, the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities." *Id. at 7974*. Thus, "equipment can possess the requisite 'capacity' to satisfy the statutory definition of 'autodialer' even if, for example, it requires the addition of software to actually perform the functions described in the definition." *Id. at 7975*. The FCC stressed that Congress "intended a broad definition of autodialer." *Id. at 7974*. Thus, the FCC rejected the argument that **[*12]** "the term 'capacity' implies present ability rather than future possibility." *Id. at 7976*.

Without "address[ing] the exact contours of the 'autodialer' definition," the FCC noted that it has "long held that the basic functions of an autodialer are to 'dial numbers without human intervention' and to 'dial thousands of numbers in a short period of time'" *Id. at 7974-75*. The FCC explained, "How the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination." *Id.* The FCC rejected, however, the "argument that the Commission should adopt a 'human intervention' test by clarifying that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention." *Id. at 7976*. Accordingly, equipment may be an autodialer despite the fact that it does not have the capacity to dial numbers without human intervention, but this lack of capacity may defeat a TCPA claim "based on how the equipment functions and depends on human intervention." *Id. at 7975*.

Here, Keim alleges that the equipment used to send him the unwanted text messages "had the capacity to store **[*13]** or produce telephone numbers to be called using a random or sequential number generator as well as dial from lists in its database and to dial such numbers." (DE 97 ¶ 48.) He further alleges that Songwhale's system had software that could store a database of cell phone numbers and then automatically send text messages en masse to those stored cell phone numbers at a later date. (DE 97 ¶¶ 33-35.) The alleged circumstances surrounding the text messages—their commercial, impersonal content; the facts that they were sent "en masse" and from a short code; and the fact that Keim never provided his cell phone number to Defendants, Songwhale, or Cellit—also create a plausible inference of autodialing. Together, these allegations are more than sufficient to plead the autodialer element of Keim's TCPA claim. *See Soular v. N. Tier Energy LP, No. 15-CV-556 SRN/LIB, 2015 U.S. Dist. LEXIS 112294, 2015 WL 5024786, at *3 (D. Minn. Aug. 25, 2015)*; *De Los Santos v. Millward Brown, Inc., No. 13-80670-CV, 2014 U.S. Dist. LEXIS 88711, 2014 WL 2938605, at *3 (S.D. Fla. June 30, 2014)*; *Blair v. CBE Grp. Inc., No. 13-CV-134-MMA WVG, 2013 U.S. Dist. LEXIS 68715, 2013 WL 2029155, at *4 (S.D. Cal. May 13, 2013)* (collecting cases).

Defendants contend that Keim's allegations cannot satisfy the autodialer element because his allegations demonstrate that the text messages could be sent only when "a person (*i.e.*, a human being) . . . *manually* input into his/her cell phone the 10-digit cell phone number of the friend **[*14]** or acquaintance (*i.e.*, Plaintiff) to whom the text is intended." (DE 99 at 2.) Defendants also argue that "it makes no difference whether the intended

[5] The FCC also reiterated that "text messages are subject to the same consumer protections under the TCPA as voice calls" and that its reference to "calls" in its order specifically includes text messages. *Id.* at 7963 n.3, 8017.

recipient receives the forwarded text message directly from the human sender or via a third-party intermediary. Rather, the determinative issue is whether the text was sent as a result of human action." (DE 99 at 3.) According to Defendants, if the text messages Keim received were "due to the actions of another person manually inputting his phone number," then they "were not sent via an [autodialer] as a matter of law." (DE 99 at 9.)

Defendants' argument echoes the "human intervention" argument that the FCC rejected in its 2015 Order. The cases upon which Defendants rely in their motion all predate the 2015 Order and rely on interpretations of the TCPA that the FCC has now rejected. *See* Derby v. AOL, Inc., No. 15-CV-00452-RMW, 2015 U.S. Dist. LEXIS 70719, 2015 WL 3477658, at *3-4 (N.D. Cal. June 1, 2015) (relying on "human intervention" test); Glauser v. GroupMe, Inc., No. C 11-2584 PJH, 2015 U.S. Dist. LEXIS 14001, 2015 WL 475111, at *3-6 (N.D. Cal. Feb. 4, 2015) (relying on both "present capacity" and "human intervention" tests); McKenna v. Whisper-Text, No. 5:14-CV-00424-PSG, 2015 U.S. Dist. LEXIS 12100, 2015 WL 428728, at *3-4 (N.D. Cal. Jan. 30, 2015) (relying on "human intervention" test); Marks v. Crunch San Diego, LLC, 55 F. Supp. 3d 1288, 1291-92 (S.D. Cal. 2014) (relying on both "present capacity" **[*15]** and "human intervention" tests);[6] Gragg v. Orange Cab Co., 995 F. Supp. 2d 1189, 1192-94 (W.D. Wash. 2014) (same). The Court declines to follow these decisions because they conflict with the FCC's 2015 Order. *See* Mais, 768 F.3d at 1119-21.

In their reply and notices of supplemental authority, Defendants cite four cases post-dating the 2015 Order as support for their "human intervention" argument. None of these decisions are persuasive. The court declines to follow these cases because they all impose a *requirement* that an autodialer have the capacity to dial numbers without human intervention—contrary to the FCC's 2015 Order. *Compare* 2015 Order at 7976 ("We also reject PACE's argument that the Commission should adopt a 'human intervention' test by clarifying that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."), *with* Derby v. AOL, Inc., No. 5:15-CV-00452-RMW, 2015 U.S. Dist. LEXIS 121500, 2015 WL 5316403, at *4 (N.D. Cal. Sept. 11, 2015) ("The FCC's order does not suggest that a system that never operates without human intervention constitutes an ATDS under the statute."); McKenna v. WhisperText, No. 5:14-CV-00424-PSG, 2015 U.S. Dist. LEXIS 120090, 2015 WL 5264750, at *3 (N.D. Cal. Sept. 9, 2015) (holding that equipment was not an autodialer "[i]n light of the need for human intervention); Luna v. Shac, LLC, No. 14-CV-00607-HRL, 2015 U.S. Dist. LEXIS 109841, 2015 WL 4941781, at *4 (N.D. Cal. Aug. 19, 2015) ("[T]he capacity to dial numbers without human intervention is required for TCPA liability."); Smith v. Securus Techs., Inc., No. 15-CV-550 SRN/HB, 2015 U.S. Dist. LEXIS 101692, 2015 WL 4636696, at *7 n.3 (D. Minn. Aug. 4, 2015) ("Precisely because an inmate must initiate the chain of events, by dialing Plaintiffs' **[*17]** phone numbers, Securus' system is not an automatic telephone dialing system that 'dial[s] numbers without human intervention.'") (alteration in original) (citation omitted).[7] Notably, none of these cases mentions the FCC's rejection of the "human intervention" test.

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[6] The *Marks* court also held, contrary to the teaching of *Mais*, that it could reject interpretations of the TCPA in FCC orders. 55 F. Supp. 3d at 1291. Furthermore, while the court did hold in the alternative that the equipment at issue also lacked the potential capacity to include a random or sequential number generator, this was based on evidence produced at summary judgment, specifically certain contractual obligations of the defendant. *Id.* at 1293. Here, Defendants do not argue that the equipment used to send the text messages lacks a potential capacity to include a random or sequential number generator and dial such numbers. They only argue that the equipment is not an autodialer because human intervention was involved in sending the text messages, i.e., the present use of the equipment. And regardless, because the Court is ruling on a motion to dismiss, it must take as true Keim's allegation that the equipment at issue had the capacity to store or produce telephone numbers to be called using a random or sequential number generator and dial such numbers. **[*16]**

[7] In *Smith*, the court distinguished between an automatic telephone dialing system and equipment that has the capacity to become an automatic telephone dialing system. 2015 U.S. Dist. LEXIS 101692, 2015 WL 4636696, at *7. It is clear from the context of that court's ruling, however, that the court meant equipment that *currently* can store or produce telephone numbers to be called, using a random or sequential number generator and dial such numbers and equipment that has the *potential capacity* to do so—either of which would be an automatic telephone dialing system under the FCC's orders. Thus, Defendants take the court's statement that human involvement rendered a system "not an automatic telephone dialing system" out of context because the court recognized that the equipment could still satisfy the TCPA if it had the "'capacity' to be an automatic telephone dialing system." 2015 U.S. Dist. LEXIS 101692, [WL] at *7 & n.3. While a better expression of the court's intent may have been to say capacity to store or produce telephone **[*18]** numbers to be called, using a random or sequential number

It is possible that the outcome of the cases cited by Defendants might be correct under alternative grounds, such as the FCC's case-by-case approach to human intervention or the FCC's discussion of who is the "maker" of a call. The Court does not opine on whether these decisions were ultimately correct, but rejects them to the extent they stand for a *requirement* of a lack of human intervention. The Court also notes that the degree of human intervention at issue in these cases was much more significant than the human intervention Defendants claim to be dispositive here. *See, e.g., Luna, 2015 U.S. Dist. LEXIS 109841, 2015 WL 4941871, at *5* ("[T]he court finds that human intervention was involved in several stages of the process prior to Plaintiff's receipt of the text message, *and was not limited to the act of uploading the telephone number to the CallFire database*, as Plaintiff argues. As **[*19]** explained above, human intervention was involved in drafting the message, determining the timing of the message, and clicking 'send' on the website to transmit the message to Plaintiff." (emphasis added)). In fact, the *Luna* court specifically distinguished cases where, similar to here, "the automated dialing system at issue uploaded lists of numbers from individual users and required no human intervention by defendant." *Id.*

While the FCC clearly rejected the "human intervention" test previously adopted by some courts, it did not say that human intervention is irrelevant. Equipment that does not have the capacity to dial numbers without human intervention might not be an autodialer depending, case-by-case, "on how the equipment functions and depends on human intervention."[8] 2015 Order at 7975. Even so, Defendants' motion (and the cases it relies on) is based on the type of *per se* argument that the FCC rejected. Defendants argue that "the *determinative issue* is whether the text was sent as a result of human action" and that if Keim's receipt of the text messages were "due to the actions of another person manually inputting his phone number," then they "were not sent via an [autodialer] **[*20]** *as a matter of law*." (DE 99 at 3, 9) (emphasis added). Despite Defendants' contention otherwise, these are *per se* arguments. *See* Per Se, *Black's Law Dictionary* (10th ed. 2014) ("1. Of, in, or by itself; standing alone, without reference to additional facts. . . . 2. As a matter of law.").

Defendants' argument **[*21]** also must be rejected because Defendants contend only that human intervention is involved when the cell phone number is dialed, but they say nothing regarding the *capacity* of the equipment to dial numbers without human intervention. The FCC orders make clear that it is the capacity of the equipment, not its present use, that is the relevant inquiry. *See* 2015 Order at 7974-76; 2003 Order at 14091-93. Keim alleges that the equipment used to send him the unwanted text messages "had the *capacity* to store or produce telephone numbers to be called using a random or sequential number generator as well as dial from lists in its database and to dial such numbers." (DE 97 ¶ 48.) (emphasis added). Under the FCC's broad interpretation of the term "capacity," it is irrelevant whether Keim's allegations otherwise imply human intervention in the present use of the equipment.

Even under a more restrictive "present use" approach, the "human intervention" upon which Defendants on—people texting their friends' cell phone numbers to Songwhale—does not amount to the type of human intervention sufficient to negate the claim that the equipment is an autodialer. It is even less "human intervention" than that **[*22]** involved when a telemarketer programs lists of phone numbers into a predicative dialer, which the FCC has determined does not preclude the equipment from being an autodialer. *See* 2003 Order at 14092-93. In the predictive dialer scenario, the telemarketer directly programs the list of numbers to be dialed into the same equipment that dials the phone numbers. Here, the only "human intervention" involved is when a person inputs a friend's phone number into the content of a text message to

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generator and dial such numbers, the import of what the court meant is clear. Furthermore, to the extent this out-of-context statement supports a requirement of lack of human intervention, it conflicts with the FCC's 2015 Order. 2015 U.S. Dist. LEXIS 101692, [WL] at *7 n.3. In fact, the only authority the court cited for this statement predated the 2015 Order.

[8] Human intervention may also be relevant to identifying the "maker" of the call. *See* 2015 Order at 7978-84. For example, a mobile application software ("app") user's level of control or involvement in sending a text a message may deem the user, rather than the app provider, the maker of the call. *Id.* Defendants' attack only the autodialer element of Keim's TCPA claim. But to the extent their argument can be construed as an assertion that the people submitting their friends' cell phone numbers to Songwhale were the makers of the text messages Keim complains of, the Court rejects that argument because Keim pleads that those people had no control or involvement in the timing, manner, or content of the text messages. (DE 97 ¶ 38.) Defendants may of course prove the contrary is true at the summary judgment or trial stage, but Keim's allegations withstand Defendants' motion to dismiss.

Songwhale, whose own equipment then automatically stores the phone number in its database and later automatically sends text messages to those stored numbers en masse. Even before the FCC issued its 2015 Order, courts deemed such "human intervention" insufficient to preclude TCPA liability. *See* Sterk v. Path, Inc., 46 F. Supp. 3d 813, 819 (N.D. Ill. 2014) ("The uploading of call lists from Path users is essentially the same as when a call list is entered by a telemarketer in a database. It is the ultimate calling from the list by the automated equipment that is the violation of the TCPA."). Additionally, Keim's allegation that the person sending the cell phone number to Songwhale has no control or involvement in the timing, manner, or content of the text messages **[*23]** demonstrates a lack of sufficient human intervention. (DE 97 ¶ 38.) Accordingly, Keim sufficiently pleads the use of an autodialer.

B. "Personal Relationship" Exemption

Alternatively, Defendants argue that Keim fails to state a claim even if the text messages were sent via an autodialer because a "personal relationship" exemption applies. The regulation Defendants rely on states:

No person or entity shall initiate any telephone solicitation to: . . .

> (2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if: . . .
>
> (iii) The telemarketer making the call has a personal relationship with the recipient of the call.

47 C.F.R. § 64.1200(c) (2015).

Keim correctly notes that this exemption applies only to violations **[*24]** of the restriction on initiating a telephone solicitation to a phone number on the do-not-call registry, which is not the basis of Keim's claim. The TCPA "provides *separate* private rights of action for violations of the do-not-call provisions of section 227(c) and violations of other TCPA prohibitions." *In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois. N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (Tcpa) Rules, 28 F.C.C. Rcd. 6574, 6584 (2013)* [hereinafter "Dish Network Order"] (emphasis added). The regulation addresses "do-not-call" violations and then specifically provides an exemption "for violating *this* requirement," thus limiting its applicability to those violations. 47 C.F.R. § 64.1200(c)(2) (emphasis added). The Court agrees with Keim that the "personal relationship" exemption cited by Defendants is inapplicable to his claim.

C. Vicarious and Joint Venture Liability

Defendants also argue that Keim's complaint must be dismissed because he "lumps" together separate and distinct legal entities that operate in different geographic areas without identifying the specific conduct of each entity. The Court disagrees.

The FCC has determined that the TCPA incorporates "general common law agency principles of vicarious liability." Dish Network Order at 6574. As the FCC explained:

> The classical definition of "agency" contemplates "the fiduciary relationship that arises **[*25]** when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." Potential liability under general agency-related principles extends beyond classical agency, however. A principal may be liable in circumstances where a third party has apparent (if not actual) authority. Such "[a]pparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal." Other principles of agency law may support liability in particular cases. For example, a seller may be liable for the acts of another under traditional agency principles if it ratifies those acts by knowingly accepting their benefits. Such ratification may occur "through conduct justifiable only on the assumption that the person consents to be bound by the act's legal consequences."

Id. at 6586-87 (footnotes omitted) (alterations in original).

Keim alleges that the separate ADF Companies jointly hired Songwhale and Cellit to promote the Pizza Hut brand, and to do so Songwhale and Cellit implemented the marketing programs **[*26]** that resulted in the allegedly offending text messages. Thus, Keim sufficiently pleads that Songwhale and Cellit acted as each ADF Company's agent, and accordingly that the ADF Companies are vicariously liable for Songwhale's and Cellit's alleged TCPA violations. Keim need not allege any specific conduct of one ADF Company where he alleges that they all jointly hired Songwhale and Cellit to act on their behalf.

Keim also alleges that Pizza Hut "approved or authorized" Songwhale and Cellit to promote the Pizza Hut brand. (DE 97 ¶¶ 18-19.) This is sufficient to plead Pizza Hut's vicarious liability for Songwhale and Cellit's alleged TCPA violations. *See* Dish Network Order at 6593 ("[W]e see no reason that a seller should not be liable under *[section 227(b)]* for calls made by a third-party telemarketer when it has authorized that telemarketer to market its good or services. In that circumstance, the seller has the ability, through its authorization, to oversee the conduct of its telemarketers, even if that power to supervise is unexercised."). Indeed, Plaintiff alleges that Cellit sent text messages on behalf of *both* Pizza Hut and the ADF Companies to promote the Pizza Hut brand across the United States. **[*27]** (DE 97 ¶ 42.) And at a minimum, it can be inferred from the allegations of the complaint that Pizza Hut ratified Songwhale's actions by accepting the benefits of its conduct when Pizza Hut had Cellit send text messages on its behalf to the cell phone numbers that Songwhale previously obtained. (DE 97 ¶ ¶ 42, 45.) "[W]hen a person ratifies another's act, the legal consequence is that the person's legal relations are affected as they would have been had the actor been an agent acting with actual authority at the time of the act." *Restatement (Third) Of Agency § 4.01 cmt. b* (2006).[9]

Keim also sufficiently states a claim for joint venture liability as to the ADF Companies. Though the parties cite Florida law for the elements of joint venture liability, it is federal common law, not state law, that applies to TCPA claims. *See* Dish Network Order at 6587 ("[W]e clarify that the prohibitions contained in *section 227(b)* incorporate the federal common law of agency . . . ."). **[*28]** Under federal common law, there is no "checklist" of elements for joint venture liability; there are only factors that serve as "signposts, likely indicia, but not prerequisites." *Fulcher's Point Pride Seafood v. M/V Theodora Maria, 935 F.2d 208, 211 (11th Cir. 1991)*. These factors include (1) the venturers' intentions, (2) a joint right of control, (3) joint proprietary interests in the subject matter of the venture, (4) sharing of profits, and (5) a duty to share in losses. *Id.* (citing *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1208 (5th Cir. 1978)). These factors should not be applied mechanically and no one factor is decisive. *See id.*

Keim alleges that "[a]t the very least, ADF Companies is a joint venture to manage and market hundreds of Pizza Hut franchises." (DE 97 ¶ 15.) The allegation that ADF Companies is a joint venture is a legal conclusion and, as such, is not entitled to an assumption of truth. *See Merritt v. Lyons Heritage Pasco, LLC, No. 8:09CV1201T27TGW, 2010 U.S. Dist. LEXIS 96509, 2010 WL 3666763, at *5 (M.D. Fla. Sept. 15, 2010)*. Keim's factual allegations to support joint venture liability are that the ADF Companies hold themselves out to the public as one entity, jointly market their stores, jointly maintain a website to market their stores (*www.ADFCompanies.com*), and employ one marketing director for all of their stores. (DE 97 ¶¶ 11-14.) Keim further alleges that the ADF Companies together **[*29]** hired Songwhale and Cellit. (DE 97 ¶¶ 18-19.)

At the pleading stage, these allegations sufficiently raise a plausible inference that the ADF Companies are joint venturers as to the marketing programs at issue. The facts that the ADF Companies hold themselves out to the public as one entity, employ a single marketing director, maintain a joint website to market their stores, and jointly hired Songwhale and Cellit raise an inference that they intended to establish a joint venture to market their restaurants. Although they may each own and operate their own restaurants, they all have a joint interest in promoting the Pizza Hut brand. The facts that the ADF Companies jointly employ one marketing director and jointly hired Songwhale and Cellit also support an inference of a joint right of control over marketing programs and the decision to hire Songwhale and Cellit.

Finally, while it may be difficult to measure the exact profits and losses attributable to an advertising

[9] Because Keim sufficiently pleads Pizza Hut's vicariously liability for the alleged TCPA violations of Songwhale and Cellit, at this stage of the proceedings the Court need not address the argument that Pizza Hut is vicariously liable for the actions of the ADF Companies, its franchisees.

campaign, Keim's allegations show that the ADF Companies shared in the costs and benefits of their text-message advertising programs. The text messages at issue promoted the Pizza Hut brand rather any specific Pizza Hut restaurant, **[*30]** and the advertising campaigns were not limited to any ADF Company's specific geographic region. (DE 97 ¶¶ 32, 39, 40, 42, 47.) Thus, whatever profits were attributable to these advertising campaigns, they were shared among the ADF Companies. And the joint hiring of Songwhale and Cellit, as well as the joint employment of a single marketing director, suggests a sharing of marketing costs.

D. Inconsistent Pleadings

Defendants' final argument is that Keim's second amended complaint impermissibly contradicts allegations in his earlier complaints. The parties dispute whether an amended complaint may contradict allegations in a prior complaint. The Court need not resolve that dispute here. Upon review of Keim's prior complaints, the Court disagrees that Keim's current allegations contradict the prior allegations that Defendants cite as inconsistent. The Court thus also rejects this basis for dismissal.

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Motion to Dismiss Second Amended Class Action Complaint by American Huts Inc. and Pizza Hut, Inc (DE 99) is **DENIED**.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 9th day of November, 2015.

[*31] /s/ Kenneth A. Marra

KENNETH A. MARRA

United States District Judge