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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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KINAYA HEWLETT, on behalf of  
herself and all others  
similarly situated,

Plaintiff,

v.

CONSOLIDATED WORLD TRAVEL,  
INC. d/b/a HOLIDAY CRUISE  
LINE,

Defendant.

Civ. No. 2:16-713 WBS AC

MEMORANDUM AND ORDER RE: MOTION  
TO DISMISS

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Plaintiff Kinaya Hewlett brought this putative class action against defendant Consolidated World Travel, Inc. d/b/a Holiday Cruise Line, alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 et seq. (First Am. Compl. ("FAC") (Docket No. 14).) The matter is now before the court on defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). (Docket No. 17.)

1 I. Background

2 Plaintiff alleges that, in March 2016, defendant called  
3 plaintiff's "cellular telephone nearly daily using an automatic  
4 telephone dialing system ["ATDS"] and artificial or prerecorded  
5 voice" in an attempt "to sell [plaintiff] a 'free cruise.'" (FAC  
6 ¶¶ 12-17.) Plaintiff alleges that she did not give her prior  
7 express consent to receive these autodialed calls from defendant.  
8 (Id. ¶ 14.) She states that defendant called her from multiple  
9 telephone numbers and continued to call her despite plaintiff's  
10 repeated "requests to Defendant and/or its agents for the calls  
11 to stop." (Id. ¶¶ 15-17.)

12 Plaintiff also seeks to represent a putative class of  
13 other unconsenting recipients of defendant's autodialed calls.  
14 (Id. ¶¶ 2, 18-20.) In its pending motion to dismiss, defendant  
15 argues that the court does not have subject matter jurisdiction  
16 here because plaintiff lacks standing under Article III. (Mem.  
17 at 1 (Docket No. 17-1).) Defendant also contends that plaintiff  
18 fails to state a claim for relief because she has not alleged  
19 "any facts plausibly stating that [defendant] had any involvement  
20 in the telephone calls." (Id. at 9.)

21 II. Discussion

22 A. Lack of Subject Matter Jurisdiction

23 "Federal courts are courts of limited jurisdiction."  
24 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377  
25 (1994). "If the court determines at any time that it lacks  
26 subject-matter jurisdiction, the court must dismiss the action."  
27 Fed. R. Civ. P. 12(h)(3). Standing pertains to the court's  
28 subject matter jurisdiction under Article III and may be

1 challenged in a motion to dismiss under Rule 12(b)(1). White v.  
2 Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).

3 Article III standing requires that a plaintiff "have  
4 (1) suffered an injury in fact, (2) that is fairly traceable to  
5 the challenged conduct of the defendant, and (3) that is likely  
6 to be redressed by a favorable judicial decision." Spokeo, Inc.  
7 v. Robins, 136 S. Ct. 1540, 1547 (2016). "The plaintiff, as the  
8 party invoking federal jurisdiction, bears the burden of  
9 establishing these elements." Id. Where the "case is at the  
10 pleading stage, the plaintiff must clearly allege facts  
11 demonstrating each element." Id. (quotation marks and  
12 alterations omitted). "To establish injury in fact, a plaintiff  
13 must show that he or she suffered an invasion of a legally  
14 protected interest that is concrete and particularized and actual  
15 or imminent, not conjectural or hypothetical." Id. (quotation  
16 marks omitted).

17 Defendant argues that plaintiff "fails to specify what  
18 injury she herself supposedly suffered" or "to allege a concrete  
19 or particularized injury that is traceable to anything  
20 [defendant] is alleged to have done." (Mem. at 1, 5.) Plaintiff  
21 alleges that she was "harmed by the acts of Defendant in the form  
22 of multiple involuntary telephone and electrical charges, the  
23 aggravation, nuisance, and invasion of privacy that necessarily  
24 accompanies the receipt of unsolicited and harassing telephone  
25 calls, and violations of [her] statutory rights." (FAC ¶ 23.)

26 "For an injury to be particularized, it must affect the  
27 plaintiff in a personal and individual way." Spokeo, 136 S. Ct.  
28 at 1548 (quotation marks omitted). In light of plaintiff's

1 allegations that defendant called her “nearly daily” in March  
2 2016 from multiple telephone numbers despite plaintiff’s repeated  
3 requests to defendant to stop calling her, plaintiff’s  
4 allegations of “aggravation, nuisance, and invasion of privacy”  
5 are sufficiently particularized to show that she was personally  
6 harmed by defendant’s alleged conduct. (FAC ¶¶ 12-17, 23); see  
7 Smith v. Microsoft Corp., Civ. No. 11-1958 JLS BGS, 2012 WL  
8 2975712, at \*6 (S.D. Cal. July 20, 2012) (“[B]y alleging he  
9 received a text message in violation of the TCPA, [plaintiff] has  
10 established a particularized injury in satisfaction of Article  
11 III premised on the invasion of his privacy, even absent any  
12 economic harm.”).

13 Plaintiff’s allegations are also sufficient to satisfy  
14 Article III’s concreteness requirement. The Supreme Court has  
15 explained that, in determining whether an intangible harm  
16 constitutes a concrete injury under Article III, courts must  
17 consider (1) “whether [the] intangible harm has a close  
18 relationship to a harm that has traditionally been regarded as  
19 providing a basis for a lawsuit”; and (2) “the judgment of  
20 Congress” in “identifying and elevating” the intangible harm “to  
21 the status of [a] legally cognizable injur[y]” that “give[s] rise  
22 to a case or controversy.” Spokeo, 136 S. Ct. at 1549-50  
23 (citations omitted).

24 Courts have consistently held that allegations of  
25 nuisance and invasion of privacy in TCPA actions are sufficient  
26 to state a concrete injury under Article III. See, e.g., Cour v.  
27 Life360, Inc., Civ. No. 16-805 TEH, 2016 WL 4039279, at \*2 (N.D.  
28 Cal. July 28, 2016) (finding that plaintiff “allege[d] a concrete

1 injury sufficient to confer Article III standing” because he  
2 alleged that “[the defendant] invaded his privacy”); Booth v.  
3 Appstack, Inc., Civ. No. C13-1533 JLR, 2016 WL 3030256, at \*5  
4 (W.D. Wash. May 24, 2016) (finding concrete injury in the form of  
5 “waste[d] time answering or otherwise addressing widespread  
6 robocalls”); Meyer v. Bebe Stores, Inc., Civ. No. 14-267 YGR,  
7 2015 WL 431148, at \*2 (N.D. Cal. Feb. 2, 2015) (holding that the  
8 allegation that a single unsolicited text message from defendant  
9 was an invasion of privacy satisfied Article III standing  
10 requirements even though plaintiff did “not allege she incurred  
11 any carrier charges for the specific text message at issue”).  
12 Because the harm alleged by plaintiff has “been regarded as  
13 providing a basis for a lawsuit,” the first factor weighs in  
14 favor of finding that plaintiff has sufficiently alleged a  
15 concrete injury here. See Spokeo, 136 S. Ct. at 1549.

16 The “judgment of Congress” also weighs in favor of  
17 finding that plaintiff has sufficiently alleged a concrete harm.  
18 See id. “[B]ecause Congress is well positioned to identify  
19 intangible harms that meet minimum Article III requirements, its  
20 judgment is . . . instructive and important.” Id. In analyzing  
21 “the purposes of the TCPA,” the Ninth Circuit observed that  
22 “[t]he TCPA was enacted in response to an increasing number of  
23 consumer complaints” that “unsolicited, automated telephone  
24 calls” were a “nuisance and an invasion of privacy.” Satterfield  
25 v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009).  
26 “The purpose and history of the TCPA indicate that Congress was  
27 trying to prohibit the use of ATDSs to communicate with others by  
28 telephone in a manner that would be an invasion of privacy.” Id.

1 The purpose and history of the TCPA thus suggest that Congress  
2 sought to curb the "aggravation, nuisance, and invasion of  
3 privacy" that plaintiff alleges here, which resulted from  
4 defendant's alleged use of an ATDS to call plaintiff despite  
5 plaintiff's repeated requests for those autodialed calls to stop.  
6 (FAC ¶¶ 12-17, 23.)

7 In support of its argument that plaintiff here does not  
8 sufficiently state a concrete injury, defendant relies on a  
9 ruling in a similar TCPA class action in Smith v. Aitima Medical  
10 Equipment, Inc., Civ. No. 16-339 AB DTB (C.D. Cal. July 29,  
11 2016). (Reply at 4, Ex. A (Docket No. 22).) In Smith, the court  
12 held that the plaintiff failed to allege a concrete injury  
13 because she could not "allege more than a de minimis injury given  
14 the fact that she received only one call." (Reply Ex. A at 6-7.)  
15 The court reasoned that the plaintiff there "only alleged the  
16 receipt of one phone call from Defendant," which at most "lasted  
17 for a few seconds." (Id. at 5-6.)

18 The Supreme Court, however, recently confirmed that  
19 allegations of a single TCPA violation can be sufficient to  
20 confer Article III standing. In Gomez v. Campbell-Ewald Co., 768  
21 F.3d 871 (9th Cir. 2014), aff'd, 136 S. Ct. 663 (2016), the  
22 plaintiff received a single unsolicited text message from the  
23 defendant's agent and filed suit against the defendant "seeking  
24 compensation for the alleged violation of the TCPA." Id. at  
25 873-74. Plaintiff "also sought to represent a putative class of  
26 other unconsenting recipients of the [defendant's] text  
27 messages." Id. at 874. The Ninth Circuit held that "Congress  
28 has expressly created a federal cause of action affording

1 individuals like Gomez standing to seek compensation for  
2 violations of the TCPA." Id. at 880. The Supreme Court  
3 affirmed, holding that "the District Court retained jurisdiction  
4 to adjudicate Gomez's complaint." Gomez, 136 S. Ct. at 672.

5 Additionally, unlike in Smith, plaintiff here alleges  
6 that defendant called her "nearly daily" in March 2016 from  
7 multiple numbers despite plaintiff's repeated requests for the  
8 calls to stop. (FAC ¶¶ 12-17.) The FAC also suggests that  
9 defendant's calls lasted more than a few seconds:

10 When [plaintiff] answered calls from Defendant and/or its  
11 agents, she heard a pause or dead air before a robotic-  
12 sounding recorded voice began, indicating use of an  
13 [ATDS] and artificial or prerecorded voice. After the  
14 robotic-sounding voice concluded, a live person came onto  
15 the phone as well. The agent attempted to sell  
16 [plaintiff] a 'free cruise' [and plaintiff] has  
17 repeatedly made requests to Defendant and/or its agent  
18 for the calls to stop.

19 (Id. ¶¶ 16-17.)

20 Plaintiff's factual allegations, which the court must  
21 construe in the light most favorable to plaintiff on a motion to  
22 dismiss, there is a reasonable inference that defendant or its  
23 agents placed more than one call to plaintiff here. This  
24 reasonable inference is sufficient to make plaintiff's TCPA claim  
25 plausible and thus survive dismissal at this stage. See Ashcroft  
26 v. Iqbal, 556 U.S. 662, 678-79 (2009) (holding that dismissal is  
27 granted only where reasonable inferences drawn from the  
28 plaintiff's allegations fail to state a plausible claim for  
relief).

29 Smith is therefore inapplicable here. In fact, the  
30 Smith court acknowledged "the injury multiple phone calls can

1 cause" and observed that "[c]ourts have found allegations of  
2 'systematic rather than episodic' unauthorized conduct to be more  
3 than a de minimis injury, and thus sufficient to confer  
4 standing." (Reply Ex. A at 6.) These are exactly the  
5 circumstances alleged in the present action. The reasoning in  
6 Smith thus supports--rather than undermines--the conclusion that  
7 plaintiff has alleged a concrete injury under Article III here.

8           Lastly, plaintiff has traced her alleged injury to  
9 defendant: "[Defendant] and/or its agents made unsolicited and  
10 harassing telemarketing calls to Plaintiff on her cellular  
11 telephone using an automatic telephone dialing system and an  
12 artificial or prerecorded voice [without plaintiff's] prior  
13 express written consent to make these calls." (FAC ¶ 1.)  
14 Plaintiff's allegations are therefore sufficient to confer  
15 Article III standing. Accordingly, the court has subject matter  
16 jurisdiction over this action.

17           B. Failure to State a Claim

18           A claim may be dismissed under Rule 12(b)(6) if the  
19 complaint's factual allegations, together with all reasonable  
20 inferences drawn from those allegations, fail to state a  
21 plausible claim for relief. Iqbal, 556 U.S. at 678-79. A  
22 plausible claim exists "when the plaintiff pleads factual content  
23 that allows the court to draw the reasonable inference that the  
24 defendant is liable for the misconduct alleged." Id. at 678.

25           The plausibility standard "does not require detailed  
26 factual allegations" or impose a "probability requirement" at the  
27 pleading stage. Id.; Starr v. Baca, 652 F.3d 1202, 1213 (9th  
28 Cir. 2011). It "simply calls for enough facts to raise a



1 reasonable expectation that discovery will reveal evidence" to  
2 support plaintiff's allegations. Starr, 652 F.3d at 1217 (citing  
3 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)). In ruling  
4 on a Rule 12(b)(6) motion to dismiss, the court must accept the  
5 plaintiff's factual allegations as true and construe them in the  
6 light most favorable to the plaintiff. Adams v. U.S. Forest  
7 Serv., 671 F.3d 1138, 1142-43 (9th Cir. 2012). The court need  
8 not, however, accept as true any unreasonable inferences or  
9 conclusory legal allegations cast in the form of factual  
10 allegations. Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir.  
11 2011).

12           The TCPA makes it unlawful "to make any call (other  
13 than a call made for emergency purposes or made with the prior  
14 express consent of the called party) using any automatic  
15 telephone dialing system or an artificial or prerecorded voice  
16 . . . to any telephone number assigned to a . . . cellular  
17 telephone service." 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA  
18 authorizes a private right of action "to recover for actual  
19 monetary loss from [] a violation, or to receive \$500 in damages  
20 for each [] violation, whichever is greater." Id. § 227(b)(3).  
21 In the case of knowing or willful violations, the court has  
22 discretion to award up to treble damages for each violation. Id.

23           Defendant argues that plaintiff fails to state a claim  
24 under the TCPA because plaintiff's "FAC lacks any facts to permit  
25 as a plausible inference that [defendant], as opposed to anyone  
26 else, is the party that physically placed the telephone calls at  
27 issue." (Mem. at 9.) But defendant's contentions that it did  
28 not actually make the alleged calls to plaintiff, even if true,

1 do not necessarily preclude plaintiff from asserting a plausible  
2 TCPA claim here. Plaintiff alleges that defendant "and/or its  
3 agents made unsolicited and harassing telemarketing calls to  
4 Plaintiff." (FAC ¶ 1 (emphasis added).) The Ninth Circuit has  
5 emphasized that "calls placed by an agent of the telemarketer are  
6 treated as if the telemarketer itself placed the call." Gomez,  
7 768 F.3d at 878 (citation and alterations omitted); see id. at  
8 877 (rejecting the argument that a defendant "cannot be held  
9 liable for TCPA violations because it outsourced the dialing and  
10 did not actually make any calls").

11 In addition, defendant's argument that plaintiff fails  
12 to allege "that [defendant], as opposed to anyone else, is the  
13 party that physically placed the telephone calls at issue" is  
14 unavailing. (Mem. at 9.) Plaintiff specifically alleges that  
15 defendant called her cellular phone at 1:35 PM on March 14, 2016  
16 using an ATDS without her prior express consent from a telephone  
17 number that her caller ID identified as "Holiday Cruise Line."  
18 (FAC ¶¶ 12-14.) Plaintiff alleges that "Holiday Cruise Line" is  
19 a fictitious business name used by defendant, (id. ¶ 4), a fact  
20 that defendant acknowledges here, (Mem. at 11). Plaintiff also  
21 alleges that defendant called her from multiple telephone numbers  
22 using an ATDS and continued to call her despite her repeated  
23 "requests to Defendant and/or its agents for the calls to stop."  
24 (FAC ¶¶ 15-17.)

25 Plaintiff has thus stated a plausible claim that  
26 defendant used an ATDS to call plaintiff's cellular phone without  
27 her prior express consent in violation of 47 U.S.C.  
28 § 227(b)(1)(A)(iii). Accordingly, the court will deny

1 defendant's motion to dismiss.

2 IT IS THEREFORE ORDERED that defendant's motion to  
3 dismiss, (Docket No. 17), be, and the same hereby is, DENIED.

4 Dated: August 23, 2016



5 WILLIAM B. SHUBB

6 UNITED STATES DISTRICT JUDGE

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