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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

STEVE MACKINNON,  
  
Plaintiff,  
  
v.  
  
HOF'S HUT RESTAURANTS, INC.,  
a California corporation,  
  
Defendant.

No. 2:17-cv-01456-JAM-DB

**ORDER GRANTING HOF'S HUT  
RESTAURANTS, INC.'S MOTION TO  
DISMISS**

15 Plaintiff Steve MacKinnon ("Plaintiff") made a dinner  
16 reservation at a Hof's Hut Restaurants, Inc.'s ("Defendant")  
17 restaurant and provided his phone number to receive confirmation  
18 of that reservation. Defendant then sent Plaintiff a text  
19 message confirming the reservation and providing a link to "View  
20 specials". Three months later Plaintiff filed this class action  
21 lawsuit. Compl., ECF No. 1. Defendant moves to dismiss the  
22 lawsuit. Mem., ECF No. 11. Plaintiff opposes. Opp'n, ECF No.  
23 13. For the reasons below, the Court grants Defendant's motion  
24 to dismiss with prejudice.<sup>1</sup>

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for November 7, 2017. In deciding this motion, the Court takes as true all well-pleaded facts in the operative complaint.

I. FACTUAL AND PROCEDURAL BACKGROUND

1 In April 2017, Plaintiff made a dinner reservation at  
2 Lucille's Smokehouse Bar-B-Que in Rocklin, California, a  
3 restaurant owned by Defendant. Compl. ¶¶ 4, 18. When making the  
4 reservation, Plaintiff was asked for and provided his cellphone  
5 number to the restaurant. See id. The restaurant later sent  
6 Plaintiff a text message reading:  
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8 *Welcome to Lucilles Rocklin!*  
9 *Your reservation for 2 is set for 6:00 pm on 4/20/2017.*  
10 *View specials at [hcguest.com/?r=3327914571](http://hcguest.com/?r=3327914571)*

11 Id. ¶ 22. In response, Plaintiff filed this class-action lawsuit  
12 on July 13, 2017, alleging that Defendant violated the Telephone  
13 Consumer Protection Act (the "TCPA"), 47 U.S.C. §§ 227, *et seq.*,  
14 by sending the text message. Defendant moves to dismiss for  
15 failure to state a claim. See Mem.

16 II. OPINION

17 Plaintiff concedes that he "likely provided express consent  
18 to Defendant to alert him when his dinner reservation was ready"  
19 but contends that this is insufficient to "absolve Defendant of  
20 liability [under the TCPA] because Defendant's message included  
21 or introduced advertising" which Plaintiff did not consent to  
22 receive in writing. See Opp'n at 2-3. The Court finds  
23 otherwise.

24 Under the TCPA, the three elements of a claim are: (1) the  
25 defendant called a cellular phone number; (2) using an automatic  
26 telephone dialing system; (3) without the recipient's prior  
27 express consent. Meyer v. Portfolio Recovery Assocs., LLC, 707  
28 F.3d 1036, 1043 (9th Cir. 2012) (internal citation and quotation

1 marks omitted). As for the first element, a text message  
2 qualifies as a "call" within the TCPA. Satterfield v. Simon &  
3 Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009).

4 For the third element, any call or text message that  
5 includes or introduces an advertisement or constitutes  
6 telemarketing cannot be made without the prior express written  
7 consent of the called or texted party. See Larson v. Harman  
8 Mgmt. Corp., No. 1:16-CV-00219-DAD-SKO, 2016 WL 6298528, at \*3  
9 (E.D. Cal. Oct. 27, 2016) (citing 47 C.F.R. § 64.1200(a)(2)).  
10 And a message qualifies as "telemarketing" or "advertising" if  
11 it is issued for the purpose of encouraging the purchase or  
12 rental of, or investment in, property, goods, or services. 47  
13 C.F.R. § 64.1200(f)(12). Courts approach the question of  
14 whether a message constitutes advertising or telemarketing with  
15 "a measure of common sense." See Chesbro v. Best Buy Stores,  
16 L.P., 705 F.3d 913, 918 (9th Cir. 2012).

17 All non-advertising or non-telemarketing calls or texts  
18 made with an automatic telephone dialing system require only the  
19 prior express consent of the called party—without having to be  
20 in writing. See Larson, 2016 WL 6298528 at \*3 (citing 47 C.F.R.  
21 § 64.1200(a)(1)).

22 A. Allegations of Telemarketing or Advertising

23 The Court finds that Defendant's text message confirming  
24 Plaintiff's dinner reservation does not constitute telemarketing  
25 or advertising because it is informative and non-telemarketing  
26 in nature. See Daniel v. Five Stars Loyalty, Inc., No. 15-CV-  
27 03456-WHO, 2015 WL 7454260 (N. D. Cal. Nov. 24, 2015) (finding  
28 that text message regarding "free pts" to be redeemed on

1 Defendant's website did not constitute advertising or  
2 telemarketing since it just informed plaintiff that joining a  
3 rewards program would result in free rewards points). Also,  
4 messages "whose purpose is to facilitate, complete, or confirm a  
5 commercial transaction that the recipient has previously agreed  
6 to enter into with the sender are not advertisements[.]" See In  
7 re Rules & Regs. Implementing the Tel. Consum. Prot. Act of  
8 1991, 21 FCC Rcd. 3787, 3812 ¶ 49 (F.C.C., Apr. 6, 2006); see  
9 also Wick v. Twilio Inc., No. C16-00914RSL, 2017 WL 2964855  
10 (W.D. Wash. July 12, 2017) (text message notifying the plaintiff  
11 that his order was incomplete and included a link to complete  
12 the order was not telemarketing because the message related to  
13 an order the plaintiff initiated). Similarly, Defendant's text  
14 message to Plaintiff confirming his dinner reservation only  
15 served to confirm an expected commercial transaction (eating at  
16 Defendant's restaurant) that Plaintiff had initiated. It was  
17 not an advertisement.

18 In addition, the phrase "View specials" does not somehow  
19 convert the text message into an advertisement. Plaintiff  
20 initiated the dining transaction by making a reservation at  
21 Defendant's restaurant. See Compl. ¶ 18. The link to view  
22 specials (even if it worked, which is apparently debated by the  
23 parties) would have facilitated Plaintiff's dining transaction  
24 by allowing him to view specials on his cellphone before sitting  
25 down for dinner. See In re Rules & Regs., 21 FCC Rcd. at 3812 ¶  
26 49.

27 Finally, Plaintiff cites Pedro-Salcedo v. Haagen-Dazs  
28 Shoppe Co., No. 5:17-CV-03504-EJD, 2017 WL 4536422 (N.D. Cal.

1 Oct. 11, 2017) in support of his argument that Defendant's text  
2 message was an advertisement or telemarketing, however, the  
3 case is from the Northern District of California and is not  
4 binding authority. Also, the facts are distinguishable from  
5 this case. In Pedro-Salcedo, the Northern District of  
6 California found that the text message in that case arguably  
7 constituted an advertisement because the words "Thank you for  
8 joining Haagen-Dazs Rewards! Download our app here:." meant  
9 that the transaction (registration for the rewards program) was  
10 complete without the text message. Id. at \*1-2.

11 Here, in contrast, Plaintiff received a text message that  
12 confirmed a reservation for an upcoming dinner that Plaintiff  
13 initiated. See Compl. ¶ 18. And the "View specials" link would  
14 have facilitated the transaction that Plaintiff initiated  
15 (eating dinner at Defendant's restaurant). Plaintiff's reliance  
16 on Pedro-Salcedo as persuasive or binding authority is,  
17 therefore, misplaced. The Court finds that Plaintiff did not  
18 receive an advertisement or telemarketing text message from  
19 Defendant.

20 B. Allegations Regarding Consent

21 Because the Court finds that Defendant's text message to  
22 Plaintiff was not an advertisement, Plaintiff's written consent  
23 was not required before he received the text message. See  
24 Larson, 2016 WL 6298528, at \*4. Instead, only Plaintiff's  
25 express consent was required (whether written or not). See  
26 Larson, 2016 WL 6298528, at \*3. Plaintiff provided Defendant  
27 with express consent to receive a text message regarding his  
28 dinner reservation by providing his phone number to Defendant.

1 See Compl. ¶¶ 18, 20; see also Roberts v. PayPal, Inc., No. C  
2 12-0622 PJH, 2013 WL 2384242, at \*3-5 (N.D. Cal. May 20, 2013)  
3 (finding that prior express consent to receive a call is given  
4 when the called party voluntarily proffers his telephone number  
5 to the calling party); see also Baird v. Sabre Inc., 995 F.  
6 Supp. 2d 1100, 1102-03, 1106-07 (C.D. Cal. 2014) (finding that  
7 Baird's act of providing her cellphone number was a voluntary  
8 act and that, as a result, she consented to be contacted on her  
9 cellphone about flight-related matters).

10         Since the Court has found that Plaintiff's allegations  
11 establish that he provided the requisite consent to receive  
12 Defendant's text message, the inquiry ends. The Court need not,  
13 and does not, reach the issue of (1) whether Defendant used an  
14 Automatic Telephone Dialing System ("ATDS") in sending the text  
15 message giving rise to this lawsuit and (2) whether Plaintiff is  
16 within the zone of interest that Congress intended to be  
17 protected by the TCPA.

18         Finally, Plaintiff seeks leave to amend should the Court  
19 grant the motion to dismiss. Opp'n at 11. But the Court need  
20 not grant leave to amend where amendment would be futile.  
21 Deveraturda v. Globe Aviation Sec. Servs., 454 F.3d 1043, 1049-  
22 1050 (9th Cir. 2006). As explained above, Plaintiff has pleaded  
23 no facts that legally support his TCPA claim. And Plaintiff has  
24 not pointed to any additional facts showing that amendment could  
25 save his claim. The Court denies Plaintiff's request.

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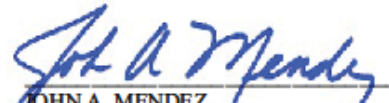
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III. ORDER

For the reasons above, the Court GRANTS Defendants' motion to dismiss WITH PREJUDICE.

IT IS SO ORDERED.

Dated: November 28, 2017



JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE