

N.D. Cal. Court Grants Summary Judgment, Finding that Text Messages Were Neither Advertising Nor Telemarketing

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The Northern District of California recently granted summary judgment dismissing a plaintiff's TCPA claim based on text messages that confirmed plaintiff's hotel reservations and encouraged him to download defendant's app. *Phan v. Agoda Co. Pte. Ltd.*, No. 16-CV-07243-BLF, 2018 WL 6591800 (N.D. Cal. Dec. 13, 2018). The case turned on whether the texts constituted advertising or telemarketing—thus requiring plaintiff's prior express *written* consent. After considering “[b]oth the context and the content of the messages,” the court held that the texts were neither advertising nor telemarketing and granted summary judgment in defendant's favor because it was undisputed that plaintiff had given the requisite consent for informational or transactional texts.

Plaintiff booked travel on defendant Agoda's website on four separate occasions. For each booking, plaintiff gave Agoda his telephone number and agreed to its Terms of Use and Privacy Policy. After each booking, he received a text saying: “Good news! Your Agoda booking [number] is confirmed. Manage your booking with our free app <http://app-agoda.com/GetTheApp>.”

The key issue in dispute at summary judgment was whether these texts constituted advertising or telemarketing. Defendant argued that the texts were transactional because they merely confirmed plaintiff's travel bookings and directed him to an app that allowed him to make modifications to an ongoing transaction. Plaintiff argued that the texts were advertising or telemarketing because the bookings had already been completed and the app allowed recipients to undertake new transactions that had nothing to do with the transactions being confirmed by the texts.

The court began its analysis by observing that, in determining whether a text constitutes advertising or telemarketing, courts must approach the issue with “a measure of common sense.” After reviewing several analogous cases, the court thoroughly parsed the context and content of the texts and sided with defendant. As to context, the court found that the texts were part of an “ongoing business transaction” because, up until the time plaintiff completed his travel, he could cancel or modify it through Agoda. As to content, the court found that the plain language of the texts was limited to confirming plaintiff's booking and managing that booking through the app. The court was unmoved by the fact that the app allowed plaintiff to engage in other transactions. In that regard, the court reasoned that similar to a recent Ninth Circuit decision, the texts contained “no content

encouraging purchase of [Agoda] services” and thus were not telemarketing. *Id.* at *5 (quoting *Aderhold v. car2go N.A.*, 668 Fed. App'x 795 (9th Cir. 2016)). The court also found that the mere inclusion of a link to the app in the texts “simply cannot be said to advertise the commercial availability of this product or service under the law.”

The court’s application of common sense here is welcome news to the business community. And the case serves as an important reminder that there can be very fine distinctions between texts that are informational and texts that constitute advertising or telemarketing.

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