UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BRYAN ROBBINS and MARVIN FEIGES, on behalf of themselves, all others similarly situated, and the general public, Plaintiffs, vs. THE COCA-COLA COMPANY, a Delaware Corporation, Defendant.	CASE NO. 13-CV-132 JLS (WVG) **ORDER: (1) GRANTING PLAINTIFFS' *EX PARTE* APPLICATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(d); (2) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; AND (3) DENYING DEFENDANT'S MOTION TO STRIKE** (ECF Nos. 36, 38, 49)

Presently before the Court is Plaintiffs Bryan Robbins and Marvin Feiges' (collectively, "Plaintiffs") *Ex Parte* Application Pursuant to Federal Rule of Civil Procedure 56(d) to Deny Defendant The Coca-Cola Company's ("Coca-Cola") Motion for Summary Judgement (ECF No. 38), as well as Coca-Cola's Response in Opposition (ECF No. 46) and Plaintiffs' Reply in Support (ECF No. 47). Also before the Court are Coca-Cola's Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, for Summary Judgment ("MSJ") (ECF No. 36) and Coca-Cola's Motion to Strike Portions of the Revised Declaration of Ronald A. Marron and Exhibit 4 Attached Thereto (ECF No. 49). Having considered the parties' arguments and the law,

the Court **GRANTS** Plaintiffs' *Ex Parte* Application and **DENIES** Coca-Cola's Motion to Strike. The Court also **DENIES** Coca-Cola's MSJ without prejudice to renewing the motion once Plaintiffs have received and reviewed the discovery at issue.

BACKGROUND

In or around 2012, Plaintiffs received unsolicited short message service ("SMS") text messages promoting Coca-Cola products. (*See* Compl. ¶¶ 12–16, ECF No. 1.) This putative class action alleges that Coca-Cola sent those text messages in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii), and seeks statutory damages pursuant thereto. (*Id.* ¶¶ 37–38, 42–43.)

On May 22, 2013, this Court denied Coca-Cola's motion to dismiss the Complaint, and the case proceeded to the discovery phase. (*See* ECF No. 18.) On December 17, 2013, Magistrate Judge William V. Gallo ordered Coca-Cola to identify each vendor and each marketing campaign utilized during the class period. (Disc. Order 19,[1] ECF No. 35.) Additionally, Judge Gallo ordered Coca-Cola to produce all documents related to any prior litigation involving TCPA claims and all documents concerning Coca-Cola's compliance with the TCPA. (*Id.* at 27–28.)

On January 16, 2014, Coca-Cola filed its MSJ. (ECF No. 36.) Plaintiffs argue, however, that Coca-Cola had not yet fully complied with Judge Gallo's Discovery Order. (Rule 56(d) Appl. 13, ECF No. 38.) Rather, Plaintiffs contend that Coca-Cola has continually delayed production of the ordered discovery, instead drafting a premature motion for summary judgement. (*Id.*)

Consequently, Plaintiffs filed the instant *Ex Parte* Application requesting that the Court deny Coca-Cola's MSJ and allow additional time for discovery. Subsequently, Judge Gallo amended his December 17, 2013 Discovery Order, acknowledging that, while Coca-Cola had complied in part, Coca-Cola also had failed to produce some of the ordered discovery. (*See* Am. Disc. Order, ECF No. 44.) Specifically, Judge Gallo determined that Coca-Cola's response to the court-ordered request to identify all

[1] Pincites refer to CM/ECF assigned page numbers.

marketing campaigns did "not come close to qualifying as a sufficient response." (*Id.* at 6.)

LEGAL STANDARD

Federal Rule of Civil Procedure 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).

"To prevail under . . . Rule [56(d)],[2] [a] part[y] opposing a motion for summary judgment must make '(a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists.'" *Emp'rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1129 (9th Cir. 2004) (quoting *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986)). "[I]f the movant fails to show how the information sought would preclude summary judgment," a court may deny the Rule 56(d) motion. *Cal. Union Ins. Co. v. Am. Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990); *see also Getz v. Boeing Co.*, 654 F.3d 852, 868 (9th Cir. 2011) (affirming denial of Rule 56(d) discovery motion where party "failed to 'proffer sufficient facts to show that the evidence sought exist[ed], and that it would [have] prevent[ed] summary judgment'" (quoting *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 n.5 (9th Cir. 2009))).

However, the U.S. Supreme Court has noted that Rule 56(d) *requires*, "rather than merely permit[s], discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Metabolife Int'l., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

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[2] Federal Rule of Civil Procedure 56(d) was formerly numbered "56(f)." *See* Fed. R. Civ. P. 56, committee's notes–2010 amendment ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).")

ANALYSIS

Plaintiffs assert that they have not had the opportunity to discover specific, existing facts, the discovery of which would preclude summary judgement. (Rule 56(d) Appl. 27–28, ECF No. 38.) Plaintiffs have pursued, and continue to diligently pursue, discovery from both Coca-Cola and its vendors. Plaintiffs now seek records from third-party vendors as well as depositions of individuals from those organizations. (Reply in Supp. 6, ECF No. 47.) Plaintiffs specifically seek evidence of text messages sent to Plaintiffs from Coca-Cola or its contracted vendors. (*Id.* at 13.) At their depositions, Plaintiffs testified that they received text messages from Coca-Cola; however, Plaintiffs could not recall the details of the messages. (Resp. in Opp'n 9–10, ECF No. 46.) However, the third-party vendors indicated that they keep records of promotional text messages sent during various advertising campaigns. (*Id.* at 10.) Hence, Plaintiffs contend that the documentary evidence they seek may very well exist.

Coca-Cola, on the other hand, contends that the evidence Plaintiffs seek does not exist for three reasons. (*Id.* at 11.) First, Coca-Cola cites the fact that Plaintiffs' cell phone providers did not keep records of text messages during the relevant time period. (*Id.* at 9.) Next, Coca-Cola admits that, while it did "run an 'in-venue' promotion involving text messages promoting a Coca-Cola product during the November 5, 2011 LSU-Alabama game," Plaintiffs could not have participated in the interactive advertisement "because it was not available to television viewers." (*Id.* at 9–10.) Finally, Coca-Cola cites sworn declarations by its vendors stating the vendors searched their records and could not find any text messages sent to Plaintiffs. (*Id.* at 10.)

The Federal Rules of Civil Procedure clearly contemplate an opportunity for Plaintiffs to confront the third-party vendor declarants before Coca-Cola can rely on those declarations to support its MSJ. *See* Fed. R. Civ. P. 26(a); 26(e); 37(c)(1); 56(d). The "purpose of summary judgement is to 'pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56

advisory committee's notes–1963 amendment). The additional discovery requested by Plaintiffs would significantly assist in determining whether Coca-Cola or its vendors in fact sent the messages at issue, an inquiry highly relevant to this case. If Plaintiffs can establish that they received text messages from Coca-Cola or its vendors, summary judgment may be precluded by issues of material fact. If, on the other hand, the third-party vendors can demonstrate—as Coca-Cola contends—that no text messages were sent to Plaintiffs, Plaintiffs' claims are substantially weakened, if not completely discredited.

Having exhausted nearly all means of obtaining evidence concerning the text messages from the *recipients*, Plaintiffs are entitled to depose and request documents from the alleged *senders* to confirm the declarations on which Coca-Cola relies before being compelled to oppose a motion for summary judgement supported by said declarations. Once Coca-Cola provides Plaintiffs with the discovery to which they are entitled, and once Plaintiffs have had the opportunity to review said discovery, the Court will entertain Coca-Cola's MSJ.

CONCLUSION

For the above-stated reasons, the Court **GRANTS** Plaintiffs' *Ex Parte* Application. Accordingly, the Court **DENIES** Coca-Cola's MSJ without prejudice to filing a renewed motion once Plaintiffs have received and reviewed the discovery at issue. The parties **MAY CONTACT** the chambers of Magistrate Judge Gallo to request, at his discretion, any scheduling revisions necessary in light of this Order.

Further, because the Court did not rely on the portions of the Declaration of Ronald A. Marron to which Coca-Cola objects, the Court **DENIES** Coca-Cola's Motion to Strike.

IT IS SO ORDERED.

DATED: April 16, 2014

Janis L. Sammartino

Honorable Janis L. Sammartino
United States District Judge