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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDITH DIXON,
Plaintiff,
v.
MONTEREY FINANCIAL SERVICES,
INC.,
Defendant.

Case No. [15-cv-03298-MMC](#)

**ORDER GRANTING DEFENDANT'S
MOTION TO STRIKE PLAINTIFF'S
CLASS ACTION ALLEGATIONS;
AFFORDING PLAINTIFF FURTHER
LEAVE TO AMEND**

Re: Dkt. No. 54

Before the Court is defendant Monterey Financial Services, Inc.'s "Motion to Strike Plaintiff's Class Allegations," filed July 20, 2016. Plaintiff Edith Dixon has filed opposition, to which defendant has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for decision on the parties' respective written submissions, VACATES the hearing scheduled for August 26, 2016, and rules as follows.

In the operative complaint, the Second Amended Complaint ("SAC"), plaintiff, who asserts claims on her own behalf and on behalf of a putative class, alleges defendant, using an automated telephone dialing system, called her cellular telephone after she had revoked her consent to be called. Plaintiff alleges such calls violated the Telephone Consumer Protection Act ("TCPA"). Under the TCPA, it is "unlawful for any person" 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." See 47 U.S.C. § 227(b)(1)(A).

By order filed June 24, 2016, the Court granted defendant's motion to strike the

1 class allegations in the First Amended Complaint ("FAC"), finding the class, as defined
2 therein, was a "fail-safe" class, and afforded plaintiff leave to amend to allege a class
3 that is not fail-safe. (See Order, filed June 24, 2016, at 7:1 - 8:20.) Plaintiff subsequently
4 filed her SAC and amended the definition of the putative class. By the instant motion,
5 defendant argues the class as defined in the SAC is, again, fail-safe.

6 As the Ninth Circuit has explained, "[t]he fail-safe appellation is simply a way of
7 labeling the obvious problems that exist when the class itself is defined in a way that
8 precludes membership unless the liability of the defendant is established." See Kamar v.
9 RadioShack Corp., 375 Fed. Appx. 734, 736 (9th Cir. 2010) (noting class is fail-safe, and
10 thus not "manageable," where class definition is "one that determines the scope of the
11 class only once it is decided that a class member was actually wronged"); see also
12 Randleman v. Fidelity Nat'l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011) (explaining
13 "improper fail-safe class" exists where "[e]ither class members win or, by virtue of losing,
14 they are not in the class, and, therefore, not bound by the judgment").

15 In the FAC, plaintiff identified the putative class as follows:

16 All persons within the United States who received any collection telephone
17 calls from [d]efendant to said person's cellular telephone made through the
18 use of any automatic telephone dialing system or an artificial or prerecorded
19 voice and such person had not previously consented to receiving such calls
20 within the four years prior to the filing of this Complaint.

21 (See FAC ¶ 13.) The Court found such language defined a fail-safe class, for the reason
22 that a TCPA class consisting of persons who received calls without prior express consent
23 would be a class consisting solely of persons who prevail on the merits.

24 In the SAC, plaintiff now defines the putative class as follows:

25 All persons within the United States who received any collection telephone
26 calls from [d]efendant to said person's cellular telephone made through the
27 use of any automatic telephone dialing system or an artificial or prerecorded
28 voice after such person had revoked any prior express consent to receiving
such calls, whether orally, in writing, or by any reasonable means, as
demonstrated by [d]efendant's account notes, recordings of calls, and/or
other collections files or records, within the four years prior to the filing of
this Complaint.

(See SAC ¶ 13.) The single difference between the newly proposed class definition and

1 the previously proposed class definition is the difference between a class member's
2 receipt of the call after having "revoked any prior express consent" (see id.), as opposed
3 to not having "previously consented" (see FAC ¶ 13), i.e., a distinction without legal
4 significance. In each instance, a determination of whether a person is a member of the
5 class is dependent on whether he/she prevails on the merits of the TCPA claim alleged in
6 the operative pleading.¹ Indeed, it is possible that the newly-proposed class would have
7 no members at all; if the trier of fact were to conclude that no person was called after
8 such person had revoked his/her prior consent, defendant would prevail on the merits
9 against a nonexistent class. See, e.g., Daffron v. Rousseau Associates, Inc., 1976 WL
10 1358, at *1 (July 27, 1976 N.D. Ind.) (holding proposed class, defined as customers of
11 defendant who were charged "illegal" fee, was "fail-safe," as "a jury determination that
12 defendants have charged no such illegal fees would at the same time determine that
13 there was no class"). Consequently, the proposed class definition in the SAC will be
14 stricken.

15 In her opposition, plaintiff requests that, in the event of such ruling, "the Court
16 amend the Class Definition to remove the consent requirement and define it as: 'All
17 persons within the United States who received any collection telephone calls from
18 [d]efendant to said person's cellular telephone made through the use of any automatic
19 telephone dialing system or an artificial or prerecorded voice.'" (See Pl.'s Opp. at 5:3-7.)
20 The Court declines to make such amendment itself, and next considers whether affording
21 plaintiff further leave to amend is appropriate.

22 Plaintiff asserts, and the Court agrees, that a class as defined in plaintiff's
23 opposition is not a fail-safe class, nor does defendant, in its reply, argue to the contrary.
24 Rather, defendant argues that any further amendment to allege claims on behalf of such
25 a putative class would be futile because no common question has been identified.

26
27 ¹The need for such determination remains unchanged irrespective of the SAC's
28 additional language specifying the type of evidence to be used in making it.

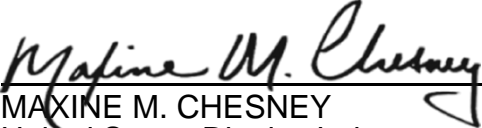
1 To proceed on behalf of a class, a plaintiff must be able to show, inter alia, "there
2 are questions of law or fact common to the class." See Fed. R. Civ. P. 23(a)(2). As the
3 Supreme Court has explained, such "common contention . . . must be of such a nature
4 that it is capable of classwide resolution — which means that determination of its truth or
5 falsity will resolve an issue that is central to the validity of each one of the claims in one
6 stroke." See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

7 At this juncture, the nature of the common factual and/or legal question(s) central
8 to the validity of the TCPA claims plaintiff seeks to assert is unclear. The Court
9 nonetheless finds such concern, as well as whether resolution of any common questions
10 "predominate over any questions affecting only individual members," see Fed. R. Civ. P.
11 23(b)(3), is more appropriately addressed after plaintiff has had an opportunity to further
12 amend her complaint, after which plaintiff will be required to demonstrate her ability to
13 meet all of the requirements set forth in Rule 23, see Dukes, 564 U.S. at 350.
14 Consequently, the Court will afford plaintiff one further opportunity to amend to allege, if
15 she can do so, a cognizable class.

16 Accordingly, defendant's motion to strike is hereby GRANTED, and the class
17 action allegations in the SAC are hereby STRICKEN. If plaintiff wishes to file a Third
18 Amended Complaint for the purpose of amending her class action allegations, plaintiff
19 shall file such pleading no later than September 9, 2016. If plaintiff does not do so within
20 the time provided, the instant action will proceed on plaintiff's individual claims.

21 **IT IS SO ORDERED.**

22
23 Dated: August 22, 2016


MAXINE M. CHESNEY
United States District Judge