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

CHRISTOPHER KRAMER, individually
and on behalf of all others
similarly situated,

Plaintiff,

v.

AUTOBYTEL, INC., a Delaware
Corporation; B2MOBILE, LLC, a
California limited liability
company; and LEADCLICK MEDIA,
INC., a California Corporation,

Defendants.

No. 10-cv-02722 CW

ORDER DENYING
DEFENDANTS'
MOTIONS TO DISMISS
(Docket Nos. 58 &
66)

Plaintiff Kramer has filed suit against Defendants Autobytel, Inc., B2Mobile, LLC, and LeadClick Media, Inc., under the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. (TCPA). The complaint alleges that Defendants sent Kramer and other similarly situated individuals thousands of unauthorized text messages. On October 26, 2010, on the parties' stipulation, the Court dismissed with prejudice Kramer's individual claims against Defendant Autobytel, and dismissed without prejudice the

1 putative class claims Kramer advanced against Defendant Autobytel.
2 Docket No. 100.

3 The remaining two Defendants, B2Mobile and LeadClick, now
4 move to dismiss Kramer's claims. Docket Nos. 58 and 66. Kramer
5 opposes the motions. Because the motions have drawn into question
6 the TCPA's constitutional validity, the Court notified the United
7 States of the constitutional challenge. Docket Nos. 71 & 73. The
8 United States has intervened in the matter, and filed a memorandum
9 opposing Defendants' constitutional arguments. Docket No. 98.

10 Having considered all of the parties' submissions and the
11 Government's memorandum, the Court DENIES Defendants' motion to
12 dismiss.

13 BACKGROUND

14 Kramer's initial complaint named only Autobytel and B2Mobile
15 as Defendants. Docket No. 1., Compl. at ¶¶ 7 & 8. Kramer
16 subsequently amended his complaint, adding LeadClick as a
17 Defendant. Docket No. 20, First Amended Compl. at ¶ 9.

18 The First Amended Complaint (1AC), challenged in this motion,
19 alleges the following facts. Kramer, an Illinois resident,
20 received ten text messages from Short Message Service (SMS) Code
21 77893, a code operated by Defendant B2Mobile. 1AC ¶¶ 6 & 20-22.
22 On information and belief, Kramer alleges that B2Mobile acquires a
23 list of phone numbers from a third-party, and then sends massive
24 amounts of spam text message advertisements, including
25 advertisements for Autobytel. 1AC ¶ 18. "Each such text message
26 was made using equipment that, upon information and belief, had
27 the capacity to store or produce telephone numbers to be called,
28 using a random or sequential number generator." 1AC ¶ 37.

1 The mass transmission of these spam text messages began at
2 least in April, 2009, and reached thousands of consumers nation-
3 wide. 1AC ¶ 19. Kramer received one such message on or about
4 April 1, 2009. 1AC ¶ 20. The "from" field of the message
5 identified the SMS short code 77893. 1AC ¶ 21. The body of the
6 text message read:

7 NEED SOME EXTRA CASH FOR YOU [sic] NEW EDUCATION?
8 GET A CASH ADVANCE OF UP TO \$1500!
9 GO TO WWW.CASHPOTUSA.COM
10 PROMO CODE: 7PX5E TO END REPLY STOP.

11 1AC ¶ 21. Immediately after receiving the above text message,
12 Plaintiff responded "Stop" in a text message to opt out of the
13 advertising messages. 1AC ¶ 22. Kramer alleges that he continued
14 to receive text advertisements from SMS short code 77893. 1AC
15 ¶ 23. Kramer's complaint included one additional example of a
16 text message that he received from SMS short code 77893. About
17 October 20, 2009, Kramer received the following text from
18 B2Mobile:

19 DEAL ALERT: CARS FROM \$99/MO! AVAIL. IN YOUR AREA!
20 GO TO:WWW.CARS499.COM PROMO: 39075
21 FOR IMMEDIATE LISTINGS CALL 1800-387-6230.
22 TO END REPLY STOP.

23 1AC ¶¶ 24-26. The website promoted in the above text message
24 allegedly directed consumers to MyRide.com, an automotive referral
25 website operated by Autobytel. 1AC ¶ 26. At no time did Kramer
26 consent to the receipt of such text messages from Defendants. 1AC
27 ¶ 28.

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1 Kramer alleged that, in "an effort to promote its automotive
2 products to consumers, Autobytel, the proprietor of one of the
3 nation's largest automotive referral services, through marketing
4 partners such as LeadClick, engaged B2Mobile to conduct an
5 especially pernicious form of marketing: the transmission of
6 unauthorized advertisements in the form of 'text message' calls to
7 the cellular phones of consumers throughout the nation." 1AC ¶ 2.
8 The complaint further stated, "In order to make their en masse
9 transmission of text message advertisements economical, Defendants
10 used lists of thousands of cellular telephone numbers of consumers
11 acquired from third-parties." 1AC ¶ 30 (emphasis in original).
12 "Defendant B2Mobile contracted with third parties to acquire lists
13 of phone numbers for the sole purpose of sending spam text
14 messages on behalf of advertisers for its own monetary gain.
15 Defendant Autobytel contracted with LeadClick, who thereafter
16 contracted with B2Mobile, for the purpose of advertising
17 Autobytel's products and services through spam text messages."
18 1AC ¶ 39.

21 B2Mobile refers to itself as a mobile advertiser. In its
22 motion to dismiss, LeadClick describes itself as a California
23 corporation that provides a variety of products and services,
24 including posting online information to solicit consumer names and
25 contact information.

27 Defendants B2Mobile and LeadClick move to dismiss Plaintiff's
28 complaint, arguing that the TCPA is so vague as to be

1 constitutionally void, and challenging the sufficiency of Kramer's
2 pleading.

3 LEGAL STANDARD

4 The Due Process Clause of the Fifth Amendment requires that
5 individuals be given fair notice of what the law requires, so that
6 they may conform their conduct accordingly. United States v.
7 Williams, 553 U.S. 285, 304 (2008). A law is unconstitutionally
8 vague only if it "fails to provide a person of ordinary
9 intelligence fair notice of what is prohibited, or is so
10 standardless that it authorizes or encourages seriously
11 discriminatory enforcement." Id. Even when a law restricts
12 constitutionally protected activity, such as free expression,
13 "perfect clarity and precise guidance have never been required[.]"
14 Id.; Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989). A
15 statute's vagueness is assessed "as applied to the particular
16 facts at issue[.]" Holder v. Humanitarian Law Project, __ U.S.
17 __; 130 S. Ct. 2705, 2718-19 (2010).

18 A sufficiently plead complaint requires a "short and plain
19 statement of the claim showing that the pleader is entitled to
20 relief." Fed. R. Civ. P. 8(a). Dismissal under Rule 12(b)(6) for
21 failure to state a claim is appropriate only when the complaint
22 does not give the defendant fair notice of a legally cognizable
23 claim and the grounds on which it rests. Bell Atl. Corp. v.
24 Twombly, 550 U.S. 544, 555 (2007). In considering whether a
25 complaint is sufficient to state a claim, the court will take all
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1 material allegations as true and construe them in the light most
2 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
3 896, 898 (9th Cir. 1986). However, this principle is inapplicable
4 to legal conclusions; "threadbare recitals of the elements of a
5 cause of action, supported by mere conclusory statements," are not
6 taken as true. Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937,
7 1949-50 (2009) (citing Twombly, 550 U.S. at 555).
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9 Whether Plaintiff has stated a claim under the TCPA turns on
10 the statutory language of 47 U.S.C. § 227(b)(1)(A)(iii). Section
11 227 of the TCPA, entitled "Restrictions on use of telephone
12 equipment," provides:

13 (a) Definitions. As used in this section-

14 (1) The term "automatic telephone dialing system" means
15 equipment which has the capacity-

16 (A) to store or produce telephone numbers to be called,
17 using a random or sequential number generator; and

18 (B) to dial such numbers.

19 (b) Restrictions on use of automated telephone equipment.

20 (1) Prohibitions. It shall be unlawful for any person within
21 the United States, or any person outside the United
22 States if the recipient is within the United States-

23 (A) to make any call (other than a call made for
24 emergency purposes or made with the prior express
25 consent of the called party) using any automatic
26 telephone dialing system or an artificial or
27 prerecorded voice-

28 . . .

(iii) to any telephone number assigned to a paging
service, cellular telephone service,
specialized mobile radio service, or other

1 radio common carrier service, or any service
2 for which the called party is charged for the
3 call.

3 DISCUSSION

4 I. The Constitutionality of the TCPA

5 Defendants argue that the TCPA is constitutionally void,
6 because it is vague as to the meaning of "prior express consent"
7 in the context of text messaging. The statute itself does not
8 address this precise issue, and agencies and courts purportedly
9 have failed to provide guidance. As a result, Defendants argue
10 that they and the mobile advertising industry in general have not
11 received notice of the parameters for lawful text messaging, with
12 the degree of specificity that the Constitution requires. In
13 particular, Defendants argue that they had insufficient notice
14 that the TCPA's prohibition against telephone calls from automatic
15 dialing systems without "prior express consent" applied to text
16 messaging.
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18 Defendants disregard ample guidance available to ensure
19 compliance with the TCPA. Over seven years ago the Federal
20 Communications Commission (FCC) explicitly stated that the TCPA's
21 prohibition on automatic telephone dialing systems "encompasses
22 both voice calls and text calls to wireless numbers including, for
23 example, short message service (SMS) calls . . ." In re Rules and
24 Regulations Implementing the Telephone Consumer Protection Act of
25 1991, Report and Order, 18 F.C.C.R. 14014, 14115 (July 3, 2003).
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27 In 2009, early in the time period during which Kramer allegedly
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1 received the unsolicited text messages, the Ninth Circuit held
2 unambiguously that a text message is a "call" for purposes of the
3 TCPA. Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954
4 (9th Cir. 2009).

5 Furthermore, in cases involving fax transmissions, courts
6 have held both advertisers and advertisement broadcasters subject
7 to liability under the TCPA. Kopff v. Battaglia, 425 F. Supp. 2d
8 76, 92-93 (D.D.C. 2006); Accounting Outsourcing, LLC v. Verizon
9 Wireless Personal Comm., L.P., 329 F. Supp. 789, 805-06 (M.D. La.
10 2004); American Blastfax, 121 F. Supp. 1085, 1089-90 (W.D. Tex.
11 2000)("It would circumvent the purpose of the TCPA to exempt
12 Blastfax from potential liability on the theory that it plays no
13 role in sending the advertisements at issue . . . Blastfax is not
14 exempt from TCPA liability on the grounds that it is a mere
15 "broadcaster" of third party advertisements.").

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18 In Satterfield, the Ninth Circuit addressed the issue of
19 express consent, defining it as "[c]onsent that is clearly and
20 unmistakably stated." Id. at 955 (quoting Black's Law
21 Dictionary). The court described in detail the steps that the
22 plaintiff took to consent online to the delivery of promotional
23 messages to her cellular phone. Id. at 949. Ultimately, the
24 court held that the plaintiff's consent to receive promotional
25 materials from one entity did not constitute consent to receive
26 marketing from Defendants in the case. Id. at 955. Thus, the
27 court's ruling gives valuable guidance about what the TCPA
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1 requires, and provides a common sense interpretation of "express
2 consent."

3 Defendants cite Leckler v. Cashcall, Inc., 554 F. Supp. 1025
4 (N.D. Cal. 2008), for the proposition that "prior express consent"
5 under the TCPA is ambiguous in the context of text messaging.
6 That decision, however, did not find ambiguity of the nature that
7 Defendants in the present case assert. Leckler found ambiguity
8 only as to whether the provision of a cell phone number on a loan
9 application served as a express consent under the TCPA to receive
10 automated calls from creditors. Leckler's finding of ambiguity in
11 this limited context does not overshadow the clarity of the FCC's
12 statement in 2003 that the TCPA encompasses text messaging, nor
13 the subsequent Ninth Circuit decision in Satterfield.
14 Furthermore, the decision was later vacated for lack of subject
15 matter jurisdiction. Leckler v. Cashcall, Case No. C 07-04002,
16 2008 WL 5000528 (N.D. Cal.).

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19 Because the FCC announced years ago that the TCPA encompasses
20 text messages, and that is clearly the law in the Ninth Circuit,
21 Defendants are obliged to examine FCC guidance and court decisions
22 that address express consent for automated marketing under the
23 TCPA. Though Defendants raise a number of hypothetical situations
24 that may present challenges to discerning what the law requires,
25 identifying "close cases" is not sufficient to invalidate a
26 statute for vagueness under the Constitution. Williams, 553 U.S.
27 at 305-06 (rejecting the lower court's use of hypothetical
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1 situations to strike down a statute for vagueness, and stating,
2 "What renders a statute vague is not the possibility that it will
3 sometimes be difficult to determine whether the incriminating fact
4 it establishes has been proved; but rather the indeterminacy of
5 precisely what that fact is."). For these reasons, Defendants'
6 constitutional challenge is without merit.

7 II. The sufficiency of Kramer's complaint

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9 Defendants challenge the sufficiency of Kramer's complaint on
10 a number of bases. Defendants assert that Kramer provided only a
11 conclusory allegation as to Defendants' use of an automatic
12 telephone dialing system to send text messages. As an isolated
13 assertion, it is conclusory to allege that messages were sent
14 "using equipment that, upon information and belief, had the
15 capacity to store or produce telephone numbers to be called, using
16 a random or sequential number generator." Such a naked assertion
17 need not be taken as true. See Iqbal, 129 S. Ct. at 1049-50.

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19 However, read as a whole, the complaint contains sufficient facts
20 to show that it is plausible that Defendants used such a system.
21 Kramer described messages from SMS short code 77893, a code
22 registered to B2Mobile. The messages were advertisements written
23 in an impersonal manner. Kramer had no other reason to be in
24 contact with Defendants. Cf. Kazemi v. Payless Shoesource, Inc.,
25 2010 WL 963225, at *2 (N.D. Cal.); Abbas v. Selling Source, LLC,
26 2009 WL 4884471, at *3 (N.D. Ill.).

1 Defendants argue that Kramer insufficiently plead the size of
2 the putative class. Given Defendants' online and mobile
3 advertising business, and the factual allegations identified in
4 the preceding paragraph, it is entirely plausible that thousands
5 of individuals may be entitled to relief from Defendants' alleged
6 misconduct. Requiring Kramer to plead with greater particularity
7 facts as to the size of the putative class is unnecessary at this
8 early stage of the litigation. The issue of numerosity is more
9 properly determined on a motion for class certification. Holtzman
10 v. Caplice, 2008 WL 2168762, at *2-3 (N.D. Ill.) (citing Wright,
11 Miller & Kane, Federal Practice & Procedure, Civil, 3d § 1798
12 ("Compliance with the Rule 23 prerequisites theoretically should
13 not be tested by a motion to dismiss for failure to state a
14 claim[.]").

16 Both B2Mobile and Leadclick challenge the sufficiency of
17 Kramer's allegations that they sent unauthorized messages, and his
18 allegations about their role in the text messaging. Kramer,
19 however, stated plainly that he never consented to the receipt of
20 such messages, and described his attempt to opt out of receiving
21 messages from SMS code 77893, which was allegedly registered to
22 B2Mobile. Kramer described the relationship between B2Mobile,
23 Autobytel, and LeadClick, and the roles involved in text message
24 advertising. Though on a motion to dismiss the Court need not
25 accept as true pleadings that are no more than legal conclusions
26 or "formulaic recitations of the elements" of a cause of action,
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1 Iqbal, 129 S. Ct. at 1951, well-plead facts are taken as true and
2 construed in the light most favorable to the non-moving party.
3 Telesaurus VPC v. Power, 2010 WL 3928945 (9th Cir.); Cahil v.
4 Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

5 Finally, LeadClick attacks Kramer's complaint for failure to
6 include details about the content and dates of eight of the ten
7 text messages he allegedly received. Kramer has offered to make
8 this information available informally and through discovery;
9 LeadClick seeks to make such allegations a pleading requirement.
10 To this end, LeadClick relies on Abbas, 2009 WL 4884471. In Abbas
11 the plaintiff brought a class action lawsuit under the TCPA after
12 allegedly receiving unsolicited text messages. The court found
13 the plaintiff's allegations regarding the text messages he
14 received insufficient, but granted leave to amend. In the sole
15 passage to address the issue, the court stated:
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18 After alleging several facts regarding the initial,
19 offending SMS message he allegedly received from
20 Selling Source, Abbas makes broad, conclusory
21 allegations regarding the "numerous" further messages
22 that he allegedly received. See Compl. ¶¶ 17, 18.
23 While Rule 8(a)(2) does not require facts to be pled
24 with particularity, Abbas's allegations here provide
25 no notice to Selling Source about the subsequent
26 messages Abbas allegedly received. There is no
27 allegation regarding when Abbas received the later
28 messages, what those messages stated, or from what
numbers he received the later messages. Some fair
notice to Selling Source is particularly necessary
here because Abbas seeks recovery for each violation
of the TCPA.

27 Abbas, 2009 WL 4884471 at *2.

1 To counter LeadClick's argument, Kramer cites Kazemi, 2010 WL
2 963225, and Lozano v. Twentieth Century Fox Film Corp., 702 F.
3 Supp. 2d 999 (N.D. Ill. 2010). In both cases the complaints
4 included details as to the first text message that the plaintiffs
5 allegedly received, but few allegations about the subsequent text
6 messages. Unlike Abbas, the courts did not address the
7 sufficiency of the pleadings with respect to the text messages, so
8 they provide no guidance on the precise issue that LeadClick has
9 raised.
10

11 As a Defendant, LeadClick is entitled to notice of the bases
12 for the lawsuit Kramer has brought. It is also true that Rule 8
13 does not require Kramer to plead his claim with particularity.
14 LeadClick argues that, in the complaint's current form, "There is
15 no way to tell what involvement, if any, LeadClick had in the
16 dissemination of the remaining eight text messages." However,
17 this misses the crux of Kramer's putative class action under the
18 TCPA. The core of the complaint is that Defendants each played a
19 role in sending en masse unsolicited text messages to Kramer and
20 possibly thousands of other individuals. The Court finds
21 persuasive Kramer's argument that, because the TCPA is designed to
22 combat mass unsolicited commercial telemarketing, at times
23 involving thousands of calls or text messages, notice pleading
24 standards do not require a plaintiff to allege details at the
25 pleading stage about the time and context of every text message.
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CONCLUSION

Because the TCPA is not unconstitutionally vague, and Kramer has adequately plead his complaint, the Court DENIES Defendants' motion to dismiss. The parties shall appear before the Court for a case management conference, as previously scheduled, on January 4, 2011 at 2:00 pm.

IT IS SO ORDERED.

Dated: 12/29/2010



CLAUDIA WILKEN
United States District Judge