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SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ERIK KNUTSON, Individually and on  
12 Behalf of All Others Similarly Situated,

Plaintiffs,

13 vs.

14  
15 REPLY!, INC.,

16 Defendants.  
17

CASE NO. 10-CV-1267 BEN (WMc)

ORDER

(1) GRANTING MOTION TO DISMISS  
BY DEFENDANT REPLY!, INC.; AND

(2) DENYING AS MOOT MOTION FOR  
A MORE DEFINITE STATEMENT BY  
DEFENDANT REPLY!, INC.

[Docket No. 11]

18 Before this Court is Defendant REPLY!, INC.'s ("Defendant") Motion to Dismiss First  
19 Amended Complaint, or, in the Alternative, Defendant's Motion for a More Definite Statement. For  
20 the reasons stated herein, the Motion to Dismiss is **GRANTED** and the Motion for a More Definite  
21 Statement is **DENIED AS MOOT**.

22 **BACKGROUND**

23 This action arises from an unspecified number of phone calls Plaintiff Erik Knutson  
24 ("Plaintiff") alleges he received on his cellular telephone from Defendant on or after March 1, 2010.  
25 (Pls.' First Am. Compl. ¶ 6, Aug. 24, 2010.) Plaintiff alleges the calls were solicitations related to  
26 his real estate business, and that he incurred a charge for the calls. (Am. Compl. ¶¶ 7, 8.) Plaintiff  
27 further alleges the calls were placed with the use of an "automatic telephone dialing system." (Am.  
28 Compl. ¶ 6.)

1 On June 14, 2010, Plaintiff initiated this Class Action against Defendant on behalf of himself  
2 and all others similarly situated. (Docket No. 1.) Plaintiff alleges Defendant made numerous calls  
3 to an unspecified national class of people, and that each call is a violation of the Telephone  
4 Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”).

5 The operative complaint is the First Amended Complaint filed on August 24, 2010. (Docket  
6 No. 7) On September 7, 2010, Defendant filed the Motion currently before the Court. (Docket No.  
7 11) Plaintiff filed an opposition, and Defendant filed a reply. (Docket Nos. 14, 15) The Court finds  
8 the Motion suitable for disposition without oral argument pursuant to Civil Local Rule 7.1.d.1.

### 9 MOTION TO DISMISS

10 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate if, taking all factual  
11 allegations as true, the complaint fails to state a plausible claim for relief on its face. *Bell Atl. Corp.*  
12 *v. Twombly*, 550 U.S. 544, 556-57 (2007). The plausibility standard means that the complaint must  
13 state “enough facts to raise a reasonable expectation that discovery will reveal evidence of” the  
14 matter complained of. *Id.* at 556. The Plaintiff is required to provide more than just labels and legal  
15 conclusions, “a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555.

16 The TCPA makes it unlawful for any person within the United States or any person outside  
17 the United States if the recipient is within the United States

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

20  
21 (iii) to any telephone number assigned to a paging service, cellular  
22 telephone service, specialized mobile radio service, or other radio  
common carrier service, or any service for which the called party is  
charged for the call[.]

23 TCPA, 47 U.S.C. § 227(b)(1)(A). The statute indicates that these types of calls are not  
24 unlawful if made with the express consent of the calling party, but the FCC has clarified that this  
25 argument is a defense and not an element that must be pled by Plaintiff. *See* FCC Declaratory Ruling  
26 07-232, 23 F.C.C.R. 559 (Dec. 28, 2007) (“To ensure that creditors and debt collectors call only  
27 those consumers who have consented to receive autodialed and prerecorded message calls, we  
28 conclude that the creditor should be responsible for demonstrating that the consumer provided prior

1 express consent.”). The only elements Plaintiff must successfully plead are: that Defendant made  
2 the call; Plaintiff was charged for the call; and the call was made using any automatic telephone  
3 dialing system or an artificial or prerecorded voice.

4 In his First Amended Complaint, Plaintiff states he received several calls from Defendant in  
5 the six months between March 1, 2010 and the date the complaint was filed in August. (Am. Compl.  
6 ¶ 6.) Plaintiff also states he incurs a charge for incoming calls on his cellular telephone. (Am.  
7 Compl. ¶ 8.) When considering a Motion to Dismiss, “all allegations of material fact are taken as  
8 true and construed in the light most favorable to the nonmoving party.” *Burgert v. Lokelani Bernice*  
9 *Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). The Court finds Plaintiff has sufficiently  
10 alleged the first two elements required for a complaint based on the TCPA. However, Plaintiff has  
11 not sufficiently plead the third element.

12 Plaintiff’s complaint includes the allegation that Defendant used an “automatic dialing  
13 system as defined by 47 U.S.C. § 227(a)(1).” (Am. Compl. ¶ 6.) The TCPA defines an automatic  
14 telephone dialing system as “equipment which has the capacity to store or produce telephone  
15 numbers to be called, using a random or sequential number generator; and to dial such numbers.”  
16 47 U.S.C. § 227(a)(1). “As an isolated assertion, it is conclusory to allege that messages were sent  
17 ‘using equipment that, upon information and belief, had the capacity to store or produce telephone  
18 numbers to be called, using a random or sequential number generator.’ Such a naked assertion need  
19 not be taken as true.” *Kramer v. Autobytel, Inc.*, 2010 U.S. Dist. LEXIS 137257 at \*12-\*13 (N.D.  
20 Cal. Dec. 29, 2010).

21 While it may be difficult for a plaintiff to know the type of calling system used without the  
22 benefit of discovery, the court in *Kramer* relied on allegations about the call to infer the use of an  
23 automatic system. “Kramer described messages from SMS short code 77893, a code registered to  
24 B2Mobile. The messages were advertisements written in an impersonal manner. Kramer had no  
25 other reason to be in contact with Defendants.” *Id.* at \*13. Here, the complaint gives no details about  
26 the manner of the calls except that they were solicitations about Defendant’s real estate related  
27 business. (Am. Compl. ¶ 7.) There is nothing in the complaint that allows the court to infer the calls  
28 were randomly generated or impersonal.

1           Accordingly, the Court finds that Plaintiff has failed to state a claim for relief based on the  
2 Telephone Consumer Protection Act because he has failed to plead one of the necessary elements.

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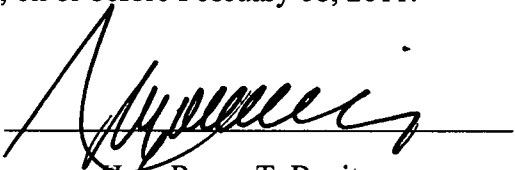
**MOTION FOR A MORE DEFINITE STATEMENT**

In addition to the Motion to Dismiss, Defendant has asked the court to consider in the alternative a Motion for a More Definite Statement. (Docket No. 11.) Given the Court's dismissal of Plaintiff's claims in this action, Defendant's Motion for a More Definite Statement is **DENIED AS MOOT.**

**CONCLUSION**

In light of the above, the Court **GRANTS** Defendant's Motion to Dismiss. The Court will however grant Plaintiff leave to amend the complaint. Plaintiff may file an amended complaint, curing the deficiency identified above, on or before February 18, 2011.

Date: 1/26/2011

  
Hon. Roger T. Benitez  
United States District Judge