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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JAMES LINLOR,

12 Plaintiff,

13 v.

14 FIVE9, INC., et al.,

15 Defendants.  
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Case No.: 17cv218-MMA (BLM)

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS  
PLAINTIFF'S SECOND AMENDED  
COMPLAINT**

[Doc. No. 29]  
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18 On February 3, 2017, Defendant Five9, Inc. (“Five9”) removed this action from  
19 the Superior Court of California, County of San Diego. *See* Doc. No. 1. In the Second  
20 Amended Complaint (“SAC”), Plaintiff James Linlor, proceeding *pro se*, alleges  
21 Defendants Five9, Futero, Inc. (“Futero”), and other unnamed defendants violated the  
22 Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”). *See* Doc. No.  
23 27 (“SAC”). Five9 moves to dismiss Plaintiff’s SAC under Federal Rule of Civil  
24 Procedure 12(b)(6). *See* Doc. No. 29-1 (“MTD”). Plaintiff filed an opposition [Doc. No.  
25 31 (“Oppo.”)] and Five9 filed a reply [Doc. No. 32 (“Reply”)]. The Court found the  
26 matter suitable for determination on the papers and without oral argument pursuant to  
27 Civil Local Rule 7.1.d.1. Doc. No. 35. For the reasons set forth below, the Court  
28 **GRANTS** Defendant’s motion to dismiss.

1 BACKGROUND<sup>1</sup>

2 The SAC asserts claims for violations of the TCPA against Defendants Five9,  
3 Futero, and other unnamed defendants, whom Plaintiff refers to as “John Does #1-#9.”  
4 SAC. Plaintiff alleges Five9 “is in the business of providing customer contact center  
5 solutions, including, but not limited to, predictive and autodialers, and inbound call  
6 management, including toll-free numbers.” SAC, p. 11.

7 Plaintiff alleges that in approximately October 2016, “Defendants began sending  
8 texts to Plaintiff’s cellular telephone number.” *Id.* Specifically, Plaintiff alleges he  
9 received “[a]t least sixteen (16) text messages . . . during 2016 and 2017.” SAC, pp. 11-  
10 12. Plaintiff alleges that the “repetitive nature of the text messages . . . indicate that  
11 Defendants’ messages were made using an ‘automatic telephone dialing system,’ as  
12 defined by 47 U.S.C. § 227(a)(1).” SAC, p. 12. The SAC states that Five9 “was  
13 identified as the teleco operator/agent responsible for toll-free #s 855-790-6802 and 855-  
14 579-9182 identified in SMS messages sent to the Plaintiff’s cell phones.” SAC, p. 11.  
15 Plaintiff alleges he does not have a relationship with Defendants, did not provide his  
16 cellular telephone number to Defendants, and did not consent to be contacted. SAC, p.  
17 12.

18 Plaintiff alleges Futero is directly liable for violating the TCPA because it “is  
19 identified as the text message sender through its SMS . . . shortcode 61869 . . . , which is  
20 also listed as owned by Futero . . . .” SAC, p. 7. Plaintiff contends Five9 is vicariously  
21 liable for violating the TCPA because Five9 provided Futero with the toll-free numbers  
22 that sent the text messages to Plaintiff. SAC, p. 2. Plaintiff alleges that Five9 controls or  
23 has the right to control “the manner and means of the text message campaign Futero . . .  
24 conducted” because Five9 formatted the toll-free numbers given to Futero to permit them  
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27 <sup>1</sup> Because this matter is before the court on a 12(b)(6) motion to dismiss, the Court must accept as true  
28 the allegations set forth in the operative complaint. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S.  
738, 740 (1976).

1 “to receive calls, . . . route, or hold, or process calls during inbound burst volumes, . . .  
2 [and] pass back caller-ID information or other metadata from Five9 to Futero.” SAC, pp.  
3 2-3. Plaintiff further alleges that Five9 receives payment from Futero for this service.  
4 SAC, p. 3. Plaintiff contends that Five9 managed the toll-free number inbound calls and  
5 profited “from the toll charges while relaying back caller-ID and other caller metadata to  
6 Futero.” SAC, p. 13.

### 7 LEGAL STANDARD

8 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint.  
9 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain “a short  
10 and plain statement of the claim showing that the pleader is entitled to relief . . .” Fed.  
11 R. Civ. P. 8(a)(2). However, plaintiffs must also plead “enough facts to state a claim to  
12 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007);  
13 Fed. R. Civ. P. 12(b)(6). That is, the pleadings must contain factual allegations  
14 “plausibly suggesting (not merely consistent with)” a right to relief. *Twombly*, 550 U.S.  
15 at 557. The plausibility standard thus demands more than a formulaic recitation of the  
16 elements of a cause of action, or naked assertions devoid of further factual enhancement.  
17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, the complaint “must contain  
18 sufficient allegations of underlying facts to give fair notice and to enable the opposing  
19 party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

20 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth  
21 of all factual allegations and must construe them in the light most favorable to the  
22 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).  
23 The court need not take legal conclusions as true merely because they are cast in the form  
24 of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).  
25 Similarly, “conclusory allegations of law and unwarranted inferences are not sufficient to  
26 defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).  
27 However, a *pro se* plaintiff’s complaint, “however inartfully pleaded, must be held to less  
28

1 stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551  
2 U.S. 89, 94 (2007). Courts must construe such pleadings liberally. *Id.*

3 Where dismissal is appropriate, a court should grant leave to amend unless the  
4 plaintiff could not possibly cure the defects in the pleading. *See Knappenberger v. City*  
5 *of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

## 6 DISCUSSION

7 In the SAC, Plaintiff does not allege Five9 is directly liable for violating the  
8 TCPA, as Plaintiff admits Five9 did not send the text messages at issue. *See SAC*, p. 12-  
9 13 (stating that Futero sent all of the text messages). Rather, Plaintiff asserts Five9 is  
10 vicariously liable for TCPA violations. *SAC*, p. 1.

11 The Ninth Circuit has assumed that “Congress intended to apply” “ordinary tort-  
12 related vicarious liability rules” to TCPA claims. *See Gomez v. Campbell-Ewald Co.*,  
13 768 F.3d 871, 877 (9th Cir. 2014), *aff’d*, 136 S.Ct. 663, 674 (2016), *as revised* (Feb. 9,  
14 2016) (deferring also to the Federal Communications Commission’s ruling that there may  
15 be vicarious liability for TCPA violations under federal common law agency principles).  
16 In other words, a defendant may be vicariously liable for a third-party caller’s TCPA  
17 violations where the plaintiff demonstrates an agency relationship between the defendant  
18 and the third-party caller. *Id.* The FCC has instructed that vicarious liability under the  
19 TCPA could be established “under a broad range of agency principles, including not only  
20 formal agency, but also principles of apparent authority and ratification.” *In re DISH*  
21 *Network, LLC*, 28 F.C.C. Rcd. 6574, 6584 (2013); *see also Gomez*, 768 F.3d at 877-78.

22 Plaintiff argues that Five9 may be vicariously liable under three theories: (1) actual  
23 authority; (2) apparent authority; and (3) ratification. *See Oppo.* at 8-10. Five9 moves to  
24 dismiss the SAC with prejudice on the grounds that it is not vicariously liable for  
25 Futero’s and the other unnamed defendants’ alleged TCPA violations. MTD at 11.

### 26 **1. Actual Authority**

27 Under traditional agency principles, “[a]n entity may be liable for actions it did not  
28 itself take when the unlawful acts were performed by an agent of the entity.” *Henderson*

1 *v. United Student Aid Funds, Inc.*, No. 13CV1845 JLS (BLM), 2017 WL 766548, at \*6  
2 (S.D. Cal. Feb. 28, 2017) (citing Restatement (Third) of Agency (2006)). “An agency  
3 relationship forms ‘when one person (a ‘principal’) manifests assent to another person (an  
4 ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s  
5 control, and the agent manifests assent or otherwise consents so to act.” *Trenz v. Sirius*  
6 *Xm Radio, Inc.*, No. 15CV0044 AJB (NLS), 2015 WL 11658715, at \*2 (S.D. Cal. July  
7 13, 2015) (quoting *France Telecom S.A. v. Marvell Semiconductor Inc.*, No. 12-cv-  
8 04967-WHO, 2015 WL 925892, at \*4 (N.D. Cal. Mar. 2, 2015) (citing Restatement  
9 (Third) of Agency § 1.01 (2006)).

10 Plaintiff alleges that Five9 had “control or . . . the right to control the manner and  
11 means of the text message campaign Futero . . . conducted.” *See* SAC, p. 2. Specifically,  
12 he alleges that Five9 controlled the “formatting of the text message to include a reply  
13 mechanism,” and “how toll free numbers would be established, managed, routed/queued  
14 for operator response, and caller-ID, other caller data, and statistical data relayed back for  
15 QoS and data mining for effectiveness of the text message campaign.” *Id.* Plaintiff  
16 explains that “Futero could not control the manner and means itself—if Futero chose the  
17 toll-free number without being directed by Five9 as to what Five9 had set up, then the  
18 toll-free number would not function to receive calls, nor to route, or hold, or process calls  
19 during inbound burst volumes, nor pass back caller-ID information or other metadata  
20 from Five9 to Futero.” SAC, p. 3.

21 “Agency means more than mere passive permission; it involves request,  
22 instruction, or command.” *Klee v. United States*, 53 F.2d 58, 61 (9th Cir. 1931). Plaintiff  
23 does not allege that Five9 directed or supervised the manner and means of the text  
24 message campaign conducted by Futero or unnamed defendants. He does not allege that  
25 Five9 created or developed the content of the text messages, nor that Five9 played any  
26 role in sending the text messages beyond provisioning the inbound toll-free number used  
27 by Futero or unnamed defendants. *See* SAC. Plaintiff merely alleges that Five9 provided  
28 a toll-free number with specifications permitting replies to the text messages and saving

1 caller and statistical data. *See id.* In other words, Plaintiff alleges that Five9 controlled  
2 the manner and means of the specifications of the toll-free phone number provided to  
3 Futero, not the manner and means of the substantive content of the text messages. This is  
4 insufficient to allege that Five9 requested, instructed, or commanded that Futero or  
5 unnamed defendants send out the text messages alleged to violate the TCPA. *See United*  
6 *States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010) (“To form an agency relationship, both  
7 the principal and agent must manifest assent to the principal’s right to control the  
8 agent.”). Thus, Plaintiff has not alleged Five9 had any control over Futero or the  
9 unnamed defendants for sending the text messages, nor that they acted in any way on  
10 Five9’s behalf. Because Plaintiff fails to allege an agency relationship, he also fails to  
11 allege that Five9 had express or actual authority over the entity that sent the alleged text  
12 messages.

### 13 **2. Apparent Authority**

14 Apparent authority “can only ‘be established by proof of something said or done  
15 by the [alleged principal], on which [the plaintiff] reasonably relied’” to the plaintiff’s  
16 detriment. *Thomas v. Taco Bell Corp.*, 582 Fed. App’x 678, 679 (9th Cir. 2014) (quoting  
17 *NLRB v. Dist. Council of Iron Workers of Cal. & Vicinity*, 124 F.3d 1094, 1099 (9th Cir.  
18 1997)). Plaintiff argues that apparent authority exists because “[a]fter Futero composed  
19 the text message to be sent out via Futero’s shortcode, Five9 still had to ratify and  
20 approve the toll-free number as being the correct number that Futero had included per  
21 Five9’s direction.” SAC, p. 5; *see* *Oppo*. at 9. Plaintiff does not allege that he relied to  
22 his detriment on something Five9 did or said with respect to Futero’s or the unnamed  
23 defendants’ authority to send the text messages. *See Thomas*, 582 Fed. App’x at 679-80.  
24 As a result, Plaintiff fails to allege that Futero or the unnamed defendants acted with  
25 apparent authority.

### 26 **3. Ratification**

27 “Although a principal is liable when it ratifies an originally unauthorized tort, the  
28 principal-agent relationship is still a requisite, and ratification can have no meaning


1 without it.” *Batzel v. Smith*, 333 F.3d 1018, 1036 (9th Cir. 2003). As discussed above,  
2 Plaintiff fails to sufficiently allege a principal-agent relationship. Therefore, Plaintiff  
3 cannot allege ratification.

4 **CONCLUSION**

5 Based on the foregoing, the Court **GRANTS** Five9’s Motion to Dismiss Plaintiff’s  
6 Second Amended Complaint and **DISMISSES** Plaintiff’s claims against Defendant  
7 Five9, Inc. *See Knappenberger*, 566 F.3d at 942 (stating that leave to amend should be  
8 granted unless amendment would be futile). The Clerk of Court is instructed to terminate  
9 the action as to Defendant Five9, Inc.

10 **IT IS SO ORDERED.**

11 Dated: November 29, 2017

  
12 Hon. Michael M. Anello  
13 United States District Judge  
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