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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

KENNETH HOAGLAND, *individually  
and on behalf of all others similarly  
situated,*  
  
Plaintiff,  
  
v.  
  
AXOS BANK,  
  
Defendant.

Case No. 20-cv-00807-BAS-DEB

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO AMEND  
COMPLAINT (ECF No. 42)**

Plaintiff filed this action on April 29, 2020. (Compl., ECF No. 1.) Defendant Axos Bank filed an answer on July 2, 2020. (ECF No. 14.) The parties began discovery with a Joint Discovery Plan on December 8, 2020. (ECF No. 30.) Plaintiff filed a Motion for Leave to Amend Complaint (ECF No. 42) on May 7, 2021, which is outside the time frame within which Plaintiff may amend as a matter of course. *See* Fed. R. Civ. P. 15(a)(1). Plaintiff delineates his proposed amendments in Exhibit B of his Motion (Ex. B, ECF No. 42-2). Defendant filed an Opposition to the Motion on May 28, 2021 (ECF No. 44), and Plaintiff filed a Reply on June 7, 2021 (ECF No. 45).

1 The Court finds this motion suitable for determination on the papers submitted and  
2 without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the following  
3 reasons, the Court **GRANTS** Plaintiff’s Motion for Leave to Amend Complaint.

4 **I. BACKGROUND**

5 Plaintiff’s original Complaint alleges that Defendant Axos Bank called Plaintiff in  
6 violation of the Telephone Consumer Protection Act (“TCPA”). (Compl. ¶ 2.) The  
7 Complaint alleges that Axos called Plaintiff in November 2019 to advertise its “Emerald  
8 Advance Line of Credit, a product it jointly markets with H&R Block.” (*Id.*) Plaintiff’s  
9 original complaint further alleges that Axos Bank authorized H&R Block to market the  
10 Emerald product. (*Id.* ¶ 22.) Plaintiff includes the transcript of the call, which contains the  
11 caller identifying itself as H&R Block “taking appointments for” the Emerald Advance  
12 Line of Credit. (*Id.* ¶ 2.) The Complaint claims that Emerald loans are originated by Axos  
13 and that H&R Block purchases a participation interest in each loan transaction. (*Id.* ¶ 17.)

14 Plaintiff’s proposed amendment adds Emerald Financial Services, LLC and HRB  
15 Tax Group, Inc. as additional defendants. (Ex. B ¶ 1.) Plaintiff alleges that “Defendants”  
16 (Axos Bank, Emerald Financial Services, and HRB Tax Group) jointly market the Emerald  
17 Line of Credit and that Defendants called Plaintiff in violation of the TCPA. (*Id.* ¶ 2.)  
18 Plaintiff also alleges that “HRB or its affiliate placed [the] call.” (*Id.* ¶ 3.) Plaintiff does  
19 not amend the transcript of the call. (*See id.* ¶ 2.) He characterizes HRB Tax Group as the  
20 parent company of H&R Block, and Emerald Financial Services as an affiliate of HRB Tax  
21 Group. (*Id.* ¶¶ 11–12.) Despite Plaintiff’s unclear claims about which Defendant made  
22 the call, he alleges that “[a]ll three Defendants approved and participated in the  
23 telemarketing efforts that are the subject of this lawsuit . . . as well as orchestrat[ed] the  
24 telemarketing at issue through Axos Bank’s headquarters in this District.” (*Id.* ¶ 13.)  
25 Plaintiff claims that proposed Defendants HRB Tax Group and Emerald Financial Services  
26 “participated in developing, approving, and facilitating the telemarketing at issue with and  
27 through Axos.” (*Id.* ¶ 17.)

1 **II. LEGAL STANDARD**

2 “[C]ourt[s] should freely give leave [to amend] when justice so requires.” Fed. R.  
3 Civ. P. 15(a)(2). Leave to amend should be granted unless there is evidence of “undue  
4 delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure  
5 deficiencies by amendments previously allowed, undue prejudice to the opposing party by  
6 virtue of allowance of the amendment, [or] futility of amendment.” *Foman v. Davis*, 371  
7 U.S. 178, 182 (1962). Courts should grant leave to amend “with extremely liberality.”  
8 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).

9 **III. ANALYSIS**

10 **A. Undue Delay**

11 The first factor in considering a motion for leave to amend is undue delay. *See*  
12 *Foman*, 371 U.S. at 182. “Relevant to evaluating the delay issue is whether the moving  
13 party knew or should have known the facts and theories raised by the amendment in the  
14 original pleading.” *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990).  
15 However, “delay, by itself, is insufficient to justify denial of leave to amend.” *DCD*  
16 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

17 Here, Axos Bank’s Opposition argues that Plaintiff was aware of the two proposed  
18 additional Defendants at the time of the original complaint. (Opp’n 1:11–13.) Indeed,  
19 Plaintiff’s original complaint alleges that the caller identified itself as “H&R Block” and  
20 was selling an “Emerald line of credit.” (*See* Compl. ¶ 2.) Given this transcript of the call,  
21 along with Plaintiff’s allegations of the intertwined business relationships among  
22 Defendants (*see id.* ¶¶ 2, 17, 22), the Court agrees with Axos that Plaintiff’s amendment to  
23 include the two new Defendants amounts to undue delay given Plaintiff’s awareness of  
24 Defendants’ alleged roles in the TCPA violation. However, because delay, by itself, does  
25 not justify denial of leave to amend, the Court finds Plaintiff’s undue delay insufficient to  
26 deny leave to amend. *See DCD Programs*, 833 F.3d at 186.

1           **B. Futility**

2           Leave to amend is properly denied if amendment would be futile. *Carrico v. City &*  
3 *County of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011). An amendment is “futile”  
4 if the amended complaint would not survive a motion to dismiss. *See Sonoma Cty. Ass’n*  
5 *of Retired Emps. v. Sonoma County*, 708 F.3d 1109, 1118 (9th Cir. 2013).

6           A complaint may be dismissed for lack of a cognizable legal theory or insufficient  
7 facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d  
8 530, 534 (9th Cir. 1984). A claim must have “enough facts to state a claim to relief that is  
9 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To survive  
10 dismissal, a claim must provide “grounds of [a plaintiff’s] entitlement to relief,” which  
11 requires “more than labels and conclusions” or a “formulaic recitation of the elements of a  
12 cause of action.” *Id.* at 555 (internal quotation marks omitted). “[Courts] accept as true  
13 all factual allegations in the operative complaint, and . . . construe them in the light most  
14 favorable to Plaintiff as the non-moving party.” *Eichenberger v. ESPN, Inc.*, 876 F.3d 979,  
15 981 (9th Cir. 2017).

16           Axos argues that Plaintiff’s proposed amendments are futile because they would be  
17 subject to dismissal for failure to state a claim. (*See* Opp’n 8:11–13.) Axos claims that  
18 Plaintiff insufficiently alleges facts to support either a direct liability theory or a vicarious  
19 liability theory under the TCPA against any of the three Defendants. (*Id.* at 8:14–20.)

20           Under the TCPA, it is unlawful “to make any call (other than a call made for  
21 emergency purposes or made with the express prior consent of the called party) using any  
22 automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone  
23 number assigned to a . . . cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii). “The  
24 three elements of a TCPA claim are: (1) the defendant called a cellular telephone number;  
25 (2) using an automatic telephone dialing system or an articular or prerecorded voice; (3)  
26 without the recipient’s prior express consent.” *Meyer v. Portfolio Recovery Assocs., LLC*,  
27 707 F.3d 1036, 1043 (9th Cir. 2012) (citing 47 U.S.C. § 227(b)(1)). A party may be liable  
28 if it “personally ‘makes’ a call in the method proscribed by the statute,” or “vicariously,

1 such as, if it was in an agency relationship with the party that made the offending call.”  
2 *Winters v. Grand Caribbean Cruises Inc.*, No. CV-20-00168-PHX-DWL, 2021 WL  
3 511217, at \*4 (D. Ariz. Feb. 11, 2021) (quoting, in part, *Thomas v. Taco Bell Corp.*, 879  
4 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012), *aff’d*, 582 F. App’x 678 (9th Cir. 2014)).

### 5 **1. Direct Liability**

6 Plaintiff’s proposed amended complaint describes Axos Bank, Emerald Financial  
7 Services, and HRB Tax Group as three separate entities, yet it begins by alleging that “[a]s  
8 part of a collective marketing effort, Defendants called Mr. Hoagland’s cellular telephone  
9 number. (See Ex. B ¶¶ 2, 10–12.) Alleging that “Defendants” directly called Plaintiff does  
10 not amount to alleging sufficient facts for a cognizable legal theory. See *Ewing v. GoNow*  
11 *Travel Club, LLC*, No. 19-cv-297-BAS-AGS, 2019 WL 3253058, at \*3 (S.D. Cal. July 19,  
12 2019) (“When suing multiple defendants, a plaintiff must differentiate which allegations  
13 are against which defendant and not lump defendants together without distinguishing the  
14 alleged wrongs amongst defendants.” (citing Fed. R. Civ. P. 8)). Seemingly pleading in  
15 the alternative, Plaintiff also alleges that HRB Tax Group or its affiliate placed the call in  
16 violation of the TCPA. (See *id.* ¶3.) This allegation sufficiently states a claim of a direct  
17 TCPA violation by HRB Tax Group.

### 18 **2. Vicarious Liability**

19 “[A] defendant may be held vicariously liable for TCPA violations where the  
20 plaintiff establishes an agency relationship, as defined by federal common law, between  
21 the defendant and a third-party caller.” *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 879  
22 (9th Cir. 2014), *aff’d*, 577 U.S. 153 (2016). “In determining . . . the general common law  
23 of agency, [courts] have traditionally looked for guidance to the Restatement of Agency.”  
24 *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 n.31 (1989). “Agency can be  
25 established expressly, via a showing of actual authority, or it can be inferred, by finding  
26 apparent authority or ratification.” *Naiman v. TranzVia LLC*, No. 17-cv-4813-PJH, 2017  
27 WL 5992123, at \*10 (N.D. Cal. Dec. 4, 2017) (citing Restatement (Third) of Agency §§  
28 2.01, 2.03, 4.01). Actual agency means a defendant “controlled or had the right to control

1 [the agents] and, more specifically, the manner and means of the [action].” *See Thomas*,  
2 879 F. Supp. 2d at 1084. “Agency means more than mere passive permission; it involves  
3 request, instruction, or command.” *Id.* (quoting *Klee v. United States*, 53 F.2d 58, 61 (9th  
4 Cir. 1931)).

5 Here, taking the proposed amended allegations as true, all three Defendants  
6 “approved,” “participated,” and “orchestrat[ed]” the phone call in violation of the TCPA.  
7 (Ex. B ¶ 13.) Additionally, proposed Defendants HRB Tax Group and Emerald Financial  
8 Services “facilitate[ed]” the call. (*Id.* ¶ 17.) The Court finds Defendants’ alleged approval  
9 and participation are insufficient for establishing vicarious liability through an agency  
10 relationship. However, given that an agency relationship may exist where one controls the  
11 manner and means of an action, the Court finds that the allegations that Defendants  
12 orchestrated and facilitated the calls sufficiently amount to facts that, if true, would  
13 appropriately allege Defendants controlled the manner and means of the phone call made  
14 by the Defendant who called in violation of the TCPA. Hence, these allegations state a  
15 claim under the vicarious liability theory. And Plaintiff’s proposed amendments are not  
16 futile.

### 17 C. Remaining factors

18 Here, there is no evidence of the remaining factors of bad faith, repeated failure to  
19 cure deficiencies, or undue prejudice.<sup>1</sup> Courts have supported a finding of bad faith when  
20 a plaintiff attempted to add a defendant to destroy diversity jurisdiction, *Sorosky v.*  
21 *Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987), or when a plaintiff added causes of  
22 action when facing a summary judgment motion, *see Lockheed Martin Corp. v. Network*  
23 *Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). Axos Bank claims that Plaintiff’s delay was  
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26 <sup>1</sup> In addition to Axos’s arguments based on undue delay and futility, Axos notes that Plaintiff  
27 failed to comply with the Court’s Standing Order’s meet and confer requirement for this Motion. (Opp’n  
28 1:16–18.) Plaintiff concedes failure to timely meet and confer. (Reply 9:8–9.) The Court declines to  
strike Plaintiff’s Motion but cautions him that a repeated failure to comply with the Court’s Standing  
Order will result in consequences under Civil Local Rule 83.1.

1 “for strategic reasons” (Opp’n 1:13–14), but without any facts to support Axos’s view of  
2 Plaintiff’s motive, this speculation does not amount to a finding of bad faith.

3 Plaintiff has not engaged in repeated failure to cure deficiencies given this is  
4 Plaintiff’s first attempt at amendment.


5 “‘Undue prejudice’ means substantial prejudice or substantial negative effect; the  
6 Ninth Circuit has found such substantial prejudice where the claims sought to be added  
7 ‘would have greatly altered the nature of the litigation and would have required defendants  
8 to have undertaken, at a late hour, an entirely new course of defense.’” *SAES Getters S.p.A.*  
9 *v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002) (quoting *Morongo Band of*  
10 *Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)). Here, Axos does not claim  
11 undue prejudice, and there is no evidence of undue prejudice given that a trial date is not  
12 imminent.

#### 13 **IV. CONCLUSION**

14 In light of the liberal standard for granting leave to amend and the balance of factors  
15 weighing in favor of amendment, the Court **GRANTS** Plaintiff’s Motion for Leave to  
16 Amend Complaint. Plaintiff shall file his First Amended Complaint no later than **October**  
17 **29, 2021**.

18 **IT IS SO ORDERED.**

19  
20 **DATED: October 21, 2021**

  
**Hon. Cynthia Bashant**  
**United States District Judge**