

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

John Hastings, et al.,  
Plaintiffs  
v.  
Triumph Property Management Corporation,  
Defendant

2:16-cv-00213-JAD-PAL

## **Order Denying Triumph's Motions to Dismiss Claims and Strike Class Allegations, Granting the Motion to Amend, and Denying the Motion for Sanctions**

[ECF Nos. 7, 9, 34, 37]

10 John and Jill Hastings bring this class-action complaint under the Telephone Consumer  
11 Protection Act to seek redress for a text message. Triumph Property Management Corporation moves  
12 to dismiss and to strike the class allegations, arguing that the Hastingses' claims fails a matter of law.  
13 The Hastingses oppose Triumph's motions, seek leave to amend their complaint, and move for  
14 sanctions under 28 U.S.C. § 1927. Because the proposed amendments are not futile, I deny  
15 Triumph's dismissal motion and motion to strike, grant the Hastingses' motion for leave to amend,  
16 and deny their motion for sanctions.<sup>1</sup>

## Background

## 18 | A. The initial complaint

19 The Hastingses allege that they received a text message shortly after placing a call to Triumph  
20 in January 2015 that read:

21 +170276137414:www.TriumphPropertyManagement.com- Your recent call to  
22 us is much appreciated. We want to hear of your opinion. Plz text back any  
comments. +(702)7999999.<sup>2</sup>

23 The Hastings claim that they did not consent to receiving this message and that the text was sent to  
24 their cell phone via an automated telephone dialing system (ATDS). They also allege that they are  
25 members of the class “consisting of all persons within the United States who received any unsolicited

<sup>27</sup> <sup>1</sup> I find these motions suitable for disposition without oral argument. L.R. 78-1.

28 | <sup>2</sup> ECF No. 1 at 3.

1 text messages from Defendant without prior express consent.”<sup>3</sup> They plead claims for negligent and  
2 willful violations of the TCPA and seek monetary and injunctive relief.

3 **B. The proposed amended complaint**

4 The Hastingses seek leave to add Kixie Online, Inc. as a defendant, include vicarious-liability  
5 allegations against Triumph, and “further clarify certain other allegations in the original Complaint.”<sup>4</sup>  
6 They allege that Kixie specializes in electronic telemarketing, including text messaging consumer  
7 telephone numbers.<sup>5</sup> In September 2014, Triumph allegedly began using Kixie’s services to “send out  
8 pre-typed SMS text messages to consumers” designated by Triumph “on Triumph’s behalf using  
9 special computer equipment and dialers.”<sup>6</sup> In Kixie’s terms-of-use agreement, Triumph agreed to  
10 warrant to Kixie that “the owners of the phone numbers you provide to Kixie, to which outbound  
11 messages and broadcasts are transmitted through the Services, have consented or otherwise opted-in  
12 to the receipt of such messages and broadcasts.”<sup>7</sup> The Hastingses assert that they called Triumph on  
13 January 20, 2015, and Triumph “trapped” their cell-phone number via caller ID, and provided the  
14 number to Kixie, and then Kixie sent them the offending text message at 1:30 p.m. that day via its  
15 ATDS system.<sup>8</sup>

16 The Hastingses also clarify their class-action allegations. They now define their proposed  
17 class as “[a]ll persons within the state of Nevada who received any text message from Defendants or  
18 their agent/s and/or employee/s, not sent for emergency purposes, to the person’s cellular telephone  
19 made through the use of any automatic telephone dialing system within the four years prior to the  
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22 <sup>3</sup> *Id.* at 4.

23 <sup>4</sup> ECF No. 34 at 3.

24 <sup>5</sup> ECF No. 34-1 at 5.

25 <sup>6</sup> *Id.* at 6.

26 <sup>7</sup> *Id.*

27 <sup>8</sup> *Id.* at 7.

1 || filing of the Complaint in this case.”<sup>9</sup>

2       Triumph moves to dismiss the initial complaint and opposes the Hastingses' motion for leave  
3 to amend, arguing that dismissal is proper and the proposed amendments are futile because the text  
4 did not violate the TCPA: it was not sent from an ATDS and "was a responsive communication  
5 intended for quality assurance and/or customer service purposes," not a solicitation.<sup>10</sup> Triumph also  
6 argues that the Hastingses fail to adequately allege that Triumph knowingly or willfully violated the  
7 TCPA. The Hastingses respond that the TCPA applies regardless of the content of the text, so the  
8 proposed amendments are not futile, and that they sufficiently allege that Triumph sent the message  
9 using an ATDS system and knowingly and willfully violated the Act.

## Discussion

## 11 A. Standards for leave to amend

12 Rule 15(a)(2) of the Federal Rules of Civil Procedure directs that “[t]he court should freely  
13 give leave when justice so requires,” but leave to amend may be denied if the proposed amendment is  
14 futile.<sup>11</sup> In determining whether to grant leave to amend, I consider five factors: (1) bad faith, (2)  
15 undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the  
16 plaintiff has previously amended the complaint.<sup>12</sup> “Futility alone can justify the denial of a motion to  
17 amend.”<sup>13</sup>

18 Rule 8 of the Federal Rules of Civil Procedure requires every complaint to contain “[a] short  
19 and plain statement of the claim showing that the pleader is entitled to relief.”<sup>14</sup> While Rule 8 does  
20 not require detailed factual allegations, the properly pled claim must contain enough facts to “state a

<sup>9</sup> *Id.* at 10.

<sup>10</sup> ECF No 35 at 3.

<sup>11</sup> *Carrico v. City & Cty of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).

<sup>12</sup> *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) (internal citation omitted).

<sup>13</sup> *Id.* (Internal citation omitted)

<sup>14</sup> Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

1 claim to relief that is plausible on its face.”<sup>15</sup> This “demands more than an unadorned,  
2 the-defendant-unlawfully-harmed-me accusation”; the facts alleged must raise the claim “above the  
3 speculative level.”<sup>16</sup> In other words, a complaint must make direct or inferential allegations about “all  
4 the material elements necessary to sustain recovery under *some* viable legal theory.”<sup>17</sup> A claim is  
5 facially plausible when the complaint alleges facts that allow the court to draw a reasonable inference  
6 that the defendant is liable for the alleged misconduct.<sup>18</sup> A complaint that does not permit the court to  
7 infer more than the mere possibility of misconduct has “alleged—but not shown—that the pleader is  
8 entitled to relief,” and it must be dismissed.

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10 **B. The Hastingses plead colorable claims under the Telephone Consumer Protection Act,  
and the proposed amendments are not futile.**

11 The TCPA makes it unlawful “to make any call” using an ATDS without the recipient’s prior  
12 express consent.<sup>19</sup> An ATDS is equipment that “has the capacity (A) to store or produce telephone  
13 numbers to be called, using a random or sequential number generator; and (2) to dial such numbers.”<sup>20</sup>  
14 The Ninth Circuit has held that a text message is “a call” within the meaning of the Act.<sup>21</sup>

15 At the outset, I reject Triumph’s argument that the text cannot be actionable because it is not a  
16 solicitation. The content of the message or call to a cellular phone affects only the type of consent  
17 required for the text to be lawful: “if a text message ‘includes or introduces an advertisement’ or  
18 ‘constitutes telemarketing,’ it may only be sent with the recipient’s prior express *written* consent,

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21<sup>15</sup> *Twombly*, 550 U.S. at 570.

22<sup>16</sup> *Iqbal*, 556 U.S. at 678.

23<sup>17</sup> *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106  
(7th Cir. 1989)) (emphasis in original).

24<sup>18</sup> *Id.*

25<sup>19</sup> *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).

26<sup>20</sup> 47 U.S.C. § 227(a)(1).

27<sup>21</sup> *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

1 whereas other texts”—like the one here<sup>22</sup>—“require only prior express consent to be legal.”<sup>23</sup> The  
2 Hastingses allege that they never gave prior express consent to Triumph, and they clarify in their  
3 proposed amended complaint that Triumph “captured” their cell-phone number utilizing a caller-ID  
4 system—a method the FCC has expressly excluded from consent absent a prior warning.<sup>24</sup>

5 I also decline to grant Triumph’s motion to dismiss because the text was purportedly not sent  
6 by an ATDS. The Hastingses sufficiently allege that the text was sent by an ATDS, and this could  
7 also plausibly be inferred from the general and impersonal nature of the message. Though Triumph  
8 disputes that the messaging equipment fits the TCPA’s definition for an ATDS, this is a fact question  
9 for summary judgment or trial. At this stage, I must accept all well-pled factual allegations as true,  
10 and the Hastingses have adequately pled that the offending message was sent via an ATDS.

11 I also find that the Hastingses sufficiently plead a knowing violation. Federal Rule of Civil  
12 Procedure 9(b) is clear that “[m]alice, intent, knowledge, and other conditions of a person’s mind may  
13 be alleged generally.” The proper vehicle for disputing whether Triumph had the requisite intent for  
14 knowing and willful violations of the TCPA is not a motion to dismiss.

15 Because I reject Triumph’s dismissal arguments; and I find that the proposed amendments are  
16 not futile, there is no indication of bad faith, undue delay, or prejudice to Triumph, and the Hastingses  
17 have not previously amended their complaint, I deny Triumph’s dismissal motion and grant the  
18 Hastingses’ motion for leave to amend.

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23 <sup>22</sup> The Hastingses allege that Triumph sent a text to their cell phone without prior express consent;  
24 they do not allege that Triumph sent them a text for marketing or solicitation purposes without prior  
25 express written consent. *See* ECF Nos. 1 (complaint); 14 (opposition explaining this distinction and  
26 pointing out that the text was not alleged to be for marketing purposes).

27 <sup>23</sup> *Reardon v. Uber Technologies, Inc.*, 115 F. Supp. 3d 1090, 1098–99 (N.D. Cal. 2015) (internal  
28 citations omitted).

27 <sup>24</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC  
28 Rcd. 8752, 8769 ¶ 31 (Oct. 16, 1992).

1   **C. Motion to strike class allegations**

2       A party may move to strike from a pleading “any insufficient defense or any redundant,  
3 immaterial, or impertinent and scandalous matter.”<sup>25</sup> A court may strike class allegations at the  
4 pleading stage,<sup>26</sup> but these motions are generally disfavored because “a motion for class certification  
5 is a more appropriate vehicle.”<sup>27</sup>

6       The bulk of Triumph’s Rule 12(f) argument is that the Hastingses fail to sufficiently allege a  
7 TCPA violation and therefore lack standing to serve as lead plaintiffs in a class action.<sup>28</sup> Because I  
8 reject Triumph’s dismissal arguments, the Hastingses have tailored their class allegations in their  
9 amended complaint, discovery has not yet commenced,<sup>29</sup> and no motion for class certification has  
10 been filed, I deny without prejudice Triumph’s motion to strike the class allegations.

11   **D. Motion for sanctions**

12       Under 28 USC § 1927, “[a]ny attorney or other person . . . who so multiplies the proceedings  
13 in any case unreasonably and vexatiously” may be required to pay attorney’s fees and other costs  
14 reasonably incurred as a result. Section 1927 sanctions “must be supported by a finding of subjective  
15 bad faith.”<sup>30</sup> “Bad faith is present when an attorney knowingly or recklessly raises a frivolous  
16 argument or argues a meritorious claim for the purpose of harassing an opponent.”

17       Counsel for the plaintiffs represents that Triumph’s counsel sent a letter demanding that the  
18 Hastingses amend their complaint to correct their residency and to name Kixie as the primary  
19 defendant. Two weeks later, plaintiffs’ counsel sent Triumph’s counsel a proposed stipulation to  
20 amend the complaint along with the proposed amended complaint. Triumph’s counsel refused to

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22       <sup>25</sup> FED. R. CIV. PROC. 12(f).

23       <sup>26</sup> *Kamm v. California City Dev. Co.*, 509 F.2d 205, 212 (9th Cir. 1975).

24       <sup>27</sup> *Thorpe v. Abbott Lab., Inc.*, 534 F. Supp. 2d 1120, 1125 (N.D. Cal. 2008).

25       <sup>28</sup> ECF No. 7.

26       <sup>29</sup> Discovery is currently stayed “except as to allowing Plaintiff’s Counsel to conduct limited  
27 discovery on the issue of whether the Defendant used an” ADTS. ECF No. 28.

28       <sup>30</sup> *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989).

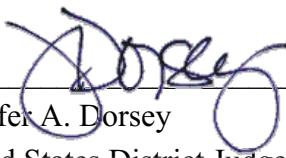
1 stipulate to the amended complaint, forcing the Hastingses to file the instant motion for leave to  
2 amend, which Triumph's counsel then opposed. The Hastingses seek \$2,875 in attorney's fees and  
3 costs, which they incurred filing the "unnecessary" motion for leave to amend and the request for  
4 sanctions.

5 Though Triumph's counsel's behavior is perhaps undesirable, I do not find that counsel acted  
6 in subjective bad faith. Triumph's counsel sent an aggressive Rule 11 Safe Harbor notice to  
7 plaintiffs' counsel requesting that they correctly allege the Hastingses' residency and add Kixie as a  
8 primary defendant. But the Hastingses made additional amendments in the proposed amended  
9 complaint that were not requested or approved by Triumph's counsel. Thus, defense counsel did not  
10 act in bad faith by refusing to stipulate to the filing of the amended complaint and in opposing the  
11 Hastingses' motion for leave to amend. Indeed, the bulk of his opposition to the motion for leave to  
12 amend raises the same arguments that he made in his dismissal motion: that the Hastingses' claims  
13 fail as a matter of law. He does not object to the addition of Kixie as a defendant. These objections  
14 are entirely consistent with the letter that Triumph's counsel sent to the Hastingses' counsel. I  
15 therefore decline to award plaintiffs sanctions under § 1927.

16 **Conclusion**

17 Accordingly, IT IS HEREBY ORDERED that Triumph's motion to dismiss [ECF No. 7] is  
18 **DENIED**, Triumph's motion to strike [ECF No. 9] is **DENIED** without prejudice, the Hastingses'  
19 motion for leave to amend complaint [ECF No. 34] is **GRANTED**, and their motion for sanctions  
20 [ECF No. 37] is **DENIED**.

21 Dated this January 26th, 2017.

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23 Jennifer A. Dorsey  
24 United States District Judge  
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