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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 NOAH WICK on behalf of himself and all
11 others similarly situated,

12 Plaintiff,

13 v.

14 TWILIO INC.,

15 Defendant.

Case No. C16-914RSL

ORDER DENYING DEFENDANT'S
MOTION FOR RULE 11 SANCTIONS

16 **I. INTRODUCTION**

17 This matter comes before the Court on defendant's motion for sanctions pursuant to Fed.
18 R. Civ. P. 11 (Dkt. #38). For the reasons set forth below, the Court finds oral argument
19 unnecessary and denies the motion.

20 **II. BACKGROUND**

21 In February 2016, plaintiff saw an advertisement for a nutritional supplement while
22 online. Plaintiff understood the advertisement to offer a free sample of the supplement. Plaintiff
23 followed the link to the website of the supplier, Crevalor, and entered his contact information but
24 then discovered no free samples remained. He elected not to finish the transaction and closed
25 the browser. Almost immediately, he received a phone call and a text message encouraging him
26 to divulge his credit card information and complete a transaction.

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28 ORDER DENYING DEFENDANT'S
MOTION FOR RULE 11 SANCTIONS- 1

1 In June 2016, plaintiff filed a complaint in federal court alleging violations of the Federal
2 Telephone Consumer Protection Act (TCPA) and other Washington statutes. Plaintiff's theory
3 of the case is that defendant, a software company that provides services to online retailers like
4 Crevalor, violated laws forbidding certain marketing practices. Defendant moved to dismiss the
5 complaint in July 2016. Without responding, plaintiff filed an amended complaint in August
6 2016. Defendant again moved to dismiss the amended complaint, and the Court dismissed the
7 complaint in November 2016.

8 In the order dismissing the complaint, the Court found that plaintiff had adequately
9 consented to receive calls and messages related to customer service. Dkt. #34 at 1-2. The Court
10 reasoned that the TCPA did not cover calls made with the prior express consent of the called
11 party, provided that the call was not an advertisement or telemarketing. Id. at 3.¹ Knowingly
12 giving one's phone number to another provides express consent for that party to call with
13 messages that do not amount to advertisement or telemarketing. Id. at 3-4. Messages with
14 instructions for how a potential customer may complete a process he or she initiated are not
15 telemarketing. Id. at 4-5. The Court concluded the call and message sent to plaintiff, as pleaded,
16 were not telemarketing and gave plaintiff leave to amend his complaint. Id. at 5, 8.

17 Plaintiff filed a second amended complaint two weeks after the dismissal. Defendant
18 served notice of its intention to move for Rule 11 sanctions and filed its motion in late
19 December.² Plaintiff's response to the motion includes a request for attorney's fees should they
20 prevail on the Rule 11 motion. Dkt. #39 at 2.

21 III. ANALYSIS

22 When, as here, a "complaint is the primary focus of Rule 11 proceedings, a district court
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24 ¹ In order to escape liability under the TCPA, calls with advertisements or telemarketing
25 require express *written* consent. Dkt. #34 at 3.

26 ² The parties do not dispute defendant complied with the procedural requirements of Rule
27 11.

1 must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually
2 baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and
3 competent inquiry before signing and filing it.” Holgate v. Baldwin, 425 F.3d 671, 675-76 (9th
4 Cir. 2005) (internal quotations and citation omitted). “As shorthand for this test, we use the
5 word frivolous to denote a filing that is *both* baseless *and* made without a reasonable and
6 competent inquiry.” Id. at 676 (source’s emphasis) (internal quotations and citation omitted).

7 **A. Adequate Legal Basis**

8 Defendant argues plaintiff’s second amended complaint is frivolous because it adds no
9 relevant facts to the dismissed complaint and advances the same legal theory. Dkt. #38 at 4-5.
10 In fact, defense counsel’s position is that no new complaint could comply with Rule 11. Dkt.
11 #38 at 8. Plaintiff insists that no clear authority forecloses his new complaint and that the
12 changes reflected in the second amended complaint “are well grounded in existing law, or the
13 good faith extension of the law.” Dkt. #39 at 6.

14 Plaintiff’s second amended complaint makes allegations that differ in material ways from
15 those in the dismissed complaint. Those differences are responsive to the Court’s order
16 dismissing the earlier complaint. For instance, plaintiff alleges the call and text message were
17 intended “to encourage plaintiff to purchase a product.” Dkt. 40-1 at 22, ¶¶38-40. Plaintiff also
18 alleges the free sample “is part of an auto-ship program by which the recipient’s credit card is
19 authorized to be charged a fee every month until cancelled by the recipient.” Dkt. 40-1 at 25,
20 ¶50.

21 The order did not, as defendant would have it, put plaintiff “on notice that pursuit of a
22 TCPA claim against Twilio had no basis in law or fact.” Dkt. 38 at 3. If that were true, the
23 claim would have been dismissed with prejudice. Regardless of whether the new facts would
24 change the result of a motion to dismiss, the Court cannot conclude the second amended
25 complaint is legally or factually unsupportable.

1 **B. Reasonable and Competent Inquiry**

2 Defendant argues there could not have been a reasonable inquiry into the merits of the
3 second amended complaint given its similarity to the dismissed amended complaint. Dkt. #43 at
4 2. It argues sanctions are appropriate because the additional facts and information in the second
5 amended complaint “are entirely irrelevant to both Twilio and the TCPA,” and the claims are
6 materially identical to those in the other complaints. Id.

7 Plaintiff offers two declarations by academic figures in support of their opposition to
8 sanctions. The two were hired after defendant’s counsel informed plaintiff’s counsel of their
9 intent to move for sanctions. Dkt. #40 at 2.

10 The first is an statement by Professor Ira Kalb, who teaches marketing at the University
11 of Southern California. Dkt. #41. Plaintiff submits Professor Kalb’s statement puts the new
12 facts of the second amended complaint in the appropriate context. Professor Kalb describes
13 Crevalor’s tactic as a “bait and switch” where vendors offer free products to customers but then
14 insist on payment for a similar product. Dkt. #41 at 2. This behavior is purportedly intended to
15 promote and sell products. Dkt. #41 at 6. Professor Kalb also defines industry standards for
16 customer service and contrasts them with defendant’s behavior. Dkt. #41 at 5-9.

17 The second is a statement by Professor John Strait, an attorney with extensive experience
18 in legal ethics. Dkt. #42. Professor Strait outlines the additional factual allegations in the
19 second amended complaint and concludes the complaint complies with the Rules of Professional
20 Conduct and Rule 11. Specifically, Professor Strait argues the new allegations “are based on
21 reasonable inquiry and . . . present a reasonable and non-frivolous attempt to correct the factual
22 deficiencies of the First Amended Complaint.” Dkt. #42 at 8.

23 The Court is satisfied plaintiff’s second amended complaint is the result of a sufficiently
24 rigorous inquiry to avoid Rule 11 sanctions.

25 **IV. REMEDY**

26 Plaintiff seeks attorney’s fees as the prevailing party in the event the Court denies the
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1 motion. Dkt. #39 at 2. Rule 11(c)(2) provides that “[i]f warranted, the court may award to the
2 prevailing party the reasonable expenses, including attorney’s fees, incurred for [the Rule 11]
3 motion.” The 1993 Advisory Committee Note to Rule 11 provides that the Rule “should not be
4 employed . . . to test the legal sufficiency or efficacy of allegations in the pleadings; other
5 motions are available for those purposes.” Defendant’s characterization of this Court’s prior
6 order as foreclosing any TCPA claim is obviously inconsistent with that order’s leave to amend
7 the complaint. Defendant’s motion for sanctions also devotes considerable attention to the
8 purported irrelevance and insufficiency of plaintiff’s new factual allegations. See Dkt. #38 at 7-
9 8 and Dkt. #43 at 4. Defendant’s Rule 11 motion would have been more appropriate in
10 conjunction with or after a motion to dismiss. In light of the limited use of Rule 11, the
11 availability of other methods for dismissing defective claims, and the new factual material
12 alleged in the second amended complaint with leave of the Court, the Court will hold plaintiff’s
13 request for attorney’s fees in abeyance pending the outcome of a motion to dismiss.

14 **V. CONCLUSION**

15 For the foregoing reasons, defendant’s motion (Dkt. #38) is DENIED.

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18 Dated this 23rd day of February, 2017.

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21 Robert S. Lasnik
22 United States District Judge
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