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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CORY LARSON,  
  
Plaintiff,  
  
v.  
  
HARMAN MANAGEMENT  
CORPORATION and 3SEVENTY, INC.,  
  
Defendants.

No. 1:16-cv-00219-DAD-SKO

ORDER DENYING DEFENDANTS’  
MOTION TO DISMISS THE FIRST  
AMENDED COMPLAINT FOR FAILURE TO  
STATE A CLAIM AND MOTION TO  
STRIKE

(Doc. No. 26)

This matter is before the court on defendant Harman Management Corporation (“HMC”) and 3Seventy, Inc.’s (“3Seventy”) motion to dismiss plaintiff Cory Larson’s first amended complaint for failure to state a claim and motion to strike class claims. A hearing on the motions was held on October 6, 2016. Attorney David Bird appeared on behalf of defendant HMC, and attorney Matthew McCullough appeared on behalf of defendant 3Seventy. Attorneys Trinette Kent and Sergei Lemberg appeared on behalf of plaintiff. Having considered the parties’ briefs and oral arguments and for the reasons set forth below, the court will deny defendant’s motion to dismiss and motion to strike.

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**BACKGROUND**

1  
2 Plaintiff commenced this action on February 17, 2016. (Doc. No. 1.) On June 20, 2016,  
3 plaintiff filed a first amended complaint, alleging claims under the Telephone Consumer  
4 Protection Act (“TCPA”) on behalf of a putative class of similarly situated individuals. (Doc. No.  
5 22.) According to plaintiff’s first amended complaint, defendants HMC and 3Seventy set out on  
6 a telemarketing campaign in 2012 to send coupons to consumers for HMC restaurant food items  
7 via automated text messages. (*Id.* ¶ 19.) In response to defendants’ promotional campaign for a  
8 free A&W Papa Burger Single, plaintiff texted the word “BURGER” to the number 70626, an  
9 SMS short code licensed and operated by defendants. (*Id.* ¶¶ 21, 23.) Defendants’ first message  
10 to plaintiff was in response to plaintiff’s “BURGER” text message. (*Id.* ¶ 23.) Unbeknownst to  
11 plaintiff, defendants allegedly stored his telephone number and thereafter sent multiple  
12 unprompted and uninvited automated text messages related to other A&W Restaurant food items.  
13 (*Id.* ¶¶ 24–25.) Plaintiff continued to receive such messages through February 2016. Plaintiff  
14 alleges he received the following message from defendants on November 16, 2014:

15 A&W: Gobble Up! First 5,000 will receive Reg. Sized Chili Cheese  
16 Fries for 99cents! Limit1.Delete@reg.Exp11/30 Valid@particip.  
A&Ws in UT,CA,CO,WA

17 TextSTOPtoEnd

18 (*Id.* ¶ 27.) Additionally, plaintiff alleges he received the following message from defendants on  
19 June 1, 2015:

20 A&W: Float into A&W for a 99 cent Reg. Sized Root Beer Float!  
21 Limit 1. Delete@reg. Exp 6/17. Valid@particip. A&Ws in  
UT,CA,CO,WA.

22 TextSTOPtoEnd

23 (*Id.*)

24 Plaintiff alleges that these additional messages were not sent in direct response to his  
25 “BURGER” text message and therefore sent without prior express written consent, in violation of  
26 the TCPA. (*Id.* ¶ 28.) Plaintiff alleges, on behalf of a putative class, two claims for violations of  
27 the TCPA. (*Id.* ¶¶ 60–71.)

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1 On July 20, 2016, defendant HMC filed the instant motion to dismiss the first amended  
2 complaint for failure to state a claim, and moved to strike plaintiff's class definition and claims.  
3 (Doc. No. 26.) On July 21, 2016, defendant 3Seventy filed a notice of joinder in HMC's motion.  
4 (Doc. No. 27.) On September 22, 2016, plaintiff filed his opposition. (Doc. No. 31.) On  
5 September 29, 2016, defendant HMC filed its reply, and defendant 3Seventy filed a joinder to the  
6 same. (Doc. Nos. 32–33.)

## 7 DEFENDANTS' MOTION TO DISMISS

### 8 A. Legal Standard for Motions to Dismiss

9 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
10 sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.  
11 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of  
12 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901  
13 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to  
14 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A  
15 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
16 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*  
17 *Iqbal*, 556 U.S. 662, 678 (2009).

18 In determining whether a complaint states a claim on which relief may be granted, the  
19 court accepts as true the allegations in the complaint and construes the allegations in the light  
20 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*  
21 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not assume the truth  
22 of legal conclusions cast in the form of factual allegations. *United States ex rel. Chunie v.*  
23 *Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed  
24 factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me  
25 accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and  
26 conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S.  
27 at 555; *see also Iqbal*, 556 U.S. at 676 ("Threadbare recitals of the elements of a cause of action,  
28 supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to

1 assume that the plaintiff “can prove facts which it has not alleged or that the defendants have  
2 violated the . . . laws in ways that have not been alleged.” *Associated Gen. Contractors of Cal.,  
3 Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). In ruling on a motion to  
4 dismiss brought pursuant to Rule 12(b)(6), the court is permitted to consider material which is  
5 properly submitted as part of the complaint, documents that are not physically attached to the  
6 complaint if their authenticity is not contested and the plaintiffs’ complaint necessarily relies on  
7 them, and matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir.  
8 2001).

9 **B. Plaintiff’s Claims Under the Telephone Consumer Protection Act**

10 Plaintiff states two claims under the same provision of the TCPA. Both rely on the  
11 allegation that defendants violated the TCPA by sending multiple automated text messages to  
12 cellular numbers belonging to plaintiff and putative class members without their prior express  
13 written consent. (*See* Doc. No. 22 ¶¶ 61, 67.) In their motion to dismiss, defendants argue that  
14 because plaintiff alleges he first initiated contact with defendants by sending a text message with  
15 the word “BURGER,” he provided prior express consent and therefore cannot state a plausible  
16 claim under 47 U.S.C. § 227(b)(1)(A).

17 a. The TCPA

18 Congress enacted the TCPA “in response to an increasing number of consumer complaints  
19 arising from the increased number of telemarketing calls.” *Satterfield v. Simon & Schuster, Inc.*,  
20 569 F.3d 946, 954 (9th Cir. 2009) (citing S.Rep. No. 102-178 at 2 (1991), reprinted in 1991  
21 U.S.C.C.A.N. 1968). Relevant to this suit, the TCPA makes it unlawful for any person “to make  
22 any call . . . using any automatic telephone dialing system . . . to any telephone number assigned  
23 to a paging service, cellular telephone service, specialized mobile radio service, or other radio  
24 common carrier service” without “the prior express consent of the called party.” 47 U.S.C.  
25 § 227(b)(1)(A)(iii). A text message is a “call” within the meaning of the TCPA. *Gomez v.  
26 Campbell-Ewald Co.*, 768 F.3d 871, 874 (9th Cir. 2014) (citing *Satterfield*, 569 F.3d at 954.)  
27 Thus, to state a TCPA claim, plaintiff must sufficiently allege that “(1) the defendant called a  
28 cellular telephone number; (2) using an automatic telephone dialing system; (3) without the

1 recipient’s prior express consent.” *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036,  
2 1043 (9th Cir. 2012) (citing 47 U.S.C. § 227(b)).

3 Defendants primarily argue that plaintiff’s claims should be dismissed because he  
4 consented to receive the text messages at issue by first sending the “BURGER” message. (Doc.  
5 No. 26-1 at 5.) Thus, defendants argue, by providing his telephone number, plaintiff gave prior  
6 express consent under the TCPA.

7 In interpreting the statute, the Federal Communications Commission (“FCC”) have on a  
8 number of occasions attempted to define the term “prior express consent” within the meaning of  
9 the TCPA. In 1992, the FCC adopted the view that

10 . . . any telephone subscriber that provides his or her telephone  
11 number to a business does so with the expectation that the party to  
12 whom the number was given will return the call. Hence, any  
13 telephone subscriber who releases his or her telephone number has,  
in effect, given prior express consent to be called by the entity to  
which the number was released.

14 Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752  
15 (1992). In 2012, the FCC revised its position in response to “the volume of consumer complaints  
16 we continue to receive concerning unwanted, telemarketing robocalls.” Rules & Regulations  
17 Implementing the Tel. Consumer Prot. Act of 1991 (“*2012 TCPA Order*”), 27 FCC Rcd. 1830,  
18 1838 (2012) (effective October 16, 2013).<sup>1</sup> Therein, the FCC modified the implementing  
19 regulation to the TCPA so that the form of a called party’s prior express consent depends on the  
20 nature of the telephone call. 47 C.F.R. § 64.1200(a). Any telephone call that “includes or  
21 introduces an advertisement or constitutes telemarketing” cannot be made without “the *prior*  
22 *express written consent* of the called party.” 47 C.F.R. § 64.1200(a)(2); *see also* 2012 *2012*

23 \_\_\_\_\_  
24 <sup>1</sup> Defendants argue, without explanation, that the FCC’s *2012 TCPA Order*, which first  
25 implemented the new prior express written consent requirement for advertisement and  
26 telemarketing calls, are inapplicable to this lawsuit. (*See* Doc. No. 26-1 at 9.) Presumably,  
27 defendants rely on plaintiff’s allegation that defendants’ telemarketing campaign began in 2012,  
28 prior to the effective date of the FCC’s new rules. However, as both the statute and the  
regulations make clear, the TCPA applies to each “call” made, rather than the date upon which an  
alleged marketing campaign began. Because at least some of the allegedly violative text  
messages were received in 2014, as alleged in the first amended complaint (*see* Doc. No. 22  
¶ 27), the FCC’s new rules, promulgated in 2013, are applicable to this case.

1 *TCPA Order*, 27 FCC Rcd. at 1838–44. All other calls made with an automatic telephone dialing  
2 system require only “the *prior express consent* of the called party.” 47 C.F.R. § 64.1200(a)(1).

3 Defendant HMC’s motion therefore appears to turn on two points of dispute: (1) whether  
4 defendants’ text messages constitute an advertisement or telemarketing, and if so, (2) whether  
5 plaintiff’s initial “BURGER” message constitutes prior express written consent.

6 b. Advertisement or Telemarketing

7 In arguing that plaintiff’s “BURGER” message constitutes prior express consent,  
8 defendants fail to address whether defendants’ alleged text messages constitute an advertisement  
9 or telemarketing, which would require plaintiff’s *prior express written consent*.

10 The regulation defines the term “advertisement” to mean “any material advertising the  
11 commercial availability or quality of any property, goods, or services.” 47 C.F.R.  
12 § 64.1200(f)(1). The term “telemarketing” means “the initiation of a telephone call or message  
13 for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or  
14 services, which is transmitted to any person.” § 64.1200(f)(12).

15 Looking to the first amended complaint, plaintiff alleges he received at least two text  
16 messages after defendants’ initial text message in response to his “BURGER” message. (*See*  
17 *Doc. No. 22 ¶¶ 25–27.*) These messages plausibly appear to both advertise the availability of and  
18 encourage the purchase of particular goods at A&W Restaurants. Thus, plaintiff has sufficiently  
19 alleged a claim that he received text messages constituting advertisement or telemarketing from  
20 defendants.

21 c. Prior Express Written Consent

22 If a text message includes or introduces an advertisement or constitutes telemarketing, it  
23 may only be sent with the prior express written consent of the called party. 47 U.S.C.  
24 § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(2). The implementing regulation defines the term  
25 “prior express written consent” as follows:

26 The term prior express written consent means an agreement, *in*  
27 *writing, bearing the signature of the person called that clearly*  
28 *authorizes* the seller to deliver or cause to be delivered to the person  
called advertisements or telemarketing messages using an automatic  
telephone dialing system or an artificial or prerecorded voice, and

1 the telephone number to which the signatory authorizes such  
2 advertisements or telemarketing messages to be delivered.

3 (i) The written agreement shall include a clear and conspicuous  
4 disclosure informing the person signing that:

5 (A) By executing the agreement, such person authorizes the  
6 seller to deliver or cause to be delivered to the signatory  
7 telemarketing calls using an automatic telephone dialing system  
8 or an artificial or prerecorded voice; and

9 (B) The person is not required to sign the agreement (directly or  
10 indirectly), or agree to enter into such an agreement as a  
11 condition of purchasing any property, goods, or services.

12 (ii) The term “signature” shall include an electronic or digital form  
13 of signature, to the extent that such form of signature is recognized  
14 as a valid signature under applicable federal law or state contract  
15 law.

16 47 C.F.R. § 64.1200(f)(8).<sup>2</sup>

17 Defendants argue that plaintiff’s initial “BURGER” message constitutes sufficient  
18 consent, and accordingly, plaintiff has failed to state a valid claim under the TCPA. However,  
19 such a message alone fails to establish the existence of a “prior express written consent” as that  
20 term is defined by the FCC’s regulation. Apart from the text message being “in writing,” the  
21 message as alleged by plaintiff neither included his signature nor clearly authorizes defendants to  
22 deliver advertisements or telemarketing messages using an automatic telephone dialing system.  
23 Because plaintiff has pled sufficient facts to support an inference that defendants failed to obtain  
24 his prior express written consent prior to receiving additional text messages, this court cannot  
25 dismiss plaintiff’s claims.

26 d. Claimed Common Sense Approach to the TCPA

27 In the alternative, defendants argue that the court should take a “common sense” approach  
28 to plaintiff’s TCPA claims. (Doc. No. 26-1 at 9–11.) Defendants rely primarily on the Ninth  
Circuit’s opinion in *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913 (9th Cir. 2012). There, the  
plaintiff alleged that defendant sent him prerecorded messages stating that his Best Buy “Reward

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<sup>2</sup> In 2012, the FCC clarified that “consent obtained in compliance with the E-SIGN Act will satisfy the requirements of our revised [written consent] rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording.” *2012 TCPA Order*, 27 FCC Rcd. at 1844.

1 Zone” certificates were to expire soon. *Chesbro*, 705 F.3d at 916. The court of appeals  
2 concluded that, while the messages contained no explicit mention of good, products, or services,  
3 “the implication is clear from the context” that these messages constituted “unsolicited  
4 advertisements” under the TCPA. *Id.* at 918.

5 This court fails to see how the decision in *Chesbro* is applicable here. Defendants do not  
6 specify what provisions of the TCPA, if any, should be approached or interpreted by application  
7 of common sense. Nor do they explain how this suggested “common sense approach” would lead  
8 one to view the nature of the alleged text messages in this case as anything but advertising or  
9 telemarketing under the FCC’s regulations. Rather, defendants contend generally that their  
10 promotional campaign, which provided an opt-out procedure, is not the type of situation the  
11 TCPA was intended to address because it did not “mislead, harm, or harass consumers.” (*See*  
12 *Doc. No. 32 at 6–7.*) The court is unpersuaded by this argument.

13 Accordingly, the court denies defendants’ motion to dismiss plaintiff’s TCPA claims  
14 under Rule 12(b)(6).

15 **DEFENDANTS’ MOTION TO STRIKE CLASS DEFINITION AND CLAIMS**

16 Defendants’ additionally move to strike plaintiff’s related class claims because the  
17 proposed class is not ascertainable and constitutes a “fail-safe” class. (*Doc. No. 26-1 at 11–12.*)  
18 While a motion to strike class allegations at the pleading stage may be appropriate in certain  
19 circumstances, the court declines to address the issue now as it is more appropriately suited for  
20 the class certification stage of the litigation. *See, e.g., Riva v. PepsiCo, Inc.*, 82 F. Supp. 3d 1045,  
21 1063 (N.D. Cal. 2015) (“The Ninth Circuit has opined that ““compliance with Rule 23 is not to be  
22 tested by a motion to dismiss for failure to state a claim.””) (quoting *Gillibeau v. City of*  
23 *Richmond*, 417 F.2d 426, 432 (9th Cir. 1969)); *Kirchner v. Shred-it USA Inc.*, No. 2:14-1437  
24 WBS, 2014 WL 6685210, at \*3 n.3 (E.D. Cal. Nov. 25, 2014) (declining to dismiss class claims  
25 prior to a motion for class certification). Accordingly, defendants’ motion to strike is denied  
26 without prejudice to renewal at the appropriate time.

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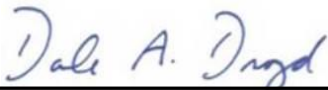
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**CONCLUSION**

For the reasons stated above, defendants' motion to dismiss for failure to state a claim and motion to strike (Doc. No. 26) are denied.

IT IS SO ORDERED.

Dated: October 26, 2016

  
UNITED STATES DISTRICT JUDGE