IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JENNIFER SMITH, et al., individually and on behalf of all others similarly situated,	)	
	)	No. 13-cv-2018
Plaintiffs,	)	
	)	Consolidated with
v.	)	Nos. 13-cv-7389,
	)	13-cv-7149, and 13-cv-6694
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,	)	
	)	
Defendants.	)	

ORDER

The Court denies Defendant State Farm's motion to strike the class allegations. The Court also denies State Farm's motion to dismiss with respect to Plaintiff Clark, and grants State Farm's motion to dismiss with respect to Plaintiff Friedman without prejudice. [158].

BACKGROUND

On February 4, 2014, Plaintiffs filed a consolidated class action complaint (the "Class Action Complaint") asserting claims against several insurance companies for violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*. (*See* R. 111, Consol. Compl.) In the Court's Memorandum Opinion and Order dated August 11, 2014 (the "August 2014 Opinion"), it granted the motions to dismiss filed by two of the insurance companies, Nationwide Mutual Insurance Company ("Nationwide") and Farmers Insurance Exchange, Fire Insurance Exchange, Truck Insurance Exchange, and Mid-Century Insurance Company (collectively, "Farmers"). (*See* R. 146.) The Court denied the motion to dismiss filed by the remaining insurance company Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"). (*Id.*) On September 4, 2014, Plaintiffs[1] filed an amended consolidated class action complaint (the "Amended Class Action Complaint"), which removed the claims against Nationwide and Farmers, but continued to assert claims against State Farm.[2] (R. 153, Am. Consol. Compl.) Defendant State Farm now moves to strike the class allegations in the Amended Class Action Complaint, and to dismiss the individual claims brought by two of the Plaintiffs, Josh Friedman ("Friedman") and Matt Clark ("Clark").[3]

[1] The Plaintiffs that filed the Amended Class Action Complaint are Jennifer Smith, Shawn Matejovich, Josh Friedman, Merrill Primack, and Matt Clark.

[2] Both complaints also asserted claims against Variable Marketing, LLC ("Variable"), the entity that allegedly placed the calls at issue on behalf of the insurance companies. Variable Marketing has not answered or otherwise pled to either of the complaints, and no attorney has filed an appearance on its behalf.

[3] State Farm does not move to dismiss the claims brought by the other three Plaintiffs.

LEGAL STANDARD

I. Motion to Strike Class Allegations

Rule 23(c)(1)(A) directs that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). Although "[m]ost often it will not be 'practicable' for the court to do that at the pleading stage, ... sometimes the complaint will make it clear that class certification is inappropriate." *Hill v. Wells Fargo Bank, N.A.*, 946 F.Supp.2d 817, 829 (N.D. Ill. 2013) (Feinerman, J.) (citing *General Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)); *see also Kasalo v. Harris & Harris, Ltd.,* 656 F.3d 557, 563 (7th Cir. 2011) ("Consistent with [Rule 23(c)(1)(A)'s] language, a court may deny class certification even before the plaintiff files a motion requesting certification."). In those situations, a court may determine that class certification is inappropriate before the parties conduct class discovery. *See Bohn v. Boiron, Inc.*, No. 11-C-08704, 2013 WL 3975126, at *5 (N.D. Ill. Aug. 1, 2013) (Durkin, J.).

If the plaintiff's class allegations are facially defective, for example, "a motion to strike class allegations ... can be an appropriate device to determine whether [the] case will proceed as a class action." *See Bohn,* 2013 WL 3975126, at *5 (quotation omitted); *Wolfkiel v. Intersections Ins. Servs. Inc.,* No. 13-C-7133, 2014 WL 866979, at *4 (N.D. Ill. Mar. 5, 2014) (Zagel, J.); *Wright v. Family Dollar, Inc.,* No. 10-C-4410, 2010 WL 4962838, at *1 (N.D. Ill. Nov. 30, 2010) (Gettleman, J.); *Muehlbauer v. General Motors Corp.,* 431 F.Supp.2d 847, 870 (N.D. Ill. 2006) (Moran, J.). If, on the other hand, the dispute concerning class certification is factual in nature and "discovery is needed to determine whether a class should be certified," a motion to strike the class allegations at the pleading stage is premature. *See Wright,* 2010 WL 4962838, at *1; *Santiago v. RadioShack Corp.,* No. 11-C-3508, 2012 WL 934524, at *4 (N.D. Ill. Feb. 10, 2012) (Gottschall, J.) (similar); *see also Boatwright v. Walgreen Co.,* No. 10-C-3902, 2011 WL 843898, at *2 (N.D. Ill. Mar. 4, 2011) (Castillo, J.) ("Because a class determination decision generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action, ... a decision denying class status by striking class allegations at the pleading stage is inappropriate.").

II. Motion to Dismiss Under Rule 12(b)(6)

"A motion under Rule 12(b)(6) tests whether the complaint states a claim on which relief may be granted." *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The short and plain statement under Rule 8(a)(2) must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quotation omitted). Under federal notice-pleading standards, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* Put differently, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). "In reviewing the sufficiency of a complaint under the

plausibility standard, [courts must] accept the well-pleaded facts in the complaint as true, but [they] 'need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665-66 (7th Cir. 2013) (quoting *Brooks v. Ross,* 578 F.3d 574, 581 (7th Cir. 2009)).

ANALYSIS

In the August 2014 Opinion, the Court denied State Farm's motion to dismiss, finding that Plaintiffs had pled sufficient factual allegations to state a claim for holding State Farm vicariously liable for Variable's telemarketing calls. After Plaintiffs filed their Amended Class Action Complaint, State Farm now moves to strike its class allegations, and also to dismiss the individual claims of Plaintiffs Friedman and Clark. The Court will address each argument in turn.

I. Motion to Strike Class Allegations

State Farm moves to strike the class allegations from the Amended Class Action Complaint, arguing that they are facially defective and cannot provide a basis for class certification. Plaintiffs respond that State Farm's motion is premature, and that Plaintiffs should be allowed to conduct further discovery before the Court rules on class certification. For the reasons below, the Court largely agrees with Plaintiffs.

In the Amended Class Action Complaint, Plaintiffs propose the following class definition:

> All persons within the United States who received a non-emergency telephone call from Variable, placed while Variable was acting on behalf of State Farm, to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice.

(R. 153, Am. Consol. Compl. ¶ 167.)

In response, State Farm first argues that this is an impermissible, "fail-safe" class definition. State Farm then makes a number of other arguments attacking the difficulties Plaintiffs face in establishing which calls (if any) Variable made on behalf of State Farm. With respect to State Farm's first argument, a "fail-safe" class is "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Id*.

Here, State Farm argues that the class definition is "fail-safe" because its members necessarily depend on a future decision on the merits—namely, which calls Variable made "on behalf of" State Farm. As Plaintiffs note, however, they may be able to obtain information in discovery that clearly shows which calls Variable made on State Farm's behalf. It may be that Variable, State Farm, or a third party maintained records that identify which Variable calls were

directed to State Farm agents. The Amended Class Action Complaint also alleges that Variable kept track of the leads it sent to State Farm. (R. 153, Am. Consol. Compl. ¶ 105.) Simply put, Plaintiffs need additional discovery to determine the extent to which they can link calls made by Variable to State Farm. At this point, it is not clear that Plaintiffs allege a "fail-safe" class. Further, even if Plaintiffs' current class definition is potentially "fail-safe," the Seventh Circuit has held that the fail-safe problem "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Messner*, 669 F.3d at 825. As such, the Court agrees with Plaintiffs that it would be premature to strike the class allegations before Plaintiffs have had the opportunity to conduct further discovery, and if necessary, refine their class definition.

State Farm's additional arguments are also directed at the difficulties Plaintiffs face in establishing that Variable made calls on behalf of State Farm, and are similarly premature. State Farm, for example, argues that i) the proposed class is not "ascertainable" because there is no administratively feasible way to determine whether a particular call was made on behalf of State Farm; ii) Plaintiffs' claims require individualized determinations that are not susceptible to class-wide adjudication; and iii) the factual and legal differences in the theories of vicarious liability in Plaintiffs' claims overwhelm any commonalities and defeat class certification. While State Farm may ultimately prevail on one or more of these arguments at the class certification stage, Plaintiffs are first entitled to conduct further class discovery to determine the extent to which they can refute these arguments by linking the Variable calls to State Farm. *See Santiago*, 2012 WL 934524, at *4 (finding that it would be premature to strike class allegations before discovery "where much of the dispute appears to be factual"); *Wright*, 2010 WL 4962838, at *1 (where "dispute is factual and discovery is needed to determine whether a class should be certified, it may be premature to strike class allegations."). The Court is not convinced based on the Amended Class Action Complaint alone that class certification is inappropriate. Accordingly, the Court denies State Farm's motion to strike the class allegations.

II. Motion to Dismiss Under Rule 12(b)(6)

State Farm also moves to dismiss the individual claims of Plaintiffs Friedman and Clark, arguing that their specific claims do not plead sufficient facts to support holding State Farm vicariously liable for Variable's telemarketing calls. "To state a cause of action under the TCPA, a plaintiff must allege that: (1) a call was made; (2) the caller used an [automatic telephone dialing system] or artificial or prerecorded voice; (3) the telephone number called was assigned to a cellular telephone service; and (4) the caller did not have prior express consent of the recipient." *Hanley v. Green Tree Servicing, LLC*, 934 F.Supp.2d 977, 982 (N.D. Ill. 2013) (Castillo, J.) (citing 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)). As discussed in depth in the Court's August 2014 Opinion, the TCPA permits vicarious liability under common-law agency principles. (R. 146, August 2014 Opinion, at 8-12.)

Here, Plaintiff Clark alleges that he "received recorded calls on his cell phone seeking to sell car insurance from Variable at (312) 854-0140, the same number used to call Plaintiff Primack," and that he "did not provide prior express consent to receive these calls." (R. 153, Am. Consol. Compl. ¶¶ 74-75.) Primack alleges that upon returning a recorded call from that number, he "was placed in contact with [the] Freddie Villaci, Jr. Insurance Agency, Inc., which

tried to sell Primack State Farm automobile insurance." (*Id*. ¶ 64.) "Primack was told that the initial calls were placed by a telemarketer in California" that the "Freddie Villaci, Jr. Insurance Agency" had hired. (*Id*. ¶ 65.) As stated above, the Court has already denied State Farm's motion to dismiss, finding that Plaintiffs had pled sufficient facts to state a claim that State Farm is vicariously liable for the calls of Variable. (*See* R. 146, August 2014 Opinion.) Although State Farm argues that Clark individually does not allege sufficient facts linking the specific calls he received to State Farm, the Court disagrees. By alleging the phone number that placed the call, and linking that phone number to Primack's more detailed allegations that the number was associated with a telemarketer placing calls on behalf of State Farm, Clark has sufficiently put State Farm on notice of his claim. *See Bell Atlantic*, 550 U.S. at 555, 127 S.Ct. 1955 (a plaintiff must "give the defendant fair notice of what the claim is and the grounds upon which it rests.") (quotation omitted). For that reason, the Court denies State Farm's motion with respect to Plaintiff Clark.

With respect to Plaintiff Friedman, however, the Court agrees with State Farm that Friedman does not state sufficient facts linking State Farm to the calls he allegedly received. Friedman states only that he "received a telephone call to his cell phone from telephone number (323) 679-2214 via an automatic telephone dialing system and using an artificial or prerecorded voice." (R. 153, Am. Consol. Compl. ¶ 70.) When he called the number back, "a prerecorded message played." (*Id*. ¶ 71.) Friedman does not allege that he received this call from State Farm, or from anyone calling on State Farm's behalf. In fact, he does not even allege to whom that phone number belongs. Friedman cannot state a cause of action against Defendants by pleading only that he received a phone call from an unknown number. Accordingly, the Court dismisses Friedman's claims against both Defendants without prejudice.

CONCLUSION

For these reasons, the Court denies Defendant State Farm's motion to strike the class allegations. The Court also denies State Farm's motion to dismiss with respect to Plaintiff Clark, and grants State Farm's motion to dismiss with respect to Plaintiff Friedman without prejudice. [158].

Dated: January 13, 2015

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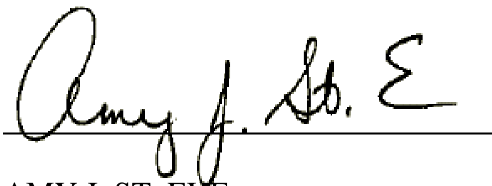

AMY J. ST. EVE
United States District Court Judge