

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

**JOSEPH ZOPPI, individually and on
behalf of all others similarly situated,**

Plaintiff,

v.

PROFORM TRADING, LLC,

Defendant.

Civ. Action No. 21-2307 (CCC) (JSA)

**OPINION AND ORDER GRANTING
MOTION TO AMEND THE
COMPLAINT**

THIS MATTER having come before the Court by way of Plaintiff Joseph Zoppi’s (“Plaintiff”) motion for leave to file an amended class action complaint (ECF No. 20); and Defendant Proform Trading LLC (“Defendant”) having opposed the motion (ECF No. 23); and no oral argument having been heard pursuant to Fed. R. Civ. P. 78(b); and upon careful consideration of the papers submitted in support of and in opposition to the motion; and for good cause shown, the Court finds as follows:

RELEVANT BACKGROUND

1. This case arises under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (the “TCPA”).
2. Defendant Proform Trading LLC conducts business under the name “Apiary Fund.” (Compl., ¶ 15). Apiary is a trading firm that provides training to consumers who want to become Forex traders. (*Id.*, ¶ 14). Plaintiff is a New Jersey resident who had a relationship with Defendant that ended four (4) years ago. (*Id.*, ¶¶ 1, 26-27).
3. Plaintiff alleges that Defendant uses telemarketing to solicit potential consumers for its services, including through the use of pre-recorded voice messages without first obtaining the consumer’s prior express written consent. (*Id.*, ¶ 18).
4. On January 25, 2021, Plaintiff alleges that he received an unsolicited phone call from Defendant to his cell phone that he did not answer, which resulted in Defendant leaving a pre-recorded voice message. (*Id.*, ¶¶ 22-23). Plaintiff further alleges that he did not provide Defendant with consent to place pre-recorded phone calls to his cell phone. (*Id.*, ¶ 27). Plaintiff contends this conduct violates the TCPA. (*Id.*, ¶¶ 27-29).

5. On February 10, 2021, Plaintiff filed a single count putative TCPA class action Complaint, alleging that Defendant transmitted unwanted solicitation telephone calls to Plaintiff and the following class of individuals: “All persons in the United States who from four years prior to the filing of this action through trial (1) Defendant (or an agent on Defendant’s behalf) called on their cellular telephone number (2) using a pre-recorded voice message, and (3) for whom the Defendant claims (a) it obtained consent to call the person or the person’s number in the same manner as Defendant claims it supposedly obtained consent to call Plaintiff or Plaintiff’s number.” (*Id.*, ¶ 31).

6. The Honorable Mark Falk, U.S.M.J. (Ret.) held an initial Rule 16 scheduling conference on June 1, 2021. Judge Falk entered a Scheduling Order that set September 13, 2021, as the deadline to file any motions to amend the pleadings. (ECF No. 18).

7. On September 13, 2021, Plaintiff filed the instant motion to amend. Plaintiff’s motion seeks to add Apiray’s Director and General Manager, Nathan Allred (“Allred”), as an individual defendant and impose individual liability on him pursuant to the TCPA.

ANALYSIS

8. Rule 15(a)(2) of the Federal Rules of Civil Procedure permits a party to amend its pleading at any point prior to trial “only with the opposing party’s written consent or the court’s leave.” *Id.* Leave should be freely given by the Court “when justice so requires.” *Arthur v. Maersk, Inc.*, 434 F.3d 196, 203 (3d Cir. 2006). This mandate encompasses a broad range of equitable factors, including consideration of whether there is (1) undue delay; (2) bad faith, (3) prejudice, (4) failure to cure deficiencies through previous amendments; or (5) futility of the proposed amendment. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1964). The decision to grant leave rests in the sound discretion of the Court. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971).

9. Plaintiff’s motion is straightforward. He seeks to add Allred as an individual defendant to his existing TCPA claim because Allred allegedly, among other things: (a) expressly approved the transmission of the pre-recorded messages; (b) determined the content of and recording of Defendant’s pre-recorded messages; (c) determined whom to make the calls using the pre-recorded message; (d) loaded telephone numbers into a system called Callfire, which is allegedly the call software used to make Defendant’s pre-recorded message calls; and initiated Defendant’s pre-recorded messages calls he recorded to telephone numbers he selected. (*See* Proposed Amended Complaint, ¶¶ 25-29, 31-38, 40-42; ECF No. 20-1). In support of his motion, Plaintiff relies on an FCC decision, *In the Matter of the Joint Petition Filed by Dish Network, LLC*, 28 FCC Rcd. 6574 (rel. May 9, 2013), for the proposition that an individual may be held personally liable under the TCPA for the corporate defendant’s TCPA violations. (Pl.’s Br. 2; ECF No. 20).

10. In opposition, Defendant contends: (1) Plaintiff’s motion should be denied because it was filed without the Court’s permission in violation of the Scheduling Order; and (2) the proposed amendment is futile because neither the Third Circuit nor the FCC have ruled that liability under the TCPA extends to individuals acting on behalf of a company. (Def.’s Opp’n Br. 1-3; ECF No. 23).

11. On reply, Plaintiff requests, to the extent he was required to seek permission to file the instant motion, that he be given leave now to do so. With respect to the merits of his motion, Plaintiff argues that the Third Circuit has never expressly concluded that there is no personal liability under the TCPA. Rather, according to Plaintiff, the Third Circuit, in *City Select Auto Sales Inc. v. David Randall Assocs.*, 885 F.3d 154 (3d Cir. 2018), merely stated, in *dicta*, it was assuming without deciding that the individual defendant may be held individually liable for the company's TCPA violations under a personal-participation theory. (Pl.'s Reply Br. 2-3; ECF No. 26). Plaintiff further contends that the majority of courts considering this issue have found that there may be personal liability under the statute. (*Id.*) Lastly, Plaintiff contends that recent guidance from the FCC suggests that individual officers may be liable for violations of the TCPA. (*Id.* at 4).

12. Initially, the Court notes that the Scheduling Order of June 21, 2021, is ambiguous regarding whether a party must seek leave before filing a motion to amend since the Order contains a September 13, 2021 deadline for filing such motions. See Scheduling Order ¶ 18, ECF No. 18. There is no dispute that Plaintiff timely filed the motion before the court imposed deadline. Based on the foregoing, the Court finds that Plaintiff's failure to obtain express permission to file the motion is not a valid basis to deny it. In any event, the Court finds that judicial economy and efficiency favor consideration now of the motion, which has been fully briefed, as the parties have canceled Mr. Allred's deposition pending a decision on this motion. (See ECF No. 27). A decision now will move the case forward. Thus, the Court will exercise its discretion and consider the motion at this time. See *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982) ("Matters of docket control . . . are committed to the sound discretion of the district court.").

13. A proposed amendment is futile if it would fail to state a claim upon which relief could be granted, in accordance with "the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). In analyzing a motion to dismiss under Rule 12(b)(6), courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citing *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

14. Given the liberal standard applicable to requests to amend pleadings, "courts place a heavy burden on opponents who wish to declare a proposed amendment futile." *Pharma. Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc.*, 106 F. Supp. 2d 761, 764 (D.N.J. 2000). Rule 15 futility does not contemplate substantive motion practice on the merits of the claim and requires only that the newly asserted claim be sufficiently well-grounded in fact or law or that it is not a frivolous pursuit. *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 468 (D.N.J.1990).

15. Here, Defendant argues that the proposed amendment would be futile because a claim for personal liability against individuals, such as Allred, does not exist under the TCPA. Defendant further contends that such an individual liability claim has not been recognized by the FCC or endorsed by the Third Circuit. It is true that the TCPA does not expressly state that

individual liability attaches to a corporate employee or officer based on the company's alleged violations of the Act. Further, in *City Select Auto Sales, Inc.*, the Third Circuit, in *dicta*, did question whether there could be personal liability against an individual corporate officer under the TCPA. See 885 F.3d 154, 160 (3d Cir. 2018) (“we doubt, as well, however, whether such common-law personal participation is available against corporate officers under the TCPA”). However, the Third Circuit expressly declined to decide such an “important question when it was neither litigated in the District Court nor fully briefed and argued on appeal.” *Id.* at 161. Instead, the Third Circuit noted “[a]ssuming that personal-participation liability is in fact available under the TCPA, a corporation's officer ‘may be personally liable under the [TCPA] if he had direct, personal participation in or personally authorized the conduct found to have violated the statute, and was not merely tangentially involved.’” *Id.* at 162 (quoting *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 898 (W.D. Tex. 2001)). The Third Circuit went on to explain that “[a] corporate officer can be personally liable if he ‘actually committed the conduct that violated the TCPA, and/or [he] actively oversaw and directed this conduct.’” *Id.* (quoting *Am. Blastfax*, 164 F. Supp.2d at 897).

16. Courts in this District have analyzed whether a TCPA claim for individual liability survives a motion to dismiss 12(b)(6) standard. Guided by *City Select*, these Courts have not ruled that such a claim does not exist under the TCPA. Rather, the Courts considered whether the pleading alleged adequate facts to support such a claim, and in each of those cases ultimately found that the facts as pled were insufficient to state a claim. See, e.g., *Rucker v. National Automotive Fin.*, 2021 WL 4482831, at *3 (D.N.J. Sept. 30, 2021) (Shipp, J.); *Zelma v. Penn*, 2020 WL 278763, at *3-4 (D.N.J. Jan. 17, 2020) (Vazquez, J.); *Cunningham v. Capital Adv. Sol., LLC*, 2018 WL 6061405, at *5 (D.N.J. Nov. 20, 2018) (Wolfson, J.). The inquiry turns on whether the Plaintiff has plausibly alleged the individual defendant has had “direct, personal participation in the allegedly unlawful conduct or that [the defendant] [] personally authorized the allegedly unlawful conduct.” *Zelma*, 2020 WL 278763, at *4; see *Cunningham*, 2018 WL 6061405, at *5 (stating that plaintiff's allegations must show that individual defendants were more than “‘tangentially involved’” or that they personally “‘authorized,’ ‘oversaw’ and ‘directed’ the challenged telemarketing calls.”)

17. Here, Defendant has not shown that the proposed amendment is futile. As noted above, the Third Circuit has not definitively concluded that there is no individual liability under the TCPA. Further, in opposition, Defendant fails to address the specific allegations in support of Plaintiff's proposed amendment. Nonetheless, a review of the proposed amended pleading demonstrates Plaintiff has alleged that Allred was more than merely tangentially involved with the complained of telemarketing calls. Allred allegedly personally recorded and made the TCPA violative pre-recorded voice call to Plaintiff's cell phone in violation of the TCPA. (See Proposed Amended Compl., ¶¶ 26-29; ECF No. 20-1). Given these allegations, the Court cannot conclude that the proposed amendment to add a TCPA claim against Allred is frivolous or does not advance a claim that is legally sufficient on its face. See *Harrison Beverage Co.*, 133 F.R.D. at 468; see generally Proposed Amended Compl., ¶¶ 26-29, 31, 38. Thus, the Court finds that Defendant has failed to establish that the proposed amendment is futile within the meaning and contemplation of Rule 15.

ACCORDINGLY, based on the above and for good cause shown,

IT IS on this 9th day of December 2021,

ORDERED that, Plaintiff's motion for leave to file an amended complaint (ECF No. 20) is **GRANTED**; and

IT IS FURTHER ORDERED that Plaintiff shall file the Amended Complaint consistent with the proposed Amended Complaint filed by Plaintiff on the Court's docket on September 13, 2021 (ECF No. 20-2), pursuant to Local Civil Rule 15.1(a)(2), within seven (7) days from the date hereof; and

IT IS FURTHER ORDERED that Plaintiff's service of the Amended Complaint shall be accomplished consistent with the Federal Rules of Civil Procedure and the Local Civil Rules; and

IT IS FURTHER ORDERED that the Clerk of the Court shall terminate the motion to amend filed as ECF No. 20.

s/Jessica S. Allen
JESSICA S. ALLEN
United States Magistrate Judge