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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 **Daniel Declements**, individually on behalf
11 of all others similarly situated,

12 Plaintiff,

13 v.

14 **Americana Holdings, LLC**, a Nevada
15 registered limited liability company

16 Defendant.

17 NO.

18 **CLASS ACTION COMPLAINT**

19 **JURY DEMAND**

20 Plaintiff Daniel DeClements (“Plaintiff DeClements,” “Plaintiff,” or
21 “DeClements”) brings this Class Action Complaint and Demand for Jury Trial against
22 Defendant Americana Holdings, LLC (“Defendant Americana Holdings,” “Defendant,”
23 or “Americana Holdings”) to stop Defendant from directing, apparently authorizing,
24 and/or ratifying their agents’ violations of the Telephone Consumer Protection Act.
25 Specifically, Defendant instructs their realtors to use third party lead generating services
26 to obtain leads lists and to call and text message those leads using an autodialer to solicit
27 their real estate listings without their consent. Plaintiff seeks injunctive and monetary
28 relief for all persons injured by the telemarketing scheme directed, apparently authorized,
and/or ratified by Americana Holdings. Plaintiff, for this Complaint, alleges as follows
upon personal knowledge as to himself and his own acts and experiences, and, as to all

1 other matters, upon information and belief, including investigation conducted by his
2 attorneys.

3 **PARTIES**

4 1. Plaintiff Daniel DeClements is a resident of Rio Verde, Arizona.

5 2. Defendant Americana Holdings is a Nevada registered limited liability
6 company headquartered at 2140 E Pebble Rd # 160, Las Vegas NV, 89123. Defendant
7 Americana Holdings conducts business throughout this District, Nevada, and California.
8

9 **JURISDICTION AND VENUE**

10 3. This Court has federal question subject matter jurisdiction over this action
11 under 28 U.S.C. § 1331, as the action arises under the Telephone Consumer Protection
12 Act, 47 U.S.C. §227 (“TCPA”).
13

14 4. This Court has personal jurisdiction over the Defendants and venue is
15 proper in this District under 28 U.S.C. § 1391(b) because the wrongful conduct giving
16 rise to this case was directed to Plaintiff’s Arizona area code phone number while
17 Plaintiff was physically present in this District.
18

19 **COMMON ALLEGATIONS**

20 5. Americana Holdings is the parent company of the Berkshire Hathaway
21 franchises in Arizona, California, and Nevada.
22

23 6. Mark Stark is the CEO/Owner of Americana Holdings.

24 7. Americana Holdings owns and operates 30 real estate offices, with 3,300
25 agents.
26

1 8. Stark, in his role as the CEO and owner of Americana Holdings, directs,
2 apparently authorizes, and/or ratifies Defendant's real estate agents' cold calling in
3 violation of the TCPA, including cold calls to consumers associated with listings that
4 expired on the multiple listing service (MLS) without a sale, like Plaintiff.
5

6 9. Consumers with expired property listings are targeted by real estate agents
7 due to their obvious desire to sell their property did not sell and the likelihood that the
8 property is no longer subject to a listing agreement with another real estate agent. Placing
9 a call to a consumer with an expired listing is a cold call, as the consumer never provided
10 consent to be called and the purpose is to solicit the consumer to hire the agent.
11

12 10. There are a number of systems on the market that real estate agents use to
13 obtain expired listing leads so that they can call or text them to offer their realty services.
14 Landvoice is one such paid system whereby real estate agents pay a subscription fee in
15 return for phone numbers of consumers whose property on the MLS has expired.
16

17 11. Landvoice's leads are aggregated from expired listings from the MLS.
18 Landvoice uses state-of-the-art technology to "take additional steps to deliver the highest
19 quality and quantity of owner contact information including cell phone numbers"
20 associated with those expired listings. Landvoice generates multiple phone numbers
21 (including cell phone numbers and other numbers listed on the DNC) for each lead to
22 ensure that the agent calling has the best chance of reaching the individual associated
23 with the expired listing.
24
25
26
27

12. Landvoice’s service includes the automatic loading of the Landvoice-generated leads lists, using a sequential number generator, into a “Power Dialer,” an automatic telephone dialing system that “dial[s] leads” at a rate of 80 to 300 per hour and delivers a pre-recorded message if calls are not answered:

https://landvoice.com/power-dialer/

LANDVOICE SOLUTIONS PRICING CONTACT US LOG IN 888-678-0905

POWER DIALER

[pou-er] [dahy-ler] | noun

1. A computerized system that will dial leads for you.
2. A tool used by top agents to dial more leads in less time to help them list more properties.

Starting at **\$100/mo**

GET STARTED

Save Time

Contact more leads in less time. By using the Landvoice single-line dialer, you can dial up to 80 calls per hour. Upgrade to the 4-line dialer to call more than 300 leads each hour.

Answer Detection

The Landvoice dialer allows you to quickly move from one call to the next. Instantly leave pre-recorded messages with a simple click. Avoid busy signals, disconnected phone numbers, and unanswered calls.

Stay Organized

Call the right people at the right time with the built-in lead management tools. Access customer history and notes. Keep track of your effectiveness with system analytics and reports.

Integrated System

Your new Landvoice expired, FSBO, and pre-foreclosure leads are automatically pushed into the dialer. Have other leads you want to call? Simply import a CSV file.

13. RedX is another subscription service for real estate agents that sells real estate agents lists of real estate leads.

14. The leads marketed by RedX are aggregated from expired listings, FSBO’s, old expired leads, and pre-foreclosure leads. RedX generates multiple phone numbers (including cell phone numbers and other numbers listed on the DNC) for each lead to

1 ensure that the real estate agent calling a particular lead has the best chance of reaching
2 the client by calling all possible numbers associated with the owner of the listing.

3 15. In addition to providing phone numbers, RedX provides its subscribers with
4 an autodialer to call those leads in rapid succession to cycle through as many leads as
5 possible.
6

7 16. These leads are automatically loaded into the “Storm Dialer” provided by
8 RedX which lets agents autodial all leads at the click of a button:
9

10 **STORM® Dialer**


11

12 Double your listings while prospecting less with a

13 power dialer. Reach 4x more homeowners per


14 hour with one, two, or three lines instead of

15 dialing by hand.

16  Eliminate importing and exporting leads. Storm is built into

17 Vortex, which means all you have to do is hit "dial" to start

18 prospecting.

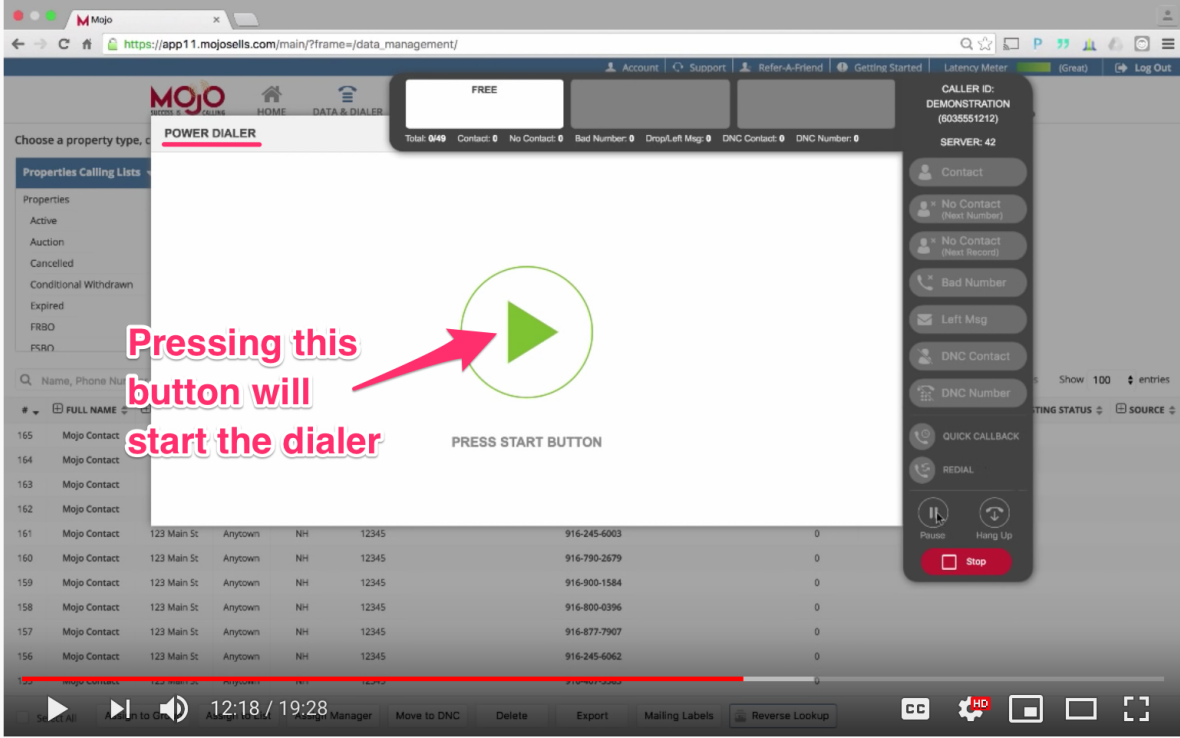
19  Hear "Hello" more often. Storm connects the call fast so you

20 know when a lead has answered and when to begin talking.

21 Avoid not hearing the "Hello" and missing your cue.

21 17. Mojo is yet another subscription service of leads for real estate agents that
22 includes, among other things, leads for expired listings and FSBOs and an autodialer.
23

24 18. The Mojo autodialer is a tool used to call lists of contacts at the click of just
25 one button:
26



Mojo Dialer Demonstration and Overview

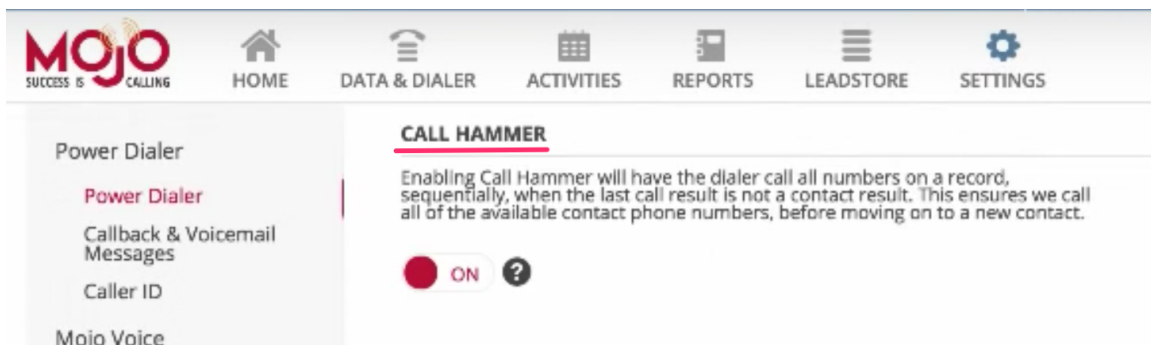
19. The Mojo autodialer boasts a number of features, including the ability to place up to 85 calls per hour using automated single line power dialing, which dials one phone number at a time in a sequence of numbers, or 300 calls per hour using automated multi-line power dialing, which dials multiple phone numbers per hour from a sequence of numbers:



The ultimate prospecting tool from the leader in sales telephony technology.

- Exclusive copper-based technology delivering unparalleled, crystal clear call quality and first hello answers.
- Easy calling modes and advanced calling filters for instant access to the most popular sales calling logic.
- Click to Call for semi-manual list and nurture dialing.
- Automated single line power dialing up to 85 calls per hour.
- Automated multi-line power dialing up to 300 calls per hour.

20. Mojo also offers a feature called Call Hammer that causes the autodialer to dial every phone number that is available for a lead before moving on (automatically) to the next lead.

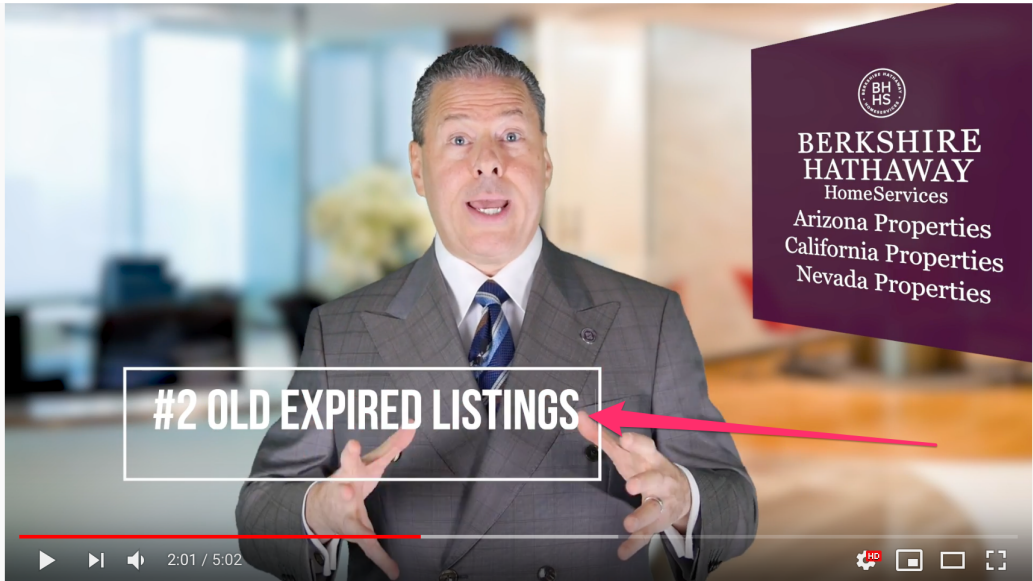


¹ <https://www.mojosells.com/>

1 21. As was stated previously, Defendant Americana’s CEO, Mark Stark,
2 instructs his agents to pursue consumers with expired property listings such as Plaintiff
3 DeClements.

4 22. Stark provides a number of training classes for agents associated with
5 Americana Holdings and/or its subsidiaries in Arizona, California, and Nevada.
6

7 23. Stark provided a training video for Americana Holdings agents on “What
8 Should I Do Now To Get Immediate Business.” In this video, Stark specifically addresses
9 pursuing consumers with expired property listings:
10



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19
20 Real Estate Training - What Should I Do Now To Get Immediate Business Part 2 of 2 2

21 24. “Old Expired Listings: Listen, if you like working new expirds, kudos,
22 that’s awesome! And if you are great at it, that’s perfect. But a lot of people tell me
23 regarding the new expirds that they are tough, and you know what, they can be. So
24
25
26

27 ² <https://www.youtube.com/watch?v=4wCFJsFo6dc>

1 again, kudos getting your skill set up to deal with the new. But if you are not so
 2 comfortable dealing with the new, deal with the old. These are people who have once put
 3 their property on the market and now it's off the market for whatever reason. Reach out
 4 to them to speak to them. **There is a company called TheRedx.com. If you need**
 5 **information on it, reach out to our VP of Sales, Rick Berube.** He can give you all the
 6 information on it. They charge about \$75 a month. And I believe Rick might even be able
 7 to help you with the discount so call him direct. What they do is they go through and
 8 clean up all the old information up you know they are not listed at this time even though
 9 they might have been selling later, it's all there with fresh information so you are saving a
 10 ton of time so that's very valuable time. Time is money, so you want to save that time.
 11 Hitting the old expireds may be the most recent month, go through all those calls and
 12 then go backwards from there.³

13
 14
 15
 16 25. Rick Berube, the VP of Sales for Berkshire Hathway HomeServices
 17 Nevada d/b/a Americana LLC also provides training and coaching to Americana
 18 Holdings agents. Rick Berube provides coaching and training to agents in Arizona,
 19 Nevada, and California.⁴

20
 21
 22
 23
 24
 25 _____
 26 ³ *Id.* (at 2 minutes, 30 seconds).

27 ⁴<https://www.youtube.com/watch?v=GhObGudwo78&fbclid=IwAR3KYLJTQ9MSRT2hx1WWh3Y9zwFDP5eMcieV1puzNKDVs5NdRnbAgFQAXsk>



Rick Berube
502 subscribers

I have been facilitating our own coaching program with Berkshire Hathaway called the Success Series that I personally train for up to 5 days in all three markets, California, Nevada, & Arizona. With this program, I hope to mentor, support, and challenge agents of all experience to be the best agent they can be. Just let this video speak for itself! Thank you to everyone included in the video I really appreciate it!

26. Rick Berube follows the direction provided by Stark and trains the Americana Holdings agents to call consumers with expired property listings.

27. Berube provides training sessions to agents in which he directs agents to pursue expirations by using systems like RedX and Landvoice.

28. On June 7, 2017, Berube gave a training class to Americana Holdings agents entitled, “Old Expired Listings.”



Old Expired Listings || Rick Berube Berkshire Hathaway HomeServices

5

⁵ <https://www.youtube.com/watch?v=Wev1qnhkrg4>

1 29. In the above video, Berube states: “A lot of people call the new expireds.
2 But what people forget is the old expireds.”⁶ Regarding how to look 4 years in the past
3 for expired listings, Berube says not to go on MLS but rather to use “Landvoice, Mojo...
4 I know Vulcan7 does this. The easiest one I can think of is RedX. RedX does this.”⁷
5 (Vulcan7 is another system that works similar to Landvoice and RedX.) Berube continues
6 “If you go back 4 years, you’re going to have 3-5,000 phone numbers. I mean, what
7 better people can you call?”⁸
8

9 30. Berube provides examples of how to place cold calls to consumers with
10 expired listings using call scripts. He then says, “I would use an autodialer myself. And I
11 would have each one of these in a file. Like Mojo, for instance... They’re going to
12 recognize you over time calling consistently.”
13

14 31. Berube provides regular training to Americana Holdings agents in Arizona,
15 Nevada and California, including the following classes:
16
17
18
19
20
21
22
23
24

25
26 ⁶ *Id.* (at 18 seconds).

27 ⁷ *Id.* - 1:41 into the video.

28 ⁸ *Id.*

CALL YOUR WAY TO
SUCCESS

September 8TH & 9TH @ 9am
22601 OLD CANAL ROAD • YORBA LINDA, CA

JOIN **RICK BERUBE** AND GET YOUR NEXT LISTING!

Call Clinic With Rick
Bring Your Contacts!



WE WILL BE CALLING YOUR
EXPIREDS | **FSBO'S** | **SOI**

PLEASE RSVP @ 714.998.8810

BERKSHIRE HATHAWAY | California Properties
HomeServices

9

<https://www.facebook.com/photo.php?fbid=1501142410201740&set=ecnf.100009179853436&type=3&theater>

CLASS ACTION COMPLAINT



RE SUCCESS

REAL ESTATE CAREER DEVELOPMENT SERIES

The RE Success Series is a results oriented training program that increases your skill sets to advance your business and generate more income! Gain certificates in the disciplines and techniques needed to make you successful. Once you have completed the courses you are awarded the Masters in Real Estate designation, and are on your way to taking your business to a new level!

Session 1 **RSVP**

- Where to Get Business:
- Law of Accumulation
 - Basics of the Business
 - Active/Passive Lead Generating Methods
 - Developing a Plan of Action for Lead Generating

Oct 7th 1:00-4:00 pm 14635 N. Kierland Blvd. #160

- How to Brand Yourself:
- The Importance of a Professional Brand
 - Marketing Support for creating your Brand

Session 2 **RSVP**

- Lead Generation Conversations:
- Scripts, Scripts, and more Scripts!
 - Effective Delivery of Scripts – the words are important!
 - Closing Scripts
 - Knowing your audience - the 4 personality types
 - Role-Playing

Oct 8th 1:00-4:00 pm 14635 N. Kierland Blvd. #160

- Maximizing Leads & Lead Follow Up:
- Lead Follow Up
 - How to Leverage Listings for more Leads
 - Turning 1 Transaction into 63 closings
 - Using your Database (contact management system)
 - Campaigns and Marketing Materials to Support your Lead Follow Up

Session 3 **RSVP**

- Farming for Business:
- How to become a neighborhood expert
 - Finding the right Demographic market to specialize in
 - Identifying other Farm opportunities
 - Marketing Support for Geographic & Demographic Farming

Oct 9th 1:00-4:00 pm 14635 N. Kierland Blvd. #160

- High Impact Open Houses:
- Where to hold an effective Open House
 - How to market your Open House for Sellers and Buyers
 - Who to invite and what to say
 - Marketing Support for holding a great Open House
 - Creating a successful Follow Up plan

Session 4 **RSVP**

- The Listing Process:
- Pre-Qualifying for Motivation and Details before your Appointment
 - The Pre-List Package
 - The Listing Presentation
 - Marketing Support for Listing Presentations

Oct 10th 1:00-4:00 pm 14635 N. Kierland Blvd. #160

- Working with Buyers:
- Setting Standards with your Buyer Clients
 - Handling Ad & Sign Calls
 - Conducting a Needs Assessment
 - Educating your Buyers on the Process
 - Handling Objections and Creating Urgency
 - Marketing Support for Buyer Presentations & Needs Assessments

Session 5 **RSVP**

- Negotiation Techniques:
- Understanding your personality style
 - Finding the Win-Win
 - Understanding Motivation

Oct 11th 1:00-4:00 pm 14635 N. Kierland Blvd. #160

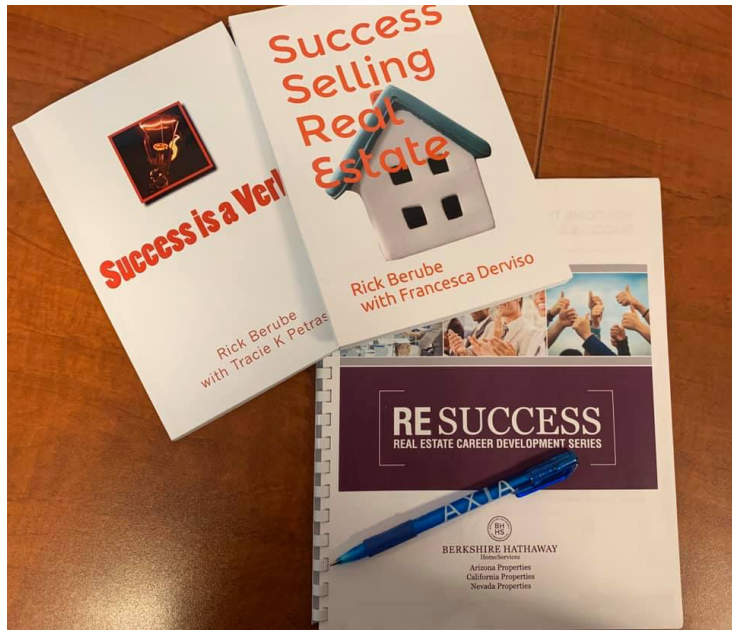
- Business Planning & Time Management:
- Finding your WHY and identify WHAT goals you need to achieve
 - The HOW – Creating an Execution plan
 - Time Management – creating a work/life balance & changing your habits
 - Daily, weekly, monthly Must Do's – creating discipline
 - Tracking your Numbers – identifying areas of growth opportunities
 - Accountability – taking responsibility

10

32. As the above classes show, Berube trains Americana Holdings agents on placing calls to consumers with expired listings and how to place effective cold calls including providing them with scripts to use on these expired listing calls.

33. In addition to the above, Berube also provides physical materials to Americana Holdings agents to reinforce his training initiatives:

¹⁰ <https://www.facebook.com/BerubeRick>



11

34. This is a small 2-week sample demonstrating the frequency and location of the training Berube regularly provides to Americana Holdings agents in Arizona, Nevada and California:¹²

- October 28, 2019 – Goodyear, Arizona
- October 28, 2019 – Camelback, Arizona
- October 29, 2019 – Scottsdale, Arizona
- October 29, 2019 – Anthem, Arizona
- October 30, 2019 – Phoenix, Arizona
- October 30, 2019 – Kierland, Arizona
- November 3, 2019 – Henderson, Nevada
- November 6, 2019 – Indian Wells, California
- November 6, 2019 – La Quinta, California
- November 7, 2019 – Palm Springs, California
- November 11 – 15 – Henderson, Nevada

¹¹

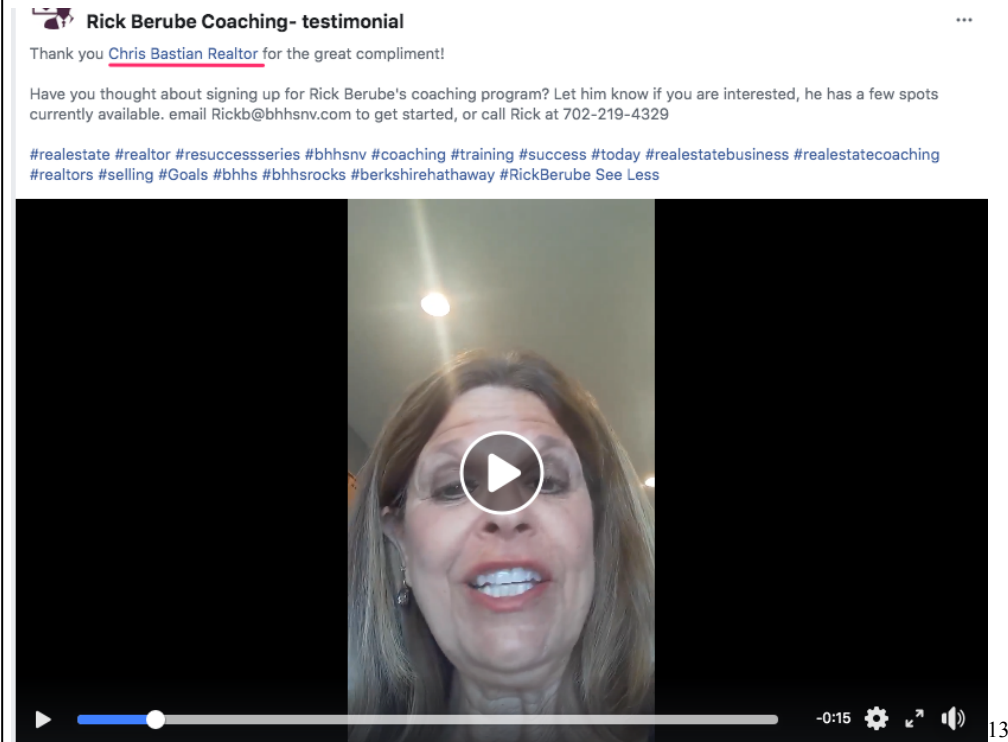
<https://www.facebook.com/photo.php?fbid=2358564481126191&set=a.1437479676568014&type=3&theater>

¹² <https://www.facebook.com/BerubeRick>

1 35. RE Academy (myreeducation.com) is a training website for Americana
2 Holdings agents. The training website shows that it is designed for Defendant's agents in
3 Arizona, California, and Nevada.

4 36. On the RE Academy website, new agents and experienced agents have
5 access to training videos given by Mark Stark and training sessions and materials
6 provided by Rick Berube.
7

8 37. Chris Bastian, one of the real estate agents that contacted Plaintiff
9 DeClements posted a testimonial video online for Rick Berube's training that is done
10 through RE Academy:
11



13 <https://www.facebook.com/watch/?v=392103971394487>

38. In the above video, Bastian says, “I’ve been doing coaching with Rick for about 3 or 4 years now, quite a while. He has made me accountable and it’s helped my production. My production has increased, so if you’re not doing coaching with Rick, sign up, it’s a good thing.”¹⁴

39. Berube offers a number of courses on RE Academy, many of which include training on placing calls to consumers with expired property listings.

40. The course “Where to Get Business Today”¹⁵ on RE Academy provides training to the realtor on how to generate listing leads. In the course documents, pursuing consumers with expired listings is specifically stated as an active method of generating leads:

ACTIVE/PASSIVE LEAD GENERATING MODELS

ACTIVE—75%

By Phone:

- ▶ Sphere of Influence
- ▶ FSBO
- ▶ Expires
- ▶ Just Sold/Just Listed
- ▶ Past Clients
- ▶ Allied Resources
- ▶ Geographic Farm Area
- ▶ Corporations
- ▶ Organizations

PASSIVE—25%

Advertising:

- ▶ Newspapers, Radio, Vehicles, Magazines, Signs, Brochures Boxes, Name Badge, Logo Shirts, Car Signs

Promotional Items:

- ▶ Magnets, Calendars, Flyers, Internet Ads/Websites:
- ▶ Craigslist, Facebook, Zillow, Trulia, etc.

16

¹⁴ *Id.*

¹⁵ https://apm.activecommunities.com/reacademy/Activity_Search/where-to-get-business-today/3892

¹⁶

https://anprod.active.com/reacademy/servlet/downloadAttachedFile.sdi?uploadedfile_id=C68A0B890

1 41. The course “Lead Generation, Follow Up & Sales Skills”¹⁷ deals heavily
 2 with prospecting. The course document starts by addressing the fact that prospecting
 3 means soliciting for business:

4 **LEAD GENERATION II PROSPECTING**

5 The thing about prospecting is that the more you practice it, the better you will be. What
 6 is prospecting to the average person? soliciting . There is no way around
 7 that because most of the people in this world are trained to believe that is true. Prospecting
 8 can be the complete opposite of what the majority believes, it’s all about how you use
 9 it. You need to accept the art of prospecting and allow it to become a part of
 you and your business. The sooner you do that, the easier the act of prospecting will become for
 you. 18

11 42. The course heavily encourages the use of scripts when an agent is
 12 prospecting for new leads:

13 **SCRIPTS, SCRIPTS, AND MORE SCRIPTS!**

14 **What is the most important tool in Selling?**

- 15 ▶ The Language of persuasion .
- 16 ▶ Show authority by downswinging your voice. However, show that you are
 17 about them and their issues by also repeating and approving. Make the conversation
 about them. Always match your style to theirs. We are able to
 identify a personality type very simply.
- 18 ▶ Be aware of your PERSONALITY and match it to your clients.
- 19 ▶ Remember to always repeat , approve , and
 20 move . When prospecting a potential lead, in conversation, make it
 always about them. Needless to say, act like you care. People love to talk about
 21 themselves . It you’re thinking to yourself, “I don’t talk like that!” Well,
 recondition your way of speaking and start talking like that.
- 22 ▶ Practice Makes Perfect . At the end of the day, you can call it
 lead generation, you can call it prospecting but it is really just getting into
 23 great conversations with people about their real estate needs! It’s about
 24 establishing and nurturing those great connections. 19

24 ¹⁷ https://apm.activecommunities.com/reacademy/Activity_Search/lead-generation-follow-up-sales-skills/3893

25 ¹⁸ https://anprod.active.com/reacademy/servlet/downloadAttachedFile.sdi?uploadedfile_id=C08A0B890B

27 ¹⁹ *Id.*

How do we accomplish this?

- ▶ By making an effort to remember the names of both your clients and people passing through the property.
- ▶ By using professional scripts.

Scripts are:

- ▶ Are intentionally used to condition your response.
- ▶ Are intentional in their purpose.

20

43. RE Academy specifically provides agents with scripts that are used in cold call scenarios such as when calling a consumer with an expired listing, a FSBO consumer, or a consumer with a just sold, or just listed property:

REFER TO THE SUCCESS CENTER SCRIPTS FOR THE FOLLOWING:

- ▶ Just Sold
- ▶ Just Listed
- ▶ Powerful Closes for Prospecting
- ▶ Sphere of Influence – Past Client
- ▶ SOI/Past Client Script – Those you haven’t talked to in awhile
- ▶ New Agent Sphere of Influence
- ▶ FSBO Script
- ▶ FSBO Objection Handlers
- ▶ Expired Listing Script 1
- ▶ Expired Listing Script 2
- ▶ Powerful Closes for Expireds
- ▶ Property Search Script
- ▶ Property Watch Script

21

²⁰ *Id.*

²¹ *Id.*

TCPA ILLEGALITY OF AUTODIALED CALLS

1
2 44. As explained by the Federal Communications Commission (“FCC”) in its
3 2012 order, the TCPA requires “*prior express written consent* for all autodialed or
4 prerecorded [solicitation] calls to wireless numbers and residential lines.” *In the Matter of*
5 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,
6 CG No. 02-278, FCC 12-21, 27 FCC Rcd. 1830 ¶ 2 (Feb. 15, 2012).

8 45. Yet in violation of this rule, based on Defendant’s instructions to purchase
9 leads lists and use autodialers to call them, Defendant’s agents fail to obtain any express
10 written consent prior to placing autodialed calls and sending autodialed text messages to
11 cellular telephone numbers such as those of Plaintiff.

13 46. There are numerous complaints posted online about unsolicited calls that
14 Berkshire Hathaway agents have placed to consumers, many of which indicate the use of
15 an autodialer:

- 17 • “Called both my cell and my husbands this a.m and left a voice mail on
18 both about talking to us before about houses in our area and if we were
19 interested in selling our to give her a call. What a bunch of BS. We live
20 outside the city limits and have never talked to her or anyone about selling
21 our home.”²²
- 22 • “... I keep getting annoying texts from the realtor asking me for listings
23 also sending them to my wife’s cell phone – it’s so annoying because I keep
24 replying to the text that I’m on do not call list and asked several times to
25 stop harassing us – then a few weeks later it starts all over again – sends the
26 exact message asking if I have any homes that I would like to sell – I keep
27 telling him no, stop texting me”²³

26 ²² <https://800notes.com/Phone.aspx/1-402-509-6267>

27 ²³ <https://800notes.com/Phone.aspx/1-619-565-4909>

- “CID ‘BH HOME SERVICES’. No message. We’re on the DoNotCall registry, & are not inclined to do business w/someone who conducts illegal cold-calls, then hangs up.”²⁴

PLAINTIFF DECLEMENTS’S ALLEGATIONS

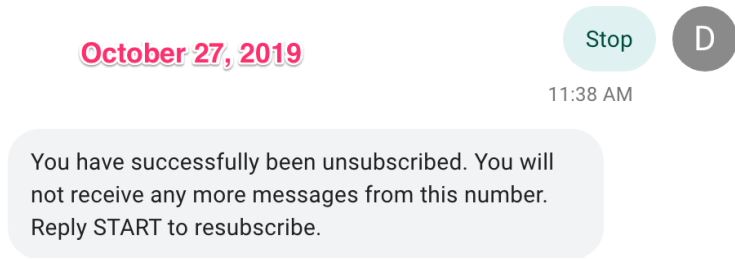
47. Plaintiff DeClements had a property listed for sale, but he terminated his contract with the realtor that he was working with in the beginning of September 2019, and had the listing removed from the MLS.

48. On September 3, 2019 at 2:21 PM, one day after DeClements had his property listing removed from the MLS, Declements received an autodialed text message from a Americana Arizona agent to his cell phone using phone number 480-351-5157:



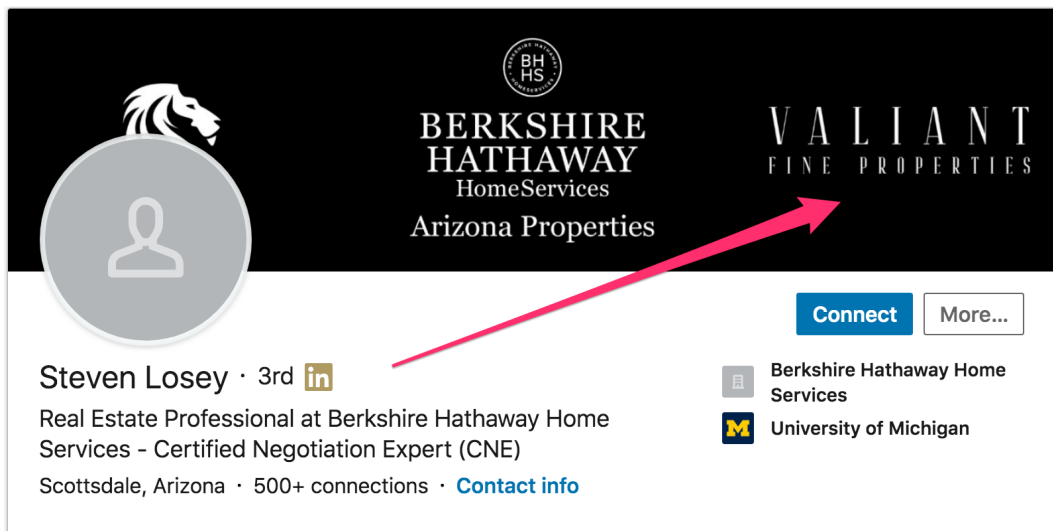
²⁴ <https://800notes.com/Phone.aspx/1-702-362-1111>

49. DeClements believes the text message was autodialed due to the unsolicited, commercial, and generic nature of the text message, and because replying “Stop” to 480-351-5157 results in an immediate automated response:



50. When 480-351-5157 is called, the voicemail indicates that it belongs to “Steven” from Berkshire Hathaway Valiant Fine Properties which is part of Americana Arizona.²⁵

51. This is Steven Losey of Berkshire Hathaway HomeServices Arizona Properties:



²⁵ <https://www.bhhsaz.com/Roster/Search>

²⁶ <https://www.linkedin.com/in/stevenlosey/>

1 52. On September 3, 2019 at 4:30 PM, Plaintiff DeClements received an
2 autodialed call from Chris Bastian, an Americana Arizona agent on his cell phone using
3 phone number 602-619-5065.

4 53. When DeClements answered the call from Bastian, he noticed a several
5 second noticeable pause before Bastian came on the phone, indicating the use of an
6 autodialer.

7 54. Bastian called DeClements regarding the expired property listing that
8 DeClements had listed on the MLS.

9 55. The call ended abruptly before DeClements could ask Bastian how she
10 acquired his contact information.

11 56. Chris Bastian is affiliated with Berkshire Hathaway HomeServices Arizona
12 Properties, which is Americana Arizona:

13
14
15
16 **BERKSHIRE HATHAWAY** | Arizona Properties
HomeServices
17 **Chris Bastian**
REALTOR
Cell: (602) 619-5065
18 **Gilbert - Mesa Office**
19 1630 S. Stapley Drive, Ste. 100
Mesa, AZ 85204
20 Office: (480) 467-4900 27

21 57. Plaintiff DeClements has never provided his cellular phone number, or any
22 phone number to Americana Holdings or otherwise consented to any Americana
23 Holdings agent placing solicitation telephone calls or sending solicitation text messages
24 to his cell phone number.

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26
27 ²⁷ <https://chrisbastian.bhhsaz.com/>

1 58. The unauthorized telephone calls and text messages by Defendant’s real
2 estate agents have harmed Plaintiff DeClements in the form of annoyance, nuisance, and
3 invasion of privacy, and disturbed the use and enjoyment of his cell phone, in addition to
4 the wear and tear on the phones’ hardware (including the phones’ battery) and the
5 consumption of memory on the phone.

6 59. Seeking redress for these injuries, Plaintiff DeClements, on behalf of
7 himself and Classes of similarly situated individuals, bring suit under the Telephone
8 Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, which prohibits unsolicited autodialed
9 calls and text messages to cellular telephones.

10 **CLASS ALLEGATIONS**

11 60. Plaintiff DeClements brings this action pursuant to Federal Rules of Civil
12 Procedure 23(b)(2) and 23(b)(3) and seeks certification of the following Class:

13
14 All persons in the United States who from four years prior to the filing of
15 this action through class certification (1) at least one of Defendant’s
16 realtors called or texted, (2) on the person’s cellular telephone number,
17 (3) using the same dialing system used to call and/or text Plaintiff, and
18 (4) for whom Defendant’s realtors obtained the person’s phone number
19 from the same source as Defendant’s realtors obtained Plaintiff’s phone
20 number.

21 61. The following individuals are excluded from the Class: (1) any Judge or
22 Magistrate presiding over this action and members of their families; (2) Defendant, their
23 subsidiaries, parents, successors, predecessors, and any entity in which Defendant or its
24 parents have a controlling interest and their current or former employees, officers and
25 directors; (3) Plaintiff’s attorneys; (4) persons who properly execute and file a timely
26 request for exclusion from the Class; (5) the legal representatives, successors or assigns
27 of any such excluded persons; and (6) persons whose claims against Defendant have been
28

1 fully and finally adjudicated and/or released. Plaintiff DeClements anticipates the need to
2 amend the Class definitions following appropriate discovery.

3 62. **Numerosity:** On information and belief, there are hundreds, if not
4 thousands of members of the Class such that joinder of all members is impracticable.

5 63. **Commonality and Predominance:** There are many questions of law and
6 fact common to the claims of Plaintiff DeClements and the Class, and those questions
7 predominate over any questions that may affect individual members of the Class.

8 Common questions for the Class include, but are not necessarily limited to the following:

9 (a) whether Defendant’s real estate agents used an automatic telephone dialing
10 system to send text messages to Plaintiff DeClements and the members of the Class;

11 (b) whether Defendant’s real estate agents used an automatic telephone dialing
12 system to place calls to Plaintiff DeClements and the members of the Classes;

13 (c) whether Defendant is vicariously liable under the TCPA for their realtors’
14 conduct; and

15 (d) whether members of the Class are entitled to treble damages based on the
16 willfulness of Defendants’ conduct.

17 64. **Adequate Representation:** Plaintiff DeClements will fairly and adequately
18 represent and protect the interests of the Class, and has retained counsel competent and
19 experienced in class actions. Plaintiff DeClements has no interests antagonistic to those
20 of the Class, and Defendant does not have any defenses unique to Plaintiff. Plaintiff
21 DeClements and his counsel are committed to vigorously prosecuting this action on
22 behalf of the members of the Class, and have the financial resources to do so.

23 65. **Appropriateness:** This class action is also appropriate for certification
24 because Defendant has acted or refused to act on grounds generally applicable to the
25 Class as a whole, thereby requiring the Court’s imposition of uniform relief to ensure
26 compatible standards of conduct toward the members of the Class and making final class-

1 wide injunctive relief appropriate. Defendant's business practices apply to and affect the
2 members of the Class uniformly, and Plaintiff's challenge of those practices hinges on
3 Defendant's conduct with respect to the Class as whole, not on facts or law applicable
4 only to the Plaintiff. Additionally, the damages suffered by individual members of the
5 Class will likely be small relative to the burden and expense of individual prosecution of
6 the complex litigation necessitated by Defendant's actions. Thus, it would be virtually
7 impossible for the members of the Class to obtain effective relief from Defendant's
8 misconduct on an individual basis. A class action provides the benefits of single
9 adjudication, economies of scale, and comprehensive supervision by a single court.

10 **FIRST CLAIM FOR RELIEF**

11 **Telephone Consumer Protection Act**

12 **(Violation of 47 U.S.C. § 227)**

13 **(On Behalf of Plaintiff DeClements and the Class)**

14 66. Plaintiff DeClements repeats and realleges paragraphs 1 through 65 of this
15 Complaint and incorporates them by reference.

16 67. Defendant's realtors sent unwanted solicitation calls and text messages to
17 cellular telephone numbers belonging to Plaintiff DeClements and the other members of
18 the Class.

19 68. Defendant directed, apparently authorized, and/or ratified these calls.

20 69. The texts and calls were made using an autodialer.

21 70. These solicitation calls and texts were made *en masse* without the prior
22 express written consent of Plaintiff DeClements and the other members of the Class.

23 71. Defendant has, therefore, violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result
24 of Defendants' conduct, Plaintiff DeClements and the other members of the Class are
25 each entitled to a minimum of \$500 in damages, and up to \$1,500 in damages, for each
26 violation.

27 **PRAYER FOR RELIEF**

28

CLASS ACTION COMPLAINT

1 **WHEREFORE**, Plaintiff DeClements, individually and on behalf of the Class,
2 prays for the following relief:

3 72. An order certifying this case as a class action on behalf of the Class as
4 defined above, appointing Plaintiff DeClements as the representative of the Class, and
5 appointing his attorneys as Class Counsel;

6 73. An award of actual and/or statutory damages and costs;

7 74. An order declaring that Defendant’s actions, as set out above, violate the
8 TCPA;

9 75. An injunction requiring Defendant to cease directing, authorizing, and/or
10 ratifying their real estate agents’ unsolicited calling and texting activity, and to otherwise
11 protect the interests of the Class; and

12 76. Such further and other relief as the Court deems just and proper.

13 **JURY TRIAL DEMAND**

14 Plaintiff DeClements requests a jury trial.

15
16 Dated: January 21, 2020

/s/ Nathan Brown
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**Pro Hac Vice motion forthcoming*

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Berkshire Hathaway Realtors Placed Illegal Telemarketing Calls, Suit Says](#)
