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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**



14	Christopher Melingonis,)	Case No.: '17CV0826 BTM AGS
15	Individually and on behalf of All)	
16	Others Similarly Situated,)	<u>CLASS ACTION</u>
17)	
18)	CLASS ACTION COMPLAINT
19)	FOR DAMAGES AND
20)	INJUNCTIVE RELIEF
21)	PURSUANT TO THE
22)	TELEPHONE CONSUMER
23)	PROTECTION ACT, 47 U.S.C. §
24)	227 ET SEQ.
25)	
26)	Jury Trial Demanded
27)	
28)	

14 **Christopher Melingonis,**
15 **Individually and on behalf of All**
16 **Others Similarly Situated,**
17 **Plaintiff,**
18 **v.**
19 **Direct Merchants Funding, LLC**
20 **d.b.a. Flash Advance,**
21
22 **Defendant.**

Case No.: '17CV0826 BTM AGS
CLASS ACTION
CLASS ACTION COMPLAINT
FOR DAMAGES AND
INJUNCTIVE RELIEF
PURSUANT TO THE
TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. §
227 ET SEQ.
Jury Trial Demanded

24
25 **INTRODUCTION**

26
27 1. CHRISTOPHER MELINGONIS (referred to individually as “Mr.
28 Melingonis” or “Plaintiff”), brings this class action for damages, injunctive

1 relief, and any other available legal or equitable remedies, resulting from the
2 illegal actions of DIRECT MERCHANTS FUNDING, LLC d.b.a. FLASH
3 ADVANCE (“Defendant”) in negligently, knowingly, and/or willfully
4 contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the
5 Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq., (“TCPA”),
6 thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon
7 personal knowledge as to himself and his own acts and experiences, and, as
8 to all other matters, upon information and belief, including investigation
9 conducted by his attorneys.

- 10 2. The TCPA was designed to prevent calls like the ones described within this
11 complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous
12 consumer complaints about abuses of telephone technology – for example,
13 computerized calls dispatched to private homes – prompted Congress to pass
14 the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).
- 15 3. In enacting the TCPA, Congress intended to give consumers a choice as to
16 how creditors and telemarketers may call them, and made specific findings
17 that “[t]echnologies that might allow consumers to avoid receiving such calls
18 are not universally available, are costly, are unlikely to be enforced, or place
19 an inordinate burden on the consumer.” TCPA, Pub.L. No. 102-243, § 11.
20 Toward this end, Congress found that:

21 Banning such automated or prerecorded telephone calls to the
22 home, except when the receiving party consents to receiving the
23 call or when such calls are necessary in an emergency situation
24 affecting the health and safety of the consumer, is the only
25 effective means of protecting telephone consumers from this
26 nuisance and privacy invasion.

27 *Id.* at § 12; *see also, Martin v. Leading Edge Recovery Solutions, LLC*, 2012
28 WL 3292838, at *4 (N.D. Ill. Aug. 10, 2012) (citing Congressional finding
on TCPA’s purpose).

1 4. Congress also specifically found that “the evidence presented to the Congress
2 indicates that automated or prerecorded calls are a nuisance and an invasion
3 of privacy, regardless of the type of call [...]” *Id.* At §§ 12-13. *See also,*
4 *Mims*, 132 S. Ct. at 744.

5 5. As Judge Easterbrook of the Seventh Circuit explained in a TCPA case
6 regarding calls to a non-debtor similar to this one:

7 The Telephone Consumer Protection Act [...] is well known for its
8 provisions limiting junk-fax transmissions. A less litigated part of
9 the Act curtails the use of automated dialers and prerecorded
10 messages to cell phones, whose subscribers often are billed by the
11 minute as soon as the call is answered – and routing a call to
12 voicemail counts as answering the call. An automated call to a
landline phone can be an annoyance; an automated call to a cell
phone adds expense to annoyance.

13 *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012).

14 JURISDICTION AND VENUE

15 6. Jurisdiction is proper under 47 U.S.C §227(b); *Mims v. Arrow Fin. Servs.,*
16 *LLC*, 132 S.Ct. 740 (2012), because Plaintiff alleges violations of federal
17 law.

18 7. Venue is proper in the United States District Court for the Southern District
19 of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because the
20 events giving rise to Plaintiff’s causes of action against Defendant occurred
21 in the State of California within the Southern District of California and
22 Defendant conducts business in the area of San Diego, California.

23 PARTIES

24 8. Plaintiff is, and at all times mentioned herein was, an individual citizen and
25 resident of the State of California.

26 9. Plaintiff is informed and believes, and thereon alleges, that Defendant is,
27 and at all times mentioned herein was, a Limited Liability Company
28

1 licensed in the state of Florida and headquartered in Ft. Lauderdale, FL, and
2 at all times mentioned herein was, a Limited Liability Company and a
3 “person,” as defined by 47 U.S.C. § 153(39).

4 10. Plaintiff is informed and believes, and thereon alleges, that at all relevant
5 times, Defendant conducted business in the State of California and in the
6 County of San Diego, and within this judicial district.

7
8 **FACTUAL ALLEGATIONS**

9 11. At all times relevant, Plaintiff was a citizen of the State of California.
10 Plaintiff is, and at all times mentioned herein was, “persons” as defined by
11 47 U.S.C § 153 (10).

12 12. Defendant is, and at all times mentioned herein was, a “person” as defined
13 by 47 U.S.C. §153 (10).

14 13. Sometime prior to January 1, 2013, Mr. Melingonis was assigned, and
15 became the owner of, a cellular telephone number from his wireless
16 provider.

17 14. On April 5, 2005, Mr. Melingonis registered his cellular phone with the
18 National Do Not Call Registry.

19 15. On or about April 12, 2017 Mr. Melingonis received a telephone call on his
20 cellular telephone from Defendant, in which Defendant utilized an automatic
21 telephone dialing system (“ATDS”) as defined by 47 U.S.C. § 227(a)(1),
22 using an “artificial or prerecorded voice” as prohibited by 47 U.S.C. §
23 227(b)(1)(A).

24 16. The call to Mr. Melingonis’s cellular telephone number (ending in 9812)
25 from Defendant came from phone number: (478) 215-0893 at approximately
26 2:00 PM on April 12, 2017.

27 17. During the call from Defendant to Mr. Melingonis’s cellular telephone,
28 Plaintiff answered the phone and said hello twice. He then heard a beep,
and someone came on the line and said, “hello, is this Chris?”





1 18. Plaintiff answered, “yes.” The man then something like, “hi, this is
2 Kenneth, I want to prequalify you for working capital for your business.”
3 Kenneth asked Plaintiff a few questions then placed him on hold. After
4 some time on hold, Kenneth came back on the line and said that everyone
5 was busy, so a loan specialist would have to call him back.

6 19. Later that day, Mr. Melingonis received a call from Samantha with Flash
7 Advance. Samantha confirmed that Kenneth also works at Flash Advance
8 and that it was Flash Advance that had called him earlier in the day.

9 20. The ATDS used by Defendant has the capacity to store or produce telephone
10 numbers to be called, using a random or sequential number generator.

11 21. The ATDS used by Defendant also has the capacity to, and does, call
12 telephone numbers from a list of databases of telephone numbers
13 automatically and without human intervention.

14 22. The telephone number Defendant called was assigned to a cellular telephone
15 service for which Plaintiff incurred a charge for incoming calls pursuant to
16 47 U.S.C. § 227 (b)(1).

17 23. Plaintiff at no time provided “prior express consent” for Defendant to place
18 telephone calls to Plaintiff’s cellular telephone with an artificial or
19 prerecorded voice utilizing an ATDS as proscribed under 47 U.S.C. § 227(b)
20 (1)(A).

21 24. Plaintiff had not provided his cellular telephone number to Defendant.
22 Plaintiff was not a customer of Defendant. Plaintiff had no “established
23 business relationship” with Defendant, as defined by 47 U.S.C. § 227 (a)(2).

24 25. These telephone calls made by Defendant or their agents were in violation of
25 47 U.S.C. § 227(b)(1).

26 **STANDING**

27 26. Standing is proper under Article III of the Constitution of the United States
28 of America because Plaintiff’s claims state:

- 1 a. a valid injury in fact;
- 2 b. which is traceable to the conduct of Defendant;
- 3 c. and is likely to be redressed by a favorable judicial decision.

4 27. See, *Spokeo, Inc. v. Robins*, 578 U.S. ____ (2016) at 6, and *Lujan v.*
5 *Defenders of Wildlife*, 504 U.S. 555 at 560.

6 28. In order to meet the standard laid out in *Spokeo* and *Lujan*, Plaintiff must
7 clearly allege facts demonstrating all three prongs above.

8
9 **a. The “Injury in Fact” Prong**

10 29. Plaintiff’s injury in fact must be both “concrete” and “particularized” in
11 order to satisfy the requirements of Article III of the Constitution, as laid out
12 in *Spokeo (Id.)*.

13 30. For an injury to be “concrete” it must be a *de facto* injury, meaning that it
14 actually exists. In the present case, Plaintiff was called on his cellular phone
15 by Defendant utilizing an autodialer. Such calls are a nuisance, an invasion
16 of privacy, and an expense to Plaintiff. *Soppet v. Enhanced Recovery Co.,*
17 *LLC*, 679 F.3d 637, 638 (7th Cir. 2012). All three of these injuries are
18 concrete and *de facto*.

19 31. For an injury to be “particularized” means that the injury must “affect the
20 plaintiff in a personal and individual way.” *Spokeo, Inc. v. Robins*, 578 U.S.
21 ____ (2016) at 7. In the instant case, it was plaintiff’s phone that was called
22 and it was plaintiff himself who answered the calls. It was plaintiff’s
23 personal privacy and peace that was invaded by Defendant’s persistent phone
24 calls using an ATDS. Finally, plaintiff alone is responsible to pay the bill on
25 his cellular phone. All of these injuries are particularized and specific to
26 plaintiff, and will be the same injuries suffered by each member of the
27 putative class.

28 **b. The “Traceable to the Conduct of Defendant” Prong**

1 32. The second prong required to establish standing at the pleadings phase is
2 that Plaintiff must allege facts to show that his injury is traceable to the
3 conduct of Defendant(s).

4 33. In the instant case, this prong is met simply by the fact that the calls to
5 plaintiff's cellular phone were placed either, by Defendant directly, or by
6 Defendant' agent at the direction of Defendant.

7
8 **c. The "Injury is Likely to be Redressed by a Favorable Judicial
9 Opinion" Prong**

10 34. The third prong to establish standing at the pleadings phase requires Plaintiff
11 to allege facts to show that the injury is likely to be redressed by a favorable
12 judicial opinion.

13 35. In the present case, Plaintiff's Prayer for Relief includes a request for
14 damages for each call made by Defendant, as authorized by statute in 47
15 U.S.C. § 227. The statutory damages were set by Congress and specifically
16 redress the financial damages suffered by Plaintiff and the members of the
17 putative class.

18 36. Furthermore, Plaintiff's Prayer for Relief requests injunctive relief to
19 restrain Defendant from the alleged abusive practices in the future. The
20 award of monetary damages and the order for injunctive relief redress the
21 injuries of the past, and prevent further injury in the future.

22 37. Because all standing requirements of Article III of the U.S. Constitution
23 have been met, as laid out in *Spokeo, Inc. v. Robins*, 578 U.S. ____ (2016),
24 Plaintiff has standing to sue Defendant on the stated claims.

25 **CLASS ACTION ALLEGATIONS**

26 38. Plaintiff brings this action on behalf of himself and on behalf of all others
27 similarly situated ("the Class").

28 39. Plaintiff represents, and is a member of, the Class, consisting of:

1 a. All persons within the United States who had or have a number assigned
2 to a cellular telephone service, who received at least one call using an
3 ATDS and/or an artificial prerecorded voice from Direct Merchants
4 Funding, LLC d.b.a. Flash Advance, or their agents, calling on behalf of
5 Direct Merchants Funding, LLC d.b.a. Flash Advance, between the date
6 of filing this action and the four years preceding, where such calls were
7 placed for marketing purposes, to non-customers of Direct Merchants
8 Funding, LLC d.b.a. Flash Advance, at the time of the calls.

9 40. Defendant and their employees or agents are excluded from the Class.
10 Plaintiff does not know the number of members in the Class, but believes
11 the Class members number in the thousands, if not more. Thus, this matter
12 should be certified as a Class action to assist in the expeditious litigation of
13 this matter.

14 41. Plaintiff and members of the Class were harmed by the acts of Defendant in
15 at least the following ways: Defendant illegally contacted Plaintiff and the
16 Class members via their cellular telephones thereby causing Plaintiff and the
17 Class members to incur certain cellular telephone charges or reduce cellular
18 telephone time for which Plaintiff and the Class members previously paid,
19 by having to retrieve or administer messages left by Defendant or their
20 agents, during those illegal calls, and invading the privacy of said Plaintiff
21 and the Class members. Plaintiff and the Class members were damaged
22 thereby.

23 42. This suit seeks only damages and injunctive relief for recovery of economic
24 injury on behalf of the Class and it expressly is not intended to request any
25 recovery for personal injury and claims related thereto. Plaintiff reserves the
26 right to expand the Class definition to seek recovery on behalf of additional
27 persons as warranted as facts are learned in further investigation and
28 discovery.





- 1 43. The joinder of the Class members is impractical and the disposition of their
2 claims in the Class action will provide substantial benefits both to the parties
3 and to the Court. The Class can be identified through Defendant’s records
4 and/or Defendant’ agent’s records.
- 5 44. There is a well-defined community of interest in the questions of law and
6 fact involved affecting the parties to be represented. The questions of law
7 and fact to the Class predominate over questions which may affect
8 individual Class members, including the following:
- 9 i. Whether, within the four years prior to the filing of the
10 Complaint, Defendant made any call(s) (other than a call made
11 for emergency purposes or made with the prior express consent
12 of the called party) to the Class members using any ATDS or an
13 artificial or prerecorded voice to any telephone number
14 assigned to a cellular telephone service;
 - 15 ii. Whether Defendant called non-customers of Defendant for
16 marketing purposes;
 - 17 iii. Whether Plaintiff and the Class members were damaged
18 thereby, and the extent of damages for such violation(s); and
 - 19 iv. Whether Defendant should be enjoined from engaging in such
20 conduct in the future.
- 21 45. As a person who received calls from Defendant in which Defendant used an
22 ATDS or an artificial or prerecorded voice, without Plaintiff’s prior express
23 consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff
24 will fairly and adequately represent and protect the interests of the Class in
25 that Plaintiff has no interests antagonistic to any member of the Class.
- 26 46. Plaintiff and the members of the Class have all suffered irreparable harm as
27 a result of the Defendant’s unlawful and wrongful conduct. Absent a class
28 action, the Class will continue to face the potential for irreparable harm. In
addition, these violations of law will be allowed to proceed without remedy

1 and Defendant will likely continue such illegal conduct. The size of Class
2 member's individual claims causes, few, if any, Class members to be able to
3 afford to seek legal redress for the wrongs complained of herein.

4 47. Plaintiff has retained counsel experienced in handling class action claims
5 and claims involving violations of the Telephone Consumer Protection Act.

6 48. A class action is a superior method for the fair and efficient adjudication of
7 this controversy. Class-wide damages are essential to induce Defendant to
8 comply with federal and California law. The interest of Class members in
9 individually controlling the prosecution of separate claims against
10 Defendant is small because the maximum statutory damages in an individual
11 action for violation of privacy are minimal. Management of these claims is
12 likely to present significantly fewer difficulties than those that would be
13 presented in numerous individual claims.

14 49. Defendant has acted on grounds generally applicable to the Class, thereby
15 making appropriate final injunctive relief and corresponding declaratory
16 relief with respect to the Class as a whole.

17 **FIRST CAUSE OF ACTION:**
18 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER**
19 **PROTECTION ACT 47 U.S.C. § 227 ET SEQ.**

20 50. Plaintiff incorporates by reference all of the above paragraphs of this
21 Complaint as though fully stated herein.

22 51. The foregoing acts and omissions of Defendant constitute numerous and
23 multiple negligent violations of the TCPA, including but not limited to each
24 and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

25 52. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq.,
26 Plaintiff and the Class are entitled to an award of \$500.00 in statutory
27 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)
28 (B).

1 53. Plaintiff and the Class are also entitled to and seek injunctive relief
2 prohibiting such conduct in the future.

3
4 **SECOND CAUSE OF ACTION:**
5 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE**
6 **CONSUMER PROTECTION ACT 47 U.S.C. § 227 ET SEQ.**

7 54. Plaintiff incorporates by reference all of the above paragraphs of this
8 Complaint as though fully stated herein.

9 55. The foregoing acts and omissions of Defendant constitute numerous and
10 multiple knowing and/or willful violations of the TCPA, including but not
11 limited to each and every one of the above-cited provisions of 47 U.S.C. §
12 227 et seq.

13 56. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. §
14 227 et seq., Plaintiff and each of the Class are entitled to treble damages, as
15 provided by statute, up to \$1,500.00, for each and every violation, pursuant
16 to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

17 57. Plaintiff and the Class are also entitled to and seek injunctive relief
18 prohibiting such conduct in the future.

19 **PRAYER FOR RELIEF**

20 58. Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the
21 Class members the following relief against Defendant:

22 **FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF**
23 **THE TCPA, 47 U.S.C. § 227 ET SEQ.**

24 59. As a result of Defendant' negligent violations of 47 U.S.C. § 227(b)(1),
25 Plaintiff seeks for himself and each Class member \$500.00 in statutory
26 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)
27 (B).
28

1 60. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
2 conduct in the future.

3 61. Any other relief the Court may deem just and proper.

4 **SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL**
5 **VIOLATION**
6 **OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

7 62. As a result of Defendant' willful and/or knowing violations of 47 U.S.C. §
8 227(b)(1), Plaintiff seeks for himself and each Class member treble
9 damages, as provided by statute, up to \$1,500.00 for each and every
10 violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)
11 (C).

12 63. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
13 conduct in the future.

14 64. Any other relief the Court may deem just and proper.

15
16 **TRIAL BY JURY**

17 65. Pursuant to the seventh amendment to the Constitution of the United States
18 of America, Plaintiff is entitled to, and demands, a trial by jury.
19

20
21
22 Date: April 24, 2017

HYDE & SWIGART

23
24 By: s/Kevin Lemieux, Esq.
25 Kevin Lemieux
26 HYDE AND SWIGART, APC
27 *Attorneys for Plaintiff*
28



1 **Other Attorneys of Record, besides caption page:**

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Christopher Melingtonis, Individually and on behalf of all others similarly situated

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Kevin Lemieux, Esq., Hyde & Swigart 619-233-7770 2221Camino Del Rio S., Ste. 101, San Diego, CA 92108

DEFENDANTS

Direct Merchants Funding, LLC d/b/a Flash Advance

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 47 U.S.C. § 227 et seq. ("TCPA") Brief description of cause: Defendant violated Telephone Consumer Protection Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/24/2017 SIGNATURE OF ATTORNEY OF RECORD s/ Kevin Lemieux

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Direct Merchants Funding Sued Over Intrusive Robocalls](#)
