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15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 KERRY O'SHEA, on behalf of himself,
18 and all others similarly situated,

19 Plaintiff,

20 v.

21 AMERICAN SOLAR SOLUTION, INC.,
22 a California corporation,

23 Defendant.

24 Case No.: '14CV0894 L RBB

25 CLASS ACTION

26 **COMPLAINT FOR DAMAGES
27 AND INJUNCTIVE RELIEF
28 PURSUANT TO THE
TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C.
§§ 227 *et seq.***

DEMAND FOR JURY TRIAL

1 **INTRODUCTION**

2 1. Kerry O’Shea (“Plaintiff”) brings this Class Action Complaint for
3 damages, injunctive relief, and any other available legal or equitable remedies,
4 resulting from the illegal actions of American Solar Solutions, Inc. (“Defendant”),
5 in negligently, and/or willfully contacting Plaintiff through telephone calls on
6 Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection
7 Act, 47 U.S.C. §§ 227 *et seq.*, (“TCPA”), thereby invading Plaintiff’s privacy.
8 Plaintiff alleges as follows upon personal knowledge as to his own acts and
9 experiences, and, as to all other matters, upon information and belief, including
10 investigation conducted by his attorneys.

11 **JURISDICTION AND VENUE**

12 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff
13 seeks up to \$1,500 in damages for each call in violation of the TCPA, which, when
14 aggregated among a proposed class number in the tens of thousands, exceeds the
15 \$5,000,000 threshold for federal court jurisdiction. Further, Plaintiff alleges a
16 national class, which will result in at least one class member belonging to different
17 states than that of Defendant, providing jurisdiction under 28 U.S.C. §
18 1332(d)(2)(A). Therefore, both elements of diversity jurisdiction under the Class
19 Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

20 3. This Court has federal question subject matter jurisdiction under 28
21 U.S.C. § 1331, as the action arises under the TCPA, a federal statute.

22 4. Venue is proper in the United States District Court for the Southern
23 District of California pursuant to 28 U.S.C. §§ 1391(b) and 1441(a) because
24 Defendant, at all times herein mentioned, was doing business in the County of San
25 Diego, State of California. Specifically, Defendant maintains an office location at
26 7676 Hazard Center Drive, San Diego California 92108.

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1 **PARTIES**

2 5. Plaintiff Kerry O’Shea is, and at all times mentioned herein was, a
3 resident of the State of California. He is, and at all times mentioned herein was a
4 “person” as defined by 47 U.S.C. § 153 (32).

5 6. Defendant American Solar Solution, Inc. (hereinafter “American
6 Solar Solution”) is a California corporation that maintains its principal place of
7 business at 14701 Albers Street, Sherman Oaks, California 91511.

8 7. American Solar Solution also maintains locations in North Hollywood
9 at 6400 Laurel Canyon Boulevard #400, North Hollywood, California 91606, and
10 San Diego at 7676 Hazard Center Drive, San Diego California 92108.

11 8. American Solar Solution is a leading installer of residential and
12 commercial solar electric systems in California.

13 9. In January 2014, American Solar Solution announced a record setting
14 year, seeing installations up by 400%. See
15 <http://www.prweb.com/releases/2014/01/prweb11480848.htm>. On information and
16 belief, American Solar Solution actively conducted and continues to conduct a
17 telemarketing campaign for the purpose of selling solar electric systems.

18 10. Plaintiff alleges that at all times relevant herein Defendant conducted
19 business in the state of California and in the county of San Diego, and within this
20 judicial district by offering solar electric products and services to California
21 residents through a telemarketing campaign.

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1 **THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**
2 **(TCPA), 47 U.S.C. §§ 227 et seq.**

3 11. In 1991, Congress enacted the Telephone Consumer Protection Act,
4 47 U.S.C. § 227 (TCPA),¹ in response to a growing number of consumer
5 complaints regarding certain telemarketing practices.

6 12. The TCPA regulates, among other things, the use of automated
7 telephone equipment, or “autodialers.” Specifically, the plain language of section
8 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless
9 number in the absence of an emergency or the prior express consent of the called
10 party.²

11 13. According to findings by the Federal Communication Commission
12 (“FCC”), the agency Congress vested with authority to issue regulations
13 implementing the TCPA, such calls are prohibited because, as Congress found,
14 automated or prerecorded telephone calls are a greater nuisance and invasion of
15 privacy than live solicitation calls, and such calls can be costly and inconvenient.
16 The FCC also recognized that wireless customers are charged for incoming calls
17 whether they pay in advance or after the minutes are used.³

18 **FACTUAL ALLEGATIONS**

19 14. Commencing no later than December of 2013, through the present,
20 Plaintiff O’Shea received a number of unsolicited phone calls to his wireless
21 phone, for which Plaintiff provided no consent to call. These calls were received
22 approximately weekly and on some occasions up to three calls in a single day.

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24 ¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat.
25 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of
26 the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq.*

27 ² 47 U.S.C. § 227(b)(1)(A)(iii).

28 ³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of*
1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

1 15. During the phone calls to Plaintiff's cellular telephone, there would be
2 a short delay before Plaintiff would be connected to a live representative. Once
3 connected with a live representative of Defendant, Defendant would offer
4 Defendant's solar energy products.

5 16. Also, during the same phone calls, Plaintiff would instruct Defendant
6 to stop calling, ask to be placed on the internal "Do Not Call List" and would
7 further advise that his cellular telephone number was on the Federal Do Not Call
8 Registry. Despite Plaintiff's effects to cease Defendant's calls, Plaintiff continued
9 and continues to receive unsolicited phone calls from Defendant.

10 17. These unsolicited phone calls placed to Plaintiff's wireless telephone
11 were placed via an "automatic telephone dialing system," ("ATDS") as defined by
12 47 U.S.C. § 227 (a)(1) and by using "an artificial or prerecorded voice" system as
13 prohibited by 47 U.S.C. § 227 (b)(1)(A), which had the capacity to produce or
14 store numbers randomly or sequentially, and to dial such numbers, to place
15 telephone calls to Plaintiff's cellular telephone.

16 18. The telephone number that Defendant, or its agents, called was
17 assigned to a cellular telephone service for which Plaintiff incurred a charge for
18 incoming calls pursuant to 47 U.S.C. § 227 (b)(1).

19 19. These telephone calls constitute calls that were not for emergency
20 purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

21 20. Plaintiff did not provide Defendant or its agents prior express consent
22 to receive unsolicited phone calls pursuant to 47 U.S.C. § 227 (b)(1)(A).

23 21. These telephone calls by Defendant or its agents therefore violated 47
24 U.S.C. § 227(b)(1).

25 22. Under the TCPA and pursuant to the FCC's January 2008 Declaratory
26 Ruling, the burden is on Defendant to demonstrate that Plaintiff provided express
27 consent within the meaning of the statute.

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1 **CLASS ACTION ALLEGATIONS**

2 23. Plaintiff brings this action on behalf of himself and on behalf of and
3 all others similarly situated (“the Class”).

4 24. Plaintiff represents, and is a member of the Class, consisting of all
5 persons within the United States who received any unsolicited telephone calls from
6 Defendant or its agents on their paging service, cellular phone service, mobile
7 radio service, radio common carrier service, or other service for which they were
8 charged for the call, through the use of any automatic telephone dialing system or
9 artificial or pre-recorded voice system as set forth in 47 U.S.C. § 227(b)(1)(A)(3)
10 or artificial or prerecorded voice, which telephone calls by Defendant or its agents
11 were not made for emergency purposes or with the recipients’ prior express
12 consent, within four years prior to the filing of this Complaint.

13 25. Defendant and its employees or agents are excluded from the Class.
14 Plaintiff does not know the number of members in the Class, but believes the Class
15 members number in the hundreds of thousands, if not more. Thus, this matter
16 should be certified as a Class action to assist in the expeditious litigation of this
17 matter.

18 26. Plaintiff and members of the Class were harmed by the acts of
19 Defendant in at least the following ways: Defendant, either directly or through its
20 agents, illegally contacted Plaintiff and the Class members via their cellular
21 telephones by using unsolicited telephone calls, thereby causing Plaintiff and the
22 Class members to incur certain cellular telephone charges or reduce cellular
23 telephone time for which Plaintiff and the Class members previously paid, and
24 invading the privacy of said Plaintiff and the Class members. Plaintiff and the
25 Class members were damaged thereby.

26 27. This suit seeks only damages and injunctive relief for recovery of
27 economic injury on behalf of the Class and it expressly is not intended to request
28 any recovery for personal injury and claims related thereto. Plaintiff reserves the

1 right to expand the Class definition to seek recovery on behalf of additional
2 persons as warranted as facts are learned in further investigation and discovery.

3 28. The joinder of the Class members is impractical and the disposition of
4 their claims in the Class action will provide substantial benefits both to the parties
5 and to the Court. The Class can be identified through Defendant's records or
6 Defendant's agents' records.

7 29. There is a well-defined community of interest in the questions of law
8 and fact involved affecting the parties to be represented. The questions of law and
9 fact to the Class predominate over questions which may affect individual Class
10 members, including the following:

- 11 a. Whether, within the four years prior to the filing of this Complaint,
12 Defendant or its agents placed telephone calls without the recipients'
13 prior express consent (other than a telephone call made for
14 emergency purposes or made with the prior express consent of the
15 called party) to a Class member using any automatic telephone
16 dialing system or an artificial or pre-recorded voice system, to any
17 telephone number assigned to a cellular telephone service;
- 18 b. Whether Plaintiff and the Class members were damaged thereby,
19 and the extent of damages for such violation; and
- 20 c. Whether Defendant and its agents should be enjoined from engaging
21 in such conduct in the future.

22 30. As a person that received at least one unsolicited telephone call to his
23 cell phone without Plaintiff's prior express consent, Plaintiff is asserting claims that
24 are typical of the Class. Plaintiff will fairly and adequately represent and protect
25 the interests of the Class in that Plaintiff has no interest antagonistic to any
26 member of the Class.

27 31. Plaintiff and the members of the Class have all suffered irreparable
28 harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class

1 action, the Class will continue to face the potential for irreparable harm. In
2 addition, these violations of law will be allowed to proceed without remedy and
3 Defendant will likely continue such illegal conduct. Because of the size of the
4 individual Class member's claims, few, if any, Class members could afford to
5 individually seek legal redress for the wrongs complained of herein.

6 32. Plaintiff has retained counsel experienced in handling class action
7 claims and claims involving violations of the Telephone Consumer Protection Act.

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

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

18 **FIRST CAUSE OF ACTION**

19 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**

20 **47 U.S.C. §§ 227 ET SEQ.**

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

23 36. Each such telephone class was made using equipment that, upon
24 information and belief, had the capacity to store or produce telephone numbers to
25 be called, using a random or sequential number generator, and to dial such
26 numbers. By using such equipment, Defendant was able to effectively make
27 thousands of phone calls simultaneously to lists of thousands of wireless phone
28 numbers of consumers without human intervention. These telephone calls were

1 made without the prior express consent of the Plaintiff and other members of the
2 Class to receive such telephone calls.

3 37. The foregoing acts and omissions of Defendant and its agents
4 constitute numerous and multiple negligent violations of the TCPA, including but
5 not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227
6 *et seq.*

7 38. As a result of Defendant's, and Defendant's agents', negligent
8 violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and the Class are entitled to an
9 award of \$500.00 in statutory damages, for each and every violation, pursuant to
10 47 U.S.C. § 227(b)(3)(B).

11 39. Plaintiff and the Class are also entitled to and seek injunctive relief
12 prohibiting such conduct in the future.

13 **SECOND CAUSE OF ACTION**
14 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**
15 **TELEPHONE CONSUMER PROTECTION ACT**
16 **47 U.S.C. §§ 227 ET SEQ.**

17 40. Plaintiff incorporates by reference the above paragraphs 1 through 34
18 inclusive, of this Complaint as though fully stated herein.

19 41. Each such telephone class was made using equipment that, upon
20 information and belief, had the capacity to store or produce telephone numbers to
21 be called, using a random or sequential number generator, and to dial such
22 numbers. By using such equipment, Defendant was able to effectively make
23 thousands of phone calls simultaneously to lists of thousands of wireless phone
24 numbers of consumers without human intervention. These telephone calls were
25 made without the prior express consent of the Plaintiff and other members of the
26 Class to receive such telephone calls.

27 42. The foregoing acts and omissions of Defendant and its agents
28 constitute numerous and multiple knowing and/or willful violations of the TCPA,

1 including but not limited to each and every one of the above-cited provisions of 47
2 U.S.C. §§ 227 *et seq.*

3 43. As a result of Defendants' knowing and/or willful violations of 47
4 U.S.C. § 227 *et seq.*, Plaintiff and the Class are entitled to treble damages, as
5 provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47
6 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

7 44. Plaintiff and the Class are also entitled to and seek injunctive relief
8 prohibiting such conduct in the future.

9 **PRAYER FOR RELIEF**

10 **Wherefore**, Plaintiff respectfully requests the Court to grant Plaintiff and the Class
11 members the following relief against Defendant:

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

14 45. As a result of Defendant's, and Defendant's agents', negligent
15 violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class
16 member \$500.00 in statutory damages, for each and every violation, pursuant to 47
17 U.S.C. § 227(b)(3)(B).

18 46. Pursuant to 47 U.S.C. § 227(b)(3)(A), Plaintiff seeks injunctive relief
19 prohibiting such conduct in the future.

20 47. Any other relief the Court may deem just and proper.

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

23 48. As a result of Defendant's, and Defendant's agents', willful and/or
24 knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each
25 Class member treble damages, as provided by statute, up to \$1,500.00 for each and
26 every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. §
27 227(b)(3)(C).

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