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14
15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 18 CLINTON ROONEY, 19 20 Plaintiff, 21 V. 22 RITE AID CORPORATION, 23 Defendant. 24 25	26 Case No: <u>'14CV1249 JAH NLS</u> 27 28 <u>CLASS ACTION</u> COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF PURSUANT TO THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227 ET SEQ. JURY TRIAL DEMANDED
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INTRODUCTION

1. Clinton Rooney (“Plaintiff”), individually, and on behalf of all others similarly situated, brings this Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Rite Aid Corporation (“Rite Aid” or “Defendant”) in negligently and/or intentionally contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.
2. The TCPA was designed to prevent calls like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).
3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them, and made specific findings that “[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.” TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that: [b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion. *Id.* at § 12; *see also Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL 3292838, at* 4 (N.D. Ill. Aug. 10, 2012) (citing Congressional findings 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, Mims,*
4 132 S. Ct. at 744.

5 **JURISDICTION AND VENUE**

6 5. This Court has federal question jurisdiction because this case arises out of
7 violation of federal law. 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC,*
8 132 S. Ct. 740 (2012).

9 6. Venue is proper in the United States District Court for the Southern District of
10 California pursuant to 18 U.S.C. § 1391(b)(2) because the harm to Plaintiff
11 occurred in this judicial district, as Plaintiff received the text message(s) at
12 issue while in the County of San Diego, and Defendant is subject to personal
13 jurisdiction in the County of San Diego, State of California because it
14 conducts business here.

15 **PARTIES**

16 7. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47
17 U.S.C. § 153 (10).

18 8. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and
19 at all times mentioned herein was, a corporation whose primary corporate
20 address is in the State of Delaware. Defendant is, and at all times mentioned
21 herein was, a Delaware corporation and is a “person,” as defined by 47 U.S.C.
22 § 153 (10).

23 9. Defendant provides retail services to hundreds of thousands of consumers.
24 Plaintiff alleges that at all times relevant herein Defendant conducted business
25 in the State of California and in the County of San Diego, and within this
26 judicial district.

27 **FACTUAL ALLEGATIONS**

28 10. Plaintiff is, and at all times mentioned herein was, a “person” as that term is
used throughout 47 U.S.C. § 227 et seq.

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1 11. Defendant is, and at all times mentioned herein was, a Delaware corporation
2 and a “person,” as that term is used throughout 47 U.S.C. § 227 et seq.

3 12. At all times relevant Defendant conducted business in the State of California
4 and in the County of San Diego, within this judicial district.

5 13. At no time did Plaintiff provide Plaintiff’s cellular phone number to
6 Defendant through any medium.

7 14. On or about February 24, 2013, at approximately 9:26 A.M. (PST),
8 Defendant, Rite Aid, sent an unsolicited impersonal and form SPAM text
9 message to Plaintiff. This text message read:

10 “Rite Aid Rx Alerts: to subscribe reply YES. Max 30mgs/mo.
11 www.riteaid.com/contact_us/ for info. Txt HELP for Help,
12 STOP to stop. Msg&Data rates may apply. [hereinafter
13 “SPAM”].

14 15. Plaintiff was unaware that Rite Aid would send him the unsolicited SPAM
15 text message described in paragraph 14.

16 16. Through this conduct, Defendant contacted Plaintiff on Plaintiff’s cellular
17 telephone regarding an unsolicited service via an “automatic telephone dialing
18 system,” (“ATDS”) as defined by 47 U.S.C. § 227(a)(1)(A) and prohibited by
19 47 U.S.C. § 227(b)(1)(A)(iii).

20 17. This ATDS has the capacity to store or produce telephone numbers to be
21 called, using a random or sequential number generator.

22 18. The telephone number Defendant called was assigned to a cellular telephone
23 service for which Plaintiff incurs a charge for incoming calls pursuant to 47
24 U.S.C. § 227(b)(1)(A)(iii).

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

27 20. Plaintiff did not provide Defendant or its agent prior express consent to
28 receive calls from Rite Aid, including unsolicited calls, to his cellular
telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).

1 21. The telephone call by Defendant, or its agent, described in Paragraph 14 of
2 this Complaint, violated 47 U.S.C. § 227(b)(1)(A)(iii).

3 22. On February 26, 2013, at 9:06 A.M., Plaintiff requested that Rite Aid cease
4 sending Plaintiff SPAM text messages, by replying to the above SPAM text,
5 and sending the word “STOP.”

6 23. On February 26, 2013, also at 9:06 A.M., Rite Aid sent Plaintiff the following
7 unsolicited and impersonal form text message:

8 “You are unsubscribed from RiteAid Prescription alerts. Visit
9 www.riteaid.com/contact_us to rejoin.”

10 24. Through this conduct, Defendant contacted Plaintiff on Plaintiff’s cellular
11 telephone regarding an unsolicited service via an “automatic telephone dialing
12 system,” (“ATDS”) as defined by 47 U.S.C. § 227(a)(1)(A) and prohibited by
13 47 U.S.C. § 227(b)(1)(A)(iii).

14 25. This ATDS has the capacity to store or produce telephone numbers to be
15 called, using a random or sequential number generator.

16 26. The telephone number Defendant called was assigned to a cellular telephone
17 service for which Plaintiff incurs a charge for incoming calls pursuant to 47
18 U.S.C. § 227(b)(1)(A)(iii).

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

21 28. On February 28, 2013, at 9:52 A.M., (despite Plaintiff expressly requesting
22 such SPAM text messages stop) Rite Aid *again* sent Plaintiff an unsolicited
23 and impersonal form SPAM text message. Like the first SPAM text message,
24 this second SPAM text message read:

25 “Rite Aid Rx Alerts: to subscribe reply YES. Max 30mgs/mo.
26 www.riteaid.com/contact_us/ for info. Txt HELP for Help,
27 STOP to stop. Msg&Data rates may apply.”
28

1 29. Plaintiff was unaware that Rite Aid would send him the unsolicited SPAM
2 text message described in paragraph 28.

3 30. Through this conduct, Defendant contacted Plaintiff on Plaintiff's cellular
4 telephone regarding an unsolicited service via an "automatic telephone dialing
5 system" ("ATDS") as defined by 47 U.S.C. §227(a)(1)(A) and prohibited by
6 47 U.S.C. § 227(b)(1)(A)(iii).

7 31. This ATDS has the capacity to store or produce telephone numbers to be
8 called, using a random or sequential number generator.

9 32. The telephone number Defendant called was assigned to a cellular telephone
10 service for which Plaintiff incurs a charge for incoming calls pursuant to 47
11 U.S.C. § 227(b)(1)(A)(iii).

12 33. These telephone calls constituted calls that were not for emergency purposes
13 as defined by 47 U.S.C. § 227(b)(1)(A)(i).

14 34. On December 11, 2013, at 11:28 A.M., Plaintiff replied to this second SPAM
15 text message as follows: "Stop."

16 35. Despite informing Defendant to stop sending SPAM text messages, Plaintiff
17 could not get the unsolicited SPAM text messages to stop and again on
18 December 11, 2013, at 11:35 A.M., Rite Aid *again* sent Plaintiff an
19 unsolicited and impersonal form text, which read as follows:

20 "You are unsubscribed from RiteAid Prescription alerts. Visit
21 www.riteaid.com/contact_us to rejoin."

22 36. Through this conduct, Defendant contacted Plaintiff on Plaintiff's cellular
23 telephone regarding an unsolicited service via an "automatic telephone dialing
24 system," ("ATDS") as defined by 47 U.S.C. § 227(a)(1)(A) and prohibited by
25 47 U.S.C. § 227(b)(1)(A)(iii).

26 37. This ATDS has the capacity to store or produce telephone numbers to be
27 called, using a random or sequential number generator.
28

1 38. The telephone number Defendant called was assigned to a cellular telephone
2 service for which Plaintiff incurs a charge for incoming calls pursuant to 47
3 U.S.C. § 227(b)(1)(A)(iii).

4 39. These telephone calls constituted calls that were not for emergency purposes
5 as defined by 47 U.S.C. § 227(b)(1)(A)(i).

6 **CLASS ACTION ALLEGATIONS**

7 40. Plaintiff brings this action on behalf of himself and on behalf of all others
8 similarly situated (“the Class”).

9 41. Plaintiff represents, and is a member of the Class, consisting of: “all persons
10 within the United States who received a text message substantially similar or
11 identical to the text messages described above in this Complaint from
12 Defendant, which message by Defendant or its agents was not made for
13 emergency purposes, within the four years prior to the filing of this
14 Complaint.”

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

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

28 44. This suit seeks only damages and injunctive relief for recovery of economic
injury on behalf of the Class, and it expressly is not intended to request any

1 recovery for personal injury and claims related thereto. Plaintiff reserves the
2 right to modify or expand the Class definition to seek recovery on behalf of
3 additional persons as warranted as facts are learned in further investigation
4 and discovery.

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

9 46. There is a well-defined community of interest in the questions of law and fact
10 involved affecting the parties to be represented. The questions of law and fact
11 to the Class predominate over questions which may affect individual Class
12 members, including, but not limited to, the following:

13 (a) Whether, within the four years prior to the filing of this Complaint,
14 Defendant or its agents sent any unsolicited text message/s to the Class
15 (other than a message made for emergency purposes or made with the
16 prior express consent of the called party) to a Class member using any
17 automatic dialing and/or SMS texting system to any telephone number
18 assigned to a cellular phone service;

19 (b) Whether Plaintiff and the Class members were damaged thereby, and
20 the extent of damages for such violation; and

21 (c) Whether Defendant and its agents should be enjoined from engaging in
22 such conduct in the future.

23 (d) Whether Plaintiff and the Class are entitled to any other relief.

24 47. As a person who received at least one unsolicited SPAM text message without
25 Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of
26 the Class. Plaintiff will fairly and adequately represent and protect the
27 interests of the Class in that Plaintiff has no interests antagonistic to any
28 member of the Class. Plaintiff and the members of the Class have all suffered
irreparable harm. In addition, these violations of law will be allowed to

1 proceed without remedy and Defendant will likely continue such illegal
2 conduct. Because of the size of the individual Class member's claims, few, if
3 any, Class members could afford to seek legal redress for the wrongs
4 complained of herein.

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

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

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

18 **FIRST CAUSE OF ACTION**

19 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER**

20 **PROTECTION ACT 47 U.S.C. § 227 ET SEQ.**

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

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

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

1 54. 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**
7 **47 U.S.C. § 227 ET SEQ.**

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

10 56. The foregoing acts and omissions of Defendant constitute numerous and
11 multiple knowing and/or willful violations of the TCPA, including but not
12 limited to each and every one of the above-cited provisions of 47 U.S.C. §
13 227 et seq.

14 57. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. §
15 227 et seq., Plaintiff and The Class are entitled to an award of \$1,500.00 in
16 statutory damages, for each and every violation, pursuant to 47 U.S.C. §
17 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

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

20 **PRAYER FOR RELIEF**

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

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

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

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

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

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

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

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

14 65.

15 **TRIAL BY JURY**

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

19 Dated: May 20, 2014

HYDE & SWIGART

21 By: /s/ Robert L. Hyde
22 Robert L. Hyde
23 Attorneys for Plaintiff
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