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16 **UNITED STATES DISTRICT COURT**
 17 **CENTRAL DISTRICT OF CALIFORNIA**

18 **DAVE VACCARO**, individually,
 19 and on behalf of all others
 20 similarly situated

21 Plaintiff,

22 v.

23 **ALBERTSONS COMPANIES,**
 24 **INC.**, and DOES 1 through 10,
 25 inclusive

26 Defendants.

27 **Case No.:** 2:21-cv-04990

28 **COMPLAINT FOR DAMAGES
 AND INJUNCTIVE RELIEF
 PURSUANT TO THE TELEPHONE
 CONSUMER PROTECTION ACT,
 47 U.S.C. § 227, ET SEQ.**

JURY TRIAL DEMANDED

INTRODUCTION

1. DAVE VACCARO (“Plaintiff”) bring this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of ALBERTSONS COMPANIES, INC. (“Defendant”), in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq.,

1 (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon
2 personal knowledge as to himself and his own acts and experiences, and, as to all
3 other matters, upon information and belief, including investigation conducted by
4 their attorneys.

5 2. The TCPA was designed to prevent calls and messages like the ones
6 described within this complaint, and to protect the privacy of citizens like Plaintiff.
7 “Voluminous consumer complaints about abuses of telephone technology – for
8 example, computerized calls dispatched to private homes – prompted Congress to
9 pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

10 3. In enacting the TCPA, Congress intended to give consumers a choice
11 as to how creditors and telemarketers may call them, and made specific findings
12 that “[t]echnologies that might allow consumers to avoid receiving such calls are
13 not universally available, are costly, are unlikely to be enforced, or place an
14 inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this
15 end, Congress found that

16 [b]anning such automated or prerecorded telephone calls
17 to the home, except when the receiving party consents to
18 receiving the call or when such calls are necessary in an
19 emergency situation affecting the health and safety of the
20 consumer, is the only effective means of protecting
21 telephone consumers from this nuisance and privacy
invasion.

22 *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
23 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
24 purpose).

25 4. Congress also specifically found that “the evidence presented to the
26 Congress indicates that automated or prerecorded calls are a nuisance and an
27 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also,
28

1 *Mims*, 132 S. Ct. at 744.

2 5. In a recent decision, the Supreme Court interpreted the term
3 “automatic telephone dialing system” and held that “[t]o qualify as an ‘automatic
4 telephone dialing system,’ a device must have the capacity either to store a
5 telephone number using a random or sequential generator *or* to produce a telephone
6 number using a random or sequential number generator.” *Facebook, Inc. v. Duguid*,
7 141 S.Ct. 1163 (2021) (emphasis added).

8 6. In *Duguid*, the Supreme Court provided an example of such systems,
9 stating: “For instance, an autodialer might use a random number generator to
10 determine the order in which to pick phone numbers from a preproduced list. It
11 would then store those numbers to be dialed at a later time.” *Id.* at 1171-72 fn. 7.

12 7. Further, both *Duguid* and the legislative history of the TCPA are clear
13 that the original focus on prerecorded voice technology prohibition was the fact
14 that such communications involved agentless calls, not on the question of whether
15 a literal voice was used during those agentless calls. *See* Hearing Before the
16 Subcommittee on Communications of the Committee on Commerce, Science and
17 Transportation, United States Senate One Hundred Second Congress First Session
18 July 24, 1992, Testimony of Robert Bulmash and Steve Hamm at pg 11; 7 FCC
19 Rcd. 8752 (F.C.C. September 17, 1992).

20 8. The Sixth Circuit has also recognized this distinction: “Congress drew
21 an explicit distinction between ‘automated telephone calls that deliver an artificial
22 or prerecorded voice message’ on the one hand and ‘calls place by ‘live’ persons’
23 on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199*
24 *WV/KY/OH*, 708 F.3d 737,743 (6th Cir. 2013).

25 9. Similarly, the FTC has observed that “prerecorded calls are by their
26 very nature one-sided conversations, and if there is no opportunity for consumers
27 to ask questions, offers may not be sufficiently clear for consumers to make
28

1 informed choices before pressing a button or saying yes to make a purchase.” 73
2 FR 51164-01, 51167 (Aug. 29, 2008).

3 **JURISDICTION AND VENUE**

4 10. Jurisdiction is proper under *28 U.S.C. § 1332(d)(2)* because Plaintiff,
5 a resident of California, seeks relief on behalf of a Class, which will result in at
6 least one class member belonging to a different state than that of Defendant, a
7 corporation incorporated in the state of Delaware with its principal place of
8 business in the state of Idaho. Plaintiff also seeks \$1,500.00 in damages for each
9 call in violation of the TCPA, which, when aggregated among a proposed class in
10 the thousands, exceeds the \$5,000,000.00 threshold for federal court jurisdiction.
11 Therefore, both diversity jurisdiction and the damages threshold under the Class
12 Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.
13

14 11. Venue is proper in the United States District Court for the Central
15 District of California pursuant to *28 U.S.C. § 1391(b)(1)* because Defendant is
16 subject to personal jurisdiction in the County of Los Angeles, State of California.

17 **PARTIES**

18 12. Plaintiff is, and at all times mentioned herein was, a natural person
19 and citizen and resident of the State of California. Plaintiff is, and at all times
20 mentioned herein was, a “person” as defined by *47 U.S.C. § 153(39)*.

21 13. Defendant is, and at all times mentioned herein was, the second-
22 largest supermarket chain in America, and is therefore a “person” as defined by *47*
23 *U.S.C. § 153(39)*.

24 14. The above named Defendant, and its subsidiaries and agents, are
25 collectively referred to as “Defendants.” The true names and capacities of the
26 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are
27 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
28 names. Each of the Defendants designated herein as a DOE is legally responsible

1 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
2 Complaint to reflect the true names and capacities of the DOE Defendants when
3 such identities become known.

4 15. Plaintiff is informed and believes that at all relevant times, each and
5 every Defendant was acting as an agent and/or employee of each of the other
6 Defendants and was acting within the course and scope of said agency and/or
7 employment with the full knowledge and consent of each of the other Defendants.
8 Plaintiff is informed and believes that each of the acts and/or omissions complained
9 of herein was made known to, and ratified by, each of the other Defendants.

10 **FACTUAL ALLEGATIONS**

11 16. At all times relevant, Plaintiff was a citizen of the County of Los
12 Angeles, State of California. Plaintiff is, and at all times mentioned herein was, a
13 “person” as defined by 47 U.S.C. § 153(39).
14

15 17. Defendant is, and at all times mentioned herein was, one of the largest
16 supermarket chains in America, and a “person,” as defined by 47 U.S.C. § 153(39).

17 18. At all times relevant Defendant conducted business in the State of
18 California and in the County of Los Angeles, within this judicial district.

19 19. On or about November 3, 2020, Plaintiff received an unsolicited text
20 message from Defendant on his cellular telephone, number ending in -3928.

21 20. Defendant sent Plaintiff the spam advertisement and/or promotional
22 offer from a short code phone number owned or controlled by Defendant, 463-59.

23 21. The text sent by Defendant on November 3, 2020 read:

24 Pavilions: Almost there! For
25 more savings, finish quick
26 signup for just for U at
27 <https://bit.ly/34WNPJj>. Msg
28

1 & data rates apply. Reply
2 STOP to cancel.

3 22. Upon receipt of this message, Plaintiff replied “stop,” and Defendant
4 replied, “This confirms [Plaintiff has] opted out and will not receive future
5 messages on this shortcode. For help call 1-877-258-2799. Msg&Data rates may
6 apply.”

7 23. As evidenced by Defendant’s messages, Plaintiff was not interacting
8 with a live agent but rather an agentless text blast generated by a computer.

9 24. Moreover, the messages sent to Plaintiff was drafted in advance and
10 sent out automatically based on pre-programmed parameters.

11 25. The text messages sent to Plaintiff’s cellular telephone were placed
12 via Defendant’s *SMS Blasting Platform*, i.e., an “automatic telephone dialing
13 system,” (“ATDS”) as defined by 47 U.S.C. § 227(a)(1) as prohibited by 47 U.S.C.
14 § 227(b)(1)(A).

15 26. The text messages sent to Plaintiff’s cellular telephone were not sent
16 by a live agent and thus created a one-sided conversation in which Plaintiff could
17 not receive a response to his questions and/or concerns. The text messages also
18 were sent in an automated fashion as a result of computerized campaigns that were
19 pre-programmed in advance to send messages out to large groups of consumers all
20 at once, either sequentially or via algorithmic dialing, i.e. in an automated fashion
21 by a computer.

22 27. In Mirriam Webster’s Dictionary “voice” is defined as “an instrument
23 or medium of expression.” It defines “artificial” as “humanly contrived...often on
24 a natural model : MAN-MADE” and “lacking in natural or spontaneous quality.”
25

26 28. The messages sent to Plaintiff by Defendant using the SMS blasting
27 platform employed a text message as an instrument or medium of expression to
28 deliver an automatic message drafted in advance of being sent, i.e. that of an SMS

1 message, to convey a telemarketing communication to Plaintiff. The SMS blasting
2 platform is a man made humanly contrived program which allows companies to
3 blast out such messages via non-spontaneous methods, i.e. automated methods
4 similar to that of an assembly line in a factory. Such SMS blasting devices are
5 incapable of spontaneity, as they must be programmed by the operator to
6 automatically send messages out, *en masse*, pursuant to preprogrammed
7 parameters.

8 29. Accordingly, Defendant's messages utilized an "artificial voice" as
9 prohibited by 47 U.S.C. § 227(b)(1)(A).

10 30. Mirriam Webster's Dictionary, "prerecorded" is defined as "recorded
11 in advance." "Recorded" is defined as "to set down in writing." The text messages
12 sent to Plaintiff's cellular telephone via the SMS blasting platform were set down
13 in writing in advance by Defendant, whose employees wrote out the standard
14 automated messages that were to be sent to Plaintiff and other class members, and
15 by way of preprogrammed SMS blasting, entered the prerecorded message into the
16 SMS Blasting platform, and thereafter sent these messages pursuant to scheduled
17 blasts that were programmed by Defendant. Thus, Defendant employed a text
18 message as an instrument or medium of expression to deliver a prerecorded
19 message drafted in advance of being sent.

20 31. Thus, Defendant's messages utilized a "prerecorded voice" as
21 prohibited by 47 U.S.C. § 227(b)(1)(A).

22 32. The telephone number that Defendant, or their agent, messaged was
23 assigned to a cellular telephone service for which Plaintiff incurs a charge for
24 incoming calls and messages pursuant to 47 U.S.C. § 227(b)(1).

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

1 34. Plaintiff was never a customer of Defendant's and never provided his
2 cellular telephone number Defendant for any reason whatsoever. Accordingly,
3 Defendant and their agent never received Plaintiff's prior express consent to
4 receive unsolicited text messages, pursuant to 47 U.S.C. § 227(b)(1)(A).

5 35. These messages by Defendant, or its agents, violated 47 U.S.C. §
6 227(b)(1).

7 **CLASS ACTION ALLEGATIONS**

8 36. Plaintiff brings this action on behalf of himself and on behalf of and
9 all others similarly situated ("the Class").

10 37. Plaintiff represents, and is a member of, the Class, consisting of all
11 persons within the United States who received any unsolicited text messages placed
12 using an automatic telephone dialing system and/or an artificial or prerecorded
13 voice from Defendant and which text message was not made for emergency
14 purposes or with the recipient's prior express consent within the four years prior to
15 the filing of this Complaint through the date of class certification.

16 38. Defendant and their employees or agents are excluded from the Class.
17 Plaintiff does not know the number of members in the Class but believes the Class
18 members number in the hundreds of thousands, if not more. Thus, this matter
19 should be certified as a Class action to assist in the expeditious litigation of this
20 matter.
21

22 39. Plaintiff and members of the Class were harmed by the acts of
23 Defendant in at least the following ways: Defendant, either directly or through their
24 agents, illegally contacted Plaintiff and the Class members via their cellular
25 telephones by using marketing and text messages, thereby causing Plaintiff and the
26 Class members to incur certain cellular telephone charges or reduce cellular
27 telephone time for which Plaintiff and the Class members previously paid, and
28

1 invading the privacy of said Plaintiff and the Class members. Plaintiff and the Class
2 members were damaged thereby.

3 40. This suit seeks only damages and injunctive relief for recovery of
4 economic injury on behalf of the Class, and it expressly is not intended to request
5 any recovery for personal injury and claims related thereto. Plaintiff reserves the
6 right to expand the Class definition to seek recovery on behalf of additional persons
7 as warranted as facts are learned in further investigation and discovery.

8 41. The joinder of the Class members is impractical and the disposition of
9 their claims in the Class action will provide substantial benefits both to the parties
10 and to the court. The Class can be identified through Defendant's records or
11 Defendant's agent's records.

12 42. There is a well-defined community of interest in the questions of law
13 and fact involved affecting the parties to be represented. The questions of law and
14 fact to the Class predominate over questions which may affect individual Class
15 members, including the following:
16

- 17 a) Whether, within the four years prior to the filing of this Complaint
18 through the date of class certification, Defendant or their agents sent
19 any text messages (other than a message made for emergency
20 purposes or made with the prior express consent of the called party)
21 to a Class member using any automatic telephone dialing system or an
22 artificial or prerecorded voice to any telephone number assigned to a
23 cellular phone service;
- 24 b) Whether Plaintiff and the Class members were damaged thereby, and
25 the extent of damages for such violation; and
- 26 c) Whether Defendant and their agents should be enjoined from
27 engaging in such conduct in the future.
28

1 43. As a person that received at least one marketing and text message
2 without Plaintiff's prior express consent, Plaintiff is asserting claims that are
3 typical of the Class. Plaintiff will fairly and adequately represent and protect the
4 interests of the Class in that Plaintiff has no interests antagonistic to any member
5 of the Class.

6 44. Plaintiff and the members of the Class have all suffered irreparable
7 harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class
8 action, the Class will continue to face the potential for irreparable harm. In
9 addition, these violations of law will be allowed to proceed without remedy and
10 Defendant will likely continue such illegal conduct. Because of the size of the
11 individual Class member's claims, few, if any, Class members could afford to seek
12 legal redress for the wrongs complained of herein.

13 45. Plaintiff has retained counsel experienced in handling class action
14 claims and claims involving violations of the Telephone Consumer Protection Act.

15 46. A class action is a superior method for the fair and efficient
16 adjudication of this controversy. Class-wide damages are essential to induce
17 Defendant to comply with federal and California law. The interest of Class
18 members in individually controlling the prosecution of separate claims against
19 Defendant are small because the maximum statutory damages in an individual
20 action for violation of privacy are minimal. Management of these claims is likely
21 to present significantly fewer difficulties than those presented in many class claims.

22 47. Defendant has acted on grounds generally applicable to the Class,
23 thereby making appropriate final injunctive relief and corresponding declaratory
24 relief with respect to the Class as a whole.
25

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1 **FIRST CAUSE OF ACTION**
2 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**
3 **47 U.S.C. § 227 ET SEQ.**

4 48. Plaintiff incorporates by reference all of the above paragraphs of this
5 Complaint as though fully stated herein.

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

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

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

14 **SECOND CAUSE OF ACTION**
15 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**
16 **TELEPHONE CONSUMER PROTECTION ACT**
17 **47 U.S.C. § 227 ET SEQ.**

18 52. Plaintiff incorporates by reference all of the above paragraphs of this
19 Complaint as though fully stated herein.

20 53. The foregoing acts and omissions of Defendant constitute numerous
21 and multiple knowing and/or willful violations of the TCPA, including but not
22 limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et
23 seq.

24 54. As a result of Defendant's knowing and/or willful violations of 47
25 U.S.C. § 227 et seq, Plaintiff and The Class are entitled to an award of \$1,500.00
26 in statutory damages, for each and every violation, pursuant to 47 U.S.C. §
27 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
28

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

3 **PRAYER FOR RELIEF**

4 Wherefore, Plaintiff respectfully requests the Court grant Plaintiff, and The
5 Class members the following relief against Defendant:

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

- 8 • As a result of Defendant’s negligent violations of 47 U.S.C. § 227(b)(1),
9 Plaintiff seeks for himself and each Class member \$500.00 in statutory
10 damages, for each and every violation, pursuant to 47 U.S.C. §
11 227(b)(3)(B).
- 12 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
13 conduct in the future.
- 14 • Any other relief the Court may deem just and proper.

15 **SECOND CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF**
16 **THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- 17 • As a result of Defendant’s negligent violations of 47 U.S.C. § 227(b)(1),
18 Plaintiff seeks for himself and each Class member \$1500.00 in statutory
19 damages, for each and every violation, pursuant to 47 U.S.C. §
20 227(b)(3)(B).
- 21 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
22 conduct in the future.
- 23 • Any other relief the Court may deem just and proper.

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26 ///
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TRIAL BY JURY

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

Dated: June 18, 2021

Respectfully submitted,

THE LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: /s/ Todd M. Friedman
TODD M. FRIEDMAN, ESQ.
ATTORNEY FOR PLAINTIFF

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Albertsons Hit with Class Action Over Alleged Marketing Texts](#)
