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11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**

13	TERRY FABRICANT, individually)	Case No. 2:19-cv-04659-AB-AS
14	and on behalf of all others similarly)	
15	situated,	)	<u>CLASS ACTION</u>
16	Plaintiff,	)	SECOND AMENDED COMPLAINT
17		)	FOR VIOLATIONS OF:
18	vs.	)	COMPLAINT FOR DAMAGES
19		)	AND INJUNCTIVE RELIEF
20	AMERISAVE MORTGAGE	)	PURSUANT TO THE TELEPHONE
21	CORPORATION, and DOES 1 through	)	CONSUMER PROTECTION ACT,
22	10, inclusive, and each of them,	)	47 U.S.C. § 227, ET SEQ.
23	Defendant.	)	JURY TRIAL DEMANDED
24		)	<u>DEMAND FOR JURY TRIAL</u>
25)	
26)	
27)	
28)	

1 Id. at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
2 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
3 purpose).

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

8 5. As Judge Easterbrook of the Seventh Circuit recently explained in a
9 TCPA case regarding calls to a non-debtor similar to this one:
10

11 The Telephone Consumer Protection Act ... is well known for its
12 provisions limiting junk-fax transmissions. A less-litigated part of the
13 Act curtails the use of automated dialers and prerecorded messages to
14 cell phones, whose subscribers often are billed by the minute as soon
15 as the call is answered—and routing a call to voicemail counts as
16 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.

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

18 6. The Ninth Circuit recently affirmed certification of a TCPA class case
19 remarkably similar to this one in *Meyer v. Portfolio Recovery Associates, LLC*, __
20 F.3d__, 2012 WL 4840814 (9th Cir. Oct. 12, 2012).

21 **JURISDICTION AND VENUE**

22 7. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff,
23 a resident of California, seeks relief on behalf of a Class, which will result in at
24 least one class member belonging to a different state than that of Defendants,
25 individuals residing and doing business in California. Plaintiff also seeks
26 \$1,500.00 in damages for each call in violation of the TCPA, which, when
27 aggregated among a proposed class in the thousands, exceeds the \$5,000,000.00
28

1 threshold for federal court jurisdiction. Therefore, both diversity jurisdiction and
2 the damages threshold under the Class Action Fairness Act of 2005 (“CAFA”) are
3 present, and this Court has jurisdiction.

4 8. Venue is proper in the United States District Court for the Central
5 District of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because
6 Defendants are subject to personal jurisdiction in the County of Los Angeles, State
7 of California.

8 **PARTIES**

9 9. Plaintiff is, and at all times mentioned herein was, a citizen and
10 resident of the State of California. Plaintiff is, and at all times mentioned herein
11 was, a “person” as defined by 47 U.S.C. § 153 (39).

12 10. Plaintiff is informed and believes, and thereon alleges, that
13 Defendants are, and at all times mentioned herein were, individuals who reside and
14 do business within the State of California. Defendants, are and at all times
15 mentioned herein were “persons,” as defined by 47 U.S.C. § 153 (39). Defendants
16 provide mortgage lending services. Plaintiff alleges that at all times relevant herein
17 Defendants conducted business in the State of California and in the County of San
18 Luis Obispo, and within this judicial district.

19 **FACTUAL ALLEGATIONS**

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

23 12. Defendants are, and at all times mentioned herein were, “persons,” as
24 defined by 47 U.S.C. § 153 (39).

25 13. At all times relevant Defendants conducted business in the State of
26 California and in the County of Los Angeles, within this judicial district.
27
28

1 14. On or about April of 2019, Plaintiff received a text message from
2 Defendants on his cellular telephone, number ending in -7069.

3 15. During this time, Defendants began to use Plaintiff's cellular
4 telephone for the purpose of sending Plaintiff spam advertisements and/or
5 promotional offers, via text messages, including a text message sent to and received
6 by Plaintiff on or about April 15, 2019.

7 16. On April 15, 2019, Plaintiff received a text message from Defendants
8 that read:

9
10 From AmeriSave Mortgage Corporation: Be sure to see our
11 low rates first, Luke: amsv.co/13210588. Text or call us!
12 AmeriSave Mortgage Corporation NMLSID #1168. Text
13 STOP to end

14 17. Following receipt of the text message from Defendant, Plaintiff
15 received a subsequent phone call from Defendant soliciting the same services.

16 18. These text messages and calls placed to Plaintiff's cellular telephone
17 were placed via an "automatic telephone dialing system," ("ATDS") as defined by
18 47 U.S.C. § 227 (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A).

19 19. Plaintiff's phone number was on the National Do Not Call List at the
20 time of these calls/texts. Defendant did not have an established business
21 relationship with Plaintiff at the time of these calls/texts.

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

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

27 22. Plaintiff was never a customer of Defendants and never provided his
28 cellular telephone number Defendants for any reason whatsoever. Accordingly,

1 Defendants and their agents never received Plaintiffs prior express consent to
2 receive unsolicited text messages, pursuant to 47 U.S.C. § 227 (b)(1)(A), nor an
3 established business relationship pursuant to 47 U.S.C. § 227 (c)(1).

4 23. Under the TCPA, texts messages are considered “calls” because they
5 are “a form of communication used primarily between telephones.” *Satterfield v.*
6 *Simon & Schuster, Inc.*, 569 F.3d 946, 953–54 (9th Cir. 2009).

7 24. These telephone calls by Defendant, or its agents, violated 47 U.S.C.
8 § 227(b)(1) and § 227(c).

9 **CLASS ACTION ALLEGATIONS**

10 25. Plaintiff brings this action on behalf of himself and on behalf of and
11 all others similarly situated (“the Class”).

12 26. Plaintiff represents, and is a member of, the ATDS Class, consisting
13 of all persons within the United States who received any unsolicited text messages
14 and/or phone call from Defendants and/or their agents, which call and/or text
15 message was not made for emergency purposes or with the recipient’s prior express
16 consent within the four years prior to the filing of the Complaint.

17 27. Plaintiff additionally represents and is a member of the DNC Class,
18 consisting of all persons within the United States registered on the National Do-
19 Not-Call Registry for at least 30 days, who had not granted Defendants prior
20 express consent nor had a prior established business relationship, who received
21 more than one call made by or on behalf of Defendants that promoted Defendants’
22 products or services, within any twelve-month period, within four years prior to the
23 filing of the Complaint.

24 28. The ATDS Class and DNC Class shall collectively be referred to as
25 the “Classes.”

26 29. Defendants, including their employees and agents, are excluded from
27 The Classes. Plaintiff does not know the number of members in The Classes, but
28

1 believes the Classes members number in the thousands, if not more. Thus, this
2 matter should be certified as a Class Action to assist in the expeditious litigation of
3 the matter.

4 30. The Classes are so numerous that the individual joinder of all of its
5 members is impractical. While the exact number and identities of The Classes
6 members are unknown to Plaintiff at this time and can only be ascertained through
7 appropriate discovery, Plaintiff is informed and believes and thereon alleges that
8 The Classes includes thousands of members. Plaintiff alleges that The Classes
9 members may be ascertained by the records maintained by Defendants.

10 31. Plaintiff and members of The ATDS Class were harmed by the acts of
11 Defendants in at least the following ways: Defendants illegally contacted Plaintiff
12 and ATDS Class members via their cellular telephones thereby causing Plaintiff
13 and ATDS Class members to incur certain charges or reduced telephone time for
14 which Plaintiff and ATDS Class members had previously paid by having to retrieve
15 or administer messages left by Defendants during those illegal calls, and invading
16 the privacy of said Plaintiff and ATDS Class members.

17 32. Common questions of fact and law exist as to all members of The
18 ATDS Class which predominate over any questions affecting only individual
19 members of The ATDS Class. These common legal and factual questions, which
20 do not vary between ATDS Class members, and which may be determined without
21 reference to the individual circumstances of any ATDS Class members, include,
22 but are not limited to, the following:

- 23
24 a. Whether, within the four years prior to the filing of this
25 Complaint, Defendants made any telemarketing/solicitation
26 call (other than a call made for emergency purposes or made
27 with the prior express consent of the called party) to a ATDS
28 Class member using any automatic telephone dialing system or

1 any artificial or prerecorded voice to any telephone number
2 assigned to a cellular telephone service;

3 b. Whether Plaintiff and the ATDS Class members were damaged
4 thereby, and the extent of damages for such violation; and

5 c. Whether Defendants should be enjoined from engaging in such
6 conduct in the future.

7 33. As a person that received numerous telemarketing/solicitation calls
8 from Defendants using an automatic telephone dialing system or an artificial or
9 prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting
10 claims that are typical of The ATDS Class.

11 34. Plaintiff and members of The DNC Class were harmed by the acts of
12 Defendants in at least the following ways: Defendants illegally contacted Plaintiff
13 and DNC Class members via their telephones for solicitation purposes, thereby
14 invading the privacy of said Plaintiff and the DNC Class members whose telephone
15 numbers were on the National Do-Not-Call Registry. Plaintiff and the DNC Class
16 members were damaged thereby.

17 35. Common questions of fact and law exist as to all members of The
18 DNC Class which predominate over any questions affecting only individual
19 members of The DNC Class. These common legal and factual questions, which do
20 not vary between DNC Class members, and which may be determined without
21 reference to the individual circumstances of any DNC Class members, include, but
22 are not limited to, the following:

23
24 a. Whether, within the four years prior to the filing of this
25 Complaint, Defendants or its agents placed more than one
26 solicitation call to the members of the DNC Class whose
27 telephone numbers were on the National Do-Not-Call Registry
28 and who had not granted prior express consent to Defendants

1 and did not have an established business relationship with
2 Defendants;

3 b. Whether Defendants obtained prior express written consent to
4 place solicitation calls to Plaintiff or the DNC Class members'
5 telephones;

6 c. Whether Plaintiff and the DNC Class member were damaged
7 thereby, and the extent of damages for such violation; and

8 d. Whether Defendants should be enjoined from engaging in such
9 conduct in the future.

10 36. As a person that received numerous solicitation calls from Defendants
11 within a 12-month period, who had not granted Defendants prior express consent
12 and did not have an established business relationship with Defendants, Plaintiff is
13 asserting claims that are typical of the DNC Class.

14 37. Plaintiff will fairly and adequately protect the interests of the members
15 of The Classes. Plaintiff has retained attorneys experienced in the prosecution of
16 class actions.

17 38. A class action is superior to other available methods of fair and
18 efficient adjudication of this controversy, since individual litigation of the claims
19 of all Classes members is impracticable. Even if every Classes member could
20 afford individual litigation, the court system could not. It would be unduly
21 burdensome to the courts in which individual litigation of numerous issues would
22 proceed. Individualized litigation would also present the potential for varying,
23 inconsistent, or contradictory judgments and would magnify the delay and expense
24 to all parties and to the court system resulting from multiple trials of the same
25 complex factual issues. By contrast, the conduct of this action as a class action
26 presents fewer management difficulties, conserves the resources of the parties and
27 of the court system, and protects the rights of each Classes member.
28

1 39. The prosecution of separate actions by individual Classes members
2 would create a risk of adjudications with respect to them that would, as a practical
3 matter, be dispositive of the interests of the other Classes members not parties to
4 such adjudications or that would substantially impair or impede the ability of such
5 non-party Class members to protect their interests.

6 40. Defendants have acted or refused to act in respects generally
7 applicable to The Classes, thereby making appropriate final and injunctive relief
8 with regard to the members of the Classes as a whole.

9 **FIRST CAUSE OF ACTION**

10 **Negligent Violations of the Telephone Consumer Protection Act**

11 **47 U.S.C. §227(b).**

12 **On Behalf of the ATDS Class**

13 41. Plaintiff repeats and incorporates by reference into this cause of action
14 the allegations set forth in the paragraphs above.

15 42. The foregoing acts and omissions of Defendants constitute numerous
16 and multiple negligent violations of the TCPA, including but not limited to each
17 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular
18 *47 U.S.C. § 227 (b)(1)(A)*.

19 43. As a result of Defendants’ negligent violations of *47 U.S.C. § 227(b)*,
20 Plaintiff and the Class Members are entitled an award of \$500.00 in statutory
21 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

22 44. Plaintiff and the ATDS Class members are also entitled to and seek
23 injunctive relief prohibiting such conduct in the future.

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SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection

Act

47 U.S.C. §227(b)

On Behalf of the ATDS Class

45. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth in the paragraphs above.

46. The foregoing acts and omissions of Defendants constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular *47 U.S.C. § 227 (b)(1)(A)*.

47. As a result of Defendants’ knowing and/or willful violations of *47 U.S.C. § 227(b)*, Plaintiff and the ATDS Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)* and *47 U.S.C. § 227(b)(3)(C)*.

48. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

On Behalf of the DNC Class

49. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth in the paragraphs above.

50. The foregoing acts and omissions of Defendants constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*, and in particular *47 U.S.C. § 227 (c)(5)*.

1 51. As a result of Defendants’ negligent violations of *47 U.S.C. § 227(c)*,
2 Plaintiff and the DNC Class Members are entitled an award of \$500.00 in statutory
3 damages, for each and every violation, pursuant to *47 U.S.C. § 227(c)(5)(B)*.

4 52. Plaintiff and the DNC Class members are also entitled to and seek
5 injunctive relief prohibiting such conduct in the future.

6 **FOURTH CAUSE OF ACTION**

7 **Knowing and/or Willful Violations of the Telephone Consumer Protection**
8 **Act**

9 **47 U.S.C. §227 et seq.**

10 **On Behalf of the DNC Class**

11 53. Plaintiff repeats and incorporates by reference into this cause of action
12 the allegations set forth in the paragraphs above.

13 54. The foregoing acts and omissions of Defendants constitute numerous
14 and multiple knowing and/or willful violations of the TCPA, including but not
15 limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*,
16 in particular *47 U.S.C. § 227 (c)(5)*.

17 55. As a result of Defendants’ knowing and/or willful violations of *47*
18 *U.S.C. § 227(c)*, Plaintiff and the DNC Class members are entitled an award of
19 \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C.*
20 *§ 227(c)(5)*.

21 56. Plaintiff and the DNC Class members are also entitled to and seek
22 injunctive relief prohibiting such conduct in the future.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff requests judgment against Defendant for the following:
25
26
27
28

FIRST CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendants’ negligent violations of *47 U.S.C. §227(b)(1)*, Plaintiff and the ATDS Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to *47 U.S.C. 227(b)(3)(B)*.
- Any and all other relief that the Court deems just and proper.

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendants’ willful and/or knowing violations of *47 U.S.C. §227(b)(1)*, Plaintiff and the ATDS Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to *47 U.S.C. §227(b)(3)(B)* and *47 U.S.C. §227(b)(3)(C)*.
- Any and all other relief that the Court deems just and proper.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

- As a result of Defendants’ negligent violations of *47 U.S.C. §227(c)(5)*, Plaintiff and the DNC Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to *47 U.S.C. 227(c)(5)*.
- Any and all other relief that the Court deems just and proper.

FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection

Act

47 U.S.C. §227(c)

- As a result of Defendants’ willful and/or knowing violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(c)(5).
- Any and all other relief that the Court deems just and proper.

JURY DEMAND

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: February 24, 2020

Respectfully submitted,

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

By: /s/ Adrian R. Bacon
 Todd M. Friedman
 Adrian R. Bacon
 Law Offices of Todd M. Friedman
 Attorney for Plaintiff

CERTIFICATE OF SERVICE

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Filed electronically on this 24th Day of February, 2020, with:

United States District Court CM/ECF system

Notification sent electronically on this 24th Day of February, 2020, to:

Honorable Judge André Birotte Jr.
United States District Court
Central District of California

And all counsel of record as recorded on the Electronic Service List.

s/Adrian R. Bacon
Adrian R. Bacon
Attorney for Plaintiff