

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO 1:18-cv-24407-UU

MARCELO PENA,
individually and on behalf of all others
similarly situated,

CLASS ACTION

Plaintiff,

JURY TRIAL DEMANDED

v.

JOHN C. HEATH, ATTORNEY AT LAW,
PLLC D/B/A LEXINGTON LAW FIRM.,

Defendant,

_____ /

[PROPOSED] FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs, Marcelo Pena (“Pena”), Frank Eisenband (“Eisenband”), James Lebowitz (“Lebowitz”), Joshua Elser (“Elser”), Craig Cunningham (“Cunningham”) (hereinafter collectively referred to as “Plaintiffs”) bring this action against defendant, John C. Heath, Attorney At Law, PLLC d/b/a Lexington Law Firm (“Defendant”), to secure redress for violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227.

NATURE OF THE ACTION

1. This is a putative class action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (the “TCPA”).
2. Defendant sells credit repair and monitoring services to consumers. To promote its services, Defendant engages in unsolicited marketing, harming thousands of consumers in the process.
3. This case arises from Defendant’s unauthorized text messages to cellular subscribers who never provided Defendant with prior express consent, as well as cellular subscribers who expressly requested not to receive Defendant’s text messages. Defendant also harassed consumers nationwide with automated and prerecorded telemarketing calls.

4. Defendant has been sued before for violating the TCPA and was aware of the restrictions imposed upon it by the TCPA.

5. Through this action, Plaintiffs seek injunctive relief to halt Defendant's illegal conduct, which has resulted in the invasion of privacy, harassment, aggravation, and disruption of the daily life of thousands of individuals. Plaintiffs also seek statutory damages on behalf of themselves and members of the class, and any other available legal or equitable remedies.

JURISDICTION AND VENUE

6. Jurisdiction is proper under 28 U.S.C. § 1331 as Plaintiffs allege violations of a federal statute. Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2) because Plaintiffs allege a national class, which will result in at least one class member belonging to a different state than that of Defendant. Plaintiffs seek up to \$1,500.00 (one-thousand-five-hundred dollars) in damages for each call, in violation of the TCPA, which, when aggregated among a proposed class numbering in the tens of thousands, or more, exceeds the \$5,000,000.00 (five-million dollars) threshold for federal court jurisdiction under the Class Action Fairness Act ("CAFA"). Therefore, both the elements of diversity jurisdiction and CAFA jurisdiction are present.

7. Venue is proper in the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1391(b) and (c) because Defendant is deemed to reside in any judicial district in which it is subject to the court's personal jurisdiction, and because Defendant provides and markets its services within this district thereby establishing sufficient contacts to subject it to personal jurisdiction. Further, Defendant's tortious conduct against Pena occurred within the State of Florida and, on information and belief, Defendant has sent the same text messages complained of by Pena to other individuals within this judicial district, such that some of Defendant's acts in making such calls have occurred within this district, subjecting Defendant to jurisdiction in the State of Florida.

PARTIES

8. Plaintiff Pena is a natural person who, at all times relevant to this action, was a resident of Miami-Dade County, Florida.

9. Plaintiff Eisenband is a natural person who, at all times relevant to this action, was a resident of New Jersey.

10. Plaintiff Lebowitz is a natural person who, at all times relevant to this action, was a resident of the City of Brighton, County of Suffolk, Commonwealth of Massachusetts.

11. Plaintiff Elser is a natural person who, at all times relevant to this action, was a resident of Florida.

12. Plaintiff Cunningham is a natural person who, at all times relevant to this action, was a resident of Tennessee.

13. Defendant is a Utah professional limited liability company whose principal office is located at 360 North Cutler Drive, Salt Lake City, Utah 84054. Defendant directs, markets, and provides its business activities throughout the State of Florida.

THE TCPA

14. The TCPA prohibits: (1) any person from calling a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A).

15. The TCPA defines an "automatic telephone dialing system" ("ATDS") as "equipment that has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

16. In an action under the TCPA, a plaintiff must only show that the defendant "called a number assigned to a cellular telephone service using an automatic dialing system or prerecorded

voice.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).

17. The Federal Communications Commission (“FCC”) is empowered to issue rules and regulations implementing the TCPA. According to the FCC’s findings, calls in violation of the TCPA are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

18. In 2012, the FCC issued an order tightening the restrictions for automated telemarketing calls, requiring “prior express *written* consent” for such calls to wireless numbers. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012) (emphasis supplied).

19. To obtain express written consent for telemarketing calls, a defendant must establish that it secured the plaintiff’s signature in a form that gives the plaintiff a “‘clear and conspicuous disclosure’ of the consequences of providing the requested consent....and having received this information, agrees unambiguously to receive such calls at a telephone number the [plaintiff] designates.” *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33, 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

20. The TCPA regulations promulgated by the FCC define “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.” 47 C.F.R. § 64.1200(f)(12). In determining whether a

communication constitutes telemarketing, a court must evaluate the ultimate purpose of the communication. *See Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).

21. “Neither the TCPA nor its implementing regulations ‘require an explicit mention of a good, product, or service’ where the implication of an improper purpose is ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012)).

22. “‘Telemarketing’ occurs when the context of a call indicates that it was initiated and transmitted to a person for the purpose of promoting property, goods, or services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R. § 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at *49).

23. The FCC has explained that calls motivated in part by the intent to sell property, goods, or services are considered telemarketing under the TCPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients are encouraged to purchase, rent, or invest in property, goods, or services during the call *or in the future*. *Id.*

24. In other words, offers “that are part of an overall marketing campaign to sell property, goods, or services constitute” telemarketing under the TCPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 136 (2003).

25. If a call is not deemed telemarketing, a defendant must nevertheless demonstrate that it obtained the plaintiff’s prior express consent. *See In the Matter of Rules and Regulaions Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7991-92 (2015) (requiring express consent “for non-telemarketing and non-advertising calls”).

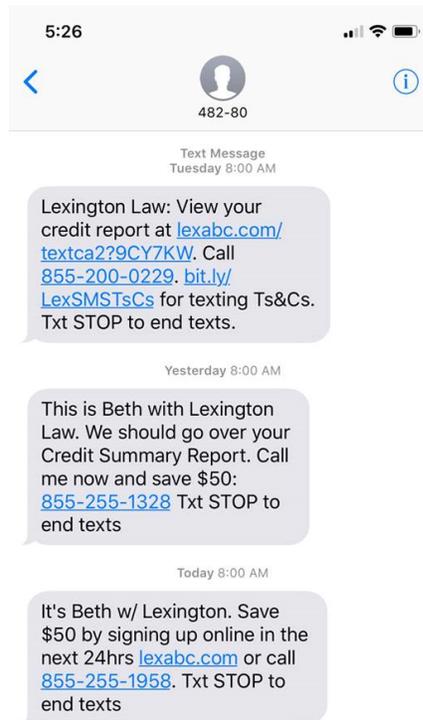
26. Further, the FCC has issued rulings and clarified that consumers are entitled to the same consent-based protections for text messages as they are for calls to wireless numbers. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) (The FCC has determined that a text message falls within the meaning of “to make any call” in 47 U.S.C. § 227(b)(1)(A)); *Toney v. Quality Res., Inc.*, 2014 WL 6757978, at *3 (N.D. Ill. Dec. 1, 2014) (Defendant bears the burden of showing that it obtained Plaintiff’s prior express consent before sending him the *text message*). (emphasis added).

27. As recently held by the United States Court of Appeals for the Ninth Circuit: “Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA ‘need not allege any *additional* harm beyond the one Congress has identified.” *Van Patten v. Vertical Fitness Grp.*, No. 14-55980, 2017 U.S. App. LEXIS 1591, at *12 (9th Cir. May 4, 2016) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (emphasis original)).

FACTUAL ALLEGATIONS

MARCELO PENA

28. On or about October 16, 2018, October 17, 2018, and October 18, 2018, Defendant sent the following telemarketing text messages to Pena’s cellular telephone number ending in 9289 (the “9289 Number”):



29. Prior to receiving the text messages at issue, Pena communicated to Defendant specifically not to send him any text messages or phone calls via recorded telephone call to Defendant.

30. Despite Pena's communication to opt-out, Defendant ignored Pena's opt-out demand and sent Pena another automated message on August 10, 2018.

31. Defendant's text messages were transmitted to Pena's cellular telephone, and within the time frame relevant to this action.

32. Defendant's text messages constitute telemarketing because they encouraged the future purchase or investment in property, goods, or services, i.e., selling Pena credit monitoring and repair services.

33. The information contained in the text message advertises Defendant's specials for saving \$50.00 which Defendant sends to promote its business.

34. Pena received the subject texts within this judicial district and, therefore, Defendant's violation of the TCPA occurred within this district. Upon information and belief, Defendant caused other text messages to be sent to individuals residing within this judicial district.

35. At no point in time did Pena provide Defendant with his express written consent to be contacted using an ATDS.

36. Pena is the subscriber and sole user of the 9289 Number and is financially responsible for phone service to the 9289 Number.

37. The impersonal and generic nature of Defendant's text message demonstrates that Defendant utilized an ATDS in transmitting the messages. *See Jenkins v. LL Atlanta, LLC*, No. 1:14-cv-2791-WSD, 2016 U.S. Dist. LEXIS 30051, at *11 (N.D. Ga. Mar. 9, 2016) ("These assertions, combined with the generic, impersonal nature of the text message advertisements and the use of a short code, support an inference that the text messages were sent using an ATDS.") (citing *Legg v. Voice Media Grp., Inc.*, 20 F. Supp. 3d 1370, 1354 (S.D. Fla. 2014) (plaintiff alleged facts sufficient to infer text messages were sent using ATDS; use of a short code and volume of mass messaging alleged would be impractical without use of an ATDS); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (finding it "plausible" that defendants used an ATDS where messages were advertisements written in an impersonal manner and sent from short code); *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1130; *Robbins v. Coca-Cola Co.*, No. 13-CV-132-IEG NLS, 2013 U.S. Dist. LEXIS 72725, 2013 WL 2252646, at *3 (S.D. Cal. May 22, 2013) (observing that mass messaging would be impracticable without use of an ATDS)).

38. The text messages originated from telephone number 482-80, a number which upon information and belief is owned and operated by Defendant.

39. The number used by Defendant (482-80) is known as a "short code," a standard 5-digit phone number that enabled Defendant to send SMS text messages *en masse*, while deceiving recipients

into believing that the message was personalized and sent from a telephone number operated by an individual.

40. Short codes work as follows: Private companies known as SMS gateway providers have contractual arrangements with mobile carriers to transmit two-way SMS traffic. These SMS gateway providers send and receive SMS traffic to and from the mobile phone networks' SMS centers, which are responsible for relaying those messages to the intended mobile phone. This allows for the transmission of a large number of SMS messages to and from a short code.

41. Specifically, upon information and belief, Defendant utilized a combination of hardware and software systems to send the text messages at issue in this case. The systems utilized by Defendant have the capacity to store telephone numbers using a random or sequential generator, and to dial such numbers without human intervention.

42. Defendant's unsolicited text messages caused Pena actual harm, including invasion of his privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion. Defendant's text messages also inconvenienced Pena and caused disruption to his daily life.

FRANK EISENBAND

43. On April 13, 2017, Defendant placed an automated call to Eisenband's cellular telephone ending in 4149 (the "4149 Number") from the following spoofed¹ telephone number: 707-475-0008.

44. Eisenband received the call while at work. He was disrupted by the call and had to stop what he was doing to answer his phone.

45. Upon answering the call, Eisenband heard a brief pause followed by a prerecorded

¹ "Spoofing occurs when a caller deliberately falsifies the information transmitted to your caller ID display to disguise their identity." <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id>.

message. The prerecorded message stated that Eisenband qualified for credit repair relief and discussed the availability of Defendant's credit repair services.

46. Frustrated by this unsolicited call, and determined to learn the identity of the company that was harassing him during business hours, Eisenband pressed the number 1, as instructed by the message, to speak with a live representative.

47. Eisenband was then transferred to an agent of Defendant, who stated that she was calling from "Lexington Law." Eisenband then heard someone say something to the agent, and the agent abruptly terminated the call.

48. Defendant's call constitutes telemarketing as Defendant was attempting to market its credit repair services.

49. Eisenband has never had any type of relationship with Defendant.

50. Eisenband has never provided his telephone number to Defendant.

51. At no point in time did Eisenband provide Defendant with his express written consent or express consent to be contacted using an ATOS or a prerecorded message.

52. Eisenband is the subscriber and sole user of the 4149 Number, and is financially responsible for phone service to the 4149 Number.

53. Other recipients of Defendant's unsolicited calls, aggravated by the nuisance, disruption, and invasion of their privacy, have voiced their complaints in various on-line forums. The following is a small sample of the complaints posted by consumers:

- Calls me several times a day, never leaves a message. Also texts me ... Says her name is Beth and she is from the Lexington Law Firm.

- I get calls from this number 2-3 times a day for the past few weeks. I tell them I'm not interested. I have good credit and don't need their services. I didn't sign up for credit help. Harassing me isn't going to get me to comply. Caller: Lexington Law Firm

- Some guy named Dan call me from 18002921512 Stating!!!! that he works for Lexington Law BS .. '!!!! HOW DID THIS A **HOLE GET MY NUMBER Caller: Lexington Law

- Stop harassing me. Caller: Lexington Law

- stop with the harassing calls at all times and days - i don't want your service. Caller: lexington law

- This company robo-calls me EVERY SINGLE DAY. I've filed complaints with the Do Not Call Registry every day for a week. I've called the 800 number they give you to supposedly stop their calls. Nothing works. I'm ill and these calls disturb my rest every day. How do we make it STOP?????

- Like others here, I get a prerecorded message stating she is Kathy Reeves a paralegal from Lexington Law Firm wanting to fix our bad credit in response to our online request. We also don't have bad credit/debt and have not submitted any requests!

- they keep calling, I called the 800-422-4895 to remove my number from their call list, and they say that my number isn't on their call list to start with, but they keep calling me! Caller: Lexington Law Firm

- Lexington law firm. What? Who? I don't know them or want to. Caller: Lexington law firm

- Entered my information on Lending Tree.com then decided I din't need a loan and the agent was insisting on transferring my call to Lexington Law I was firm when I repeatedly said no I don't want Lexington Law's help or Lending Tree's and as soon as I hung up I received a call from Beth at Lexington Law after that I've had at least 3 calls a day from Lexington Law, I refuse to answer because I had already stated I did not want their help I keep getting emails and I have replied to stop contacting me ...

- Called at 8am on a SUNDAY MORNING. Unbelievable. I was planning on using this company, but not after being solicited! ! ! ! Definite clue that this is more of a company who is worried about SALES and their representatives most definitely are making commissions or get some type of incentive for supposedly 'helping' their customers - or in my case, potential customer. Caller: Lexington Law

- I've received two calls and a text message from "Lexington Law Firm" who apparently work on debt consolidation. They're looking for someone named Doris, who is most definitely not me, and as

I'm the only female in my household and they're calling my cell phone, they have the wrong number. I replied to the text "stop" to stop receiving contact from them, and told both the men on the phone calls to take me off their list. This last call, the man told me it would take up to 7 business days for me to be taken off the list. I asked if that meant I was going to have to deal with these calls for the next week. He just said that's how long it can take to be taken off their list. I then asked for the name of the company and he hung up on me. Even if they are a legit debt consolidation service and I needed that, I would find one that doesn't harass innocent people daily

- I keep getting these harassing calls from Lexington Law. All day long, never signed up for this. Please stop!!²

54. The fact that other individuals have received the same prerecorded messages as Eisenband demonstrates that Defendant has used prerecorded messages to harass thousands of individuals.

55. Further, the impersonal and generic nature of Defendant's calls and prerecorded messages demonstrates that Defendant utilized an ATDS in making the calls.

56. Upon information and belief, Defendant utilized a combination of hardware and software systems to make the calls at issue in this case. The systems utilized by Defendant have the current capacity or present ability to generate or store random or sequential numbers or to dial sequentially or randomly at the time the call is made, and to dial such numbers, *en masse*, in an automated fashion without human intervention.

57. In fact, on its website, Defendant admits that it uses "artificial or prerecorded voice" messages and "autodialer[s]" to contact consumers.³

58. Through its telemarketing calls, Defendant violated Eisenband's substantive rights under the TCPA.

59. Further, Eisenband suffered the following injuries:

² <http://800notes.com/forum/ta-7e2c47cbd3c924d/lexington-law-firm>.

³ See <https://www.lexingtonlaw.com/signup>.

- a. Invasion of his privacy;
- b. Inconvenience;
- c. Unwanted occupation of his time and mental energy;
- d. Unwanted occupation of his cellular telephone;
- e. Nuisance;
- f. Trespass on his cellular telephone; and
- g. Aggravation and annoyance.

JAMES LEBOWITZ

61. On April 27, 2017, Defendant called Lebowitz on Lebowitz's cellular telephone number ending in 7013 via an "automatic telephone dialing system" ("ATDS"), as defined by 47 U.S.C. § 227(a)(1), using an "artificial or prerecorded voice" as prohibited by 47 U.S.C. § 227(b)(1)(A).

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

63. Lebowitz is informed and believes that Defendant also has called him multiple times in the past, but always from a blocked number.

64. On the April 27, 2017 phone call, the automatic system prompted Lebowitz to press the number "1" to speak to a representative. Lebowitz pressed "1" so he could find out who was calling him.

65. On the April 27, 2017 phone call, when Lebowitz pressed "1", he was connected to a representative for an unknown company. The representative refused to provide her name or the name of the company she represented.

66. The representative from the unknown company gave Lebowitz some basic information about credit repair and then transferred Lebowitz to another person, Yvette. Yvette told Lebowitz she was a representative of Defendant and offered credit repair services to Lebowitz.

67. After the April 27, 2017 phone call, Yvette sent an email to Lebowitz offering credit repair services to Lebowitz.

68. Lebowitz does not and has never had any business or other relationship with Defendant.

69. Lebowitz is informed and believes that the purpose of Defendant's call was to solicit Lebowitz to sign up and pay for Defendant's services.

70. As a result of Defendant's actions, Lebowitz suffered an invasion of a legally protected interest in privacy, which is specifically addressed and protected by the TCPA.

71. Lebowitz was personally affected because he was frustrated and distressed that Defendant called him on his cell phone without Lebowitz's permission.

72. Defendant's calls forced Lebowitz and class members to live without the utility of their cellular phones by forcing Lebowitz and class members to silence their cellular phones and/or block incoming numbers.

73. The calls from Defendant's telephone number to Lebowitz's cellular telephone number were unsolicited by Lebowitz and without Lebowitz's permission or consent.

74. Lebowitz is informed and believes and here upon alleges, that these calls were made by Defendant or Defendant's agent, with Defendant's permission, knowledge, control and for Defendant's benefit.

75. Lebowitz never provided permission nor consent for Defendant to call Lebowitz on his cellular telephone number.

76. The telephone number Defendant called was assigned to a cellular telephone service for which Lebowitz incurs a charges for using the service pursuant to 47 U.S.C. § 227(b)(1).

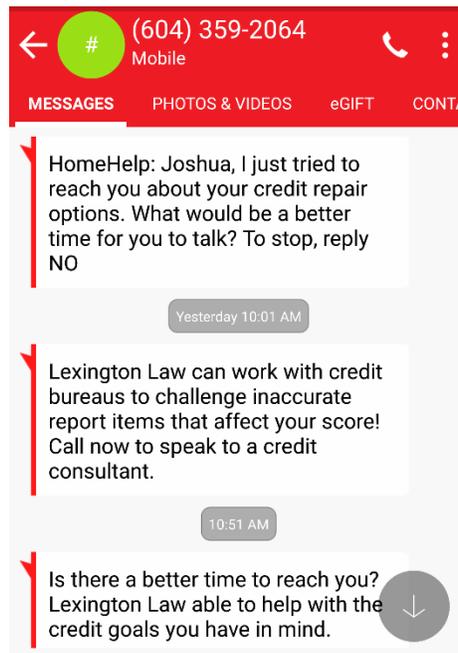
77. The telephone calls constituted a call that was not for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

78. Lebowitz did not provide Defendant or its agent(s) prior express consent to receive the calls on or about April 27, 2017 to his cellular telephone, via an ATDS or an artificial or prerecorded voice, pursuant to 47 U.S.C. § 227 (b)(1)(A).

79. The telephone calls by Defendant, or its agent(s), violated 47 U.S.C. § 227(b)(1).

JOSHUA ELSER

80. Commencing on or about June 23, 2017, Defendant embarked upon a telemarketing campaign that has consisted of almost daily automated telephone calls and text messages to Elser's cellular telephone. The following are just a few of the text messages received by Elser on his cellular telephone:



81. Elser has also received automated and prerecorded telephone calls from the same number (604-359-2064) on various occasions, including, but not limited to, June 23, 2017 and June 24, 2017. These calls and text messages are ongoing as of the date of this Complaint.

82. These text messages and calls were transmitted to Elser's cellular telephone, and within the time frame relevant to this action.

83. Defendant's calls and text messages constitute telemarketing because they encouraged

the future purchase or investment in property, goods, or services.

84. The telephone number (604-359-2064) that transmitted the telephone calls and text messages belongs to and is operated by Defendant. A call placed to that number is greeted by an automated message offering Defendant's credit repair services.

85. Elser is the sole user of the subject cellular telephone.

86. Elser received the subject texts and calls within this judicial district and, therefore, Defendant's violation of the TCPA occurred within this district. Upon information and belief, Defendant caused other calls and text messages to be sent to individuals residing within this judicial district.

87. At no point in time did Elser provide Defendant with his express written consent to be contacted using an ATDS.

88. Other recipients of Defendant's unsolicited calls, aggravated by the nuisance, disruption, and invasion of their privacy, have voiced their complaints in various on-line forums. The following is a small sample of the complaints posted by consumers:

- Calls me several times a day, never leaves a message. Also texts me... Says her name is Beth and she is from the Lexington Law Firm.
- I get calls from this number 2-3 times a day for the past few weeks. I tell them I'm not interested. I have good credit and don't need their services. I didn't sign up for credit help. Harassing me isn't going to get me to comply. Caller: Lexington Law Firm
- Some guy named Dan call me from 18002921512 Stating!!!! that he works for Lexington Law BS.. '!!!! HOW DID THIS A**HOLE GET MY NUMBER....Caller: Lexington Law
- Stop harassing me. Caller: Lexington Law
- stop with the harrassing calls at all times and days - i don't want your service. Caller: lexington law
- This company robo-calls me EVERY SINGLE DAY. I've filed complaints with the Do Not Call Registry every day for a week. I've

called the 800 number they give you to supposedly stop their calls. Nothing works. I'm ill and these calls disturb my rest every day. How do we make it STOP?????

- Like others here, I get a prerecorded message stating she is Kathy Reeves a paralegal from Lexington Law Firm wanting to fix our bad credit in response to our online request. We also don't have bad credit/debt and have not submitted any requests!
- they keep calling, I called the 800-422-4895 to remove my number from their call list, and they say that my number isn't on their call list to start with, but they keep calling me! Caller: Lexington Law Firm
- Lexington law firm. What? Who? I don't know them or want to. Caller: Lexington law firm
- Entered my information on Lending Tree.com then decided I didn't need a loan and the agent was insisting on transferring my call to Lexington Law I was firm when I repeatedly said no I don't want Lexington Law's help or Lending Tree's and as soon as I hung up I received a call from Beth at Lexington Law after that I've had at least 3 calls a day from Lexington Law, I refuse to answer because I had already stated I did not want their help I keep getting emails and I have replied to stop contacting me ...
- Called at 8am on a SUNDAY MORNING. Unbelievable. I was planning on using this company, but not after being solicited!!!! Definite clue that this is more of a company who is worried about SALES and their representatives most definitely are making commissions or get some type of incentive for supposedly 'helping' their customers - or in my case, potential customer. Caller: Lexington Law
- 've received two calls and a text message from "Lexington Law Firm" who apparently work on debt consolidation. They're looking for someone named Doris, who is most definitely not me, and as I'm the only female in my household and they're calling my cell phone, they have the wrong number. I replied to the text "stop" to stop receiving contact from them, and told both the men on the phone calls to take me off their list. This last call, the man told me it would take up to 7 business days for me to be taken off the list. I asked if that meant I was going to have to deal with these calls for the next week. He just said that's how long it can take to be taken off their list. I then asked for the name of the company and he hung up on me. Even if they are a legit debt consolidation service and I needed that, I would find one that doesn't harass innocent people daily

- I keep getting these harassing calls from Lexington Law. All day long, never signed up for this. Please stop!!⁴

89. The impersonal and generic nature of Defendant's calls and text message, demonstrates that Defendant utilized an ATDS in transmitting the message. *See Jenkins v. LL Atlanta, LLC*, No. 1:14-cv-2791-WSD, 2016 U.S. Dist. LEXIS 30051, at *11 (N.D. Ga. Mar. 9, 2016) ("These assertions, combined with the generic, impersonal nature of the text message advertisements and the use of a short code, support an inference that the text messages were sent using an ATDS.") (citing *Legg v. Voice Media Grp., Inc.*, 20 F. Supp. 3d 1370, 1354 (S.D. Fla. 2014) (plaintiff alleged facts sufficient to infer text messages were sent using ATDS; use of a short code and volume of mass messaging alleged would be impractical without use of an ATDS); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (finding it "plausible" that defendants used an ATDS where messages were advertisements written in an impersonal manner and sent from short code); *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1130; *Robbins v. Coca-Cola Co.*, No. 13-CV-132-IEG NLS, 2013 U.S. Dist. LEXIS 72725, 2013 WL 2252646, at *3 (S.D. Cal. May 22, 2013) (observing that mass messaging would be impracticable without use of an ATDS)).

90. Specifically, upon information and belief, Defendant utilized a combination of hardware and software systems to send the text message at issue in this case. The systems utilized by Defendant have the current capacity or present ability to generate or store random or sequential numbers or to dial sequentially or randomly at the time the call is made, and to dial such numbers, *en masse*, in an automated fashion without human intervention.

91. Through its telemarketing calls, Defendant violated Elser's substantive rights under the TCPA.

92. Further, Elser suffered the following concrete injuries:

⁴ <http://800notes.com/forum/ta-7e2c47cbd3c924d/lexington-law-firm>.

- a. Invasion of his privacy;
- b. Inconvenience;
- c. Unwanted occupation of his time and mental energy;
- d. Unwanted occupation of his cellular telephone;
- e. Nuisance;
- f. Trespass on his cellular telephone; and
- g. Aggravation and annoyance.

CRAIG CUNNINGHAM

93. Beginning on or around November 14, 2016, Defendant contacted Cunningham on his cellular telephone, -9191, in an effort to sell or solicit its services.

94. Defendant used an “automatic telephone dialing system,” as defined by 47 U.S.C. § 227(a)(1) to place its daily calls to Plaintiff seeking to sell or solicit its business services. At one or more instance during these calls, Defendant utilized an “artificial or prerecorded voice” as prohibited by 47 U.S.C. § 227(b)(1)(A).

95. Defendant’s calls constituted calls that were not for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A).

96. Defendant’s calls were placed to telephone number assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227(b)(1).

97. Cunningham received calls from Defendant from the phone numbers confirmed to belong to Defendant, including without limitation (716) 442-3220 and (800) 641-2930.

98. Furthermore, Defendant sent Cunningham a text message soliciting Defendant’s services from the short-code 31044 containing the following message:

Hello, this is Beth from Lexington Law. We would like to send you more information about your FREE credit consultation! Reply Y to get more information.

99. Cunningham is not a customer of Defendant's services and has never provided any personal information, including his cellular telephone number, to Defendant for any purpose whatsoever. Accordingly, Defendant never received Plaintiff's "prior express consent" to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice on his cellular telephone pursuant to 47 U.S.C. § 227(b)(1)(A).

CLASS ALLEGATIONS

PROPOSED CLASS

100. Plaintiffs bring this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of themselves and all others similarly situated.

101. Pena brings this case on behalf of a Class defined as follows:

All persons within the United States who, within the four years prior to the filing of this Complaint, were sent a text message, from Defendant or anyone on Defendant's behalf, to said person's cellular telephone number, advertising Defendant's services, without the recipients' prior express written consent.

102. Eisenband, Lebowtiz, Elser and Cunningham bring this case on behalf of a Class defined as follows:

All persons within the United States who received any telephone call from Defendant or its agent/s and/or employee/s to said person's cellular telephone made through the use of any automatic telephone dialing system or with an artificial or prerecorded voice, which call was not made for emergency purposes or with the recipient's prior express consent, within the four years prior to the filing of the Complaint.

103. Defendant and its employees or agents are excluded from the Class. Plaintiffs do not know the number of members in the Class but believes the Class members number in the several thousands, if not more.

NUMEROSITY

104. Upon information and belief, Defendant has placed automated and/or prerecorded calls to cellular telephone numbers belonging to thousands of consumers throughout the United States without their prior express consent. The members of the Class, therefore, are believed to be so numerous that joinder of all members is impracticable.

105. The exact number and identities of the Class members are unknown at this time and can only be ascertained through discovery. Identification of the Class members is a matter capable of ministerial determination from Defendant's call records.

COMMON QUESTIONS OF LAW AND FACT

106. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

- (1) Whether Defendant made non-emergency calls to Plaintiffs' and Class members' cellular telephones using an ATDS;
- (2) Whether Defendant can meet its burden of showing that it obtained prior express written consent to make such calls;
- (3) Whether Defendant's conduct was knowing and willful;
- (4) Whether Defendant is liable for damages, and the amount of such damages; and
- (5) Whether Defendant should be enjoined from such conduct in the future.

107. The common questions in this case are capable of having common answers. If Plaintiffs' claim that Defendant routinely transmits text messages to telephone numbers assigned to cellular telephone services is accurate, Plaintiffs and the Class members will have identical claims capable of being efficiently adjudicated and administered in this case.

TYPICALITY

108. Plaintiffs' claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

PROTECTING THE INTERESTS OF THE CLASS MEMBERS

109. Plaintiffs are representatives who will fully and adequately assert and protect the interests of the Class and has retained competent counsel. Accordingly, Plaintiffs are adequate representatives and will fairly and adequately protect the interests of the Class.

PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE

110. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant's wrongful conduct are too small to warrant the expense of individual lawsuits. The likelihood of individual Class members prosecuting their own separate claims is remote, and, even if every member of the Class could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases.

111. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another may not. Additionally, individual actions may be dispositive of the interests of the Class, although certain class members are not parties to such actions.

COUNT I
Violations of the TCPA, 47 U.S.C. § 227(b)
(On Behalf of Plaintiffs and the Class)

112. Plaintiffs re-allege and incorporate paragraphs 1-111 as if fully set forth herein.

113. It is a violation of the TCPA to make “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service” 47 U.S.C. § 227(b)(1)(A)(iii).

114. Defendant – or third parties directed by Defendant – used equipment having the capacity to dial numbers without human intervention to make non-emergency telephone calls to the cellular telephones of Plaintiffs and the other members of the Classes defined herein.

115. These calls were made without regard to whether or not Defendant had first obtained express permission from the called party to make such calls. In fact, Defendant did not have prior express consent to call the cell phones of Plaintiffs and the other members of the putative Class when its calls were made.

116. Defendant has, therefore, violated § 227(b)(1)(A)(iii) of the TCPA by using an automatic telephone dialing system to make non-emergency telephone calls to the cell phones of Plaintiffs and the other members of the putative Class without their prior express written consent.

117. Defendant knew that it did not have prior express consent to make these calls, and knew or should have known that it was using equipment that constituted an automatic telephone dialing system. The violations were therefore willful or knowing.

118. As a result of Defendant’s conduct and pursuant to § 227(b)(3) of the TCPA, Plaintiffs and the other members of the putative Classes were harmed and are each entitled to a minimum of \$500.00 in damages for each violation. Plaintiffs and the class are also entitled to an injunction against future calls. *Id.*

COUNT II
Knowing and/or Willful Violation of the TCPA, 47 U.S.C. § 227(b)
(On Behalf of Plaintiffs and the Class)

119. Plaintiffs re-allege and incorporate paragraphs 1-118 as if fully set forth herein.

120. At all times relevant, Defendant knew or should have known that its conduct as alleged herein violated the TCPA.

121. Defendant knew that it did not have prior express consent to make these calls and knew or should have known that its conduct was a violation of the TCPA.

122. Because Defendant knew or should have known that Plaintiffs and Class Members had not given prior express consent to receive its autodialed calls, the Court should treble the amount of statutory damages available to Plaintiff and the other members of the putative Class pursuant to § 227(b)(3) of the TCPA.

123. As a result of Defendant's violations, Plaintiffs and the Class Members are entitled to 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).

WHEREFORE, Plaintiffs on behalf of themselves and the other members of the Class, pray for the following relief:

- a. A declaration that Defendant's practices described herein violate the Telephone Consumer Protection Act, 47 U.S.C. § 227;
- b. An injunction prohibiting Defendant from using an automatic telephone dialing system to call and text message telephone numbers assigned to cellular telephones without the prior express permission of the called party;
- c. An award of actual and statutory damages; and
- d. Such further and other relief the Court deems reasonable and just.

JURY DEMAND

Plaintiffs and Class Members hereby demand a trial by jury.

Date: March 29, 2019

Respectfully submitted,

HIRALDO P.A.

/s/ Manuel S. Hiraldo

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 29, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Manuel S. Hiraldo

Florida Bar No. 030380
Counsel for Plaintiff