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

JAMAL JOHNSON, individually
and on behalf of all others similarly
situated,

Plaintiff,

vs.

MOSS BROS. AUTO GROUP,
INC., California Corporation,

Defendant.

CASE NO.: 5:19-cv-02456-FMO-SP

CLASS ACTION

**SECOND AMENDED CLASS
ACTION COMPLAINT FOR
VIOLATIONS OF THE
TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. §§
227, ET SEQ. (TCPA)**

JURY TRIAL DEMANDED

13. 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).

14. 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).

15. In 2012, the FCC issued an order tightening the restrictions for automated and prerecorded 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).

16. 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).

17. The TCPA regulations promulgated by the FCC define “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the

1 purchase or rental of, or investment in, property, goods, or services.” 47 C.F.R. §
 2 64.1200(f)(12). In determining whether a communication constitutes telemarketing,
 3 a court must evaluate the ultimate purpose of the communication. *See Golan v.*
 4 *Veritas Entm't, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).

5 18. “Neither the TCPA nor its implementing regulations ‘require an
 6 explicit mention of a good, product, or service’ where the implication of an improper
 7 purpose is ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*,
 8 705 F.3d 913, 918 (9th Cir. 2012)).

9 19. “‘Telemarketing’ occurs when the context of a call indicates that it was
 10 initiated and transmitted to a person for the purpose of promoting property, goods,
 11 or services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R.
 12 § 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone*
 13 *Consumer Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL
 14 21517853, at *49).

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

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

25 22. If a call is not deemed telemarketing, a defendant must nevertheless
 26 demonstrate that it obtained the plaintiff’s prior express consent. *See In the Matter*
 27 *of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC
 28

1 Rcd. 7961, 7991-92 (2015) (requiring express consent “for non-telemarketing and
2 non-advertising calls”).

3 23. Further, the FCC has issued rulings and clarified that consumers are
4 entitled to the same consent-based protections for text messages as they are for calls
5 to wireless numbers. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952
6 (9th Cir. 2009) (The FCC has determined that a text message falls within the
7 meaning of “to make any call” in 47 U.S.C. § 227(b)(1)(A)); *Toney v. Quality Res.,*
8 *Inc.*, 2014 WL 6757978, at *3 (N.D. Ill. Dec. 1, 2014) (Defendant bears the burden
9 of showing that it obtained Plaintiff’s prior express consent before sending him the
10 ***text message***). (emphasis added).

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

18 **FACTS**

19 **FACTS SPECIFIC TO PLAINTIFF**

20 25. On or about September 5, 2018, Defendant Anderson, in her capacity
21 as the marketing director for Defendant Moss Bros., entered into an agreement with
22 Reliable Response for the transmission of prerecorded marketing messages.

23 26. On August 19, 2019, Defendant Anderson, in her capacity as the
24 marketing director for Defendant Moss Bros., entered into an agreement with Ideal
25 Direct Ad Group, Inc. for the transmission of prerecorded marketing messages.
26

1 27. Beginning on or about February 2019, and continuing up through
2 October 2019, pursuant to the above referenced agreements, Reliable Response
3 and/or Direct Ad Group, Inc., at the direction of Defendants, transmitted prerecorded
4 telemarketing messages to Plaintiff's cellular telephone number ending in 5097 (the
5 "5097 Number"), including the following message:

6 Hi this is Patrick with Moss Bros Chrysler Dodge Jeep
7 Ram in marina valley. I'm calling once again because I'm
8 seeing a high demand for your vehicle and I was hoping
9 you would be willing to sell it. My manager has approved
10 me to pay top dollars, so we need your vehicle in the
11 inventory. If you're interested, please call me back. Again,
my name is Patrick my number is 888-330-4089, again,
888-330-4089. Talk to you soon.

12 28. Defendant Anderson prepared and approved the content of the
13 prerecorded messages.

14 29. In total, at the direction of Defendants, Ideal Direct Ad Group
15 transmitted 12,584 prerecorded messages to Plaintiff and the putative class
16 members, and Reliable Response transmitted 6,238 prerecorded messages to
17 Plaintiff and the putative class members.

18 30. Defendants' prerecorded messages constitute telemarketing because
19 the ultimate purpose of the messages was to advertise and/or promote one of
20 Defendant Moss Bros.'s dealerships.

21 31. Plaintiff received the subject prerecorded messages within this District
22 and, therefore, Defendants' violations of the TCPA occurred within this District.
23 Upon information and belief, Defendant caused other prerecorded telemarketing
24 calls to be sent to individuals residing within this judicial district.

25 32. At no point in time did Plaintiff provide Defendants with his express
26 written consent to be contacted with marketing messages.

33. Plaintiff is the subscriber and sole user of the 5097 Number and is financially responsible for phone service to the 5097 Number.

34. Defendant's unsolicited prerecorded messages caused Plaintiff actual harm, including invasion of his privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion. Defendant's prerecorded messages also inconvenienced Plaintiff and caused disruption to his daily life. *See Patriotic Veterans, Inc. v. Zoeller*, No. 16-2059, 2017 WL 25482, at *2 (7th Cir. Jan. 3, 2017) ("Every call uses some of the phone owner's time and mental energy, both of which are precious.").

CLASS ALLEGATIONS

PROPOSED CLASS

35. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of himself and all others similarly situated.

36. Plaintiff brings this case on behalf of the Class defined as follows:

All persons within the United States who, within the four years prior to the filing of this action, were sent a prerecorded message, from Defendants or anyone on Defendants' behalf, to said person's cellular telephone number, for the purpose of advertising and/or promoting any dealership that is held, operated, owned, and/or controlled by, and/or is a subsidiary of, Defendant Moss Bros.

37. Defendants and its employees or agents are excluded from the Class. Plaintiff does not know the exact number of members in the Class but believes the Class members number in the several thousands, if not more.

NUMEROSITY

38. Upon information and belief, Defendants have placed prerecorded calls to cellular telephone numbers belonging to thousands of consumers throughout the

1 United States without their prior express written consent. The members of the Class,
 2 therefore, are believed to be so numerous that joinder of all members is
 3 impracticable.

4 39. Identification of the Class members is a matter capable of ministerial
 5 determination from Defendants' call records.

6 **COMMON QUESTIONS OF LAW AND FACT**

7 40. There are numerous questions of law and fact common to members of
 8 the Class which predominate over any questions affecting only individual members
 9 of the Class. Among the questions of law and fact common to the members of the
 10 Class are:

- 11 a) Whether Defendants made non-emergency calls to Plaintiff's and
 12 Class Members' cellular telephones using prerecorded messages;
- 13 b) Whether Defendants can meet their burden of showing that they
 14 obtained prior express written consent to make such calls;
- 15 c) Whether Defendants' conduct was knowing and willful;
- 16 d) Whether Defendants are liable for damages, and the amount of such
 17 damages; and
- 18 e) Whether Defendants should be enjoined from such conduct in the
 19 future.

20 41. The common questions in this case are capable of having common
 21 answers. If Plaintiff's claim that Defendants routinely transmit prerecorded calls to
 22 telephone numbers assigned to cellular telephone services is accurate, Plaintiff and
 23 the Class Members will have identical claims capable of being efficiently
 24 adjudicated and administered in this case.

25 **TYPICALITY**

26 42. Plaintiff's claims are typical of the claims of the Class Members, as
 27 they are all based on the same factual and legal theories.

47. 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 or prerecorded artificial voice... to any telephone number assigned to a ... cellular telephone service” 47 U.S.C. § 227(b)(1)(A)(iii).

48. Defendants – or third parties directed by Defendants – used prerecorded messages to place calls to the cellular telephones of Plaintiff and the other members of the Class.

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

50. Defendants have, therefore, violated § 227(b)(1)(A)(iii) of the TCPA by using prerecorded messages to place calls to the cell phones of Plaintiff and the other members of the putative Class without their prior express written consent.

51. Defendants knew that they did not have prior express written consent to make these calls, and knew or should have known that they were using prerecorded messages. The violations were therefore willful or knowing.

52. As a result of Defendants’ conduct and pursuant to § 227(b)(3) of the TCPA, Plaintiff and the other members of the putative Class were harmed and are each entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and the members of 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 Plaintiff and the Class)

53. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

54. At all times relevant, Defendants knew or should have known that their conduct as alleged herein violated the TCPA.

55. Defendants knew that they did not have prior express written consent to make these calls, and knew or should have known that their conduct was a violation of the TCPA.

56. Because Defendants knew or should have known that Plaintiff and Class Members had not given prior express written consent to receive their prerecorded 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.

57. As a result of Defendants' violations, Plaintiff 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).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for the following relief:

- a) An order certifying this case as a class action on behalf of the Class as defined above, and appointing Plaintiff as the representative of the Class and Plaintiff's counsel as Class Counsel;
- b) An award of actual and statutory damages for Plaintiff and each member of the Class;
- c) As a result of Defendant's negligent violations of 47 U.S.C. §§ 227, *et seq.*, Plaintiff seeks for himself and each member of the Class \$500.00 in statutory damages for each and every violation pursuant to 47 U.S.C. § 227(b)(3)(B);
- d) As a result of Defendants' knowing and/or willful violations of 47 U.S.C. §§ 227, *et seq.*, Plaintiff seeks for himself and each member of

1 the Class treble damages, as provided by statute, up to \$1,500.00 for
2 each and every violation pursuant to 47 U.S.C. § 277(b)(3)(B) and §
3 277(b)(3)(C);

4 e) An order declaring that Defendants' actions, as set out above, violate
5 the TCPA;

6 f) An injunction requiring Defendants to cease all unsolicited call activity,
7 and to otherwise protect the interests of the Class;

8 g) An injunction prohibiting Defendants from using, or contracting the use
9 of prerecorded messages without obtaining, recipient's consent to
10 receive calls made with such equipment;

11 h) An award of reasonable attorneys' fees and costs pursuant to, *inter alia*,
12 California Code of Civil Procedure § 1021.5; and

13 i) Such further and other relief as the Court deems necessary.

14 **JURY DEMAND**

15 Plaintiff hereby demand a trial by jury.
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1 Dated: August 24, 2020

Respectfully submitted,

2 **HIRALDO P.A.**

3 /s/ Manuel S. Hiraldo

4 Manuel S. Hiraldo

5 (*pro hac vice*)

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