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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF NEVADA**

10 JOHN NATIVIDAD,
individually and on behalf of all others
similarly situated,

11 Plaintiff,

12 vs.

13 MMJ AMERICA HOLDINGS
14 CORPORATION, a Nevada corporation,

15 Defendant.
16
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Case No.:

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

JURY TRIAL DEMANDED

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1 **INTRODUCTION**

2 1. Plaintiff, John Natividad (“Plaintiff”), brings this action against Defendant,
3 MMJ America Holdings Corporation (“Defendant”), to secure redress for violations of
4 the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. §§ 227, *et seq.*

5 **NATURE OF THE ACTION**

6 2. This is a putative class action pursuant to the Telephone Consumer
7 Protection Act, 47 U.S.C. §§ 227, *et seq.* (the “TCPA”).

8 3. Defendant is a cannabis dispensary. To promote its services, Defendant
9 engages in aggressive unsolicited marketing, harming thousands of consumers in the
10 process.

11 4. Through this action, Plaintiff seeks injunctive relief to halt Defendant’s
12 illegal conduct, which has resulted in the invasion of privacy, harassment, aggravation,
13 and disruption of the daily life of thousands of individuals. Plaintiff also seeks statutory
14 damages on behalf of himself and members of the Class, and any other available legal or
15 equitable remedies.

16 **JURISDICTION AND VENUE**

17 5. This Court has federal question subject matter jurisdiction over this action
18 pursuant to 28 U.S.C. § 1331, as the action arises under the Telephone Consumer
19 Protection Act, 47 U.S.C. §§ 227, *et seq.* (“TCPA”).

20 6. The Court has personal jurisdiction over Defendant and venue is proper in
21 this District because Defendant directs, markets, and provides its business activities to
22 this District, and because Defendant’s unauthorized marketing scheme was directed by
23 Defendant to consumers, including Plaintiff, within this District.

24 **PARTIES**

25 7. Plaintiff is a natural person who, at all times relevant to this action, was a
26 resident of Clark County, Nevada.

27 8. Defendant is a Nevada corporation whose principal office is located at
28 4660 S Decatur Blvd., Las Vegas, Nevada 89103. Defendant directs, markets, and



1 provides its business activities throughout the United States, including throughout the
2 state of Nevada.

3 9. Unless otherwise indicated, the use of Defendant’s name in this Complaint
4 includes all agents, employees, officers, members, directors, heirs, successors, assigns,
5 principals, trustees, sureties, subrogees, representatives, vendors, and insurers of
6 Defendant.

7 **THE TCPA**

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

11 11. The TCPA defines an “automatic telephone dialing system” (“ATDS”) as
12 “equipment that has the capacity - (A) to store or produce telephone numbers to be
13 called, using a random or sequential number generator; and (B) to dial such numbers.”
14 47 U.S.C. § 227(a)(1).

15 12. In an action under the TCPA, a plaintiff must only show that the defendant
16 “called a number assigned to a cellular telephone service using an automatic dialing
17 system or prerecorded voice.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316,
18 1319 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).

19 13. The Federal Communications Commission (“FCC”) is empowered to issue
20 rules and regulations implementing the TCPA. According to the FCC’s findings, calls in
21 violation of the TCPA are prohibited because, as Congress found, automated or
22 prerecorded telephone calls are a greater nuisance and invasion of privacy than live
23 solicitation calls, and such calls can be costly and inconvenient. The FCC also
24 recognized that wireless customers are charged for incoming calls whether they pay in
25 advance or after the minutes are used. *Rules and Regulations Implementing the Telephone*
26 *Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd
27 14014 (2003).

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1 14. In 2012, the FCC issued an order tightening the restrictions for automated
2 telemarketing calls, requiring “prior express *written* consent” for such calls to wireless
3 numbers. See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of*
4 *1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012) (emphasis supplied).

5 15. To obtain express written consent for telemarketing calls, a defendant must
6 establish that it secured the plaintiff’s signature in a form that gives the plaintiff a “clear
7 and conspicuous disclosure’ of the consequences of providing the requested
8 consent....and having received this information, agrees unambiguously to receive such
9 calls at a telephone number the [plaintiff] designates.” *In re Rules & Regulations*
10 *Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838 ¶ 20,
11 1844 ¶ 33, 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

12 16. The TCPA regulations promulgated by the FCC define “telemarketing” as
13 “the initiation of a telephone call or message for the purpose of encouraging the
14 purchase or rental of, or investment in, property, goods, or services.” 47 C.F.R. §
15 64.1200(f)(12). In determining whether a communication constitutes telemarketing, a
16 court must evaluate the ultimate purpose of the communication. See *Golan v. Veritas*
17 *Entm’t, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).

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

22 18. “‘Telemarketing’ occurs when the context of a call indicates that it was
23 initiated and transmitted to a person for the purpose of promoting property, goods, or
24 services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R. §
25 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of*
26 *1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at *49).

27 19. The FCC has explained that calls motivated in part by the intent to sell
28 property, goods, or services are considered telemarketing under the TCPA. See *In re*



1 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd.
2 14014, ¶¶ 139-142 (2003). This is true whether call recipients are encouraged to
3 purchase, rent, or invest in property, goods, or services during the call *or in the future*. *Id.*

4 20. In other words, offers “that are part of an overall marketing campaign to
5 sell property, goods, or services constitute” telemarketing under the TCPA. *See In re*
6 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd.
7 14014, ¶ 136 (2003).

8 21. If a call is not deemed telemarketing, a defendant must nevertheless
9 demonstrate that it obtained the plaintiff’s prior express consent. *See In the Matter of Rules*
10 *and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7991-92
11 (2015) (requiring express consent “for non-telemarketing and non-advertising calls”).

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

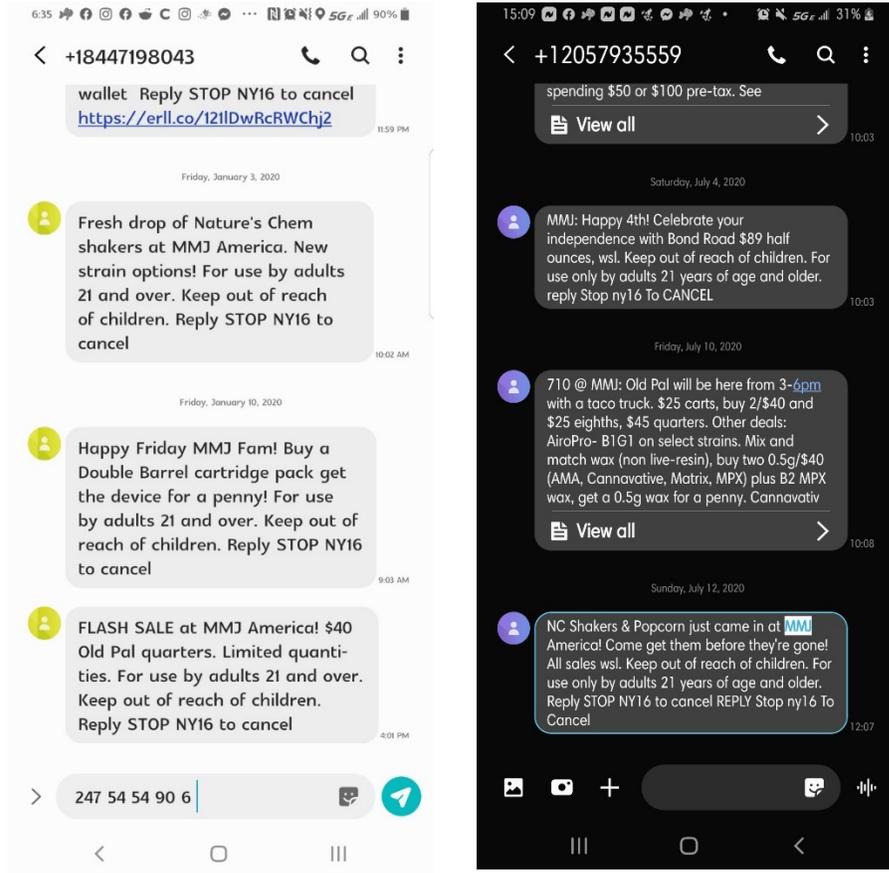
19 23. As recently held by the United States Court of Appeals for the Ninth
20 Circuit: “[u]nsolicited telemarketing phone calls or text messages, by their nature, invade
21 the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation
22 under the TCPA ‘need not allege any *additional* harm beyond the one Congress has
23 identified.’” *Van Patten v. Vertical Fitness Grp.*, No. 14-55980, 2017 U.S. App. LEXIS
24 1591, at *12 (9th Cir. May 4, 2016) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549
25 (2016) (emphasis original)).

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28 **FACTUAL ALLEGATIONS**

24. Over the past year, Defendant sent numerous telemarketing text messages to Plaintiff’s cellular telephone number ending in 9505 (the “9505 Number”) including but not limited to the following text messages sent during January of 2020 and continuously through July of 2020:



25. Defendant’s text messages were transmitted to Plaintiff’s cellular telephone, and within the time frame relevant to this action.

26. Defendant’s text messages constitute telemarketing because they solicited business from Plaintiff and encouraged the purchase of property, goods, or services, i.e., selling Plaintiff Defendant’s cannabis products for Defendant’s benefit.

27. The information contained in the text message advertises Defendant’s various prices and promotions, which Defendant sends to promote its business and sales of Defendant’s products.

1 28. Plaintiff received the subject texts within this judicial district and, therefore,
2 Defendant's violation of the TCPA occurred within this district. Upon information and
3 belief, Defendant caused other text messages to be sent to individuals residing within
4 this judicial district, throughout the State of Nevada, and nationwide.

5 29. At no point in time did Plaintiff provide Defendant with his express
6 written consent to be contacted using an ATDS.

7 30. Plaintiff is the subscriber and sole user of the 9505 Number and is
8 financially responsible for phone service to the 9505 Number.

9 31. Plaintiff has been registered with the National Do Not Call Registry since
10 March 15, 2008.

11 32. The impersonal and generic nature of Defendant's text message
12 demonstrates that Defendant utilized an ATDS in transmitting the messages. *See Jenkins*
13 *v. LL Atlanta, LLC*, No. 1:14-cv-2791-WSD, 2016 U.S. Dist. LEXIS 30051, at *11 (N.D.
14 Ga. Mar. 9, 2016) ("These assertions, combined with the generic, impersonal nature of
15 the text message advertisements and the use of a short code, support an inference that
16 the text messages were sent using an ATDS.") (citing *Legg v. Voice Media Grp., Inc.*, 20 F.
17 Supp. 3d 1370, 1354 (S.D. Fla. 2014) (plaintiff alleged facts sufficient to infer text
18 messages were sent using ATDS; use of a short code and volume of mass messaging
19 alleged would be impractical without use of an ATDS); *Kramer v. Autobytel, Inc.*, 759 F.
20 Supp. 2d 1165, 1171 (N.D. Cal. 2010) (finding it "plausible" that defendants used an
21 ATDS where messages were advertisements written in an impersonal manner and sent
22 from short code); *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1130; *Robbins v. Coca-*
23 *Cola Co.*, No. 13-CV-132-IEG NLS, 2013 U.S. Dist. LEXIS 72725, 2013 WL 2252646, at
24 *3 (S.D. Cal. May 22, 2013) (observing that mass messaging would be impracticable
25 without use of an ATDS)).

26 33. The text messages to Plaintiff originated from telephone numbers 844-719-
27 8043 and 205-793-5559, both numbers which upon information and belief are owned
28 and operated by Defendant or on behalf of Defendant.

1 34. The numbers used by Defendant (844-719-8043 and 205-793-5559) are
2 known as a “long code,” a standard 10-digit code that enables Defendant to send SMS
3 text messages *en masse*, while deceiving recipients into believing that the message was
4 personalized and sent from a telephone number operated by an individual.

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

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

16 37. To send the text messages, Defendant used a messaging platform (the
17 “Platform”) that permitted Defendant to transmit thousands of automated text messages
18 without any human involvement.

19 38. The Platform has the capacity to store telephone numbers, which capacity
20 was in fact utilized by Defendant.

21 39. The Platform has the capacity to generate sequential numbers, which
22 capacity was in fact utilized by Defendant.

23 40. The Platform has the capacity to dial numbers in sequential order, which
24 capacity was in fact utilized by Defendant.

25 41. The Platform has the capacity to dial numbers from a list of numbers,
26 which capacity was in fact utilized by Defendant.

27 42. The Platform has the capacity to dial numbers without human intervention,
28 which capacity was in fact utilized by Defendant.



1 43. The Platform has the capacity to schedule the time and date for future
2 transmission of text messages, which occurs without any human involvement.

3 44. To transmit the messages at issue, the Platform automatically executed the
4 following steps:

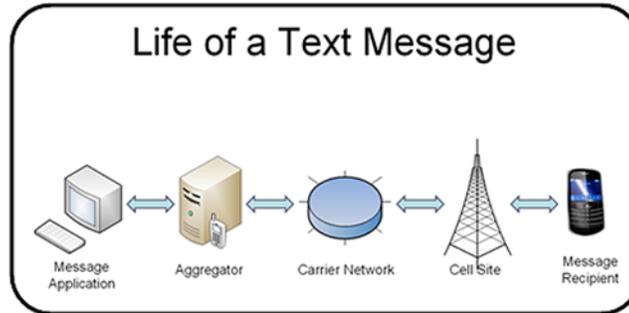
- 5 a) The Platform retrieved each telephone number from a list of numbers
6 in the sequential order the numbers were listed;
- 7 b) The Platform then generated each number in the sequential order listed
8 and combined each number with the content of Defendant’s message
9 to create “packets” consisting of one telephone number and the
10 message content;
- 11 c) Each packet was then transmitted in the sequential order listed to an
12 SMS aggregator, which acts an intermediary between the Platform,
13 mobile carriers (e.g. AT&T), and consumers.
- 14 d) Upon receipt of each packet, the SMS aggregator transmitted each
15 packet – automatically and with no human intervention – to the
16 respective mobile carrier for the telephone number, again in the
17 sequential order listed by Defendant. Each mobile carrier then sent the
18 message to its customer’s mobile telephone.

19 45. The above execution these instructions occurred seamlessly, with no
20 human intervention, and almost instantaneously. Indeed, the Platform is capable of
21 transmitting thousands of text messages following the above steps in minutes, if not less.

22 46. Further, the Platform “throttles” the transmission of the text messages
23 depending on feedback it receives from the mobile carrier networks. In other words, the
24 platform controls how quickly messages are transmitted depending on network
25 congestion. The platform performs this throttling function automatically and does not
26 allow a human to control the function.



1 47. The following graphic summarizes the above steps and demonstrates that
 2 the dialing of the text messages at issue was done by the Platform automatically and
 3 without any human intervention:



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 10 48. Defendant’s unsolicited text messages caused Plaintiff actual harm,
 11 including invasion of his privacy, aggravation, annoyance, intrusion on seclusion,
 12 trespass, loss of utility of Plaintiff’s cellular telephone, and conversion. Defendant’s text
 13 messages also inconvenienced Plaintiff and caused disruption to his daily life.

14 49. Defendant’s unsolicited text messages caused Plaintiff actual harm.
 15 Specifically, Plaintiff estimates that he has wasted approximately 10 minutes reviewing all
 16 of Defendant’s unwanted messages and additional time searching for and retaining
 17 counsel for this case in order to stop Defendant’s unwanted messages.

18 50. Furthermore, Defendant’s text messages took up memory on Plaintiff’s
 19 cellular phone. The cumulative effect of unsolicited text messages like Defendant’s poses
 20 a real risk of ultimately rendering the phone unusable for text messaging purposes as a
 21 result of the phone’s memory being taken up. *See*
 22 <https://www.consumer.ftc.gov/articles/0350-text-message-spam#text> (finding that text
 23 message solicitations like the ones sent by Defendant present a “triple threat” of identity
 24 theft, unwanted cell phone charges, and slower cell phone performance).

25 51. Defendant’s text messages also can slow cell phone performance by taking
 26 up space on the recipient phone’s memory. *See*
 27 <https://www.consumer.ftc.gov/articles/0350-text-message-spam#text> (finding that
 28

1 spam text messages can slow cell phone performance by taking up phone memory
2 space).

3 52. Plaintiff has suffered the above harm or injury as a result of Defendant's
4 multiple unauthorized text message solicitations to Plaintiff's cellular telephone via an
5 ATDS. The subject text messages are directly and explicitly linked to Defendant;
6 therefore, Defendant is the sole source of Plaintiff and similarly situated class members'
7 injuries and violation of their privacy rights which the TCPA was enacted to protect.
8 Thus, Plaintiff's Prayer for Relief below seeks statutory damages under the TCPA set by
9 Congress to specifically redress the harm suffered by Plaintiff and similarly situated class
10 members.

11 **CLASS ALLEGATIONS**

12 **PROPOSED CLASS**

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

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

16
17 **No Consent Class:** All persons in the United
18 States who, within four years prior to the filing of this
19 action, (1) were sent a text message by or on behalf of
20 Defendant, (2) using an automatic telephone dialing
21 system, (3) for the purpose of soliciting Defendant's
22 goods and services, (4) without prior express consent
23 of the recipient, or with the same manner of
24 purported consent Defendant claims to have
25 obtained from Plaintiff, if any.

26 55. Plaintiff also brings this case on behalf of the Sub-Class defined as follows:

27 **Do Not Call Registry Class:** All persons in the
28 United States who from four years prior to the filing
of this action (1) were sent a text message by or on
behalf of Defendant; (2) more than one time within
any 12-month period; (3) where the person's
telephone number had been listed on the National
Do Not Call Registry for at least thirty days; (4) for
the purpose of selling Defendant's products and
services; and (5) for whom Defendant claims (a) it
did not obtain prior express written consent, or (b) it
obtained prior express written consent in the same
manner as Defendant claims it supposedly obtained
prior express written consent to call the Plaintiff.



1 56. Defendant and its employees or agents are excluded from the Class and the
2 Sub-Class. Plaintiff does not know the number of members in the Class and the Sub-
3 Class, but believes the Class members number in the several thousands, if not more.

4 **NUMEROSITY**

5 57. Upon information and belief, Defendant has placed automated calls to
6 cellular telephone numbers belonging to thousands of consumers throughout the United
7 States without their prior express consent. The members of the Class and the Sub-Class.
8 Therefore, the class members are believed to be so numerous that joinder of all
9 members is impracticable.

10 58. The exact number and identities of the members of the Class and the Sub-
11 Class are unknown at this time and can only be ascertained through discovery.
12 Identification of the class members is a matter capable of ministerial determination from
13 Defendant's call records.

14 **COMMON QUESTIONS OF LAW AND FACT**

15 59. There are numerous questions of law and fact common to members of the
16 Class which predominate over any questions affecting only individual members of the
17 Class. Among the questions of law and fact common to the members of the Class and
18 the Sub-Class are:

- 19 a) Whether Defendant sent non-emergency text messages to Plaintiff's and
20 class members' cellular telephones using an ATDS;
21 b) Whether Defendant can meet its burden of showing that it obtained
22 prior express written consent to make such text messages;
23 c) Whether Defendant's conduct was knowing and willful;
24 d) Whether Defendant is liable for damages, and the amount of such
25 damages; and
26 e) Whether Defendant should be enjoined from such conduct in the
27 future.
28

1 60. The common questions in this case are capable of having common
2 answers. If Plaintiff's claim that Defendant routinely transmits text messages to
3 telephone numbers assigned to cellular telephone services is accurate, Plaintiff and the
4 class members will have identical claims capable of being efficiently adjudicated and
5 administered in this case.

6 **TYPICALITY**

7 61. Plaintiff's claims are typical of the claims of the class members, as they
8 are all based on the same factual and legal theories.

9 **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

10 62. Plaintiff is a representative who will fully and adequately assert and protect
11 the interests of the Class and the Sub-Class, and has retained competent counsel highly
12 experienced in class action litigation. Accordingly, Plaintiff is an adequate representative
13 and will fairly and adequately protect the interests of the Class.

14 **PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE**

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

25 64. The prosecution of separate actions by members of the Class and the Sub-
26 Class would create a risk of establishing inconsistent rulings and/or incompatible
27 standards of conduct for Defendant. For example, one court might enjoin Defendant
28 from performing the challenged acts, whereas another may not. Additionally, individual

1 actions may be dispositive of the interests of the Class and the Sub-Class, although
2 certain class members are not parties to such actions.

3 **COUNT I**

4 **Violations of the TCPA, 47 U.S.C. § 227(b)**

5 **(On Behalf of Plaintiff and the Class and the Sub-Class)**

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

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

12 67. Defendant – or third parties directed by Defendant – used equipment
13 having the capacity to dial numbers without human intervention to make non-emergency
14 telephone calls to the cellular telephones of Plaintiff and the other members of the Class
15 defined below.

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

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

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

27 71. As a result of Defendant’s conduct and pursuant to § 227(b)(3) of the
28 TCPA, Plaintiff and the other members of the putative Class and the Sub-Class were



1 harmed and are each entitled to a minimum of \$500.00 in damages for each violation.
2 Plaintiff and the members of the Class and the Sub-Class are also entitled to an
3 injunction against future calls. *Id.*

4 **COUNT II**

5 **Knowing and/or Willful Violation of the TCPA, 47 U.S.C. § 227(b)**

6 **(On Behalf of Plaintiff and the Class and the Sub-Class)**

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

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

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

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

17 76. As a result of Defendant's violations, Plaintiff and each of the members are
18 entitled to an award of \$1,500.00 in statutory damages, for each and every violation,
19 pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

20 **COUNT III**

21 **Violation of the TCPA, 47 U.S.C. § 227**

22 **(On Behalf of Plaintiff and the Do Not Call Registry Sub-Class)**

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

25 78. The TCPA's implementing regulation, 47 C.F.R. § 64.1200(c), provides that
26 "[n]o person or entity shall initiate any telephone solicitation" to "[a] residential
27 telephone subscriber who has registered his or her telephone number on the national do-
28



1 not-call registry of persons who do not wish to receive telephone solicitations that is
2 maintained by the federal government.”

3 79. 47 C.F.R. § 64.1200(e), provides that § 64.1200(c) and (d) “are applicable to
4 any person or entity making telephone solicitations or telemarketing calls to wireless
5 telephone numbers.”¹

6 80. 47 C.F.R. § 64.1200(d) further provides that “[n]o person or entity shall
7 initiate any call for telemarketing purposes to a residential telephone subscriber unless
8 such person or entity has instituted procedures for maintaining a list of persons who
9 request not to receive telemarketing calls made by or on behalf of that person or entity.”

10 81. Any “person who has received more than one telephone call within any 12-
11 month period by or on behalf of the same entity in violation of the regulations
12 prescribed under this subsection may” may bring a private action based on a violation of
13 said regulations, which were promulgated to protect telephone subscribers’ privacy rights
14 to avoid receiving telephone solicitations to which they object. 47 U.S.C. § 227(c).

15 82. Defendant violated 47 C.F.R. § 64.1200(c) by initiating, or causing to be
16 initiated, telephone solicitations to telephone subscribers such as Plaintiff and the Sub-
17 Class of Do Not Call Registry Class members who registered their respective telephone
18 numbers on the National Do Not Call Registry, a listing of persons who do not wish to
19 receive telephone solicitations that is maintained by the federal government.

20 83. Defendant violated 47 U.S.C. § 227(c)(5) because Plaintiff and the Sub-
21 Class of Do Not Call Registry Class received more than one telephone call in a 12-
22 month period made by or on behalf of Defendant in violation of 47 C.F.R. § 64.1200, as
23 described above. As a result of Defendant’s conduct as alleged herein, Plaintiff and the
24 Do Not Call Registry Sub-Class suffered actual damages and, under section 47 U.S.C. §
25
26

27
28 ¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket
No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) Available at
https://apps.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf

1 227(c), are entitled, *inter alia*, to receive up to \$500 in damages for such violations of 47
2 C.F.R. § 64.1200.

3 84. To the extent Defendant's misconduct is determined to be willful and
4 knowing, the Court should, pursuant to 47 U.S.C. § 227(c)(5), treble the amount of
5 statutory damages recoverable by the members of the Do Not Call Registry Sub-Class.

6 **PRAYER FOR RELIEF**

7 **WHEREFORE**, Plaintiff, individually and on behalf of the Class and the Sub-
8 Class, prays for the following relief:

- 9 a) An order certifying this case as a class action on behalf of the Class and the
10 Sub-Class as defined above, and appointing Plaintiff as the representative
11 of the Class and the Sub-Class and confirming Plaintiff's counsel as Class
12 Counsel;
- 13 b) An award of actual and statutory damages for Plaintiff and each member of
14 the Class and the Sub-Class;
- 15 c) As a result of Defendant's negligent violations of 47 U.S.C. §§ 227, *et seq.*,
16 Plaintiff seeks for himself and each member of the Class and the Sub-Class
17 \$500.00 in statutory damages for each and every violation pursuant to 47
18 U.S.C. § 277(b)(3)(B);
- 19 d) As a result of Defendant's knowing and/or willful violations of 47 U.S.C.
20 §§ 227, *et seq.*, Plaintiff seeks for himself and each member of the Class and
21 the Sub-Class treble damages, as provided by statute, up to \$1,500.00 for
22 each and every violation pursuant to 47 U.S.C. § 277(b)(3)(B) and §
23 277(b)(3)(C);
- 24 e) An order declaring that Defendant's actions, as set out above, violate the
25 TCPA;
- 26 f) A declaratory judgment that Defendant's telephone calling equipment
27 constitutes an automatic telephone dialing system under the TCPA;
- 28

- 1 g) An injunction requiring Defendant to cease all unsolicited text messaging
- 2 activity, and to otherwise protect the interests of all class members;
- 3 h) An injunction prohibiting Defendant from using, or contracting the use of,
- 4 an automatic telephone dialing system without obtaining, recipient's
- 5 consent to receive calls made with such equipment;
- 6 i) An award of reasonable attorneys' fees and costs;
- 7 j) Such further and other relief as the Court deems necessary.

8 **DEMAND FOR JURY TRIAL**

9 Plaintiff, on behalf of himself and the putative class, hereby demands a trial by
10 jury pursuant to the Seventh Amendment and Federal Rule of Civil Procedure 38(b) on
11 all claims so triable.

12
13 DATED this 29th day of July 2020.

14 Respectfully submitted,

15 **KAZEROUNI LAW GROUP, APC**

16
17 By: s/ Gustavo Ponce

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21 *Attorneys for Plaintiff John Natividad*
22 *and the Putative Class and Sub-Class*