

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Allan Johnson, *on behalf of himself and all
others similarly situated,*

Plaintiff,

v.

Time Warner Cable, Inc.,

Defendant.

: Civil Action No.: 1:15-cv-06518-LLS

: **FIRST AMENDED CLASS ACTION**
: **COMPLAINT**

Plaintiff Allan Johnson (“Plaintiff” or “Johnson”), individually and on behalf of all others similarly situated, sues Time Warner Cable, Inc. (“TWC”), and states as follows:

INTRODUCTION

1. Plaintiff seeks damages and injunctive and declaratory relief from the illegal actions of TWC in contacting Plaintiff and Class members on their cellular telephones for non-emergency purposes using an “automated telephone dialing system” (“ATDS”) in direct contravention of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”).

2. The TCPA regulates, among other things, the use of ATDS or “autodialers.” 47 U.S.C. § 227(b)(1)(A)(iii). Specifically, the TCPA prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party. 47 C.F.R. §64.1200(a)(2).

3. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient.

4. Plaintiff seeks equitable relief, actual and statutory damages for Defendant’s

harassing telephone calls made in connection with the collection of a debt, in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (“FDCPA”).

PARTIES, JURISDICTION AND VENUE

5. Plaintiff, Allan Johnson is an adult individual residing in Cleveland, Tennessee, and is a “person” as defined by 47 U.S.C. § 153(39).

6. Defendant, Time Warner Cable, Inc. (“TWC”), is a New York business entity with an address of 60 Columbus Circle, New York, New York 10023, and is a “person” as defined by 47 U.S.C. § 153(39).

7. This Court has subject matter jurisdiction under 28 U.S.C. §1331.

8. Personal jurisdiction and venue in this district are proper pursuant to 28 U.S.C. § 1391(b) in that Defendant transacts business in this District and a substantial portion of the acts giving rise to this action occurred in this District.

ALLEGATIONS APPLICABLE TO ALL COUNTS

9. TWC placed repeated and unwanted calls to the Plaintiff’s AT&T cellular telephone number 585-xxx-0000 using an automatic telephone dialing system (“ATDS”).

10. TWC uses an “interactive voice response” calling system (the “IVR”) to make calls to its customers. The IVR is an ATDS under the TCPA in that it creates a list of telephone numbers and then dials from that list without human intervention. *See King v. Time Warner Cable*, 2015 WL 4103689, at *4 (S.D.N.Y., Jul. 7, 2015).

11. The IVR has the capacity to store number and dial numbers sequentially or randomly. Further, the IVR is a predicative dialer which stores lists of phone numbers and dials such numbers without human intervention.

12. When Plaintiff answered calls from TWC, he heard a prerecorded message which

stated that TWC was calling about an important change in the status of an account. Plaintiff does not have an account with TWC.

13. Plaintiff never provided his cellular telephone number to TWC and never provided his consent to be contacted on his cellular telephone number.

14. Plaintiff has repeatedly requested that TWC stop calling him.

15. During one nine minute conversation with TWC on June 14, 2013, Plaintiff told TWC that it was calling the wrong number and demanded that the calls cease. Nevertheless, the automated calls continued.

CLASS ALLEGATIONS

16. Plaintiff brings this claim pursuant to Federal Rule of Civil Procedure 23(b)(2) and (b)(3) on behalf the following Class:

(1) All persons in the United States (2) to whose cellular telephone number (3) TWC placed a non-emergency telephone call (4) using its IVR system (5) within four years of the complaint (6) where TWC was on notice that it was calling the wrong number.

17. Plaintiff represents and is a member of the Class. Excluded from the Class are Defendant and any entities in which Defendant has a controlling interest, Defendant's agents and employees, the Judge to whom this action is assigned and any member of the Judge's staff and immediate family.

18. Plaintiff does not know the exact number of members in the Class, but based upon the size and national scope of TWC and the automated nature of the messages, Plaintiff reasonably believes that the Class number in the thousands.

19. The joinder of all Class members is impracticable due to the size and relatively modest value of each individual claim. The disposition of the claims in a class action will

provide substantial benefit to the parties and the Court in avoiding a multiplicity of identical suits. The Class can be identified easily through records maintained by TWC.

20. There are questions of law and fact common to the members of the Class which predominate over any questions that affect only individual Class members. Those common questions of law and fact include, but are not limited to, the following:

- i. Whether TWC engaged in a pattern of using ATDS to place calls to cellular phones;
- ii. Whether TWC had prior express consent to place the calls;
- iii. Whether TWC ignored consumers' indications that they were not the debtors indicated on TWC's calls; and
- iv. Whether TWC willfully violated the TCPA.

21. As a person who received telephone calls from TWC using an ATDS to his cellular phone without having given prior express consent, Plaintiff asserts claims that are typical of the members of the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class, and has no interests which are antagonistic to any member of either Class.

22. Plaintiff has retained counsel experienced in handling class action claims, including class claims involving violations of federal and state consumer protection statutes such as the TCPA.

23. A class action is the superior method for the fair and efficient adjudication of this controversy. Class-wide relief is essential to compel Defendant to comply with the TCPA. The interest of individual Class members in individually controlling the prosecution of separate claims against Defendant is small because the statutory damages for violation of the TCPA are

small in comparison to the costs and expenses of litigation of such claims. Management of these claims is likely to present few difficulties because the calls at issue are all automated and the Class members, by definition, did not provide the prior express consent required under the statute to authorize calls to their cellular telephones as TWC did not attempt to obtain consent required by the TCPA prior to placing the calls.

24. Defendant has acted on grounds generally applicable to the Class, thereby making final injunctive relief and corresponding declaratory relief with respect to the Class as a whole appropriate. Moreover, Plaintiff alleges that the TCPA violations complained of herein are substantially likely to continue in the future if an injunction is not entered.

COUNT I – VIOLATIONS OF THE TCPA

25. Plaintiff incorporates the foregoing as if fully set forth herein.

26. Plaintiff brings this claim on behalf of the Class.

27. TWC made automated telephone calls to the wireless telephone number of Plaintiff and the other Class members using a prerecorded or artificial voice and an ATDS. These phone calls were made without the prior express consent of Plaintiff or the other Class members and were not made for emergency purposes.

28. TWC has therefore violated the TCPA, 47 U.S.C. § 227(b)(1)(A), which makes it “unlawful for any person within the United States . . . 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 an artificial or prerecorded voice.”

29. Each of the aforementioned calls by TWC constitutes a violation of the TCPA.

30. Plaintiff and Class members are entitled to an award of \$500.00 in statutory damages for each call made in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B).

31. Plaintiff and Class members are also entitled to and do seek injunctive relief prohibiting Defendant's violation of the TCPA in the future.

32. Plaintiff and Class members are also entitled to and do seek a declaration that:

- Defendant violated the TCPA;
- Defendant used a predictive dialer and ATDS to Plaintiff and the Class's cellular telephones; and
- Defendant placed calls to the Plaintiff and the Class without prior express consent.

COUNT II – WILLFUL VIOLATIONS OF THE TCPA

33. Plaintiff incorporates the foregoing as if fully set forth herein.

34. Plaintiff brings this claim on behalf of the Class.

35. TWC made automated telephone calls to the wireless telephone number of Plaintiff and the other Class members using a prerecorded or artificial voice. These phone calls were made without the prior express consent of Plaintiff or the other Class members and were not made for emergency purposes.

36. TWC has therefore violated the TCPA, 47 U.S.C. § 227(b)(1)(A), which makes it “unlawful for any person within the United States . . . 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 an artificial or prerecorded voice.”

37. Each of the aforementioned calls by TWC constitutes a willful violation of the TCPA.

38. Plaintiff and the members of the Class are entitled to an award of up to \$1500.00 in statutory damages for each call made in willful violation of the TCPA pursuant to

47 U.S.C. § 227(b)(3).

39. Plaintiff and Class members are also entitled to and do seek injunctive relief prohibiting Defendant's violation of the TCPA in the future.

40. Plaintiff and TCPA Class members are also entitled to and do seek a declaration that:

- Defendant knowingly and/or willfully violated the TCPA;
- Defendant knowingly and/or willfully used a predictive dialer and ATDS on calls to Plaintiff and the Class;
- Defendant knew it did not have Plaintiff and the Class's prior express consent to call with a predictive dialer and ATDS;
- Defendant knew it was contacting the wrong numbers when dialing Plaintiff and the Class's cellular telephones;
- Defendant knowingly and/or willfully failed to put procedures in place to stop automated calls to consumers who had indicated it was receiving Defendant's calls in error; and
- It is Defendant's practice and history to place automated telephone calls to consumers without their prior express consent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and the Class and against Defendant for:

- A. Statutory damages pursuant to 47 U.S.C. § 227(b)(3);
- B. Injunctive relief prohibiting such violations of the TCPA by Defendant in the future;

- C. Declaratory relief as prayed for herein;
- D. An award of attorneys' fees and costs to counsel for Plaintiff and the Class;
- E. Such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on issues so triable.

Dated: August 26, 2015

Respectfully submitted,

By: /s/ Jenny DeFrancisco
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 26, 2015, a true and correct copy of the foregoing First Amended Complaint was filed with the United States District Court for the Southern District of New York CM/ECF system and that document is available on the ECF system.

By /s/ Jenny DeFrancisco
Jenny DeFrancisco