

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

Christina Kinnamon, individually and)
on behalf of all others similarly situated)

Plaintiff)

v.)

Ditech Financial LLC.)

Defendant)

Case No: 4:16-cv-646

JURY TRIAL DEMANDED

COMPLAINT - CLASS ACTION

Plaintiff, Christina Kinnamon, individually and on behalf of all others similarly situated, brings this action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”) for violation by the Defendant, Ditech Financial, LLC.

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. §1337, and 47 U.S.C. § 227 (TCPA).

2. Venue in this District is proper because the acts occurred here, Plaintiff resides here, and Defendant transacts business here.

PARTIES & FACTS

3. Plaintiff Christina Kinnamon is, and at all times mentioned herein was, an individual citizen of the State of Missouri, who resides in St. Charles, MO, which is located in the Eastern District of Missouri.

4. Ditech Financial, LLC (Ditech) is a Delaware Limited Liability Company, and is a national provider of home loan origination and loan servicing with offices

throughout the country. Its registered agent in Missouri is CT Corporation System, 120 South Central Ave., Clayton, Mo 63015.

5. Defendant Ditech is authorized to conduct, and so regularly conducts, business in the State of Missouri.

6. Plaintiff is, and at all times mentioned herein was a “person” as defined by 47 U.S.C. §153(39).

7. Ditech is, and at all times mentioned herein was a “person” as defined by 47 U.S.C. §153(39).

8. In or around November 2015 Plaintiff began receiving numerous calls from Ditech on Plaintiff’s cellular telephone in an attempt to reach a “Ron Goodel”.

9. Plaintiff answered several of Defendant’s telephone calls and notified them that the person they were attempting to reach could not be reached at her cellular telephone number and instructed Ditech to cease calling her phone number.

10. Despite being notified that they were calling the wrong phone number, Ditech continued to call Plaintiff’s cellular telephone number, sometimes multiple times a day, in an attempt to reach a “Ron Goodel”.

11. Despite being notified that they were calling the wrong number, Ditech continued to call Plaintiff’s cellular telephone throughout January, February, and March 2016, including the following; two calls on February 5, 2016, three calls on March 25, 2016, and five calls on March 29, 2016, including three calls which left a voice message.

12. At all times relevant herein, Plaintiff has been the user, and has exercised dominion and control of her cellular telephone number that received the subject calls which form the basis of this action.

13. Ditech placed all of the above referenced calls to Plaintiff's cellular telephone number using an "automatic telephone dialing system" ("ATDS"), as that term is defined by 47 U.S.C. § 227 (a)(1), meaning it had the capacity to store or produce numbers randomly or sequentially, and to dial such numbers, and to place telephone calls to Plaintiff's cellular telephone.

14. Ditech utilizes the Aspect Unified IP Predictive dialer for its calls to Plaintiff and the class.

15. Ditech did not have Plaintiff's consent to place calls to Plaintiff's cellular telephone number using an ATDS or an artificial or pre-recorded voice message.

16. Plaintiff is not the person who Ditech is attempting to reach, is not party to any debt, contract, or obligation with Ditech, and has never provided her cellular telephone number to Ditech for any purpose.

THE TCPA

17. In 1991, Congress enacted the TCPA in response to a growing number of consumer complaints regarding certain telemarketing practices - for example, computerized calls to private homes. Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls. *See Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012).

18. Accordingly, the TCPA regulates, *inter alia*, the use of prerecorded messages and use of automated telephone equipment, or "autodialers." Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of prerecorded messages or autodialers to make any call to a wireless number in the absence of an emergency or the

prior express consent of the called party.

19. 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 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. *In re Rules Implementing the TCPA of 1991*, 23 FCC Rcd 559, 562 (2007); *In re Rules and Regulations Implementing the TCPA of 1991*, 18 FCC Rcd. 14014, 14115 (2003) (“Wireless subscribers who purchase a large ‘bucket’ of minutes at a fixed rate nevertheless are charged for those minutes[.]”).

20. In 2003, the FCC held that predictive dialers like the one used by defendant constitute an ATDS under the TCPA. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14115, ¶ 131 (July 3, 2003).

21. The FCC held “[c]onsumers may revoke consent in any manner that clearly expresses a desire not to receive further messages, and that callers may not infringe on that ability by designating an exclusive means to revoke.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, FCC 15-72, 2015 FCC LEXIS 1586, ¶ 63, 30 FCC Rcd 7961, 2015 FCC LEXIS 1586, 62 Comm. Reg. (P & F) 1539 (F.C.C. July 10, 2015) (“FCC 2015 Order”).

COUNT I: VIOLATION OF THE TCPA

22. Plaintiff restates each of the factual allegations in all other paragraphs as if

full stated herein.

23. This claim is for violation of the TCPA by Ditech.

24. The telephone calls from Ditech to Plaintiff's cellular telephone number were made using an ATDS.

25. The subject calls were placed using a predictive dialer.

26. Ditech, or vendors on its behalf, placed calls to Plaintiff at a telephone number assigned to a cellular telephone service.

27. The telephone calls Ditech placed to Plaintiff were not placed for emergency purposes, as defined by TCPA § 227 (b)(1)(A)(i).

28. Ditech made unsolicited telephone calls to the wireless telephone number of Plaintiff and the other members of the class using pre-recorded voices and or using equipment that had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

29. At the time Ditech placed the phone calls alleged herein, Ditech did not have consent to do so.

30. Ditech has therefore violated the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), 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 ...".

31. As a result of Ditech's illegal conduct, Plaintiff and the members of the class suffered actual damages and, under § 227(b)(3)(B), and are each entitled to, *inter alia*, a minimum of \$500.00 in damages for each such violation of the TCPA.

32. Plaintiff and class members are also entitled to, and do, seek injunctive relief prohibiting Ditech's violations of the TCPA in the future.

CLASS ALLEGATIONS

33. Plaintiff restates each of the allegations in all other paragraphs as if fully stated herein.

34. Plaintiff, individually and on behalf of all others similarly situated, brings the above claims on behalf of a Class.

35. The TCPA Class consists of:

(1) All persons in the United States (2) to whose cellular telephone number (3) Ditech placed a non-emergency telephone call (4) using substantially the same system(s) that were used to telephone Plaintiff (5) within 4 years of the complaint and (6) who did not have a contractual relationship with Ditech.

36. Ditech has caused the Class actual harm, not only because the Class was subjected to the aggravation that necessarily accompanies these calls, but also because said members frequently have to pay their cell phone service providers for the receipt of such calls.

37. These calls are also an intrusion upon seclusion, diminish cellular battery life, and waste the class member's time.

38. Plaintiff represents and is a member of the Class. Excluded from the Class are Defendant and any entities in which Ditech has a controlling interest, Ditech's agents and employees, the Judge to whom this action is assigned, and any member of the Judge's staff and immediate family, and claims for personal injury, wrongful death and/or emotional distress.

39. Plaintiff is presently unaware of the exact number of members in the Class, but based upon the size and national scope of Ditech's business, Plaintiff reasonably believes that the class members' number at a minimum in the thousands based on the use of software to make the calls.

40. Plaintiff and all members of the Class have been harmed by Ditech's actions.

41. This Class Action Complaint seeks money damages and injunctive relief.

42. The joinder of all class members is impracticable due to the size and relatively modest value of each individual claim.

43. The disposition of the claims in a class action will provide substantial benefit to both the parties and the Court in avoiding multiplicity of identical suits. The class can be easily identified through records maintained by Ditech.

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

- a. Whether Ditech engaged in a pattern of using an ATDS to place calls to cellular telephones;
- b. Whether Ditech's conduct was knowing or willful; and
- c. Whether Ditech's actions violated the TCPA.

45. As a person who received the telephone calls using an ATDS or an artificial or prerecorded voice, without their prior express consent, all within the meaning of the TCPA, Plaintiff asserts claims that are typical of the members of the Class.

46. Plaintiff will fairly and adequately represent and protect the interests of the

Class, and Plaintiff does not have an interest that is antagonistic to any member of the Class.

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

48. A class action is the superior method for the fair and efficient adjudication of this controversy.

49. Class-wide relief is essential to compel Ditech to comply with the TCPA. The interest of class members in individually controlling the prosecution of separate claims against Ditech is small because the statutory damages in an individual action for violation of the TCPA is small.

50. Management of these claims is likely to present significantly fewer difficulties than are presented in many class claims 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.

51. Ditech 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.

52. Moreover, Plaintiff alleges that the TCPA violations complained of herein are substantially likely to continue in the future if an injunction is not entered.

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

1. A declaration that Ditech's practices described herein violate the Telephone Consumer Protection Act, 47 U.S.C. § 227;
2. An injunction requiring Defendant not to call any third parties or numbers that were skip traced to insure that Plaintiff is not called now or when Plaintiff obtains additional telephone numbers in the future;
3. An injunction requiring Defendant to file quarterly reports of third party audits with the Court on its system and procedures not to call any third parties or numbers that were skip traced to insure that Plaintiff is not called in the future;
4. An injunction requiring Defendant not to call any third parties or numbers that were skip traced to insure that class members are not called if they obtain additional telephone numbers in the future;
5. An injunction requiring Defendant to file quarterly reports of third party audits with the Court on its system and procedures not to call any third parties or numbers that were skip traced to insure that class members are not called in the future;
6. An award of actual damages in an amount to be proven at trial;
7. An award of statutory damages for Plaintiff and each Class member in the amount of \$500.00 for each and every call that violated the TCPA;

8. An award of treble damages, as provided by statute, of up to \$1,500.00 for Plaintiff and each Class member for each and every call that violated the TCPA;
9. An order certifying this action to be a proper class action pursuant to the Federal Rules of Civil Procedure 23, establishing the appropriate Classes and any Sub-classes the Court deems appropriate, finding that Plaintiff is a proper representative of the Classes, and appointing the lawyers and law firms representing Plaintiff as counsel for the Classes;
10. Attorney's fees, litigation expenses and costs of suit; and
11. Such further and other relief the Court deems reasonable and just.

Date: May 10, 2016

Respectfully submitted,

/s/ Timothy J. Sostrin
Timothy Sostrin, Ill. Bar No. 6290807IL
Keith J. Keogh (Pro Hac Vice to be filed)
Keogh Law, Ltd.
55 W. Monroe St., Suite 3390
Chicago, Illinois 60603
312.726.1092 (office)
312.726.1093 (fax)
tsostrin@keoghlaw.com
keith@keoghlaw.com

Sergei Lemberg, Ct. Bar No. 25027CT
Lemberg Law LLC
43 Danbury Road
Wilton, CT 06897
203.653.2250 x5500 (office)
203.653.3425 (fax)
slemberg@lemborglaw.com

John Hein, MO Bar No. 53182
Sauerwein Hein, P.C.
147 North Meramec Ave.

St. Louis, MO 63105
314.863.9100 (office)
314.863.9101 (fax)
jjh@sauerwein.com

Attorneys for Plaintiff

JURY DEMAND

Plaintiff, individually and on behalf of all others similarly situated, demands trial by jury.

Dated: May 10, 2016

Christina Kinnamon, individually and
on behalf of all others similarly situated,

By: /s/Timothy J. Sostrin

One of Plaintiffs' Attorneys