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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOSHUA TERRELL individually
and on behalf of all others similarly
situated,

Plaintiffs,

v.

**2018HMO LLC d/b/a HIKEI
MODERN CANNABIS; AARON
MAGAGNA; DOES 1-10 Inclusive,**

Defendant.

Case No.: 3:22-cv-00883-MMA-KSC

CLASS ACTION

**FIRST AMENDED COMPLAINT
FOR DAMAGES AND
INJUNCTIVE RELIEF
PURSUANT TO THE
TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. §
227, ET SEQ.**

JURY TRIAL DEMANDED

INTRODUCTION

1. JOSHUA TERRELL (“Plaintiff”), brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of 2018HMO LLC d/b/a HIKEI MODERN CANNABIS (“Defendant 2018”) and AARON MAGAGNA (“Defendant Magagna”) in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, (“TCPA”) and related regulations. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other

1 matters, upon information and belief, including investigation conducted by his
2 attorneys.

3 2. The TCPA was designed to prevent calls and messages like the ones
4 described within this complaint, and to protect the privacy of citizens like Plaintiff.
5 “Voluminous consumer complaints about abuses of telephone technology – for
6 example, computerized calls dispatched to private homes – prompted Congress to
7 pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

8 3. In enacting the TCPA, Congress intended to give consumers a choice
9 as to how creditors and telemarketers may call them, and made specific findings
10 that “[t]echnologies that might allow consumers to avoid receiving such calls and
11 messages are not universally available, are costly, are unlikely to be enforced, or
12 place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11.
13 Toward this end, Congress found that

14
15 [b]anning such automated or prerecorded telephone calls to the home,
16 except when the receiving party consents to receiving the call or when
17 such calls are necessary in an emergency situation affecting the health
18 and safety of the consumer, is the only effective means of protecting
telephone consumers from this nuisance and privacy invasion.

19 *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
20 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
21 purpose).

22 4. Congress also specifically found that “the evidence presented to the
23 Congress indicates that automated or prerecorded calls are a nuisance and an
24 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also,
25 *Mims*, 132 S. Ct. at 744.

26 5. In a recent decision, the Supreme Court interpreted the term
27 “automatic telephone dialing system” and held that “[t]o qualify as an ‘automatic
28 telephone dialing system,’ a device must have the capacity either to store a

1 telephone number using a random or sequential generator *or* to produce a telephone
 2 number using a random or sequential number generator.” *Facebook, Inc. v. Duguid*,
 3 141 S.Ct. 1163 (2021) (emphasis added).

4 6. In *Duguid*, the Supreme Court provided an example of such systems,
 5 stating: “For instance, an autodialer might use a random number generator to
 6 determine the order in which to pick phone numbers from a preproduced list. It
 7 would then store those numbers to be dialed at a later time.” *Id.* at 1171-72 fn. 7.

8 7. Further, both *Duguid* and the legislative history of the TCPA are clear
 9 that the original focus on prerecorded voice technology prohibition was the fact
 10 that such communications involved agentless calls, not on the question of whether
 11 a literal voice was used during those agentless calls. *See* Hearing Before the
 12 Subcommittee on Communications of the Committee on Commerce, Science and
 13 Transportation, United States Senate One Hundred Second Congress First Session
 14 July 24, 1992, Testimony of Robert Bulmash and Steve Hamm at pg 11; 7 FCC
 15 Rcd. 8752 (F.C.C. September 17, 1992).

16 8. The Sixth Circuit has also recognized this distinction: “Congress drew
 17 an explicit distinction between ‘automated telephone calls that deliver an artificial
 18 or prerecorded voice message’ on the one hand and ‘calls place by ‘live’ persons’
 19 on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199*
 20 *WV/KY/OH*, 708 F.3d 737,743 (6th Cir. 2013).

21 9. Similarly, the FTC has observed that “prerecorded calls are by their
 22 very nature one-sided conversations, and if there is no opportunity for consumers
 23 to ask questions, offers may not be sufficiently clear for consumers to make
 24 informed choices before pressing a button or saying yes to make a purchase.” 73
 25 FR 51164-01, 51167 (Aug. 29, 2008).

26 27 JURISDICTION AND VENUE

28 10. Jurisdiction is proper under 28 U.S.C. § 1331 because this action

1 arises under a federal statute, namely the Telephone Consumer Protection Act, 47
2 U.S.C. § 227, *et seq.*

3 11. Venue is proper in the United States District Court for the Southern
4 District of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because
5 Defendant 2018 and Defendant Magagna do business within the state of California
6 and Plaintiff resides within this district.

7 **PARTIES**

8 12. Plaintiff is, and at all times mentioned herein, was a citizen and
9 resident of the State of California. Plaintiff is, and at all times mentioned herein
10 was, a “person” as defined by 47 U.S.C. § 153 (39). Plaintiff was physically in
11 California at the time he received the alleged text messages from Defendant 2018.

12 13. Plaintiff is informed and believes, and thereon alleges, that Defendant
13 2018 is a cannabis dispensary incorporated in the state of California. Defendant
14 2018, and all of its agents, are and at all times mentioned herein were “persons,” as
15 defined by 47 U.S.C. § 153 (39). Plaintiff alleges that at all times relevant herein
16 Defendant conducted business in the State of California and in the County of San
17 Diego, and within this judicial district.

18 14. Defendant Aaron Magagna is an individual who at all relevant times
19 was the owner of Defendant 2018. As owners of Defendant 2018, Defendant
20 Magagna was responsible for the overall success of the company. Defendant
21 Magagna materially participated in the practices of Defendant 2018 by occupying
22 a position of critical importance to Defendant 2018’s business; as the owner of
23 Defendant Magagna, he exercised control over the affairs of Defendant 2018 and
24 played a key role in maintaining and expanding Defendant 2018’s activities
25 throughout the time in question.
26
27
28

FACTUAL ALLEGATIONS

15. At all times relevant, Plaintiff was a citizen of San Diego County, and a citizen of the State of California. Plaintiff is, and at all times mentioned herein was a “person” as defined by 47 U.S.C. § 153 (39).

16. Defendant 2018 is, and at all times mentioned herein was, a “person,” as defined by 47 U.S.C. § 153 (39). Defendant Magagna has owned and operated Defendant 2018 at all times mentioned herein. Defendant 2018 and Defendant Magagna will be referred to as Defendants collectively hereafter.

17. At all times relevant Defendants conducted business in the State of California and in the County of San Diego, within this judicial district.

18. On or about April 6, 2020, Plaintiff received a text message from Defendants on his cellular telephone number ending in -9584.

19. Specifically, the text message read:
(Hikei Cannabis) Stocking on essentials? Today only Hikei
OZ are only \$100 while supplies last. This month, all orders
receive a complementary face mask.

20. At this time, Defendants began to use Plaintiff’s cellular phone to send repeated text messages in an attempt to solicit its products or services.

21. Defendants sent Plaintiff more than twenty-five (25) text messages over the following months.

22. Defendants did not have Plaintiff’s prior express consent to contact him on his cellular phone.

23. Based on the content and format of these text messages, Plaintiff alleges that they were sent via Defendant’s SMS Blasting Platform, i.e., an “automatic telephone dialing system,” (“ATDS”) as defined by 47 U.S.C. § 227 (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A).

24. The text message sent to Plaintiff’s cellular telephone was not sent by a live agent and thus created a one-sided conversation in which Plaintiff could not

1 receive a response to her questions and/or concerns. The text message also was sent
2 in an automated fashion as a result of computerized campaigns that were pre-
3 programmed in advance to send messages out to large groups of consumers all at
4 once, either sequentially or via algorithmic dialing, i.e. in an automated fashion by
5 a computer.

6 25. In Merriam Webster's Dictionary, "voice" is defined as "an
7 instrument or medium of expression." It defines "artificial" as "humanly
8 contrived...often on a natural model : MAN-MADE" and "lacking in natural or
9 spontaneous quality."

10 26. The messages sent to Plaintiff by Defendants using the SMS blasting
11 platform employed a text message as an instrument or medium of expression to
12 deliver an automatic message drafted in advance of being sent, i.e. that of an SMS
13 message, to convey a telemarketing communication to Plaintiff. SMS blasting
14 platforms are man-made humanly contrived programs which allow companies to
15 blast out such messages via non-spontaneous methods, i.e. automated methods
16 similar to that of an assembly line in a factory. Such SMS blasting devices are
17 incapable of spontaneity, as they must be programmed by the operator to
18 automatically send messages out, *en masse*, pursuant to preprogrammed
19 parameters.
20

21 27. Accordingly, Defendant's messages utilized an "artificial voice" as
22 prohibited by 47 U.S.C. § 227(b)(1)(A).

23 28. In Merriam Webster's Dictionary, "prerecorded" is defined as
24 "recorded in advance." "Recorded" is defined as "to set down in writing." The
25 text message sent to Plaintiff's cellular telephone via an SMS blasting platform was
26 set down in writing in advance by Defendants, whose employees wrote out the
27 standard automated messages that were to be sent to Plaintiff and other class
28 members, and by way of preprogrammed SMS blasting, entered the prerecorded

1 message into the SMS Blasting platform, and thereafter sent these messages
2 pursuant to scheduled blasts that were programmed by Defendants. Thus,
3 Defendants employed a text message as an instrument or medium of expression to
4 deliver a prerecorded message drafted in advance of being sent.

5 29. Thus, Defendant's messages utilized a "prerecorded voice" as
6 prohibited by 47 U.S.C. § 227(b)(1)(A).

7 30. The telephone number that Defendants, or their agent texted were
8 assigned to a cellular telephone service for which Plaintiff incur charges for
9 incoming texts pursuant to 47 U.S.C. § 227 (b)(1).

10 31. These text messages constituted calls that were not for emergency
11 purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

12 32. Plaintiff was never a customer of Defendants and never provided his
13 cellular telephone number to Defendants for any reason whatsoever. Accordingly,
14 Defendants and their agents never received Plaintiff's prior express consent to
15 receive unsolicited text messages, pursuant to 47 U.S.C. § 227 (b)(1)(A).

16 33. Such text messages constitute solicitation calls pursuant to 47 C.F.R.
17 § 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

18 34. These text messages by Defendants, or its agents, violated 47 U.S.C.
19 § 227(b)(1).

20 **CLASS ACTION ALLEGATIONS**

21 35. Plaintiff brings this action on behalf of himself and on behalf of and
22 all others similarly situated, as a member of the proposed Class.

23 36. Plaintiff represents, and is a member of, the Class, defined as follows:
24 all persons within the United States who received any unsolicited text messages
25 sent using an ATDS or an artificial or prerecorded voice from Defendants, which
26 text message was not made for emergency purposes or with the recipient's prior
27 express consent within the four years prior to the filing of the Complaint through
28 the date of class certification.

1 37. Defendants and its employees or agents are excluded from the Class.
2 Plaintiff does not know the number of members in the Class, but believes the Class
3 members number in the thousands, if not more. Thus, this matter should be
4 certified as a Class action to assist in the expeditious litigation of this matter.

5 38. This suit seeks only damages and injunctive relief for recovery of
6 economic injury on behalf of the Class, and it expressly is not intended to request
7 any recovery for personal injury and claims related thereto. Plaintiff reserves the
8 right to expand the Class definition to seek recovery on behalf of additional persons
9 as warranted as facts are learned in further investigation and discovery.

10 39. The joinder of the members of the Class is impractical and the
11 disposition of their claims in the Class action will provide substantial benefits both
12 to the parties and to the court. The Class can be identified through Defendant's
13 records or Defendant's agents' records.

14 40. Plaintiff and members of the Class were harmed by the acts of
15 Defendants in at least the following ways: Defendants, either directly or through
16 their agents, illegally contacted Plaintiff and the Class members via their cellular
17 telephones by using marketing and text messages, thereby causing Plaintiff and the
18 Class members to incur certain cellular telephone charges or reduce cellular
19 telephone time for which Plaintiff and the Class members previously paid, and
20 invading the privacy of said Plaintiff and the Class members. Plaintiff and the
21 Class members were damaged thereby.

22 41. There is a well-defined community of interest in the questions of law
23 and fact involved affecting the Class members. The questions of law and fact
24 common to the Class predominate over questions which may affect individual
25 Class members, including the following:

- 26 a) Whether, within the four years prior to the filing of this Complaint
27 through the date of class certification, Defendant or their agents sent
28 any text messages (other than a message made for emergency

1 purposes or made with the prior express consent of the called party)
2 to a Class member using any automatic dialing system or artificial or
3 prerecorded voice to any telephone number assigned to a cellular
4 phone service;

- 5 b) Whether Plaintiff and the Class members were damaged thereby, and
6 the extent of damages for such violation; and
7 c) Whether Defendant and their agents should be enjoined from
8 engaging in such conduct in the future.

9 42. As a person that received at least one solicitation text message without
10 Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of the
11 Class. Plaintiff will fairly and adequately represent and protect the interests of the
12 Class in that Plaintiff has no interests antagonistic to any member of the Class.

13 43. Plaintiff and the members of the Class have suffered irreparable harm
14 as a result of the Defendant's unlawful and wrongful conduct. Absent a class
15 action, the Class will continue to face the potential for irreparable harm. In
16 addition, these violations of law will be allowed to proceed without remedy and
17 Defendant will likely continue such illegal conduct. Because of the size of the
18 individual member's claims, few, if any, members of the Class could afford to seek
19 legal redress for the wrongs complained of herein.

20 44. Plaintiff has retained counsel experienced in handling class action
21 claims and claims involving violations of the Telephone Consumer Protection Act.

22 45. A class action is a superior method for the fair and efficient
23 adjudication of this controversy. Class-wide damages are essential to induce
24 Defendants to comply with federal and California law. The interest of the Class
25 members in individually controlling the prosecution of separate claims against
26 Defendants are small because the maximum statutory damages in an individual
27 action for violation of privacy are minimal. Management of these claims is likely
28 to present significantly fewer difficulties than those presented in many class claims.

1 46. Defendants have acted on grounds generally applicable to the Class,
2 thereby making appropriate final injunctive relief and corresponding declaratory
3 relief with respect to the Class as a whole.

4
5 **FIRST CAUSE OF ACTION**
6 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**
7 **47 U.S.C. § 227(B)**

8 47. Plaintiff incorporates by reference all of the above paragraphs of this
9 Complaint as though fully stated herein.

10 48. The foregoing acts and omissions of Defendants constitute numerous
11 and multiple negligent violations of the TCPA, including but not limited to each
12 and every one of the above-cited provisions of 47 U.S.C. § 227(b).

13 49. As a result of Defendants' negligent violations of 47 U.S.C. § 227(b),
14 Plaintiff and ATDS Class members are entitled to an award of \$500.00 in statutory
15 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

16 50. Plaintiff and ATDS Class members are also entitled to and seek
17 injunctive relief prohibiting such conduct in the future.

18 **SECOND CAUSE OF ACTION**
19 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**
20 **TELEPHONE CONSUMER PROTECTION ACT**
21 **47 U.S.C. § 227(B)**

22 51. Plaintiff incorporates by reference all of the above paragraphs of this
23 Complaint as though fully stated herein.

24 52. The foregoing acts and omissions of Defendants constitute numerous
25 and multiple knowing and/or willful violations of the TCPA, including but not
26 limited to each and every one of the above-cited provisions of 47 U.S.C. § 227(b).

27 53. As a result of Defendants' knowing and/or willful violations of 47
28 U.S.C. § 227(b), Plaintiff and ATDS Class members are entitled to an award of

1 \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C.
2 § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

3 54. Plaintiff and ATDS Class members are also entitled to and seek
4 injunctive relief prohibiting such conduct in the future.

5 6 **PRAYER FOR RELIEF**

7 Wherefore, Plaintiff respectfully requests the Court grant Plaintiff, and
8 members of the Classes, the following relief against Defendants:

9 10 **FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF 11 THE TCPA, 47 U.S.C. § 227(B)**

- 12 • As a result of Defendants' negligent violations of 47 U.S.C. § 227(b)(1),
13 Plaintiff seeks for himself and each ATDS Class member \$500.00 in
14 statutory damages, for each and every violation, pursuant to 47 U.S.C. §
15 227(b)(3)(B).
- 16 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
17 conduct in the future.
- 18 • Any other relief the Court may deem just and proper.

19 **SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION OF 20 THE TCPA, 47 U.S.C. § 227(B)**

- 21 • As a result of Defendants' knowing and/or willful violations of 47 U.S.C.
22 § 227(b)(1), Plaintiff seeks for himself and each ATDS Class member
23 \$1,500.00 in statutory damages, for each and every violation, pursuant to
24 47 U.S.C. § 227(b)(3)(B).
- 25 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
26 conduct in the future.
- 27 • Any other relief the Court may deem just and proper.

TRIAL BY JURY

55. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: November 4, 2022

Respectfully submitted,

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