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15 *Jason Hartley*

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

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| 18 Jason Hartley, individually, and on 19 behalf of others similarly situated, 20 21 Plaintiffs, 22 23 v. 24 25 Gallup, Inc., 26 27 Defendant. 28 | Case No: <u>'17CV768 L AGS</u> COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. §§ 227, ET. SEQ. <u>CLASS ACTION</u> JURY TRIAL DEMANDED |
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INTRODUCTION

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3 1. Jason Hartley, (Plaintiff), through Plaintiff's attorneys, brings this action for
4 damages, injunctive relief, and any other available legal or equitable
5 remedies, resulting from the illegal actions of Gallup, Inc. ("Defendant"), in
6 negligently and/or intentionally contacting Plaintiff on Plaintiff's cellular
7 phone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. §
8 227 et seq. ("TCPA"), thereby invading Plaintiff's privacy. Plaintiff alleges as
9 follows upon personal knowledge as to himself and his own acts and
10 experiences, and, as to all other matters, upon information and belief,
11 including investigation conduct by his attorneys.

12 2. The TCPA was designed to prevent calls and messages like the ones described
13 within this complaint, and to protect the privacy of citizens like Plaintiff.
14 "Voluminous consumer complaints about abuses of telephone technology –
15 for example, computerized calls dispatched to private homes – prompted
16 Congress to pass the TCPA." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740,
17 744 (2012).

18 3. In enacting the TCPA, Congress intended to give consumers a choice as to
19 how creditors and telemarketers may call them, and made specific findings
20 that "[t]echnologies that might allow consumers to avoid receiving such calls
21 are not universally available, are costly, are unlikely to be enforced, or place
22 an inordinate burden on the consumer. TCPA, Pub.L. No. 102-243, § 11.
23 Toward this end, Congress found that

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

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

4 4. Congress also specifically found that “the evidence presented to the Congress
5 indicates that automated or prerecorded calls are a nuisance and an invasion
6 of privacy, regardless of the type of call...” *Id.* at §§ 12-13. See also, *Mims*,
7 132 S. Ct. at 744.

8 5. As Judge Easterbrook of the Seventh Circuit recently explained in a TCPA
9 case regarding calls similar to this one:

10 The Telephone Consumer Protection Act ... is well known for
11 its provisions limiting junk-fax transmissions. A less-litigated
12 part of the Act curtails the use of automated dialers and
13 prerecorded messages to cell phones, whose subscribers often
14 are billed by the minute as soon as the call is answered—and
15 routing a call to voicemail counts as answering the call. An
automated call to a landline phone can be an annoyance; an
automated call to a cell phone adds expense to annoyance.

16 *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012).

17 **JURISDICTION AND VENUE**

18 6. Jurisdiction of this Court arises pursuant to 28 U.S.C. § 1331.

19 7. This action arises out of Defendant's violations of the Telephone Consumer
20 Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”).

21 8. Plaintiff is a natural person who resides in the City of San Diego, County of
22 San Diego, State of California.

23 9. Because Defendant does business within the State of California, personal
24 jurisdiction is established.

25 10. Venue is proper in the United States District Court for the Southern District of
26 California pursuant to 28 U.S.C. § 1391 because Plaintiff resides in the City
27 of San Diego, County of San Diego, State of California which is within this
28

1 judicial district and the conduct complained of herein occurred within this
2 judicial district.

3 11. At all times relevant, Defendant conducted business within the State of
4 California.

5 **PARTIES**

6 12. Plaintiff is a natural person who resides in the City of San Diego, State of
7 California.

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

10 14. Defendant is incorporated in the State of Delaware with its Headquarters
11 located in Washington D.C.

12 15. Defendant, is and at all times mentioned herein was, a corporation and is a
13 “person,” as defined by 47 U.S.C. § 153 (39).

14 16. Plaintiff alleges that at all times relevant herein Defendant conducted business
15 in the State of California and in the County of San Diego, within this judicial
16 district.

17 **FACTUAL ALLEGATIONS**

18 17. Plaintiff added his cellular phone number ending in 3472 to the National Do
19 Not Call Registry on December 11, 2004.

20 18. Sometime around November 9, 2016, Defendant began calling Plaintiff.

21 19. On or about November 9, 2016, Defendant called Plaintiff’s cellular phone
22 ending in 3472 from 402-829-9112. There was a long pause before the call
23 connected to Plaintiff’s cellular telephone.

24 20. After the long pause, Plaintiff was connected to a representative who
25 informed him that Defendant was calling on behalf of Union Bank.

26 21. Plaintiff informed Defendant that he had not visited a Union Bank branch and
27 was concerned why Defendant was calling.
28

- 1 22. Plaintiff was injured because his privacy rights were infringed upon in the
2 form of harassment by Defendant.
- 3 23. These telephone calls Defendant made to Plaintiff’s cellular telephone ending
4 in 3472 on November 9, 2016 and at least one time prior to November 9,
5 2016 were made via an “automatic telephone dialing system” (“ATDS”), as
6 defined by 47 U.S.C. § 227(a)(1), using “an artificial or prerecorded voice” as
7 prohibited by 47 U.S.C. § 227(b)(1)(A).
- 8 24. Plaintiff did not provide prior express consent to Defendant or its agent to
9 receive calls on Plaintiff’s cellular telephone, pursuant to 47 U.S.C. § 227 (b)
10 (1)(A).
- 11 25. This ATDS has the capacity to store or produce telephone numbers to be
12 called, using a random or sequential number generator.
- 13 26. The ATDS used by Defendant also has the capacity to, and does, dial
14 telephone numbers stored as a list or in a database without human
15 intervention.
- 16 27. Defendant’s calls were placed to a telephone number assigned to a cellular
17 telephone service for which Plaintiff incurs a charge for incoming calls
18 pursuant to 47 U.S.C.(b)(1).
- 19 28. These telephone calls constitute calls that were not for emergency purposes as
20 defined by 47 U.S.C. § 227(b)(1)(A)(i).
- 21 29. This telephonic communication by Defendant violated 47 U.S.C. § 227 (b)(1).
- 22 30. Through this action, Plaintiff suffered an invasion of his legally protected
23 interest in privacy, which is specifically addressed and protected by the
24 TCPA.
- 25 31. He was personally affected because she was frustrated and distressed that
26 Defendant harassed Plaintiff with a call using an ATDS.
- 27
28

1 32. Defendant's call forces Plaintiff and class members to live without the utility
2 of Plaintiff's cell phone by forcing him to silence his cell phone and/or block
3 incoming numbers.

4 33. Defendant's calls to Plaintiff's cellular telephone number were unsolicited by
5 Plaintiff and without Plaintiff's permission or consent.

6 34. Plaintiff is informed and believes and here upon alleges, that these calls were
7 made by Defendant or Defendant's agent, with Defendant's permission,
8 knowledge, control and for Defendant's benefit.

9 35. The calls from Defendant came from the phone number 402-829-9112.

10
11 **CAUSES OF ACTION**

12 **CLASS ACTION ALLEGATIONS**

13 36. Plaintiff brings this action on behalf of himself and on behalf of and all others
14 similarly situated (the "Class"). The proposed Class that Plaintiff seeks to
15 represent are defined as follows:

16 37. Plaintiff represents, and is a member of the Class, consisting of:

17 All persons within the United States who received any
18 telephone call from Defendants or their agent/s and/or
19 employee/s, not sent for emergency purposes, to said
20 person's cellular telephone made through the use of any
21 automatic telephone dialing system and/or with an
22 artificial or prerecorded message within the four years
23 prior to the filing of this Complaint.

24 38. Plaintiff represents, and is a member of, the Class, because Plaintiff received
25 telephone calls from Defendant to Plaintiff's cellular telephone using a
26 prerecorded voice, some or all of which Plaintiff was billed for receiving such
27 calls.

28 39. Defendant and its employees or agents are excluded from the Class. Plaintiff
does not know the number of members in the Class, but believes the Class

1 members number in the several thousands, if not more. Thus, this matter
2 should be certified as a Class action to assist in the expeditious litigation of
3 this matter.

4 40. Plaintiff and members of the Class were harmed by the acts of Defendant in at
5 least the following ways:

- 6 • Plaintiff and members of the Class were harmed by the acts of
7 Defendants in at least the following ways: Defendant, either directly or
8 through its agents, illegally contacting Plaintiff and the Class members
9 via their cellular telephones by using an ATDS, thereby causing Plaintiff
10 and the Class members to incur certain cellular telephone charges or
11 reduce cellular telephone time for which Plaintiff and the Class
12 members previously paid, and invading the privacy of said Plaintiff and
13 the Class members. Plaintiff and the Class members were damaged
14 thereby.

15 41. This suit seeks only damages and injunctive relief for recovery of economic
16 injury on behalf of the Class and it expressly is not intended to request any
17 recovery for personal injury and claims related thereto. Plaintiff reserves the
18 right to expand the Class definition to seek recovery on behalf of additional
19 persons as warranted as facts are learned in further investigation and
20 discovery.

21 42. The joinder of the Class members is impractical and the disposition of their
22 claims in the Class action will provide substantial benefits both to the parties
23 and to the court. The Class can be identified through Defendant's records.

24 43. There is a well-defined community of interest in the questions of law and fact
25 involved affecting the parties to be represented. The questions of law and fact
26 to the Class predominate over questions which may affect individual Class
27 members, including, but not limited to, the following:
28

- 1 • Whether, within the four years prior to the filing of this Complaint,
- 2 Defendant made any call (other than a call made for emergency
- 3 purposes or made with the prior express consent of the called party) to a
- 4 Class member using any automatic telephone dialing system or an
- 5 artificial or prerecorded voice to any telephone number assigned to a
- 6 cellular telephone service.
- 7 • Whether Plaintiff and the Class were damaged thereby, and the extent of
- 8 damages for such violation; and
- 9 • Whether Defendant should be enjoined from engaging in such conduct
- 10 in the future.

11 44. As a person that received numerous calls using an automatic telephone dialing
12 system or an artificial or prerecorded voice, without Plaintiff's express prior
13 consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff
14 will fairly and adequately represent and protect the interests of the Class in
15 that Plaintiff has no interests antagonistic to any member of the Class.

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

23 46. Plaintiff has retained counsel experienced in handling class action claims and
24 claims involving consumer actions and violations of the Telephone Consumer
25 Protection Act.

26 47. A class action is a superior method for the fair and efficient adjudication of
27 this controversy. Class-wide damages are essential to induce Defendant to
28 comply with federal and California law. The interest of Class members in

1 individually controlling the prosecution of separate claims against Defendant
2 is small because the maximum statutory damages in an individual action for
3 violation of privacy are minimal. Management of these claims is likely to
4 present significantly fewer difficulties than those presented in many class
5 claims.

- 6 48. Defendant has acted on grounds generally applicable to the Class, thereby
7 making appropriate final injunctive relief and corresponding declaratory relief
8 with respect to the Class as a whole.

9
10 **CAUSES OF ACTION**

11 **COUNT I**

12 **NEGLIGENT VIOLATIONS OF THE**

13 **TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

14 **47 U.S.C. 227**

- 15 49. Plaintiff repeats, re-alleges, and incorporates by reference, all other
16 paragraphs.

- 17 50. The foregoing acts and omissions constitute numerous and multiple violations
18 of the TCPA, including but not limited to each and every one of the above-
19 cited provisions of the TCPA, 47 U.S.C. 227 et. seq.

- 20 51. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq,
21 Plaintiff is entitled to an award of \$500.00 in statutory damages, for each and
22 every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

23 **COUNT II**

24 **KNOWING AND/OR WILLFUL OF THE**

25 **TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

26 **47 U.S.C. 227**

- 27 52. Plaintiff repeats, re-alleges, and incorporates by reference, all other
28 paragraphs.

1 53. The foregoing acts and omissions of Defendant constitute numerous and
2 multiple knowing and/or willful violations of the TCPA, including but not
3 limited to each and every one of the above-cited provisions of 47 U.S.C. §
4 227 et seq.

5 54. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. §
6 227 et seq., Plaintiff is entitled to treble damages, as provided by statute, up to
7 \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B)
8 and 47 U.S.C. § 227(b)(3)(C).

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff prays that judgment be entered against Defendant, and
11 Plaintiff be awarded damages from Defendant, as follows:

- 12 • That the action regarding each violation of the TCPA be certified as a
13 class action on behalf of the Class and requested herein;
- 14 • That Plaintiff be appointed as representative of the Class;
- 15 • That Plaintiff's counsel be appointed as counsel for the Class;
- 16 • Statutory damages of \$500.00 for each negligent violation of the TCPA
17 pursuant to 47 U.S.C. § 227(b)(3)(B) for each plaintiff and putative
18 class member;
- 19 • Statutory damages of \$1,500.00 for each knowing and/or willful
20 violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B) and 47
21 U.S.C. § 227(b)(3)(C);
- 22 • Pursuant to 47 U.S.C § 227(b)(3)(A), injunctive relief prohibiting such
23 conduct in the future;
- 24 • any and all other relief that this Court deems just and proper;

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

3
4 Respectfully submitted,

Hyde & Swigart

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6 Date: April 17, 2017

7 By: /s/ Joshua B. Swigart
8 Joshua B. Swigart
9 Attorneys for Plaintiff
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