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14
15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**
17

18 **BADIE JABER, INDIVIDUALLY AND**
19 **ON BEHALF OF ALL OTHERS**
20 **SIMILARLY SITUATED**

21 **PLAINTIFF,**

22 **v.**

23 **NASCAR HOLDINGS, INC.,**

24 **DEFENDANT.**
25
26

Case No: '11CV1783 DMS WVG

CLASS ACTION

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

JURISDICTION AND VENUE

11
12 2. Jurisdiction of this Court arises pursuant to 28 U.S.C. § 1332(d)(2) because
13 Plaintiff seeks relief on behalf of a national class action, which will result in
14 at least one class member belonging to a different state than that of
15 Defendants. Plaintiff also seeks up to \$1,500 in damages for each call in
16 violation of the TCPA, which, when aggregated among a proposed class
17 number in tens of thousands, exceeds the \$5,000,000 threshold for federal
18 court jurisdiction. Therefore, both elements of diversity jurisdiction under the
19 Class Action Fairness Act of 2005 ("CAFA") are present and this Court has
20 jurisdiction.
21 3. Venue is proper in the United States District Court for the Southern District of
22 California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because Defendant,
23 NASCAR does business within the State of California and the County of San
24 Diego and is a citizen of Florida, as that is its principal place of business and
25 incorporated in the State of Florida.

26 //

27 //

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PARTIES

4. Plaintiff is, and all times mentioned herein was, an individual citizen and resident of the State of California. Plaintiff is, and all times mentioned herein was, "person(s)" as defined by 47 U.S.C. §153 (10).
5. Plaintiff is informed and believes, and thereon alleges, that NASCAR is, at all times mentioned herein was, a corporation whose primary corporate address is in Daytona Beach, Florida.
6. At all times mentioned herein, Defendant, NASCAR was and is a corporation and "person(s)" as defined by 47 U.S.C. § 152 (10).

FACTUAL ALLEGATIONS

7. At all times relevant, Plaintiff was an individual residing within the State of California. Plaintiff is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153 (10).
8. At all times relevant all Defendant conducted business in the State of California, County of San Diego.
9. Plaintiff maintains cellular service with a common cellular telephone service provider and maintains cellular telephone number 909-964-5565. Plaintiff has maintained this cellular telephone for years.
10. Plaintiff has never provided this cellular telephone number to Defendant or provided any type of prior express consent to receive sales solicitations through Plaintiff's cellular telephone.
11. On February 19, 2011 at approximately 2:16 p.m., Plaintiff received an unsolicited advertisement, via text message from Defendant sent to Plaintiff's cellular telephone number, as listed above.
12. The telephone identification number provided in the text message read "2222". The text message stated in pertinent part:
"FREE NASCAR Sprint Cup Mobile lets you watch the action from Daytona live on your phone. Download now: <http://sprint.us/nascar> Reply END to stop"

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13. This unsolicited text message placed to Plaintiff's cellular telephone was placed via 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).
14. The telephone number that the Defendant, or its agents, called was assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).
15. These telephone calls constituted calls that were not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).
16. Plaintiff did not provide Defendant or its agents prior express consent to receive unsolicited text messages, pursuant to 47 U.S.C. § 227 (b)(1)(A).
17. These telephone calls by Defendant or its agents violated 47 U.S.C. § 227(b)(1).
18. In response to receiving this unsolicited text message, Plaintiff replied "End".
19. In response, Defendant then sent another unsolicited text message to Plaintiff which stated in pertinent part:

"Thanks. You have been removed from our Device Education SMS program."
20. During this telephone call and/or sending of the unsolicited text message, Defendant used "an artificial or prerecorded voice" as prohibited by 47 U.S.C. § 227 (b)(1)(A).
21. The telephone number Defendant called and/or sent the unsolicited text message was assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).
22. These telephone call and/or unsolicited text message constituted a call that was not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

1 23. Plaintiff did not provide prior express consent to receive calls and/or
2 unsolicited text messages on Plaintiff's cellular telephone, pursuant to 47
3 U.S.C. § 227 (b)(1)(A).

4 24. These telephone calls by Defendant violated 47 U.S.C. § 227(b)(1).

5 **CLASS ACTION ALLEGATIONS**

6 25. Plaintiff brings this action on behalf of himself and on behalf of and all others
7 similarly situated ("the Class").

8 26. Plaintiff represents, and is a member of the Class, consisting of all persons
9 within the United States who received any unsolicited text messages and/or
10 any other unsolicited text messages from Defendant without prior express
11 consent.

12 27. Plaintiff also brings this action on behalf of himself and on behalf of all others
13 similarly situated and is a member of ("the Sub-Class").

14 28. Plaintiff represents and is a member of the Sub-Class of persons who sent a
15 reply text message, "end," to Defendant in response to a text message sent by
16 Defendant, and then received an unsolicited confirmatory text message from
17 Defendant, which text message was not made for emergency purposes or with
18 the recipient's prior express consent, within the four years prior to the filing
19 of this Complaint.

20 29. Defendant and its employees or agents are excluded from the Class and the
21 Sub-Class. Plaintiff does not know the number of members in the Class or
22 Sub-Class, but believes the Class and Sub-Class members number in the
23 hundreds of thousands, if not more. Thus, this matter should be certified as a
24 Class action to assist in the expeditious litigation of this matter.

25 30. Plaintiff and members of the Class and Sub-Class were harmed by the acts of
26 Defendant in at least the following ways: Defendant, either directly or
27 through their agents, illegally contacted Plaintiff and the Class members via
28 their cellular telephones by using an unsolicited and/or confirmatory text

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1 message, thereby causing Plaintiff and the Class members to incur certain
2 cellular telephone charges or reduce cellular telephone time for which
3 Plaintiff and the Class members previously paid, and invading the privacy of
4 said Plaintiff and the Class members. Plaintiff and the Class members were
5 damaged thereby.

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

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

16 33. There is a well-defined community of interest in the questions of law and fact
17 involved affecting the parties to be represented. The questions of law and fact
18 to the Class predominate over questions which may affect individual Class
19 members, including the following:

- 20 a) Whether, within the four years prior to the filing of this Complaint,
21 Defendant placed any confirmatory text messages (other than a text
22 message made for emergency purposes or made with the prior express
23 consent of the called party) to a Class member using any automatic
24 telephone dialing and/or texting system to any telephone number
25 assigned to a cellular telephone service;
- 26 b) Whether Plaintiff and the Class members were damaged thereby, and
27 the extent of damages for such violation; and
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c) Whether Defendants should be enjoined from engaging in such conduct in the future.

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

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

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

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

32. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendant to comply with federal and California law. The interest of Class members in individually controlling the prosecution of separate claims against Defendant is small because the maximum statutory damages in an individual action for violation of privacy are minimal. Management of these claims is likely to

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present significantly fewer difficulties than those presented in many class claims.

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

**FIRST CAUSE OF ACTION
NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.**

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

35. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

36. As a result of Defendant’s negligent violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and The Class is entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

37. Plaintiff and the The Class is also entitled to and seek injunctive relief prohibiting such conduct in the future.

**SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.**

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

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

- 1 40. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227
2 *et seq.*, Plaintiff and each of the The Classes are entitled to treble damages, as
3 provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47
4 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
- 5 41. Plaintiff and the The Classes are also entitled to and seek injunctive relief
6 prohibiting such conduct in the future.

7 **PRAYER FOR RELIEF**

8 Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and The Class
9 members the following relief against Defendant:

10
11 **FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF**
12 **THE TCPA, 47 U.S.C. § 227 *ET SEQ.***
13 ***AS TO ALL DEFENDANTS***

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

21 **SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION**
22 **OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.***
23 ***AS TO ALL DEFENDANTS***

- 24 • As a result of Defendant's willful and/or knowing violations of 47
25 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class and
26 Subclass member treble damages, as provided by statute, up to
27 \$1,500.00 for each and every violation, pursuant to 47 U.S.C. § 227(b)
28 (3)(B) and 47 U.S.C. § 227(b)(3)(C).

- 1 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
- 2 conduct in the future.
- 3 • Any other relief the Court may deem just and proper.
- 4

5 **TRIAL BY JURY**

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

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9 Respectfully submitted,

10 **Hyde & Swigart**

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12 Date: 8/10/11

13 By: /s/ Joshua Swigart
14 Joshua B. Swigart
15 Attorneys for Plaintiff

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
 Badie Jaber, Individually and on Behalf of All Others Similarly Situated

(b) County of Residence of First Listed Plaintiff _____
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
 Hyde & Swigart
 411 Camino Del Rio South Suite 301, San Diego, CA 92108

DEFENDANTS
 NASCAR Holdings, Inc.

County of Residence of First Listed Defendant _____
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known) **'11CV1783 DMS WVG**

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):
 TCPA 47 U.S.C. § 227 et seq. 28:1331

Brief description of cause:
 Violation of the Telephonic Consumer Protection Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 5,000,001.00

CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 08/10/11 SIGNATURE OF ATTORNEY OF RECORD /s/ Joshua B. Swigart

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____