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14 Sam Atherton, Jr.

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

<p>18 SAM ATHERTON, JR. individually, 19 and on behalf of others similarly 20 situated,</p> <p>21 Plaintiffs,</p> <p>22 v.</p> <p>23 CLICKSPARK, LLC.</p> <p>24 Defendant.</p>	<p>Case No: <u>'16CV3000 BEN KSC</u></p> <p>COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. §§ 227, ET. SEQ.</p> <p><u>CLASS ACTION</u></p> <p>JURY TRIAL DEMANDED</p>
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INTRODUCTION

1. Sam Atherton, Jr. (Plaintiff), through Plaintiff's attorneys, brings this action for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of ClickSpark, LLC ("Defendant"), in negligently and/or intentionally contacting Plaintiff on Plaintiff's cellular phone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"), thereby invading Plaintiff's privacy. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conduct by his attorneys.
2. The TCPA was designed to prevent calls and messages like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff. "Voluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).
3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them, and made specific findings that "[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that

[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only 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
16 automated call to a landline phone can be an annoyance; an
17 automated call to a cell phone adds expense to annoyance.

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

19 JURISDICTION AND VENUE

20 6. Jurisdiction of this Court arises pursuant to 28 U.S.C. § 1331, 15 U.S.C.
21 §1692(k), and 28 U.S.C. § 1367 for supplemental state claims.

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

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

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

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

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 located in the City of Henrietta, New York.

11 15. Defendant, is and at all times mentioned herein was, a limited liability
12 company and is a “person,” as defined by 47 U.S.C. § 153 (39). Defendant is
13 marketing company, specializing in generating leads through all media
14 channels.

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

18 **FACTUAL ALLEGATIONS**

19 17. Sometime before February 2015, Defendant began calling Plaintiff’s cellular
20 phone ending with “6248” from a 215-465-2379 number.

21 18. During the calls, there was a long pause, and no representatives came on the
22 line.

23 23. Plaintiff was injured because his privacy rights were infringed upon in the
24 form of harassment by Defendant.

25 24. These telephone calls Defendant made to Plaintiff’s cellular telephone ending
26 in 6248 were made via an “automatic telephone dialing system” (“ATDS”), as
27 defined by 47 U.S.C. § 227(a)(1), using “an artificial or prerecorded voice” as
28 prohibited by 47 U.S.C. § 227(b)(1)(A).



1 25. Plaintiff did not provide prior express consent to Defendant or its agent to
2 receive calls on Plaintiff's cellular telephone, pursuant to 47 U.S.C. § 227 (b)
3 (1)(A).

4 26. This ATDS has the capacity to store or produce telephone numbers to be
5 called, using a random or sequential number generator.

6 27. The ATDS used by Defendant also has the capacity to, and does, dial
7 telephone numbers stored as a list or in a database without human
8 intervention.

9 28. Defendant's calls were placed to a telephone number assigned to a cellular
10 telephone service for which Plaintiff incurs a charge for incoming calls
11 pursuant to 47 U.S.C.(b)(1).

12 29. These telephone calls constitute calls that were not for emergency purposes as
13 defined by 47 U.S.C. § 227(b)(1)(A)(i).

14 30. This telephonic communication by Defendant violated 47 U.S.C. § 227 (b)(1).

15 31. Through this action, Plaintiff suffered an invasion of his legally protected
16 interest in privacy, which is specifically addressed and protected by the
17 TCPA.

18 32. Plaintiff was personally affected because he was frustrated and distressed that
19 Defendant harassed Plaintiff with a call using an ATDS.

20 33. Defendant's call forces Plaintiff and class members to live without the utility
21 of Plaintiff's cell phone by forcing him to silence his cell phone and/or block
22 incoming numbers.

23 34. Defendant's calls to Plaintiff's cellular telephone number were unsolicited by
24 Plaintiff and without Plaintiff's permission or consent.

25 35. Plaintiff is informed and believes and here upon alleges, that these calls were
26 made by Defendant or Defendant's agent, with Defendant's permission,
27 knowledge, control and for Defendant's benefit.

28 36. The calls from Defendant came from the phone number 215-465-2379.

CAUSES OF ACTION

CLASS ACTION ALLEGATIONS

1
2
3 37. Plaintiff brings this action on behalf of himself and on behalf of and all others
4 similarly situated (the “Class”). The proposed Class that Plaintiff seeks to
5 represent are defined as follows:

6 38. Plaintiff represents, and is a member of the Class, consisting of:

7
8 All persons within the United States who received any
9 telephone call from Defendant or its agent/s and/or
10 employee/s to said person’s cellular telephone made
11 through the use of any automatic telephone dialing system
12 or with an artificial or prerecorded voice, which the call
13 was not made for emergency purposes or with the
14 recipient’s prior express consent, within the four years
15 prior to the filing of the Complaint.

16 39. Plaintiff represents, and is a member of, the Class, because Plaintiff received
17 telephone calls from Defendant to Plaintiff’s cellular telephone using a
18 prerecorded voice, some or all of which Plaintiff was billed for receiving such
19 calls.

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

25 41. Plaintiff and members of the Class were harmed by the acts of Defendant in at
26 least the following ways:

- 27 • Plaintiff and members of the Class were harmed by the acts of
28 Defendants in at least the following ways: Defendant, either directly or
through its agents, illegally contacting Plaintiff and the Class members
via their cellular telephones by using an ATDS, thereby causing Plaintiff
and the Class members to incur certain cellular telephone charges or

1 reduce cellular telephone time for which Plaintiff and the Class
2 members previously paid, and invading the privacy of said Plaintiff and
3 the Class members. Plaintiff and the Class members were damaged
4 thereby.

5 45. This suit seeks only damages and injunctive relief for recovery of economic
6 injury on behalf of the Class and it expressly is not intended to request any
7 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
9 persons as warranted as facts are learned in further investigation and
10 discovery.

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

14 47. There is a well-defined community of interest in the questions of law and fact
15 involved affecting the parties to be represented. The questions of law and fact
16 to the Class predominate over questions which may affect individual Class
17 members, including, but not limited to, the following:

- 18 • Whether, within the four years prior to the filing of this Complaint,
19 Defendant made any call (other than a call made for emergency
20 purposes or made with the prior express consent of the called party) to a
21 Class member using any automatic telephone dialing system or an
22 artificial or prerecorded voice to any telephone number assigned to a
23 cellular telephone service.
 - 24 • Whether Plaintiff and the Class were damaged thereby, and the extent of
25 damages for such violation; and
 - 26 • Whether Defendant should be enjoined from engaging in such conduct
27 in the future.
- 28



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

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

13 50. Plaintiff has retained counsel experienced in handling class action claims and
14 claims involving consumer actions and violations of the Telephone Consumer
15 Protection Act.

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

24 52. Defendant has acted on grounds generally applicable to the Class, thereby
25 making appropriate final injunctive relief and corresponding declaratory relief
26 with respect to the Class as a whole.
27
28

CAUSES OF ACTION

COUNT I

**NEGLIGENT VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

47 U.S.C. 227

53. Plaintiff repeats, re-alleges, and incorporates by reference, all other paragraphs.

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

55. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq, Plaintiff 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).

COUNT II

**KNOWING AND/OR WILLFUL OF THE
TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

47 U.S.C. 227

56. Plaintiff repeats, re-alleges, and incorporates by reference, all other paragraphs.

57. 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.

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

PRAYER FOR RELIEF

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

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

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

Respectfully submitted,
Hyde & Swigart

Date: 12/09/2016

By: /s/ Joshua B. Swigart
Joshua B. Swigart, Esq.
Attorney for Plaintiff

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 NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Sam Atherton, Jr., individually and on behalf of others similarly situated

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

(c) Attorneys (Firm Name, Address, and Telephone Number) Joshua B. Swigart, Esq. (225557); Yana A. Hart, Esq. (306499) Hyde & Swigart (619) 233-7770 2221 Camino Del Rio South, Suite 101, San Diego, CA 92108

DEFENDANTS

Clickspark, LLC

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

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

Attorneys (If Known)

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

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 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)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

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

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

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, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 47 U.S.C. §§227 et seq. Brief description of cause: Violations of the Telephone Consumer Protection Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/09/2016 SIGNATURE OF ATTORNEY OF RECORD s/Joshua B. Swigart

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [ClickSpark Hit with TCPA Class Action Over Auto-Dialed Calls](#)
