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

14 KEVIN LEMIEUX, Individually and )  
15 On Behalf of All Others Similarly )  
16 Situated, )  
17 Plaintiff, )

18 vs. )

19 SMART ENERGY SOLAR, INC. dba )  
20 SMART ENERGY USA, )  
21 Defendant. )

Case No. '17CV0694 DMS BLM

**CLASS ACTION COMPLAINT**  
**FOR DAMAGES AND DEMAND**  
**FOR JURY TRIAL**

22 )  
23 )  
24 )  
25 **NATURE OF THE CASE**

26 1. Plaintiff brings this action individually and on behalf of all others  
27 similarly situated seeking damages and any other available legal or equitable  
28 remedies resulting from the illegal actions of SMART ENERGY SOLAR INC. dba

1 SMART ENERGY USA (“Defendant”) in negligently, knowingly, and/or willfully  
2 contacting Plaintiff and on Plaintiff’s cellular telephone in violation of the  
3 Telephone Consumer Protection Act, *47 U.S.C. § 227 et seq.* (“TCPA”), thereby  
4 invading Plaintiff’s privacy.

5 **JURISDICTION & VENUE**

6 2. Jurisdiction is proper as Plaintiff seeks redress under a federal statute,  
7 thus this Court has jurisdiction as this matter involves questions of federal law.

8 3. Venue is proper in the United States District Court for the Southern  
9 District of California pursuant to *18 U.S.C. 1391(b)* and *18 U.S.C. § 1441(a)*  
10 because Defendant does business within the state of California and the Southern  
11 District of California, in Escondido, California.

12 **PARTIES**

13 4. Plaintiff, KEVIN LEMIEUX (“Plaintiff”), is a natural person residing  
14 in San Diego County, California and is a “person” as defined by *47 U.S.C. § 153*  
15 *(10)*.

16 5. Defendant is a California corporation engaged in the business of solar  
17 energy contracting and installation with multiple offices throughout the State of  
18 California and is a “person” as defined by *47 U.S.C. § 153 (39)*.

19 **FACTUAL ALLEGATIONS**

20 6. At all times relevant, Plaintiff was a citizen of the State of California.  
21 Plaintiff is, and at all times mentioned herein was, “persons” as defined by *47 U.S.C*  
22 *§ 153 (39)*.

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

25 8. Sometime prior to November 2, 2012 Plaintiff was assigned, and  
26 became the owner of, a cellular telephone number from his wireless provider.

27 9. On or about November 2, 2016, Plaintiff received a telephone call on  
28 his cellular telephone from Defendant, in which Defendant utilized an automatic

1 telephone dialing system (“ATDS”) as defined by 47 U.S.C. § 227(a)(1), using an  
2 “artificial or prerecorded voice” as prohibited by 47 U.S.C. § 227(b)(1)(A).

3 10. This November 2 call to Plaintiff’s cellular telephone number ending  
4 in 6796, was placed by Defendant from phone number (619) 324-4749, at 4:05 p.m.

5 11. During this call from Defendant to Plaintiff’s cellular telephone, an  
6 artificial or prerecorded voice said, “This is an urgent public announcement” and  
7 at the end of the recording, it directed Plaintiff to “press 1’ to ‘stop the electricity  
8 bill increase.”

9 12. After pressing 1, a live woman came on the phone and identified  
10 herself to Plaintiff as a representative from the “Clean Air Project.” [“CAP  
11 Representative # 1]. Plaintiff asked CAP Representative # 1 what the nature of the  
12 “Clean Air Project” was and CAP Representative # 1 stated to Plaintiff that the  
13 “Clean Air Project” was a community organization. Plaintiff asked the CAP  
14 Representative #1 she was a telemarketer, and she responded “No.”

15 13. CAP Representative # 1 proceeded to ask Plaintiff a series of  
16 questions, including, but not limited to: whether he was a homeowner; and, how  
17 much he paid for his electrical bill, etc. Once Plaintiff fully responded to each of  
18 these questions, CAP Representative # 1 stated to Plaintiff that “he qualifies and  
19 would definitely benefit from our program.” Shortly thereafter, CAP  
20 Representative # 1 terminated the call with Plaintiff.

21 14. On November 3, 2016, Plaintiff called the contact number for “Clean  
22 Air Project” and spoke with another CAP Representative. [CAP Representative #  
23 2]. CAP Representative # 2 posed the same questions to Plaintiff that were posed  
24 to him the day before by CAP Representative # 1, and was again told by CAP  
25 Representative #2 that he was “qualified.” Thereafter, CAP Representative # 2  
26 made an appointment with Plaintiff for Smart Energy USA to come to his home  
27 address.

28 15. After further consideration, later the same day, on November 3, 2016,

1 Plaintiff called the “Clean Air Project” phone number back to cancel the  
2 appointment with Smart Energy USA and to request that his number be removed  
3 from their dialing list.

4 16. On November 14, 2016, at 4:17 p.m., Plaintiff again received the  
5 same pre-recorded call from Defendant that he received on November 2, 2016 (as  
6 referenced in ¶¶ 9 & 10 *supra*), this time from telephone number (949) 332-1093.  
7 Plaintiff pressed ‘1’ and was connected to “Melissa.” Thereafter, Plaintiff  
8 eventually terminated this call with Melissa.

9 17. Defendant used an “automatic telephone dialing system,” (“ATDS”)  
10 as defined by 47 U.S.C. § 227(a)(1) to place its calls to Plaintiff.

11 18. Defendant used an artificial or prerecorded voice to place its calls to  
12 Plaintiff.

13 19. The voicemail messages Plaintiff received were created using a pre-  
14 recorded and/or artificial voice. As it is highly unlikely that Defendant’s  
15 representative manually dialed Plaintiff’s telephone number and subsequently  
16 placed a prerecorded message when Plaintiff did not answer, Defendant’s use of  
17 an artificial or prerecorded message indicates that Defendant’s call was placed  
18 with an automatic telephone dialing system.

19 20. The ATDS used by Defendant has the capacity to store or produce  
20 telephone numbers to be called, using a random or sequential number generator.

21 21. The ATDS used by Defendant also has the capacity to, and does, call  
22 telephone numbers from a list of databases of telephone numbers automatically  
23 and without human intervention.

24 22. The telephone number Defendant called was assigned to a cellular  
25 telephone service for which Plaintiff incurred a charge for incoming calls pursuant  
26 to 47 U.S.C. § 227 (b)(1).

27 23. Plaintiff at no time provided “prior express consent” for Defendant to  
28 place telephone calls to Plaintiff’s cellular telephone with an artificial or

1 prerecorded voice utilizing an ATDS as proscribed under 47 U.S.C. § 227(b)(1)(A).

2 24. Plaintiff had not provided his cellular telephone number to Defendant.  
3 Plaintiff was not a customer of Defendant.

4 25. Plaintiff had no “established business relationship” with Defendant,  
5 as defined by 47 U.S.C. § 227 (a)(2). 24. These telephone calls made by Defendant  
6 or its agents were in violation of 47 U.S.C. § 227(b)(1). Accordingly, Defendant  
7 did not have Plaintiff’s “prior express consent” to receive calls using an automatic  
8 telephone dialing system on his cellular telephone pursuant to 47 U.S.C. §  
9 227(b)(1)(A).

10 26. As a result of Defendant’s alleged violations of law by placing these  
11 automated calls to Plaintiff’s cellular telephone without prior express consent,  
12 Defendant caused Plaintiff harm and/or injury such that Article III standing is  
13 satisfied in at least the following, if not more, ways:

- 14 a. Invading Plaintiff’s and the putative class’ privacy;
- 15 b. Electronically intruding upon Plaintiff’s and the putative class’  
16 seclusion;
- 17 c. Intrusion into Plaintiff’s and the putative class’ use and enjoyment  
18 of their cellular telephones;
- 19 d. Impermissibly occupying minutes, data, availability to answer  
20 another call, and various other intangible rights that Plaintiff and the  
21 putative class have as to complete ownership and use of their cellular  
22 telephones;
- 23 e. Causing Plaintiff and the putative class to expend needless time in  
24 receiving, answering, and attempting to dispose of Defendant’s  
25 unwanted calls.

26 **CLASS ALLEGATIONS**

27 27. Plaintiff brings this action on behalf of himself and all others similarly  
28 situated, as a member of the proposed class (hereafter “The Class”) defined as

1 follows:

2  
3 a. All persons within the United States who had or have  
4 a number assigned to a cellular telephone service, who  
5 received at least one call using an ATDS and/or an  
6 artificial prerecorded voice from Defendant, or its agents,  
7 calling on behalf of Defendant, between the date of filing  
8 this action and the four years preceding, where such calls  
9 were placed for marketing purposes, to noncustomers of  
10 Defendant, at the time of the calls.

11  
12 28. Defendant and its employees or agents are excluded from the Class.  
13 Plaintiff does not know the number of members in the Class, but believes the Class  
14 members number in the thousands, if not more. Thus, this matter should be  
15 certified as a Class action to assist in the expeditious litigation of this matter.

16 29. Plaintiff and members of the Class were harmed by the acts of  
17 Defendant in at least the following ways: Defendant illegally contacted Plaintiff  
18 and the Class members via their cellular telephones thereby causing Plaintiff and  
19 the Class members to incur certain cellular telephone charges or reduce cellular  
20 telephone time for which Plaintiff and the Class members previously paid, by  
21 having to retrieve or administer messages left by Defendant or their agents, during  
22 those illegal calls, and invading the privacy of said Plaintiff and the Class members.  
23 Plaintiff and the Class members were damaged thereby.

24 30. This suit seeks only damages and injunctive relief for recovery of  
25 economic injury on behalf of the Class and it expressly is not intended to request  
26 any recovery for personal injury and claims related thereto. Plaintiff reserves the  
27 right to expand the Class definition to seek recovery on behalf of additional persons  
28 as warranted as facts are learned in further investigation and discovery.

1           31. The joinder of the Class members is impractical and the disposition of  
2 their claims in the Class action will provide substantial benefits both to the parties  
3 and to the Court. The Class can be identified through Defendant's records and/or  
4 Defendant's agent's records.

5           32. There is a well-defined community of interest in the questions of law  
6 and fact involved affecting the parties to be represented. The questions of law and  
7 fact to the Class predominate over questions which may affect individual Class  
8 members, including the following:

9           i. Whether, within the four years prior to the filing of the  
10 Complaint, Defendant made any call(s) (other than a call made for emergency  
11 purposes or made with the prior express consent of the called party) to the Class  
12 members using any ATDS or an artificial or prerecorded voice to any telephone  
13 number assigned to a cellular telephone service;

14           ii. Whether Defendant called non-customers of Defendant for  
15 marketing purposes;

16           iii. Whether Plaintiff and the Class members were damaged  
17 thereby, and the extent of damages for such violation(s); and,

18           iv. Whether Defendant should be enjoined from engaging in such  
19 conduct in the future.

20           33. As a person that received numerous calls from Defendant in which  
21 Defendant used an ATDS or an artificial or prerecorded voice, without Plaintiff's  
22 prior express consent, Plaintiff is asserting claims that are typical of the Class.  
23 Plaintiff will fairly and adequately represent and protect the interests of the Class  
24 in that Plaintiff has no interests antagonistic to any member of the Class.

25           34. Plaintiff and the members of the Class have all suffered irreparable  
26 harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class  
27 action, the Class will continue to face the potential for irreparable harm. In  
28 addition, these violations of law will be allowed to proceed without remedy and

1 Defendant will likely continue such illegal conduct. The size of Class member's  
2 individual claims causes, few, if any, Class members to be able to afford to seek  
3 legal redress for the wrongs complained of herein.

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

6 36. A class action is a superior method for the fair and efficient  
7 adjudication of this controversy. Class-wide damages are essential to induce  
8 Defendant to comply with federal and California law. The interest of Class  
9 members in individually controlling the prosecution of separate claims against  
10 Defendant is small because the maximum statutory damages in an individual action  
11 for violation of privacy are minimal. Management of these claims is likely to  
12 present significantly fewer difficulties than those that would be presented in  
13 numerous individual claims.

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

17 **FIRST CAUSE OF ACTION**

18 **Negligent Violations of the Telephone Consumer Protection Act**

19 **47 U.S.C. §227 et seq.**

20 38. Plaintiff repeats and incorporates by reference into this cause of  
21 action the allegations set forth above at Paragraphs 1-32.

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

25 40. As a result of Defendant's negligent violations of *47 U.S.C. § 227 et*  
26 *seq.*, Plaintiff and the Class Members are entitled an award of \$500.00 in statutory  
27 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

28 41. Plaintiff and the Class members are also entitled to and seek

1 injunctive relief prohibiting such conduct in the future.

2 **SECOND CAUSE OF ACTION**

3 **Knowing and/or Willful Violations of the Telephone Consumer Protection**

4 **Act**

5 **47 U.S.C. §227 et seq.**

6 42. Plaintiff repeats and incorporates by reference into this cause of  
7 action the allegations set forth above at Paragraphs 1-36.

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

12 44. As a result of Defendant's knowing and/or willful violations of *47*  
13 *U.S.C. § 227 et seq.*, Plaintiff and the Class members are entitled an award of  
14 \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C.*  
15 *§ 227(b)(3)(B)* and *47 U.S.C. § 227(b)(3)(C)*.

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

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff requests judgment against Defendant for the following:

20 **FIRST CAUSE OF ACTION**

21 **Negligent Violations of the Telephone Consumer Protection Act**

22 **47 U.S.C. §227 et seq.**

- 23 • As a result of Defendant's negligent violations of *47 U.S.C.*  
24 *§227(b)(1)*, Plaintiff and the Class members are entitled to and  
25 request \$500 in statutory damages, for each and every violation,  
26 pursuant to *47 U.S.C. 227(b)(3)(B)*.
- 27 • Injunctive relief.
- 28 • Any and all other relief that the Court deems just and proper.

**SECOND CAUSE OF ACTION**

**Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

**47 U.S.C. §227 et seq.**

- As a result of Defendant’s willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiff and the Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).
- Injunctive relief.
- Any and all other relief that the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Please take notice that Plaintiff demands a trial by jury in this action.

Date: April 5, 2017

**MARTIN & BONTRAGER, APC**

By: /s/ Nicholas J. Bontrager  
Nicholas J. Bontrager  
Attorneys 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

KEVIN LEMIEUX, Individually and On Behalf of All Others Similarly Situated,

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

(c) Attorneys (Firm Name, Address, and Telephone Number)

MARTIN & BONTRAGER, APC 6464 W. Sunset Blvd., Ste. 960, Los Angeles, CA 90028 T: (323) 940-1700

DEFENDANTS

SMART ENERGY SOLAR, INC. dba SMART ENERGY USA,

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

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

Attorneys (If Known)

'17 CV0694 DMS BLM

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)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, 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)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER 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

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. ("TCPA") Brief description of cause: unlawful debt collection practices

VII. REQUESTED IN COMPLAINT:

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

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/05/2017 SIGNATURE OF ATTORNEY OF RECORD /s/ Nicholas J. Bontrager

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

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**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: [Smart Energy Solar Named in Class Action Over Robocalls](#)

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