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

14 AUSTIN MAXWELL, Individually and)	Case No. <u>'17CV1609 JLS BGS</u>
15 On Behalf of All Others Similarly)	
16 Situated,)	CLASS ACTION COMPLAINT
17 Plaintiff,)	FOR DAMAGES AND DEMAND
18 vs.)	FOR JURY TRIAL
19 COHN RESTAURANT GROUP, INC.)	
20 dba THE MELTING POT,)	
21 Defendant.)	
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 COHN RESTAURANT GROUP,

1 INC. dba THE MELTING POT (“Defendant”), in negligently, knowingly, and/or
2 willfully contacting Plaintiff 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 is a California corporation with headquarters in San Diego,
11 California and does business within the state of California and the Southern District
12 of California, and because Plaintiff received the offending text message at issue in
13 San Diego, California.

14 **PARTIES**

15 4. Plaintiff, Austin Maxwell (“Plaintiff”), is a natural person who resides
16 in Manhattan Beach, California and is a “person” as defined by 47 U.S.C. § 153
17 (10).

18 5. Defendant (“Defendant”), is a California corporation with its
19 headquarters in San Diego, California and is a “person” as defined by 47 U.S.C. §
20 153 (10).

21 **FACTUAL ALLEGATIONS**

22 6. On June 27, 2017, Plaintiff called the Melting Pot restaurant in San
23 Diego, California located at 901 5th Ave., San Diego, CA 92101. He dialed the
24 phone number (619) 234-5554 to make a reservation.

25 7. The receptionist or hostess answering the telephone took Plaintiff’s
26 reservation for that evening for two people. The receptionist asked for Plaintiff’s
27 name and cellular telephone phone number. Plaintiff provided both, using his
28 cellular telephone number ending in the last four digits 9300.

1 8. At no point during this conversation with Plaintiff did the
2 receptionist/hostess for Defendant provide an explanation as to why Plaintiff's
3 cellular telephone number was needed, required or requested in order for Plaintiff
4 to make his reservation. Defendant's receptionist/hostess never advised Plaintiff
5 that Defendant intended to send a text message to Plaintiff's cellular telephone, nor
6 did she obtain Plaintiff's consent to send him a text message.

7 9. That evening, about the time of Plaintiff's reservation, 7:30 p.m.,
8 Plaintiff received a text message. It stated: "Your table is now ready at Melting
9 Pot Gas Lamp, please return to the host stand."

10 10. This text message was sent from the telephone number 858-609-8391,
11 a telephone number belonging to the Melting Pot in the Gas Lamp District at the
12 same location Plaintiff called to make a reservation.

13 11. Plaintiff has never consented to receiving texts of any kind from
14 Defendant on his cellular telephone, nor has he consented to receiving automated
15 text messages from Defendant.

16 12. Defendant used an "automatic telephone dialing system", as defined
17 by *47 U.S.C. § 227(a)(1)* to send its text message to Plaintiff. The informal and
18 impersonal nature of the text messages sent (i.e., Plaintiff was never referred to by
19 name – thus not a customized message sent manually to Plaintiff, but instead a mass
20 automated text message) is indicative of the use of an automatic telephone dialing
21 system.

22 13. Defendant's text message constituted a call that was not for
23 emergency purposes as defined by *47 U.S.C. § 227(b)(1)(A)*.

24 14. Defendant's text message was placed to a telephone number assigned
25 to a cellular telephone service for which Plaintiff incurs a charge for incoming calls
26 pursuant to *47 U.S.C. § 227(b)(1)*.

27 15. Defendant did not have Plaintiff's "prior express consent" to receive
28 text messages using an automatic telephone dialing system on his cellular telephone

1 pursuant to 47 U.S.C. § 227(b)(1)(A).

2 16. As a result of Defendant's alleged violations of law by placing this
3 automated text message to Plaintiff's cellular telephone without prior express
4 consent, Defendant caused Plaintiff harm and/or injury such that Article III
5 standing is satisfied in at least the following, if not more, ways:

6 a. Invading Plaintiff's and the putative class' privacy;

7 b. Electronically intruding upon Plaintiff's and the putative class'
8 seclusion;

9 c. Intrusion into Plaintiff's and the putative class' use and enjoyment
10 of their cellular telephones;

11 d. Impermissibly occupying minutes, data, availability to answer
12 another call, and various other intangible rights that Plaintiff and the
13 putative class have as to complete ownership and use of their cellular
14 telephones;

15 e. Causing Plaintiff and the putative class to expend needless time in
16 receiving, answering, and attempting to dispose of Defendant's
17 unwanted text messages and attempting to stop Defendant's unwanted
18 text messages.

19 **CLASS ALLEGATIONS**

20 17. Plaintiff brings this action on behalf of himself and all others similarly
21 situated, as a member of the proposed class (hereafter "The Class") defined as
22 follows:

23 All persons within the United States who received any
24 text message from Defendant or Defendant's agent/s
25 and/or employee/s to said person's cellular telephone
26 made through the use of any automatic telephone dialing
27 system within the four years prior to the filing of this
28 Complaint, wherein said person never consented to
receiving such text message

1 18. Plaintiff represents, and is a member of, The Class, consisting of All
2 persons within the United States who received any text message from Defendant
3 or Defendant's agent/s and/or employee/s to said person's cellular telephone made
4 through the use of any automatic telephone dialing system within the four years
5 prior to the filing of this Complaint, wherein said person never consented to
6 receiving such text message.

7 19. Defendant, its employees and agents are excluded from The Class.
8 Plaintiff does not know the number of members in The Class, but believes the Class
9 members number in the hundreds, if not more. Thus, this matter should be certified
10 as a Class Action to assist in the expeditious litigation of the matter.

11 20. The Class is so numerous that the individual joinder of all of its
12 members is impractical. While the exact number and identities of The Class
13 members are unknown to Plaintiff at this time and can only be ascertained through
14 appropriate discovery, Plaintiff is informed and believes and thereon alleges that
15 The Class includes hundreds of members. Plaintiff alleges that The Class members
16 may be ascertained by the records maintained by Defendant.

17 21. Plaintiff and members of The Class were harmed by the acts of
18 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
19 and Class members via their cellular telephones thereby causing Plaintiff and Class
20 members to incur certain charges or reduced telephone time for which Plaintiff and
21 Class members had previously paid by having to retrieve or administer messages
22 left by Defendant during those illegal calls, and/or otherwise occupying Plaintiff's
23 and the Class members' cellular telephones with unwanted automated messages
24 therefore obstructing fully use and enjoyment of their respective cellular telephones
25 and thus invading the privacy of said Plaintiff and Class members.

26 22. Common questions of fact and law exist as to all members of The
27 Class which predominate over any questions affecting only individual members of
28 The Class. These common legal and factual questions, which do not vary between

1 Class members, and which may be determined without reference to the individual
2 circumstances of any Class members, include, but are not limited to, the following:

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

13 23. As a person that received text messages from Defendant using an
14 automatic telephone dialing system, without Plaintiff's prior express consent,
15 Plaintiff is asserting claims that are typical of The Class.

16 24. Plaintiff will fairly and adequately protect the interests of the members
17 of The Class. Plaintiff has retained attorneys experienced in the prosecution of
18 class actions.

19 25. A class action is superior to other available methods of fair and
20 efficient adjudication of this controversy, since individual litigation of the claims
21 of all Class members is impracticable. Even if every Class member could afford
22 individual litigation, the court system could not. It would be unduly burdensome
23 to the courts in which individual litigation of numerous issues would proceed.
24 Individualized litigation would also present the potential for varying, inconsistent,
25 or contradictory judgments and would magnify the delay and expense to all parties
26 and to the court system resulting from multiple trials of the same complex factual
27 issues. By contrast, the conduct of this action as a class action presents fewer
28 management difficulties, conserves the resources of the parties and of the court

1 system, and protects the rights of each Class member.

2 26. The prosecution of separate actions by individual Class members
3 would create a risk of adjudications with respect to them that would, as a practical
4 matter, be dispositive of the interests of the other Class members not parties to such
5 adjudications or that would substantially impair or impede the ability of such non-
6 party Class members to protect their interests.

7 27. Defendant has acted or refused to act in respects generally applicable
8 to The Class, thereby making appropriate final and injunctive relief with regard to
9 the members of the Class as a whole.

10 **FIRST CAUSE OF ACTION**

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

12 **47 U.S.C. §227 et seq.**

13 28. Plaintiff repeats and incorporates by reference into this cause of
14 action the allegations set forth above at Paragraphs 1-27.

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

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

21 31. Plaintiff and the Class members are also entitled to and seek
22 injunctive relief prohibiting such conduct in the future.

23 **SECOND CAUSE OF ACTION**

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

25 **Act**

26 **47 U.S.C. §227 et seq.**

27 32. Plaintiff repeats and incorporates by reference into this cause of
28 action the allegations set forth above at Paragraphs 1-31.

1 33. The foregoing acts and omissions of Defendant constitute numerous
2 and 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. § 227 et*
4 *seq.*

5 34. As a result of Defendant's knowing and/or willful violations of *47*
6 *U.S.C. § 227 et seq.*, Plaintiff and the Class members are entitled an award of
7 \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C.*
8 *§ 227(b)(3)(B)* and *47 U.S.C. § 227(b)(3)(C)*.

9 35. Plaintiff and the Class members are also entitled to and seek
10 injunctive relief prohibiting such conduct in the future.

11 **PRAYER FOR RELIEF**

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

13 **FIRST CAUSE OF ACTION**

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

15 **47 U.S.C. §227 et seq.**

- 16 • As a result of Defendant's negligent violations of *47 U.S.C.*
17 *§227(b)(1)*, Plaintiff and the Class members are entitled to and
18 request \$500 in statutory damages, for each and every violation,
19 pursuant to *47 U.S.C. 227(b)(3)(B)*.
20 • Injunctive relief.
21 • Any and all other relief that the Court deems just and proper.

22 **SECOND CAUSE OF ACTION**

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

25 **47 U.S.C. §227 et seq.**

- 26 • As a result of Defendant's willful and/or knowing violations of *47*
27 *U.S.C. §227(b)(1)*, Plaintiff and the Class members are entitled to
28 and request treble damages, as provided by statute, up to \$1,500, for

1 each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47
2 U.S.C. §227(b)(3)(C).

- 3 • Injunctive relief.
4 • Any and all other relief that the Court deems just and proper.
5

6 **DEMAND FOR JURY TRIAL**

7 Please take notice that Plaintiff demands a trial by jury in this action.
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9

10 Date: August 9, 2017

MARTIN & BONTRAGER, APC

11 By: /s/ G. Thomas Martin, III
12 G. Thomas Martin, III
13 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 NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

AUSTIN MAXWELL, Individually and On Behalf of All Others Similarly Situated,

(b) County of Residence of First Listed Plaintiff Los Angeles, 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

COHN RESTAURANT GROUP, INC. dba THE MELTING POT,

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

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

Attorneys (If Known)

'17CV1609 JLS BGS

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)

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
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 08/09/2017 SIGNATURE OF ATTORNEY OF RECORD /s/ G. Thomas Martin, III

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: [The Melting Pot Operating Co. Facing TCPA Lawsuit](#)
