

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

DEC 16 2016

[Signature]
CLERK

LINDA PENDLETON, on behalf of
herself, and all others similarly situated,

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CIV 16-cv-4171

Plaintiff,

)
)

**COMPLAINT AND INJUNCTIVE
RELIEF PURSUANT TO THE
TELEPHONE CONSUMER**

v.

)
)

**PROTECTION ACT, 47 U.S.C. §§ 227
et seq.**

1st FINANCIAL BANK, USA,

)
)

Defendant.

DEMAND FOR JURY TRIAL

INTRODUCTION

1. Linda Pendleton (“Plaintiff”) brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of 1st Financial Bank, USA (“Defendant” or “1st Financial”), in negligently, and/or willfully contacting Plaintiff through telephone calls on Plaintiff’s cellular telephone, 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 her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

NATURE OF THE ACTION

2. 1st Financial Bank, established in 1910, provides credit card and banking services. In an attempt to collect on alleged debts owed, 1st Financial routinely contacts alleged debtors through telephone calls with automatic telephone dialing equipment. However, when 1st Financial is unable to reach the alleged debtors by a telephone number

provided by the debtor, 1st Financial results to locating new numbers on its own through unreliable skip tracing methods or through number trapping – a number that it necessarily lacks express consent to call. Unfortunately, as a result of this business practice, 1st Financial regularly makes calls to cellular telephone numbers, without consent, in violation of the TCPA.

3. The TCPA strictly forbids nuisance calls exactly like those alleged in this Complaint – intrusive phone calls to private cellular phones, placed to numbers obtained without the prior express consent of the call recipients.

4. 1st Financial's violations caused Plaintiff and members of the Class actual harm, including aggravation, nuisance, and invasion of privacy that necessarily accompanies the receipt of unsolicited phone calls, as well as the violation of their statutory rights.

5. Plaintiff and members of the Class suffered a concrete injury in fact, whether tangible or intangible, that is directly traceable to 1st Financial's conduct, and is likely to be redressed by a favorable decision in this action

6. Plaintiff seeks an injunction stopping 1st Financial from making unsolicited phone calls, as well as an award of statutory damages under the TCPA, together with costs and reasonable attorneys' fees.

JURISDICTION AND VENUE

7. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff seeks up to \$1,500 in damages for each call in violation of the TCPA, which, when aggregated among a proposed class number in the tens of thousands, exceeds the \$5,000,000 threshold

for federal court jurisdiction. Further, Plaintiff alleges a national class, which will result in at least one class member belonging to a different state than that of the Defendant, providing jurisdiction under 28 U.S.C. § 1332(d)(2)(A). Therefore, both elements of diversity jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

8. This Court has federal question subject matter jurisdiction under 28 U.S.C. § 1331, as the action arises under the TCPA, a federal statute.

9. Venue is proper in the United States District Court for the District of South Dakota pursuant to 28 U.S.C. §§ 1391(b) because Defendant, at all times herein mentioned, was doing business in the State of South Dakota, and a substantial part of the events giving rise to the claim occurred in this jurisdiction.

PARTIES

10. Plaintiff Linda Pendleton is, and at all times mentioned herein was, a resident of the State of Mississippi. She is, and at all times mentioned herein was a “person” as defined by 47 U.S.C. § 153 (39).

11. Defendant 1st Financial maintains its corporate office at 363 W. Anchor Drive, North Sioux City, South Dakota, 57049 and is a “person” as defined by 47 U.S.C. § 153 (39).

12. Plaintiff alleges that at all times relevant herein 1st Financial conducted business in the state of South Dakota and within this judicial district.

**THE TELEPHONE CONSUMER PROTECTION ACT OF 1991
(TCPA), 47 U.S.C. §§ 227 *et seq.***

13. In 1991, Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA),¹ in response to a growing number of consumer complaints regarding certain telemarketing practices.

14. The TCPA regulates, among other things, the use of automated telephone equipment, or “autodialers.” Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.²

15. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.³

16. On January 4, 2008, the FCC released a Declaratory Ruling wherein it confirmed that autodialed and prerecorded message calls to a wireless number by a creditor

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq.*

² 47 U.S.C. § 227(b)(1)(A)(iii).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

(or on behalf of a creditor) are permitted only if the calls are made with the “prior express consent” of the called party.⁴ The FCC “emphasize[d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.”⁵

17. Under the TCPA and pursuant to the FCC’s January 2008 Declaratory Ruling, the burden is on Defendant to demonstrate that Plaintiff provided express consent within the meaning of the statute.

FACTUAL ALLEGATIONS

18. Beginning around at least September 2015, although Plaintiff never provided Defendant with her cellular number, consent to contact her cellular phone, or had any debt with 1st Financial, Plaintiff began receiving unsolicited phone calls from 1st Financial, sometimes multiple times a day, attempting to collect on an alleged debt owed on behalf of her adult son.

19. During each call there was prolonged silence and delays prior to being connected to a live representative. The call(s) placed to Plaintiff’s cellphone was done so at the direction of 1st Financial.

20. These unsolicited phone calls placed to Plaintiff’s wireless telephones were placed via an “automatic telephone dialing system,” (“ATDS”) as defined by 47 U.S.C. §

⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (“FCC Declaratory Ruling”),* 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008).

⁵ *FCC Declaratory Ruling,* 23 F.C.C.R. at 564-65 (¶ 10).

227 (a)(1) and by using “an artificial or prerecorded voice” system as prohibited by 47 U.S.C. § 227 (b)(1)(A), which had the capacity to produce or store numbers randomly or sequentially, and to dial such numbers, to place telephone calls to Plaintiff’s cellular telephone.

21. The existence of this ATDS is further evidence by the sheer volume of calls received by Plaintiff. Defendant could only make such calls using such automated equipment.

22. The telephone numbers that Defendant, or its agents, called were assigned to cellular telephone services for which Plaintiff incurred a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).

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

24. On information and belief, 1st Financial has a corporate policy to use an automatic telephone dialing system or pre-recorded or artificial voice, and to make autodialer calls just as they did to Plaintiff’s cellular telephones.

25. Thus, these telephone calls by Defendant or its agents therefore violated 47 U.S.C. § 227(b)(1).

26. Plaintiff is not alone in receiving these unsolicited phone calls. One consumer complaint filed with the Better Business Bureau states as follows:

“I am being called and harassed repeatedly about something that has nothing to do with me.

For the last year, I have been receiving harassing calls from this law firm trying to collect from a person that I don't know and have never met. I have had my phone number for 16 years and have explained this each and every time I get a call. Sometimes I get several calls a day, early in the morning when I am still asleep. Every time I explain to the person who calls that I've already been asked to be removed from the list, they pretty much imply that I'm a liar "because if you would have asked, we would have removed you." I once was even told that if I wanted to remedy the problem for good, my only choice was to change my phone number."

27. Defendant has other individually filed federal lawsuits pending against it alleging similar violations as stated in this complaint, including that Defendant's automatic telephone dialing systems continues to call people who have not provided their number or otherwise revoked consent to be called.

CLASS ACTION ALLEGATIONS

28. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of herself and on behalf of and all others similarly situated ("the Class").

29. Plaintiff represents, and is a member of the Class, consisting of all persons within the United States who received any unsolicited telephone calls from Defendant or their agents on their cellular telephones through the use of any automatic telephone dialing system or artificial or pre-recorded voice system as set forth in 47 U.S.C. § 227(b)(1)(A)(3), which telephone calls by Defendant or its agents were not made for emergency purposes or with the recipients' prior express consent, within four years prior to the filing of this Complaint through the date of preliminary approval

30. Defendant and its employees or agents are excluded from the Class.

31. Plaintiff does not know the number of members in the Class, but believe the members number in the hundreds of thousands, if not more. Thus, this matter should be certified as a class action to assist in the expeditious litigation of this matter.

32. Plaintiff and members of the Class were harmed by the acts of Defendant in at least the following ways: Defendant, either directly or through its agents, illegally contacted Plaintiff and members of the Class via their cellular telephones by using unsolicited telephone calls, thereby causing Plaintiff and members of the Class to incur certain cellular telephone charges or reduce cellular telephone time for which Plaintiff and the Class members previously paid, and invading the privacy of said Plaintiff and members of the Class. Plaintiff and the Class members were damaged thereby.

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

34. The joinder of the members of the Class is impractical and the disposition of their claims in the class action will provide substantial benefits both to the parties and to the Court. The Class can be identified through Defendant's records or Defendant's agents' records.

35. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. The questions of law and fact to the Class

predominate over questions which may affect individual Class members, including the following:

- a. Whether, within four years prior to the filing of this Complaint through the date of final approval, Defendant or its agents placed telephone calls without the recipients' prior express consent (other than a telephone call made for emergency purposes or made with the prior express consent of the called party) to a Class member using any automatic telephone dialing system or an artificial or pre-recorded voice system, to any telephone number assigned to a cellular telephone service;
- b. Whether the equipment Defendant, or its agents, used to make the telephone calls in question was an automatic telephone dialing system as contemplated by the TCPA;
- c. Whether Defendant, or its agents, systematically made telephone calls to persons featuring an artificial or pre-recorded voice;
- d. Whether Defendant, or its agents, systematically made telephone calls to persons who did not previously provide Defendant with their prior express consent to receive such telephone calls;
- e. Whether Plaintiff and the Class members were damaged thereby, and the extent of damages for such violation; and
- f. Whether Defendant and its agents should be enjoined from engaging in such conduct in the future.

36. As persons that received at least one unsolicited telephone call to their cell phones without their 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 interest antagonistic to any member of the Class.

37. Plaintiff and the members of the Class have all suffered irreparable harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class action, the 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, members of the Class could afford to individually seek legal redress for the wrongs complained of herein.

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

39. 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 law. The interest of the members of the Class 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 present significantly fewer difficulties than those presented in many class claims.

40. This class action is appropriate for certification because Defendant has acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring

the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making final injunctive relief appropriate with respect to the Class as a whole. Defendant's practices challenged herein apply to and affect each of the Class members uniformly. Plaintiff challenges to those practices hinges on Defendant's conduct with respect to the Class as whole, not on facts or law applicable only to Plaintiff.

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

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

42. Each such telephone call was made using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. By using such equipment, Defendant was able to effectively make thousands of phone calls simultaneously to lists of thousands of wireless phone numbers of consumers without human intervention.

43. Defendant also made telephone calls featuring a prerecorded or artificial voice without the prior express consent of the Plaintiff and other members of the Class to receive such telephone calls.

44. The foregoing acts and omissions of Defendant and its agents 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.*

45. As a result of Defendant's, and Defendant's agents', negligent violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and the Class are 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).

46. Plaintiff and the Class are 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.***

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

48. Each such telephone call was made using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. By using such equipment, Defendant was able to effectively make thousands of phone calls simultaneously to lists of thousands of wireless phone numbers of consumers without human intervention.

49. Defendant also made telephone calls featuring a prerecorded or artificial voice without the prior express consent of the Plaintiff and other members of the Class to receive such telephone calls.

50. The foregoing acts and omissions of Defendant constitutes 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.*

51. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and the Class are 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).

52. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court to grant Plaintiff and the Class members the following relief against Defendant:

FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF THE TCPA, 47 U.S.C. §§ 227 *ET SEQ.*

53. As a result of Defendant's, and Defendant's agents', negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each member of the Class \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

54. Pursuant to 47 U.S.C. § 227(b)(3)(A), Plaintiff seeks injunctive relief prohibiting such conduct in the future.

55. Any other relief the Court may deem just and proper.

SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION OF THE TCPA, 47 U.S.C. §§ 227 *ET SEQ.*

56. As a result of Defendant's, and Defendant's agents', willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member

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).

57. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.

58. Any other relief the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: December 16, 2016

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This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [1st Financial Bank, USA Facing Class Action over Robocalls](#)
