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17 Thane Charman

18 **UNITED STATES DISTRICT COURT**
19 **SOUTHERN DISTRICT OF CALIFORNIA**

20 **THANE CHARMAN,**
21 **Individually and On Behalf of All**
22 **Others Similarly Situated,**

23 **Plaintiff,**

24 **v.**

25 **ALBERTSONS COMPANIES,**
26 **INC.,**

27 **Defendant.**

28 **Case No.: '20CV0740 CAB MDD**

CLASS ACTION

COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF
PURSUANT TO THE
TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. §
227, ET SEQ.

JURY TRIAL DEMANDED

1 INTRODUCTION

2 1. In 1991, Congress passed the Telephone Consumer Protection Act,
3 47 U.S.C. § 227, *et seq.*, (“TCPA”), in response to complaints about certain
4 telemarketing practices.

5 2. In enacting the TCPA, Congress intended to give consumers a choice
6 as to how creditors and telemarketers may call them, and made specific findings
7 that “[t]echnologies that might allow consumers to avoid receiving such calls are
8 not universally available, are costly, are unlikely to be enforced, or place an
9 inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward
10 this end, Congress found that:

11 [b]anning such automated or prerecorded telephone calls
12 to the home, except when the receiving party consents to
13 receiving the call or when such calls are necessary in an
14 emergency situation affecting the health and safety of the
15 consumer, is the only effective means of protecting
telephone consumers from this nuisance and privacy
invasion.

16 *Id.* at § 12; *see also, Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
17 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
18 purpose).

19 3. The Federal Trade Commission (“FCC”) is charged with the
20 authority to issue regulations implementing the TCPA. According to findings by
21 the FCC, automated calls and text messages are prohibited under the TCPA
22 because receiving them is a greater invasion of privacy and nuisance compared to
23 live solicitation calls. The FCC has also acknowledged that wireless customers are
24 charged for any incoming calls and text messages.

25 4. Plaintiff THANE CHARMAN, (“Mr. Charman,” or “Plaintiff”),
26 individually and on behalf of all others similarly situated (“Class Members”),
27 brings this action for damages and injunctive relief, and any other available legal
28

1 or equitable remedies, resulting from the illegal actions of defendant
2 ALBERTSONS COMPANIES, INC. (“Albertsons” or “Defendant”) in
3 negligently and/or intentionally contacting Plaintiff on his cellular telephone, in
4 violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*,
5 (“TCPA”), thereby invading Plaintiff’s privacy.

6 5. Plaintiff makes these allegations on information and belief, with the
7 exception of those allegations that pertain to Plaintiff, or to Plaintiff’s counsel,
8 which Plaintiff alleges on personal knowledge.

9 6. Unless otherwise indicated, the use of Defendant’s name in this
10 Complaint includes all agents, employees, officers, members, directors, heirs,
11 successors, assigns, principals, trustees, sureties, subrogees, representatives, and
12 insurers of the named Defendant.

13 JURISDICTION AND VENUE

14 7. This Court has federal question jurisdiction because this case arises
15 out of violation of federal law. 47 U.S.C § 227(b).

16 8. Personal jurisdiction and venue are proper pursuant to 28 U.S.C. §
17 1391 for the following reasons: (1) Plaintiff resides within this judicial district; (2)
18 the conduct complained of herein occurred within this judicial district; and (3)
19 Defendant conducted business within this judicial district at all times relevant.
20 Specifically, Defendant invaded Plaintiff’s privacy by contacting Plaintiff on his
21 cellular telephone, which occurred while Plaintiff was physically located in the
22 County of San Diego, State of California, pursuant to 28 U.S.C. § 1391(b)(2).

23 PARTIES

24 9. Plaintiff is an individual residing in the County of San Diego, State
25 of California, and is, and at all times mentioned herein was, a “person” as defined
26 by 47 U.S.C. § 153(39).

27 10. Upon information and belief, Plaintiff alleges that Defendant is a
28 corporation whose state of incorporation is Delaware and principal place of

1 business is in Boise, Idaho.

2 11. Defendant is, and at all times mentioned herein was, a “person” as
3 defined by 47 U.S.C. § 153(39).

4 12. Upon information and belief, Plaintiff alleges that Defendant is one
5 of the largest drug and food supermarket retailers in the United States, with
6 locations in over thirty states across the country, including this district.

7 13. Plaintiff alleges that at all times relevant herein, Defendant conducted
8 business in the State of California, in the County of San Diego, and within this
9 judicial district.

10 **FACTUAL ALLEGATIONS**

11 14. Plaintiff is, and at all times mentioned herein was, the subscriber of
12 the cellular telephone number (619) ***-1119 (the “1119 Number”). The 1119
13 Number is, and at all times mentioned herein was, assigned to a cellular
14 telephone service as specified in 47 U.S.C. § 227(b)(1)(A)(iii).

15 15. On or about March 8, 2020, at approximately 12:55 p.m., Defendant
16 sent a marketing text message to the 1119 Number, from the short code 46359,
17 without Plaintiff’s prior express written consent.

18 16. The text message read:

19 Albertsons: Welcome to just for U. Here’s the link to
20 finish your registration <http://bit.ly/2zcbQgN> Msg &
21 Date Rates May Apply

22 17. Upon information and belief, the hyperlink indicated above,
23 <http://bit.ly/2zcbQgN>, is leased or owned, and is operated and maintained by
24 Defendant.

25 18. When clicked, the hyperlink, <http://bit.ly/2zcbQgN>, re-directs
26 visitors to another website, [https://www.safeway.com/account/short-
27 registration.html?bannerId=albertsons&cmpid=sms_reg_alb_POS_wk04](https://www.safeway.com/account/short-registration.html?bannerId=albertsons&cmpid=sms_reg_alb_POS_wk04), (the
28 “Registration Website”), which Plaintiff also alleges, upon information and belief,

1 is leased or owned, and is operated and maintained by Defendant.

2 19. When someone visits the Registration Website, Defendant directs
3 visitors to create an account by submitting various personal information and
4 entering an e-mail address and password.

5 20. The “Privacy Policy” hyperlink on the Registration Website links the
6 visitor to another website page which states, “[y]ou may opt out of a text message
7 program at any time by texting the word STOP to the applicable short code . . .”¹

8 21. The March 8, 2020 text message sent by Defendant to the 1119
9 Number contained no method for Plaintiff to instruct Defendant to stop sending
10 Plaintiff the unwanted text messages.

11 22. Plaintiff does not have an account with Albertsons.

12 23. Plaintiff has not shopped at Albertsons for at least a year prior to
13 receiving the text message.

14 24. Upon information and belief, the text message was sent by Defendant
15 during a time of great challenges for consumers due to the COVID-19 pandemic,
16 in which many consumers were both struggling to obtain provisions from grocery
17 stores and more at risk for contracting the coronavirus in such environment.

18 25. Because Plaintiff is alerted when a text message is received to
19 Plaintiff’s cellular device, the unsolicited text message that Defendant transmitted
20 to Plaintiff’s cellular device invaded Plaintiff’s privacy, and distracted and
21 aggravated Plaintiff upon receipt.

22 26. Upon information and belief, Defendant sent the aforementioned text
23 message to Plaintiff’s cellular telephone using short message script (“SMS”)
24 messaging technology, specifically SMS “46359”, which is a short code leased by
25

26 ¹ “Privacy Policy,” Albertsons Companies, Inc, *available at*
27 [https://www.albertsonscorporation.com/about-us/our-policies/privacy-](https://www.albertsonscorporation.com/about-us/our-policies/privacy-policy.html#3.3)
28 [policy.html#3.3](https://www.albertsonscorporation.com/about-us/our-policies/privacy-policy.html#3.3) (last visited April 16, 2020).

1 Defendant or Defendant's agent(s) or affiliate(s) and is used for operating
2 Defendant's text message marketing program.

3 27. Upon information and belief, Defendant sent or transmitted, or had
4 sent or transmitted on its behalf, the same or substantially similar unsolicited text
5 message *en masse* to thousands of customers' cellular telephones nationwide.

6 28. Upon information and belief, the automated text messaging system
7 used by Defendant to send the text messages has the capacity to store or produce
8 telephone numbers to be called, using a random or sequential number generator.

9 29. Upon information and belief, Defendant utilized an "automated
10 telephone dialing system" because the text message sent to the 1119 Number were
11 sent from "46359", which is a short code telephone number utilized to send text
12 messages to consumers *en masse* and without human intervention; and because
13 the hardware and software used by Defendant to send such messages have the
14 capacity to store, produce, and dial random or sequential numbers, or receive and
15 store lists of telephone numbers, and to dial such numbers automatically.

16 30. On Defendant's "Privacy Policy" page on the Registration Website,
17 which contains an "updated" date of April 1, 2020, Defendant admits that its text
18 messages "may be sent by automated means."

19 31. The text message at issue sent by Defendant to the 1119 Number on
20 March 8, 2020 constituted an "advertisement" and/ or "telemarketing" as
21 prohibited by the TCPA, as Defendant sent the text message to Plaintiff in order to
22 advertise its "Just for U" rewards program as well as its mobile messaging service
23 itself, and also because Defendant sent the text message for the purpose of
24 advertising the sale of its grocery goods to Plaintiff in the future.

25 32. Defendant's telephonic communications to Plaintiff were not made
26 for emergency purposes, as defined by 47 U.S.C. § 227(b)(1)(A)(iii).

27 33. Plaintiff never provided "prior express written consent" or any other
28 form of consent to Defendant or any affiliate, subsidiary, or agent of Defendant to

1 transmit SMS or MMS text messages to the 1119 Number by means of an
2 “automatic telephone dialing system,” within the meaning of 47 U.S.C. §
3 227(b)(1)(A).

4 34. Through Defendant’s aforementioned conduct, Plaintiff suffered an
5 invasion of a legally protected interest in privacy, which is specifically addressed
6 and protected by the TCPA.

7 35. Plaintiff was personally affected by Defendant’s aforementioned
8 conduct because Plaintiff was frustrated and distressed that Defendant annoyed
9 Plaintiff with an unwanted marketing text message, without Plaintiff’s consent.

10 36. The text messages from Defendant, or its agent(s), violated 47 U.S.C.
11 § 227(b)(1)(A)(iii).

12 CLASS ACTION ALLEGATIONS

13 37. Plaintiff brings this action on behalf of Plaintiff and all others
14 similarly situated (the “Class”).

15 38. Plaintiff represents, and is a member of, the Class, which is defined
16 as follows:

17 All persons within the United States who were sent any
18 text message by Defendant or its agent, affiliate, or
19 subsidiary, using a short code to said person’s cellular
20 telephone, without express written consent, within the
four years prior to the filing of the Complaint.

21 39. Excluded from the Class are: (1) Defendant, any entity or division in
22 which Defendant has a controlling interest, and their legal representatives,
23 officers, directors, assigns, and successors; (2) the Judge to whom this case is
24 assigned and the Judge’s staff; and (3) those persons who have suffered personal
25 injuries as a result of the facts alleged herein.

26 40. Plaintiff reserves the right to redefine the Class, and to add and
27 redefine any additional subclass as appropriate based on discovery and specific
28 theories of liability.

1 41. The Class that Plaintiff seeks to represent contains numerous
2 members and is clearly ascertainable including, without limitation, by using
3 Defendant's records to determine the size of the Class and to determine the
4 identities of individual Class members.

5 **Numerosity**

6 42. The Class members are so numerous that joinder of all members
7 would be unfeasible and impractical. The membership of the Class is currently
8 unknown to Plaintiff at this time. However, given that, on information and belief,
9 Defendant sent or transmitted, or had sent or transmitted on its behalf, unsolicited
10 text messages *en masse* to thousands of customers' cellular telephones nationwide
11 during the proposed class period, it is reasonable to presume that the members of
12 the Class are so numerous that joinder of all members is impracticable. The
13 disposition of their claims in a class action will provide substantial benefits to the
14 parties and the Court.

15 **Commonality**

16 43. There are questions of law and fact common to the Class that
17 predominate over any questions affecting only individual Class members. Those
18 common questions of law and fact include, without limitation, the following:

- 19 a) Whether within the four years prior to the filing of this Complaint,
20 Defendant or affiliates, subsidiaries, or agents of Defendant sent
21 any text messages without the prior express written consent of
22 Plaintiff and Class members using an "automatic telephone
23 dialing system";
- 24 b) Whether Defendant or affiliates, subsidiaries, or agents of
25 Defendant transmitted advertising or telemarketing text messages
26 to Plaintiff's and Class members' cellular telephones;
- 27 c) Whether Defendant or affiliates, subsidiaries, or agents of
28 Defendant can meet their burden to show Defendant obtained

1 prior express written consent (as defined by 47 C.F.R.
2 64.1200(f)(8)) to send the text messages complained of, assuming
3 such an affirmative defense is raised;

4 d) Whether the complained of conduct was knowing or willful;

5 e) Whether Plaintiff and the members of the Class were damaged
6 thereby, and the extent of damages for such violation; and,

7 f) Whether Defendant or affiliates, subsidiaries, or agents of
8 Defendant should be enjoined from engaging in such conduct in
9 the future.

10 **Typicality**

11 44. Plaintiff is qualified to, and will, fairly and adequately protect the
12 interests of each Class member with whom they are similarly situated, and
13 Plaintiff's claims (or defenses, if any) are typical of all Class members' as
14 demonstrated herein.

15 45. Plaintiff represents and is a Class member of the Class because
16 Plaintiff received at least one marketing text message through the use of an
17 automatic telephone dialing system, without providing prior express written
18 consent to the Defendant within the meaning of the TCPA. Consequently, the
19 claims of Plaintiff are typical of the claims of Class members and Plaintiff's
20 interests are consistent with and not antagonistic to those of the other Class
21 members Plaintiff seeks to represent.

22 46. Plaintiff and all members of the Class have been impacted by, and
23 face continuing harm arising out of, Defendant's violations or misconduct as
24 alleged herein.

25 **Adequacy**

26 47. Plaintiff is qualified to, and will, fairly and adequately protect the
27 interests of each Class member with whom Plaintiff is similarly situated, as
28 demonstrated herein. Plaintiff acknowledges that Plaintiff has an obligation to

1 make known to the Court any relationship, conflicts, or differences with any Class
2 member. Plaintiff's attorneys, the proposed class counsel, are versed in the rules
3 governing class action discovery, certification, and settlement. In addition, the
4 proposed class counsel is experienced in handling claims involving consumer
5 actions and violations of Telephone Consumer Protection Act, 47 U.S.C. § 227, *et*
6 *seq.* Plaintiff has incurred, and throughout the duration of this action, will
7 continue to incur costs and attorneys' fees that have been, are, and will be,
8 necessarily expended for the prosecution of this action for the substantial benefit
9 of each Class member. Neither Plaintiff nor Plaintiff's counsel have any interests
10 adverse to those of the other Class members.

11 **Predominance**

12 48. Questions of law or fact common to the members of the Class
13 predominate over any questions affecting only individual members of the class.
14 The elements of the legal claims brought by Plaintiff and members of the Class
15 are capable of proof at trial through evidence that is common to the class rather
16 than individual to its members.

17 **Superiority**

18 49. A class action is superior to other available methods for the fair and
19 efficient adjudication of this controversy because individual litigation of the
20 claims of all Class members is impracticable and questions of law and fact
21 common to the Class predominate over any questions affecting only individual
22 members of the Class. Even if every individual Class member could afford
23 individual litigation, the court system could not. It would be unduly burdensome
24 to the courts if individual litigation of the numerous cases were to be required.

25 50. Individualized litigation also would present the potential for varying,
26 inconsistent, or contradictory judgments, and would magnify the delay and
27 expense to all parties and to the court system resulting from multiple trials of the
28 same factual issues. By contrast, conducting this action as a class action will

1 present fewer management difficulties, conserve the resources of the parties and
2 the court system, and protect the rights of each Class member. Further, it will
3 prevent the very real harm that would be suffered by numerous Class members
4 who will be unable to enforce individual claims of this size on their own, and by
5 Defendant's competitors, who will be placed at a competitive disadvantage
6 because they chose to obey the law. Plaintiff anticipates no difficulty in the
7 management of this case as a class action.

8 51. The prosecution of separate actions by individual Class members
9 may create a risk of adjudications with respect to them that would, as a practical
10 matter, be dispositive of the interests of other Class members not parties to those
11 adjudications, or that would otherwise substantially impair or impede the ability of
12 those non-party Class members to protect their interests.

13 52. The prosecution of individual actions by Class members would
14 establish inconsistent standards of conduct for Defendant.

15 53. Defendant has acted or refused to act in ways generally applicable to
16 the Class, thereby making appropriate final and injunctive relief or corresponding
17 declaratory relief with regard to members of the Class as a whole. Likewise,
18 Defendant's conduct as described above is unlawful, is capable of repetition, and
19 will continue unless restrained and enjoined by the Court.

20 54. The Class may also be certified because:

- 21 (a) the prosecution of separate actions by individual Class
22 members would create a risk of inconsistent or varying
23 adjudication with respect to individual Class members, which
24 would establish incompatible standards of conduct for Defendants;
- 25 (b) the prosecution of separate actions by individual Class
26 members would create a risk of adjudications with respect to them
27 that would, as a practical matter, be dispositive of the interests of
28 other Class members not parties to the adjudications, or

1 substantially impair or impede their ability to protect their
2 interests; and,

3 (c) Defendants have acted or refused to act on grounds generally
4 applicable to the Class, thereby making appropriate final and
5 injunctive relief with respect to the members of the Class as a
6 whole.

7 55. This suit seeks only damages and injunctive relief for recovery of
8 statutory damages on behalf of Class and it expressly is not intended to request
9 any recovery for personal injury and claims related thereto. Plaintiffs reserve the
10 right to expand the Class definitions to seek recovery on behalf of additional
11 persons as warranted as facts are learned in further investigation and discovery.

12 **FIRST CAUSE OF ACTION**

13 **NEGLIGENT VIOLATIONS OF THE TCPA**

14 **47 U.S.C. § 227 ET SEQ.**

15 56. Plaintiff repeats and incorporates by reference the allegations set
16 forth above as though fully stated herein.

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

20 58. As a result of Defendant's negligent violations of 47 U.S.C. § 227,
21 Plaintiff and all Class members are entitled to, and do seek, injunctive relief
22 prohibiting such conduct violating the TCPA in the future.

23 59. As a result of Defendant's negligent violations of 47 U.S.C. § 227,
24 Plaintiff and all Class members are also entitled to, and do seek, an award of
25 \$500.00 statutory damages, for each and every violation, pursuant to 47 U.S.C. §
26 227(b)(3)(B).

SECOND CAUSE OF ACTION

KNOWING AND/OR WILLFUL VIOLATIONS OF THE TCPA

47 U.S.C. § 227 ET SEQ.

1
2
3
4 60. Plaintiff repeats and incorporates by reference the allegations set
5 forth above as though fully stated herein.

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

10 62. As a result of Defendant's knowing and/or willful violations of 47
11 U.S.C. § 227, *et seq.*, Plaintiff and all Class members are entitled to, and do seek,
12 injunctive relief prohibiting such conduct violating the TCPA in the future.

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

PRAYER FOR RELIEF

17
18 WHEREFORE, Plaintiff, on behalf of himself and members of the Class,
19 prays for the following relief:

- 20
- 21 • An order certifying the Class and appointing Plaintiff the
22 representative of the Class, and appointing counsel for Plaintiff as
23 Class Counsel;
 - 24 • An award of \$500.00 in statutory damages to Plaintiff and each Class
25 member for each and every negligent violation of 47 U.S.C. §
26 227(b)(1) by Defendant, pursuant to 47 U.S.C. § 227(b)(3)(B);
 - 27 • An award of \$1,500.00 in statutory damages to Plaintiff and each Class
28 member for each and every knowing and/or willful violation of 47

U.S.C. § 227(b)(1) by Defendant, pursuant to 47 U.S.C. § 227(b)(3)(B);

- Pre-judgment and post-judgment interest;
- An order providing injunctive relief prohibiting such conduct in the future, pursuant to 47 U.S.C. § 227(b)(3)(A);
- Costs of suit;
- An award of reasonable attorneys’ fees, pursuant to, *inter alia*, the common fund doctrine;
- Any other further relief that the court may deem just and proper.

JURY DEMAND

64. Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: April 17, 2020

Respectfully submitted,

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