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16 **UNITED STATES DISTRICT COURT**  
 17 **CENTRAL DISTRICT OF CALIFORNIA**

18 **DAVE VACCARO**, individually,  
 19 and on behalf of all others  
 20 similarly situated

21 Plaintiff,

22 v.

23 **OPENTABLE, INC.**, and DOES 1  
 24 through 10, inclusive

25 Defendants.

26 **Case No.:** 2:21-cv-05809

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

28 **JURY TRIAL DEMANDED**

**INTRODUCTION**

1. DAVE VACCARO (“Plaintiff”) bring this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of OPENTABLE, INC. (“Defendant”), in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby

1 invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge  
2 as to himself and his own acts and experiences, and, as to all other matters, upon  
3 information and belief, including investigation conducted by their attorneys.

4         2. The TCPA was designed to prevent calls and messages like the ones  
5 described within this complaint, and to protect the privacy of citizens like Plaintiff.  
6 “Voluminous consumer complaints about abuses of telephone technology – for  
7 example, computerized calls dispatched to private homes – prompted Congress to  
8 pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

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

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

21 *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL  
22 3292838, at\* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s  
23 purpose).

24         4. Congress also specifically found that “the evidence presented to the  
25 Congress indicates that automated or prerecorded calls are a nuisance and an  
26 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also,  
27 *Mims*, 132 S. Ct. at 744.  
28

1           5. In a recent decision, the Supreme Court interpreted the term  
2 “automatic telephone dialing system” and held that “[t]o qualify as an ‘automatic  
3 telephone dialing system,’ a device must have the capacity either to store a  
4 telephone number using a random or sequential generator *or* to produce a telephone  
5 number using a random or sequential number generator.” *Facebook, Inc. v. Duguid*,  
6 141 S.Ct. 1163 (2021) (emphasis added).

7           6. In *Duguid*, the Supreme Court provided an example of such systems,  
8 stating: “For instance, an autodialer might use a random number generator to  
9 determine the order in which to pick phone numbers from a preproduced list. It  
10 would then store those numbers to be dialed at a later time.” *Id.* at 1171-72 fn. 7.

11           7. Further, both *Duguid* and the legislative history of the TCPA are clear  
12 that the original focus on prerecorded voice technology prohibition was the fact  
13 that such communications involved agentless calls, not on the question of whether  
14 a literal voice was used during those agentless calls. *See* Hearing Before the  
15 Subcommittee on Communications of the Committee on Commerce, Science and  
16 Transportation, United States Senate One Hundred Second Congress First Session  
17 July 24, 1992, Testimony of Robert Bulmash and Steve Hamm at pg 11; 7 FCC  
18 Rcd. 8752 (F.C.C. September 17, 1992).

19           8. The Sixth Circuit has also recognized this distinction: “Congress drew  
20 an explicit distinction between ‘automated telephone calls that deliver an artificial  
21 or prerecorded voice message’ on the one hand and ‘calls place by ‘live’ persons’  
22 on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199*  
23 *WV/KY/OH*, 708 F.3d 737,743 (6th Cir. 2013).

24           9. Similarly, the FTC has observed that “prerecorded calls are by their  
25 very nature one-sided conversations, and if there is no opportunity for consumers  
26 to ask questions, offers may not be sufficiently clear for consumers to make  
27 informed choices before pressing a button or saying yes to make a purchase.” 73  
28

1 FR 51164-01, 51167 (Aug. 29, 2008).

2 **JURISDICTION AND VENUE**

3 10. Jurisdiction is proper under *28 U.S.C. § 1332(d)(2)* because Plaintiff,  
4 a resident of California, seeks relief on behalf of a Class, which will result in at  
5 least one class member belonging to a different state than that of Defendant, a  
6 corporation incorporated in the state of Delaware. Plaintiff also seeks \$1,500.00 in  
7 damages for each call in violation of the TCPA, which, when aggregated among a  
8 proposed class in the thousands, exceeds the \$5,000,000.00 threshold for federal  
9 court jurisdiction. Therefore, both diversity jurisdiction and the damages threshold  
10 under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court  
11 has jurisdiction.

12 11. Venue is proper in the United States District Court for the Central  
13 District of California pursuant to *28 U.S.C. § 1391(b)(1)* because Defendant is  
14 subject to personal jurisdiction in the County of Los Angeles, State of California.

15 **PARTIES**

16 12. Plaintiff is, and at all times mentioned herein was, a natural person  
17 and citizen and resident of the State of California. Plaintiff is, and at all times  
18 mentioned herein was, a “person” as defined by *47 U.S.C. § 153(39)*.

19 13. Defendant is, and at all times mentioned herein was, an online  
20 restaurant-reservation service company, and is therefore a “person” as defined by  
21 *47 U.S.C. § 153(39)*.

22 14. The above named Defendant, and its subsidiaries and agents, are  
23 collectively referred to as “Defendants.” The true names and capacities of the  
24 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are  
25 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious  
26 names. Each of the Defendants designated herein as a DOE is legally responsible  
27 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the  
28

1 Complaint to reflect the true names and capacities of the DOE Defendants when  
2 such identities become known.

3 15. Plaintiff is informed and believes that at all relevant times, each and  
4 every Defendant was acting as an agent and/or employee of each of the other  
5 Defendants and was acting within the course and scope of said agency and/or  
6 employment with the full knowledge and consent of each of the other Defendants.  
7 Plaintiff is informed and believes that each of the acts and/or omissions complained  
8 of herein was made known to, and ratified by, each of the other Defendants.

9  
10 **FACTUAL ALLEGATIONS**

11 16. At all times relevant, Plaintiff was a citizen of the County of Los  
12 Angeles, State of California. Plaintiff is, and at all times mentioned herein was, a  
13 “person” as defined by 47 U.S.C. § 153(39).

14 17. Defendant is, and at all times mentioned herein was, an online  
15 restaurant-reservation service company, and a “person,” as defined by 47 U.S.C. §  
16 153(39).

17 18. At all times relevant Defendant conducted business in the State of  
18 California and in the County of Los Angeles, within this judicial district.

19 19. On or about May 30, 2021, Plaintiff received an unsolicited text  
20 message from Defendant on his cellular telephone, number ending in -3928.

21 20. Defendant sent Plaintiff the unsolicited text message from a short code  
22 phone number owned or controlled by Defendant, 36246.

23 21. The three text messages sent by Defendant on May 30, 2021 read:

24 1) Welcome! Thanks for  
25 joining OpenTable  
26 messaging. Standard  
27 message & data rates may  
28 apply. Text “STOP” to stop

1 receiving all text messages  
2 from OpenTable.

3 2) You've been added to the  
4 waitlist for 4 at Maui  
5 Brewing Company –  
6 Waikiki. Reply 9 to cancel.  
7 Text STOP to stop  
8 messages.

9 3) Please check in with the  
10 host at Maui Brewing  
11 Company – Waikiki now  
12 Your table is ready. Text 1  
13 if you're on your way, 9 to  
14 cancel, or STOP to end  
15 messages.  
16

17 22. Upon receipt of this message, Plaintiff replied “stop,” and Defendant  
18 replied, “You will no longer receive any text messages from OpenTable. Text  
19 anything back to re-enroll. This is not a subscription service. Std msg&data rates  
20 may apply.”

21 23. As evidenced by Defendant’s messages, Plaintiff was not interacting  
22 with a live agent but rather an agentless text blast generated by a computer.

23 24. Moreover, the messages sent to Plaintiff was drafted in advance and  
24 sent out automatically based on pre-programmed parameters.

25 25. The text messages sent to Plaintiff’s cellular telephone were placed  
26 via Defendant’s *SMS Blasting Platform*, i.e., an “automatic telephone dialing  
27 system,” (“ATDS”) as defined by 47 U.S.C. § 227(a)(1) as prohibited by 47 U.S.C.  
28 § 227(b)(1)(A).

1           26. The text messages sent to Plaintiff's cellular telephone were not sent  
2 by a live agent and thus created a one-sided conversation in which Plaintiff could  
3 not receive a response to his questions and/or concerns. The text messages also  
4 were sent in an automated fashion as a result of computerized campaigns that were  
5 pre-programmed in advance to send messages out to large groups of consumers all  
6 at once, either sequentially or via algorithmic dialing, i.e. in an automated fashion  
7 by a computer.

8           27. In Mirriam Webster's Dictionary "voice" is defined as "an instrument  
9 or medium of expression." It defines "artificial" as "humanly contrived...often on  
10 a natural model : MAN-MADE" and "lacking in natural or spontaneous quality."

11           28. The messages sent to Plaintiff by Defendant using the SMS blasting  
12 platform employed a text message as an instrument or medium of expression to  
13 deliver an automatic message drafted in advance of being sent, i.e. that of an SMS  
14 message, to convey a telemarketing communication to Plaintiff. The SMS blasting  
15 platform is a man made humanly contrived program which allows companies to  
16 blast out such messages via non-spontaneous methods, i.e. automated methods  
17 similar to that of an assembly line in a factory. Such SMS blasting devices are  
18 incapable of spontaneity, as they must be programmed by the operator to  
19 automatically send messages out, *en masse*, pursuant to preprogrammed  
20 parameters.  
21

22           29. Accordingly, Defendant's messages utilized an "artificial voice" as  
23 prohibited by 47 U.S.C. § 227(b)(1)(A).

24           30. Mirriam Webster's Dictionary, "prerecorded" is defined as "recorded  
25 in advance." "Recorded" is defined as "to set down in writing." The text messages  
26 sent to Plaintiff's cellular telephone via the SMS blasting platform were set down  
27 in writing in advance by Defendant, whose employees wrote out the standard  
28 automated messages that were to be sent to Plaintiff and other class members, and

1 by way of preprogrammed SMS blasting, entered the prerecorded message into the  
2 SMS Blasting platform, and thereafter sent these messages pursuant to scheduled  
3 blasts that were programmed by Defendant. Thus, Defendant employed a text  
4 message as an instrument or medium of expression to deliver a prerecorded  
5 message drafted in advance of being sent.

6 31. Thus, Defendant's messages utilized a "prerecorded voice" as  
7 prohibited by 47 U.S.C. § 227(b)(1)(A).

8 32. The telephone number that Defendant, or their agent, messaged was  
9 assigned to a cellular telephone service for which Plaintiff incurs a charge for  
10 incoming calls and messages pursuant to 47 U.S.C. § 227(b)(1).

11 33. These messages constituted "calls" that were not for emergency  
12 purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

13 34. Plaintiff was never a customer of Defendant's and never provided his  
14 cellular telephone number Defendant for any reason whatsoever. Accordingly,  
15 Defendant and their agent never received Plaintiff's prior express consent to  
16 receive unsolicited text messages, pursuant to 47 U.S.C. § 227(b)(1)(A).

17 35. These messages by Defendant, or its agents, violated 47 U.S.C. §  
18 227(b)(1).

19  
20 **CLASS ACTION ALLEGATIONS**

21 36. Plaintiff brings this action on behalf of himself and on behalf of and  
22 all others similarly situated ("the Class").

23 37. Plaintiff represents, and is a member of, the Class, consisting of all  
24 persons within the United States who received any unsolicited text messages placed  
25 using an automatic telephone dialing system and/or an artificial or prerecorded  
26 voice from Defendant and which text message was not made for emergency  
27 purposes or with the recipient's prior express consent within the four years prior to  
28 the filing of this Complaint through the date of class certification.



1           38. Defendant and their employees or agents are excluded from the Class.  
2 Plaintiff does not know the number of members in the Class but believes the Class  
3 members number in the hundreds of thousands, if not more. Thus, this matter  
4 should be certified as a Class action to assist in the expeditious litigation of this  
5 matter.

6           39. Plaintiff and members of the Class were harmed by the acts of  
7 Defendant in at least the following ways: Defendant, either directly or through their  
8 agents, illegally contacted Plaintiff and the Class members via their cellular  
9 telephones by using marketing and text messages, thereby causing Plaintiff and the  
10 Class members to incur certain cellular telephone charges or reduce cellular  
11 telephone time for which Plaintiff and the Class members previously paid, and  
12 invading the privacy of said Plaintiff and the Class members. Plaintiff and the Class  
13 members were damaged thereby.

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

19           41. The joinder of the Class members is impractical and the disposition of  
20 their claims in the Class action will provide substantial benefits both to the parties  
21 and to the court. The Class can be identified through Defendant's records or  
22 Defendant's agent's records.

23           42. There is a well-defined community of interest in the questions of law  
24 and fact involved affecting the parties to be represented. The questions of law and  
25 fact to the Class predominate over questions which may affect individual Class  
26 members, including the following:  
27  
28

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

13 43. As a person that received at least one marketing and text message  
14 without Plaintiff's prior express consent, Plaintiff is asserting claims that are  
15 typical of the Class. Plaintiff will fairly and adequately represent and protect the  
16 interests of the Class in that Plaintiff has no interests antagonistic to any member  
17 of the Class.

18 44. Plaintiff and the members of the Class have all suffered irreparable  
19 harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class  
20 action, the Class will continue to face the potential for irreparable harm. In  
21 addition, these violations of law will be allowed to proceed without remedy and  
22 Defendant will likely continue such illegal conduct. Because of the size of the  
23 individual Class member's claims, few, if any, Class members could afford to seek  
24 legal redress for the wrongs complained of herein.

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

27 46. A class action is a superior method for the fair and efficient  
28 adjudication of this controversy. Class-wide damages are essential to induce

1 Defendant to comply with federal and California law. The interest of Class  
2 members in individually controlling the prosecution of separate claims against  
3 Defendant are small because the maximum statutory damages in an individual  
4 action for violation of privacy are minimal. Management of these claims is likely  
5 to present significantly fewer difficulties than those presented in many class claims.

6 47. Defendant has acted on grounds generally applicable to the Class,  
7 thereby making appropriate final injunctive relief and corresponding declaratory  
8 relief with respect to the Class as a whole.

9 **FIRST CAUSE OF ACTION**

10 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**

11 **47 U.S.C. § 227 ET SEQ.**

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

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

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

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

22 **SECOND CAUSE OF ACTION**

23 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**

24 **TELEPHONE CONSUMER PROTECTION ACT**

25 **47 U.S.C. § 227 ET SEQ.**

26 52. Plaintiff incorporates by reference all of the above paragraphs of this  
27 Complaint as though fully stated herein.  
28

1 53. 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 54. As a result of Defendant's knowing and/or willful violations of 47  
6 U.S.C. § 227 et seq, Plaintiff and The Class are entitled to an award of \$1,500.00  
7 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 55. Plaintiff and the Class are also entitled to and seek injunctive relief  
10 prohibiting such conduct in the future.

11 **PRAYER FOR RELIEF**

12 Wherefore, Plaintiff respectfully requests the Court grant Plaintiff, and The  
13 Class members the following relief against Defendant:

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

- 16
- 17 • As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1),  
18 Plaintiff seeks for himself and each Class member \$500.00 in statutory  
19 damages, for each and every violation, pursuant to 47 U.S.C. §  
20 227(b)(3)(B).
  - 21 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such  
22 conduct in the future.
  - 23 • Any other relief the Court may deem just and proper.

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

- 26
- 27 • As a result of Defendant's knowing and/or willful violations of 47 U.S.C.  
28 § 227(b)(1), Plaintiff seeks for himself and each Class member \$1500.00

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

- 3 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such  
4 conduct in the future.  
5 • Any other relief the Court may deem just and proper.

6 **TRIAL BY JURY**

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

9  
10  
11 Dated: July 19, 2021

Respectfully submitted,

12  
13 **THE LAW OFFICES OF TODD M. FRIEDMAN, P.C.**

14  
15 By: /s/ Todd M. Friedman  
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17 ATTORNEY FOR PLAINTIFF  
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