

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-cv-62438-Ruiz/Seltzer

ANITA JAIRAM,  
individually and on behalf of all  
others similarly situated,

CLASS ACTION

Plaintiff,

JURY TRIAL DEMANDED

v.

COLOURPOP COSMETICS, LLC,

Defendant.

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**FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiff Anita Jairam brings this class action against Defendant Colourpop Cosmetics, LLC, and alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

**NATURE OF THE ACTION**

1. This is a putative class action under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, (“TCPA”), arising from Defendant’s violations of the TCPA.
2. Defendant is an online retailer of consumer cosmetics products, as well as a manufacturer and distributor of cosmetic products.
3. To solicit new customers, Defendant engages in unsolicited marketing with no regard for privacy rights of the recipients of those messages.
4. Defendant caused thousands of unsolicited text messages to be sent to the cellular telephones of Plaintiff and Class Members, causing them injuries.

5. Through this action, Plaintiff seeks injunctive relief to halt Defendant's illegal conduct. Plaintiff also seeks statutory damages on behalf of himself and Class Members, as defined below, and any other available legal or equitable remedies resulting from the illegal actions of Defendant.

### **JURISDICTION AND VENUE**

6. Jurisdiction is proper under 28 U.S.C. § 1331 as Plaintiff alleges violations of a federal statute. Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2) because Plaintiff alleges a national class, which will result in at least one Class member belonging to a different state than Defendant. Plaintiff seeks up to \$1,500.00 in damages for each text message in violation of the TCPA, which, when aggregated among a proposed class numbering in the tens of thousands, or more, exceeds the \$5,000,000.00 threshold for federal court jurisdiction under the Class Action Fairness Act ("CAFA").

7. Venue is proper in the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. §§ 1391(b) and (c) because Defendant are deemed to reside in any judicial district in which it is subject to the court's personal jurisdiction, and because Defendant provide and market their services within this district thereby establishing sufficient contacts to subject it to personal jurisdiction. Further, Defendant's tortious conduct against Plaintiff occurred within this district and, on information and belief, Defendant have sent the same text message complained of by Plaintiff to other individuals within this judicial district, such that some of Defendant's acts have occurred within this district, subjecting Defendant to jurisdiction here.

### **PARTIES**

8. Plaintiff is a natural person and is a resident of Broward County, Florida.

9. Defendant is a California limited liability company, with a principal address of 1451 Vanguard Drive, Oxnard, California 93033.

10. Defendant directs, markets, and provides substantial business activities throughout the

State of Florida.

**THE TCPA**

11. The TCPA prohibits: (1) any person from calling a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A).

12. The TCPA defines an "automatic telephone dialing system" ("ATDS") as "equipment that has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

13. The TCPA exists to prevent communications like the ones described within this Complaint. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

14. In an action under the TCPA, a plaintiff must show only that the defendant "called a number assigned to a cellular telephone service using an automatic dialing system or prerecorded voice." *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012), *aff'd*, 755 F.3d 1265 (11th Cir. 2014).

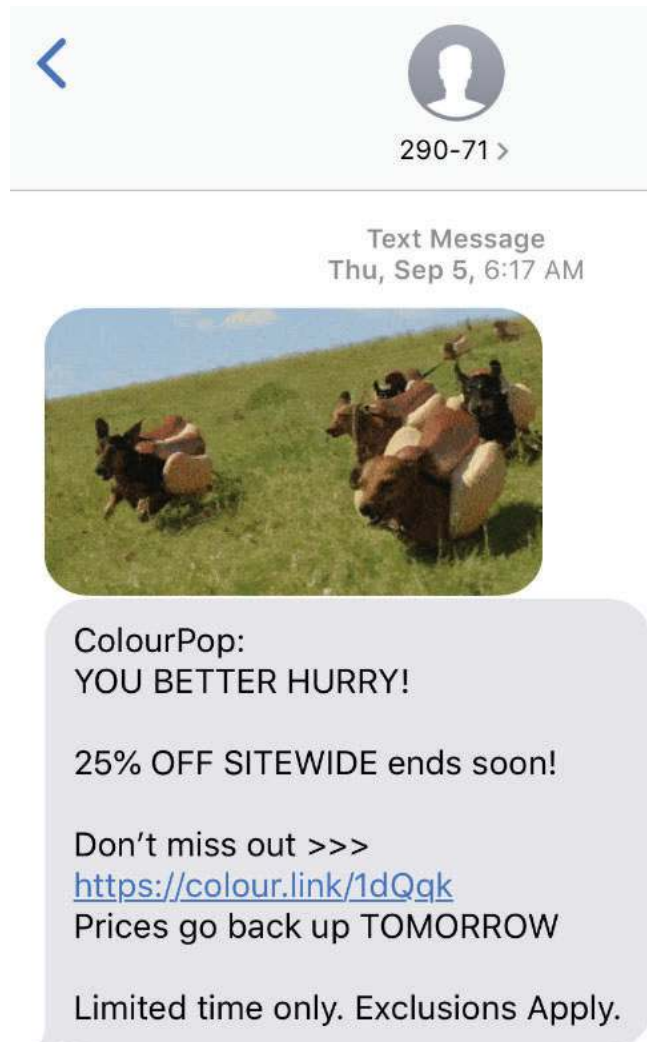
15. The Federal Communications Commission ("FCC") is empowered to issue rules and regulations implementing the TCPA. According to the FCC's findings, calls in violation of the TCPA are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion 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.

16. A defendant must demonstrate that it obtained the plaintiff's prior express consent. *See In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7991-92 (2015) (requiring express consent "for non-telemarketing and non-advertising calls").

17. Further, the FCC has issued rulings and clarified that consumers are entitled to the same consent-based protections for text messages as they are for calls to wireless numbers. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) (“The FCC has determined that a text message falls within the meaning of ‘to make any call’ in 47 U.S.C. § 227(b)(1)(A)”).

**FACTS**

18. On or about September 05, 2019 at 6:17 a.m., September 12, 2019 at 6:52 p.m., September 19, 2019 at 3:55 p.m., September 26, 2019 at 12:27 p.m., and October 1, 2019 at 12:10 p.m., Defendant sent the following marketing text messages to Plaintiff’s cellular telephone number, ending in 0751 (the “0751 Number”):



Today 6:52 PM

everyone in Fall be like



ColourPop:  
I'll take a venti double shot of  
WHATEVER!

Fall is here & so is our FALL  
COLLECTION! 🍂

You need to see this!

<https://colour.link/1jirW>

Thu, Sep 19, 3:55 PM



ColourPop:  
We're feeling euphoric...  
Cuz we LILAC you a lot! 💜

NEW PALETTE IS HERE!

Be the first to see it!  
<https://colour.link/1o3qM>



Thursday 12:27 PM



ColourPop:  
WE'LL HAVE YOU FEELIN' LIKE  
BEYONCÉ ✨

NEW Pretty Fresh Tinted Moisturizer  
Oil free, lightweight with Hyaluronic  
Acid

We've got the largest shade range,  
FIND YOURS!

<https://colour.link/1sVDO>

Today 12:10 PM

when someone says they think  
my lashes are too dramatic



ColourPop:  
FAUX-M-G!  
WE LAUNCHED LASHES 🙄🙄

You can NEVER be too extra... See  
our FALSIES Now!

<https://colour.link/1x1V5>



19. Defendant's tortious conduct against Plaintiff occurred in part within this district and, on information and belief, Defendant sent the same text messages complained of by Plaintiff to other individuals within this judicial district, such that some of Defendant's acts have occurred within this district, subjecting Defendant to jurisdiction here.

20. At no point in time did Plaintiff provide Defendant with express written consent to be contacted by text message using an ATDS.

21. Plaintiff is the sole user and/or subscriber of the 0751 Number.

22. The number used by or on behalf of Defendant (29071), is known as a "short code." Short codes are short digit sequences, significantly shorter than telephone numbers, that are used to address messages in the Multimedia Messaging System and short message service systems of mobile network operators.

23. Short codes cannot be used to transmit text messages from a traditional telephone. Only computer systems can transmit text messages using a short-code.

24. Further, the impersonal and generic nature of Defendant's text messages, coupled with the fact that they were originated from a short code, demonstrates that Defendant utilized an automatic telephone dialing system, *i.e.*, an ATDS, in transmitting the messages.

25. To send the text messages, Defendant used a messaging platform provided by Stodge, LLC d/b/a Postscript (the "Postscript Platform") that permitted Defendant to transmit thousands of automated text messages without any human involvement.

26. The Postscript Platform has the capacity to store telephone numbers.<sup>1</sup>

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<sup>1</sup> See <https://www.postscript.io/creating-segments/> (discussing the creation of segments from a user's "sendable" list of consumer telephone numbers); see also [www.postscript.io/faq](http://www.postscript.io/faq); ("I have a list of customer phone numbers outside of Shopify. How do I upload them to Postscript? Email us ([support@postscript.io](mailto:support@postscript.io)) and we'll help you get these numbers into Postscript."); (last accessed Jan. 8.

27. The Postscript Platform has the capacity to generate sequential numbers.
28. The Postscript Platform has the capacity to dial numbers in sequential order.
29. The Postscript Platform has the capacity to dial numbers from a list of numbers.
30. The Postscript Platform has the capacity to dial numbers without human intervention.

Specifically, the Postscript Platform has an “Automations” function that operates by, as described by Postscript’s CEO, allowing a telemarketer like Defendant to “send out messages automatically based on triggers...”<sup>2</sup> Stated differently, “[a]utomations are multi-stage communication that are triggered by a certain event – they’re a great way to increase customer engagement and add a light-hearted feel to your store’s communication.”<sup>3</sup>

31. For example, the “Abandoned Cart” automation functions by sending an automated text message to a consumer who abandons an on-line purchase.<sup>4</sup> The purpose of such automated message is to encourage the consumer to complete their purchase. The transmission of a text message using the Postscript Platform’s “Automations” function occurs automatically, without human intervention, and solely based on pre-configured parameters that are executed by a computer with no human involvement at the time of execution, including the dialing of telephone numbers for the transmission of the messages.<sup>5</sup>

32. The Postscript Platform has the capacity to schedule the time and date for future

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2020); <https://www.youtube.com/watch?v=7zoW5BezGOk> (discussing the Postscript Platform’s capacity to store lists of telephone numbers) (last accessed on Jan. 8, 2020).

<sup>2</sup> See <https://www.youtube.com/watch?v=7zoW5BezGOk> (discussing automations); (last accessed on Jan. 8, 2020).

<sup>3</sup> See <https://www.postscript.io/creating-automations/>; (last accessed Jan. 8, 2020).

<sup>4</sup> See *id.*

<sup>5</sup> See <https://www.postscript.io/enabling-automations/>; <https://www.postscript.io/creating-automations/>; (Jan. 8, 2020).

transmission of text messages, including a “Campaign” function that allows its users to schedule the future transmission of text messages based on certain consumer criteria (e.g. last date of purchase, and amount spent).<sup>6</sup>

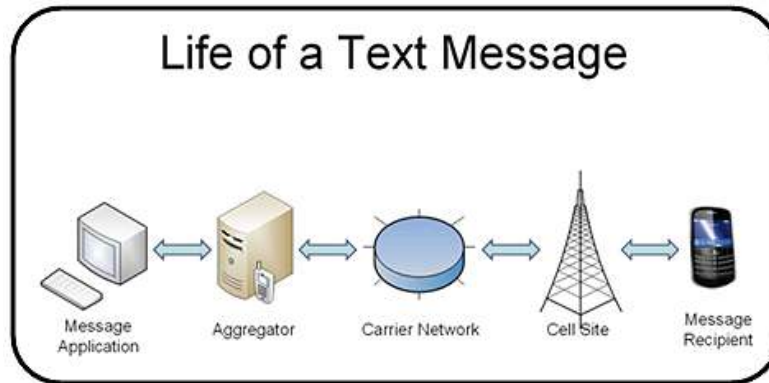
33. To transmit the text messages at issue, the Postscript Platform automatically executed the following steps: [1] The Postscript Platform retrieved each telephone number from a list of numbers in the sequential order the numbers were listed; [2] The Postscript Platform then generated each number in the sequential order listed and combined each number with the content of Defendant’s message to create “packets” consisting of one telephone number and the message content; [3] Each packet was then transmitted in the sequential order listed to an SMS aggregator, which acts an intermediary between the Postscript Platform, mobile carriers (e.g. AT&T), and consumers; and [4] Upon receipt of each packet, the SMS aggregator transmitted each packet – automatically and with no human intervention – to the respective mobile carrier for the telephone number, again in the sequential order listed by Defendant. Each mobile carrier then sent the message to its customer’s mobile telephone.

34. The above execution of Defendant’s instructions occurred seamlessly, with no human intervention, and almost instantaneously. Indeed, the Platform is capable of transmitting thousands of text messages following the above steps in minutes, if not less.

35. The following graphic summarizes the above steps and demonstrates that the dialing of the text messages at issue was done by the Platform automatically and without any human intervention:

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<sup>6</sup> *See id.* (discussing the scheduling of future message transmissions).



36. Defendant’s unsolicited text messages caused Plaintiff actual harm. Specifically, Plaintiff estimates that she wasted 25 to 30 seconds reviewing Defendant’s unwanted messages. Each time, Plaintiff had to stop what she was doing to look down at her phone to review the message.

37. Defendant’s text messages took up memory on Plaintiff’s cellular telephone, with each message taking up approximately 190 bytes. The cumulative effect of unsolicited text messages, such as those complained of by Plaintiff herein, poses a real risk of ultimately rendering the phone unusable for text messaging purposes as a result of the phone’s memory being taken up.

38. Defendant’s text messages also caused the depletion of Plaintiff’s cellular telephone battery. The battery used to power Plaintiff’s cellular telephone can only be recharged a limited number of times before the battery’s voltage begins to decrease, causing the cellular phone to turn off completely, without warning, if the battery drops below the minimum voltage needed to safely power Plaintiff’s cellular telephone.

### **CLASS ALLEGATIONS**

#### **PROPOSED CLASS**

39. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of himself and all others similarly situated.

40. Plaintiff brings this case on behalf of the below defined Class:

[1] All persons in the United States [2] within the four years immediately preceding the filing of this Complaint [3] whose cellular telephone number [4] was sent one or more text message [5] using the same type of equipment used to text message Plaintiff [6] from Defendant or anyone on Defendant's behalf, [7] for the purpose of advertising or promoting Defendant's goods and/or services.

41. Defendant and their employees or agents are excluded from the Class.

42. Plaintiff does not know the number of members in the Class but believes the Class members number in the several thousands, if not more.

#### **NUMEROSITY**

43. Upon information and belief, Defendant has placed automated calls to cellular telephone numbers belonging to thousands of consumers throughout the United States without their prior express written consent. The members of the Class, therefore, are believed to be so numerous that joinder of all members is impracticable.

44. The exact number and identities of the Class members are unknown at this time and can be ascertained only through discovery. Identification of the Class members is a matter capable of ministerial determination from Defendant's call records.

#### **COMMON QUESTIONS OF LAW AND FACT**

45. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

- (1) Whether Defendant made non-emergency calls to Plaintiff and Class members' cellular telephones using an ATDS;
- (2) Whether Defendant can meet their burden of showing that they obtained prior express written consent to make such calls;



- (3) Whether Defendant conduct was knowing and willful;
- (4) Whether Defendant are liable for damages, and the amount of such damages; and
- (5) Whether Defendant should be enjoined from such conduct in the future.

46. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendant routinely transmits text messages to telephone numbers assigned to cellular telephone services is accurate, Plaintiff and the Class members will have identical claims capable of being efficiently adjudicated and administered in this case.

#### **TYPICALITY**

47. Plaintiff's claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

#### **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

48. Plaintiff is a representative who will fully and adequately assert and protect the interests of the Class and has retained competent counsel. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

#### **SUPERIORITY**

49. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant wrongful conduct are too small to warrant the expense of individual lawsuits. The likelihood of individual Class members prosecuting their own separate claims is remote, and, even if every member of the Class could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases.

50. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another may not. Additionally, individual actions may be dispositive of the interests of the Class, although certain class members are not parties to such actions.

**COUNT I**  
**VIOLATIONS OF 47 U.S.C. § 227(b)**  
*On Behalf of Plaintiff and the Class*

51. Plaintiff re-alleges and incorporates paragraphs 1-50 as if fully set forth herein.

52. It is a violation of the TCPA to make “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service ....” 47 U.S.C. § 227(b)(1)(A)(iii).

53. The TCPA defines an “automatic telephone dialing system” (“ATDS”) as “equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *Id.* at § 227(a)(1).

54. Defendant – or third parties directed by Defendant – used equipment having the capacity to store telephone numbers, using a random or sequential generator, and to dial such numbers and/or to dial numbers from a list automatically, without human intervention, to make non-emergency telephone calls to the cellular telephones of Plaintiff and the other members of the Class. These text messages were sent without regard to whether Defendant had first obtained express permission from the called party to send such text message. In fact, Defendant did not have prior express consent to text the cell phones of Plaintiff or the other members of the putative Class when such text messages were sent.

55. Defendant violated § 227(b)(1)(A)(iii) of the TCPA by using an automatic telephone dialing system to make non-emergency telephone calls to the cell phones of Plaintiff and the other members of the putative Class without their prior express consent.

56. As a result of Defendant's conduct and pursuant to § 227(b)(3) of the TCPA, Plaintiff and the other members of the No Consent Class were harmed and are each entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and the No Consent Class are also entitled to an injunction against future calls.

57. To the extent Defendant's misconduct is determined to be willful and knowing, the Court should, pursuant to 47 U.S.C. § 227(c)(5), treble the amount of statutory damages recoverable by Plaintiff and members of the Class.

**WHEREFORE**, Plaintiff requests that the Court enter judgment in favor of Plaintiff and the No Consent Class, and against Defendant that provides the following relief: [1] Statutory damages of \$500 per violation, and up to \$1,500 per violation if proven to be willful; [2] a permanent injunction prohibiting Defendant from violating the TCPA in the future through calling or texting cell phones using an automatic telephone dialing system; [3] a declaration that Defendant used an automatic telephone dialing system and violated the TCPA in using such to call or text the cell phones of Plaintiff and the No Consent Class; and [4] any other relief the Court finds just and proper.

**JURY DEMAND**

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

**DOCUMENT PRESERVATION DEMAND**

Plaintiff demands that Defendant takes affirmative steps to preserve all records, lists, electronic databases or other itemization of telephone numbers associated with Defendant and the text messages as alleged herein.

DATED: January 10, 2020

Respectfully Submitted,

**HIRALDO P.A.**

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