

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.

BONNIE METVINER, on behalf of herself
and others similarly situated,

Plaintiff,

v.

ZILLOW,
a Washington corporation,

Defendant.

CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiff, Bonnie Metviner, (hereinafter “Plaintiff”) brings this action to enforce the provisions of the Telephone Consumer Protection Act (hereinafter “TCPA”), a federal statute enacted in 1991 in response to widespread public outrage about the proliferation of intrusive, nuisance telemarketing practices.

2. To that end, the TCPA prohibits a person to “make any call (other than a call made...with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice...” to any cellular telephone. 47 U.S.C. § 227(b)(1)(A)(iii).

3. Under the TCPA, the burden is on Defendant to demonstrate that Plaintiff provided express consent within the meaning of the statute. Defendant cannot meet this burden because Plaintiff did not provide Defendant with his or her prior express consent to receive telephone calls using automated telephone-dialing systems.

4. The TCPA also prohibits the initiation of any telephone solicitation to a telephone subscriber (including a cell phone subscriber) who has registered his or her telephone number on the National Do Not Call Registry. 47 C.F.R. § 64.1200(c).

5. Despite these requirements, Defendant, or some person authorized to do so on its behalf, has routinely and systematically: (a) placed calls using an automatic telephone dialing system or an artificial or pre-recorded voice to Plaintiff's cellular telephone and those of others defined in the Class below; and/or (b) telephone solicitation calls to numbers that Class Members and Plaintiff had registered on the national Do Not Call Registry.

6. The TCPA provides a private cause of action for violation of its provisions and violations of the rules promulgated under the Act. A class action is the best means of obtaining redress for Defendant's wide-scale illegal telemarketing, and is consistent both with the private right of action afforded by the TCPA and the fairness and efficiency goals of Rule 23 of the Federal Rules of Civil Procedure.

7. Defendant is therefore liable to Plaintiff, individually, and the proposed Class of similarly situated persons—Class Members—for Defendant's violations of the TCPA; and for Class Members and Plaintiff individually, Plaintiff seeks an injunction, requiring Defendant to cease its illegal calls and an award of statutory damages to Plaintiff and Class Members, together with costs and reasonable attorneys' fees.

JURISDICTION AND VENUE

8. The court has federal question subject matter jurisdiction pursuant to 28 U.S.C. §1331 and 47 U.S.C. §227.

9. Venue in this jurisdiction is proper under 28 U.S.C. §1391(b)(2), because a substantial part of the events or omissions giving rise to the claims in this case occurred in this District.

10. At all times material, this Court has had personal jurisdiction over the Defendant, Zillow, because it had had continuous and systematic contacts with Florida by actively transacting and soliciting business in Florida; and, among other things, upon information and belief, committing a tortious act in Florida by actively authorizing or causing the unlawful conduct described herein in violation of the TCPA. Defendant engaged in this activity (a) intending that the auto-dialed calls would be received in Florida; and (b) for the purpose of benefitting itself and others monetarily through its activities in Florida.

PARTIES

11. Plaintiff, Bonnie Metviner, is a resident and citizen of the State of Florida. Plaintiff is a Florida real estate licensee in the State of Florida, and while her telephone number may appear in certain publicly available materials, in relation to certain properties or offerings, she does not have any pre-existing relationship with the Defendant, nor did she consent to being contacted by the Defendant in the manner alleged herein.

12. Defendant, Zillow, is a publicly traded company on the Nasdaq Global Market and is headquartered in Seattle, Washington. Zillow maintains principal executive offices at 130 Second Avenue, Floor 31 in Seattle, Washington as disclosed and represented in public filings with the United States Securities & Exchange Commission.. As such, upon information and belief, Defendant is a citizen of the State of Washington.

13. Zillow maintains a website, www.zillow.com, that claims to offer a virtual on-line home and real estate marketplace to consumers. It describes itself in the search engine Google as

follows: “*Fast, free, thorough home search on America’s most popular web portal, covering real estate, apartments, mortgages, school data, and home improvement...*”. Zillow generates revenue from local real estate professionals, or real estate licensees like Plaintiff, primarily on an individual subscription basis, as well as from mortgage professionals and brand advertisers as disclosed in public filings with the United States Securities & Exchange Commission.

14. Zillow claims to operate the largest real estate and rental advertising networks in the United States in partnership with Yahoo!Homes! Zillow has publicly reported that as of December 31, 2012, it generated \$116.9 million dollars in revenue marking a 77% increase for the year that ended December 31, 2011 when it reported \$66.1 million dollars in revenue.

15. The name, Zillow, allegedly evolved from a desire to literally make “zillions of data points for homes accessible to everyone”.

16. At all times material hereto, Plaintiff is informed and believes and alleges that the acts complained of, and otherwise attributable to Defendant were executed and performed by its contractors, agents or personnel, which were at the same time acting within the scope and with actual or apparent authority of Zillow. Upon information and belief, Defendant, directly or else through other entities or persons acting on its behalf, conspired to, agreed to, contributed to, assisted with, and/or otherwise caused all of the wrongful acts and omissions, including the initiation of calls, that are the subject matter of this Complaint.

17. Whenever in this Complaint reference is made to any act or omission of Defendant, such allegations shall be deemed to mean that the directors, officers, agents, employees, distributors, partners, contractors, third-party sales agencies or representatives of said corporate defendant, partnership or other entity, did, authorize or command such act or omission while actively engaged in the management, operation, control or representation of the affairs of

said corporate defendant, partnership or entity, and while acting within the course and scope of their agency, distributorship, contract, employment, representation and capacity.

TCPA BACKGROUND

18. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy [.]” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

19. Through the TCPA, Congress outlawed telemarketing via unsolicited automated or pre-recorded telephone calls to cellular telephones (“robocalls”) and prohibited calls made to persons whose telephone numbers are listed on the national Do Not Call Registry.

The TCPA prohibits telemarketing calls to numbers listed on the Do Not Call Registry, unless the caller has the recipient’s signed, written consent

20. The national **Do Not Call Registry** allows consumers to register their telephone numbers (including personal cellular telephone numbers) and thereby indicate their desire not to receive telephone solicitations at those numbers. *See* 47 C.F.R. § 64.1200(c)(2). A listing on the **Do Not Call Registry** “must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.” *Id.*

21. The TCPA and implementing regulations prohibit the initiation of telephone solicitations to telephone numbers on the **Do Not Call Registry** (hereinafter “**Registry**”). 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2).

22. A person whose number is on the **Registry**, and who has received more than one telephone call within any (12) twelve-month period by or on behalf of the same entity in

violation of the TCPA, can sue the violator and seek statutory damages as a matter of law. 47 U.S.C. §227(c)(5).

23. The regulations exempt from liability a caller who has obtained the subscriber's signed, written agreement to receive telephone solicitations from the caller. 47 C.F.R. § 64.1200(c)(2)(ii). That agreement must also include the telephone number to which the calls may be placed. *Id.*

***The TCPA bans autodialer
calls to cell phones***

24. The TCPA's most stringent restrictions pertain to computer-generated telemarketing calls placed to cell phones.

25. The TCPA categorically bans persons and entities from initiating telephone calls (other than a call made...with the prior express consent of the called party) using an automated telephone dialing system (or "autodialer") to any telephone number assigned to a cellular telephone service. *See* 47 C.F.R. § 64.1200(a)(1)(iii); *see also* 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA provides a private cause of action "to a person or entity" based on "a violation of or the regulations prescribed under this subsection to enjoin such violation" and/or "to recover for actual monetary loss from such violation, or to receive \$500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(b)(3)(A) & (B).

***The TCPA imposes vicarious liability on third-
parties who do not physically dial the calls***

26. Under the TCPA, a seller of a product or service, like the Defendant, Zillow, may be vicariously liable for a third-party marketer's violations of Sections 227(b) and 227(c), even if the seller did not physically dial the illegal call, and even if the seller did not directly control the

marketer who did. *In re Joint Pet. filed by Dish Network, LLC*, FCC 13-54 ¶ 37, 2013 WL193449 (May 9, 2013) (“FCC Ruling”).

27. A seller is liable under Sections 227(b) and (c) when it has authorized a telemarketer to market its goods or services. *Id.* ¶ 47.

28. Additionally, a seller may be vicariously liable for violations of those provisions under principles of apparent authority and ratification. Factors relevant to a finding of vicarious liability include:

- a. Whether “the seller allows the outside sales entity access to information and systems that normally would be within the seller’s exclusive control, including . . . access to detailed information regarding the nature and pricing of the seller’s products and services or to the seller’s customer information.”
- b. Whether the outside sales entity can “enter consumer information into the seller’s sales or customer systems[.]”
- c. Whether the outside sales entity has “the authority to use the seller’s trade name, trademark and service mark[.]”;
- d. Whether “the seller approved, wrote or reviewed the outside entity’s telemarketing scripts.”; and
- e. “Whether the seller knew (or reasonably should have known) that the telemarketer was violating the TCPA on the seller’s behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct.”

Id. ¶ 46.

FACTUAL ALLEGATIONS
Zillow places telemarketing calls to the Plaintiff

29. On July 31, 2013, the Plaintiff received a phone call from a telemarketing representative calling from or on behalf of Zillow (“7/31/13 Call”).

30. The number displayed on the Plaintiff’s caller ID for the 7/31/13 Call was 949-398-1631.

31. When the call connected, there was an audible click from the receiver, followed by a significant pause before any party initiated any dialogue or made any statement to Plaintiff.

32. The facts in the preceding paragraph indicate the call was placed through an “automatic telephone dialing system” as defined in 47 U.S.C. § 227(a)(1).

33. Plaintiff has received multiple similar calls despite having her telephone number registered on the **National Do Not Call Registry** since April 2013.

34. The calls were placed through an automatic telephone dialing system and all calls were placed without the Plaintiff’s prior express consent.

35. Plaintiff is not a customer of Defendant, and has not provided Defendant with her personal information or cellular telephone number.

36. Both calls were placed to the same telephone number that Plaintiff had listed on the national **Do Not Call Registry**.

CLASS ACTION ALLEGATIONS

37. Plaintiff brings this class action under rules 23(a) and 23(b)(2) & (b)(3) of the Federal Rules of Civil Procedure on behalf of itself and of a similarly situated “Class” or “Class Members” as defined in the following paragraphs.

38. The class of persons Plaintiff proposes to represent with respect to Count I is tentatively defined as All Florida real estate licensees in the State of Florida whose phone numbers were registered on the Do Not Call Registry, and who, within the four (4) years before the filing of the initial Complaint, received more than one telemarketing call within any twelve-month period from, or on behalf of, Zillow offering its services.

39. The class of persons Plaintiff proposes to represent with respect to Count II is tentatively defined as all Florida real estate licensees in the State of Florida who Zillow directly, or through its agents, called on a cellular telephone line by the use of an automatic telephone dialing system to offer a service, and with respect to whom Defendant does not have evidence of prior express consent of the called party.

40. This action has been brought and may properly be maintained as a class action against Defendant pursuant to Rule 23 of the Federal Rules of Civil Procedure because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable. Plaintiff reserves the right to amend the Class definition if discovery and further investigation reveal that any Class should be expanded or otherwise modified.

41. **Numerosity:** At this time, Plaintiff does not know the exact number of Class Members, but among other things, given the nature of the claims and that Defendant's conduct consisted of a standardized mass solicitation campaign targeting particular telephone numbers, Plaintiff believes, at a minimum, there are hundreds, if not thousands, of Class Members. Plaintiff believes that the Class is so numerous that joinder of all members of the Class is impracticable and the disposition of their claims in a class action rather than incremental individual actions will benefit the Parties and the Court by eliminating the possibility of inconsistent or varying adjudications of individual actions.

42. Upon information and belief, a more precise Class size and the identities of the individual members thereof are ascertainable through Defendant's records including, but not limited to, Defendant's telephone and marketing records.

43. Members of the Class may additionally or alternatively be notified of the pendency of this action by techniques and forms commonly used in class actions, such as by published notice, e-mail notice, website notice, fax notice, first class mail, or combinations thereof, or by other methods suitable to this class and deemed necessary and/or appropriate by the Court.

44. **Existence and Predominance of Common Questions of Fact and Law:** There is a well-defined community of common questions of fact and law affecting the Plaintiff and members of the Class. Common questions of law and/or fact exist as to all members of the Class and predominate over the questions affecting individual Class members. These common legal and/or factual questions include, but are not limited to, the following:

- a. Whether Defendant or someone acting on Defendant's behalf initiated and conducted telephone calls promoting the commercial availability or quality of any property, goods, or services to Plaintiff and Class Members and the legal relationship between Defendant and any person sending initiating the handling of those calls on its behalf;
- b. Whether the telephone calls directed Plaintiff and Class Members were sent via mass or organized campaigns that utilized auto-dialers or predictive calling methods prohibited by the TCPA and how Defendant acquired the names and telephone numbers of Plaintiff and Class Members;

- c. Whether Defendant willfully or knowingly violated the TCPA or the rules prescribed under it;
- d. Whether Plaintiff and the members of the Class are entitled to statutory damages, treble damages, and attorney fees and costs for Defendant's acts and conduct; and
- e. Whether Plaintiff and members of the Class are entitled to a permanent injunction enjoining Defendant from continuing to engage in its unlawful conduct.

45. One or more questions or issues of law and/or fact regarding Defendant's liability are common to all Class Members and predominate over any individual issues that may exist and may serve as a basis for class certification under Rule 23(c)(4).

46. **Typicality:** Plaintiff's claims are typical of the claims of the members of the Class. The claims of the Plaintiff and members of the Class are based on the same legal theories and arise from the same course of conduct that violates the TCPA.

47. Plaintiff and members of the Class each received at least one telephone call regarding the commercial availability or quality of property, goods, or services, offered by Defendant in violation of the TCPA, which Defendant sent or caused to be sent to Plaintiff and the members of the Class.

48. **Adequacy of Representation:** Plaintiff is an adequate representative of the Class because Plaintiff's interests do not conflict with the interests of the members of the Class. Plaintiff will fairly, adequately and vigorously represent and protect the interests of the members of the Class and has no interests antagonistic to the members of the Class. Plaintiff has retained counsel, who are competent and experienced in litigation in the federal courts, TCPA litigation and class action litigation.

49. **Superiority:** A class action is superior to other available means for the fair and efficient adjudication of the claims of the Class. While the aggregate damages which may be awarded to the members of the Class are like to be substantial, the damages suffered by individual members of the Class are relatively small. As a result, the expense and burden of individual litigation makes it economically infeasible and procedurally impracticable for each member of the Class to individually seek redress for the wrongs done to them. Plaintiff does not know of any other litigation concerning this controversy already commenced against Defendant by any member of the Class. The likelihood of the individual members of the Class prosecuting separate claims is remote. Individualized litigation would also present the potential for varying, inconsistent or contradictory judgments, and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. In contrast, the conduct of this matter as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and would protect the rights of each member of the Class. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

50. **Class-Wide Injunctive Relief and Rule 23(b)(2):** Moreover, as an alternative to or in addition to certification of the Class under Rule 23(b)(3), class certification is warranted under Rule 23(b)(2) because Defendant has acted on grounds generally applicable to Plaintiff and members of Class, thereby making appropriate final injunctive relief with respect to Plaintiff and Class Members as a whole. Plaintiff seeks injunctive relief on behalf of Class Members on grounds generally applicable to the entire Class in order to enjoin and prevent Defendant's' ongoing violations of the TCPA, and to order Defendant to provide notice to them of their rights

under the TCPA to statutory damages and to be free from unwanted telephone calls made by Defendant, or on behalf of the Defendant.

LEGAL CLAIMS

COUNT I:

Violation of the TCPA's Do Not Call provisions

51. Plaintiff incorporates the allegations from paragraphs 1 - 50 as if fully set forth herein.

52. The Defendant violated the TCPA by (a) initiating telephone solicitations to persons and entities whose telephone numbers were listed on the national **Do Not Call Registry**, and/or (b) by the fact that others made those calls on its behalf. *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2).

53. The Defendant's violations were negligent and/or knowing.

COUNT II:

Violation of the TCPA's provisions prohibiting autodialer and prerecorded message calls to cell phones

54. Plaintiff incorporates the allegations from Paragraphs 1 - 50 as if fully set forth herein.

55. The Defendant violated the TCPA by (a) initiating a telephone call using an automated dialing system or prerecorded voice to Plaintiff's telephone number assigned to a cellular telephone service, or (b) by the fact that others caused the initiation of those calls on its behalf. *See* 47 C.F.R. 64.1200(a)(1)(iii); 47 U.S.C. § 227(b)(1).

56. The Defendant's violations were negligent and/or knowing.

COUNT III:
Injunctive relief to bar future TCPA violations

57. Plaintiff incorporates the allegations from Paragraphs 1 - 50 as if fully set forth herein.

58. The TCPA authorizes injunctive relief to prevent further violations of the TCPA.

59. The Plaintiff respectfully petitions this Court to order the Defendant, Zillow, and their employee and agents, to immediately cease engaging in unsolicited telemarketing in violation of the TCPA.

RELIEF SOUGHT

WHEREFORE, for herself and all class members, Plaintiff requests the following relief:

- A. An order certifying the Class under Rule 23(a); and Rule 23(b)(3),(b)(3) or both, or as to particular issues under Rule 23(c)(4); and appointing Plaintiff as the representative of the Class; and appointing the law firms representing Plaintiff as counsel for the Class;
- B. An award to Plaintiff and the members of the Class of statutory damages pursuant to 47 U.S.C. §227 for Defendant's violations of that statute;
- C. If it is found that Defendant willfully and/or knowingly initiated a telephone call using an automated dialing system or prerecorded voice to the Class or caused the initiation of those calls on its behalf, in violation of the TCPA, an increase by the Court of the award of statutory damages pursuant to 47 U.S.C 227(b) prayed for to three times that amount described in the previous paragraph, as authorized by 47 U.S.C. §227(b)(3), for willful and/or knowing violations
- D. An award of attorney's fees and costs; and
- E. Such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff requests a Trial by Jury.

DOCUMENT PRESERVATION DEMAND

Plaintiff hereby demands that Defendant take affirmative steps to preserve all records, lists, electronic databases or other itemization of telephone or fax numbers associated with the Defendant and the communication or transmittal of advertisements as alleged herein.

Dated: November 25, 2013

Respectfully submitted,

/s/ Steven R. Jaffe

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