

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

LATONYA SIMMS, on behalf of herself, and	)	Cause No: 1:14-cv-00737-WTL-DKL
all others similarly situated,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
EXACTTARGET, LLC,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	
	)	

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**SECOND AMENDED CLASS ACTION COMPLAINT FOR  
DAMAGES AND INJUNCTIVE RELIEF PURSUANT TO  
THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. §§ 227 et seq.**

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*Attorneys for Plaintiff and the Proposed Class*

## INTRODUCTION

1. Latonya Simms (“Plaintiff” or “Simms”) files this Second Amended Class Action Complaint and Demand for Jury Trial against ExactTarget, LLC (“ExactTarget”) for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of ExactTarget in negligently, and/or willfully contacting Plaintiff through SMS or text messages 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 her attorneys.

## NATURE OF THE ACTION

2. The TCPA strictly forbids nuisance calls exactly like those alleged in this Complaint – intrusive text messages to private cellular phones, placed without consent, and continuing even after receiving requests to stop.

3. In an effort to increase its own business revenues, ExactTarget repeatedly sent unsolicited text messages, without consent, to cellular telephones while using automatic telephone dialing equipment having the capacity to store and dial telephone numbers, *en masse*. As a result, ExactTarget has repeatedly violated the TCPA.

4. ExactTarget’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 text messages, 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 ExactTarget’s conduct, and is likely to be redressed by a favorable decision in this action.

6. In response to ExactTarget's unlawful conduct, Plaintiff seeks an injunction stopping ExactTarget from sending unsolicited text messages, as well as an award of statutory damages under the TCPA, together with costs and reasonable attorneys' fees.

### **JURISDICTION AND VENUE**

7. This Court has federal question subject matter jurisdiction under 28 U.S.C. § 1331, as the action arises under the TCPA, a federal statute. *Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005). Subject matter jurisdiction over this action is further appropriate in this Court pursuant to 28 U.S.C. § 1332(d)(2), because (i) at least one member of the putative Class is a citizen of a state different than Defendant, (ii) the amount in controversy exceeds \$5,000,000.00, exclusive of interest and costs, and (iii) none of the exceptions under that subsection apply to this action.

8. The Court has personal jurisdiction over Defendant and venue is proper in this District because Defendant transacts significant amounts of business within this District and because the conduct and events giving rise to Plaintiff's claims occurred in this District.

### **PARTIES**

9. Plaintiff Simms is, and at all times mentioned herein was, a resident of the State of Louisiana. She is, and at all times mentioned herein was a "person" as defined by 47 U.S.C. § 153 (39).

10. Defendant ExactTarget is, and at all times mentioned herein was, an Indiana company, whose primary corporate offices are located in Indianapolis, Indiana, and is a "person," as defined by 47 U.S.C. § 153 (39). Upon information and belief, ExactTarget maintains a San Francisco office which is the largest of ExactTarget's satellite offices, which

employees a social media team, West Coast sales team, services experts and product engineers and developers.

11. Defendant ExactTarget, in its course of business, has offered its services to various entities, such as Simply Fashion. As a part of ExactTarget's services it builds custom platforms and dialing equipment to allow the mass transmission of text messages. As a part of this service, ExactTarget is responsible for sending the text messages and processing any responses messages, including opt-out or STOP requests. ExactTarget also offers consulting and implementation services.

**THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**

**(TCPA), 47 U.S.C. §§ 227 *et seq.***

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

13. While the statute imposed restrictions on a wide set of telemarketing practices, its strictest provision apply to telemarketing by automatic telephone dialing systems. *See* 47 U.S.C. § 227(b)(1). 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.<sup>2</sup>

14. An automatic telephone dialing system (sometime called "autodialer") is "equipment which has the capacity to store or produce telephone numbers to be called, using a

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<sup>1</sup> 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.*

<sup>2</sup> 47 U.S.C. § 227(b)(1)(A)(iii).

random or sequential number generator to dial the numbers[.]" and has the capacity to dial such numbers. *Id.* at § 227(a)(1). The term extends to equipment that has the capacity to dial numbers without human intervention.

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.<sup>3</sup>

16. With the limited exception of calls made for emergency purpose, the TCPA bans *all* calls and text messages sent to cellular telephones through an autodialer, regardless of whether they solicit the sale of good or services, unless the recipient of the call provides "prior express consent" to receive the calls or text messages. 47 U.S.C. § 227(b); 47 C.F.R. § 64.1200(a)(1).

17. "Prior express consent" exists where a consumer has (a) clearly stated that the telemarketing may call or text, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made of the purpose of encouraging the purchase of goods or services.<sup>4</sup> *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12396, para. 11 (1995).

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

<sup>4</sup> *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12396, para. 11 (1995).

## FACTUAL ALLEGATIONS

18. In recent years, marketers stymied by federal laws limited solicitations by telephone, facsimile machine, and email have increasingly looked to alternative technologies through which to send bulk solicitations to consumers easily and cheaply.

19. One of the newest types of bulk marketing is to advertise through Short Message Services. The term “Short Message Service” or “SMS” is a messaging system that allows cellular telephone subscribers to use their cellular telephones to send and receive short text messages, usually limited to 160 characters.

20. An “SMS message” is a text message call directed to a wireless device through the use of the telephone number assigned to the device. When an SMS or “text” message call is successfully made, the recipient’s cell phone rings or otherwise notes the receipt of the text message, alerting him or her that a call is being received. As cellular telephones are inherently mobile and are frequently carried on their owner’s person, calls to cellular telephones, including SMS messages, may be received by the called party virtually anywhere worldwide.

21. The instantaneous nature of text message communication make it very appealing to telemarketers – and very annoying to consumer subjected to spam text messages.

22. Unlike more conventional advertisements, such text messages actually costs their recipients money, because cell phone users must frequently pay their wireless service providers either for each text message call they receive or incur a usage allocation deduction to their text plan, regardless of whether or not the message is authorized.

23. Spam text messages are a burgeoning phenomenon. One authority estimates that Americans received more than four billion spam text messages in 2011 – more than double the number sent just two years earlier.

24. Over the course of an extended period beginning no later than March of 2013, Defendant directed the mass transmission of text messages to cell phones nationwide.

25. Beginning in March of 2013 and continuing to the present time, Plaintiff Simms received numerous text messages from Defendant regarding sales and other promotions at a Simply Fashion's retail stores.

26. All of the text messages came from the SMS Code 699-79, a number which belongs to ExactTarget.

27. Specifically, on March 1, 2013, Plaintiff Simms received the following text messages from SMS code 699-79:

“Simply Fashion's ADDITIONAL 50% off ALL red tags sale has been extended just for Fashionistas! Come see us to get select styles for only \$3-\$5 while it lasts!”

28. Plaintiff Simms continued to receive similar text messages from Defendant promoting Simply Fashion's business on March 15, 2013, March 22, 2013, March 28, 2013, April 1, 2013, April 5, 2013 and May 3, 2013, from the same SMS code 699-79, which did not provide a method for opt-out.

29. On May 9, 2013, Plaintiff Simms received the following text message from SMS code 699-79 with an opt-out method:

“(Simply Fashion) BOGO 50% off ALL dresses until Mother's Day! Celebrate your Mom in style. See store for details. FWD to a friend! Reply STOP to be removed.”

30. Thus, on May 9, 2013, Plaintiff Simms specifically instructed Defendant to no longer contact her by responding “STOP” to the text message.

31. On May 9, 2013, Defendant acknowledged receipt of that text message by the following text message from SMS code 699-79:

“You have been unsubscribed from future ExactTarget SMS Alerts.”

32. Despite confirmation that Plaintiff Simms had “unsubscribed”, on May 17, 2013, Plaintiff Simms received the following text message from SMS code 699-79:

“(Simply Fashion) Save 50% - 75% off the original prices of ALL clearance items. Hurry in while we still have your size! FWD to a friend to help them save, too!”

33. Thus, on May 17, 2013, Plaintiff once again replied “STOP” to Defendant’s text messages.

34. Once again Defendant acknowledged receipt of that message by the following text message on May 17, 2013, from SMS code 699-79:

“You have been unsubscribed from future ExactTarget SMS Alerts. Reply HELP for help. Msg&data rates may apply.”

35. However, again despite confirmation that Plaintiff Simms had “unsubscribed”, on June 6, 2013, Plaintiff Simms received the following text message from SMS code 699-79:

“(Simply Fashion) 25% off ALL red tag items NOW until Sunday! Take an additional 25% off red tags just in time for summer! FWD to a friend so they can save too!”

36. Plaintiff Simms continued to receive similar text messages from Defendant promoting Simply Fashion’s business on June 21, 2013, July 2, 2013, July 5, 2013 and July 19, 2013.

37. Despite Plaintiff Simms’ efforts to inform ExactTarget that she did not wish to be contacted, ExactTarget still sent unsolicited text messages on a regular basis.

38. Each text message Plaintiff received was sent from Defendant ExactTarget.

39. These unsolicited text messages sent to Plaintiff Simms’ cellular telephone were placed via an “automatic telephone dialing system,” (“ATDS”) as defined by 47 U.S.C. § 227

(a)(1), is prohibited by 47 U.S.C. § 227 (b)(1)(A), which had the capacity to store or produce numbers randomly or sequentially, and to dial such numbers, to place telephone calls and/or SMS or text messages to Plaintiff's cellular telephone.

40. The telephone number that Defendant sent the text messages to were assigned to cellular telephone services for which Plaintiff incurred a charge for incoming calls or text messages pursuant to 47 U.S.C. § 227(b)(1).

41. These telephone text messages constituted "calls" under the TCPA that were not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

42. Plaintiff Simms did not provide Defendant prior express consent to receive unsolicited text messages pursuant to 47 U.S.C. § 227 (b)(1)(A). Further, Plaintiff revoked any alleged consent by responding "STOP" to the text messages sent from ExactTarget's SMS code.

43. These telephone confirmatory text messages by Defendant violated 47 U.S.C. § 227(b)(1).

#### **CLASS ACTION ALLEGATIONS**

44. Plaintiff brings this action on behalf of herself and on behalf of all others similarly situated ("the Class").

45. Plaintiff represents, and is a member of the Class consisting of all persons within the United States who received any unsolicited SMS or text messages from Defendant on their paging service, cellular phone service, mobile radio service, radio common carrier service, or other service for which they were charged for the SMS or text messages, through the use of any automatic telephone dialing system as set forth in 47 U.S.C. § 227(B)(1)(A)(3), which SMS or text messages by Defendant were not made for emergency purposes or with the recipients' prior

express consent, within the four years prior to the filing of the initial Complaint through the present.

46. Defendant and its employees or agents are excluded from the Class. Plaintiff does not know the number of members in the Class, but believes the Class 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.

47. Plaintiff and members of the Class were harmed by the acts of Defendant in at least the following ways: Defendant illegally contacted Plaintiff and the Class members via their cellular telephones by using unsolicited SMS or text messages, thereby causing Plaintiff and the Class members 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 the Class members. Plaintiff and the Class members were damaged thereby.

48. 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 Class definition to seek recovery on behalf of additional persons as warranted as facts are learned in further investigation and discovery.

49. The joinder of the Class members 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.

50. 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 the four years prior to the filing of this Complaint, Defendant sent SMS or text messages without the recipients' prior express consent (other than SMS or text messages made for emergency purposes or made with the prior express consent of the called party) to a Class member using any automatic telephone dialing to any telephone number assigned to a cellular telephone service;
- b. Whether Plaintiff and the Class members were damaged thereby, and the extent of damages for such violation; and
- c. Whether Defendant should be enjoined from engaging in such conduct in the future.

51. As persons who received at least one unsolicited SMS or text message without Plaintiff's prior express consent, Plaintiff is asserting a claim that is typical of the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class in that Plaintiff has no interests antagonistic to any member of the Class.

52. 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, Class members could afford to individually seek legal redress for the wrongs complained of herein.

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

54. 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 Class members 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.

55. Management of these claims is likely to present significantly fewer difficulties than those presented in many class claims.

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

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

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

58. Each SMS or text message was made using equipment that, upon information and belief, had the capacity to store or produce telephone numbers, using a random or sequential number generator, and to dial such numbers. By using such equipment, Defendant was able to effectively send thousands of text messages simultaneously to lists of thousands of wireless phone numbers of consumers without human intervention. These text messages were made *en masse* through the use of a short code and without the prior express consent of the Plaintiff and the other members of the Class to receive such text messages.

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

60. As a result of Defendant's 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).

61. 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.***

62. Plaintiff incorporates by reference the above paragraphs 1 through 56 inclusive, of this Complaint as though fully stated herein.

63. Each SMS or text message was made using equipment that, upon information and belief, had the capacity to store or produce telephone numbers, using a random or sequential number generator, and to dial such numbers. By using such equipment, Defendant was able to effectively send thousands of text messages simultaneously to lists of thousands of wireless phone numbers of consumers without human intervention. These text messages were made en masse through the use of a short code and without the prior express consent of the Plaintiff and the other members of the Class to receive such text messages.

64. 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.*

65. 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).

66. 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 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.**

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

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

69. 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.**

70. As a result of Defendant's 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).

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

72. 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: July 25, 2016

/s/ Ronald A. Marron

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LATONYA SIMMS, on behalf of herself )  
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SIMPLY FASHION STORES, LTD and )  
EXACTTARGET, INC., )  
 )  
Defendants. )  
 )

Cause No. 1:14-cv-00737-WTL-DKL

**CERTIFICATE OF SERVICE**

I certify that on July 25, 2016, a copy of the Second Amended Class Action Complaint for Damages and Injunctive Relief pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* was served via this Court’s Electronic Filing Systems to all parties, pursuant to Fed. R. Civ. P. 5(d) and 5(e):

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Dated: July 25, 2016

/s/ Ronald A. Marron

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