

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

REBECCA ASHACK, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

CALIBER HOME LOANS, INC.,

Defendant.

NO. 1:15-cv-01069-JMS-DML

JURY TRIAL DEMANDED

Honorable Jane E. Magnus-Stinson

AMENDED CLASS ACTION COMPLAINT

Preliminary Statement

Plaintiff, Rebecca Ashack, by her undersigned counsel, for this class action Complaint against Defendant, Caliber Home Loans, Inc., and its present, former, or future direct and indirect parent companies, subsidiaries, affiliates, agents, and/or other related entities (hereinafter referred to as “Defendant” or “Caliber”), alleges as follows:

NATURE OF ACTION

1. Plaintiff, individually and as a class representative for all others similarly situated, brings this action against Caliber for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”).

PARTIES

2. Plaintiff, Rebecca Ashack (“Plaintiff”), is a natural person and a citizen of Indiana, residing in Marion County, Indiana.

3. Defendant, Caliber Home Loans, Inc., is a Delaware corporation with its principal place of business in Irving, Texas. Defendant is registered to do and is doing business in Indiana and throughout the United States.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff's claims arise under the laws of the United States, specifically 47 U.S.C. § 227.

5. This Court has personal jurisdiction over Defendant because it has submitted to Indiana jurisdiction by registering with the Secretary of State to do business in the state of Indiana, and a substantial part of the wrongful acts alleged in this Complaint were committed in Indiana.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 47 U.S.C. § 227

7. In 1991, Congress enacted the TCPA in response to a growing number of consumer complaints regarding certain telemarketing practices.

8. The TCPA makes it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA provides a private cause of action to persons who receive calls in violation of 47 U.S.C. § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).

9. 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. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014 (2003).

10. On January 4, 2008, the FCC issued a Declaratory Ruling confirming that autodialed calls and calls using an artificial voice or prerecorded message to a wireless number by, or on behalf of, a creditor are permitted only if the calls are made with the “prior express consent” of the called party. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (“FCC Declaratory Ruling”), 23 F.C.C. Rcd. 559 (2008).

11. The FCC “emphasize[d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.” FCC Declaratory Ruling, 23 F.C.C. Rcd. 559, 564-65 ¶ 10 (2008).

12. Under the TCPA, and pursuant to the FCC Declaratory Ruling, the burden is on the Defendant to demonstrate that the Plaintiff gave her express consent to Defendant to use an autodialer to call her cellular telephone within the meaning of the statute. *See* FCC Declaratory Ruling, 23 F.C.C. Rcd. 559, 565 ¶ 10.

FACTUAL ALLEGATIONS

A. Factual Allegations Regarding Defendant

13. Caliber is a full-service, national mortgage lender that holds itself out to be “one of the largest independent mortgage companies in the country.” *See* <https://www.caliberhomeloans.com/about-us/caliber-news> (last visited June 12, 2015).

14. Caliber is “an approved Seller/Servicer for both Fannie Mae and Freddie Mac, an approved issuer for Ginnie Mae and is an approved servicer for FHA, VA and the USDA.” *Id.*

15. Caliber services mortgage loans nationwide, including in Indiana.

B. Factual Allegations Regarding Plaintiff

16. On May 10, 2010, Plaintiff purchased real property located at 4933 Brehob Road, Indianapolis, Indiana 46217 (the “Property”). Plaintiff financed the purchase of the Property through a mortgage from PNC Mortgage, a division of PNC Bank, National Association (“Mortgage Account”).

17. In 2013, Plaintiff experienced financial hardship and her expenses began to dwarf her income and assets.

18. As a result, Plaintiff filed a Chapter 7 bankruptcy petition in the United States District Court for the Southern District of Indiana on July 22, 2013. *See In re Bankruptcy of Rebecca Ashack*, 13-07785-FJO-7 (“Bankruptcy”), Doc 1.

19. Plaintiff included her Mortgage Account in her bankruptcy filing. At the time of filing, Plaintiff’s Mortgage was serviced by PNC Mortgage.

20. Plaintiff’s bankruptcy, including the Mortgage Account, was discharged on November 13, 2013. *See Bankruptcy*, Doc. 19.

21. Plaintiff is the account holder of a Sprint cellular telephone number and, pursuant to the terms of her contract, is charged for each call within the meaning of 47 U.S.C. § 227(b)(1)(A)(iii).

22. On or about September 16, 2014, Plaintiff received a telephone call on her cellular telephone from Caliber concerning her Mortgage Account. During this telephone call:

- a. The Caliber representative specifically requested to speak with Plaintiff.
- b. Plaintiff informed the Caliber representative that the telephone number the Caliber representative had dialed was Plaintiff’s personal cellular telephone number.
- c. The Caliber representative told Plaintiff that she was late on her mortgage payments associated with her Mortgage Account.
- d. Plaintiff informed the Caliber representative that the debt associated with the Mortgage Account had been discharged in bankruptcy.
- e. Plaintiff provided the Caliber representative with the cause number for her bankruptcy.
- f. The Caliber representative acknowledged that Caliber did not have any notification regarding Plaintiff’s bankruptcy filing.

g. Despite these notifications from Plaintiff, the Caliber representative continued to pressure Plaintiff to either pursue loss mitigation options, such as a short sale, or to pay the balance allegedly owed on her Mortgage Account.

h. Plaintiff requested that the Caliber representative cease and desist all direct communication with her related to her Mortgage Account and instead speak directly with her bankruptcy attorney, Ryan Wright.

23. On September 17, 2014, the day after the initial call from the Caliber representative, Plaintiff faxed copies of her bankruptcy discharge documents to Caliber, along with a statement that the debt associated with her Mortgage Account had been discharged.

24. Notwithstanding Plaintiff's verbal and written notifications regarding the discharge of the debt associated with her Mortgage Account, Defendant continued to directly contact Plaintiff on her cellular telephone to attempt to collect the alleged debt.

25. On or about November 3, 2014, Mr. Wright faxed Caliber a letter stating that the debt associated with Plaintiff's Mortgage Account had been discharged in bankruptcy and Caliber should cease all direct contact related to the Mortgage Account with Plaintiff.

26. Plaintiff received numerous calls to her cellular telephone from Caliber, including but not limited to, on the following dates: 9/15/14; 9/19/14; 9/22/14; 9/23/14; 9/24/14; 9/25/14; 9/26/14; 9/29/14; 10/2/14; 10/3/14; 10/4/14; 10/10/14; 10/15/14; 10/16/14; 10/17/14; 10/18/14; 10/21/14; 10/23/14; 10/27/14; 10/29/14; 10/30/14; 11/3/14; 11/5/14; 11/7/14; 11/12/14; 11/15/14; 11/18/14; 12/25/14; 1/2/15; 1/7/15; 1/8/15; 1/9/15; 1/12/15; 1/16/15; 1/12/15; 1/16/15; 1/22/15; 1/23/15; 1/28/15; 1/29/15; 2/3/15; and 2/4/15.

27. Some of the calls answered by Plaintiff, and placed by Caliber, had a standard pause and gap before a live operator was available. Consequently, many, if not all, of the calls Caliber made to Plaintiff on her cellular telephone, including, but not limited to, the calls listed in paragraph 26 above, were made using an automatic telephone dialing system ("ATDS") and/or artificial or prerecorded voice.

28. Caliber's calls to Plaintiff on her cellular telephone were made for purposes of collecting a debt associated with her Mortgage Account.

29. Caliber did not obtain prior express consent to call Plaintiff on her cellular telephone for purposes of attempting to collect debt associated with her Mortgage Account. Alternatively, any prior express consent obtained was revoked by: (1) Plaintiff's affirmative act of filing for bankruptcy; (2) by operation of law as a result of the automatic bankruptcy stay and ensuing discharge injunction; and (3) by Plaintiff's and her attorney's affirmative act of demanding, both verbally and in writing, that Caliber cease and desist calling Plaintiff on her cellular telephone.

30. Defendant is responsible for making the above-described ATDS-generated and/or automated or prerecorded calls.

31. Defendant has made a significant number of similar ATDS generated and/or automated or pre-recorded calls to persons on their cellular telephones in Indiana and throughout the entire United States.

32. Defendant intends to continue to make similar ATDS-generated and/or automated or prerecorded calls to persons on their cellular telephones in Indiana and throughout the entire United States.

33. Plaintiff and members of the Class, described in paragraph 34 below, have been damaged by these illegal calls because their privacy was improperly invaded, minutes were used from their cellular telephone plans, and they were forced to spend time tending to unwanted calls. *See Martin v. Leading Edge Recovery Solutions, LLC*, Case No. 11 C 5886, 2012 WL 3292838, at *2 (N.D. Ill. Aug. 10, 2012). Furthermore, Plaintiff and members of the Class also incurred injury including but not limited to postage cost, value of time spent in an attempt to resolve this dispute with Caliber, and cost of fuel and mileage incurred as a direct result of Caliber's actions.

CLASS ACTION ALLEGATIONS

34. Class Definition. Pursuant to Fed. R. Civ. P. 23, Plaintiff brings this case as a class action on behalf of a class (hereinafter referred to as the “Class”) defined as follows:

All persons in the United States to whom Defendant and/or a third party acting on Defendant’s behalf, (a) made one or more non-emergency telephone calls; (b) to their cellular telephone number; (c) through the use of an automatic telephone dialing system or an artificial or prerecorded voice; and (d) at any time in the period that begins four years before the date of filing this Complaint to trial.

Collectively, all of these persons will be referred to as members of the Class. Plaintiff represents, and is a member, of the Class.

35. Excluded from Class are Defendant, any entity in which Defendant has a controlling interest or that has a controlling interest in Defendant, and Defendant’s legal representatives, assignees, and successors. Also excluded are the judge to whom this case is assigned and any member of the judge’s immediate family.

36. Numerosity. Plaintiff does not know the exact number of members in the Class but Plaintiff reasonably believes that the Class is so numerous that joinder of all members is impracticable. On information and belief, the Class has more than 100 members. Moreover, the disposition of the claims of the Class in a single action will provide substantial benefits to all parties and the Court.

37. Commonality. There are numerous questions of law and fact common to Plaintiff and members of the Class. These common questions of law and fact include, but are not limited to, the following:

a. As to Plaintiff and the Class, whether Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant’s behalf violated 47 U.S.C. § 227(b)(1)(A) by making any call, except for emergency purposes, to a cellular telephone number using an ATDS or artificial or prerecorded voice;

b. As to Plaintiff and the Class, whether Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf knowingly and/or willfully violated 47 U.S.C. § 227(b)(1)(A) by making any call, except for emergency purposes, to a cellular telephone number using an ATDS or artificial or prerecorded voice, thus entitling Plaintiff and the Class to treble damages;

c. As to Plaintiff and the Class, whether Defendant is liable for ATDS generated and/or automated or prerecorded calls attempting to collect debt related to a mortgage account serviced by Defendant; and

d. As to Plaintiff and the Class, whether Defendant and/or its agents, affiliates, and/or other persons or entities acting on Defendant's behalf should be enjoined from violating the TCPA in the future.

38. Typicality. Plaintiff's claims are typical of the claims of the Class. Plaintiff's claims, like the claims of Class arise out of the same common course of conduct by Defendant and are based on the same legal and remedial theories.

39. Adequacy. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has retained competent and capable attorneys with significant experience in complex and class action litigation, including consumer class actions and TCPA class actions. Plaintiff and her counsel are committed to prosecuting this action vigorously on behalf of the Class and have the financial resources to do so. Neither Plaintiff nor her counsel have interests that are contrary to or that conflict with those of the proposed Class.

40. Predominance. Defendant has engaged in a common course of conduct toward Plaintiff and members of the Class. The common issues arising from this conduct that affect Plaintiff and members of the Class predominate over any individual issues. Adjudication of these common issues in a single action has important and desirable advantages of judicial economy.

41. Superiority. A class action is the superior method for the fair and efficient adjudication of this controversy. Classwide relief is essential to compel Defendant to comply

with the FDCPA and TCPA. The interest of individual members of the Class in individually controlling the prosecution of separate claims against Defendant is small because the damages in an individual action for violation of the TCPA and the FDCPA are small. Management of these claims is likely to present significantly fewer difficulties than are presented in many class claims because the calls at issue are all automated and/or were made in an attempt to collect debt that was no longer enforceable. Class treatment is superior to multiple individual suits or piecemeal litigation because it conserves judicial resources, promotes consistency and efficiency of adjudication, provides a forum for small claimants, and deters illegal activities. There will be no significant difficulty in the management of this case as a class action.

42. Injunctive and Declaratory Relief Appropriate. Defendant has acted on grounds generally applicable to the Class, thereby making final injunctive relief and corresponding declaratory relief with respect to the Class appropriate on a classwide basis. Moreover, on information and belief, Plaintiff alleges that the automated calls and the attempts to collect debt made by Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf that are complained of herein are substantially likely to continue in the future if an injunction is not entered.

CAUSES OF ACTION

FIRST COUNT

VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT

47 U.S.C. § 227(b)(1)(A)

43. Plaintiff realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

44. The foregoing acts and omissions of Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to the cellular telephone numbers of Plaintiff and members of the Class using an ATDS and/or artificial or prerecorded voice.

45. As a result of the Defendant's and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf violations of 47 U.S.C. § 227(b)(1)(A), Plaintiff and members of the Class presumptively are entitled to an award of \$500 in statutory damages for each and every call to their cellular telephone numbers using and ATDS and/or artificial or prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

46. Plaintiff and members of the Class are also entitled to and do seek injunctive relief prohibiting the Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf from violating the TCPA, 46 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to any cellular telephone numbers using an ATDS and/or artificial or prerecorded voice in the future.

47. Plaintiff and members of the Class are also entitled to an award of attorneys' fees and costs.

SECOND COUNT

KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227(b)(1)(A)

48. Plaintiff realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

49. The foregoing acts and omissions of the Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf constitute numerous and multiple knowing and/or willful violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to the cellular telephone numbers of Plaintiff and members of the Class using an ATDS and/or artificial or prerecorded voice.

50. As a result of the Defendant's and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf knowing and/or willful violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), Plaintiff and members of the Class are entitled to treble damages of up to \$1,500 for each and every call to their cellular telephone numbers using an ATDS and/or artificial or prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

51. Plaintiff and members of the Class are also entitled to and do seek injunctive relief prohibiting Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf from violating the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to any cellular telephone numbers using an ATDS and/or artificial or prerecorded in the future.

52. Plaintiff and members of the Class are also entitled to an award of attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on her own behalf and on behalf of the members of the Class, prays for judgment against Defendant as follows:

- A. Certification of the proposed Class;
- B. Appointment of Plaintiff as representative of the Class;
- C. Appointment of the undersigned counsel as counsel for the Class;
- D. A declaration that Defendant and/or its affiliates, agents, and/or other related entities' actions complained of herein violate the TCPA;
- E. An order enjoining Defendant and/or its affiliates, agents and/or other related entities, as provided by law, from engaging in the unlawful conduct set forth herein;
- F. An award to Plaintiff and the Class of damages, as allowed by law;
- G. An award to Plaintiff and the Class of attorneys' fees and costs, as allowed by law and/or equity;
- H. Leave to amend this Complaint to conform to the evidence presented at trial; and
- I. Orders granting such other and further relief as the Court deems necessary, just, and proper.

DEMAND FOR JURY

Plaintiff demands a trial by jury for all issues so triable.

Dated: February 18, 2016.

Respectfully submitted,

/s/ Syed Ali Saeed
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