

KAZEROUNI LAW GROUP, APC
2700 N. Main Street, Ste. 1000
Santa Ana, California 92705

1 **KAZEROUNI LAW GROUP, APC**
Abbas Kazerounian, Esq. (SBN: 249203)
2 ak@kazlg.com
Jason A. Ibey, Esq. (SBN: 284607)
3 jason@kazlg.com
2700 N. Main Street, Ste. 1000
4 Santa Ana, California 92705
5 Telephone: (800) 400-6808
Facsimile: (800) 520-5523
6

7 **HYDE & SWIGART**
Robert L. Hyde, Esq. (SBN 227183)
8 bob@westcoastlitigation.com
Joshua B. Swigart, Esq. (SBN: 225557)
9 josh@westcoastlitigation.com
411 Camino Del Rio South, Suite 301
10 San Diego, CA 92108
Telephone: (619) 233-7770
11 Facsimile: (619) 297-1022

12 Attorneys for Plaintiff,
13 Rafael David Sherman

14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 **RAFAEL DAVID SHERMAN,**
17 **individually and on behalf of all others**
similarly situated,

18 **Plaintiffs,**

19 **v.**

20 **YAHOO! INC., a Delaware**
21 **Corporation,**

22 **Defendant.**

Case No.: **'13CV0041 GPC WVG**

CLASS ACTION

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

JURY TRIAL DEMANDED

23 **INTRODUCTION**

24 1. RAFAEL DAVID SHERMAN (“Plaintiff”), individually, and on behalf of all others
25 similarly situated, brings this First Amended Complaint for damages, injunctive relief,
26 and any other available legal or equitable remedies, resulting from the illegal actions of
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1 YAHOO! INC. (“YAHOO” or “Defendant”), in negligently and/or intentionally
2 contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone
3 Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading
4 Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to himself and
5 his own acts and experiences, and, as to all other matters, upon information and belief,
6 including investigation conducted by his attorneys.

7 2. The TCPA was designed to prevent calls like the ones described within this complaint,
8 and to protect the privacy of citizens like Plaintiff. “Voluminous consumer complaints
9 about abuses of telephone technology – for example, computerized calls dispatched to
10 private homes – prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*,
11 132 S. Ct. 740, 744 (2012).

12 3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors
13 and telemarketers may call them, and made specific findings that “[t]echnologies that
14 might allow consumers to avoid receiving such calls are not universally available, are
15 costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

16 TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that:

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

23 *Id.* at § 12; *see also Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
24 3292838, at* 4 (N.D. Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
25 purpose).

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

2 **JURISDICTION AND VENUE**

3 5. This Court has federal question jurisdiction because this case arises out of violation of
4 federal law. 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).

5 6. Venue is proper in the United States District Court for the Southern District of California
6 pursuant to 18 U.S.C. § 1391(b) because Plaintiff resides in this judicial district, the harm
7 to Plaintiff occurred in this judicial district, and Defendant is subject to personal
8 jurisdiction in the County of San Diego, State of California because it conducts business
9 there.

10 **PARTIES**

11 7. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the County of
12 San Diego, State of California. Plaintiff is, and at all times mentioned herein was, a
13 “person” as defined by 47 U.S.C. § 153 (10).

14 8. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and at all times
15 mentioned herein was, a corporation whose primary corporate address is in the State of
16 Delaware. Defendant is, and at all times mentioned herein was, a Delaware corporation
17 and is a “person,” as defined by 47 U.S.C. § 153 (10). Defendant provides
18 communication services to hundreds of thousands of consumers. Plaintiff alleges that at
19 all times relevant herein Defendant conducted business in the State of California and in
20 the County of San Diego, and within this judicial district.

21 **FACTUAL ALLEGATIONS**

22 9. At all times relevant, Plaintiff was a citizen of the State of California. Plaintiff is, and at
23 all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (10).

24 10. Defendant is, and at all times mentioned herein was, a Delaware corporation and a
25 “person,” as defined by 47 U.S.C. § 153 (10).

26 11. At all times relevant Defendant conducted business in the State of California and in the
27 County of San Diego, within this judicial district.

1 12. YAHOO offers its users an Instant Messaging service that provides users the opportunity
2 to send a free text message/s.

3 13. At no time did Plaintiff provide Plaintiff's cellular phone number to Defendant through
4 any medium.

5 14. On or about January 7, 2013, at approximately 11:07 a.m. (PST), a YAHOO user utilized
6 YAHOO's service to send a text message to Plaintiff's cellular telephone. This text
7 message, which was unsolicited by Plaintiff, read:

8 "hey get online i have to talk to you." [hereinafter "MESSAGE"]

9 15. Prior to the MESSAGE being received by Plaintiff, YAHOO sent an unsolicited SPAM
10 text message to Plaintiff (on its own accord) on or about the same day at approximately
11 11:07 a.m. (PST). This text message read:

12 "A Yahoo! User has sent you a message. Reply to that SMS to
13 respond. Reply INFO to this SMS for help or go to [y.ahoo.it/
14 imsms](http://y.ahoo.it/imsms)." [hereinafter "SPAM"].

15 16. Plaintiff was unaware that YAHOO's Instant Messaging service would send him the
16 unsolicited SPAM text message described in Paragraph 15 of this Complaint. In fact, on
17 good information and belief, the sender of the MESSAGE was also unaware that
18 YAHOO would send the SPAM text.

19 17. Through this conduct, Defendant contacted Plaintiff on Plaintiff's cellular telephone
20 regarding an unsolicited service via an "automatic telephone dialing system," ("ATDS")
21 as defined by 47 U.S.C. § 227(a)(1) and prohibited by 47 U.S.C. § 227(b)(1)(A).

22 18. This ATDS has the capacity to store or produce telephone numbers to be called, using a
23 random or sequential number generator.

24 19. The telephone number Defendant called was assigned to a cellular telephone service for
25 which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227(b)(1).

26 20. These telephone calls constituted calls that were not for emergency purposes as defined
27 by 47 U.S.C. § 227(b)(1)(A)(i).
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1 21. Plaintiff did not provide Defendant or its agent prior express consent to receive calls,
2 including unsolicited calls, to his cellular telephone, pursuant to 47 U.S.C. § 227
3 (b)(1)(A).

4 22. The telephone call by Defendant, or its agent, described in Paragraph 15 of this
5 Complaint, violated 47 U.S.C. § 227(b)(1).

6 **CLASS ACTION ALLEGATIONS**

7 23. Plaintiff brings this action on behalf of himself and on behalf of all others similarly
8 situated (“the Class”).

9 24. Plaintiff represents, and is a member of the Class, consisting of: “all persons within the
10 United States who received a text message substantially similar or identical to the text
11 message described in Paragraph 15 of this Complaint from Defendant without prior
12 express consent, which message by Defendant or its agents was not made for emergency
13 purposes, within the four years prior to the filing of this Complaint.”

14 25. Defendant and its employees or agents are excluded from the Class. Plaintiff does not
15 know the number of members in the Class, but believes the Class members number in the
16 tens of thousands, if not more. Thus, this matter should be certified as a Class action to
17 assist in the expeditious litigation of this matter.

18 26. Plaintiff and members of the Class were harmed by the acts of Defendant in at least the
19 following ways: Defendant, either directly or through its agents, illegally contacted
20 Plaintiff and the Class members via their cellular telephones by using an unsolicited
21 SPAM text messages, thereby causing Plaintiff and the Class members to incur certain
22 cellular telephone charges or reduce cellular telephone time for which Plaintiff and the
23 Class members previously paid, and invading the privacy of said Plaintiff and the Class
24 members. Plaintiff and the Class members were damaged thereby.

25 27. This suit seeks only damages and injunctive relief for recovery of economic injury on
26 behalf of the Class, and it expressly is not intended to request any recovery for personal
27 injury and claims related thereto. Plaintiff reserves the right to modify or expand the
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1 Class definition to seek recovery on behalf of additional persons as warranted as facts are
2 learned in further investigation and discovery.

3 28. The joinder of the Class members is impractical and the disposition of their claims in the
4 Class action will provide substantial benefits both to the parties and to the court. The
5 Class can be identified through Defendant's records or Defendant's agents' records.

6 29. There is a well-defined community of interest in the questions of law and fact involved
7 affecting the parties to be represented. The questions of law and fact to the Class
8 predominate over questions which may affect individual Class members, including, but
9 not limited to, the following:

- 10 a) Whether, within the four years prior to the filing of this Complaint, Defendant or
11 its agents sent any unsolicited text message/s to the Class (other than a message
12 made for emergency purposes or made with the prior express consent of the called
13 party) to a Class member using any automatic dialing and/or SMS texting system
14 to any telephone number assigned to a cellular phone service;
- 15 b) Whether Plaintiff and the Class members were damaged thereby, and the extent of
16 damages for such violation; and
- 17 c) Whether Defendant and its agents should be enjoined from engaging in such
18 conduct in the future.
- 19 d) Whether Plaintiff and the Class are entitled to any other relief.

20 30. As a person who received at least one unsolicited SPAM text message without Plaintiff's
21 prior express consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff
22 will fairly and adequately represent and protect the interests of the Class in that Plaintiff
23 has no interests antagonistic to any member of the Class.

24 31. Plaintiff and the members of the Class have all suffered irreparable harm as a result of the
25 Defendant's unlawful and wrongful conduct. Absent a class action, the Class will
26 continue to face the potential for irreparable harm. In addition, these violations of law
27 will be allowed to proceed without remedy and Defendant will likely continue such
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- 1 illegal conduct. Because of the size of the individual Class member's claims, few, if any,
2 Class members could afford to seek legal redress for the wrongs complained of herein.
- 3 32. Plaintiff has retained counsel experienced in handling class action claims and claims
4 involving violations of the Telephone Consumer Protection Act.
- 5 33. A class action is a superior method for the fair and efficient adjudication of this
6 controversy. Class-wide damages are essential to induce Defendant to comply with
7 federal and California law. The interest of Class members in individually controlling the
8 prosecution of separate claims against Defendant is small because the maximum statutory
9 damages in an individual action for violation of privacy are minimal. Management of
10 these claims is likely to present significantly fewer difficulties than those presented in
11 many class claims.
- 12 34. Defendant has acted on grounds generally applicable to the Class, thereby making
13 appropriate final injunctive relief and corresponding declaratory relief with respect to the
14 Class as a whole.

15 **FIRST CAUSE OF ACTION**

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

17 **47 U.S.C. § 227 ET SEQ.**

- 18 35. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as
19 though fully stated herein.
- 20 36. The foregoing acts and omissions of Defendant constitute numerous and multiple
21 negligent violations of the TCPA, including but not limited to each and every one of the
22 above-cited provisions of 47 U.S.C. § 227 et seq.
- 23 37. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq., Plaintiff and
24 The Class are entitled to an award of \$500.00 in statutory damages, for each and every
25 violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- 26 38. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such
27 conduct in the future.

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SECOND CAUSE OF ACTION

**KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT**

47 U.S.C. § 227 ET SEQ.

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

40. The foregoing acts and omissions of Defendant constitute 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.

41. 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 an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

42. 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.**

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

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

- As a result of Defendant’s knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

TRIAL BY JURY

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

Dated: January 8, 2013

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: /s/ Abbas Kazerounian, Esq.
ABBAS KAZEROUNIAN
ATTORNEY FOR PLAINTIFF