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12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF CALIFORNIA**

14 Cory Larson, *on behalf of himself and all*
15 *others similarly situated,*

16 Plaintiff,

17 vs.

18 Harman-Management Corporation; and
20 3Seventy, Inc.,

21 Defendants.
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Case No.: _____

**CLASS ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE
RELIEF FOR VIOLATION OF THE
TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. § 227,
*ET SEQ.***

JURY TRIAL DEMANDED

1 For his Class Action Complaint, Plaintiff, Cory Larson, by and through his
2 undersigned counsel, pleading on his own behalf and on behalf of all others similarly
3 situated, states as follows:

4 **INTRODUCTION**

5 1. Plaintiff, Cory Larson (“Plaintiff”), brings this class action for damages
6 resulting from the illegal actions of Harman-Management Corporation (“Harman” or
7 “Defendant”). Defendants sent unauthorized text messages to Plaintiff’s cellular phone
8 in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (the
9 “TCPA”).

10 2. Wireless spam is a growing problem in the United States. In April 2012,
11 the Pew Research Center found that 69% of texters reported receiving unwanted spam
12 text messages, while 25% reported receiving spam texts weekly.
13 <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (last visited
14 February 9, 2016); *see also* Nicole Perlroth, *Spam Invades a Last Refuge, the*
15 *Cellphone*, N.Y. Times, April 8, 2012, at A1 (“In the United States, consumers received
16 roughly 4.5 billion spam texts [in 2011], more than double the 2.2 billion received in
17 2009 . . .”).

18 3. Harman is a nationwide franchisee of several fast-food restaurant chains
19 including KFC, Taco Bell, Pizza Hut and A&W Restaurants. In a combined effort
20 with 3Seventy, Inc. (“3Seventy” and with Harman “Defendants”) to market its
21 restaurants’ products, Harman established a coupon program whereby Defendants sent
22 automated text messages to consumers offering discounted or free food items.

23 4. Defendants sent Plaintiff and other consumers its automated telemarketing
24 text messages without obtaining clear and conspicuous prior express written consent as
25 required by the TCPA.

26 **JURISDICTION AND VENUE**

27 5. This Court has original jurisdiction over this matter pursuant to 28 U.S.C.
28

1 § 1331. *Mims v. Arrow Fin. Serv., LLC*, 132 S. Ct. 740, 751-53 (2012).

2 6. Venue is proper in this District pursuant to 28 U.S.C. § 1391, because a
3 substantial part of the events giving rise to the claim occurred in this District.

4 **PARTIES**

5 7. Plaintiff is, and at all times mentioned herein was, an adult individual
6 residing in Fresno, California, and is a “person” as defined by 47 U.S.C. § 153(39).

7 8. Harman is a Utah business entity with an address of 199 First Street, Suite
8 212, Los Altos, California 94022, and is a “person” as defined by 47 U.S.C. § 153(39).

9 9. 3Seventy is a Delaware business entity with an address of 2224 Walsh
10 Tarlton Lane, Suite 220, Austin, Texas 78746, and is a “person” as defined by 47
11 U.S.C. § 153(39).

12 **THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**

13 10. The TCPA regulates, among other things, the use of automated telephone
14 dialing systems (“ATDS”).

15 11. Specifically, 47 U.S.C. § 227(b)(1)(A)(iii) prohibits any call using an
16 ATDS to a cellular phone without prior express consent by the person being called,
17 unless the call is for emergency purposes.

18 12. 47 U.S.C. § 227(a)(1) defines an ATDS as equipment having the
19 capacity—

20 (A) to store or produce telephone numbers to be called, using a random or
21 sequential number generator; and

22 (B) to dial such numbers.

23 13. “Prior express *written* consent” is required before making automated
24 *telemarketing* calls, meaning there must be a written agreement, signed by the person
25 receiving the call or text, with a “clear and conspicuous disclosure” that specifically
26 authorizes the seller to send telemarketing communications using an automatic
27 telephone dialing system or an artificial or prerecorded voice. 47 C.F.R. § 64.1200.

1 14. The FCC has clarified that text messages qualify as “calls” under the
2 TCPA:

3 We affirm that under the TCPA, it is unlawful to make any call using an
4 automatic telephone dialing system or an artificial or prerecorded message to
5 any wireless telephone number. Both the statute and our rules prohibit these
6 calls, with limited exceptions, “to any telephone number assigned to a paging
7 service, cellular telephone service, specialized mobile radio service, or other
8 common carrier service, or any service for which the party is charged.” This
9 encompasses both voice calls and text calls to wireless numbers including, for
10 example, short message service (SMS) calls, provided the call is made to a
11 telephone number assigned to such service.

12 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of*
13 *1991*, Report and Order, 18 FCC Rcd. 14014, 14115 (July 3, 2003); *see Satterfield v.*
14 *Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009).

15 **ALLEGATIONS APPLICABLE TO ALL COUNTS**

16 15. In 2012, Harman and 3Seventy set out on a telemarketing campaign to
17 send consumers coupons for Harman restaurant food items via automated text
18 messages.¹

19 16. Defendants placed text messages to the Plaintiff’s cellular telephone from
20 number 70626, an abbreviated telephone number known as an SMS short code licensed
21 and operated by Harman or 3Seventy.

22 17. At all times referenced herein, Harman acted through and with 3Seventy
23 to send marketing text messages.

24 18. Defendants’ first text message to Plaintiff was in response to Plaintiff
25 text-messaging the word “BURGER” to number 70626. Plaintiff had texted
26 “BURGER” to the 70626 number to obtain a free A&W Papa Burger Single as part of
27 Defendants’ promotional campaign.

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¹ See Carrie Chitsey, *A&W Burger Franchise Delivers Tasty Mobile Deals with SMS Marketing from 3Seventy*, prweb (June 28, 2012), <http://www.prweb.com/releases/2012/6/prweb9638487.htm>.

1 behalf of himself and all others similarly situated.

2 27. Plaintiff represents, and is a member of the following class (the “Class”):

3 **All persons within the United States to whom Defendants sent a**
4 **telemarketing text message using an ATDS without said person’s**
5 **prior express written consent.**

6 28. Defendants and its employees or agents are excluded from the Class.
7 Plaintiff does not know the number of members in the Class, but believes the class
8 members number in the tens of thousands, if not more. Thus, this matter should be
9 certified as a class action to assist in the expeditious litigation of this matter.

10 **B. Numerosity**

11 29. Upon information and belief, Defendants have sent automated
12 telemarketing text messages to cellular telephone numbers belonging to thousands of
13 consumers throughout the United States without their prior express written consent.
14 The members of the Class, therefore, are believed to be so numerous that joinder of all
15 members is impracticable.

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

19 **C. Common Questions of Law and Fact**

20 31. There are questions of law and fact common to the Classes that
21 predominate over any questions affecting only individual Class members. These
22 questions include:

- 23 a. Whether Defendants sent non-emergency text messages to Plaintiff
24 and Class members’ cellular telephones using an ATDS;
- 25 b. Whether Defendants’ text messages were sent for telemarketing
26 purposes;
- 27 c. Whether Defendants can meet their burden of showing they

- 1 obtained prior express written consent to send each message;
- 2 d. Whether Defendants' conduct was knowing and/or willful;
- 3 e. Whether Defendants are liable for damages, and the amount of
- 4 such damages; and
- 5 f. Whether Defendants should be enjoined from such conduct in the
- 6 future.

7 32. The common questions in this case are capable of having common

8 answers. If Plaintiff's claim that Defendants routinely send automated text messages

9 to telephone numbers assigned to cellular telephone services without prior express

10 written consent is accurate, Plaintiff and the Class members will have identical claims

11 capable of being efficiently adjudicated and administered in this case.

12 **D. Typicality**

13 33. Plaintiff's claims are typical of the claims of the Class members, as they

14 are all based on the same factual and legal theories.

15 **E. Protecting the Interests of the Class Members**

16 34. Plaintiff will fairly and adequately protect the interests of the Class and

17 has retained counsel experienced in handling class actions and claims involving

18 unlawful business practices. Neither Plaintiff nor his counsel has any interests which

19 might cause them not to vigorously pursue this action.

20 **F. Proceeding Via Class Action is Superior and Advisable**

21 35. A class action is the superior method for the fair and efficient adjudication

22 of this controversy. The interest of Class members in individually controlling the

23 prosecutions of separate claims against Defendants is small because it is not

24 economically feasible for Class members to bring individual actions.

25 36. Management of this class action is unlikely to present any difficulties.

26 Several courts have certified classes in TCPA actions. These cases include, but are not

27 limited to: *Mitchem v. Ill. Collection Serv.*, 271 F.R.D. 617 (N.D. Ill. 2011); *Sadowski*

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1 *v. Med1 Online, LLC*, 2008 WL 2224892 (N.D. Ill., May 27, 2008); *CE Design Ltd. V.*
2 *Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D. Ill. 2009); *Lo v. Oxnard European*
3 *Motors, LLC*, 2012 WL 1932283 (S.D. Cal., May 29, 2012).

4 **COUNT I**
5 **Violations of the Telephone**
6 **Consumer Protection Act,**
7 **47 U.S.C. § 227, et seq.**

8 37. Plaintiff repeats and realleges the above paragraphs of this Complaint and
9 incorporates them herein by reference.

10 38. Defendants sent multiple automated text messages to cellular numbers
11 belonging to Plaintiff and the other members of the Class without their prior express
12 written consent.

13 39. Each of the aforementioned messages by Defendants constitutes a
14 violation of the TCPA.

15 40. Plaintiff and the Class are entitled to an award of \$500.00 in statutory
16 damages for each message sent in violation of the TCPA pursuant to 47 U.S.C. §
17 227(b)(3)(B).

18 41. Additionally, Plaintiff and the Classes are entitled to and seek injunctive
19 relief prohibiting such conduct by Defendants in the future.

20 42. Plaintiff and Class members are also entitled to and do seek a declaration
21 that:

- 22 • Defendants violated the TCPA;
 - 23 • Defendants used an ATDS; and
 - 24 • Defendants placed calls to the Plaintiff and the Class without prior
25 express written consent.
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COUNT II
Knowing and/or Willful Violations of the
Telephone Consumer Protection Act,
47 U.S.C. § 227, et seq.

43. Plaintiff repeats and realleges the above paragraphs of this Complaint and incorporates them herein by reference.

44. Defendants knowingly and/or willfully sent multiple automated text messages to cellular numbers belonging to Plaintiff and the other members of the Class without their prior express consent.

45. Each of the aforementioned messages by Defendants constitutes a knowing and/or willful violation of the TCPA.

46. As a result of Defendants' knowing and/or willful violations of the TCPA, Plaintiff and the Classes are entitled to an award of treble damages up to \$1,500.00 for each call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

47. Additionally, Plaintiff and the Classes are entitled to and seek injunctive relief prohibiting such conduct by Defendants in the future.

48. Plaintiff and TCPA Class members are also entitled to and do seek a declaration that:

- Defendants knowingly and/or willfully violated the TCPA;
- Defendants knowingly and/or willfully used ATDS on calls to Plaintiff and the Class;
- Defendants knowingly and/or willfully obtained the telephone numbers of non-debtors;
- Defendants willfully placed automated calls to non-customers such as Plaintiff and the Class, knowing it did not have prior express consent to do so; and

- 1 • It is Defendants’ practice and history to place automated telephone calls to
2 non-consumers without their prior express consent.

3
4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff prays that the Court grant Plaintiff and the Class
6 the following relief against Defendants as follows:

- 7 1. Injunctive relief prohibiting such violations of the TCPA by Defendants
8 in the future;
9 2. Statutory damages of \$500.00 for each and every call in violation of the
10 TCPA pursuant to 47 U.S.C. § 227(b)(3)(B);
11 3. Treble damages of up to \$1,500.00 for each and every call in violation
12 of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(C);
13 4. An award of attorneys’ fees and costs to counsel for Plaintiff and the
14 Classes; and
15 5. Such other relief as the Court deems just and proper.

16 **TRIAL BY JURY DEMANDED ON ALL COUNTS**

17
18 DATED: February 17, 2016

Respectfully submitted,

19 By: /s/ Trinette Kent
20 Trinette Kent, Esq. (Bar No. 222020)
21 Lemberg Law, LLC
22 Attorney for Plaintiff, Cory Larson
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