

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN -- SOUTHERN DIVISION

GERALDINE WENGLE,
Individually and on behalf others similarly situated,
Plaintiff,

-vs-

Case No. 2:14-CV-10644
Hon. Matthew F. Leitman
CLASS ACTION COMPLAINT

DIALAMERICA MARKETING, INC.,
Defendant.

FIRST AMENDED COMPLAINT & JURY DEMAND

Geraldine Wengle states the following claims for relief:

Jurisdiction

1. This Court has jurisdiction under the Telephone Consumer Protection Act, (“TCPA”), 47 U.S.C. § 227 *et seq.*, and 28 U.S.C. §§1331, 1337.
2. This Court also has jurisdiction under the Class Action Fairness Act, as the amount in controversy in this diverse class action exceeds \$5,000,000. 28 U.S.C. § 1332(d).

Parties

3. The Plaintiff to this lawsuit is Geraldine Wengle who resides in Dearborn, Michigan.

4. The Defendant to this lawsuit is DialAmerica Marketing, Inc. (“DialAmerica”), a for-profit, telemarketing business incorporated in Delaware, with its primary place of business in New Jersey, and who makes telemarketing calls throughout the United States, including Michigan.

Venue

5. The transactions and occurrences which give rise to this action occurred in Wayne County, Michigan.

6. Venue is proper in the Eastern District of Michigan, pursuant to 28 U.S.C. §1391(b)(2).

General Allegations

7. Mrs. Wengle brings this action against DialAmerica arising from unlawful telemarketing calls that DialAmerica made to her home in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”), and its related regulations set forth at 47 C.F.R. § 62.1200.

8. Congress enacted the Telephone Consumer Protection Act in order to protect consumers from unwanted telephone solicitations using artificial or prerecorded messages.

9. Congress explicitly found that robocalling to solicit business is an invasion of privacy: “Evidence compiled by Congress indicates that residential

telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator or the message, to be a nuisance and an invasion of privacy.” Section 2 of Pub. L. 102–24.

10. In regard to such telemarketing, Senator Hollings of South Carolina, the primary sponsor of the bill, explained, “computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and the elderly out of bed; they hound us until we want to rip the telephone right out of the wall.” See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 F.C.C.R. 17459 at note 90 (2002), quoting 137 Cong. Rec. H10, 341 (Nov. 7, 1991).

11. DialAmerica has a business arrangement with magazine publishers to promote and sell magazine subscriptions with a certain percentage – usually 12% - donated to charity.

12. Through 2005, DialAmerica called this program its “Sponsor Program.”

13. While the stated intent of the program is to enable charities to fund-raise, DialAmerica and the magazine publishers received the bulk of the proceeds.

14. In 2004, DialAmerica petitioned the Federal Communications Commission (“FCC”) to exempt its “Sponsor Program” from the for-profit restrictions under the TCPA.

15. DialAmerica argued that because it worked for non-profit entities to aid in their fund raising efforts, it should be able to call any number, even if registered on the National Do-Not-Call registry, just as a non-profit agency would be able to do if it conducted fund raising itself.

16. In 2005, the FCC denied DialAmerica’s petition stating: “We believe that to exempt for-profit organizations merely because a tax-exempt nonprofit organization is involved in the telemarketing program would undermine the purpose of the do-not-call registry. Thus, we decline to exempt DialAmerica’s Sponsor Program from the national do-not-call registry.” Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 19330, 19334 (April 13, 2005).

17. After this denial, DialAmerica changed the name of the program to the “Professional Fundraising Program” (“PFP”) and changed the payment process.

18. Under the PFP, subscription checks are now sent to a P.O. Box set up for Special Olympics and deposited directly into the Special Olympics bank

account. Then the full amount is swept by wire transfer to DialAmerica's bank account.

19. DialAmerica then gives back 12 ½ % for each paid order to Special Olympics.

20. DialAmerica continues to process all the magazine orders the same as it did under the Sponsor Program.

21. DialAmerica continues to direct all aspects of the fundraising campaign the same as it did before 2005.

22. Ms. Wengle subscribes to residential telephone service on a land line.

23. Ms. Wengle added herself to the National "Do Not Call" registry of persons who do not wish to receive telephone solicitations as of May 14, 2010.

24. In February 2011, DialAmerica initiated multiple phone calls to Ms. Wengle using an automated dialer.

25. In those calls, DialAmerica used a prerecorded message that represented the call was for or from the Special Olympics.

26. The purpose of the call was to solicit Ms. Wengle to buy magazine subscriptions.

27. Special Olympics, itself, never initiated any call to Ms. Wengle.

28. The FCC found in 2005 that DialAmerica does not qualify as a tax exempt nonprofit organization for purposes of the TCPA.

29. The PFP is the same in substance as the Sponsor Program and DialAmerica remains unqualified for the exemption.

30. Notwithstanding the FCC's rejection of DialAmerica's request for an exemption from the TCPA's "Do Not Call" requirements, DialAmerica has continued unabated its pattern and practice of telemarketing to individuals on the "Do Not Call" registry under the auspices of its rejected exemption.

31. DialAmerica did not receive Ms. Wengle's prior express consent to call her.

32. DialAmerica does not have a preexisting business relationship with Ms. Wengle.

33. The call to Ms. Wengle by DialAmerica was part of DialAmerica's larger campaign to telemarket magazine subscriptions.

34. DialAmerica placed calls to hundreds, if not thousands, of residential telephone subscribers across America.

35. Many of the residential telephone subscribers to whom DialAmerica placed calls have listed their numbers on the National "Do Not Call" Registry.

36. These telemarketing calls by DialAmerica violate the prohibitions in the TCPA on making telephone solicitations a) via artificial or prerecorded voices; b) without clearly stating the name of the calling entity, and c) to residential telephone subscribers on the National “Do Not Call” registry.

37. These same telemarketing calls also violate Michigan’s prohibition on telephone solicitation and use of a telephone for commercial advertising.

CLASS DEFINITION AND CLASS ISSUES

38. Ms. Wengle incorporates the preceding allegations by reference.

39. Ms. Wengle brings this action on behalf of herself and a class of all other persons similarly situated pursuant to Fed. R. Civ. P. 23.

40. Ms. Wengle proposes to represent the following classes:

a. National Class: All persons in the United States who received a call on their residential telephone line with an artificial or pre-recorded message, initiated by or on behalf of Defendant, and without the recipient’s prior express consent, for the time period beginning February 12, 2010 to present.

b. National Class: All persons in the United States who received more than one call from DialAmerica in a 12-month period on their residential land line and whose residential land line number(s) appear

on the National Do Not Call registry, for the time period beginning February 12, 2010 to present.

- c. National Class: All persons in the United States to whom DialAmerica placed a call to their residential landline using an artificial or prerecorded voice message that failed to identify DialAmerica at the beginning of the message as the business responsible for initiating the call, for the time period beginning February 12, 2010 to present.

41. Numerous questions of law and fact exist that are common to all members of the class, which questions predominate over any question affecting only individual class members.

42. The principal common issues include:

- a. Whether DialAmerica uses prerecorded voice messages in its magazine subscription program?
- b. Whether DialAmerica's telephone calls were made for a commercial purpose?
- c. Whether DialAmerica qualifies as a tax exempt, nonprofit organization for purposes of the TCPA?

- d. Whether DialAmerica operates on behalf of a tax exempt, nonprofit organization for purposes of the TCPA?
 - e. Whether DialAmerica initiated telephone solicitations to residential telephone subscribers on a Do Not Call Registry?
 - f. Whether DialAmerica's conduct was knowing and/or willful?
43. Ms. Wengle's claims are typical of the claims of the class members.

All are based on the same legal and remedial theories.

44. Ms. Wengle will fairly and adequately protect the interests of all class members in the prosecution of this action and in the administration of all matters relating to claims stated herein. She is similarly situated with, and has suffered similar injuries as, the members of the class she seeks to represent.

45. Ms. Wengle has retained counsel experienced in handling class action suits involving unfair business practices and consumer law. Neither the named plaintiff nor her counsel have any interest which might cause them not to vigorously pursue this action.

46. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

47. The class is so numerous as to make it impracticable to join all members of the class as plaintiffs. Based upon the investigation of counsel, the number of class members is estimated to be in excess of 100 persons.

COUNT I – Telephone Consumer Protection Act of 1991 and 47 C.F.R. 16.1200 et seq.

48. Ms. Wengle incorporates the preceding allegations by reference.

49. DialAmerica violated the TCPA, 47 U.S.C. § 227 *et seq.*, and 47 C.F.R. § 64.1200a(3), and c(2) in relation to Ms. Wengle and the class members.

50. As a result of DialAmerica's negligent violations of the TCPA, Ms. Wengle and class members may recover statutory damages of \$500 for each and every call in violation of the statute.

51. Alternatively, DialAmerica knowingly or wilfully violated the TCPA in relation to Ms. Wengle and the class members.

52. As a result of DialAmerica's knowing or willful violations of the TCPA, Ms. Wengle and class members may recover statutory damages of up to \$1,500 per call in violation of the statute.

Demand for Jury Trial

53. Ms. Wengle demands trial by jury in this action.

Demand For Judgment for Relief

WHEREFORE, Plaintiff, on her own behalf and on behalf of the members of the National Classes and Michigan Classes requests judgment against Defendant as follows:

- A. Certification of the proposed Classes;
- B. Appointment of Plaintiff as representative of the Classes;
- C. Appointment of the undersigned counsel as counsel for the Classes;
- 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 Classes, of damages, as allowed by law;
- G. An award to Plaintiff, the Classes, 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.

Respectfully Submitted,

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