

HONORABLE JAMES L. ROBART

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U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MONTY J. BOOTH, ATTORNEY AT LAW,
P.S., a Washington corporation, RICARDO T.
MASCARENAS, a Washington resident, and
CHRISTOPHER GREGORY, a Washington
resident, individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

APPSTACK, INC., a Delaware corporation;
STEVE ESPINOSA, individually; and JOHN
ZDANOWSKI, individually,

Defendants.

NO. 2:13-cv-01533-JLR

**SECOND AMENDED CLASS
ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE
RELIEF**

Plaintiffs Monty J. Booth, Attorney at Law, P.S., Ricardo T. Mascarenas, and
Christopher Gregory (collectively "Plaintiffs"), by their undersigned attorneys, for this class
action complaint against AppStack, Inc., and its present, former or future direct and indirect
parent companies, subsidiaries, affiliates, agents, and/or other related entities, Steve Espinosa,
and John Zdanowski (collectively "Defendants"), alleges as follows:

I. INTRODUCTION

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2 1.1 Nature of Action. Plaintiffs, individually and as class representatives for all
3 others similarly situated, bring this action against Defendants for violations of the Washington
4 Automatic Dialing and Announcing Device Statute, RCW 80.36.400, the Washington
5 Consumer Protection Act, RCW 19.86 *et seq.*, and the Telephone Consumer Protection Act,
6 47 U.S.C. § 227 *et seq.* (“TCPA”).

II. JURISDICTION AND VENUE

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8 2.1 Jurisdiction. This Court has jurisdiction over Plaintiffs’ claims pursuant to the
9 “Class Action Fairness Act,” 28 U.S.C. §§ 1332(d), 1435 (“CAFA”). At least one member of
10 each of the proposed classes is a citizen of a state other than where Defendant is incorporated
11 and headquartered. The proposed classes each consist of more than 100 members. Further, the
12 amount in controversy exceeds \$5 million taking into account all damages and equitable relief
13 on behalf of the proposed classes, and excluding interest and costs. Additionally, Defendants
14 do business in Washington State and the wrongful acts alleged in this Complaint were
15 committed in Washington State. This Court has further jurisdiction over Plaintiffs Mascarenas’
16 and Gregory’s TCPA claims pursuant to 28 U.S.C. § 1331 because Plaintiffs Mascarenas’ and
17 Gregory’s TCPA claims arise under the laws of the United States, specifically 47 U.S.C. § 227.

18 2.2 Venue. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) in
19 that a substantial part of the wrongful acts alleged were committed in this judicial district and
20 pursuant to 28 U.S.C. § 1391(c)(2) in that Defendants do sufficient business in this District to
21 subject them to personal jurisdiction.

III. PARTIES

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23 3.1 Plaintiff Monty J. Booth, Attorney at Law, P.S. (“Plaintiff Booth”), is a law firm
24 in Everett, Washington, incorporated in Washington State. Plaintiff Booth receives telephone
25 calls on its business telephone, including those which are the subject of this Complaint, which
26 was intended to be received and was received on Plaintiff Booth’s business telephone in
27 Everett, Washington.

1 3.2 Plaintiff Ricardo T. Mascarenas (“Plaintiff Mascarenas”) is a citizen of
2 Washington, residing in Pierce County, Washington. Plaintiff Mascarenas received automated,
3 prerecorded calls on his cellular telephone from, or on behalf of, Defendants.

4 3.3 Plaintiff Christopher Gregory (“Plaintiff Gregory”) is a citizen of Washington,
5 residing in King County, Washington. Plaintiff Gregory received automated, prerecorded calls
6 on his cellular telephone from, or on behalf of, Defendants.

7 3.4 Defendant AppStack, Inc. is a Delaware limited liability company with its
8 principal office in Temecula, California.

9 3.5 Defendant Steve Espinosa is a co-founder of Defendant AppStack, Inc. During
10 the relevant time period, Espinosa has served as the Chief Executive Officer of Defendant
11 AppStack and is currently listed on its website as “Head Honcho.” On information and belief,
12 Espinosa directly and personally participated in, directed and/or authorized the statutory
13 violations alleged herein. On information and belief, Espinosa established or approved
14 AppStack’s policies, oversaw operations, and was involved in the business practices that
15 violated the TCPA. Espinosa is, and all times mentioned herein was, a “person” as defined by
16 47 U.S.C. § 153(39).

17 3.6 On information and belief, Defendant John Zdanowski is a co-founder of
18 Defendant AppStack, Inc. During the relevant time period, Zdanowski has served as the Chief
19 Financial Officer of Defendant AppStack and is currently listed on its website as “CFO.” On
20 information and belief, Zdanowski directly and personally participated in, directed and/or
21 authorized the statutory violations alleged herein. On information and belief, Zdanowski
22 established or approved AppStack’s policies, oversaw operations, and was involved in the
23 business practices that violated the TCPA. Zdanowski is, and all times mentioned herein was, a
24 “person” as defined by 47 U.S.C. § 153(39).

IV. THE WASHINGTON AUTOMATIC DIALING AND ANNOUNCING DEVICE STATUTE, RCW 80.36.400

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2 4.1. In 1986, the Washington State Legislature enacted the Washington Automatic
3 Dialing and Announcing Device statute, RCW 80.36.400 (“WADAD”). As defined by the
4 statute, “[a]n automatic dialing and announcing device is a device which automatically dials
5 telephone numbers and plays a recorded message once a connection is made.” *See* RCW
6 80.36.400(1)(a).

7 4.2 The WADAD makes it unlawful for any person to use an automatic dialing and
8 announcing device “for purposes of commercial solicitation” and “applies to all commercial
9 solicitation intended to be received by telephone consumers within the state” of Washington.
10 *See* RCW 80.36.400(2).

11 4.3 A violation of the WADAD is a violation of the Washington Consumer
12 Protection Act, RCW 19.86 *et seq.* (“WCPA”). *See* RCW 80.36.400(3).

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

14 5.1 In 1991, Congress enacted the TCPA in response to a growing number of
15 consumer complaints regarding certain telemarketing practices.

16 5.2 The TCPA makes it unlawful “to make any call (other than a call made for
17 emergency purposes or made with the prior express consent of the called party) using an
18 automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone
19 number assigned to a ... cellular telephone service.” *See* 47 U.S.C. § 227(b)(1)(A)(iii). The
20 TCPA provides a private cause of action to persons who receive calls in violation of 47 U.S.C.
21 § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).

22 5.3 Federal Communication Commission (“FCC”) promulgated regulations
23 “generally establish that the party on whose behalf a solicitation is made bears ultimate
24 responsibility for any violations.” *See* Rules and Regulations Implementing the Telephone
25 Consumer Protection Act of 1991, Memorandum and Order, 10 FCC Rcd. 12391, 12397 ¶ 13
26 (1995).

1 more information and was connected with a representative who identified himself as an
2 employee of Defendants.

3 6.4 Plaintiff Booth has no relationship with Defendants and, prior to receiving these
4 phone calls, was unfamiliar with Defendants. Plaintiff Booth did not provide prior consent,
5 express or implied, to the receipt of any of the telephone calls made by or on behalf of
6 Defendants. The calls made to Plaintiff Booth's business telephone consisted of a pre-recorded
7 message delivered by an ADAD. The pre-recorded message made to Plaintiff Booth's business
8 telephone, by or on behalf of Defendants, was made for the purpose of commercial solicitation,
9 urging Plaintiff Booth to purchase AppStack's services.

10 6.5 Upon information and belief, Defendants, and/or others acting on their behalf,
11 have made similar pre-recorded calls to the business telephone numbers of other Washington
12 businesses and intend to continue to do so.

13 6.6 Defendants' use of ADADs for purposes of commercial solicitation violates the
14 privacy of Plaintiff Booth and Washington State Class members.

15 **B. Factual Allegations Regarding Plaintiff Mascarenas**

16 6.7 On or around July 3, 2013, Plaintiff Mascarenas received a telemarketing call on
17 his cellular telephone from, or on behalf of, Defendants.

18 6.8 The call consisted of a prerecorded message which stated words to the effect
19 that the call could help the recipient with his Google advertisement placement.

20 6.9 Plaintiff Mascaranes, thereafter, continued to receive numerous automated calls
21 from, or on behalf of, Defendants in July, August, and September 2013.

22 6.10 The calls consisted of the same prerecorded message as the call Plaintiff
23 Mascarenas received on or around July 3, 2013.

24 6.11 In July, August, and September 2013, Plaintiff Mascarenas was located in the
25 state of Washington when he received each of the above described calls.

26 6.12 Plaintiff Mascarenas has never done business with Defendants.
27

1 6.13 Plaintiff Mascarenas did not provide prior express consent to receive
2 prerecorded telephone calls on his cellular telephone from, or on behalf of, Defendants.

3 6.14 Defendants are responsible for making the above-described automated calls.

4 6.15 Defendants have made a significant number of automated and/or prerecorded
5 calls to persons on their cellular telephones in Washington and throughout the United States.

6 **C. Factual Allegations Regarding Plaintiff Gregory**

7 6.16 On or around June 27, 2013, Plaintiff Gregory received a telemarketing call on
8 his cellular telephone from, or on behalf of, Defendants.

9 6.17 The call consisted of a prerecorded message which stated words to the effect
10 that the call could help the recipient with his Google advertisement placement.

11 6.18 Plaintiff Gregory, thereafter, continued to receive numerous automated calls
12 from, or on behalf of, Defendants in July, August, and September 2013.

13 6.19 The calls consisted of the same prerecorded message as the call Plaintiff
14 Gregory received on or around June 27, 2013.

15 6.20 Plaintiff Gregory was located in the state of Washington when he received each
16 of the above described calls.

17 6.21 Plaintiff Gregory has never done business with Defendants.

18 6.22 Plaintiff Gregory did not provide prior express consent to receive prerecorded
19 telephone calls on his cellular telephone from, or on behalf of, Defendants.

20 6.14 Defendants are responsible for making the above-described automated calls.

21 6.15 Defendants have made a significant number of automated and/or prerecorded
22 calls to persons on their cellular telephones in Washington and throughout the United States.

23 **VII. CLASS ACTION ALLEGATIONS**

24 7.1 Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs bring this case as a
25 class action on behalf of two Classes of persons defined as follows:

26 Washington State Class: All Washington businesses who
27 received one or more telephone calls made by Defendants and/or

1 made on Defendants' behalf using an automatic dialing and
2 announcing device, when such a call included a pre-recorded
3 message containing a commercial solicitation and was
4 transmitted to a telephone number with a Washington State area
code at any time for the period that begins four years from the
date of this Complaint to trial.

5 Cell Phone Class: All persons or entities in the United States
6 who, on or after four years before the filing of this action,
7 received a call on their cellular telephone line with a pre-recorded
8 message, made by or on behalf of Defendants, and without the
9 recipient's express prior consent.

10 Excluded from the Classes are Defendants, any entities in which Defendants have a controlling
11 interest or that have a controlling interest in Defendants, and Defendants' legal representatives,
12 assignees and successors. Also excluded are the judge to whom this case is assigned and any
13 member of the judge's immediate family and staff.

14 7.2 **Numerosity.** The Classes are so numerous that joinder of all members is
15 impracticable. Upon information and belief the Classes each have more than 100 members.
16 Moreover, the disposition of the claims of the Classes in a single action will provide substantial
17 benefits to all parties and the Court.

18 7.3 **Commonality.** There are numerous questions of law and fact common to
19 Plaintiffs and Class members. These common questions of law and fact include:

20 a. As to Plaintiffs and the Washington State Class, whether Defendants
21 and/or their agents, affiliates and/or others acting on Defendants' behalf used an automatic
22 dialing and announcing device, as defined by RCW 80.36.400(1)(a), for purposes of
commercial solicitation;

23 b. As to Plaintiffs and the Washington State Class, whether Defendants
24 and/or their agents, affiliates and/or others acting on Defendants' behalf violated RCW
25 80.36.400;

1 c. As to Plaintiffs and the Washington State Class, whether Defendants
2 and/or their agents, affiliates and/or others acting on Defendants' behalf violated RCW 19.86 *et*
3 *seq.*;

4 d. As to Plaintiff Mascarenas, Plaintiff Gregory, and the Cell Phone Class,
5 whether Defendants and/or their affiliates, agents, and/or other persons or entities acting on
6 Defendants' behalf violated 47 U.S.C. § 227(b)(1)(A) by making any call, except for
7 emergency purposes, to a cellular telephone number using an ATDS or artificial or prerecorded
8 voice;

9 e. As to Plaintiff Mascarenas, Plaintiff Gregory, and the Cell Phone Class,
10 whether Defendants and/or their affiliates, agents, and/or other persons or entities acting on
11 Defendants' behalf knowingly and/or willingly violated 47 U.S.C. § 227(b)(1)(A) by making
12 any call, except for emergency purposes, to a cellular telephone number using an ATDS or
13 artificial or prerecorded voice, thus entitling Plaintiff Mascarenas, Plaintiff Gregory, and the
14 Cell Phone Class to treble damages;

15 f. Whether Defendants are liable for prerecorded calls marketing
16 Defendants' products and/or services when such calls were made by Defendants' agents,
17 affiliates and/or others acting on Defendants' behalf; and

18 g. Whether Defendants and/or its agents, affiliates and/or others acting on
19 Defendants' behalf should be enjoined from violating the WADAD, the WCPA, and/or the
20 TCPA in the future.

21 7.4 **Typicality.** Plaintiffs' claims are typical of the Classes in that they arise from
22 Defendants' common course of conduct and are based on the same legal and remedial theories.

23 7.5 **Adequacy.** Plaintiffs will fairly and adequately represent and protect the
24 interests of the Classes. Plaintiffs have retained competent and experienced counsel who have
25 significant experience in complex and class action litigation, including consumer class actions,
26 and WADAD class actions, TCPA class actions. Plaintiffs and their counsel are committed to
27

1 knowing and/or willful violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls,
2 except for emergency purposes, to the cellular telephone numbers of Plaintiff Mascarenas,
3 Plaintiff Gregory, and members of the Cell Phone Class using an ATDS and/or artificial or
4 prerecorded voice.

5 11.3 As a result of Defendants' and/or their affiliates, agents and/or other persons or
6 entities acting on Defendants' behalf's knowing and/or willful violations of the TCPA,
7 47 U.S.C. § 227(b)(1)(A), Plaintiff Mascarenas, Plaintiff Gregory, and members of the Cell
8 Phone Class are entitled to treble damages of up to \$1,500 for each and every call to their
9 cellular telephone numbers using an ATDS and/or artificial or prerecorded voice in violation of
10 the statute, pursuant to 47 U.S.C. § 227(b)(3).

11 11.4 Plaintiff Mascarenas, Plaintiff Gregory, and members of the Cell Phone Class
12 are also entitled to and do seek injunctive relief prohibiting Defendants and/or their affiliates,
13 agents, and/or other persons or entities acting on Defendants' behalf from violating the TCPA,
14 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to any cellular
15 telephone numbers using an ATDS and/or artificial or prerecorded voice in the future.

16 XII. PRAYER FOR RELIEF

17 WHEREFORE, Plaintiffs prays for judgment against Defendants as follows:

- 18 A. Certification of the Classes pursuant to Federal Rule of Civil Procedure 23;
19 B. Appoint Plaintiff Booth, Plaintiff Mascarenas, and Plaintiff Gregory as
20 representatives of the Washington State Class;
21 C. Appoint Plaintiff Mascarenas and Plaintiff Gregory as representatives of the Cell
22 Phone Class;
23 D. Appoint the undersigned counsel as counsel for the Classes;
24 E. Grant declaratory, equitable, and/or injunctive relief as permitted by law to
25 ensure that Defendants and/or their affiliates, agents and/or others acting on Defendants' behalf
26 will not continue to engage in the unlawful conduct set forth herein;
27

1 F. Award Plaintiffs and the Classes statutory, compensatory and exemplary
2 damages as permitted by law;

3 G. Judgment against Defendants for attorney's fees and costs as permitted by law
4 and/or equity;

5 H. Permit Plaintiffs and the Classes leave to amend the Complaint to conform to
6 the evidence presented at trial; and

7 I. Any other or further relief which the Court deems fair and equitable.

8 RESPECTFULLY SUBMITTED AND DATED this 29th day of December, 2014.

9 TERRELL MARSHALL DAUDT & WILLIE PLLC

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CERTIFICATE OF SERVICE

I, Mary B. Reiten, hereby certify that on December 29, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 29th day of December, 2014.

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