

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MILDRED BALDWIN, RONALD STRUCKOFF, STEPHEN BLATT, and MICHAEL SERATI, on behalf of themselves and others similarly situated,

Plaintiffs

vs.

HEARINGPRO, INC. and MIRACLE-EAR, INC.

Defendants

vs.

LAS DAVIS ENTERPRISES, INC.; HEARINGPRO, INC.; and TIFFANY DAVIS

Third-Party Defendants.

Civil File No. 0-20-cv-1502 (JRT/HB)

**SECOND AMENDED COMPLAINT
– CLASS ACTION**

Preliminary Statement

1. Plaintiffs Mildred Baldwin, Ronald Struckhoff, Stephen Blatt, and Michael Serati bring this action against Miracle-Ear, Inc (“Miracle-Ear”) and HearingPro, Inc (“HearingPro”) (collectively, “Defendants”) to enforce the consumer-privacy provisions of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, a federal statute enacted in 1991 in response to widespread public outrage about the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).

2. Plaintiffs allege that HearingPro sent automated telemarketing calls to Plaintiffs and other putative class members to obtain new business and customers for Miracle-Ear hearing aid products.

3. HearingPro did so by calling residential numbers including those that were listed on the National Do Not Call Registry (“Registry”), like Ms. Baldwin’s, which is prohibited by the TCPA. Miracle-Ear also used pre-recorded messages to call cell phone numbers, including Mr. Struckhoff’s, without consent, which is also prohibited by the TCPA.

4. Because telemarketing campaigns generally place calls to hundreds of thousands or even millions of potential customers *en masse*, Plaintiffs bring this action on behalf of a proposed nationwide class of all persons who received illegal telemarketing calls from, or on behalf of, Defendants.

5. A class action is the best means of obtaining redress for the Defendants’ wide-scale illegal telemarketing and is consistent both with the private right of action afforded by the TCPA and the fairness and efficiency goals of Rule 23 of the Federal Rules of Civil Procedure.

Parties

6. Plaintiff Mildred Baldwin currently resides in Missouri.

7. Plaintiff Ronald Struckhoff currently resides in Missouri.

8. Plaintiff Stephen Blatt currently resides in Missouri.

9. Plaintiff Michael Serati currently resides in Missouri.

10. Defendant HearingPro, Inc. is a Missouri corporation headquartered in St. Louis, MO. HearingPro is a franchisee of Miracle-Ear and has two franchises with Miracle-Ear.

11. Defendant Miracle-Ear is headquartered in Minnesota in this District, as it was at all relevant times during the conduct alleged in the Complaint.

Jurisdiction & Venue

12. The Court has federal question subject matter jurisdiction over these TCPA claims. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012).

13. The Court has personal jurisdiction over HearingPro because it entered into a franchise agreement with Miracle-Ear in Minnesota, and it was pursuant to that agreement that they made the calls at issue. Furthermore, HearingPro consented to jurisdiction in this Court in those franchise agreements.

14. The Court has personal jurisdiction over Miracle-Ear because its principal place of business is in this District.

15. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this District, as the contracts at issue that led to the calling occurred in this District.

TCPA Background

16. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy[.]” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

17. The TCPA regulates, among other things, the use of a pre-recorded message or an automated telephone dialing system (“ATDS”) to make calls or send text messages. *See* 47 U.S.C. § 227, *et seq.*; *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003).

18. Specifically, the TCPA prohibits the use of a pre-recorded message to make any telemarketing call or to a wireless number in the absence of an emergency or the prior express written consent of the called party. *See* 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(2); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1831 (F.C.C. 2012).

19. The National Do Not Call Registry allows consumers to register their telephone numbers and thereby indicate their desire not to receive telephone solicitations at those numbers. *See* 47 C.F.R. § 64.1200(c)(2).

20. A listing on the Registry “must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.” *Id.*

21. The TCPA and implementing regulations prohibit the initiation of telephone solicitations to residential telephone subscribers to the Registry and provides a private right of action against any entity that makes those calls, or “on whose behalf” such calls are promoted. 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2).

22. “Robocalls and telemarketing calls are currently the number one source of consumer complaints at the FCC.” Tom Wheeler, *Cutting Off Robocalls* (July 22, 2016),

<https://www.fcc.gov/news-events/blog/2016/07/22/cutting-robocalls> (statement of FCC chairman).

23. “The FTC receives more complaints about unwanted calls than all other complaints combined.” Staff of the Federal Trade Commission’s Bureau of Consumer Protection, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, at 2 (2016), https://www.ftc.gov/system/files/documents/advocacy_documents/commentstaff-ftc-bureau-consumer-protection-federal-communications-commission-rulesregulations/160616robocallscomment.pdf.

Miracle-Ear’s Telemarketing

24. Miracle-Ear is a hearing aid provider that targets, among other things, individual consumers like Plaintiffs.

25. Miracle-Ear uses franchisees, such as HearingPro, to place its product into the stream of commerce.

26. HearingPro used telemarketing as one of its primary means to promote its products directly to individual consumers like Plaintiffs.

27. Recipients of these calls, including Plaintiffs, did not consent to receive the calls and are often on the National Do Not Call Registry.

28. Furthermore, HearingPro used pre-recorded messages to make calls to cellular telephones, like Mr. Struckhoff’s.

Factual Allegations for Calls to Plaintiffs

Calls to Ms. Baldwin

29. Plaintiff Baldwin is a “person” as defined by 47 U.S.C. § 153(39).

30. Ms. Baldwin’s telephone number, (XXX) XXX-2768, is assigned to a residential service.

31. The number is used for domestic purposes only.

32. The number is not associated with any business.

33. The number is currently and has been continuously on the Registry since March of 2016, more than 31 days prior to the calls received in December 2019.

34. HearingPro placed at least two telemarketing calls to Ms. Baldwin.

35. The calls were on December 11 and 20, 2019.

36. The caller used a local Caller ID to increase the likelihood that recipients would answer.

37. Two of the calls used Caller ID numbers of (660) 290-0650 and (660) 290-0617.

38. The purpose of each call was to sell Miracle Ear products.

39. The solicitation of each call included a call back number of (844) 300-4252.

40. This number is associated with Miracle Ear.

41. Other individuals have complained about calls from Miracle Ear from that left the same number for a callback:

Message said it was Rebecca at Miracle Ear trying to set my annual appointment and maybe provide hearing aid at no cost to me. I have never contacted Miracle Ear or had an annual appointment with any ear doctor or clinic.

See <https://www.shouldianswer.com/phone-number/8443004252>.

42. Ms. Baldwin has never done any business with Miracle Ear.

43. Ms. Baldwin has never consented to receiving calls from or on behalf of Miracle Ear at any relevant time.

44. Ms. Baldwin has never visited a Miracle Ear location or provided her phone number to Miracle Ear for telemarketing purposes.

Calls to Mr. Struckhoff

45. Plaintiff Struckhoff is a “person” as defined by 47 U.S.C. § 153(39).

46. Mr. Struckhoff’s cellular telephone number is (XXX) XXX-9392.

47. Mr. Struckhoff’s landline number is (XXX) XXX-0166.

48. Both numbers are used for domestic purposes only.

49. Neither number is associated with any business.

50. Mr. Struckhoff received calls from HearingPro on October 24 and 25, 2019.

51. The call on October 24, 2019 was to Mr. Struckhoff’s cellular telephone.

52. The call on October 25, 2019 was to Mr. Struckhoff’s residential line.

53. The calls were both from (314) 397-7595.

54. Mr. Struckhoff received both calls, saw that they were incoming and did not recognize the caller.

55. Mr. Struckhoff did not want to answer a call from an unidentified caller.

56. Mr. Struckhoff let the calls go to voicemail.

57. The Defendant left an identical message on each call.

58. There was an individual who identified herself and stated that she was with Miracle Ear.

59. Miracle-Ear services were promoted on both calls, by inviting Mr. Struckhoff to visit a Miracle-Ear location for an appointment.

60. The October 24, 2019 call to Mr. Struckhoff's cellular telephone was made with an ATDS, as that term is defined by the TCPA.

61. Mr. Struckhoff also received a series of pre-recorded calls on his cellular telephone, including on August 21, 24, 25, 2020.

62. Miracle-Ear services were also intended to be promoted on these pre-recorded calls.

Calls to Dr. Blatt

63. Plaintiff Blatt is a "person" as defined by 47 U.S.C. § 153(39).

64. Dr. Blatt's residential telephone number is (XXX) XXX-6660. This telephone number is not used for any business purpose.

65. Dr. Blatt's residential telephone number, (XXX) XXX-6660, has been registered on the Missouri Do Not Call List since March 16, 2001 and the National Do Not Call Registry since August 7, 2003.

66. Dr. Blatt received calls from HearingPro on July 3, 2019 and October 11, 2019.

67. The caller used a local Caller ID to increase the likelihood that recipients would answer.

68. The purpose of each call was to sell Miracle Ear products.

69. This number is associated with Miracle Ear.

70. Dr. Blatt has never done any business with Miracle Ear.

71. Dr. Blatt has never consented to receiving calls from or on behalf of Miracle Ear at any relevant time.

72. Dr. Blatt has never visited a Miracle Ear location or provided his phone number to Miracle Ear for telemarketing purposes.

Calls to Mr. Serati

73. Plaintiff Serati is a “person” as defined by 47 U.S.C. § 153(39).

74. Mr. Serati’s residential telephone number is (XXX) XXX-6913. This telephone number is not used for any business purpose.

75. Mr. Serati’s residential telephone number, (XXX) XXX-6913, has been registered on the National Do Not Call Registry since August 31, 2003.

76. Mr. Serati received calls from HearingPro on March 21, 2019, March 27, 2019, September 9, 2019, August 31, 2020 and January 20, 2021.

77. The caller used a local Caller ID to increase the likelihood that recipients would answer.

78. The purpose of each call was to sell Miracle Ear products.

79. This number is associated with Miracle Ear.

80. Mr. Serati has never done any business with Miracle Ear.

81. Mr. Serati has never consented to receiving calls from or on behalf of Miracle Ear at any relevant time.

82. Mr. Serati has never visited a Miracle Ear location or provided his phone number to Miracle Ear for telemarketing purposes.

83. Plaintiffs and the other call recipients were harmed by these calls. They were temporarily deprived of legitimate use of their phones because the phone line was tied up during the telemarketing calls, and their privacy was improperly invaded. Moreover, these calls injured Plaintiff and the other call recipients because they were frustrating, obnoxious, annoying, a nuisance, and disturbed the solitude of Plaintiff and the classes.

Miracle-Ear's Liability

84. For twenty-five years the FCC has explained that its “rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.” *In re Rules & Regulations Implementing the TCPA*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 (¶ 13) (1995).

85. On May 9, 2013, the FCC released a Declaratory Ruling holding that a corporation or other entity that contracts out its telephone marketing “may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers.”¹

86. In that ruling, the FCC instructed that sellers such as Miracle-Ear may not avoid liability by outsourcing telemarketing:

[A]llowing the seller to avoid potential liability by outsourcing its telemarketing activities to unsupervised third parties would leave consumers in many cases without an effective remedy for telemarketing intrusions. This would particularly be so if the telemarketers were judgment proof,

¹ *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling Concerning the TCPA Rules*, 28 FCC Rcd 6574, 6574 (¶ 1) (2013) (“May 2013 FCC Ruling”).

unidentifiable, or located outside the United States, as is often the case. Even where third-party telemarketers are identifiable, solvent, and amenable to judgment limiting liability to the telemarketer that physically places the call would make enforcement in many cases substantially more expensive and less efficient, since consumers (or law enforcement agencies) would be required to sue each marketer separately in order to obtain effective relief. As the FTC noted, because “[s]ellers may have thousands of ‘independent’ marketers, suing one or a few of them is unlikely to make a substantive difference for consumer privacy.”

May 2013 FCC Ruling, 28 FCC Rcd at 6588 (¶ 37) (internal citations omitted).

87. HearingPro was contractually required to promote Miracle-Ear products in its telemarketing calls in order to potentially generate royalty payments to Miracle-Ear from any sales. HearingPro did in fact promote Miracle-Ear products using marketing calls placed to Plaintiffs and the Classes in violation of the TCPA.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

90. Miracle-Ear knew, or should have known, that HearingPro was violating the TCPA on its behalf.

91. [REDACTED]

[REDACTED], which would have revealed that HearingPro was making pre-recorded calls and calls to individuals listed on the National Do Not Call Registry.

92. [REDACTED]

[REDACTED].

93. Had one been conducted, it would have revealed that HearingPro was making pre-recorded calls and calls to individuals listed on the National Do Not Call Registry.

94. The State of Missouri alone has received more than a dozen complaints about the telemarketing conduct promoting the services of Miracle-Ear for telemarketing done by Hearing Pro.

95. Miracle-Ear maintained interim control over HearingPro's actions.

96. Miracle-Ear gave further interim instructions to HearingPro by providing the areas they could contact.

97. Through four different franchise agreements, Miracle-Ear instructed HearingPro to contact different zip codes:

a. An October 31, 2016 franchise agreement instructed HearingPro to contact 96 zip codes in the state of Illinois.

b. A February 6, 2019 franchise agreement instructed HearingPro to contact 233 zip codes in the state of Missouri.

c. A June 9, 2019 franchise agreement instructed HearingPro to contact 157 zip codes in the state of Missouri.

d. A March 31, 2020 franchise agreement instructed HearingPro to contact 247 zip codes in the state of Missouri, 29 zip codes in the state of Kansas, and 47 zip codes in the state of Arkansas.

[REDACTED]

[REDACTED]

99. Miracle-Ear provided designated telephone lines for HearingPro to use.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

103. Finally, the May 2013 FCC Ruling states that called parties may obtain “evidence of these kinds of relationships . . . through discovery, if they are not independently privy to such information.” *Id.* at 6592-593 (¶ 46). Evidence of circumstances pointing to apparent authority on behalf of the telemarketer “should be sufficient to place upon the seller the burden of demonstrating that a reasonable consumer would not sensibly assume that the telemarketer was acting as the seller’s authorized agent.” *Id.* at 6593 (¶ 46).

Class Action Allegations

104. As authorized by Rule 23(b)(2) or (b)(3) of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of classes of all other persons or entities similarly situated throughout the United States.

105. The classes of persons Plaintiffs propose to represent is tentatively defined as:

National Do Not Call Registry Class: All persons in the United States whose (1) telephone numbers were on the National Do Not Call Registry for at least 31 days, (2) but who received more than one telemarketing calls from

HearingPro (3) promoting Miracle-Ear goods or services (4) within a 12-month period, (5) from four years prior the filing of the Complaint.

Pre-Record Class: All persons in the United States whose (1) telephone numbers were assigned to a cellular telephone service, (2) but who received one or more calls from HearingPro (3) promoting Miracle-Ear goods or services (4) using the same or similar recorded message used to call Mr. Struckhoff; (5) from four years prior the filing of the Complaint.

These are referred to as the “Classes”.

106. Excluded from the Classes are counsel, the Defendant, any entities in which the Defendant has a controlling interest, the Defendant’s agents and employees, any judge to whom this action is assigned, and any member of such judge’s staff and immediate family.

107. The Classes as defined above are identifiable through phone records and phone number databases.

108. The potential members of the Classes number at least in the thousands.

109. Individual joinder of these persons is impracticable.

110. Plaintiff Baldwin, Plaintiff Blatt, and Plaintiff Serati are members of the National Do Not Call Registry Class.

111. Plaintiff Struckhoff is a member of the Pre-Record class.

112. There are questions of law and fact common to Plaintiffs and to the proposed Classes, including but not limited to the following:

- (a) whether HearingPro systematically made multiple telephone calls to Plaintiff Baldwin, Plaintiff Blatt, and Plaintiff Serati and the members of the National Do Not Call Registry Class;

- (b) whether HearingPro used a pre-recorded message, as that term is defined under the TCPA, to make calls to Plaintiff Struckhoff and the members of the Pre-Record class.
- (c) Whether Miracle-Ear is vicariously liable for HearingPro's conduct.
- (d) whether HearingPro made calls to Plaintiffs and members of the Classes without first obtaining prior express written consent to make the calls;
- (e) whether Defendants' conduct constitutes a violation of the TCPA; and
- (f) whether members of the Classes are entitled to treble damages based on the willfulness of Defendants' conduct.

113. Plaintiff Baldwin's, Plaintiff Blatt's, and Plaintiff Serati's claims are typical of the claims of members of the National Do Not Call Registry Class.

114. Plaintiff Struckhoff's claims are typical of the claims of members of the Pre-Record class.

115. Plaintiffs are adequate representatives of the Classes because their interests do not conflict with the interests of the Classes, they will fairly and adequately protect the interests of the Classes, and they are represented by counsel skilled and experienced in class actions, including TCPA class actions.

116. Class certification is the superior procedural vehicle for the fair and efficient adjudication of the claims asserted because:

- a. Common questions of law and fact overwhelmingly predominate over any individual questions that exist within the class and, consequently, economies to the Court and parties exist in litigating the common issues on a class-wide basis instead of on a repetitive individual basis;

b. Each class member's damage claim is too small to make individual litigation an economically viable alternative, and few class members have any interest in individually controlling the prosecution of separate actions;

c. Class treatment is required for optimal deterrence and compensation and for limiting the Court-awarded, reasonable legal expenses incurred by class members; and

d. No unusual difficulties are likely to be encountered in this class action's management in that all legal and factual questions are common to the class

117. The only individual question concerns identification of class members, which will be ascertainable from records maintained by Defendants and/or their agents.

FIRST CAUSE OF ACTION

Telephone Consumer Protection Act (Violations of 47 U.S.C. § 227) (On Behalf of Plaintiff Baldwin, Plaintiff Blatt, Plaintiff Serati and the National Do Not Call Registry Class)

118. Plaintiff Baldwin, Plaintiff Blatt, and Plaintiff Serati repeat the prior allegations of this Complaint and incorporate them by reference herein.

119. The foregoing acts and omissions of Defendants and/or their affiliates, agents, and/or other persons or entities acting on Defendants' behalf constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227, by making telemarketing calls, except for emergency purposes, to the Plaintiff and the National Do Not Call Registry Class despite their numbers being on the National Do Not Call Registry.

120. The Defendants' violations were negligent, willful, or knowing.

121. As a result of Defendants' and/or its affiliates, agents, and/or other persons or entities acting on Defendants' behalf violations of the TCPA, 47 U.S.C. § 227, Plaintiff and members of the Class presumptively are entitled to an award of between \$500 and \$1,500 in damages for each and every call made.

122. Plaintiff Baldwin, Plaintiff Blatt, Plaintiff Serati and members of the National Do Not Call Registry Class are also entitled to and do seek injunctive relief prohibiting Defendants and/or its affiliates, agents, and/or other persons or entities acting on Defendants' behalf from making telemarketing calls to numbers on the National Do Not Call Registry, except for emergency purposes, to any residential telephone number in the future.

SECOND CAUSE OF ACTION

Telephone Consumer Protection Act (Violations of 47 U.S.C. § 227) (On Behalf of Plaintiff Struckhoff and the Pre-Record Class)

123. Plaintiff Struckhoff repeats the prior allegations of this Complaint and incorporates them by reference herein.

124. The foregoing acts and omissions of Defendants and/or their affiliates, agents, and/or other persons or entities acting on Defendants' behalf constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227, by making telemarketing calls, except for emergency purposes, to the Plaintiff and the Pre-Record Class using a pre-recorded message to the cellular telephones of Plaintiff and Pre-Record class members.

125. The Defendants' violations were negligent, willful, or knowing.

126. As a result of Defendants' and/or its affiliates, agents, and/or other persons or entities acting on Defendants' behalf's violations of the TCPA, 47 U.S.C. § 227, Plaintiff and members of the Class presumptively are entitled to an award of between \$500 and \$1,500 in damages for each and every call made.

127. Plaintiff Struckhoff and members of the Pre-Record Class are also entitled to and do seek injunctive relief prohibiting Defendants and/or their affiliates, agents, and/or other persons or entities acting on Defendants' behalf from making pre-recorded calls to any cellular telephone number in the future, except for emergency purposes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the Classes, pray for the following relief:

- A. Certification of the proposed Classes;
- B. Appointment of Plaintiffs as representative of the Classes;
- C. Appointment of the undersigned counsel as counsel for the Classes;
- D. A declaration that Defendants and/or its affiliates, agents, and/or other related entities' actions complained of herein violate the TCPA;
- E. An order enjoining Defendants and/or its affiliates, agents, and/or other persons or entities acting on Defendants' behalf from making pre-recorded calls, except for emergency purposes, to any cellular telephone number in the future or from making telemarketing calls to numbers on the National Do Not Call Registry.
- F. An award to Plaintiff and the Classes of damages, as allowed by law; and

G. Orders granting such other and further relief as the Court deems necessary, just, and proper.

JURY TRIAL DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

Dated: February 10, 2022

Respectfully submitted,

s/Daniel E. Gustafson

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Attorneys for Plaintiffs and Proposed Class

Exhibit A

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~~22-24.~~ Miracle-Ear is a hearing aid provider that targets, among other things, individual consumers like Plaintiffs.

~~23-25.~~ Miracle-Ear uses franchisees, such as HearingPro, to place its product into the stream of commerce.

~~24-26.~~ HearingPro used telemarketing as one of its primary means to promote its products directly to individual consumers like Plaintiffs.

~~25-27.~~ Recipients of these calls, including Plaintiffs, did not consent to receive the calls and are often on the National Do Not Call Registry.

~~26-28.~~ Furthermore, HearingPro used pre-recorded messages to make calls to cellular telephones, like Mr. Struckhoff’s.

Factual Allegations for Calls ~~to Ms. Baldwin~~ to Plaintiffs

Calls to Ms. Baldwin

~~27-29.~~ Plaintiff Baldwin is a “person” as defined by 47 U.S.C. § 153(39).

~~28-30.~~ Ms. Baldwin’s telephone number, (XXX) XXX-2768, is assigned to a residential service.

~~29-31.~~ The number is used for domestic purposes only.

~~30-32.~~ The number is not associated with any business.

~~31-33.~~ The number is currently and has been continuously on the Registry since March of 2016, more than 31 days prior to the calls received in December 2019.

~~32-34.~~ HearingPro placed at least two telemarketing calls to Ms. Baldwin.

~~33-35.~~ The calls were on December 11 and 20, 2019.

~~34-36.~~ The caller used a local Caller ID to increase the likelihood that recipients would answer.

~~35-37.~~ Two of the calls used Caller ID numbers of (660) 290-0650 and (660) 290-0617.

~~36-38.~~ The purpose of each call was to sell Miracle Ear products.

~~37-39.~~ The solicitation of each call included a call back number of (844) 300-4252.

~~38-40.~~ This number is associated with Miracle Ear.

~~39-41.~~ Other individuals have complained about calls from Miracle Ear from that left the same number for a callback:

Message said it was Rebecca at Miracle Ear trying to set my annual appointment and maybe provide hearing aid at no cost to me. I have never contacted Miracle Ear or had an annual appointment with any ear doctor or clinic.

See <https://www.shouldianswer.com/phone-number/8443004252>.

~~40-42.~~ Ms. Baldwin has never done any business with Miracle Ear.

~~41-43.~~ Ms. Baldwin has never consented to receiving calls from or on behalf of Miracle Ear at any relevant time.

~~42-44.~~ Ms. Baldwin has never visited a Miracle Ear location or provided her phone number to Miracle Ear for telemarketing purposes.

Calls to Mr. Struckhoff

~~43-45.~~ Plaintiff Struckhoff is a “person” as defined by 47 U.S.C. § 153(39).

~~44-46.~~ Mr. Struckhoff’s cellular telephone number is (XXX) XXX-9392.

~~45-47.~~ Mr. Struckhoff’s landline number is (XXX) XXX-0166.

~~46-48.~~ Both numbers are used for domestic purposes only.

~~47-49.~~ Neither number is associated with any business.

~~48-50.~~ Mr. Struckhoff received calls from HearingPro on October 24 and 25, 2019.

~~49-51.~~ The call on October 24, 2019 was to Mr. Struckhoff’s cellular telephone.

~~50-52.~~ The call on October 25, 2019 was to Mr. Struckhoff’s residential line.

~~51-53.~~ The calls were both from (314) 397-7595.

~~52-54.~~ Mr. Struckhoff received both calls, saw that they were incoming and did not recognize the caller.

~~53-55.~~ Mr. Struckhoff did not want to answer a call from an unidentified caller.

~~54-56.~~ Mr. Struckhoff let the calls go to voicemail.

~~55-57.~~ The Defendant left an identical message on each call.

~~56-58.~~ There was an individual who identified herself and stated that she was with Miracle Ear.

57-59. Miracle-Ear services were promoted on both calls, by inviting Mr. Struckhoff to visit a Miracle-Ear location for an appointment.

58-60. The October 24, 2019 call to Mr. Struckhoff's cellular telephone was made with an ATDS, as that term is defined by the TCPA.

59-61. Mr. Struckhoff also received a series of pre-recorded calls on his cellular telephone, including on August 21, 24, 25, 2020.

62. Miracle-Ear services were also intended to be promoted on these pre-recorded calls.

Calls to Dr. Blatt

63. Plaintiff Blatt is a "person" as defined by 47 U.S.C. § 153(39).

64. Dr. Blatt's residential telephone number is (XXX) XXX-6660. This telephone number is not used for any business purpose.

65. Dr. Blatt's residential telephone number, (XXX) XXX-6660, has been registered on the Missouri Do Not Call List since March 16, 2001 and the National Do Not Call Registry since August 7, 2003.

66. Dr. Blatt received calls from HearingPro on July 3, 2019 and October 11, 2019.

67. The caller used a local Caller ID to increase the likelihood that recipients would answer.

68. The purpose of each call was to sell Miracle Ear products.

69. This number is associated with Miracle Ear.

70. Dr. Blatt has never done any business with Miracle Ear.

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71. Dr. Blatt has never consented to receiving calls from or on behalf of Miracle Ear at any relevant time.

72. Dr. Blatt has never visited a Miracle Ear location or provided his phone number to Miracle Ear for telemarketing purposes.

Calls to Mr. Serati

73. Plaintiff Serati is a "person" as defined by 47 U.S.C. § 153(39).

74. Mr. Serati's residential telephone number is (XXX) XXX-6913. This telephone number is not used for any business purpose.

75. Mr. Serati's residential telephone number, (XXX) XXX-6913, has been registered on the National Do Not Call Registry since August 31, 2003.

76. Mr. Serati received calls from HearingPro on March 21, 2019, March 27, 2019, September 9, 2019, August 31, 2020 and January 20, 2021.

77. The caller used a local Caller ID to increase the likelihood that recipients would answer.

78. The purpose of each call was to sell Miracle Ear products.

79. This number is associated with Miracle Ear.

80. Mr. Serati has never done any business with Miracle Ear.

81. Mr. Serati has never consented to receiving calls from or on behalf of Miracle Ear at any relevant time.

~~82.~~ Mr. Serati has never visited a Miracle Ear location or provided his phone number to Miracle Ear for telemarketing purposes.

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~~61-83.~~ Plaintiffs and the other call recipients were harmed by these calls. They were temporarily deprived of legitimate use of their phones because the phone line was tied up during the telemarketing calls, and their privacy was improperly invaded. Moreover, these calls injured Plaintiff and the other call recipients because they were frustrating, obnoxious, annoying, a nuisance, and disturbed the solitude of Plaintiff and the classes.

Miracle-Ear's Liability

~~62-84.~~ For twenty-five years the FCC has explained that its “rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.” *In re Rules & Regulations Implementing the TCPA*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 (¶ 13) (1995).

~~63-85.~~ On May 9, 2013, the FCC released a Declaratory Ruling holding that a corporation or other entity that contracts out its telephone marketing “may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers.”¹

~~64-86.~~ In that ruling, the FCC instructed that sellers such as Miracle-Ear may not avoid liability by outsourcing telemarketing:

[A]llowing the seller to avoid potential liability by outsourcing its telemarketing activities to unsupervised third parties would leave consumers in many cases without an effective remedy for telemarketing intrusions. This would particularly be so if the telemarketers were judgment proof,

¹ *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling Concerning the TCPA Rules*, 28 FCC Rcd 6574, 6574 (¶ 1) (2013) (“May 2013 FCC Ruling”).

unidentifiable, or located outside the United States, as is often the case. Even where third-party telemarketers are identifiable, solvent, and amenable to judgment limiting liability to the telemarketer that physically places the call would make enforcement in many cases substantially more expensive and less efficient, since consumers (or law enforcement agencies) would be required to sue each marketer separately in order to obtain effective relief. As the FTC noted, because “[s]ellers may have thousands of ‘independent’ marketers, suing one or a few of them is unlikely to make a substantive difference for consumer privacy.”

May 2013 FCC Ruling, 28 FCC Rcd at 6588 (¶ 37) (internal citations omitted).

~~65-87.~~ HearingPro was contractually required to promote Miracle-Ear products in its telemarketing calls in order to potentially generate royalty payments to Miracle-Ear from any sales. HearingPro did in fact promote Miracle-Ear products using marketing calls placed to Plaintiffs and the Classes in violation of the TCPA.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

~~68-90.~~ Miracle-Ear knew, or should have known, that HearingPro was violating the TCPA on its behalf.

~~69-91.~~ [REDACTED]

[REDACTED], which would have revealed that HearingPro was making pre-recorded calls and calls to individuals listed on the National Do Not Call Registry.

~~70-92.~~ [REDACTED]

[REDACTED]

71-93. Had one been conducted, it would have revealed that HearingPro was making pre-recorded calls and calls to individuals listed on the National Do Not Call Registry.

72-94. The State of Missouri alone has received more than a dozen complaints about the telemarketing conduct promoting the services of Miracle-Ear for telemarketing done by Hearing Pro.

73-95. Miracle-Ear maintained interim control over HearingPro's actions.

74-96. Miracle-Ear gave further interim instructions to HearingPro by providing the areas they could contact.

75-97. Through four different franchise agreements, Miracle-Ear instructed HearingPro to contact different zip codes:

- a. An October 31, 2016 franchise agreement instructed HearingPro to contact 96 zip codes in the state of Illinois.
- b. A February 6, 2019 franchise agreement instructed HearingPro to contact 233 zip codes in the state of Missouri.
- c. A June 9, 2019 franchise agreement instructed HearingPro to contact 157 zip codes in the state of Missouri.
- d. A March 31, 2020 franchise agreement instructed HearingPro to contact 247 zip codes in the state of Missouri, 29 zip codes in the state of Kansas, and 47 zip codes in the state of Arkansas.

[REDACTED]

[REDACTED]

~~77-99.~~ Miracle-Ear provided designated telephone lines for HearingPro to use.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

~~81-103.~~ Finally, the May 2013 FCC Ruling states that called parties may obtain “evidence of these kinds of relationships . . . through discovery, if they are not independently privy to such information.” *Id.* at 6592-593 (¶ 46). Evidence of circumstances pointing to apparent authority on behalf of the telemarketer “should be sufficient to place upon the seller the burden of demonstrating that a reasonable consumer would not sensibly assume that the telemarketer was acting as the seller’s authorized agent.” *Id.* at 6593 (¶ 46).

Class Action Allegations

~~82-104.~~ As authorized by Rule 23(b)(2) or (b)(3) of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of classes of all other persons or entities similarly situated throughout the United States.

~~83-105.~~ The classes of persons Plaintiff~~s~~ propose~~s~~ to represent is tentatively defined as:

National Do Not Call Registry Class: All persons in the United States whose (1) telephone numbers were on the National Do Not Call Registry for at least 31 days, (2) but who received more than one telemarketing calls from

HearingPro (3) promoting Miracle-Ear goods or services (4) within a 12-month period, (5) from four years prior the filing of the Complaint.

Pre-Record Class: All persons in the United States whose (1) telephone numbers were assigned to a cellular telephone service, (2) but who received one or more calls from HearingPro (3) promoting Miracle-Ear goods or services (4) using the same or similar recorded message used to call Mr. Struckhoff; (5) from four years prior the filing of the Complaint.

These are referred to as the “Classes”.

~~84.106.~~ Excluded from the Classes are counsel, the Defendant, any entities in which the Defendant has a controlling interest, the Defendant’s agents and employees, any judge to whom this action is assigned, and any member of such judge’s staff and immediate family.

~~85.107.~~ The Classes as defined above are identifiable through phone records and phone number databases.

~~86.108.~~ The potential members of the Classes number at least in the thousands.

~~87.109.~~ Individual joinder of these persons is impracticable.

~~88.110.~~ ~~The~~ Plaintiff Baldwin, Plaintiff Blatt, and Plaintiff Serati ~~is~~ is a member of the National Do Not Call Registry Class.

~~89.111.~~ ~~The~~ Plaintiff Struckhoff is a member of the Pre-Record class.

~~90.112.~~ There are questions of law and fact common to Plaintiffs and to the proposed Classes, including but not limited to the following:

- (a) whether HearingPro systematically made multiple telephone calls to Plaintiff Baldwin, Plaintiff Blatt, and Plaintiff Serati and the members of the National Do Not Call Registry Class;

- (b) whether HearingPro used a pre-recorded message, as that term is defined under the TCPA, to make calls to Plaintiff Struckhoff and the members of the Pre-Record class.
- (c) Whether Miracle-Ear is vicariously liable for HearingPro's conduct.
- (d) whether HearingPro made calls to Plaintiffs and members of the Classes without first obtaining prior express written consent to make the calls;
- (e) whether Defendants' conduct constitutes a violation of the TCPA; and
- (f) whether members of the Classes are entitled to treble damages based on the willfulness of Defendants' conduct.

~~91.113.~~ Plaintiff Baldwin's, Plaintiff Blatt's, and Plaintiff Serati's claims are typical of the claims of members of the National Do Not Call Registry Class.

~~92.114.~~ Plaintiff Struckhoff's claims are typical of the claims of members of the Pre-Record class.

~~93.115.~~ Plaintiffs are adequate representatives of the Classes because their interests do not conflict with the interests of the Classes, they will fairly and adequately protect the interests of the Classes, and they are represented by counsel skilled and experienced in class actions, including TCPA class actions.

~~94.116.~~ Class certification is the superior procedural vehicle for the fair and efficient adjudication of the claims asserted because:

- a. Common questions of law and fact overwhelmingly predominate over any individual questions that exist within the class and, consequently, economies to the Court and parties exist in litigating the common issues on a class-wide basis instead of on a repetitive individual basis;

b. Each class member's damage claim is too small to make individual litigation an economically viable alternative, and few class members have any interest in individually controlling the prosecution of separate actions;

c. Class treatment is required for optimal deterrence and compensation and for limiting the Court-awarded, reasonable legal expenses incurred by class members; and

d. No unusual difficulties are likely to be encountered in this class action's management in that all legal and factual questions are common to the class

~~95-117.~~ The only individual question concerns identification of class members, which will be ascertainable from records maintained by Defendants and/or their agents.

FIRST CAUSE OF ACTION

Telephone Consumer Protection Act (Violations of 47 U.S.C. § 227)

(On Behalf of Plaintiff Baldwin, Plaintiff Blatt, Plaintiff Serati and the National Do Not Call Registry Class)

~~96-118.~~ Plaintiff Baldwin, Plaintiff Blatt, and Plaintiff Serati repeats the prior allegations of this Complaint and incorporates them by reference herein.

~~97-119.~~ The foregoing acts and omissions of Defendants and/or their affiliates, agents, and/or other persons or entities acting on Defendants' behalf constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227, by making telemarketing calls, except for emergency purposes, to the Plaintiff and the National Do

Not Call Registry Class despite their numbers being on the National Do Not Call Registry.

~~98.120.~~ 99.120. The Defendants' violations were negligent, willful, or knowing.

~~99.121.~~ 100.121. As a result of Defendants' and/or its affiliates, agents, and/or other persons or entities acting on Defendants' behalf violations of the TCPA, 47 U.S.C. § 227, Plaintiff and members of the Class presumptively are entitled to an award of between \$500 and \$1,500 in damages for each and every call made.

~~100.122.~~ 101.122. Plaintiff Baldwin, Plaintiff Blatt, Plaintiff Serati and members of the National Do Not Call Registry Class are also entitled to and do seek injunctive relief prohibiting Defendants and/or its affiliates, agents, and/or other persons or entities acting on Defendants' behalf from making telemarketing calls to numbers on the National Do Not Call Registry, except for emergency purposes, to any residential telephone number in the future.

SECOND CAUSE OF ACTION

Telephone Consumer Protection Act (Violations of 47 U.S.C. § 227)

(On Behalf of Plaintiff Struckhoff and the Pre-Record Class)

~~101.123.~~ 102.123. Plaintiff Struckhoff repeats the prior allegations of this Complaint and incorporates them by reference herein.

~~102.124.~~ 103.124. The foregoing acts and omissions of Defendants and/or their affiliates, agents, and/or other persons or entities acting on Defendants' behalf constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227, by making

telemarketing calls, except for emergency purposes, to the Plaintiff and the Pre-Record Class using a pre-recorded message to the cellular telephones of Plaintiff and Pre-Record class members.

~~103.125.~~ The Defendants' violations were negligent, willful, or knowing.

~~104.126.~~ As a result of Defendants' and/or its affiliates, agents, and/or other persons or entities acting on Defendants' behalf's violations of the TCPA, 47 U.S.C. § 227, Plaintiff and members of the Class presumptively are entitled to an award of between \$500 and \$1,500 in damages for each and every call made.

~~105.127.~~ Plaintiff Struckhoff and members of the Pre-Record Class are also entitled to and do seek injunctive relief prohibiting Defendants and/or their affiliates, agents, and/or other persons or entities acting on Defendants' behalf from making pre-recorded calls to any cellular telephone number in the future, except for emergency purposes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the Classes, pray for the following relief:

- A. Certification of the proposed Classes;
- B. Appointment of Plaintiffs as representative of the Classes;
- C. Appointment of the undersigned counsel as counsel for the Classes;
- D. A declaration that Defendants and/or its affiliates, agents, and/or other related entities' actions complained of herein violate the TCPA;

E. An order enjoining Defendants and/or its affiliates, agents, and/or other persons or entities acting on Defendants' behalf from making pre-recorded calls, except for emergency purposes, to any cellular telephone number in the future or from making telemarketing calls to numbers on the National Do Not Call Registry.

F. An award to Plaintiff and the Classes of damages, as allowed by law; and

G. Orders granting such other and further relief as the Court deems necessary, just, and proper.

JURY TRIAL DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

Dated: February 10, 2022

Respectfully submitted,

s/Daniel E. Gustafson

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