

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

CASE NO.: 2:19-cv-00403-SPC-MRM

DARYL TEBLUM,
individually and on behalf of all others
similarly situated,

CLASS ACTION

JURY TRIAL DEMANDED

Plaintiff,

v.

**PHYSICIAN COMPASSIONATE CARE
LLC d/b/a DOCMJ,**

Defendant.

_____ /

**DEFENDANT PHYSICIAN COMPASSIONATE CARE LLC
d/b/a DOCMJ'S ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S CLASS ACTION COMPLAINT**

Defendant Physician Compassionate Care LLC d/b/a DocMJ ("DocMJ") hereby answers Plaintiff Daryl Teblum's ("Plaintiff") Class Action Complaint ("Complaint") as follows:

In responding to the Complaint, Defendant denies all allegations contained therein unless specifically admitted below in response to Plaintiff's Complaint.

ANSWER TO NATURE OF THE ACTION

1. This is a putative class action under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, ("TCPA"), arising from Defendant's knowing and willful violations of the TCPA.

ANSWER: Paragraph 1 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ admits only that Plaintiff purports to bring this action under the TCPA but denies that it engaged in any such practices or that Plaintiff is entitled to any relief whatsoever. Except as expressly admitted, DocMJ denies each and every allegation contained in Paragraph 1.

2. Defendant owns and/or operates medical centers throughout Florida and Ohio where patients can obtain medical marijuana recommendations.

ANSWER: DocMJ admits only that it operates physician offices throughout Florida. Except as expressly admitted, DocMJ denies each and every allegation contained in Paragraph 2.

3. Defendant engages in unsolicited telemarketing directed towards prospective customers with no regard for consumers' privacy rights.

ANSWER: Paragraph 3 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 3.

4. Defendant's telemarketing consists of sending text messages to consumers soliciting them to purchase its goods and/or services.

ANSWER: Paragraph 4 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 4.

5. Defendant caused thousands of unsolicited text messages to be sent to the cellular telephones of Plaintiff and Class Members, causing them injuries, including

invasion of their privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 5.

6. Through this action, Plaintiff seeks injunctive relief to halt Defendant's illegal conduct. Plaintiff also seeks statutory damages on behalf of himself and Class Members, as defined below, and any other available legal or equitable remedies resulting from the illegal actions of Defendant.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, DocMJ admits only that Plaintiff seeks injunctive relief and statutory damages. DocMJ denies that Plaintiff is entitled to any relief and denies each and every remaining allegation contained in Paragraph 6.

ANSWER TO JURISDICTION AND VENUE

7. Jurisdiction is proper under 28 U.S.C. § 1331 as Plaintiff alleges violations of a federal statute. Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2) because Plaintiff alleges a national class, which will result in at least one Class member belonging to a different state than Defendant. Plaintiff seeks up to \$1,500.00 in damages for each call in violation of the TCPA, which, when aggregated among a proposed class numbering in the tens of thousands, or more, exceeds the \$5,000,000.00 threshold for federal court jurisdiction under the Class Action Fairness Act ("CAFA").

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 7.

8. Venue is proper in the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. §§ 1391(b) and (c) because Defendant is deemed to reside in any judicial district in which it is subject to the court's personal jurisdiction, and because Defendant provides and markets its services within this district thereby establishing sufficient contacts to subject it to personal jurisdiction. Further, Defendant's tortious conduct against Plaintiff occurred within this district and, on information and belief, Defendant has sent the same text message complained of by Plaintiff to other individuals within this judicial district, such that some of Defendant's acts have occurred within this district, subjecting Defendant to jurisdiction here.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 8.

ANSWER TO PARTIES

9. Plaintiff is a natural person who, at all times relevant to this action, was a resident of Lee County, Florida.

ANSWER: DocMJ lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9, and on that basis, denies each and every allegation contained in Paragraph 9.

10. Defendant is a Florida corporation with its principal address at 1022 Main St. Dunedin, FL 34698. Defendant directs, markets, and provides business activities throughout the State of Florida.

ANSWER: Paragraph 10 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ admits only that it is a Florida corporation with its principal address at 1022 Main Street, Suite J, Dunedin, FL 34698. Except as expressly admitted, DocMJ denies each and every allegation contained in Paragraph 10.

ANSWER TO THE TCPA

11. The TCPA prohibits: (1) any person from calling a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A).

ANSWER: Paragraph 11 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA speaks for itself and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 11.

12. The TCPA defines an "automatic telephone dialing system" ("ATDS") as "equipment that has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

ANSWER: Paragraph 12 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA speaks for itself and denies any

allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 12.

13. The TCPA exists to prevent communications like the ones described within this Complaint. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

ANSWER: Paragraph 13 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA speaks for itself and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 13.

14. In an action under the TCPA, a plaintiff must show only that the defendant “called a number assigned to a cellular telephone service using an automatic dialing system or prerecorded voice.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).

ANSWER: Paragraph 14 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA speaks for itself and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 14.

15. The Federal Communications Commission (“FCC”) is empowered to issue rules and regulations implementing the TCPA. According to the FCC’s findings, calls in violation of the TCPA are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized

that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.

ANSWER: Paragraph 15 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 15.

16. In 2012, the FCC issued an order further restricting automated telemarketing calls, requiring “prior express written consent” for such calls to wireless numbers. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012) (emphasis supplied).

ANSWER: Paragraph 16 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 16.

17. To obtain express written consent for telemarketing calls, a defendant must establish that it secured the plaintiff’s signature in a form that gives the plaintiff a “‘clear and conspicuous disclosure’ of the consequences of providing the requested consent.... and [the plaintiff] having received this information, agrees unambiguously to receive such calls at a telephone number the [plaintiff] designates.” *In re Rules & Regulations Implementing*

the Tel. Consumer Prot. Act of 1991, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33, 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

ANSWER: Paragraph 17 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 17.

18. The TCPA regulations promulgated by the FCC define “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.” 47 C.F.R. § 64.1200(f)(12). In determining whether a communication constitutes telemarketing, a court must evaluate the ultimate purpose of the communication. *See Golan v. Veritas Entm’t, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).

ANSWER: Paragraph 18 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 18.

19. “Neither the TCPA nor its implementing regulations ‘require an explicit mention of a good, product, or service’ where the implication of an improper purpose is ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012)).

ANSWER: Paragraph 19 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 19.

20. “‘Telemarketing’ occurs when the context of a call indicates that it was initiated and transmitted to a person for the purpose of promoting property, goods, or services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii) & 47 C.F.R. § 64.1200(f)(12)); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at *49).

ANSWER: Paragraph 20 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 20.

21. The FCC has explained that calls motivated in part by the intent to sell property, goods, or services are considered telemarketing under the TCPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients are encouraged to purchase, rent, or invest in property, goods, or services during the call *or in the future. Id.*

ANSWER: Paragraph 21 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak

for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 21.

22. In other words, offers “that are part of an overall marketing campaign to sell property, goods, or services constitute” telemarketing under the TCPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 136 (2003).

ANSWER: Paragraph 22 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 22.

23. If a call is not deemed telemarketing, a defendant must nevertheless demonstrate that it obtained the plaintiff’s prior express consent. *See In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7991-92 (2015) (requiring express consent “for non-telemarketing and non-advertising calls”).

ANSWER: Paragraph 23 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 23.

24. Further, the FCC has issued rulings and clarified that consumers are entitled to the same consent-based protections for text messages as they are for calls to wireless numbers. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) (“The FCC has determined that a text message falls within the meaning of ‘to make any call’ in 47 U.S.C. § 227(b)(1)(A)”).

ANSWER: Paragraph 24 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 24.

25. With respect to standing, as recently held by the United States Court of Appeals for the Ninth Circuit:

Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA “need not allege any *additional* harm beyond the one Congress has identified.”

Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037 (9th Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

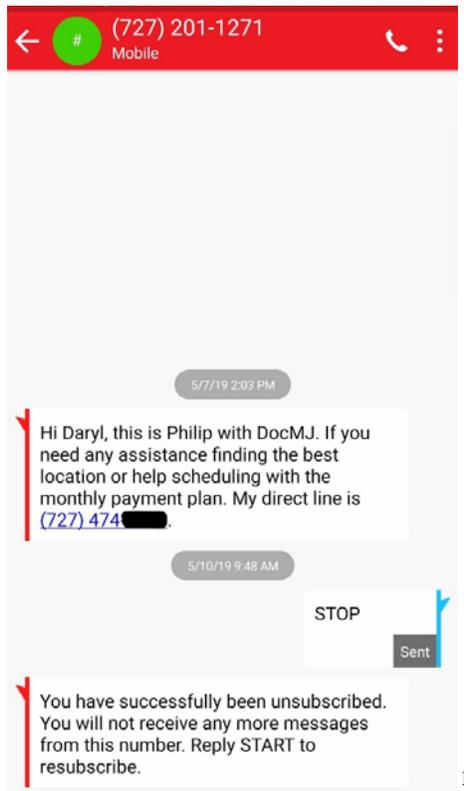
ANSWER: Paragraph 25 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 25.

26. Similarly, the United States Court of Appeals for the Second Circuit recently held that the receipt of a telemarketing or unsolicited call “demonstrates more than a bare violation and satisfies the concrete-injury requirement for standing.” *Leyse v. Lifetime Entm’t Servs., LLC*, Nos. 16-1133-cv, 16-1425-cv, 2017 U.S. App. LEXIS 2607 (2d Cir. Feb. 15, 2017) (citing *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 105 (2d Cir. 2013) (“The injury-in-fact necessary for standing need not be large; an identifiable trifle will suffice.”); *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015) (holding that injury under similar TCPA provision may be shown by one-minute occupation of fax machine)).

ANSWER: Paragraph 26 asserts legal conclusions and argument to which no response is required. DocMJ states that the TCPA and its implementing regulations speak for themselves and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 26.

ANSWER TO FACTS

27. On or about May 7, 2019, Defendant caused the following automated text message to be transmitted to Plaintiff’s cellular telephone number ending in 0363 (“0363 Number”):



ANSWER: The alleged image(s) are unauthenticated and speak for themselves. By way of further response, Paragraph 27 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies the allegations in Paragraph 27.

28. Defendant's text message constitutes telemarketing/advertising because it promotes Defendant's business, goods and services.

ANSWER: The alleged image(s) are unauthenticated and speak for themselves. By way of further response, Paragraph 28 asserts legal conclusions and argument to which

¹ Plaintiff has redacted the last four digits of the Salesman's direct phone number.

no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 28.

29. Specifically, Defendant asks Plaintiff is [sic] he “need[s] any assistance finding the best location or help scheduling with the monthly payment plan”.

ANSWER: The alleged image(s) are unauthenticated and speak for themselves. By way of further response, Paragraph 29 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 29.

30. The text message includes a phone number (727-474-****)² which upon information and belief, is the direct phone number for one of Defendant’s Sales Managers.

ANSWER: The alleged image(s) are unauthenticated and speak for themselves. By way of further response, Paragraph 30 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies the allegations in Paragraph 30.

31. Plaintiff received the subject text message within this judicial district and, therefore, Defendant’s violation of the TCPA occurred within this district.

ANSWER: Paragraph 31 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 31, and on that basis, denies each and every allegation contained in Paragraph 31.

² Plaintiff has redacted the last four digits of the Salesman’s direct phone number.

32. Upon information and belief, Defendant caused similar text messages to be sent to individuals residing within this judicial district.

ANSWER: Paragraph 32 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 32.

33. At no point in time did Plaintiff provide Defendant with his express written consent to be contacted by text messages using an ATDS.

ANSWER: Paragraph 33 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 33.

34. Plaintiff is the sole user of the 0363 Number.

ANSWER: DocMJ lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 34, and on that basis, denies each and every allegation contained in Paragraph 34.

35. The number used by or on behalf of Defendant (727-201-1271) is known as a “long code,” a standard 10-digit code that enables Defendant to send SMS text messages *en masse*, while deceiving recipients into believing that the message was personalized and sent from a telephone number operated by an individual.

ANSWER: Paragraph 35 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 35.

36. Long codes work as follows: Private companies known as SMS gateway providers have contractual arrangements with mobile carriers to transmit two-way SMS traffic. These SMS gateway providers send and receive SMS traffic to and from the mobile phone networks' SMS centers, which are responsible for relaying those messages to the intended mobile phone. This allows for the transmission of a large number of SMS messages to and from a long code.

ANSWER: Paragraph 36 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 36.

37. The generic nature of Defendant's text message, demonstrates that Defendant utilized an ATDS in transmitting the messages.

ANSWER: Paragraph 37 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 37. By way of further response, DocMJ further denies that the text at issue is "generic," in that is directed only to Plaintiff, by name, from a specifically-identified sender.

38. To send the text messages, Defendant used a messaging platform (the "Platform") that permitted Defendant to transmit thousands of automated text messages without any human involvement.

ANSWER: Paragraph 38 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 38.

39. The Platform has the capacity to store telephone numbers, which capacity was in fact utilized by Defendant.

ANSWER: Paragraph 39 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 39.

40. The Platform has the capacity to generate sequential numbers, which capacity was in fact utilized by Defendant.

ANSWER: Paragraph 40 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 40.

41. The Platform has the capacity to dial numbers in sequential order, which capacity was in fact utilized by Defendant.

ANSWER: Paragraph 41 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 41.

42. The Platform has the capacity to dial numbers from a list of numbers, which capacity was in fact utilized by Defendant.

ANSWER: Paragraph 42 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 42.

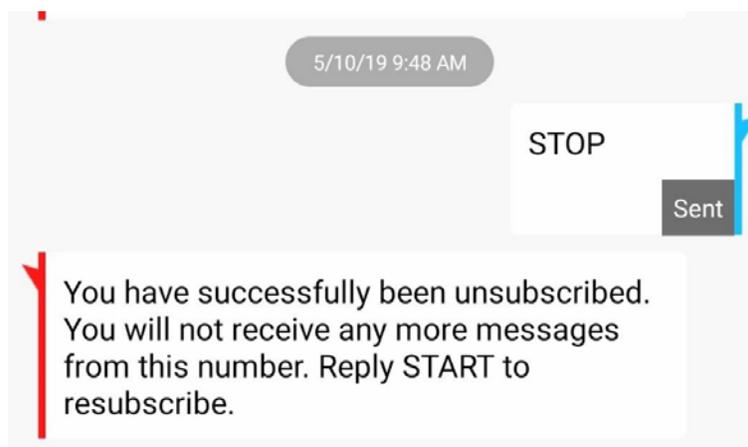
43. The Platform has the capacity to dial numbers without human intervention, which capacity was in fact utilized by Defendant.

ANSWER: Paragraph 43 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 43.

44. The Platform has the capacity to schedule the time and date for future transmission of text messages, which occurs without any human involvement.

ANSWER: Paragraph 44 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 44.

45. Additionally, the Platform has an auto-reply function that results in the transmission of text messages to individual's cellular telephones automatically from the system, and with no human intervention, in response to a keyword (e.g. "STOP") being sent by a consumer, which function was also utilized by Defendant on May 10, 2019. As shown below:



ANSWER: The alleged image(s) are unauthenticated and speak for themselves. By way of further response, Paragraph 45 asserts legal conclusions and argument to which

no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 45.

46. To transmit the messages at issue, the Platform automatically executed the following steps:

(1) The Platform retrieved each telephone number from a list of numbers in the sequential order the numbers were listed;

(2) The Platform then generated each number in the sequential order listed and combined each number with the content of Defendant's message to create "packets" consisting of one telephone number and the message content;

(3) Each packet was then transmitted in the sequential order listed to an SMS aggregator, which acts an intermediary between the Platform, mobile carriers (e.g. AT&T), and consumers.

(4) Upon receipt of each packet, the SMS aggregator transmitted each packet – automatically and with no human intervention – to the respective mobile carrier for the telephone number, again in the sequential order listed by Defendant. Each mobile carrier then sent the message to its customer's mobile telephone.

ANSWER: Paragraph 46 and subparts (1) through (4) assert legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 46 and subparts (1) through (4).

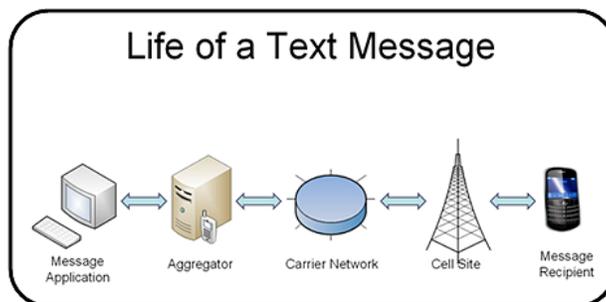
47. The above execution these instructions occurred seamlessly, with no human intervention, and almost instantaneously. Indeed, the Platform is capable of transmitting thousands of text messages following the above steps in minutes, if not less.

ANSWER: Paragraph 47 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 47.

48. Further, the Platform “throttles” the transmission of the text messages depending on feedback it receives from the mobile carrier networks. In other words, the platform controls how quickly messages are transmitted depending on network congestion. The platform performs this throttling function automatically and does not allow a human to control the function.

ANSWER: Paragraph 48 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 48.

49. The following graphic summarizes the above steps and demonstrates that the dialing of the text messages at issue was done by the Platform automatically and without any human intervention:



ANSWER: The alleged image(s) are unauthenticated and speak for themselves. By way of further response, Paragraph 49 asserts legal conclusions and argument to which

no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 49.

50. Defendant's unsolicited text message caused Plaintiff actual harm, including invasion of his privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion. Defendant's text message also inconvenienced Plaintiff and caused disruption to his daily life.

ANSWER: Paragraph 50 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 50.

ANSWER TO CLASS ALLEGATIONS

PROPOSED CLASS

51. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of himself and all others similarly situated.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, DocMJ admits only that Plaintiff seeks to bring this action on behalf of himself and on behalf of a class of all others purportedly similarly situated. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 51 and denies that any class should be certified in this action and that this action is appropriate for class treatment.

52. Plaintiff brings this case on behalf of the below defined Class:

All persons within the United States who, within the four years prior to the filing of this Complaint, were sent a text message using the same type of equipment used to

text message Plaintiff, from Defendant or anyone on Defendant's behalf, to said person's cellular telephone number.

ANSWER: This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, DocMJ admits only that Plaintiff seeks to bring this action on behalf of himself and on behalf of a class of all others purportedly similarly situated. DocMJ denies that the proposed class definition is proper and denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies the allegations contained in Paragraph 52.

53. Defendant and its employees or agents are excluded from the Class. Plaintiff does not know the number of members in the Class but believes the Class members number in the several thousands, if not more.

ANSWER: Paragraph 53 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 53.

NUMEROSITY

54. Upon information and belief, Defendant has placed automated calls to cellular telephone numbers belonging to thousands of consumers throughout the United States without their prior express consent. The members of the Class, therefore, are believed to be so numerous that joinder of all members is impracticable.

ANSWER: Paragraph 54 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 54.

55. The exact number and identities of the Class members are unknown at this time and can be ascertained only through discovery. Identification of the Class members is a matter capable of ministerial determination from Defendants' call records.

ANSWER: Paragraph 55 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 55.

COMMON QUESTIONS OF LAW AND FACT

56. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

- (1) Whether Defendant made non-emergency calls to Plaintiff and Class members' cellular telephones using an ATDS;
- (2) Whether Defendant can meet their burden of showing that they obtained prior express written consent to make such calls;
- (3) Whether Defendant's conduct was knowing and willful;

(4) Whether Defendant is liable for damages, and the amount of such damages; and

(5) Whether Defendant should be enjoined from such conduct in the future.

ANSWER: Paragraph 56 and subparts (1) through (5) assert legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 56 and subparts (1) through (5).

57. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendants routinely transmits text messages to telephone numbers assigned to cellular telephone services is accurate, Plaintiff and the Class members will have identical claims capable of being efficiently adjudicated and administered in this case.

ANSWER: Paragraph 57 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 57.

TYPICALITY

58. Plaintiff's claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

ANSWER: Paragraph 58 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 58.

PROTECTING THE INTERESTS OF THE CLASS MEMBERS

59. Plaintiff is a representative who will fully and adequately assert and protect the interests of the Class and has retained competent counsel. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

ANSWER: Paragraph 59 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 59.

SUPERIORITY

60. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant's wrongful conduct are too small to warrant the expense of individual lawsuits. The likelihood of individual Class members prosecuting their own separate claims is remote, and, even if

every member of the Class could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases.

ANSWER: Paragraph 60 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 60.

61. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another may not. Additionally, individual actions may be dispositive of the interests of the Class, although certain class members are not parties to such actions.

ANSWER: Paragraph 61 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies that any class should be certified in this action and that this action is appropriate for class treatment. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 61.

COUNT I
Violations of the TCPA, 47 U.S.C. § 227(b)
(On Behalf of Plaintiff and the Class)

62. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

ANSWER: This incorporation paragraph requires no answer.

63. It is a violation of the TCPA to make “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service ...” 47 U.S.C. § 227(b)(1)(A)(iii).

ANSWER: DocMJ states that the TCPA speaks for itself and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 63.

64. The TCPA defines an “automatic telephone dialing system” (hereinafter “ATDS”) as “equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” Id. at § 227(a)(1).

ANSWER: DocMJ states that the TCPA speaks for itself and denies any allegations that are inconsistent therewith. To the extent a further response is required, DocMJ denies each and every allegation contained in Paragraph 64.

65. Defendant – or third parties directed by Defendant – used equipment having the capacity to store telephone numbers, using a random or sequential generator, and to dial such numbers and/or to dial numbers from a list automatically, without human intervention, to make non-emergency telephone calls to the cellular telephones of Plaintiff and the other members of the Class.

ANSWER: Paragraph 65 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 65.

66. These calls were made without regard to whether Defendant had first obtained express permission from the called party to make such calls. In fact, Defendant did not have prior express consent to call the cell phones of Plaintiff and the other members of the putative Class when its calls were made.

ANSWER: Paragraph 66 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 66.

67. Defendant violated § 227(b)(1)(A)(iii) of the TCPA by using an automatic telephone dialing system to make non-emergency telephone calls to the cell phones of Plaintiff and the other members of the putative Class without their prior express consent.

ANSWER: Paragraph 67 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 67.

68. As a result of Defendant's conduct and pursuant to § 227(b)(3) of the TCPA, Plaintiff and the other members of the putative Class were harmed and are each entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and the class are also entitled to an injunction against future calls.

ANSWER: Paragraph 68 asserts legal conclusions and argument to which no response is required. To the extent a response is required, DocMJ denies each and every allegation contained in Paragraph 68.

WHEREFORE, Plaintiff Daryl Teblum, on behalf of himself and the other members of the Class, prays for the following relief:

- a. A declaration that Defendant's practices described herein violate the Telephone Consumer Protection Act, 47 U.S.C. § 227;
- b. A declaration that Defendant's violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, were willful and knowing;
- c. An injunction prohibiting Defendant from using an automatic telephone dialing system to call and text message telephone numbers assigned to cellular telephones without the prior express consent of the called party;
- d. An award of actual, statutory damages, and/or trebled statutory damages; and
- e. Such further and other relief the Court deems reasonable and just.

ANSWER TO PRAYER FOR RELIEF

ANSWER: DocMJ denies that Plaintiff, or any member of the proposed class, is entitled to any relief whatsoever, including, but not limited to, certification of the proposed class; appointment of Plaintiff as representative of the proposed class; appointment of Plaintiff's counsel as counsel for the proposed class; a declaration that DocMJ and/or its affiliates, agents, or other related entities violated the TCPA; a declaration that DocMJ and/or its affiliates, agents, or other related entities violated the TCPA willfully and knowingly; and an award of damages, attorneys' fees, or costs. DocMJ denies each and every allegation and statement contained in the Complaint not previously denied or otherwise qualified.

JURY DEMAND

Plaintiff and Class Members hereby demand a trial by jury.

ANSWER: DocMJ admits that Plaintiff purports to see the relief described in this paragraph but denies that the relief requested is justified or available to Plaintiff.

* * *

AFFIRMATIVE DEFENSES

DocMJ asserts the following affirmative defenses without assuming any burden of pleading or proof that would otherwise rest on Plaintiff. All defenses are pleaded in the alternative and do not constitute an admission of liability or that Plaintiff is entitled to any relief whatsoever. All defenses pleaded below are based upon DocMJ's current understanding of the claims asserted by Plaintiff, and DocMJ reserves the right to plead additional defenses when and if they become appropriate and/or available in this action. DocMJ may assert additional affirmative defenses to which it may be entitled, or which may be developed during discovery, including additional unique affirmative defenses applicable to different putative class members of Plaintiff's proposed class insofar as class certification has not been granted and is not appropriate. In further response to Plaintiff's Complaint, DocMJ asserts the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

The Complaint and each purported claim contained therein fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE
(Lack of Article III Standing)

The Court lacks the necessary subject matter jurisdiction over the claims that Plaintiff has asserted because Plaintiff has not alleged or suffered a particularized, concrete harm, fairly traceable to DocMJ's alleged conduct, to satisfy Article III standing.

THIRD AFFIRMATIVE DEFENSE
(Lack of Standing)

The Complaint and each purported claim contained therein are barred to the extent that Plaintiff or any member of the putative classes lacks standing because they have not incurred a loss.

FOURTH AFFIRMATIVE DEFENSE
(No Statutory Standing)

Plaintiff is not within the "zone of interests" protected by the TCPA and thus lacks statutory standing to assert such claims against DocMJ.

FIFTH AFFIRMATIVE DEFENSE
(First Amendment)

The TCPA violates the First Amendment of the U.S. Constitution on its face and as applied.

SIXTH AFFIRMATIVE DEFENSE
(Unconstitutional Vagueness and Overbreadth)

Interpretations of the TCPA upon which Plaintiff's Complaint is based are unconstitutionally vague and overbroad and thus violate the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Due Process provisions of the Fourteenth Amendment to the United States Constitution.

SEVENTH AFFIRMATIVE DEFENSE
(Due Process)

The statutory damages allowed under the TCPA violate DocMJ's substantive due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States of America, as they are grossly disproportionate to the damages incurred by Plaintiff, which are inconsequential or immaterial.

EIGHTH AFFIRMATIVE DEFENSE
(Excessive Penalties)

The statutory penalties sought by Plaintiff and members of the putative classes are excessive and thus violate the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Due Process provision of the Fourteenth Amendment to the United States Constitution.

NINTH AFFIRMATIVE DEFENSE
(Prior Express Consent)

The Complaint and each purported claim contained therein are barred to the extent that Plaintiff or any member of the putative classes provided consent for the alleged text message calls to Defendant, or any third-party not named in the Complaint, including, without limitation, "prior express consent" under the TCPA.

TENTH AFFIRMATIVE DEFENSE
(No Automated Dialer)

The Complaint and each purported claim contained therein are barred to the extent that neither DocMJ nor any agents or third-parties acting under its direction or control employed an ATDS to transmit the alleged text message calls.

ELEVENTH AFFIRMATIVE DEFENSE
(Estoppel, Laches, Unclean Hands, Ratification, Satisfaction, and Statute of Limitations)

The claims asserted in the Complaint are barred, in whole or in part, by the doctrines of estoppel, laches, unclean hands, ratification, satisfaction and/or applicable statutes of limitations.

TWELFTH AFFIRMATIVE DEFENSE
(Waiver and Estoppel)

Plaintiff and members of any putative class have waived their right to recover herein, in whole or in part, and/or their claims are barred by estoppel.

THIRTEENTH AFFIRMATIVE DEFENSE
(Comparative Fault)

Any damages sustained by Plaintiff or members of any putative class must be reduced in proportion to the wrongful or negligent conduct of persons or entities other than DocMJ, including third parties, under the principles of equitable allocation, recoupment, set-off, proportionate responsibility, and/or comparative fault.

FOURTEENTH AFFIRMATIVE DEFENSE
(Good Faith)

DocMJ at all times acted in good faith and within reasonable commercial standards as to the matters alleged in the Complaint.

FIFTEENTH AFFIRMATIVE DEFENSE
(Plaintiff's Own Actions or Inaction)

Plaintiff's damages, and the damages of the members of the putative classes, if any, have been caused by his/their own action or inaction, including, but not limited to, his/their provision of prior express consent to receive text message calls.

SIXTEENTH AFFIRMATIVE DEFENSE
(Defenses Specific to Class Members)

DocMJ may have additional unique affirmative defenses applicable to different putative members of Plaintiff's proposed classes. DocMJ reserve the right to assert such additional affirmative defenses as the need arises, insofar as class certification has not been granted and is not appropriate in this case.

SEVENTEENTH AFFIRMATIVE DEFENSE
(Substantial Compliance with Law)

DocMJ is not liable to Plaintiff or members of the putative classes because DocMJ acted reasonably and with due care and substantially complied with all applicable statutes, regulations, ordinances, and/or other laws and qualifies for all exemptions and Safe Harbors provided by the TCPA and its corresponding regulations.

EIGHTEENTH AFFIRMATIVE DEFENSE
(No Duplicative Relief)

To the extent that any relief sought by Plaintiff would be duplicative of relief sought by Plaintiff in other lawsuits, subjecting DocMJ to the possibility of multiple recoveries, such recovery is barred by the Fifth and Eighth Amendments to the United States Constitution.

NINETEETH AFFIRMATIVE DEFENSE
(Settlement Credits)

In the event that a settlement is reached between Plaintiff or any other putative class member, on the one hand, and any other person or entity on the other hand, DocMJ is entitled to any settlement credits permitted by law.

TWENTIETH AFFIRMATIVE DEFENSE
(Not Knowing or Willful)

Plaintiff is precluded from any recovery from DocMJ for a willing and knowing violation of the TCPA because any such violation, which Defendant denies occurred, would not have been willful or knowing.

TWENTY-FIRST AFFIRMATIVE DEFENSE
(No Loss)

Plaintiff's claims are barred because Plaintiff was not charged for the text messages referenced in the Compliant.

TWENTY-SECOND AFFIRMATIVE DEFENSE
(Mitigation)

Plaintiff's claims are barred in whole or in part because Plaintiff has failed to mitigate any of his alleged damages.

TWENTY-THIRD AFFIRMATIVE DEFENSE
(Lack of Personal Jurisdiction – Non-Resident Putative Class Member(s))

The Court lacks personal jurisdiction over DocMJ as to the claims of any non-resident putative class member(s). *See Bristol-Myers Squibb v. Super. Ct. of Calif.*, 137 S.Ct. 1773 (2017).

TWENTY-FOURTH AFFIRMATIVE DEFENSE
(Established Business Relationship)

Plaintiff's claims are barred by the existence of the established business relationship exception to claims under the TCPA

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Claims Barred by Other States' Laws)

Plaintiff's claims, and the claims of some or all putative class members, may be barred by the various laws of the 50 states, including statutes, regulations and common laws related to the allegations of wrongdoing addressed by other state's laws.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Failure to Plead Basis for Class Certification)

Plaintiff has not pleaded an adequate basis for class certification and that class relief or certification is appropriate because the required elements of adequacy, commonality, typicality and preponderance are not present in the instant case.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Class Certification Cannot be Met)

The pre-requisites for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure cannot be met because, among other reasons, joinder of all members of the putative class is not practicable; individual questions of fact and law predominate over common issues; Plaintiff's claims are not typical of the claims and/or defenses of other putative class members; Plaintiff is not an adequate representative for the putative class; and a class action is not superior to other available methods of fair and efficient adjudication of the controversy. In addition, the prerequisites for class certification cannot be met because the claims alleged, by their nature, raise factual issues of reliance, intent and other elements that cannot be addressed on a class basis.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE
(Reservation of Rights)

DocMJ reserves the right to raise additional affirmative defenses to which it may be entitled or which may be developed in the course of discovery.

PRAYER FOR RELIEF

WHEREFORE, DocMJ requests that the Court enter a judgment against Plaintiff and for DocMJ:

1. That Plaintiff take nothing by reason of the Class Action Complaint;
2. That judgment be entered in favor of DocMJ and against Plaintiff;
3. For costs incurred by DocMJ herein, if and to the extent permitted by law;
and
4. Granting such other and further relief as this Court may deem just and proper.

DATED: July 30, 2019

Respectfully submitted,

s/Maria K. Vigilante

Maria K. Vigilante

Florida Bar No.: 98822

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*Counsel for Defendant
Physician Compassionate Care LLC
d/b/a DocMJ*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 30, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF.

s/Maria K. Vigilante
Maria K. Vigilante