

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA**

ROBERT HOSSFELD, individually and on  
behalf of all others similarly situated,

**Case No.: 2:16-cv-02017-SGC**

Plaintiff,

**JURY DEMAND**

v.

BBVA COMPASS BANCSHARES, INC.,  
an Alabama Corporation, and  
MSR GROUP, LLC, a Nebraska Limited  
Liability Company

Defendants.

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**FIRST AMENDED COMPLAINT**<sup>1</sup>

1. Plaintiff Robert Hossfeld brings this action against Defendants, BBVA Compass Bancshares, Inc. (“BBVA” or “Compass”), and MSR Group, LLC (“MSR”) to secure redress for violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. At various times, and on numerous instances within the four (4) year period prior to the filing of this complaint, Defendants sent, or caused to be sent unsolicited calls to Plaintiff’s cellular telephone, in violation of the TCPA.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction pursuant 28 U.S.C. § 1331 due to federal questions raised in the Complaint. This action arises under a federal statute. *See Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 565 U.S., 181 L. Ed. 2d 881 (2012). This Court also has jurisdiction pursuant to the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d)(2) and

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<sup>1</sup> This Amended Complaint is being filed “as a matter of course” pursuant to Fed.R.Civ.P. 15(a)(1)(B), within 21 days of Defendant’s responsive pleading. Docket Item 8, filed February 9, 2017.

(6), because (i) at least one member of the putative class is a citizen of a state different from Defendants, (ii) the amount in controversy exceeds \$5,000,000, exclusive of costs and interest, and (iii) none of the exceptions under that section apply to this action.

3. This Court has personal jurisdiction over the Defendant BBVA because Defendant's headquarters and principal place of business is in this District.

4. This Court has personal jurisdiction over the Defendant MSR because Defendant conducts business in this District, places automatically dialed calls into this District, and maintains continuing and significant business contacts within this District sufficient to subject it to personal jurisdiction.

5. Venue is proper in this District under 28 U.S.C. § 1391(b) because Defendants are deemed to reside in any judicial district in which Defendants are subject to personal jurisdiction

### **PARTIES**

6. Plaintiff ROBERT HOSSFELD is a natural person and a citizen of the State of Texas. At all relevant times Plaintiff was the subscriber and sole user of the cellular telephone at issue.

7. Defendant BBVA COMPASS BANCSHARES, INC., ("BBVA") is an Alabama Corporation that operates from offices located at 15 South 20th Street Birmingham, Alabama 35233.

8. Defendant MSR GROUP, LLC ("MSR") is a Nebraska Limited Liability Company that operates from offices located at 1121 North 102 Court Omaha, Nebraska 68114.

9. Upon information and belief, BBVA contracted with MSR for its services that include tracking customer satisfaction, targeting and messaging to bring new customers through telephone calls.<sup>2</sup>

### THE TCPA

10. In 1991, Congress enacted the TCPA to regulate the use of automatic telephone dialing systems and artificial or prerecorded voice messages.

11. The TCPA regulates and restricts the use of automatic telephone equipment.

12. The TCPA protects consumers from unwanted calls and text messages that are made with autodialers and with prerecorded messages.

13. Specifically, 47 U.S.C. § 227(b) provides:

**1) Prohibitions** It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) 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 or an artificial or prerecorded voice—

\* \* \*

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

47 U.S.C. § 227(b)

14. “An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.” *Bagg v. Ushealth Group, Inc.*, Case No. 6:15-cv-1666-Orl-37GJK, 2016 WL 1588666, at \*3 (M.D. Fla. Apr. 20, 2016).

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<sup>2</sup> MSR GROUP, <http://www.themsrgroup.com/your-needs/acquire-customers/> (last visited Jan. 27, 2017).

15. A caller may use an autodialer or pre-recorded or automated voice to call a telephone number only if the caller has the recipient's prior express consent.

16. The FCC has issued rulings and clarified that in order to obtain an individual's consent, a clear, unambiguous, and conspicuous written disclosure must be provided to the individual. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 Report and Order, FCC 12-21, ¶¶ 26, 32-33 (February 15, 2012).

### **FACTUAL ALLEGATIONS**

17. Defendant BBVA placed and continues to place unsolicited calls to "randomly selected" members of the public, through Defendant MSR.

18. These calls are said to be made with the purpose of doing surveys. Plaintiff abandons any and all prior allegations that these calls had a marketing purpose. The calls did not have a marketing purpose.

19. Defendants' calls are placed by an automatic telephone dialing system. The prerecorded message when the number "855-271-7383" is called indeed states:

"If you received a call from this number, you were **randomly selected** . . . ."<sup>3</sup>

20. On April 2, 2016, Plaintiff began receiving unsolicited, automatically dialed calls to his cellular telephone from the number "855-271-7383."

21. Although Plaintiff does not have any current relationship with Defendants, and has not for over thirteen years, if ever, the operator named Molly asked whether Plaintiff ever visited BBVA Compass in Temple, Texas.

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<sup>3</sup> *See also* Maurice Greer, LINKEDIN, <https://www.linkedin.com/in/maurice-greer-2976bb94> (last visited Nov. 14, 2016) (where the vice-president of BBVA lists on his LinkedIn profile under his experience "Utilize Predictive Dialing") (emphasis added).

22. Plaintiff expressly notified MSR and Compass that they had reached the wrong person, and requested not to be called during this first unsolicited call. (“April 2016 call”).

23. Upon information and belief, Defendants kept data as to which calls were authenticated as having reached a Compass customer, and which calls reached a wrong number.

24. During the April 2, 2016, call, the representative of defendants told plaintiff that the call had been made with an autodialer.

25. During the April 2, 2016, call Plaintiff also warned defendants that the nonconsensual automated call was a violation of federal law.

26. Defendant BBVA maintains a list of phone numbers for which, as plaintiff did, consumers have indicated a desire not to be called. The prerecorded message that plays when the number “855-271-7383” is called indeed states:

“If you prefer not to receive survey call, please clearly speak your ten digit phone number . . .”

27. Similarly, Defendant MSR maintains a list of telephone numbers that have been the subject of a request not to be called.<sup>4</sup>

28. However, defendants’ individual, and combined, policies, practices and procedures permit calls to be made to persons who have explicitly told MSR that it has reached the “wrong person.”

29. This happened to plaintiff.

30. On around June 2016, plaintiff emailed Compass customer service and notified Compass that it had called him in violation of federal law, and threatened a lawsuit.

31. Despite that on or before November 8, 2016 Defendants were on notice that Plaintiff did not wish to receive telephone calls from or on behalf of Defendants, that Plaintiff’s

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<sup>4</sup> MSR GROUP, <http://www.themsrgroup.com/call-list-removal/> (last visited Jan. 27, 2017).

phone number was not the number of a Compass customer or the customer Compass might have been trying to reach, that plaintiff was not a current customer of Compass, and that Plaintiff believed their calls to his cellular telephone may have been violations of federal law, Defendants again called Plaintiff's cellular telephone number using an automatic telephone dialing system.

32. Defendants' data and/or records showed that their previous phone call to Plaintiff's cellular phone had resulted in a "non-authenticate" i.e., that Defendants had called a non-customer about an account that did not belong to the call recipient and a transaction that did not involve the recipient.

33. In other words, Defendants used an autodialer to call Plaintiff's cellular telephone *again*, even though their best information showed that the call was to a non-customer. Plaintiff did not provide either Defendant with consent to receive automated calls.

34. At the time Plaintiff received the calls, Plaintiff had no relationship with either Defendant. In all events, any relationship Plaintiff or any of the other "non-authenticate" persons Defendants called may have had with Compass was completely unrelated to calls Defendants placed to telephone numbers.

35. The number "855-271-7383," when called, is answered by a recorded voice stating, "Thank you for calling BBVA Compass."

36. BBVA Compass hired MSR to make these calls, and knew that MSR was using an autodialer to make them. Compass also accepted the benefits of the calls, and continued to accept the benefits of the calls after plaintiff notified both Compass and MSR that they were violating the TCPA.

37. Plaintiff is the registered subscriber, with exclusive dominion and control, of the cellular telephone number to which the violative calls alleged herein were placed.

38. At the beginning of the April 2, 2016, call, the caller tried to authenticate that it had called the right person.

39. Upon information and belief, Defendants did not have or did not follow reasonable procedures to prevent autodialed calls to persons who did not consent, and/or who had previously requested not to receive calls.

40. Defendants' calls were a nuisance which briefly deprived Plaintiff of the use of his phone, invaded his personal privacy, and wasted his time. Additionally, Plaintiff incurred a reduction in his cellular battery life as a result of Defendants' calls.

### **CLASS ALLEGATION**

41. As authorized by Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of all other persons or entities similarly situated throughout the United States.

42. Plaintiff proposes to represent a class and sub-class of persons affected by Defendants' actions, described as follows:

All persons within the United States (i) to whom either defendant, directly or through another, (ii) made a call to their cellular phone (iii) using the same or similar system that was used to call Plaintiff (iv) between December 14, 2012 through the date of class certification; (v) excluded from the class are those persons who provided his or her cell phone number to the Defendants in connection with the transaction that was the subject of the call, or who did not request not to receive calls.

Plaintiff alleges a subclass of members of the above class who were called one or more times after defendant had received a "non-authenticate" notice or other information indicating that the cellular telephone number called went to a non-customer.

43. Excluded from the classes are the Defendants, any entities in which the Defendants have a controlling interest, the Defendants' agents and employees, any Judge to whom this action is assigned, and any member of the Judge's staff and immediate family.

44. The proposed class members are identifiable through phone records and phone number databases.

45. Upon information and belief, the potential class members number in the thousands, at least.

46. Individual joinder of these persons is impracticable.

47. Plaintiff is a member of the class.

48. There are questions of law and fact common to Plaintiff and to the proposed class, including but not limited to the following:

- a) Whether Defendants' calls were made using an automatic telephone dialing system;
- b) Whether the Defendants had consent to make such calls; including whether Defendants had consent for calls made after they were on notice that the number called was a "wrong number" and associated with a non-customer;
- c) Whether the Defendants' violations of the TCPA were willful or knowing; and
- d) Whether the Plaintiff and the class members are entitled to statutory damages as a result of the Defendants' actions.

49. Plaintiff's claims are based on the same facts and legal theories, and therefore are typical of the claims of class members.

50. Plaintiff is an adequate representative of the class because his interests do not conflict with the interests of the classes, he will fairly and adequately protect the interests of the classes, and he is represented by counsel skilled and experienced in class actions, including TCPA class actions.

51. The actions of Defendants are generally applicable to the class as a whole and to Plaintiff.

52. Common questions of law and fact predominate over questions affecting only individual class members, and a class action is the superior method for fair and efficient adjudication of the controversy. The only individual question concerns identification of class members, which will be ascertainable from records maintained by Defendants and/or their agents.

53. The likelihood that individual class members will prosecute separate actions is remote due to the time and expense necessary to prosecute an individual case, and given the small recoveries available through individual actions.

54. Plaintiff is not aware of any litigation concerning this controversy already commenced by others who meet the criteria for class membership described above.

#### **COUNT ONE**

##### ***Violation of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii) and 47 C.F.R. § 64.1200(a)***

55. Plaintiff incorporates the allegations from all previous paragraphs as if fully set forth herein.

56. The Defendants violated the TCPA by using any automatic telephone dialing system, to make calls to telephone numbers assigned to a cellular telephone service.

57. Plaintiff did not consent to receiving Defendants' automatically dialed calls.

58. Defendants placed the calls at issue knowing that they did not have the prior express consent of the recipient of the call, therefore the violations were willful or knowing.

59. Defendants' calls caused Plaintiff and class members concrete injuries including, but not limited to, invasion of their personal privacy; nuisance and disruption in their daily lives; reduction in cellular telephone battery life; and loss of use of their cellular telephones.

**WHEREFORE**, for himself and all class members, Plaintiff requests the following relief:

a) That the Court certify the proposed class under Rule 23 of the Federal Rules of Civil Procedure;

b) That the Plaintiff and all class members be awarded statutory damages of \$500 for each negligent violation of the TCPA, and \$1,500 for each knowing violation.

c) An injunction requiring Defendants not to use any automatic dialing system such as was used to call Plaintiff, to call any phone numbers that Defendants knew or had reason to know (e.g. through an authentication failure) were associated with non-customers or other persons who had not consented to receive such calls.

d) An injunction requiring Defendants to file quarterly reports of third party audits with the Court on its, system, procedures not to call any phone numbers Defendants knew or had reason to know were associated with non-customers or other persons who had not consented to receive such calls, as well as audits and “gap” reports describing how well it had done with TCPA compliance.;

e) An injunction requiring Defendants not to call any numbers after a request to cease communications to ensure that Plaintiff is not called in the future;

f) An injunction requiring Defendants to file quarterly reports of third party audits with the Court on its system and procedures not to call any numbers after a request to cease communications to ensure that Plaintiff is not called in the future;

g) That the Plaintiff and all class members be granted other relief as is just and equitable under the circumstances.

**JURY DEMAND**

Plaintiff demands trial by jury.

Dated this February 24, 2017.

Respectfully submitted,

*Attorneys for Plaintiff*

/s/ Alexander H. Burke

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