

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**ROBERT HOSSFELD,** )  
**individually and on behalf of all** )  
**similarly situated parties,** )

**Plaintiff,** )

**v.** )

**CASE NO: 2:16-CV-2017-VEH**

**BBVA COMPASS BANCSHARES,** )  
**INC., and MSR GROUP, LLC,** )

**Defendants.** )

**ANSWER AND AFFIRMATIVE DEFENSES**

**COMES NOW** The MSR Group, LLC (“MSR”), incorrectly named in Plaintiff Robert Hossfeld’s First Amended Complaint as “MSR Group, LLC,” and answers that complaint as follows:

1. To the extent the paragraph refers to parties other than MSR, no response is required. Otherwise, denied.

**JURISDICTION AND VENUE**

2. Denied.

3. No response is required.

4. Denied.

5. Denied.

## **PARTIES**

6. MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph, and therefore, they are denied.
7. No response is required.
8. Admitted.
9. Denied.
10. Congress's actions and the TCPA speak for themselves.
11. The TCPA speaks for itself.
12. The TCPA speaks for itself.
13. The TCPA speaks for itself.
14. Cases interpreting the TCPA and/or commenting on it speak for themselves.
15. The paragraph contains a statement which contains no citation to the law. No response is required to conclusions of law. To the extent a response is deemed to be required, MSR denies the averments of this paragraph.
16. The FCC's orders and rulings speak for themselves.

## **FACTUAL ALLEGATIONS**

17. Denied.
18. The first sentence of the paragraph states that the calls "are said" to have a certain purpose, but does not attribute the source of that characterization, and thus MSR is not required to respond. With respect to plaintiff's abandonment of his

own prior allegations, no response is required. To the extent a response is required to any material allegation within the paragraph, denied.

19. MSR admits that it uses an automatic telephone dialing system for certain calls. MSR denies that the referenced telephone number belongs to MSR. MSR denies that the quotation set forth in the complaint fully and fairly contains the language of the referenced message.

20. MSR denies that the referenced telephone number belongs to MSR. MSR is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of this paragraph, and therefore, they are denied.

21. Denied.

22. MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph, and therefore, they are denied.

23. Denied.

24. Denied.

25. MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph, and therefore, they are denied.

26. MSR denies that the referenced telephone number belongs to MSR. MSR denies that the quotation set forth in the Amended Complaint fully and fairly contains the language of the referenced message. Otherwise, the paragraph appears to relate to another party, and to that extent, no response is required. To

the extent a response is required, MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph, and therefore, they are denied.

27. MSR admits its keeps a list of telephone numbers of customers who have requested not to be called.

28. Denied.

29. Denied.

30. Plaintiff's e-mail speaks for itself.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

35. The telephone number referenced appears to relate to a party other than MSR. As such, no response is required.

36. The averments of paragraph 36 are directed to another party and therefore no response by MSR is required. To the extent that a response by MSR is deemed required, MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph, and therefore denies.

37. MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph, and therefore, they are denied.

38. MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 38 as phrased, and therefore they are denied.

39. Denied.

40. Denied.

### **CLASS ALLEGATIONS**

41. No response is required to Plaintiff's assertion that he is attempting to bring a class action. To the extent a response is required, denied.

42. Paragraph 42 describes the members of a purported class, and therefore no response is required. To the extent that a response is required, MSR denies the allegations of paragraph 42.

43. Paragraph 43 describes those purportedly excluded from the purported class, and therefore no response is required. To the extent that a response is required, MSR denies the allegations of paragraph 43.

44. MSR is without sufficient information to either admit or deny the material allegations of the paragraph, and therefore they are denied. MSR denies that any purported class meets the requirements of Rule 23, Fed. R. Civ. P.

45. MSR denies the averments of paragraph 45, and further denies that any purported class meets the requirements of Rule 23, Fed. R. Civ. P.

46. MSR denies the averments of paragraph 46, and further denies that any purported class meets the requirements of Rule 23, Fed. R. Civ. P.

47. MSR denies the averments of paragraph 47, and further denies that any purported class meets the requirements of Rule 23, Fed. R. Civ. P.

48. MSR is not required to respond to the questions of fact and law purportedly implicated in this lawsuit. To the extent a response is required, MSR denies that questions of law and fact common to Plaintiff and the purported class exist, and further denies that any such questions justify certification of a class pursuant to Rule 23, Fed. R. Civ. P.

49. MSR denies the averments of paragraph 49, and further denies that any purported class meets the requirements of Rule 23, Fed. R. Civ. P.

50. To the extent the paragraph merely reflects Plaintiff's beliefs and conclusions, no response is required. Otherwise, MSR is without sufficient knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 50, and therefore, they are denied. MSR further denies that any purported class meets the requirements of Rule 23, Fed. R. Civ. P.

51. MSR denies the averments of paragraph 51, and further denies that any purported class meets the requirements of Rule 23, Fed. R. Civ. P.

52. MSR denies the averments of paragraph 52, and further denies that any purported class meets the requirements of Rule 23, Fed. R. Civ. P.

53. The paragraph contains only Plaintiff's personal opinions and conclusions, to which no response is required. To the extent a response is required, denied.

54. MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 54, and therefore, they are denied.

### **COUNT ONE**

55. MSR realleges and incorporates by reference its responses to paragraphs 1-54 as if fully set forth herein.

56. Denied.

57. The averments of this paragraph call for a legal conclusion, and to that extent, no response is required. To the extent a response is required, MSR is without knowledge or information sufficient to form a belief as to the truth of the averments of the paragraph, and therefore, they are denied.

58. Denied.

59. Denied.

With respect to plaintiff's unnumbered request for relief, MSR denies that plaintiff is entitled to any such relief, whether or not specified, and demands strict proof thereof. Specifically, without limitation, MSR denies that plaintiff is entitled to (a) class certification, (b) statutory or other monetary damages, (c) any form of injunctive relief, and/or (d) any other relief sought.

To the extent that MSR has not denied any material allegation set forth above, MSR expressly denies the same and demands strict proof thereof.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

Plaintiff lacks standing to bring this lawsuit.

**SECOND AFFIRMATIVE DEFENSE**

This Honorable Court lacks personal jurisdiction over MSR.

**THIRD AFFIRMATIVE DEFENSE**

The lawsuit fails to state a claim upon which relief can be granted.

**FOURTH AFFIRMATIVE DEFENSE**

To the extent any violation of law or damages occurred beyond the statutory limitations period, any claim arising therefrom is barred by statute of limitations and/or the doctrine of laches.

**FIFTH AFFIRMATIVE DEFENSE**

This Court is not the proper venue for litigation of the Plaintiff's lawsuit.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's injuries, if any, were the result of an intervening or superseding cause or the acts or omissions of third or other parties over which MSR had no responsibility or control and for which MSR may not be held liable.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims must fail to the extent that Plaintiff failed to mitigate damages, if any.

**EIGHTH AFFIRMATIVE DEFENSE**

At all times and under all circumstances relevant to the Complaint, MSR acted in good faith and without malice.

**NINTH AFFIRMATIVE DEFENSE**

Any violation of law, which MSR denies, was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

**TENTH AFFIRMATIVE DEFENSE**

MSR did not willfully or knowingly contact Plaintiff's cellular phone(s) without prior express consent regarding the subject accounts in violation of the TCPA.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims must fail because MSR had a preexisting business relationship with the intended recipient of any calls.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff's TCPA claims fail because any alleged calls made by MSR were not made for the purpose of solicitation.

**THIRTEENTH AFFIRMATIVE DEFENSE**

MSR hereby incorporates all defenses available under the Telephone Consumer Protection Act, 47 U.S.C. § 227.

**FOURTEENTH AFFIRMATIVE DEFENSE**

MSR did not use a device with the capacity to dial numbers randomly or sequentially using a “number generator” and, hence, did not use an ATDS in violation of the TCPA.

**FIFTEENTH AFFIRMATIVE DEFENSE**

The imposition of statutory damages under the TCPA against MSR would violate the due process provisions of the United States Constitution and the Alabama Constitution.

**SIXTEENTH AFFIRMATIVE DEFENSE**

The Telephone Consumer Protection Act, and the subsequent interpretations of the Act by the Federal Communications Commission, are violative of the First Amendment of the United States Constitution as an impermissible restriction upon free speech.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Plaintiff has suffered no actual damage as a result of MSR’s alleged violation of the TCPA.

## **EIGHTEENTH AFFIRMATIVE DEFENSE**

The proposed class action does not satisfy requirements for class certification under the Fed. R. Civ. P. 23. MSR objects to any class certification on the following grounds:

(a) The Complaint fails to adequately define any class/persons who could properly maintain this action as a class actions;

(b) The class as alleged is overbroad, vague, and is not capable of being certified;

(c) The proposed class action does not meet the numerosity requirement under Fed. R. Civ. P. 23 (a) (1);

(d) There are not common questions of fact and law as to the members of the proposed class as defined by Fed. R. Civ. P. 23 (a) (2);

(e) The proposed class action does not meet the typicality requirement under Fed. R. Civ. P. 23 (a) (3);

(f) The proposed class action does not meet the requirement of adequate class representation under Fed. R. Civ. P. 23 (a) (4);

(g) Defendants' time-based defenses, such as statutes of limitations and laches, mandate the denial of class certification;

(h) The purported class representatives have not sustained the burden of establishing standing;

(i) Individualized issues predominate over common issues; and

(j) A class action is not superior to other available methods for the fair and efficient administration of this controversy.

#### **NINETEENTH AFFIRMATIVE DEFENSE**

Any violation of the law or damage suffered by Plaintiff, which MSR denies, was due to the affirmative actions and/or omissions of Plaintiff and does not give rise to any liability of MSR.

#### **TWENTIETH AFFIRMATIVE DEFENSE**

MSR pleads the *in pari delicto* doctrine and the defense of unclean hands.

#### **TWENTY-FIRST AFFIRMATIVE DEFENSE**

MSR reserves the right to assert additional defenses as discovery progresses. To the extent that any of the foregoing allegations in the Complaint have not been expressly admitted or denied, they are hereby denied.

Respectfully submitted, this the 3<sup>rd</sup> day of April, 2017.

*s/ Sharon D. Stuart*

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following; and I hereby certify that I have mailed by United States Postal Service the document to any non-CM/ECF participants, on this the 3<sup>rd</sup> day of April, 2017:

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*s/ Sharon D. Stuart*  
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