

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

MADELEINE YATES, on behalf of
herself and other persons similarly situated,

Plaintiff,

v.

CHECKERS DRIVE-IN RESTAURANTS,
INC. and VIBES MEDIA, LLC

Defendants.

Case No. 1:17-cv-09219

JUDGE SHARON JOHNSON COLEMAN

MAG. JUDGE JEFFREY COLE

THIRD AMENDED CLASS ACTION COMPLAINT

Plaintiffs Madeleine Yates brings this class action complaint and demand for jury trial against Defendants Checkers Drive-in Restaurants, Inc. and Vibes Media, LLC (collectively “Defendants”) to stop their practice of making unauthorized and unwanted text message calls to the cellular telephones of consumers nationwide and to obtain redress for all persons injured by their conduct. Plaintiff alleges as follows upon personal knowledge, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

NATURE OF THE ACTION

1. Defendant Checkers Drive-in Restaurants, Inc. is the company behind the nationwide fast-food restaurant chains “Checkers” and “Rally’s.”

2. Defendant Vibes Media, LLC is a mobile marketing company that helps marketers reach customers through their mobile devices.

3. In order to solicit consumers, Defendants send unauthorized automated telemarketing and/or advertising text messages to thousands of consumers’ cellular telephones nationwide.

4. Defendants take steps necessary to physically place such text message calls using an automated telephone dialing system and/or are so involved in placing the texts as to be deemed to have initiated them.

5. Defendants do not obtain the required consent from such consumers to make such text message calls and, therefore repeatedly violate the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”).

6. Defendants also violate the TCPA by failing to provide in every text message advertisement sent an automated mechanism to opt-out of receiving such messages.

7. The TCPA was enacted to protect consumers from unauthorized calls, exactly like those alleged in this case. Defendants make these text message calls despite the fact that neither Plaintiffs nor the other members of a putative class of consumers (defined below) provide Defendants with their prior express written consent to receive such text messages.

8. As a result, Plaintiff, on behalf of herself and a putative class, seeks an injunction requiring Defendants to cease all unlawful text messaging activities alleged in this Complaint, and also an award of statutory damages to Plaintiffs and the class for each such violation, together with costs and reasonable attorneys' fees.

PARTIES

9. Plaintiff Madeline Yates is a natural person and citizen of the State of Louisiana.

10. Defendant Checkers Drive-in Restaurants, Inc. is a Florida-based for-profit corporation that does business under the registered trade names “Checkers” and “Rally’s.”

11. Defendant Vibes Media, LLC is a Chicago-based for-profit corporation.

12. Defendants conduct business in Illinois and throughout the United States.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 for Plaintiff's claims arising under the federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, *et seq.*

14. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 (b)-(c) and 1441(a) because a substantial part of the events giving rise to the claim occurred in this District. Defendant Vibes Media, LLC is also incorporated and has its principal office in this District.

FACTUAL ALLEGATIONS

15. Defendant Checkers Drive-in Restaurants Inc. ("Checkers") contracts with Defendant Vibes Media, LLC ("Vibes") to send advertisements to consumers via nationwide text message promotion campaigns. Checkers' markets this campaign on their products and in their restaurants, inviting consumers to participate.

16. Defendants' text message promotion campaign is ostensibly very simple. Supposedly a consumer can text an advertised keyword (e.g. "Buford" or "Burger") to Defendants' 5-digit short message service ("SMS") number, and in exchange that consumer receives a coupon for Checkers food.

17. If Defendants did exactly that, there would be no lawsuit here. Yet they do not. Instead, in response to receiving a consumer's keyword request for a coupon, Defendants send a commercial advertisement text.

18. Specifically, Defendants send a text stating "REPLY with your ZIP CODE to get your FREE [Checkers food item] coupon & other deals from Checkers/Rally's at this #. No purchase necessary to join."

19. This single text, itself, is a violation of the Telephone Consumer Protection Act.

20. The Federal Communications Commission has specifically issued guidance relative to so-called “on-demand text offers.” It stated: “we find that a one-time text sent in response to a consumer’s request for information does not violate the TCPA or the Commission’s rules so long as it: (1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains *only the information requested by the consumer with no other marketing or advertising information.*” [emphasis added].¹

21. Contrary to the dictates of the TCPA and FCC, Defendants do not respond to class members with a text message containing only a coupon. In fact, Defendants text response contains *no* coupon.

22. Plaintiffs and class members did not provide any prior express written consent to receive the text message that contained no coupon.

23. Not only did Defendants send a text message to all class members that violated the TCPA when it did not contain the requested coupon, Defendants also failed to secure the requisite consent from class members before sending them additional text message advertisements.

24. As shown in Paragraph 18 above, Defendants purposely bundle the requested coupon with an offer of “other deals.” It is not apparent (much less explicit) that by “other deals” the Defendants actually mean to begin a text advertising campaign to class members’ cell phones using an automated telephone dialing system.

25. Thus, Plaintiff and class members did not expressly provide their prior express written consent to receive the numerous commercial text messages that Defendants ultimately sent

¹ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8015-16 at ¶106 (2015)

to them. Nor did any class member consent to receiving advertising or telemarketing messages issued via an automatic telephone dialing system.

26. To add insult to injury, Defendants conceal how to escape Defendants' text advertising campaign. Defendants fail to disclose in every text message how to opt-out of the text advertisement campaign. Because Defendants send so many texts to class members, it is common for class members to miss, delete or otherwise lose track of the text messages that provide instructions on how to escape. This is purposeful on the part of the Defendants, because they seek to disseminate as many text advertisements as possible to increase their bottom line.

27. Defendants could almost effortlessly incorporate opt-out instructions into each of the advertising text messages that they transmit.

28. The nature of the text messages sent by Defendants to Plaintiffs and class indicates that they used an automatic telephone dialing system.

29. The text messages were written in an impersonal manner.

30. The text messages were not addressed to Plaintiffs or class members by name.

31. The text messages only consisted of generic sales language.

32. The hardware and software used by Defendants have the capacity to store, produce, and dial random and sequential numbers, and/or receive and store lists of telephone numbers, and to dial such numbers *en masse* in an automated fashion without human intervention. Defendants' automated dialing equipment includes features substantially similar to a predictive dialer, inasmuch as it is capable of making numerous text message calls simultaneously (all without human intervention).

33. Vibes Media LLC designs customized "mobile experiences" for customers on behalf of big brands like Checkers.

34. Checkers enlisted Vibes Media LLC to create a customized software platform and text campaign in order to initiate thousands of text messages *en masse* to consumers.

35. Vibes Media LLC was significantly involved in the development and implementation of the content and technology used in the Checkers text advertising campaign at issue in this case.

36. The text messages alleged herein were exclusively sent by Defendants. Defendants sent, or had sent on their behalf, the same (or substantially the same) text messages *en masse* to thousands of cellular telephone numbers.

37. Defendants created and/or controlled the content of each text message, initiated each text message, took steps necessary to physically place the call and/or were so involved in sending each text message at issue that they could be considered to have initiated them.

38. The advertisements sent by Defendants to Plaintiff via auto-dialed text messages were not sent pursuant a written agreement that included a clear and conspicuous authorization for Defendants to deliver telemarketing and/or advertising text messages via an automatic telephone dialing system.

39. Through their conduct, Defendants caused class members actual harm by sending the unauthorized text message calls at issue. Plaintiff and members of the class were not only subjected to the aggravation that necessarily accompanies the receipt of unauthorized text messages, but also because consumers frequently have to pay their cell phone service providers for the receipt of such unauthorized text messages. Additionally, class members were harmed by the inconvenience and confusion attendant to receiving ATDS calls that are not accompanied by opt-out directions.

40. Moreover, Plaintiffs and members of the class suffered injuries in the form of invasion of privacy and violations of their statutory rights, the monies paid to receive Defendants' unsolicited text messages, the diminished value and utility of their telephone equipment and telephone subscription service (i.e. the value of such equipment and services is higher when unencumbered by repeated and harassing text messages), the amount of time lost answering and fielding unwanted telemarketing text messages, the wear and tear on their telephone equipment, the loss of battery (which becomes diminished with each incoming phone call), the loss of battery life (which has a finite number of charging cycles), and electricity costs required to recharge their cellular phones.

41. Defendants were and are aware that the above-described text messages were being sent on a widespread basis, and that the text messages were being sent to Plaintiffs and class members who had not provided prior express written consent to receive them.

42. The above factual allegations are true for Plaintiff individually and as a member of the class.

PLAINTIFF MADELINE YATES

43. On December 18, 2016, at approximately 7:34 PM Central Standard Time ("CST"), the following text message exchange occurred between Defendants and Plaintiff Madeline Yates:

44. Ms. Yates texted the word "BUFORD" to Defendants' SMS number "88001" from her cellular phone number ending in "-4835" to obtain one coupon for a free "Big Buford" cheeseburger.

45. In response, Defendants did not send the coupon. Instead, they sent a text message stating:

REPLY with your ZIP CODE to get your FREE Big Buford coupon & other deals from Checkers/Rally's at this #. No purchase necessary to join.

46. To obtain the coupon she had originally requested, Ms. Yates replied by sending a text message with her zip code “70118.” Defendants responded with the following text message:

You're a BOSS! You scored a FREE Big Buford from Checkers/Rally's. Tap to view & redeem your offer: <http://vbs.cm/D1Xq3m>. Txt STOP2stop.

47. Defendants then sent the following text messages to Ms. Yates at her “-4835” number:

48. On January 10, 2017, at approximately 9:02 AM,

Go BUCK wild on this deal. Checker/Rallyburger with Cheese for just a \$1 at Checkers/Rally's. Limited time only. <http://vbs.cm/G1cu6q> Txt HELP4help, STOP2end.

49. On January 17, 2017, at approximately 9:02 AM,

When two burgers become one! Grab a FREE Roadhouse Baconzilla w/LG drink purchase at Checkers/Rally's. View & redeem: <http://vbs.cm/t1Cwbd> Exp1/23/17.

50. On January 24, 2017, at approximately 9:03 AM,

Seasoned & cheese-oned. Get FREE Monsterella Stix (4PC.) w/any drink purchase at Checkers/Rally's. View & redeem: <http://vbs.cm/G19xAs> Exp1/30/17. Txt STOP2end.

51. On February 3, 2017, at approximately 9:04 AM,

Get SUPER saucy this Sunday. Score big with any flavor 20pc wings for \$12.99 w/purchase. Checkers/Rally's. View/Redeem: <http://vbs.cm/p2M0LS> Exp2/6/17.

52. On February 7, 2017, at approximately 10:02 AM,

BACON CHEDDAR CRISP. Now part of the 4/\$3 deal at Checkers/Rally's. Get a sandwich, fries, drink & apple pie - all for \$3: <http://vbs.cm/W2Q2vH>. Txt HELP4help.

53. On February 14, 2017, at approximately 9:03 AM,

Fries > Flowers. Profess your Fry Love this Valentine's day. Get a FREE Lg fry w/purchase from Checkers/Rally's. View & redeem: <http://vbs.cm/02S3H4> Exp 2/20/17

54. On February 28, 2017, at approximately 9:04 AM,
New deal alert! FREE Monsterella Stix Dbl Burger or Monsterella Chicken Parm w/Lg drink purchase @ Checkers/Rally's. View/redeem: <http://vbs.cm/B2w5mg>.
55. On March 14, 2017, at approximately 9:04 AM,
These shrimp are cray. Get a FREE Cheddar Biscuit Shrimp & Fries Box w/ Lg drink purchase at Checkers/Rally's. View & redeem: <http://vbs.cm/R2K8kc> Exp3/23/17.
56. On March 24, 2017, at approximately 10:12 AM,
Two ways to go bold. Buy 1 Crispy Fish or Spicy Chicken sandwich, get 1 FREE at Checkers/Rally's. View & redeem: <http://vbs.cm/n2KCnP> Exp4/7/17. Txt STOP2stop.
57. On April 11, 2017, at approximately 9:04 AM,
Oh Yeah! The Kool-Aid Watermelon Slushie is NEW at Checkers/Rally's. Get a FREE regular size w/any purchase. View & redeem: <http://vbs.cm/Q23Hf2> Exp4/17/17.

CLASS ACTION ALLEGATIONS

58. **Class Definition:** Plaintiff Madeline Yates brings this action on behalf of herself and a class defined as follows:

Class: All individuals in the United States whose wireless telephone number Defendants, or someone on Defendants' behalf, called in connection with Defendants' text message advertising campaigns.

Excluded from the Class are: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, Defendants' subsidiaries, parents, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and their current or former employees, officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and

Defendants' counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

59. **Numerosity:** The exact number of Class members is unknown and not available to Plaintiffs at this time, but it is clear that individual joinder is impracticable. Upon information and belief, Defendants send text message advertisements to thousands of consumers who fall into the definition of the Class. Class members can be identified through Defendants' records.

60. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiffs and the putative Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

- (a) Whether Defendants' conduct violated the TCPA;
- (b) Whether Defendants sent text messages to Class Members using an automatic telephone dialing system, as contemplated by the TCPA;
- (c) Whether Defendants systematically sent telemarketing and/or advertising text messages to Class Members who did not previously provide it with prior express written consent to receive such text message calls;
- (d) Whether Defendants sent telemarketing and/or advertising text messages to Class Members where those messages did not include opt-out instructions; and
- (e) Whether Plaintiff and Class Members are entitled to treble damages based on the willfulness of Defendants' conduct.

61. **Typicality:** Plaintiff's claims are typical of the claims of other members of the Class in that Plaintiff and the Class members sustained damages arising out of Defendants' uniform wrongful conduct and unsolicited text message calls.

62. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class, and has retained counsel competent and experienced in complex litigation and class actions. Plaintiff's claims are representative of the claims of the other members of the Class. That is, Plaintiff and the Class members sustained damages as a result of Defendants' conduct and received substantially the same text messages. Plaintiff also has no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiff. Plaintiff and her counsel are committed to vigorously prosecuting this action on behalf of the members of the Class, and have the financial resources to do so. Neither Plaintiff nor her counsel have any interest adverse to the Class.

63. **Appropriateness:** This class action is also appropriate for certification because Defendants have acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class and making final class-wide injunctive relief appropriate. Defendants' practices apply to and affect the members of the Class uniformly, and Plaintiff's challenge of those practices hinges on Defendants' conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiff. Additionally, the damages suffered by individual members of the Class will likely be small relative to the burden and expense of individual prosecution of the complex litigation necessitated by Defendants' actions. Thus, it would be virtually impossible for the members of the Class to obtain effective relief from Defendants' misconduct on an individual basis. A class action provides the benefits of single adjudication,

economies of scale, and comprehensive supervision by a single court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

64. Plaintiff reserves the right to revise the foregoing "Class Allegations" and "Class Definition" based on facts learned through additional investigation and in discovery.

CAUSE OF ACTION
(Violation of 47 U.S.C. § 227, *et seq.* – Telephone Consumer Protection Act)
(on behalf of Plaintiff and the Class)

65. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

66. In an effort to solicit consumers, Defendants sent unauthorized and unwanted telemarketing and/or advertising text messages to Plaintiff and class members' cellular telephones without their prior express written consent.

67. Defendants sent the text messages to Plaintiff and class members' cellular telephone numbers using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and/or receive and store lists of phone numbers, and to dial such numbers *en masse*.

68. Defendants utilized equipment that sent the text messages to Plaintiff and other class members without human intervention.

69. Defendants took steps to physically place such text message calls and/or were so involved in placing the calls as to be deemed to have initiated them.

70. By sending the telemarketing and/or advertising text messages to Plaintiff and class members' cellular telephones without prior express written consent and by utilizing an ATDS, Defendants violated 47 U.S.C. § 227(b)(1)(A)(iii).

71. By failing to provide an automated, interactive voice- and/or key press-activated opt-out mechanism for Plaintiff and class members to make a do-not-call request, Defendants also violated 47 U.S.C. § 64.1200(b)(3).

72. As a result of Defendants' unlawful conduct, Plaintiff and class members suffered actual damages and have also had their rights to privacy adversely impacted. Plaintiffs and the class are therefore entitled to, among other things, a minimum of \$500 in statutory damages for each such violation under 47 U.S.C. § 227(b)(3)(B).

73. Because Defendants' misconduct was willful and knowing, the Court should, pursuant to 47 U.S.C. § 227(b)(3), treble the amount of statutory damages recoverable by the Plaintiff and the other members of the putative class.

74. Additionally, as a result of Defendants unlawful conduct, Plaintiff and class members are entitled to an injunction under 47 U.S.C. § 227(b)(3)(A) to ensure that Defendants' violations of the TCPA do not continue into the future.

RELIEF REQUESTED

WHEREFORE, Plaintiff Madeleine Yates, individually and on behalf of the class, prays for the following relief:

(a) An order certifying this case as a class action under Fed. R. Civ. P. 23(a) & (b)(3), and appointing Plaintiff Madeleine Yates as class representative and her attorneys as class counsel;

(b) Enter a judgment in favor of Plaintiff and the proposed class for all damages available under the TCPA, including \$500.00 per violation and up to \$1,500.00 per violation if Defendants willfully violated the TCPA;

(c) An order declaring that Defendants' actions, as set out above, violate the TCPA;

(d) A declaratory judgment that the telephone calling equipment utilized by Defendants constitutes an automated telephone dialing system under the TCPA;

(e) An order requiring Defendants to disgorge any ill-gotten funds acquired as a result of their unlawful telephone calling practices;

(f) An injunction requiring Defendants to cease all unsolicited text message activities, and otherwise protecting the interests of the classes;

(g) Award Plaintiff and the class all expenses of this action, and requiring Defendants to pay the costs and expenses of class notice and claims administration; and

(h) Such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs demand trial by jury on all issues for which a jury trial is allowed.

Respectfully submitted:

/s/ Roberto Luis Costales

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