

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**CAROL MILLER**, individually and on behalf  
of all others similarly situated,

*Plaintiff,*

v.

**BATH SAVER, INC.** and **BATH FITTER  
MANUFACTURING INC.**,

*Defendants.*

Case No. 1:21-cv-01072-JPW

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

**FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiff Carol Miller (“Plaintiff” or “Plaintiff Miller”) brings this Class Action Complaint and Demand for Jury Trial against Defendants Bath Saver, Inc. (“Bath Saver”) and Bath Fitter Manufacturing Inc. (“Bath Fitter”) to stop the Defendants from violating the Telephone Consumer Protection Act (“TCPA”) by making pre-recorded telemarketing calls without prior express written consent, including to consumers who registered their phone numbers on the National Do Not Call registry (“DNC”). Plaintiff also seeks injunctive and monetary relief for all persons injured by Defendants’ conduct. Plaintiff, for this Complaint, alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

**PARTIES**

1. Plaintiff Carol Miller is a resident of Etters, Pennsylvania.
2. Defendant Bath Saver, Inc. is a Pennsylvania corporation headquartered in this District.

3. Defendant Bath Fitter Manufacturing Inc. is a Delaware corporation headquartered in Tennessee. Bath Fitter conducts business throughout this District, Pennsylvania, and the U.S.

### **JURISDICTION AND VENUE**

4. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331, as the action arises under the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”).

5. This Court has personal jurisdiction over the Defendants because Bath Saver resides in this District and because wrongful conduct giving rise to this case was directed from and to this District as part of the business Bath Saver does with Bath Fitter in this District, and venue is proper in this District under 28 U.S.C. §§ 1391(b)(1)-(2) for the same reasons.

### **INTRODUCTION**

6. As the Supreme Court recently explained, “Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints. For nearly 30 years, the people’s representatives in Congress have been fighting back.” *Barr v. Am. Ass’n of Political Consultants*, No. 19-631, 2020 U.S. LEXIS 3544, at \*5 (U.S. July 6, 2020).

#### The TCPA Prohibits Automated Telemarketing Calls

7. The TCPA makes it unlawful to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a cellular telephone service or that is charged per the call. *See* 47 U.S.C. § 227(b)(1)(A)(iii).

8. The TCPA provides a private cause of action to persons who receive calls in violation of 47 U.S.C. § 227(b)(1)(A) or 47 U.S.C. § 227(b)(1)(B). *See* 47 U.S.C. § 227(b)(3).

9. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls 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.

10. In 2013, the FCC required prior express written consent for all autodialed or prerecorded telemarketing calls (“robocalls”) to wireless numbers and residential lines. Specifically, it ordered that:

[A] consumer’s written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received “clear and conspicuous disclosure” of the consequences of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.[] In addition, the written agreement must be obtained “without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.[]”

*In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1844 (2012) (footnotes omitted).

The National Do Not Call Registry

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

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

*Id.*

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

### **COMMON ALLEGATIONS**

14. Bath Fitter is a manufacturer of bathtubs and shower stalls that sells its products across the United States through a network of regional affiliates.

15. Bath Fitter owns and operates some of the regional locations and franchises other of the regional locations.

16. Bath Saver is a Bath Fitter franchisee in Pennsylvania with a location in Harrisburg, PA.

17. Bath Fitter makes calls to solicit purchases of Bath Fitter’s products from a central call center on behalf of both company-owned locations and franchised locations in the Pennsylvania area.

18. Plaintiff registered her cell phone number on the DNC on December 15, 2013.

19. Plaintiff uses her cell phone number for personal use only. It is not associated with a business.

20. Plaintiff has received a series of unsolicited calls to her cell phone soliciting her purchase of a Bath Fitter bathtub or shower stall to her DNC registered telephone number since January of 2021.

21. On January 5, 2021, the Plaintiff received a call from the phone number 717-831-9762 to her cell phone. She did not answer this call and a voicemail with a pre-recorded voice message was sent to her cell phone and Plaintiff listened to the full message.

22. The voicemail identified the caller as Bath Fitter, a seller of bathtubs and shower stalls, and was otherwise generic and did not identify Plaintiff.

23. Because the call sounded prerecorded, was generic, unsolicited, and commercial in nature, and was made using what Bath Fitter's call center employees have identified as an "automated" system,<sup>1</sup> which typically includes an answering machine detection function that triggers delivery of a prerecorded message upon the detection of an answering machine to save on the costs of having live agents leave voice messages, Plaintiff believes Bath Fitter's voicemail was prerecorded.

24. Plaintiff received further unsolicited calls from phone number 717-831-9762 on February 5, 2021 at 5:41 PM; March 10, 2021 at 3:21 PM; April 10, 2021 at 11:18 AM; May 10, 2021 2:39 PM.

25. The caller ID for the calls from 717-831-9762 to Plaintiff's phone identified "BATHFITTER – Harrisburg, PA."

26. When the phone number 717-831-9762 is called back, an automated system identifies the company as Bath Fitter and directs the caller to speak with an employee to, among other things, obtain a quote for Bath Fitter products for the Pennsylvania area.

27. During one such call, the employee promoting Bath Fitter's products stated that the calls were being made by Bath Fitter from a Pennsylvania call center and that Bath Fitter makes the calls from the Pennsylvania call center for franchised locations, like Bath Saver.

28. Bath Fitter expected that missed calls and voicemails, like the ones to Plaintiff's DNC registered number, would result in calls back from consumers who were not preexisting Bath

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<sup>1</sup> <https://800notes.com/Phone.aspx/1-888-713-0083/3>

Fitter customers to its Pennsylvania call center where it could promote the purchase of Bath Fitter products from its company owned and franchised locations, like Bath Saver.

29. The calls and sales made as a result of the calls were made as part of the contractual agreement between Defendants requiring Bath Fitter to make calls to promote Bath Fitter products in the regions associated with Bath Saver's locations, including Harrisburg, PA.

30. The calls were made for the joint financial benefit of both Defendants.

31. At no time did Plaintiff provide prior express consent to receive pre-recorded or other telemarketing calls from either of the Defendants.

32. Plaintiff also did not have an established business relationship with either of the Defendants at the time of the calls.

33. The unauthorized telephone calls that Plaintiff received from Bath Fitter as alleged herein, have harmed Plaintiff in the form of annoyance, nuisance, and invasion of privacy, and disturbed the use and enjoyment of her phone, in addition to the wear and tear on the phone's hardware (including the phone's battery) and the consumption of memory on the phone.

34. Defendants were and are aware that the above-described telephone calls are being made either by them directly, or made on their behalf, and that the telephone calls were being made to consumers who had not provided prior express written consent to receive them.

35. In fact, many consumers have complained for years about receiving repeated telemarketing calls from Defendants using the exact same telephone number used to call the Plaintiff:

- "Unsolicited call ... bath fitters. calls multiple times a week."<sup>2</sup>
- "Call is 1 of many calls recieved from bathfitter. Asked to not..."<sup>3</sup>

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<sup>2</sup> <https://us.shouldianswer.net/phone-number/7178319762>

<sup>3</sup> <https://reporttelemarketer.com/717-831-9762/>

### CLASS ACTION ALLEGATIONS

36. Plaintiff brings this action pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3) and seeks certification of the following Classes:

**Pre-recorded No Consent Class:** All persons in the United States who from four years prior to the filing of this action through trial (1) Defendants called (2) using a pre-recorded voice message, (3) on their cellular telephone number.

**Do Not Call Registry Class:** All persons in the United States who from four years prior to the filing of this action through trial (1) Defendants called more than one time, (2) within any 12-month period, (3) where the person's telephone number had been listed on the National Do Not Call Registry for at least thirty days, (4) for substantially the same reason the Defendants called the Plaintiff.

37. The following individuals are excluded from the Classes: (1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendants, their subsidiaries, parents, successors, predecessors, and any entity in which either Defendants or their parents have a controlling interest and their current or former employees, officers and directors; (3) Plaintiff's attorneys; (4) persons who properly execute and file a timely request for exclusion from the Classes; (5) the legal representatives, successors or assigns of any such excluded persons; and (6) persons whose claims against the Defendants have been fully and finally adjudicated and/or released. Plaintiff anticipates the need to amend the Class definition following appropriate discovery.

38. **Numerosity and Typicality:** On information and belief, there are hundreds, if not thousands of members of the Classes such that joinder of all members is impracticable, and Plaintiff is a member of both Classes.

39. **Commonality and Predominance:** There are many questions of law and fact common to the claims of the Plaintiff and the Classes, and those questions predominate over any

questions that may affect individual members of the Classes. Common questions for the Classes include, but are not necessarily limited to the following:

- (a) whether the Defendants placed pre-recorded voice message calls to Plaintiff and members of the Pre-recorded No Consent Class;
- (b) whether the Defendants placed multiple calls within a 12-month period to Plaintiff and other consumers whose telephone numbers were registered with the National Do Not Call Registry for at least 30 days at the time of each call;
- (c) whether the Defendants made these calls without first obtaining prior express written consent;
- (d) whether Defendants' conduct violated the TCPA; and
- (e) whether members of the Class are entitled to treble damages based on the willfulness of Defendants' conduct.

40. **Numerosity and Ascertainability:** The exact sizes of the Classes are unknown and not available to Plaintiff at this time, but it is likely that the Defendants made telephone calls to thousands of consumers who fall into each of the Classes, such that individual joinder of all members is impracticable. Members of the Classes can be identified through the Defendants' records.

41. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Classes, and has retained counsel competent and experienced in class actions. Plaintiff has no interests antagonistic to those of the Classes, and the 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 Classes, and have the financial resources to do so. Neither Plaintiff nor her counsel have any interest adverse to the Classes.



42. **Appropriateness:** This class action is also appropriate for certification because the Defendants have acted or refused to act on grounds generally applicable to the Classes and as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Classes and making final class-wide injunctive relief appropriate. Defendants' business practices apply to and affect the members of the Classes uniformly, and Plaintiff's challenge of those practices hinges on Defendant's conduct with respect to the Classes as a whole, not on facts or law applicable only to Plaintiff. Additionally, the damages suffered by individual members of the Classes 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 Classes 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.

**FIRST CLAIM FOR RELIEF**  
**Telephone Consumer Protection Act**  
**(Violation of 47 U.S.C. § 227)**  
**(On Behalf of Plaintiff and the Pre-recorded No Consent Class)**

43. Plaintiff repeats and realleges the prior allegations of this Complaint and incorporates them by reference herein.

44. The Defendants and/or their agents made unwanted solicitation telephone calls to Plaintiff and the other members of the Pre-recorded Class in an effort to sell goods and services.

45. These calls used artificial or pre-recorded voices.

46. These pre-recorded voice calls were made without the prior express written consent of Plaintiff and the other members of the Pre-recorded Class.

47. The Defendants have, therefore, violated 47 U.S.C. §§ 227(b)(1)(A)(iii) and (b)(1)(B). As a result of the Defendants' conduct, Plaintiff and the other members of the Pre-

recorded Class are each entitled to a minimum of \$500 in damages, and up to \$1,500 in damages, for each violation.

**SECOND CLAIM FOR RELIEF**  
**Telephone Consumer Protection Act**  
**(Violation of 47 U.S.C. § 227)**  
**(On Behalf of Plaintiff and the Do Not Call Registry Class)**

48. Plaintiff repeats and realleges the prior allegations of this Complaint and incorporates them by reference herein.

49. The TCPA's implementing regulation, 47 C.F.R. § 64.1200(c), provides that "[n]o person or entity shall initiate any telephone solicitation" to "[a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government."

50. Any "person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may" may bring a private action based on a violation of said regulations, which were promulgated to protect telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. 47 U.S.C. § 227(c).

51. The Defendants have violated 47 C.F.R. § 64.1200(c) by initiating, or causing to be initiated, telephone solicitations to telephone subscribers such as Plaintiff Miller and the Do Not Call Registry Class members who registered their respective telephone numbers on the National Do Not Call Registry, a listing of persons who do not wish to receive telephone solicitations that is maintained by the federal government.

52. The Defendants have violated 47 U.S.C. § 227(c)(5) because Plaintiff Miller and the Do Not Call Registry Class received more than one telephone call in a 12-month period made by or on behalf of the Defendants in violation of 47 C.F.R. § 64.1200, as described above.

53. As a result of the Defendants' conduct as alleged herein, Plaintiff Miller and the Do Not Call Registry Class suffered actual damages and, under section 47 U.S.C. § 227(c), are entitled, inter alia, to receive up to \$500 in damages for such violations of 47 C.F.R. § 64.1200.

54. To the extent the Defendants' misconduct is determined to be willful and knowing, the Court should, pursuant to 47 U.S.C. § 227(c)(5), treble the amount of statutory damages recoverable by the members of the Do Not Call Registry Class.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff individually and on behalf of the Classes, prays for the following relief:

- a) An order certifying this case as a class action on behalf of the Classes as defined above; appointing Plaintiff as the representative of the Classes; and appointing her attorneys as Class Counsel;
- b) An award of actual and/or statutory damages and costs;
- c) Enhanced damages for willful misconduct, up to treble the amount of statutory damages;
- d) An order declaring that the Defendants' actions, as set out above, violate the TCPA;
- e) An injunction requiring the Defendants to cease all unsolicited calling activity, and to otherwise protect the interests of the Classes; and
- f) Such further and other relief as the Court deems just and proper.

### **JURY DEMAND**

Plaintiff requests a jury trial.

**CAROL MILLER**, individually and on behalf of  
all others similarly situated,

DATED this 13th day of September, 2021.

/s/ Avi R. Kaufman  
Avi R. Kaufman  
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