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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

**Ricci Saliba**, individually and on behalf of all  
others similarly situated,

Plaintiff,

v.

**KS Statebank Corporation,**

Defendant.

Case No. 2:20-cv-00503-JAT

**FIRST AMENDED  
CLASS ACTION COMPLAINT**  
(JURY TRIAL DEMANDED)

Plaintiff Ricci Saliba brings this class action against Defendant KS Statebank Corporation (“Defendant”), and 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.

**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

1 of the TCPA.

2           2. Defendant is a bank with six branches throughout Kansas and one in Phoenix,  
3 Arizona.<sup>1</sup> Defendant also has Mortgage Origination Offices throughout the country  
4 including Kansas, Minnesota, Arizona and Missouri.<sup>2</sup>

6           3. As part of its business, Defendant engages in unsolicited telemarketing  
7 directed towards prospective customers with no regard for consumers' privacy rights.

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

11           5. Upon information and belief, Defendant caused thousands of text messages  
12 to be sent to the cellular telephones of Plaintiff and Class Members, causing them injuries,  
13 including invasion of their privacy, aggravation, annoyance, intrusion on seclusion,  
14 trespass, and conversion.

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

### 21 **JURISDICTION AND VENUE**

22           7. Jurisdiction is proper under 28 U.S.C. § 1331 as Plaintiff alleges violations of  
23 a federal statute. Jurisdiction is also proper under 28 U.S.C. § 1332(d)(2) because Plaintiffs  
24 allege a national class, which will result in at least one Class member belonging to a  
25

27 <sup>1</sup> See <https://www.ksstate.bank/about-us/> (last accessed 2/28/2020)

28 <sup>2</sup> *Id.*

1 different state than Defendant. Plaintiffs seek up to \$1,500.00 in damages for each call in  
2 violation of the TCPA, which, when aggregated among a proposed class numbering in the  
3 tens of thousands, or more, exceeds the \$5,000,000.00 threshold for federal court  
4 jurisdiction under the Class Action Fairness Act (“CAFA”).  
5

6 8. Venue is proper in the United States District Court for the District of Arizona  
7 pursuant to 28 U.S.C. §§ 1391(b) and (c) because Defendant is deemed to reside in any  
8 judicial district in which it is subject to the court’s personal jurisdiction, and because  
9 Defendant provides and markets its services within this district thereby establishing  
10 sufficient contacts to subject it to personal jurisdiction.  
11

### 12 **PARTIES**

13 9. Plaintiff is a natural person who, at all times relevant to this action, was a  
14 citizen of the state of Arizona.  
15

16 10. Defendant is a Kansas corporation with its principal address at 1010 Westloop  
17 PL. Manhattan, Kansas 66502-2836. Defendant directs, markets, and provides business  
18 activities throughout the State of Arizona. Defendant maintains a Phoenix Branch location  
19 at 5110 North Central Avenue, AZ 85012 and Loan Production Offices at 9237 East Via de  
20 Ventura, Suite 210, Scottsdale, AZ 85258 and 16430 North Scottsdale Road, Suite 117,  
21 Scottsdale, AZ 85254.  
22

### 23 **THE TCPA**

24 11. The TCPA prohibits: (1) any person from calling a cellular telephone number;  
25 (2) using an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded  
26 voice; (3) without the recipient’s prior express consent. 47 U.S.C. § 227(b)(1)(A).  
27

28 12. The TCPA further prohibits: (1) any person from initiating a call to any

1 residential telephone line; (2) using an artificial or prerecorded voice; (3) without the  
2 recipient's prior express consent. 47 U.S.C. § 227(b)(1)(B).

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

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

11 15. The Federal Communications Commission ("FCC") is empowered to issue  
12 rules and regulations implementing the TCPA. According to the FCC's findings, calls in  
13 violation of the TCPA are prohibited because, as Congress found, automated or prerecorded  
14 telephone calls are a greater nuisance and invasion of privacy than live solicitation calls,  
15 and such calls can be costly and inconvenient. The FCC also recognized that wireless  
16 customers are charged for incoming calls whether they pay in advance or after the minutes  
17 are used.

19 16. In 2012, the FCC issued an order further restricting automated telemarketing  
20 calls, requiring "prior express written consent" for such calls. *See In the Matter of Rules &*  
21 *Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶  
22 20 (Feb. 15, 2012) (emphasis supplied).

24 17. To obtain express written consent for telemarketing calls, a defendant must  
25 establish that it secured the plaintiff's signature in a form that gives the plaintiff a "clear  
26 and conspicuous disclosure' of the consequences of providing the requested consent....and  
27 [the plaintiff] having received this information, agrees unambiguously to receive such calls  
28

1 at a telephone number the [plaintiff] designates.” *In re Rules & Regulations Implementing*  
 2 *the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33,  
 3 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

4  
 5 18. The TCPA regulations promulgated by the FCC define “telemarketing” as  
 6 “the initiation of a telephone call or message for the purpose of encouraging the purchase  
 7 or rental of, or investment in, property, goods, or services.” 47 C.F.R. § 64.1200(f)(12). In  
 8 determining whether a communication constitutes telemarketing, a court must evaluate the  
 9 ultimate purpose of the communication. *See Golan v. Veritas Entm’t, LLC*, 788 F.3d 814,  
 10 820 (8th Cir. 2015).

11  
 12 19. “Neither the TCPA nor its implementing regulations ‘require an explicit  
 13 mention of a good, product, or service’ where the implication of an improper purpose is  
 14 ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918  
 15 (9th Cir. 2012)).

16  
 17 20. “‘Telemarketing’ occurs when the context of a call indicates that it was  
 18 initiated and transmitted to a person for the purpose of promoting property, goods, or  
 19 services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii) & 47 C.F.R. §  
 20 64.1200(f)(12)); *In re Rules and Regulations Implementing the Telephone Consumer*  
 21 *Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at \*49).

22  
 23 21. The FCC has explained that calls motivated in part by the intent to sell  
 24 property, goods, or services are considered telemarketing under the TCPA. *See In re Rules*  
 25 *and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC  
 26 Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients are encouraged to  
 27 purchase, rent, or invest in property, goods, or services during the call *or in the future*. *Id.*  
 28

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).

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”).

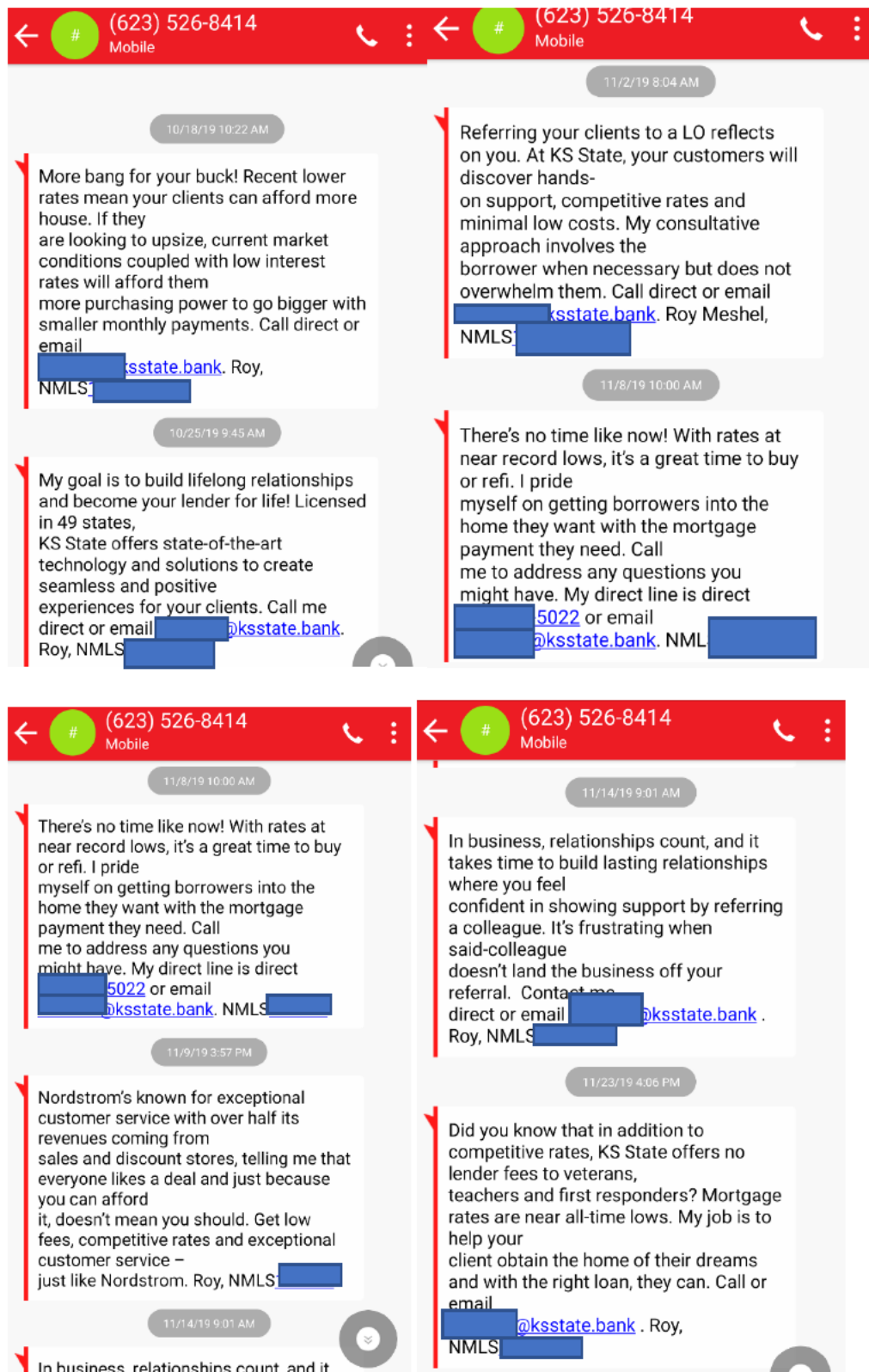
24. In regards to what constitutes an ATDS, the Ninth Circuit has explained “that the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator.” *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043 (9th Cir. 2018).

25. The Ninth Circuit has further explained that “By referring to the relevant device as an ‘automatic telephone dialing system,’ Congress made clear that it was targeting equipment that could engage in automatic dialing, rather than equipment that operated without any human oversight or control.” *Marks*, 904 F.3d at 1052 (citing 47 U.S.C. § 227(a)(1)) (emphasis in *Marks*).

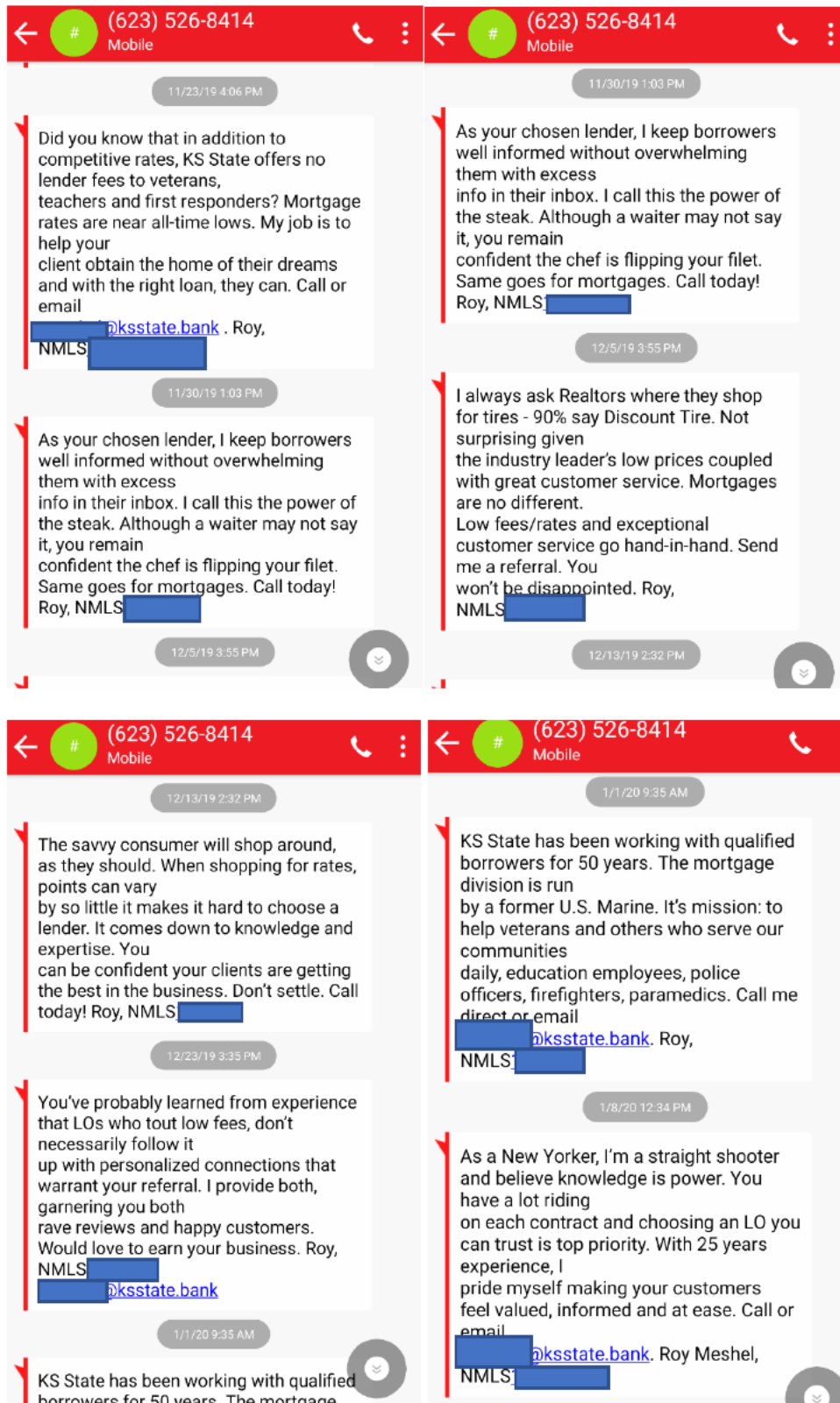
### **FACTS**

26. On or about October 18, 2019, October 25, 2019, November 2, 2019, November 8, 2019, November 9, 2019, November 14, 2019, November 23, 2019, November 30, 2019, December 5, 2019, December 13, 2019, December 23, 2019, January 1, 2020, January 8, 2020, January 15, 2020 and January 16, 2020, Defendant caused the

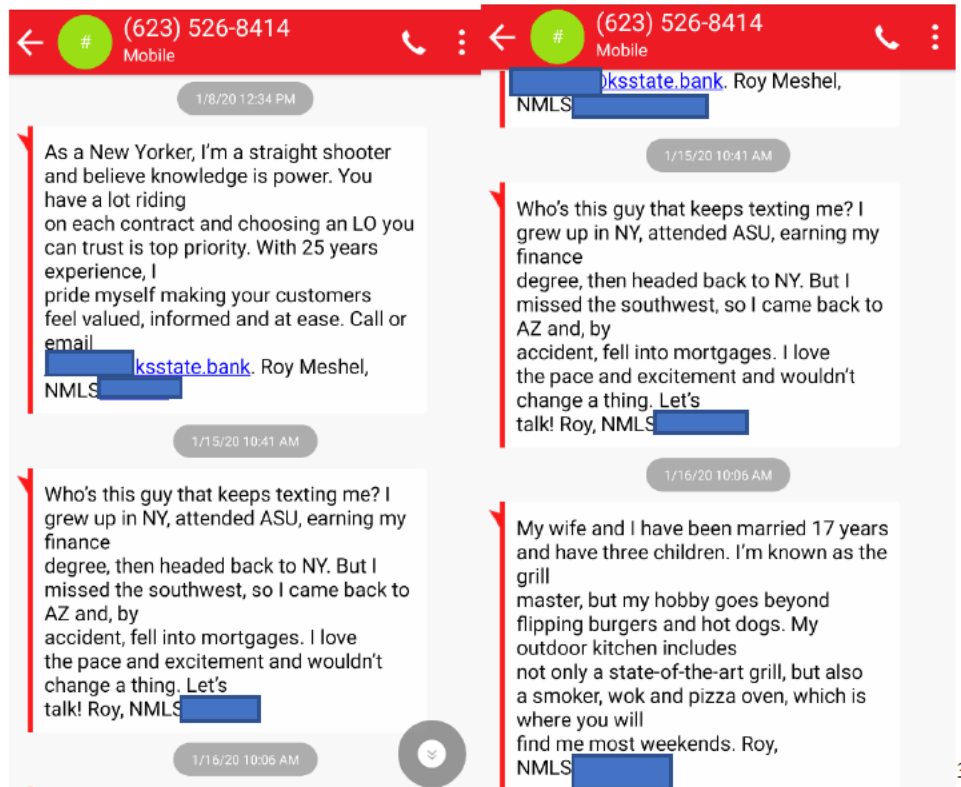
1 following automated text messages to be transmitted to Plaintiff's cellular telephone number  
 2 ending in 8025 ("8025 Number"):











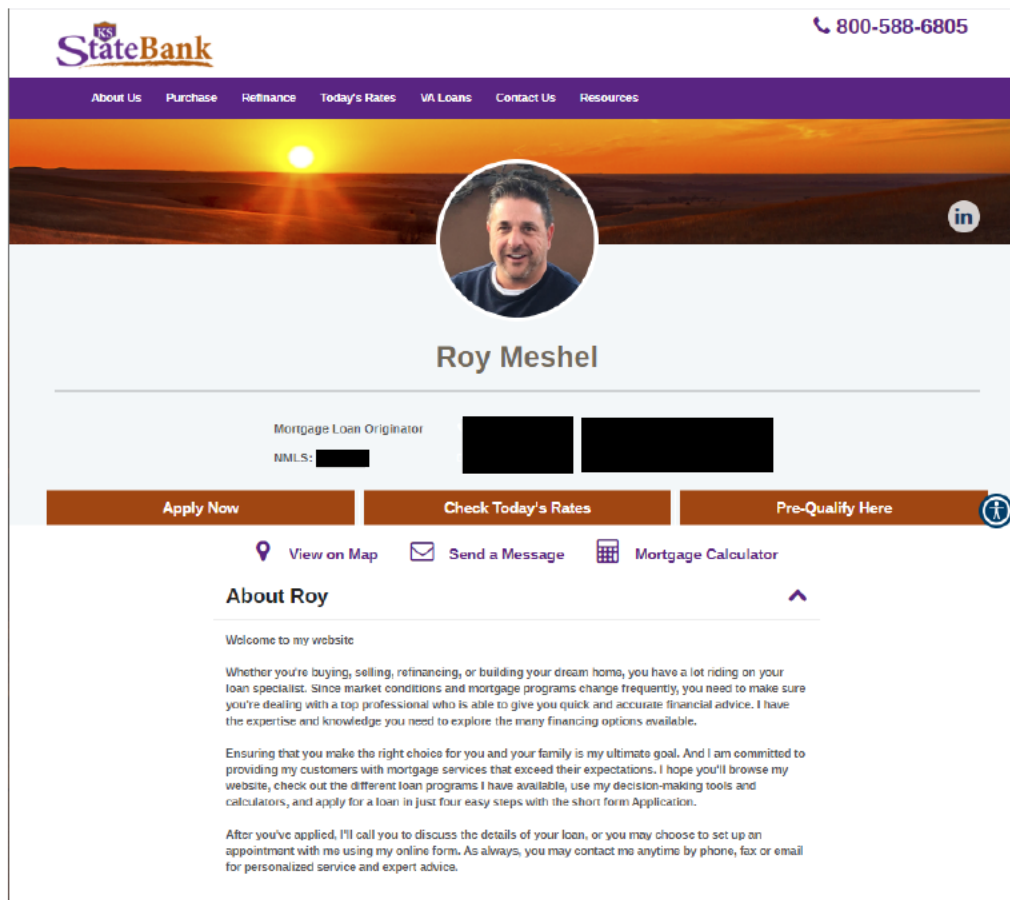
27. Plaintiff is the subscriber and/or sole user of the 8025 number.

28. The individual identified in the text messages, Roy Meshel, was an employee of Defendant's during all times in which the text messages were sent.

29. On its website, Defendant lists Mr. Meshel as its employee:<sup>4</sup>

<sup>3</sup> Plaintiff has redacted the personal email address, direct phone number and license information of Defendant's employee.

<sup>4</sup> See <https://homeloans.ksstate.bank/rmeshel/> (last visited April 16, 2020) (redacted).



30. On its website, Defendant lists Mr. Meshel as part of its “Mortgage Lending Team”.<sup>5</sup>

31. Defendant’s text messages constitute telemarketing/advertising because they promote Defendants business, goods and services.

32. Specifically, the text messages promote Defendant’s mortgage origination and mortgage financing business.

33. For example, the message sent on October 25, 2019 states “KS State offers state-of-the-art technology and solutions to create seamless and positive experiences for your clients.”

<sup>5</sup> See <https://homeloans.ksstate.bank/staff-roster/> (last visited April 16, 2020).

1           34.     Similarly, the message sent on November 2, 2019 states “At KS State, your  
2 customers will discover hands-on support, competitive rates and minimal low costs.”

3           35.     Similarly, the message sent on November 23, 2019 states “Did you know that  
4 in addition to competitive rates, KS State offers no lender fees to veterans teacher and first  
5 responders?”

6           36.     Upon information and belief, Defendant obtains a financial benefit from  
7 selling its goods and services including mortgage loans.  
8

9           37.     Plaintiff received the subject text messages within this judicial district and,  
10 therefore, Defendants violation of the TCPA occurred within this district.  
11

12           38.     Upon information and belief, Defendant caused similar text messages to be  
13 sent to individuals residing within this judicial district.  
14

15           39.     At no point in time did Plaintiff provide Defendant with her express consent  
16 to be contacted by text messages using an ATDS.

17           40.     The number used by Defendant (623-526-8414) is known as a “long code,” a  
18 standard 10-digit phone number that enabled Defendant to send SMS text messages *en*  
19 *masse*, while deceiving recipients into believing that the message was personalized and sent  
20 from a telephone number operated by an individual.  
21

22           41.     Long codes work as follows: Private companies known as SMS gateway  
23 providers have contractual arrangements with mobile carriers to transmit two-way SMS  
24 traffic. These SMS gateway providers send and receive SMS traffic to and from the mobile  
25 phone networks' SMS centers, which are responsible for relaying those messages to the  
26 intended mobile phone. This allows for the transmission of a large number of SMS messages  
27 to and from a long code.  
28

1           42. The impersonal and generic nature of Defendant's text messages,  
2 demonstrates that Defendant utilized an ATDS in transmitting the messages.

3           43. For example, the messages are lengthy, contain limited grammatical errors or  
4 typos, and contain proper punctuation and capitalization, all of which are indicators that the  
5 messages were not typed individually on a cell phone but instead prepared using an ATDS  
6 to transmit *en masse*.

7  
8           44. Further, the messages do not identify Plaintiff by name.

9  
10           45. To send the text messages, Defendant used a messaging platform (the  
11 "Platform") that permitted Defendant to transmit thousands of automated text messages  
12 without any human involvement.

13           46. The Platform has the capacity to store telephone numbers.

14           47. The Platform has the capacity to generate sequential numbers.

15           48. The Platform has the capacity to dial numbers in sequential order.

16           49. The Platform has the capacity to dial numbers from a list of numbers.

17           50. The Platform has the capacity to dial numbers without human intervention.

18           51. The Platform has the capacity to schedule the time and date for future  
19 transmission of text messages.

20           52. To transmit the messages at issue, the Platform automatically executed the  
21 following steps:

22                   (1) The Platform retrieved each telephone number from a list of

23                               numbers in the sequential order the numbers were listed;

24                   (2) The Platform then generated each number in the sequential order  
25  
26  
27  
28

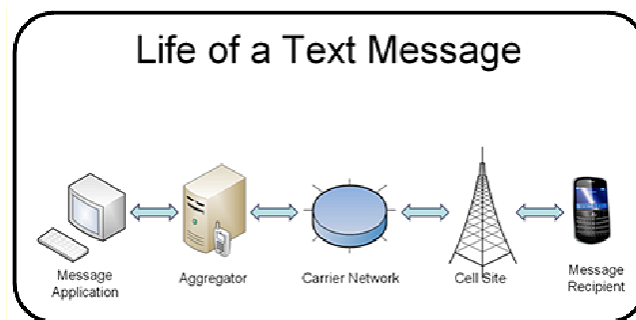
1 listed and combined each number with the content of Defendant's  
 2 messages to create "packets" consisting of one telephone number and  
 3 the message content;  
 4

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

8 (4) Upon receipt of each packet, the SMS aggregator transmitted each  
 9 packet – automatically and with no human intervention – to the  
 10 respective mobile carrier for the telephone number, again in the  
 11 sequential order listed by Defendant. Each mobile carrier then sent  
 12 the message to its customer's mobile telephone.  
 13  
 14

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

18 54. The following graphic summarizes the above steps and demonstrates that the  
 19 dialing of the text messages at issue was done by the Platform automatically and without  
 20 any human intervention:  
 21



28 55. Defendant's unsolicited text messages caused Plaintiff actual harm.

1 Specifically, Plaintiff estimates that she wasted at least ten seconds reviewing each of  
2 Defendant's unwanted messages.

3 56. Plaintiff was at home when she received many of these messages, which  
4 resulted in her phone vibrating and a disturbance of the domestic peace of Plaintiff's home.

5 57. Furthermore, Defendant's text messages took up memory space on Plaintiff's  
6 cellular telephone, with each message taking up approximately 190 bytes. The cumulative  
7 effect of unsolicited text messages like Defendants' poses a real risk of ultimately rendering  
8 the phone unusable for text messaging purposes as a result of the phone's memory being  
9 taken up.  
10

11 58. Defendant's text messages also caused the depletion of Plaintiff's cellular  
12 telephone battery. The battery used to power Plaintiff's cellular telephone can only be  
13 recharged a limited number of times before the battery's voltage begins to decrease, causing  
14 the cellular phone to turn off completely, without warning, if the battery drops below the  
15 minimum voltage needed to safely power Plaintiff's cellular telephone.  
16

17 59. Defendant's unsolicited text messages caused Plaintiff additional harm,  
18 including invasion of privacy, aggravation, annoyance, intrusion on seclusion, trespass, and  
19 conversion. Defendant's calls also inconvenienced Plaintiff and caused disruption to her  
20 daily life.  
21

## 22 **CLASS ALLEGATIONS**

### 23 **PROPOSED CLASS**

24 60. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on  
25 behalf of herself and all others similarly situated.  
26  
27  
28

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

2                           **All persons within the United States who, within the**  
 3                           **four years prior to the filing of this Complaint, were**  
 4                           **sent a text message using the same type of equipment**  
 5                           **used to text message Plaintiff, from Defendant, to said**  
 6                           **person's cellular telephone number.**

7           62. Plaintiffs reserve the right to modify the Class definitions as warranted as facts  
 8 are learned in further investigation and discovery.

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

#### 12                           **NUMEROSITY**

13           64. Upon information and belief, Defendant has placed calls to telephone  
 14 numbers belonging to thousands of consumers throughout the United States without their  
 15 prior express consent. The members of the Classes, therefore, are believed to be so  
 16 numerous that joinder of all members is impracticable.

17           65. The exact number and identities of the members of the Classes are unknown  
 18 at this time and can be ascertained only through discovery. Identification of the members  
 19 of the Classes is a matter capable of ministerial determination from Defendant's call records.

#### 20                           **COMMON QUESTIONS OF LAW AND FACT**

21           66. There are numerous questions of law and fact common to the Classes which  
 22 predominate over any questions affecting only individual members of the Classes. Among  
 23 the questions of law and fact common to the Classes are:

- 24                           (1) Whether Defendant made non-emergency calls to Plaintiff and the  
 25 Class members' cellular or residential telephones using an ATDS;  
 26



- 1 (2) Whether Defendant can meet its burden of showing that they obtained  
2 prior express written consent to make such calls;  
3  
4 (3) Whether Defendant's conduct was knowing and willful;  
5  
6 (4) Whether Defendant is liable for damages, and the amount of such  
7 damages; and  
8  
9 (5) Whether Defendant should be enjoined from such conduct in the  
10 future.

11 67. The common questions in this case are capable of having common answers.  
12 If Plaintiff's claims that Defendant routinely transmits text messages to cellular telephone  
13 numbers is accurate, Plaintiff and the Class members will have identical claims capable of  
14 being efficiently adjudicated and administered in this case.

15 **TYPICALITY**

16 68. Plaintiff's claims are typical of the claims of the members of the Classes, as  
17 they are all based on the same factual and legal theories.

18 **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

19 69. Plaintiff is a representative who will fully and adequately assert and protect  
20 the interests of the Class and has retained competent counsel. Accordingly, Plaintiff is an  
21 adequate representative and will fairly and adequately protect the interests of the Class.  
22

23 **SUPERIORITY**

24 70. A class action is superior to all other available methods for the fair and  
25 efficient adjudication of this lawsuit, because individual litigation of the claims of all  
26 members of the Class is economically unfeasible and procedurally impracticable. While the  
27 aggregate damages sustained by the Class are in the millions of dollars, the individual  
28

1 damages incurred by each member of the Class resulting from Defendant's wrongful  
 2 conduct are too small to warrant the expense of individual lawsuits. The likelihood of  
 3 individual Class members prosecuting their own separate claims is remote, and, even if  
 4 every member of the Class could afford individual litigation, the court system would be  
 5 unduly burdened by individual litigation of such cases.

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

13 **COUNT I**  
 14 **Violation of the TCPA, 47 U.S.C. § 227**  
 15 **(On Behalf of Plaintiff and the Class)**

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

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

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

27 75. Defendant used equipment having the capacity to store telephone numbers,  
 28

1 using a random or sequential generator, and to dial such numbers and/or to dial numbers  
2 from a list automatically, without human intervention, to make non-emergency telephone  
3 calls to the cellular telephones of Plaintiff and the other members of the Class.  
4

5 76. These calls were made without regard to whether Defendant had first obtained  
6 express permission from the called party to make such calls. In fact, Defendant did not have  
7 prior express consent to call the cell phones of Plaintiff and the other members of the  
8 putative Class when its calls were made.  
9

10 77. Defendant violated § 227(b)(1)(A)(iii) of the TCPA by using an automatic  
11 telephone dialing system to make non-emergency telephone calls to the cell phones of  
12 Plaintiff and the other members of the putative Class without their prior express consent.  
13

14 78. As a result of Defendant's conduct and pursuant to § 227(b)(3) of the TCPA,  
15 Plaintiff and the other members of the putative Class were harmed and are each entitled to  
16 a minimum of \$500.00 in damages for each violation. Plaintiff and the class are also entitled  
17 to an injunction against future calls.  
18

### 19 **PRAYER FOR RELIEF**

20 **WHEREFORE**, Plaintiff Ricci Saliba, individually and on behalf of the other  
21 members of the Class, pray for the following relief:

22 a. A declaration that Defendant's practices described herein violate the  
23 Telephone Consumer Protection Act, 47 U.S.C. § 227;  
24

25 b. A declaration that Defendant's violations of the Telephone Consumer  
26 Protection Act, 47 U.S.C. § 227, were willful and knowing;  
27  
28

1 c. An injunction prohibiting Defendant from calling telephone numbers  
2 assigned to cellular or residential telephones using an ATDS without the prior express  
3 consent of the called party;

4  
5 d. An award of actual, statutory damages, and/or trebled statutory damages; and

6 e. Such further and other relief the Court deems reasonable and just.

7  
8 **JURY DEMAND**

9 Plaintiff and Class Members hereby demand a trial by jury.

10 **DOCUMENT PRESERVATION DEMAND**

11 Plaintiff demands that Defendant take affirmative steps to preserve all records, lists,  
12 electronic databases or other itemization of telephone numbers associated with Defendant  
13 and the communication or transmittal of the prerecorded messages as alleged herein.

14 Date: April 17, 2020

15  
16 Respectfully submitted,

17 **IJH LAW**

18 /s/ Ignacio J. Hiraldo

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