

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of the** )  
 )  
**Rules and Regulations Implementing** )  
 ) **CG Docket No. 02-278**  
**the Telephone Consumer Protection** )  
 )  
**Act of 1991** )

**Submission for The Record of Joe Shields on the Petition**

**For Expedited Declaratory Ruling of Santander Consumer USA**

The Commission is seeking comments on the Santander Consumer USA Petition for Declaratory Ruling. The petition asks the Commission to issue a ruling that prior express consent cannot be revoked or alternatively that prior express consent can only be revoked by a method chosen by the caller. The draconian interpretation is already being used as a defense in a TCPA claim. The Commission must put a stop to these draconian interpretations of the TCPA that attempt to defeat the purposes of the TCPA.

A complaint<sup>1</sup> was filed in federal court based on prerecorded telemarketing calls made without prior **written** consent that also failed to provide the required opt out mechanism as required by 47 §64.1200(b)(3). When attempting to use the opt out button press, instead of providing an opt out option, the opt out message was repeated instead of complying with the opt out request. Since that did not work, the complainant called the defendants corporate office where the complainant was told that the defendant could not comply with the complainants opt out request<sup>2</sup>. Despite these facts the defendant replied

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<sup>1</sup> *Poole v. Wal-mart Stores Inc*, Case No.: 1:14-cv-23519 (S.D. FL Filed 09/12/14)

<sup>2</sup> See paragraphs 11– 20 of the attached Original Complaint.

to the complaint insisting that the opt out must be in writing<sup>3</sup>. This case is an example of what consumers will be subjected to if the Commission grants the Santander petition.

Nothing in the TCPA prohibits revocation of consent in any manner the called party choses. The TCPA's silence on how consent can be given or revoked is a clear indication that Congress intended for common law principles of giving and revoking consent to apply. Since common law principles of giving and revoking consent apply then it follows that consent and revocation of consent can be made in any manner the consumer chooses<sup>4</sup>. Limiting how consent can be revoked to some manner prescribed by the caller, as seen here, will discourage and frustrate consumer's attempts to opt out. Clearly, that was never the intent of Congress!

Letting the caller dictate how consent may be revoked is letting the fox guard the hen house. Revoking consent should not be limited by the caller. Clearly, prior express consent can be revoked and clearly, any method including an oral method provides a provable record of revocation of consent<sup>5</sup>. Consequently, the Santander petition must be denied.

Respectfully submitted,

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/s/

Joe Shields  
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<sup>3</sup> See 6<sup>th</sup> Affirmative Defense of the Attached Original Answer

<sup>4</sup> See *Gutierrez v. Barclays Group*, No. 10-CV-1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, at \*11-12 (S.D. Cal. Feb. 9, 2011) See also *Beal v. Wyndham Vacation Resorts, Inc.*, 956 F. Supp. 2d 962 - Dist. Court, WD Wisconsin.

<sup>5</sup> The Commission accepts recordings of calls as evidence of TCPA violations. Why then would the Commission reject recorded oral revocation of consent as evidence of TCPA violations?

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA**

JAMES POOLE, on behalf of himself  
and all others similarly situated,

CASE NO.:

Plaintiff,

**CLASS REPRESENTATION**

v.

WAL-MART STORES, INC.

Defendant.

/

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**CLASS ACTION COMPLAINT**

Plaintiff, James Poole, individually and on behalf of all others similarly situated, sues Defendant, Wal-Mart Stores, Inc. (“Wal-Mart”) and states as follows:

**NATURE OF THE ACTION**

1. This is a putative class action brought by Plaintiff, James Poole, pursuant to Federal Rule of Procedure 23, on behalf of himself and (1) all persons in the United States (2) to whose cellular telephone number (3) Wal-Mart placed a non-emergency telephone call (4) using an artificial or prerecorded voice relating to prescription medications (5) within four years of the complaint (6) where Wal-Mart did not have express written consent to call said cellular telephone number (the “Class”).

2. Plaintiff seeks damages and injunctive relief resulting from the illegal actions of Wal-Mart in contacting Plaintiff and Class members on their cellular telephone for non-emergency purposes using a prerecorded message or artificial voice in direct contravention of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”). The TCPA prohibits calls to cellular telephones using prerecorded or artificial voices without prior express written consent of the called party.

3. “Consumer complaints about abuses of telephone technology - for example, computerized calls to private homes - prompted Congress to pass the Telephone Consumer Protection Act of 1991 . . . .” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012). “Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls.” *Id.*

4. The TCPA regulates, among other things, the use of prerecorded messages and use of automatic telephone dialing systems (“ATDS”), or “autodialers.” 47 U.S.C. § 227(b)(1)(A)(iii). Specifically, the TCPA prohibits the use of prerecorded messages or autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party. 47 C.F.R. §64.1200(a)(2).

5. 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. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.

6. On February 15, 2012, the FCC revised its rules implementing the TCPA to require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers. In re Rules and Regulations Implementing the TCPA, 27 FCC Rcd. 1830, 1838-40 (2012). Pursuant to FCC rules, effective October 16, 2013, unambiguous written consent is required before a telemarketer makes an autodialed or prerecorded call to a wireless number, and there is no exception for telemarketers that have an established business relationship with the consumer.

**PARTIES, JURISDICTION AND VENUE**

7. Plaintiff James Poole (“Poole”) is and at all times mentioned herein was an individual person residing in the state of Florida.

8. Defendant, Wal-Mart, is a Delaware corporation that maintains its headquarters at 702 SW 8th Street, Bentonville, Arkansas. Wal-Mart is the world’s largest public corporation and operates retail stores throughout the United States. There are nearly 300 Wal-Mart affiliated stores throughout Florida.

9. This Court has subject matter jurisdiction under 28 U.S.C. §1331.

10. Personal jurisdiction and venue in this District are proper pursuant to 28 U.S.C. § 1391(b)(1) because Defendant resides in this District.

**CLASS ACTION ALLEGATIONS**

11. Many Wal-Mart stores have pharmacies. In a quest to compete with other pharmacies, Wal-Mart implemented a telemarketing tool in which it made automated calls to prior customers of Wal-Mart’s pharmacies and others using an artificial or prerecorded voice in order to solicit Wal-Mart’s services with regard to prescription medications.

12. Because the prerecorded calls were for telemarketing purposes, Wal-Mart was required to have express written consent prior to making the calls.

13. Wal-Mart was also required to allow consumers to opt out of these calls via an automated, interactive voice-and/or key press-activated opt-out mechanism and to honor requests by consumers to opt out.

14. Prior to making the prerecorded calls, Wal-Mart did not obtain express consent of consumers, including Plaintiff, as required by the TCPA.

15. In addition, Wal-Mart did not comply with the TCPA's requirements for allowing consumers, including Plaintiff, to opt out of the prerecorded calls.

**INDIVIDUAL PLAINTIFF'S ALLEGATIONS**

16. Several years after patronizing Wal-Mart's pharmacy, Plaintiff began receiving automated prerecorded voice messages from Wal-Mart relating to prescription medications even though Plaintiff had no prescriptions with Wal-Mart. Plaintiff never provided express consent to receive prerecorded or artificial voice calls to his cellular telephone from Wal-Mart.

17. In fact, at the time the calls started, Plaintiff was not a customer of Wal-Mart's pharmacy, but instead was a customer of a pharmacy of a competitor of Wal-Mart.

18. Wal-Mart continued to send prerecorded calls relating to prescriptions despite Plaintiff's attempts to stop Wal-Mart from continuing to make the calls.

19. The prerecorded calls were for telemarketing purposes as the purpose of the calls was to have Plaintiff refill his prescriptions with Wal-Mart instead of Wal-Mart's competitors. In addition, the prerecorded messages received by Plaintiff stated to press a number to opt out of receiving the calls. Yet, every time Plaintiff pressed the number to opt out of the calls, instead of accepting his request to opt out, the message replayed. Accordingly, Wal-Mart failed to honor Plaintiff's request to opt out of receiving the calls, and failed to comply with the TCPA's requirement that consumers be allowed to opt out via an automated, interactive voice-and/or key press-activated opt-out mechanism.

20. Plaintiff even called Wal-Mart's corporate office in order to ask for the calls to stop, but was told that they could not help.

**CLASS ALLEGATIONS**

21. Plaintiff brings this claim pursuant to Federal Rule of Civil Procedure 23(b)(2) and (b)(3) on behalf the following Class and Subclasses:

**TCPA Class**

(1) All persons in the United States (2) to whose cellular telephone number (3) Wal-Mart placed a non-emergency telephone call (4) using an artificial or prerecorded voice relating to prescription medications (5) within four years of the Complaint (6) where Wal-Mart did not have express written consent to call said cellular telephone number (the “Class”).

**TCPA Former/Non-Customer Subclass**

(1) All persons in the United States (2) to whose cellular telephone number (3) Wal-Mart placed a non-emergency telephone call (4) using an artificial or prerecorded voice relating to prescription medications (5) within four years of the Complaint (6) where Wal-Mart called when the person did not have any pending prescriptions with Wal-Mart and Wal-Mart did not have express written consent to call (“Subclass A”).

**TCPA Revocation Subclass**

(1) All persons in the United States (2) to whose cellular telephone number (3) Wal-Mart placed a non-emergency telephone call (4) using an artificial or prerecorded voice relating to prescription medications (5) within four years of the Complaint (6) where Wal-Mart called after the person opted out or revoked consent to be called (“Subclass “B”).

22. Plaintiff represents and is a member of the Class and Subclasses. Excluded from the Class are Defendant and any entities in which Defendant has a controlling interest, Defendant’s agents and employees, the Judge to whom this action is assigned and any member of the Judge’s staff and immediate family.

23. Plaintiff does not know the exact number of members in the Class, but based upon the size, national scope of Wal-Mart and the automated nature of the prerecorded messages, Plaintiff reasonably believes that the Class numbers in the thousands at a minimum.

24. The joinder of all class members is impracticable due to the size and relatively modest value of each individual claim. The disposition of the claims in a class action will provide substantial benefit to the parties and the Court in avoiding a multiplicity of identical suits. The Class can be identified easily through records maintained by Wal-Mart.

25. There are questions of law and fact common to the members of the Class and Subclasses, which common questions predominate over any questions that affect only individual Class and Subclass members. Those common questions of law and fact include, but are not limited to, the following:

- i. Whether Wal-Mart engaged in a pattern of using artificial or prerecorded voices to place calls to cellular phones;
- ii. Whether the calls at issue were for telemarketing purposes;
- iii. Whether Wal-Mart had prior express consent to place the calls;
- iv. Whether Wal-Mart failed to allow consumers to opt out of the calls;
- v. Whether Wal-Mart negligently violated the TCPA; and
- vi. Whether Wal-Mart willfully violated the TCPA.

26. As a person who received telephone calls from Wal-Mart using an artificial or prerecorded voice to his cellular phone relating to prescription medications without his prior express consent, Plaintiff asserts claims that are typical of the members of the Class. Plaintiff will fairly and adequately represent and protect the interests of the class, and has no interests which are antagonistic to any member of the Class.

27. Plaintiff has retained counsel experienced in handling class action claims, including class claims involving violations of federal and state consumer protection statutes such as the TCPA.

28. A class action is the superior method for the fair and efficient adjudication of this controversy. Class-wide relief is essential to compel Defendant to comply with the TCPA. The interest of individual Class Members in individually controlling the prosecution of separate claims against Defendant is small because the statutory damages for violation of the TCPA are small in comparison to the costs and expenses of litigation of such claims. Management of these claims is likely to present few difficulties because the calls at issue are all automated and the Class Members, by definition, did not provide the prior express consent required under the statute to authorize calls to their cellular telephones as Wal-Mart did not attempt to obtain consent required by the TCPA prior to placing the calls.

29. Defendant has acted on grounds generally applicable to the Class, thereby making final injunctive relief and corresponding declaratory relief with respect to the Class as a whole appropriate. Moreover, Plaintiff alleges that the TCPA violations complained of herein are substantially likely to continue in the future if an injunction is not entered.

**COUNT I – NEGLIGENT VIOLATIONS OF THE TCPA**

30. Plaintiff incorporates the allegations of Paragraphs 1 through 29 as if fully set forth herein.

31. Plaintiff brings this claim on behalf of the Class, Subclass A and Subclass B.

32. Wal-Mart made unsolicited telephone calls to the wireless telephone number of Plaintiff and the other members of the Class and Subclasses using a prerecorded or artificial voice. These phone calls were made without the prior written express consent of Plaintiff or the

other members of the Class or Subclasses.

33. Wal-Mart has therefore violated the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), which makes it unlawful for any person within the United States . . . 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 . . . .”

34. Each of the aforementioned calls by Wal-Mart constitutes a negligent violation of the TCPA.

35. In addition, Wal-Mart failed to allow Plaintiff and members of Subclass B to opt out of receiving the calls in violation of 47 C.F.R. § 64.1200.

36. As a result of Walmart’s negligent violations of the TCPA, Plaintiff and the members of the Class are entitled to an award of \$500.00 in statutory damages for each call in violation of the TCPA pursuant to 47 U.S.C. ¶ 227(b)(3)(B).

37. Plaintiff and Class and Subclass members are also entitled to and do seek injunctive relief prohibiting Defendant’s violation of the TCPA in the future.

**COUNT II – WILLFUL VIOLATIONS OF THE TCPA**

38. Plaintiff incorporates the allegations of Paragraphs 1 through 29 as if fully set forth herein.

39. Plaintiff brings this claim on behalf of the Class and Subclasses A and B.

40. Wal-Mart made unsolicited telephone calls to the wireless telephone number of Plaintiff and the other members of the Class and Subclasses using prerecorded or artificial voices.

41. These phone calls were made without the prior written express consent of Plaintiff or the other members of the Class or Subclasses.

42. Wal-Mart has therefore violated the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), which makes it unlawful for any person within the United States . . . 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 . . . .”

43. Each of the aforementioned calls by Wal-Mart constitutes a willful violation of the TCPA.

44. In addition, Wal-Mart failed to allow Plaintiff and members of Subclass B to opt out of receiving the calls in violation of 47 C.F.R. § 64.1200.

45. As a result of Walmart’s willful violations of the TCPA, Plaintiff and the members of the Class are entitled to an award of \$1500.00 in statutory damages for each call in violation of the TCPA pursuant to 47 U.S.C. ¶ 227(b)(3)(B).

46. Plaintiff and Class and Subclass members are also entitled to and do seek injunctive relief prohibiting Defendant’s violation of the TCPA in the future.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and the Class and against Defendant for:

- A. Statutory damages pursuant to 47 U.S.C. § 227(b)(1);
- B. Injunctive relief prohibiting such violations of the TCPA by Defendant in the future;
- C. An award of attorneys’ fees and costs to counsel for Plaintiff and the Class;
- D. Such other relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on issues so triable.

Respectfully submitted,

/s/ John A. Yanchunis

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

JAMES POOLE, on behalf of himself  
and all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

Civ. No. 1:14-cv-23519-KMW

Hon. Kathleen M. Williams

**DEFENDANT WAL-MART STORES, INC.'S  
ANSWER AND AFFIRMATIVE DEFENSES**

The undersigned, counsel of record for Defendant Wal-Mart Stores, Inc., (“Wal-Mart”) by and through counsel hereby answers the averments set forth in Plaintiff James Poole’s (“Plaintiff”) Complaint, as numbered herein, and asserts affirmative defenses as follows<sup>1</sup>:

**NATURE OF THE ACTION**

1. Wal-Mart admits that this purports to be a class action, but denies that this case is entitled to class treatment or that Plaintiff has any lawful grounds for asserting such action and otherwise denies the allegations contained in Paragraph 1 of the Complaint.
2. Wal-Mart admits that the Complaint purports to allege a claim under the Telephone Consumer Protection Act (“TCPA”), but denies it is liable to Plaintiff and/or any class of persons for any such claim and denies the remaining allegations of Paragraph 2 of the Complaint.

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<sup>1</sup> Defendant denies each and every allegation, matter, statement and thing contained in the Complaint except as may be hereinafter admitted, qualified or otherwise explained.

3. The allegations of Paragraph 3 of the Complaint contain no factual allegations and merely quote legal decisions, Wal-Mart states that the referenced case speaks for itself, and to the extent any factual allegations are contained in paragraph 3, Wal-Mart denies them.
4. Wal-Mart admits that the TCPA regulates certain use of prerecorded messages and “automatic telephone dialing systems” or “auto dialers” and prohibits certain use of such systems in the United States to call wireless telephone numbers. Wal-Mart denies the remaining allegations of Paragraph 4 and denies that Plaintiff has cited all relevant portions of the TCPA.
5. Wal-Mart admits that Congress authorized the Federal Communications Commission (FCC) to issue certain regulations implementing the TCPA. The remaining allegations contain legal conclusions to which no response is required. To the extent a response is required, Wal-Mart denies the allegations.
6. Wal-Mart admits that the FCC revised rules related to telemarketing calls to cellular telephones but denies Plaintiff’s characterization of the rules and of the changes and denies that Plaintiff has cited all relevant portions of the Rules.

**PARTIES, JURISDICTION AND VENUE**

7. Wal-Mart is without sufficient knowledge as to the allegations contained in Paragraph 7, and thus, denies those allegations.
8. Wal-Mart admits that it is a Delaware Corporation and maintains its principal place of business at 702 SW 8<sup>th</sup> Street, Bentonville, Arkansas. Wal-Mart admits that it operates several stores throughout Florida and the United States. Wal-Mart denies the remaining allegations of paragraph 8.

9. Wal-Mart admits that this Court has subject matter jurisdiction.
10. Wal-Mart admits that venue is appropriate in this District and that the Court has personal jurisdiction over Wal-Mart. Wal-Mart denies the remaining allegations in Paragraph 10.

**CLASS ACTION ALLEGATIONS**

11. Wal-Mart admits that pharmacies are located in certain Wal-Mart stores through which pharmacy-related services are provided to customers, but denies the remaining allegations contained in Paragraph 11.
12. Denied.
13. Denied.
14. Denied.
15. Denied.

**INDIVIDUAL PLAINTIFF'S ALLEGATIONS**

16. Plaintiff has refused to provide details regarding Plaintiff's alleged calls, including the telephone number at issue. Therefore, Wal-Mart lacks sufficient knowledge or information to admit or deny whether a call was made. Wal-Mart denies the remaining allegations of Paragraph 16.
17. Wal-Mart is without knowledge as to the allegations contained in Paragraph 17 of the Complaint, and thus, denies those allegations.
18. Wal-Mart is without knowledge as to the allegations contained in Paragraph 18 of the Complaint, and thus, denies those allegations.
19. Plaintiff has refused to provide his personal information, including the telephone number at issue. Therefore, Wal-Mart lacks sufficient knowledge or information to

admit or deny whether a call was made. Wal-Mart denies the remaining allegations of Paragraph 19.

20. Wal-Mart is without knowledge as to the allegations contained in Paragraph 20 of the Complaint, and thus, denies those allegations.

### **CLASS ALLEGATIONS**

21. Wal-Mart admits that Plaintiff purports to represent a class under Rule 23(b)(2).

Wal-Mart denies that this action is entitled to class treatment or that Plaintiff is a proper class representative.

22. Wal-Mart makes no answer to the allegations of Paragraph 22 to the extent that they are conclusions of law. To the extent Paragraph 22 is deemed to include allegations of fact, they are denied.

23. Wal-Mart admits that Plaintiff purports to represent a class under Rule 23(b)(2).

Wal-Mart denies that this action is entitled to class treatment or that Plaintiff is a proper class representative.

24. Wal-Mart makes no answer to the allegations of Paragraph 24 to the extent that they are conclusions of law. To the extent Paragraph 24 is deemed to include allegations of fact they are denied.

25. Wal-Mart makes no answer to the allegations of Paragraph 25, and its subparts i. through vi. to the extent that they are conclusions of law. To the extent Paragraph 25, and its subparts i. through vi., are deemed to include allegations of fact, they are denied.

26. Plaintiff has refused to provide his personal information, including the telephone number at issue. Therefore, Wal-Mart lacks sufficient knowledge or information to

admit or deny whether a call was made. Wal-Mart denies the remaining allegations of Paragraph 26.

27. Wal-Mart is without knowledge as to the allegations contained in Paragraph 27 of the Complaint, and thus, denies those allegations.

28. Wal-Mart makes no answer to the allegations of Paragraph 28 to the extent that they are conclusions of law. To the extent Paragraph 28 is deemed to include allegations of fact, they are denied.

29. Wal-Mart makes no answer to the allegations of Paragraph 29 to the extent that they are conclusions of law. To the extent Paragraph 29 is deemed to include allegations of fact, they are denied.

**COUNT I - NEGLIGENT VIOLATIONS OF THE TCPA**

30. Wal-Mart incorporates its responses to the allegations of Paragraphs 1-29, and any applicable subparts to the same, of the Complaint as though fully set forth herein.

31. Wal-Mart admits that Plaintiff purports to represent a class under Rule 23(b)(2).

Wal-Mart denies that this action is entitled to class treatment or that Plaintiff is a proper class representative.

32. Denied.

33. Denied.

34. Denied.

35. Plaintiff has refused to provide his personal information, including the telephone number at issue. Therefore, Wal-Mart lacks sufficient knowledge or information to admit or deny whether a call was made and/or whether Wal-Mart failed to allow Plaintiff to opt out of receiving calls, and thus, denies those allegations. Wal-Mart

denies that this action is entitled to class treatment or that Plaintiff is a proper class representative.

36. Denied.

37. Denied.

**COUNT II – WILLFUL VIOLATIONS OF THE TCPA**

38. Wal-Mart incorporates its responses to the allegations of Paragraphs 1-37, and any applicable subparts to the same, of the Complaint as though fully set forth herein.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Plaintiff has refused to provide his personal information, including the telephone number at issue. Therefore, Wal-Mart lacks sufficient knowledge or information to admit or deny whether a call was made and/or whether Wal-Mart failed to allow Plaintiff to opt out of receiving calls, and thus, denies those allegations. Wal-Mart denies that this action is entitled to class treatment or that Plaintiff is a proper class representative.

45. Denied.

46. Denied.

**AS TO PLAINTIFF'S PRAYER FOR RELIEF**

Wal-Mart denies that Plaintiff, or any member of the purported class, is entitled to any of the requested relief whatsoever, including, but not limited to, any statutory damages, injunctive relief, attorneys' fees or costs.

**Affirmative Defenses**

**FIRST AFFIRMATIVE DEFENSE**

**(Failure to State a Claim)**

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

**(Prior Express Consent)**

The Complaint and each purported claim contained therein are barred to the extent that Plaintiff or any member of the putative class provided express consent, including express written consent, for the alleged calls.

**THIRD AFFIRMATIVE DEFENSE**

**(No Automated Dialer)**

The Complaint and each purported claim therein are barred to the extent that Wal-Mart did not employ an automatic telephone dialing system ("ATDS") to place the alleged calls.

**FOURTH AFFIRMATIVE DEFENSE**

**(Waiver, Estoppel, Laches, Unclean Hands, Ratification, and Statute of Limitations)**

The claims asserted in the Complaint are barred, in whole or in part, by the doctrines of waiver, estoppel, laches, unclean hands, ratification, and/or applicable statutes of limitations.

**FIFTH AFFIRMATIVE DEFENSE**

**(Plaintiff's Own Actions or Inaction)**

Plaintiff's damages, and the damages of the putative class members, if any, have been caused by their own action or inaction, including his failure to opt-out of telephone calls.

**SIXTH AFFIRMATIVE DEFENSE  
(Failure to Mitigate)**

Plaintiff and the putative class members have failed to mitigate their damages based in part on their failure to request in writing that the calls cease.

**SEVENTH AFFIRMATIVE DEFENSE  
(Unconstitutional Vagueness and Overbreadth)**

Interpretations of the TCPA upon which the Plaintiff's Complaint is based are unconstitutionally vague and overbroad and thus violate the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Due Process provisions of the Fourteenth Amendment to the United States Constitution.

**EIGHTH AFFIRMATIVE DEFENSE  
(Defenses Specific to Class Members)**

Wal-Mart may have additional unique affirmative defenses applicable to different putative members of Plaintiff's proposed class. Wal-Mart reserves the right to assert such additional affirmative defenses as the need arises, insofar as class certification has not been granted and is not appropriate in this case.

**NINTH AFFIRMATIVE DEFENSE  
(Excessive Penalties)**

The statutory penalties sought by Plaintiff and members of the putative class are excessive and thus violate the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Due Process provision of the Fourteenth Amendment to the United States Constitution.

**TENTH AFFIRMATIVE DEFENSE  
(Third Parties)**

The matters that are the subject of this Complaint and the actions therein complained of are attributable to third parties over who Wal-Mart had no control or right to control, and recovery therefore is barred or limited.

**ELEVENTH AFFIRMATIVE DEFENSE  
(Substantial Compliance with Law)**

Wal-Mart is not liable to Plaintiff or members of any putative class because Wal-Mart acted reasonably and with due care and substantially complied with all applicable statutes, regulations, ordinances, and/or other laws.

<p>Dated: November 17<sup>th</sup>, 2014</p>	<p>Respectfully submitted, North Tower 2029 Century Park East, 6<sup>th</sup> Floor Los Angeles, CA 90067 Telephone: 424-239-3465 Facsimile: 424-239-3690 <i>/s/ Ana Tagvoryan</i> <b>Ana Tagvoryan, Esq.</b> (admitted pro hac vice) California Bar No. 246536 <a href="mailto:Atagvoryan@BlankRome.com">Atagvoryan@BlankRome.com</a> <i>/s/ Paul J. Sodhi</i> Paul Sodhi, Esquire Florida Bar Number: 42353 psodhi@blankrome.com Blank Rome 1200 North Federal Highway Boca Raton, FL 33432 (561) 417-8100 (561) 417-8153 (Telephone) (561) 417-8101 (Fax) Attorneys for Wal-Mart Stores, Inc., Defendant</p>
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**I HEREBY CERTIFY** that on this 17<sup>th</sup> day of November 2014, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

*/s/ Paul J. Sodhi*

**Paul J. Sodhi**

Florida Bar No. 42353

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