

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

GRACE MURRAY, STEPHEN BAUER,
JEANNE TIPPETT, ROBIN TUBESING,
NIKOLE SIMECEK, MICHELLE
MCOSKER, JACQUELINE GROFF, and
HEATHER HALL, on behalf of themselves
and others similarly situated,

Plaintiffs,

v.

GROCERY DELIVERY E-SERVICES
USA INC. DBA HELLO FRESH

Defendant.

Case No. 1:19-cv-12608-WGY

**SECOND CONSOLIDATED AMENDED
COMPLAINT – CLASS ACTION**

Preliminary Statement

1. Plaintiffs Grace Murray, Stephen Bauer, Jeanne Tippett, Robin Tubesing, Nikole Simecek, Michelle McOsker, Jacqueline Groff, and Heather Hall (collectively “Plaintiffs”), bring this action to enforce the consumer-privacy provisions of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, a federal statute enacted in 1991 in response to widespread public outrage about the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).

2. Plaintiffs allege that Grocery Delivery E-Services USA Inc. DBA Hello Fresh (“Hello Fresh” or “Defendant”) violated the TCPA by making telemarketing calls to Plaintiffs and other putative class members listed on the National Do Not Call Registry without their written consent.

3. Because telemarketing campaigns generally place calls to hundreds of thousands or even millions of potential customers *en masse*, Plaintiffs bring this action on behalf of a

proposed nationwide class of other persons who received illegal telemarketing calls from or on behalf of Defendant.

4. A class action is the best means of obtaining redress for Defendant's wide-scale illegal telemarketing and is consistent both with the private right of action afforded by the TCPA and the fairness and efficiency goals of Rule 23 of the Federal Rules of Civil Procedure.

Parties

5. Plaintiff Grace Murray resides in Massachusetts in this District, as she did at all relevant times during the conduct alleged in the Complaint.

6. Plaintiff Stephen Bauer resides in Michigan, as he did at all relevant times during the conduct alleged in the Complaint.

7. Plaintiff Jeanne Tippett resides in Michigan, as she did at all relevant times during the conduct alleged in the Complaint.

8. Plaintiff Robin Tubesing resides in California, as she did at all relevant times during the conduct alleged in the Complaint.

9. Plaintiff Nikole Simecek resides in Colorado, as she did at all relevant times during the conduct alleged in the Complaint.

10. Plaintiff Michelle McOsker resides in Missouri, as she did at all relevant times during the conduct alleged in the Complaint.

11. Plaintiff Jacqueline Groff resides in Pennsylvania, as she did at all relevant times during the conduct alleged in the Complaint.

12. Defendant Grocery Delivery E-Services USA Inc. DBA Hello Fresh is headquartered in New York.

Jurisdiction & Venue

13. The Court has federal question subject matter jurisdiction over these TCPA claims. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012).

14. The Court has personal jurisdiction over Hello Fresh because it makes telemarketing calls and delivers its product into this District, as it did with Ms. Murray.

15. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this District, as the telemarketing calls at issue were made into this District, and throughout the United States.

TCPA Background

16. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy [.]” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

17.

The National Do Not Call Registry

18. 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).

19. 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.*

20. 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).

The Growing Problem of Automated Telemarketing

21. “Robocalls and telemarketing calls are currently the number one source of consumer complaints at the FCC.” Tom Wheeler, *Cutting Off Robocalls* (July 22, 2016), <https://www.fcc.gov/news-events/blog/2016/07/22/cutting-robocalls> (statement of FCC chairman).

22. “The FTC receives more complaints about unwanted calls than all other complaints combined.” Staff of the Federal Trade Commission’s Bureau of Consumer Protection, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, at 2 (2016), https://www.ftc.gov/system/files/documents/advocacy_documents/commentstaff-ftc-bureau-consumer-protection-federal-communications-commission-rulesregulations/160616robocallscomment.pdf.

23. In fiscal year 2017, the FTC received 4,501,967 complaints about robocalls, compared with 3,401,614 in 2016. Federal Trade Commission, *FTC Releases FY 2017 National Do Not Call Registry Data Book and DNC Mini Site* (Dec. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-releases-fy-2017-nationaldo-not-call-registry-data-book-dnc>.

24. Industry data shows that the number of robocalls made each month increased from 831 million in September 2015 to 4.7 billion in December 2018—a 466% increase in three years.

25. According to online robocall tracking service “YouMail,” 4.8 billion robocalls were placed in August 2019 at a rate of 154.2 million per day. www.robocallindex.com (last visited October 29, 2020). YouMail estimates that 2019 robocall totals will exceed 60 billion. *See id.*

26. The FCC also has received an increasing number of complaints about unwanted calls, with 150,000 complaints in 2016, 185,000 complaints in 2017, and 232,000 complaints in 2018. FCC, Consumer Complaint Data Center, www.fcc.gov/consumer-help-center-data (last visited October 29, 2020).

Factual Allegations

Calls to Plaintiff Grace Murray

27. Plaintiff Murray is a “person” as defined by 47 U.S.C. § 153(39).

28. Ms. Murray’s telephone number, (XXX) XXX-1476, is listed on the National Do Not Call Registry and has been since January 12, 2006.

29. Ms. Murray’s telephone number, (XXX) XXX-1476, is a residential telephone number that is not used for business purposes.

30. Ms. Murray signed up for a Hello Fresh trial subscription in late 2015 or early 2016.

31. Ms. Murray ended her trial subscription after a single meal delivery.

32. In fact, on January 5, 2016, Ms. Murray received the following e-mail:



We're so appy!

- [Download our app now for](#)

iPhone and iPad!



We'll Miss You!



- Hi Grace,

My name is Seth Goldman and I'm the CEO here at HelloFresh US.

I heard that you recently deactivated your Classic Box Classic - 3 meals per week for 2 people, so I wanted to send you a quick note to thank you for being a part of the HelloFresh family.

Thanks again for being a part of the HelloFresh family. We really hope to see you again soon!

As always, Happy Cooking!

A handwritten signature in cursive script that reads "Seth".

33. Several years later, in 2018, she began receiving calls from Hello Fresh.

34. The calls were telemarketing in purpose, designed to solicit Ms. Murray to

purchase Hello Fresh services again.

35. Ms. Murray was not interested and informed the callers of that.

36. In fact, Ms. Murray specifically requested that she be placed on the Internal Do Not Call List of Hello Fresh.

37. However, the telemarketing calls to her continued.

38. In total, Ms. Murray believes she received at least 15 telemarketing calls.

Calls to Plaintiff Stephen Bauer

39. Plaintiff Bauer is a “person” as defined by 47 U.S.C. § 153(39).

40. Mr. Bauer’s telephone number, (XXX) XXX-7600, is assigned to a cellular telephone service.

41. Mr. Bauer’s telephone number, (XXX) XXX-7600, is listed on the National Do Not Call Registry and has been since May 8, 2009.

42. Mr. Bauer’s telephone number, (XXX) XXX-7600, is a residential telephone number that is not used for business purposes.

43.

44. Mr. Bauer signed up for a Hello Fresh trial subscription in or around March 2018.

45. Shortly after signing up, however, Mr. Bauer decided to terminate his relationship with Hello Fresh.

46. Hello Fresh allows consumers to “pause” their accounts if they wish to stop receiving meal delivery kits but want to remain active account holders.

47. Alternatively, consumers can terminate their relationship with Hello Fresh entirely by “deactivating” their accounts.

48. Mr. Bauer ended his trial subscription with Hello Fresh and wanted to terminate his relationship with the company, so he deactivated his account in or around April 2018.

49. Soon after Mr. Bauer deactivated his account, Hello Fresh repeatedly called his cellular telephone. The purpose of Hello Fresh’s calls was to solicit, or “win back,” his business as a Hello Fresh subscriber.

50. The calls annoyed Mr. Bauer and invaded his privacy, causing him to ask Hello Fresh’s representatives to stop calling him on multiple occasions. Hello Fresh ignored his requests and continued calling him.

51. Mr. Bauer even emailed Hello Fresh three times asking them to stop the calls, but they continued.

52. Mr. Bauer then filed a complaint with the Better Business Bureau, Serving Metropolitan New York, complaining about Hello Fresh’s conduct.

53. That complaint was shared with Hello Fresh, but, Hello Fresh continued calling Mr. Bauer.

Calls to Plaintiff Jeanne Tippett

54. Plaintiff Tippett is a “person” as defined by 47 U.S.C. § 153(39).

55. Ms. Tippett’s telephone number, (XXX) XXX-0166, is assigned to a cellular telephone service.

56. Ms. Tippett’s telephone number, (XXX) XXX-0166, is listed on the National Do Not Call Registry and has been since December 4, 2004.

57. Ms. Tippett’s telephone number, (XXX) XXX-0166, is a residential telephone

number that is not used for business purposes.

58.

59. Ms. Tippett's signed up for a Hello Fresh trial subscription in or around early 2018.

60. Ms. Tippett ended her trial subscription and deactivated her account shortly thereafter, terminating her relationship with Hello Fresh.

61. Hello Fresh subsequently started calling Ms. Tippett's cellular telephone to solicit, or "win back," her business.

62. The calls annoyed Ms. Tippett and invaded her privacy, so she asked Hello Fresh to stop calling her on multiple occasions.

63. For approximately one year, HelloFresh honored her do-not-call request.

64. In approximately 2019, however, HelloFresh started placing telemarketing calls to Ms. Tippett.

65. For example, Ms. Tippett received four calls from Hello Fresh on February 6, 2019.

66. Ms. Tippett received at least three other calls that week—all despite her requests that Hello Fresh stop calling her.

Calls to Plaintiff Robin Tubesing

67. Plaintiff Tubesing is a "person" as defined by 47 U.S.C. § 153(39).

68. Ms. Tubesing's telephone number, (XXX) XXX-9357, is assigned to a cellular telephone service.

69. Ms. Tubesing registered her cellular telephone number on the National Do Not Call Registry on July 21, 2018.

70. Ms. Tubesing's telephone number, (XXX) XXX-9357, is not used for business purposes.

71. Ms. Tubesing signed up for a Hello Fresh trial subscription in or around June 2018.

72. Ms. Tubesing ended her trial subscription and deactivated her account approximately one year later in June 2019.

73. During the cancellation process, Ms. Tubesing included a message to Hello Fresh demanding that Hello Fresh stop all communication with her.

74. Hello Fresh disregarded her request and began placing telemarketing calls to her cellular telephone.

75. Hello Fresh called Ms. Tubesing at least nine times in August 2019, all despite Ms. Tubesing's requests that Hello Fresh stop calling her.

Calls to Plaintiff Nikole Simecek

76. Plaintiff Simecek is a "person" as defined by 47 U.S.C. § 153(39).

77. Ms. Simecek's telephone number, (XXX) XXX-1616, is assigned to a cellular telephone service.

78. Ms. Simecek registered her cellular telephone number on the National Do Not Call Registry on October 21, 2010.

79. Ms. Simecek's telephone number, (XXX) XXX-1616, is not used for business purposes.

80. Ms. Simecek signed up for a Hello Fresh trial subscription in or around late 2017.

81. After several weeks, Ms. Simecek cancelled her subscription through the Hello Fresh website and terminated her relationship with the company.

82. Shortly after Ms. Simecek canceled her subscription, Hello Fresh started placing telemarketing calls to her cellular telephone.

83. Ms. Simecek repeatedly asked the callers to stop.

84. Ms. Simecek estimates she received a minimum of twenty calls from Hello Fresh after asking Hello Fresh to stop calling.

85. Ms. Simecek eventually began blocking the telephone number from which Hello Fresh was calling.

86. Hello Fresh then began calling Ms. Simecek from different numbers, which frustrated and annoyed Ms. Simecek further.

Calls to Plaintiff Michelle McOsker

87. Plaintiff McOsker is a “person” as defined by 47 U.S.C. § 153(39).

88. Ms. McOsker’s telephone number, (XXX) XXX-8112, is assigned to a cellular telephone service.

89. Ms. McOsker registered her cellular telephone on the National Do Not Call Registry on December 12, 2007.

90. Ms. McOsker’s telephone number, (XXX) XXX-8112, is not used for business purposes.

91. In June 2019, Ms. McOsker subscribed to Hello Fresh.

92. After several weeks, Ms. McOsker cancelled her subscription through the Hello Fresh website and terminated her relationship with Hello Fresh.

93. Shortly after Ms. McOsker canceled her subscription, Hello Fresh began placing telemarketing calls to her cellular telephone to get her to re-subscribe.

94. Ms. McOsker repeatedly asked the callers to stop calling her, but HelloFresh

continued to call despite her requests.

Calls to Plaintiff Jacqueline Groff

95. Plaintiff Groff is a “person” as defined by 47 U.S.C. § 153(39).

96. Ms. Groff’s telephone number, (XXX) XXX-0661, is assigned to a cellular telephone service.

97. Ms. Groff registered her cellular telephone number on the National Do Not Call Registry on April 4, 2006.

98. Ms. Groff’s telephone number, (XXX) XXX-0661, is not used for business purposes.

99. In May 2018, Ms. Groff subscribed to Hello Fresh.

100. Ms. Groff maintained her Hello Fresh subscription for approximately five months before she deactivated her account and terminated her relationship with Hello Fresh.

101. Shortly after terminating her relationship with Hello Fresh, Hello Fresh started placing telemarketing calls to Ms. Groff’s cellular telephone.

102. On at least five occasions, Ms. Groff told the callers to stop calling her and to place her telephone number on Hello Fresh’s “do not call” list.

103. On March 13, 2019, Ms. Groff sent Hello Fresh a letter and email demanding that the calls stop.

104. Ms. Groff attached a copy of her AT&T bill to the letter and email with one of the calls from Hello Fresh highlighted.

105. The HelloFresh calls continued despite Ms. Groff’s repeated requests.

Calls to Plaintiff Heather Hall

106. Plaintiff Hall is a “person” as defined by 47 U.S.C. § 153(39).

107. Ms. Hall's telephone number, (XXX) XXX-6642, is assigned to a cellular telephone service.

108. Ms. Hall registered her cellular telephone number on the National Do Not Call Registry on October 21, 2014.

109. Ms. Hall's telephone number, (XXX) XXX-6642, is not used for business purposes.

110. In early December 2018, Ms. Hall subscribed to Hello Fresh as part of a promotional trial subscription.

111. After receiving a single delivery, Ms. Hall cancelled her subscription through the Hello Fresh website and terminated her relationship with the company.

112. Shortly after Ms. Hall canceled her subscription, Hello Fresh started placing telemarketing calls to her cellular telephone number.

113. Hello Fresh continued to place calls to Ms. Hall's cellular telephone even though she repeatedly told the callers to stop.

114. Frustrated by Hello Fresh's refusal to honor her "do not call" requests, on December 27, 2018, Ms. Hall filed a complaint with the Better Business Bureau ("BBB"). In her complaint, Ms. Hall explained that HelloFresh was "[c]onstantly calling" and that she requested Hello Fresh remove her number, but HelloFresh refused to acknowledge her "do not call" requests.

115. On January 2, 2019, Hello Fresh responded to Ms. Hall and promised to cease calling her.

116. On January 10, 2019, Ms. Hall submitted a second complaint to the BBB because Hello Fresh was still calling her.

CLASS ACTION ALLEGATIONS

117. As authorized by Rule 23(b)(2) or (b)(3) of the Federal Rules of Civil Procedure, Plaintiffs bring this action on behalf of a national class of all other persons or entities similarly situated throughout the United States.

118. The class of persons Plaintiffs propose to represent is defined as follows:

All persons in the United States from September 5, 2015 to December 31, 2019 to whom Hello Fresh, either directly or by a vendor of Hello Fresh, placed at least two telemarketing calls during any 12-month period where their phone numbers appeared on the NDNCR for at least 31 days before the calls.

119. Excluded from the Class are counsel, the Defendant, and any entities in which the Defendant have a controlling interest, the Defendant's agents and employees, any judge to whom this action is assigned, and any member of such judge's staff and immediate family.

120. The Class as defined above is identifiable through phone records and phone number databases.

121. The potential members of the Class number at least in the thousands.

122. Individual joinder of these persons is impracticable.

123. The Plaintiffs are all members of the Class.

124. There are questions of law and fact common to Plaintiffs and to the proposed Class, including but not limited to the following:

(a) whether Defendant systematically made multiple telephone calls to members of the Class;

(b) whether Defendant made calls to Plaintiffs and members of the Class without first obtaining consent to make the calls;

- (c) whether Defendant maintained a written “do not call” policy;
- (d) whether Defendant trained its employees or agents engaged in telemarketing on the existence and usage of any “do not call” policy;
- (e) whether Defendant recorded or honored “do not call” requests of Plaintiffs and members of the =Class; and
- (f) =
- (g) whether members of the Class are entitled to treble damages based on the willfulness of Defendant’s conduct.

125. Plaintiffs’ claims are typical of the claims of members of the Class.

126. Plaintiffs are adequate representatives of the Class because their interests do not conflict with the interests of the Class, they will fairly and adequately protect the interests of the Class, and they are represented by counsel skilled and experienced in class actions, including TCPA class actions.

127. Common questions of law and fact predominate over questions affecting only individual class members, and a class action is the superior method for fair and efficient adjudication of the controversy. The only individual question concerns identification of class members, which will be ascertainable from records maintained by Defendant and/or its agents.

128. The likelihood that individual members of the Class will prosecute separate actions is remote due to the time and expense necessary to prosecute an individual case.

FIRST CAUSE OF ACTION

Telephone Consumer Protection Act (Violations of 47 U.S.C. § 227) (On Behalf of Plaintiffs and the Class)

129. Plaintiffs repeat their prior allegations of this Complaint and incorporate them by reference herein.

130. The foregoing acts and omissions of Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227, by making telemarketing calls, except for emergency purposes, to Plaintiffs and the members of the National Do Not Call Registry Class despite their numbers being on the National Do Not Call Registry.

131. The Defendant's violations were negligent, willful, or knowing.

132. As a result of Defendant's and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf, violations of the TCPA, 47 U.S.C. § 227, Plaintiffs and members of the National Do Not Call Registry Class are presumptively entitled to an award of between \$500 and \$1,500 in damages for each and every call made.

133. Plaintiffs and the members of the National Do Not Call Registry Class are also entitled to and do seek injunctive relief prohibiting Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf from making telemarketing calls to numbers on the National Do Not Call Registry, except for emergency purposes, to any cellular telephone number in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the Class, pray for the following relief:

- A. Certification of the proposed Class;
- B. Appointment of Plaintiffs as representatives of the of the Class;

- C. Appointment of the undersigned counsel as counsel for the Class;
- D. A declaration that Defendant and/or its affiliates, agents, and/or other related entities' actions complained of herein violated the TCPA;
- E. An order enjoining Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf from making calls in violation of the NDNC Registry provisions of the TCPA in the future;
- F. An award to Plaintiffs and the Classes of damages, as allowed by law; and
- G. Orders granting such other and further relief as the Court deems necessary, just, and proper.

JURY DEMAND

Plaintiffs request a jury trial as to all claims of the complaint so triable.

Dated: October 10, 2023

By: /s/ Anthony I. Paronich

Anthony I. Paronich
Paronich Law. P.C.
350 Lincoln Street, Suite 2400
Hingham, MA 02043
Telephone: 617-485-0018
anthony@paronichlaw.com

TURKE & STRAUSS
Samuel J. Strauss
613 Williamson Street, Suite 100
Madison, WI 53703
Telephone: 608-237-1775
sam@turkestrauss.com

ROBINS KAPLAN LLP
Stacey P. Slaughter
Brenda L. Joly
800 LaSalle Ave., Suite 2800
Minneapolis, MN 55402
sslaughter@robinskaplan.com
bjoly@robinskaplan.com

Attorneys for Plaintiffs and the Proposed Class