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16 **UNITED STATES DISTRICT COURT**
 17 **CENTRAL DISTRICT OF CALIFORNIA**

18 **DAVE VACCARO**, individually,
 19 and on behalf of all others
 20 similarly situated

21 Plaintiff,

22 v.

23 **OPENTABLE, INC.**, and DOES 1
 24 through 10, inclusive

25 Defendants.

26 **Case No.:** 2:21-cv-05809

27 **COMPLAINT FOR DAMAGES**
AND INJUNCTIVE RELIEF
PURSUANT TO THE TELEPHONE
CONSUMER PROTECTION ACT,
47 U.S.C. § 227, ET SEQ.

28 **JURY TRIAL DEMANDED**

INTRODUCTION

1. DAVE VACCARO (“Plaintiff”) bring this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of OPENTABLE, INC. (“Defendant”), in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby

1 invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge
2 as to himself and his own acts and experiences, and, as to all other matters, upon
3 information and belief, including investigation conducted by their attorneys.

4 2. The TCPA was designed to prevent calls and messages like the ones
5 described within this complaint, and to protect the privacy of citizens like Plaintiff.
6 “Voluminous consumer complaints about abuses of telephone technology – for
7 example, computerized calls dispatched to private homes – prompted Congress to
8 pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

9 3. In enacting the TCPA, Congress intended to give consumers a choice
10 as to how creditors and telemarketers may call them, and made specific findings
11 that “[t]echnologies that might allow consumers to avoid receiving such calls are
12 not universally available, are costly, are unlikely to be enforced, or place an
13 inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this
14 end, Congress found that

15 [b]anning such automated or prerecorded telephone calls
16 to the home, except when the receiving party consents to
17 receiving the call or when such calls are necessary in an
18 emergency situation affecting the health and safety of the
19 consumer, is the only effective means of protecting
20 telephone consumers from this nuisance and privacy
invasion.

21 *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
22 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
23 purpose).

24 4. Congress also specifically found that “the evidence presented to the
25 Congress indicates that automated or prerecorded calls are a nuisance and an
26 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also,
27 *Mims*, 132 S. Ct. at 744.
28

1 5. In a recent decision, the Supreme Court interpreted the term
2 “automatic telephone dialing system” and held that “[t]o qualify as an ‘automatic
3 telephone dialing system,’ a device must have the capacity either to store a
4 telephone number using a random or sequential generator *or* to produce a telephone
5 number using a random or sequential number generator.” *Facebook, Inc. v. Duguid*,
6 141 S.Ct. 1163 (2021) (emphasis added).

7 6. In *Duguid*, the Supreme Court provided an example of such systems,
8 stating: “For instance, an autodialer might use a random number generator to
9 determine the order in which to pick phone numbers from a preproduced list. It
10 would then store those numbers to be dialed at a later time.” *Id.* at 1171-72 fn. 7.

11 7. Further, both *Duguid* and the legislative history of the TCPA are clear
12 that the original focus on prerecorded voice technology prohibition was the fact
13 that such communications involved agentless calls, not on the question of whether
14 a literal voice was used during those agentless calls. *See* Hearing Before the
15 Subcommittee on Communications of the Committee on Commerce, Science and
16 Transportation, United States Senate One Hundred Second Congress First Session
17 July 24, 1992, Testimony of Robert Bulmash and Steve Hamm at pg 11; 7 FCC
18 Rcd. 8752 (F.C.C. September 17, 1992).

19 8. The Sixth Circuit has also recognized this distinction: “Congress drew
20 an explicit distinction between ‘automated telephone calls that deliver an artificial
21 or prerecorded voice message’ on the one hand and ‘calls place by ‘live’ persons’
22 on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199*
23 *WV/KY/OH*, 708 F.3d 737,743 (6th Cir. 2013).

24 9. Similarly, the FTC has observed that “prerecorded calls are by their
25 very nature one-sided conversations, and if there is no opportunity for consumers
26 to ask questions, offers may not be sufficiently clear for consumers to make
27 informed choices before pressing a button or saying yes to make a purchase.” 73
28

1 FR 51164-01, 51167 (Aug. 29, 2008).

2 **JURISDICTION AND VENUE**

3 10. Jurisdiction is proper under *28 U.S.C. § 1332(d)(2)* because Plaintiff,
4 a resident of California, seeks relief on behalf of a Class, which will result in at
5 least one class member belonging to a different state than that of Defendant, a
6 corporation incorporated in the state of Delaware. Plaintiff also seeks \$1,500.00 in
7 damages for each call in violation of the TCPA, which, when aggregated among a
8 proposed class in the thousands, exceeds the \$5,000,000.00 threshold for federal
9 court jurisdiction. Therefore, both diversity jurisdiction and the damages threshold
10 under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court
11 has jurisdiction.

12 11. Venue is proper in the United States District Court for the Central
13 District of California pursuant to *28 U.S.C. § 1391(b)(1)* because Defendant is
14 subject to personal jurisdiction in the County of Los Angeles, State of California.

15 **PARTIES**

16 12. Plaintiff is, and at all times mentioned herein was, a natural person
17 and citizen and resident of the State of California. Plaintiff is, and at all times
18 mentioned herein was, a “person” as defined by *47 U.S.C. § 153(39)*.

19 13. Defendant is, and at all times mentioned herein was, an online
20 restaurant-reservation service company, and is therefore a “person” as defined by
21 *47 U.S.C. § 153(39)*.

22 14. The above named Defendant, and its subsidiaries and agents, are
23 collectively referred to as “Defendants.” The true names and capacities of the
24 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are
25 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
26 names. Each of the Defendants designated herein as a DOE is legally responsible
27 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
28

1 Complaint to reflect the true names and capacities of the DOE Defendants when
2 such identities become known.

3 15. Plaintiff is informed and believes that at all relevant times, each and
4 every Defendant was acting as an agent and/or employee of each of the other
5 Defendants and was acting within the course and scope of said agency and/or
6 employment with the full knowledge and consent of each of the other Defendants.
7 Plaintiff is informed and believes that each of the acts and/or omissions complained
8 of herein was made known to, and ratified by, each of the other Defendants.

9
10 **FACTUAL ALLEGATIONS**

11 16. At all times relevant, Plaintiff was a citizen of the County of Los
12 Angeles, State of California. Plaintiff is, and at all times mentioned herein was, a
13 “person” as defined by 47 U.S.C. § 153(39).

14 17. Defendant is, and at all times mentioned herein was, an online
15 restaurant-reservation service company, and a “person,” as defined by 47 U.S.C. §
16 153(39).

17 18. At all times relevant Defendant conducted business in the State of
18 California and in the County of Los Angeles, within this judicial district.

19 19. On or about May 30, 2021, Plaintiff received an unsolicited text
20 message from Defendant on his cellular telephone, number ending in -3928.

21 20. Defendant sent Plaintiff the unsolicited text message from a short code
22 phone number owned or controlled by Defendant, 36246.

23 21. The three text messages sent by Defendant on May 30, 2021 read:

24 1) Welcome! Thanks for
25 joining OpenTable
26 messaging. Standard
27 message & data rates may
28 apply. Text “STOP” to stop

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