

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

JOSHUA EPPS, individually and on behalf of  
all others similarly situated,

Plaintiff,

v.

PEPSICO, INC. and QUAIL MOUNTAIN  
COFFEE & VENDING, d/b/a PEPSI-COLA  
BOTTLING

Defendants.

Case No.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiff Joshua Epps (“Plaintiff”) brings this action against PepsiCo, Inc., (“PepsiCo”) and Quail Mountain Coffee & Vending, d/b/a Pepsi-Cola Bottling (“PCB”) (collectively, “Defendants”) by and through his attorneys, individually and behalf of all others similarly situated (“Class Members”). Plaintiff’s allegations as to his own actions are based on personal knowledge. The other allegations are based on his counsel’s investigation, and information and belief.

**INTRODUCTION**

1. Plaintiff, individually and as a class representative for all others similarly situated, brings this action against Defendants for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”), for unsolicited telemarketing calls made by or on behalf of Defendants using an artificial and/or prerecorded voice. Plaintiff, individually, and for Class Members, seeks an injunction and an award of statutory damages to Class Members under the TCPA, together with costs and reasonable attorneys’ fees.

**PARTIES**

2. Plaintiff Joshua Epps was a resident of Klamath Falls, Oregon at all times during the events alleged in the Complaint. At all relevant times Mr. Epps was the user, subscriber,

owner and possessor of the cellular telephone number 541-638-XXXX. Mr. Epps never provided Defendants with consent to call him using an artificial or prerecorded voice or otherwise. Despite that, Defendants placed numerous telemarketing calls to Mr. Epps's cellular phone from the phone number 541-884-1313 using an artificial or prerecorded voice, including but not limited to a call on February 9, 2022. When Mr. Epps answered these calls, he heard a recording saying it was Pepsi calling and then the recorded voice asked whether he would like to restock his supply of Pepsi products. The calls to Mr. Epps' cellphone from Defendants have been a nuisance and an invasion of his privacy.

3. Defendant PepsiCo, Inc. is, and at all relevant times was, a North Carolina corporation with a principal place of business located at 700 Anderson Hill Road, Purchase, New York, 10577

4. Defendant Quail Mountain Coffee & Vending is, and at all relevant times was, an Oregon corporation with a principal place of business located at 4033 Miller Avenue, Klamath Falls, Oregon 97603 registered under the name "Quail Mountain, Inc." Quail Mountain Coffee & Vending does business under the name "Pepsi-Cola Bottling" and identifies itself on its website, kfpepsi.com, as "Southern Oregon's Pepsi Distributor."<sup>1</sup>

5. Each of the Defendants acted jointly to perpetrate the acts described herein. At all times relevant to the allegations in this matter, each of these Defendants acted in concert with, with the knowledge and approval of, and/or as the agent of the other Defendant within the course and scope of the agency, regarding the acts and omissions alleged.

### **JURISDICTION AND VENUE**

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<sup>1</sup> <https://kfpepsi.com/>

6. The Court has federal subject matter jurisdiction under 28 U.S.C. § 1331.

7. This Court has personal jurisdiction over Defendants because Defendant PepsiCo maintains its headquarters in New York, does business in the State of New York, and because the wrongful acts alleged in this Complaint were committed in or emanated from New York the headquarters of Defendant PepsiCo, Inc.

8. Venue is also proper before this Court 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 and because Defendant PepsiCo is headquartered in this District.

**THE TELEPHONE CONSUMER  
PROTECTION ACT OF 1991, 47 U.S.C. § 227 et seq.**

9. In 1991, Congress enacted the TCPA in response to a growing number of consumer complaints regarding certain telemarketing practices. Congress found that “automated and prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call,” and decided that “banning” such calls made without consent was “the only effective means of protecting telephone consumers from the nuisance and privacy invasion.” Pub. L. No. 102-243, §§ 2 (10-13) (Dec. 20, 1991), codified at 47 U.S.C. § 227. *See also Mims v. Arrow Fin. Services, LLC*, 565 U.S. 368 (2012) (“The Act bans certain invasive telemarketing practices”).

10. The TCPA regulates, among other things, the use of an artificial or prerecorded voice to deliver messages via telephone. Specifically, the plain language of section 227(b)(1)(B) states that it shall be unlawful for any person “to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party,” if either the caller or recipient is within the United States.

11. The FCC’s regulations “generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.” *In the Matter of Rules*

*and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12397, ¶ 13 (1995). The FCC reiterated this principle in 2013, when it explained that “a seller . . . may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers.” *In the Matter of the Joint Petition Filed by Dish Network, LLC*, 28 FCC Rcd. 6574, 6574 (2013).

12. The FCC has also confirmed that a party can be vicariously liable for calls that are placed by third parties in violation of Section 227(b) of the TCPA and that subsection’s corresponding regulations. *See In re Joint Pet. Filed by Dish Network*, 28 FCC Rcd. 6574 (2013). *Accord, Jenkins v. National Grid USA*, No. 15-cv-1219, 2017 WL 1208445, \*3 (E.D.N.Y. Mar. 31, 2017); *McCabe v. Caribbean Cruise Line, Inc.*, No. 13-cv-6131, 2014 WL 3014874, \*3 (E.D.N.Y. July 3, 2014).

### **FACTUAL ALLEGATIONS**

13. Plaintiff has never provided Defendants with consent to call him using an artificial or prerecorded voice.

14. Despite that, Defendants placed numerous telemarketing calls to Mr. Epps’s cellular phone from the phone number 541-884-1313 using an artificial or prerecorded voice, including but not limited to a call on February 9, 2022.

15. When Mr. Epps answered these calls, he heard a recording saying it was Pepsi calling and then the recorded voice asked whether he would like to restock his supply of Pepsi products.

16. The calls to Mr. Epps’ cellphone from Defendants have been a nuisance and an invasion of his privacy.

17. PCB placed each of these calls at the direction and on behalf of PepsiCo, while acting as its agent. At all relevant times, PCB was acting with PepsiCo's permission, knowledge and control. PCB made all of the calls at issue for the benefit of PepsiCo.

18. PCB holds itself out as an agent of Pepsi. On each of the calls at issue, PCB identified itself as "Pepsi," demonstrating that it was acting with the apparent authority of PepsiCo. The name of PCB's website—kfpepsi.com—highlights its connection to PepsiCo. When PCB's phone number is called, a recording states "Offices of PepsiCola." PCB even uses the PepsiCo logo as its own:



Products Services Company Contact

## **Southern Oregon's Pepsi Distributor**



19. Furthermore, the apparent authority of PCB can be traced back to manifestations of PepsiCo itself. Specifically, PepsiCo permitted PCB to use the Pepsi logo and to hold itself out as an alter ego of PepsiCo.

20. Based on these facts, a third party would reasonably infer, as Plaintiff reasonably inferred, that the calls placed by PCB were made either by PepsiCo itself or by an agent of PepsiCo acting on behalf of PepsiCo.

21. Furthermore, PepsiCo provides actual authority to PCB to make the calls at issue

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