

1 Joshua B. Swigart (SBN 225557)  
2 Josh@SwigartLawGroup.com  
3 **SWIGART LAW GROUP, APC**  
4 2221 Camino del Rio S, Ste 308  
5 San Diego, CA 92108  
6 P: 866-219-3343  
7 F: 866-219-8344

8 *Attorney for Plaintiff*  
9 *Ryan Childers*

10 **UNITED STATES DISTRICT COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 RYAN CHILDERS, individually )  
13 and on behalf of others, )

14 Plaintiff, )

15 v. )

16 BANK OF AMERICA, N.A., )  
17 )

18 Defendant. )  
19 )  
20 )

**Case No.: '19CV2316 WQHRBB**

**CLASS ACTION**

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

**INTRODUCTION**

1  
2 1. Ryan Childers (“Plaintiff”) brings this Class Action Complaint for damages,  
3 injunctive relief, and any other available legal or equitable remedies, resulting  
4 from the illegal actions of Bank of America, National Association  
5 (“Defendant”), in negligently, and/or willfully contacting Plaintiff and class  
6 members for alleged debt on their cellular telephones, in violation of the  
7 Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq., (“TCPA”),  
8 thereby invading their privacy. Plaintiff alleges as follows upon personal  
9 knowledge as to his own acts and experiences, and, as to all other matters, upon  
10 information and belief, including investigation conducted by his attorneys.

**JURISDICTION AND VENUE**

11  
12 2. This Court has federal question jurisdiction because this case arises out of  
13 violation of federal law. 47 U.S.C. §227(b).  
14 3. Venue is proper in the United States District Court for the Southern District of  
15 California pursuant to 18 U.S.C. § 1391(b) because the events giving rise to  
16 Plaintiff’s causes of action against Defendant occurred within the State of  
17 California and the County of San Diego, within this judicial district.

**PARTIES**

18  
19 4. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the  
20 State of California. Plaintiff is, and at all times mentioned herein was, a  
21 “person” as defined by 47 U.S.C. § 153 (39).  
22 5. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and  
23 at all times mentioned herein was, a national association with its principal place  
24 of business in North Carolina.  
25 6. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and  
26 at all times mentioned herein was, a “person,” as defined by 47 U.S.C. § 153  
27 (39).

28 ///

**FACTUAL ALLEGATIONS**

7. At all times relevant Defendant conducted business in the State of California and in the County of San Diego, within this judicial district, specifically by locating Plaintiff’s cellular telephone number, placing automated telephone calls to Plaintiff’s cellular telephone, which were directed into the State of California.
8. Plaintiff allegedly incurred an unpaid financial obligation to Defendant for a personal “debt” as that term is defined by 15 U.S.C. § 1692a(5).
9. Plaintiff allegedly fell behind in the payments owed on the debt.
10. Plaintiff then retained the legal services of an attorney in relation to the debt.
11. On or around October 13<sup>th</sup>, 2019, Defendant called Plaintiff on his cellular telephone. When Plaintiff answered the telephone he was the only live person on the phone call. A prerecorded voice tried to verify that Plaintiff had answered the phone. When Plaintiff attempted to verify his identity by zip code, the recording continued to repeat itself and appeared to glitch.
12. Plaintiff waited several seconds on the line anticipating a live person to come on the phone call before ending the call.
13. On or around October 15<sup>th</sup>, 2019, Defendant again called Plaintiff’s cellphone attempting to collect the debt. Plaintiff experienced a long delay before Plaintiff was connected with a live person. Such a delay indicates use of an Automatic Telephone Dialing System as described below.
14. During the October 15<sup>th</sup>, 2019 conversation, Plaintiff unequivocally and explicitly informed Defendant’s representative, agent, or employee that Plaintiff was represented by an attorney regarding the debt. As such, Plaintiff demanded Defendant cease all contact and communication with him directly.
15. Accordingly, Plaintiff revoked any implied consent previously given to receive the calls when he demanded that Defendant stop calling him.

- 1 16. On November 4<sup>th</sup>, 2019, despite Plaintiff’s revocation of any implied consent,  
2 Defendant called Plaintiff again. Upon answering the call, Plaintiff  
3 experienced a long delay indicating use of an Automatic Telephone Dialing  
4 System.
- 5 17. Defendant’s call to Plaintiff was made with an “automatic telephone dialing  
6 system” (“ATDS”) as defined by 47 U.S.C. § 227(a)(1). This ATDS has the  
7 capacity to store or produce telephone numbers to be called, using a random or  
8 sequential number generator without human intervention.
- 9 18. The telephone number Defendant called was assigned to a cellular telephone  
10 service in violation of 47 U.S.C. § 227 (b)(1)(A)(iii).
- 11 19. The telephone call constituted a call that was not for emergency purposes as  
12 defined by 47 U.S.C. § 227 (b)(1)(A).
- 13 20. The telephone call made by Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii).
- 14 21. Through Defendant’s aforementioned conduct, Plaintiff suffered an invasion of  
15 a legally protected interest in privacy, which is specifically addressed and  
16 protected by the TCPA.
- 17 22. The invasion itself caused concrete harm to Plaintiff similar to trespass to real  
18 property which has been illegal for hundreds of years with no actual damages  
19 required for the harm.
- 20 23. Defendant’s calls forced Plaintiff and other similarly situated class members to  
21 live without the utility of their cellular phones by occupying their cellular  
22 telephone with one or more unwanted calls, causing a nuisance and lost time.
- 23 24. The telephone number Defendant called was assigned to a cellular telephone  
24 service for which Plaintiff incurred a charge for cellular telephone service  
25 pursuant to 47 U.S.C. § 227(b)(1).
- 26 25. The calls to Plaintiff were not for emergency purposes as defined by 47 U.S.C.  
27 § 227(b)(1)(A)(i).
- 28 26. Defendant’s call to Plaintiff’s cellular telephone was unsolicited by Plaintiff.

**CLASS ACTION ALLEGATIONS**

1  
2 27. Plaintiff brings this action on behalf of himself and on behalf of Class Members  
3 of the proposed Class pursuant to Federal Rules of Civil Procedure 23(a) and  
4 (b)(3) and/or (b)(2).

5 28. Plaintiff proposes to represent the following Class consisting of and defined  
6 as follows:

7  
8 All persons within the United States who received any call  
9 from Defendant or its agent/s and/or employee/s to said  
10 person's cellular telephone made through the use of any  
11 automatic telephone dialing system, or with a pre-recorded  
12 or artificial voice, within the four years prior to the filing  
13 of this Complaint.

14 29. Defendant and its employees or agents are excluded from the Class. Plaintiff  
15 does not know the number of members in the Class, but believes the Class  
16 members number in the several thousands, if not more. Thus, this matter should  
17 be certified as a Class action to assist in the expeditious litigation of this matter.

18 30. Plaintiff and members of the Class were harmed by the acts of Defendant in at  
19 least the following ways: Defendant, either directly or through its agents,  
20 illegally contacted Plaintiff and the Class members by making calls to their  
21 cellular telephones with an automatic telephone dialing system for the  
22 purposes of collecting alleged debt, thereby causing Plaintiff and the Class  
23 members to incur certain cellular telephone charges or reduce cellular  
24 telephone time for which Plaintiff and the Class members previously paid, and  
25 invading the privacy of said Plaintiff and the Class members. Plaintiff and the  
26 Class members were damaged thereby.

27 31. This suit seeks only damages and injunctive relief for recovery of economic  
28 injury on behalf of the Class and it expressly is not intended to request any  
recovery for personal injury and claims related thereto. Plaintiff reserves the

1 right to expand the Class definition to seek recovery on behalf of additional  
2 persons as warranted as facts are learned in further investigation and discovery.

3 32. The joinder of the Class members is impractical and the disposition of their  
4 claims in the Class action will provide substantial benefits both to the parties  
5 and to the court. The Class can be identified through Defendant' records or  
6 Defendant' agents' records.

7 33. There is a well-defined community of interest in the questions of law and fact  
8 involved affecting the parties to be represented. The questions of law and fact  
9 to the Class predominate over questions which may affect individual Class  
10 members, including the following:

- 11 a. Whether, within the last four years, Defendant or its agent(s) placed any  
12 artificial or prerecorded voice messages to the Class (other than a  
13 message made for emergency purposes or made with the prior express  
14 consent of the called party) using any automatic telephone dialing  
15 system to any telephone number assigned to a cellular telephone  
16 service;
- 17 b. Whether Plaintiff and the Class members were damaged thereby, and  
18 the extent of damages for such violation; and
- 19 c. Whether Defendant and its agents should be enjoined from engaging in  
20 such conduct in the future.

21 34. As a person that received at least one alleged debt collection call via an ATDS  
22 or an artificial or prerecorded voice message to their cell phones, Plaintiff is  
23 asserting claims that are typical of the Class. Plaintiff will fairly and adequately  
24 represent and protect the interests of the Class in that Plaintiff has no interests  
25 antagonistic to any member of the Class.

26 35. Plaintiff and the members of the Class have all suffered irreparable harm as a  
27 result of the Defendant' unlawful and wrongful conduct. Absent a class action,  
28 the Class will continue to face the potential for irreparable harm. In addition,

1 these violations of law will be allowed to proceed without remedy and  
2 Defendant will likely continue such illegal conduct. Because of the size of the  
3 individual Class member's claims, few, if any, Class members could afford to  
4 seek legal redress for the wrongs complained of herein.

5 36. Plaintiff has retained counsel experienced in handling class action claims and  
6 claims involving violations of the Telephone Consumer Protection Act.

7 37. A class action is a superior method for the fair and efficient adjudication of this  
8 controversy. Class-wide damages are essential to induce Defendant to comply  
9 with federal and California law. The interest of Class members in individually  
10 controlling the prosecution of separate claims against Defendant is small  
11 because the maximum statutory damages in an individual action for violation  
12 of privacy are minimal. Management of these claims is likely to present  
13 significantly fewer difficulties than those presented in many class claims.

14 38. Defendant has acted on grounds generally applicable to the Class, thereby  
15 making appropriate final injunctive relief and corresponding declaratory relief  
16 with respect to the Class as a whole.

17 **FIRST CAUSE OF ACTION**  
18 **NEGLIGENT VIOLATIONS OF THE**  
19 **TELEPHONE CONSUMER PROTECTION ACT**  
20 **47 U.S.C. § 227 ET SEQ.**

21 39. Plaintiff incorporates by reference all of the above paragraphs of this Complaint  
22 as though fully stated herein.

23 40. Defendant's call to Plaintiff's cellular telephone for the collection of alleged  
24 debt constitutes negligent violation of the TCPA, including but not limited to  
25 each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

26 41. As a result of Defendant's, and Defendant's agents', negligent violations of 47  
27 U.S.C. § 227 et seq., Plaintiff and the Class are entitled to an award of \$500.00  
28

1 in statutory damages, for each and every violation, pursuant to 47 U.S.C. §  
2 227(b)(3)(B).

- 3 1. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting  
4 such conduct in the future pursuant to 47 U.S.C. § 227(b)(3)(A).

5 **SECOND CAUSE OF ACTION**

6 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**

7 **TELEPHONE CONSUMER PROTECTION ACT**

8 **47 U.S.C. § 227 ET SEQ.**

- 9 42. Plaintiff incorporates by reference all of the above paragraphs of this Complaint  
10 as though fully stated herein.

- 11 43. Defendant’s actions constitute knowing and/or willful violation of the TCPA,  
12 including, but not limited to, each and every one of the above-cited provisions  
13 of 47 U.S.C. § 227 et seq.

- 14 44. As a result of Defendant’s knowing and/or willful violations of 47 U.S.C. § 227  
15 et seq., Plaintiff and each of the Class members are entitled to treble damages,  
16 as provided by statute, up to \$1,500.00, for each and every violation, pursuant  
17 to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

- 18 45. Plaintiff and the Class members are also entitled to and seek injunctive relief  
19 prohibiting such conduct in the future.

20  
21 **PRAYER FOR RELIEF**

- 22 46. Wherefore, Plaintiff respectfully requests the Court to grant Plaintiff and the  
23 Class members the following relief against Defendant:

24  
25 **FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATIONS OF THE**

26 **TCPA, 47 U.S.C. § 227 ET SEQ.**

- 27 • As a result of Defendant’s and Defendant’s agents’ negligent violations of 47  
28 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member

1 \$500.00 in statutory damages, for each and every violation, pursuant to 47  
2 U.S.C. § 227(b)(3)(B).

- 3 • Pursuant to 47 U.S.C. § 227(b)(3)(A), Plaintiff seeks injunctive relief
- 4 prohibiting such conduct in the future.
- 5 • Any other relief the Court may deem just and proper.

6

7 **SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL**

8 **VIOLATIONS OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- 9 • As a result of Defendant’s willful and/or knowing violations of 47 U.S.C. §
- 10 227(b)(1), Plaintiff seeks for himself and each Class member treble damages,
- 11 as provided by statute, up to \$1,500.00 for each and every violation, pursuant
- 12 to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
- 13 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
- 14 conduct in the future.

15 **TRIAL BY JURY**

16 47. Pursuant to the seventh amendment to the Constitution of the United States of

17 America, Plaintiff is entitled to, and hereby demand, a trial by jury.

18

19 **SWIGART LAW GROUP, APC**

20 Date: December 4, 2019

21 By: s/ Joshua B. Swigart

22 Joshua B. Swigart, Esq.

23 Josh@SwigartLawGroup.com

24 Attorney for Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

19CV2316 WQHRBB

I. (a) PLAINTIFFS

RYAN CHILDERS

(b) County of Residence of First Listed Plaintiff San Diego (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Joshua B. Swigart (225557), Swigart Law Group, APC 2221 Camino del Rio S., Ste. 308 San Diego, CA 92108; 866-219-3343

DEFENDANTS

BANK OF AMERICA, N.A

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 47 USC § 227 et seq.

Brief description of cause: Violations of the Telephone Consumer Protection Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION DEMAND \$ UNDER RULE 23, F.R.Cv.P.

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE DOCKET NUMBER

DATE 12/04/2019 SIGNATURE OF ATTORNEY OF RECORD s/ Joshua B. Swigart

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

### Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.  
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.  
**PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.