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14 *Consolidated World Travel, Inc.*

15 UNITED STATES DISTRICT COURT  
16 EASTERN DISTRICT OF CALIFORNIA

17 KINAYA HEWLETT, on Behalf of Herself  
18 and all Others Similarly Situated,  
19 Plaintiffs,  
20 v.  
21 CONSOLIDATED WORLD TRAVEL, INC.  
d/b/a HOLIDAY CRUISE LINE,  
22 Defendant.  
23

Case No. 2:16-cv-00713-WBS-AC

**DEFENDANT CONSOLIDATED WORLD  
TRAVEL, INC.'S ANSWER AND  
AFFIRMATIVE DEFENSES TO THE  
FIRST AMENDED CLASS ACTION  
COMPLAINT**

1 Defendant CONSOLIDATED WORLD TRAVEL, INC. (“CWT”), hereby submits its  
2 ANSWER AND AFFIRMATIVE DEFENSES in response to Plaintiff KINAYA HEWLETT’s First  
3 Amended Class Action Complaint (Dkt. No. 14) (the “Complaint”).

4 **NATURE OF THE ACTION**

- 5 1. CWT denies the allegations contained in Paragraph 1 of the Complaint.  
6 2. CWT admits that Plaintiff purports to bring this action for relief under the Telephone  
7 Consumer Protection Act, 47 U.S.C. § 227 et seq. (“TCPA”).

8 **PARTIES**

- 9 3. CWT lacks knowledge or information sufficient to form a belief about the truth of the  
10 allegations contained in Paragraph 3 of the Complaint.  
11 4. CWT admits the allegations contained in Paragraph 4 of the Complaint.

12 **JURISDICTION AND VENUE**

- 13 5. Paragraph 5 of the Complaint states legal conclusions as to which no response is  
14 required. To the extent a response is required, CWT denies the allegations contained in Paragraph 5 of  
15 the Complaint.  
16 6. Paragraph 6 of the Complaint states legal conclusions as to which no response is  
17 required. To the extent a response is required, CWT denies the allegations contained in Paragraph 6 of  
18 the Complaint.  
19 7. Paragraph 7 of the Complaint states legal conclusions as to which no response is  
20 required. To the extent a response is required, CWT denies the allegations contained in Paragraph 7 of  
21 the Complaint.

22 **FACTS COMMON TO ALL CAUSES OF ACTION**

- 23 8. With regard to the allegations contained in Paragraph 8 of the Complaint, the  
24 circumstances of the enactment of the TCPA speak for themselves, and CWT denies any  
25 characterization thereof. CWT respectfully refers the Court to the legislative history of the TCPA for a  
26 complete and accurate statement of its contents.  
27 9. With regard to the allegations contained in Paragraph 9 of the Complaint, the quoted  
28 provision of the TCPA speaks for itself, and CWT denies any characterization thereof. CWT

1 respectfully refers the Court to the quoted provision of the TCPA for a complete and accurate statement  
2 of its contents.

3 10. With regard to the allegations contained in Paragraph 10 of the Complaint, the Federal  
4 Communications Commission's ("FCC") findings speak for themselves, and CWT denies any  
5 characterization thereof. CWT respectfully refers the Court to the FCC's findings for a complete and  
6 accurate statement of their contents.

7 11. With regard to the allegations contained in Paragraph 11 of the Complaint, FCC's  
8 rulings speak for themselves, and CWT denies any characterization thereof. CWT respectfully refers the  
9 Court to the FCC's rulings for a complete and accurate statement of their contents.

10 12. CWT denies the allegations contained in Paragraph 12 of the Complaint.

11 13. CWT lacks knowledge or information sufficient to form a belief about the truth of the  
12 allegations contained in Paragraph 13 of the Complaint.

13 14. CWT lacks knowledge or information sufficient to form a belief about the truth of the  
14 allegations contained in Paragraph 14 of the Complaint.

15 15. CWT denies the allegations contained in Paragraph 15 of the Complaint.

16 16. CWT lacks knowledge or information sufficient to form a belief about the truth of the  
17 allegations contained in Paragraph 16 of the Complaint.

18 17. CWT lacks knowledge or information sufficient to form a belief about the truth of the  
19 allegations contained in Paragraph 17 of the Complaint.

20 18. With regard to the allegations contained in Paragraph 18 of the Complaint, the quoted  
21 portions of the cited webpages speak for themselves, and CWT denies any characterization thereof.  
22 CWT respectfully refers the Court to the quoted portions of the webpages for a complete and accurate  
23 statement of its contents.

24 **CLASS ACTION ALLEGATIONS**

25 19. CWT admits that Plaintiff brings this action on behalf of herself and on behalf of all  
26 other persons similarly situated.

27 20. CWT admits that Plaintiff proposes the stated Class definition.

28 21. Paragraph 21 of the Complaint states legal conclusions as to which no response is

1 required. To the extent a response is required, CWT lacks knowledge or information sufficient to form  
2 a belief about the truth of the allegations contained in Paragraph 21 of the Complaint.

3 22. CWT denies the allegations contained in Paragraph 22 of the Complaint.

4 23. CWT denies the allegations contained in Paragraph 23 of the Complaint.

5 24. CWT denies the allegations contained in Paragraph 24 of the Complaint.

6 25. CWT denies the allegations contained in Paragraph 25 of the Complaint.

7 26. CWT denies the allegations contained in Paragraph 26 of the Complaint.

8 27. CWT denies the allegations contained in Paragraph 27 of the Complaint.

9 28. CWT denies the allegations contained in Paragraph 28 of the Complaint.

10 29. CWT denies the allegations contained in Paragraph 29 of the Complaint.

11 **CAUSES OF ACTION**

12 **FIRST COUNT**

13 30. CWT realleges its responses to the foregoing paragraphs of the Complaint as if restated  
14 herein.

15 31. CWT denies the allegations contained in Paragraph 31 of the Complaint.

16 32. CWT denies the allegations contained in Paragraph 32 of the Complaint.

17 33. CWT denies the allegations contained in Paragraph 33 of the Complaint.

18 34. CWT denies the allegations contained in Paragraph 34 of the Complaint.

19 **SECOND COUNT**

20 35. CWT realleges its responses to the foregoing paragraphs of the Complaint as if restated  
21 herein.

22 36. CWT denies the allegations contained in Paragraph 36 of the Complaint.

23 37. CWT denies the allegations contained in Paragraph 37 of the Complaint.

24 38. CWT denies the allegations contained in Paragraph 38 of the Complaint.

25 39. CWT denies the allegations contained in Paragraph 39 of the Complaint.

26 **DEMAND FOR JUDGMENT FOR RELIEF**

27 Answering the unnumbered paragraphs including Plaintiff's Prayer for Relief and its paragraphs,  
28 CWT denies that Plaintiff is entitled to the relief sought.

**AFFIRMATIVE DEFENSES**

CWT states that it intends to rely upon and otherwise preserve the following defenses in defense of Plaintiff's Complaint, and respectfully reserves the right to assert other defenses if facts learned in discovery warrant amendment of CWT Affirmative Defenses. Accordingly, CWT asserts the following Affirmative Defenses:

**FIRST AFFIRMATIVE DEFENSE**

Plaintiff fails to state a plausible claim upon which relief can be granted under any theory of action, including but not limited to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff lacks standing under Article III of the Constitution, and, accordingly, this Court does not have subject-matter jurisdiction over this action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff's damages, if any, and none being admitted, were not caused by CWT but by another person or entity for whom CWT is not responsible and over whose activities CWT exercises no control and/or has no right to control.

**FOURTH AFFIRMATIVE DEFENSE**

CWT is not vicariously or otherwise liable for the acts of any third parties making and/or initiating the complained of telephone call(s) to Plaintiff because any such third parties were, at all relevant times, separate and distinct entities from CWT, were not CWT's agents, and CWT did not have ownership, direction, or exercise substantial control over their actions.

**FIFTH AFFIRMATIVE DEFENSE**

CWT is not vicariously or otherwise liable for the acts of any third parties making and/or initiating the complained of telephone call(s) to Plaintiff. To the extent that any such third parties are deemed CWT's agents, such parties were acting outside the scope of their authority and any agency relationship with CWT, and CWT did not ratify their actions.

1 **SIXTH AFFIRMATIVE DEFENSE**

2 To the extent Plaintiff seeks to hold CWT liable under any theory of vicarious liability, agency  
3 or joint venture, no such claim has been specifically or sufficiently pleaded.

4 **SEVENTH AFFIRMATIVE DEFENSE**

5 Plaintiff's claims are barred by the doctrine of estoppel.

6 **EIGHTH AFFIRMATIVE DEFENSE**

7 Plaintiff's claims are barred by the doctrines of laches and waiver.

8 **NINTH AFFIRMATIVE DEFENSE**

9 Plaintiff's claims are barred by the doctrine of unclean hands.

10 **TENTH AFFIRMATIVE DEFENSE**

11 Plaintiff's claims are barred by the doctrine of *in pari delicto*.

12 **ELEVENTH AFFIRMATIVE DEFENSE**

13 Plaintiff's claims are barred by the doctrine of ratification due to Plaintiff's failure to timely  
14 notify the alleged callers that the complained of calls should cease.

15 **TWELTH AFFIRMATIVE DEFENSE**

16 Plaintiff's claims are barred because the alleged caller(s)' use of any automatic telephone dialing  
17 system as defined under the TCPA and/or use of a prerecorded voice was consented to by Plaintiff.

18 **THIRTEENTH AFFIRMATIVE DEFENSE**

19 Plaintiff's claims are barred for failure to join necessary and indispensable parties.

20 **FOURTEENTH AFFIRMATIVE DEFENSE**

21 Plaintiff's claims are barred because Plaintiff did not suffer any actual damages.

22 **FIFTEENTH AFFIRMATIVE DEFENSE**

23 Plaintiff's claims for treble damages are barred because CWT did not engage in knowing or  
24 willful misconduct.

25 **SIXTEENTH AFFIRMATIVE DEFENSE**

26 Plaintiff has failed to mitigate his damages, if any, based in part on his failure to timely notify all  
27 alleged callers that the alleged calls to his cellular and/or residential telephone(s) should cease.

28 **SEVENTEENTH AFFIRMATIVE DEFENSE**

1 CWT complied with all applicable statutory, regulatory, and common law requirements and  
2 accordingly, Plaintiff's claims are barred by CWT's compliance with all applicable State, Federal, and  
3 local laws and regulations.

4 **EIGHTEENTH AFFIRMATIVE DEFENSE**

5 Plaintiff's claims are barred because the TCPA violates CWT's First Amendment right to free  
6 speech. Specifically, the TCPA improperly inhibits the exercise of constitutionally protected speech.

7 **NINETEENTH AFFIRMATIVE DEFENSE**

8 Plaintiff's claims may be barred by the exceptions provided under the TCPA.

9 **TWENTIETH AFFIRMATIVE DEFENSE**

10 Plaintiff's claims are barred because the complained of calls do not constitute a "telephone  
11 solicitation" or "unsolicited advertisement" under the TCPA.

12 **WHEREFORE**, Defendant Consolidated World Travel, Inc. respectfully requests that this  
13 Court enter judgment against Plaintiff and in favor of CWT, dismiss this action with prejudice, award  
14 CWT its reasonable attorney's fees and costs incurred in defending this action, and for such other relief  
15 this Court deems just and proper.

16 Dated: September 14, 2016

Respectfully Submitted,

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18 /s/ Jeffrey A. Backman

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 14, 2016, a true and correct copy of the foregoing was electronically filed with the Clerk of Court by using CM/ECF which will serve copies to all counsel of record registered to receive CM/ECF notification, and that it was served upon any other counsel and parties in some other authorized manner.

**SERVICE LIST**

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