

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS,  
EASTERN DIVISION**

|                                               |   |                             |
|-----------------------------------------------|---|-----------------------------|
| JULIE CHOLLY, on behalf                       | ) |                             |
| of herself and all others similarly situated, | ) |                             |
|                                               | ) | Case No. 15-cv-5030         |
| Plaintiff,                                    | ) |                             |
|                                               | ) | Judge Robert W. Gettleman   |
| v.                                            | ) | Magistrate Michael T. Mason |
|                                               | ) |                             |
| UPTAIN GROUP, INC.                            | ) |                             |
| and ALERE HEALTH, LLC.                        | ) |                             |
|                                               | ) |                             |
| Defendants.                                   | ) | JURY DEMAND                 |

**THIRD AMENDED COMPLAINT – CLASS ACTION**

1. Plaintiff brings this action for damages, and other legal and equitable remedies, against the Uptain Group, Inc. (“Uptain”) and Alere Health, LLC. (“Alere”) for negligently, knowingly, and/or willfully contacting Plaintiff on Plaintiff’s cellular telephone without her prior express consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (hereinafter referred to as the “TCPA”). The TCPA prohibits automated telephone calls to cellular telephones without prior express consent.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction under 28 U.S.C. §1331 (general federal question), §1337, and the TCPA. Venue in this District is proper because Defendants transact business here.

**PARTIES**

3. Plaintiff Julie Cholly is, and at all times mentioned herein was, an individual citizen of the State of Illinois, who resides in the district.

4. Defendant Uptain is an Alabama corporation that maintains its headquarters at 7037 Old Madison Pike, Suite 450, Huntsville, AL 35806. Uptain provides collection services to hospitals and physician practices.

5. Defendant Alere is a medical device and service provider and is a Delaware Corporation that maintains a Registered Agent in Illinois of CT Corporation System, 208 S. LaSalle St, Suite 814, Chicago, IL 60604.

**THE TELEPHONE CONSUMER PROTECTION  
ACT OF 1991 (TCPA), 47 U.S.C. § 227**

6. In 1991, Congress enacted the TCPA in response to a growing number of consumer complaints regarding certain telemarketing practices.

7. The TCPA regulates, among other things, the use of automated telephone equipment, or “auto-dialers.” Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of auto-dialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.

8. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.

9. On January 4, 2008, the FCC released a Declaratory Ruling wherein it held that both the creditor and the third party debt collector may be held liable under the TCPA for debt collection calls. (“A creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the

Commission's rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call....A third party collector may also be liable for a violation of the Commission's rules.")

10. The FCC held in *In Re Soundbite* that a request to stop constituted revocation. See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, 27 FCC Rcd 15391, 2012 FCC LEXIS 4874, (FCC 2012)("FCC 2012 Order")

11. In 2015, the FCC expanded its revocation position and held a caller cannot limit the ways in which revocation can be conveyed, but instead that revocation could be made in any reasonable manner. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, FCC 15-72, 2015 FCC LEXIS 1586, ¶¶ 64 (FCC July 10, 2015)("FCC 2015 Order").

### **FACTS**

12. At all times relevant, plaintiff was an individual residing in the State of Illinois. Plaintiff is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153(39).

13. Plaintiff incurred an obligation to Alere to pay money, the primary purpose of which was for personal, family, or household uses, specifically medical services (the "Debt").

14. Alere hired Uptain to collect the Debt from Plaintiff.

15. Uptain uses instruments of interstate commerce for its principal purpose of business, which is the collection of debts.

16. On December 16, 2013, Uptain telephoned Plaintiff on her cellular telephone using an automatic telephone dialing system. Uptain's account notes refer to the device that called as an "Auto Dialer" and an "UnAttended Dialer."

17. During that telephone call, Plaintiff told Uptain to stop calling her and also informed Uptain that she was filing bankruptcy.

18. Despite Plaintiff's clear and unambiguous instruction to Uptain to stop calling her, Uptain told Plaintiff that she must provide the bankruptcy case number in order for Uptain to stop calling.

19. At the time of the call in question, Uptain had a policy or procedure to not honor oral revocation requests.

20. Uptain subsequently placed many more telephone calls to Plaintiff's cellular telephone using an automatic telephone dialing system, despite Plaintiff's unambiguous instruction to stop.

21. Plaintiff's instruction to Uptain to stop calling her revoked any consent it had to call her. FCC 2012 Order.

22. Uptain was precluded from limiting the manner in which Plaintiff conveyed revocation as well as precluded from insisting on a bankruptcy case number. FCC 2015 Order.

23. On July 31, 2014, Plaintiff filed a Voluntary Petition for Chapter 7 Bankruptcy, in a matter styled *In Re: Frank D. Cholly, Julie A. Cholly*, No. 14-28162-BWB. Among the creditors listed on Schedule F of Mrs. Cholly's bankruptcy petition was Alere for the debt she owed for medical services.

24. Accordingly, on August 6, 2014, Alere was sent, via first class mail, notice of the bankruptcy by the court.

25. The above-referenced notice from the Bankruptcy Court also notified all of Plaintiff's creditors that an automatic stay was in place for all collection actions against Plaintiff.

26. Despite being barred from contacting Plaintiff, Alere hired Uptain to contact Plaintiff in an attempt to collect a debt.

27. Notwithstanding the fact that Plaintiff had filed Bankruptcy and neither Defendant had authorization to contact Plaintiff, Uptain contacted Plaintiff with a pre-recorded or artificial voice on Plaintiff's cellular telephone on behalf of Alere on numerous occasions between September 2014 and May 2015, including September 18, 2014, September 19, 2014, September 30, 2014, October 13, 2014, October 15, 2014, November 4, 2014, November 6, 2014, April 28, 2015, and May 29, 2015.

28. On October 15, 2014 Uptain telephoned Plaintiff on her cellular telephone and left the following voice message utilizing a prerecorded message or artificial voice:

[Julie Cholly]. If we have reached the wrong number for this person, please call us toll free at 866-915-2404 to remove your phone number. If you are not [Julie Cholly] please delete this message and or hang up now. If you are [Julie Cholly] please continue to listen to this message. There will now be a pause in the message. (Music) [Julie] you should not listen to this message so that other can people can hear it as it contains personal and private information. There will now be a pause in this message to allow you to listen to it in private. (Music) This is a message from the Upton Group, a professional debt collection agency. This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose. Please contact our office about an important business matter at 866-661-2758. That number again is 866-661-2758. Thank you.

29. On November 4, 2014 Uptain telephoned Plaintiff on her cellular telephone and left the following voice message utilizing a prerecorded message and artificial voice:

... or hang up now. If you are [Julie Cholly] please continue to listen to this message. There will now be a pause in the message. (Music) [Julie] you should not listen to this message so other people can hear it as it contains personal and private information. There will now be a pause in this message to allow you to listen to it in private. (Music) This is a message from the Upton Group, a Professional Debt Collection Agency. This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose. Please contact our office about an important business matter at 866-661-2758. That number again is 866-661-2758. Thank you.

30. On April 28, 2015 Uptain telephoned Plaintiff on her cellular telephone and left the following voice message utilizing a prerecorded message and artificial voice:

... or hang up now. If you are [Julie Cholly] please continue to listen to this message. There will now be a pause in the message. (Music) [Julie] you should not listen to this message so other people can hear it as it contains personal and private information. There will now be a pause in this message to allow you to listen to it in private. (Music) This is a message from the Upton Group, a professional debt collection agency. This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose. Please contact our office about an important business matter at 866-661-2758. That number again is 866-661-2758. Thank You.

31. All telephone contact by Defendants to Plaintiff on her cellular telephone occurred via an “automatic telephone dialing system” and/or utilizing a “pre-recorded or artificial voice,” as defined by 47 U.S.C. § 227(a)(1), and all calls that are the subject of this complaint occurred within four years of the filing of this complaint.

32. The telephone number that Defendants used to contact Plaintiff, with an “automatic telephone dialing system” and/or utilizing a “pre-recorded or artificial voice,” was assigned to a cellular telephone service as specified in 47 U.S.C. § 227(b)(1)(A)(iii).

33. The complained of telephone calls constituted calls not for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

34. Plaintiff did not provide “express consent” allowing Defendants to place telephone calls to Plaintiff’s cellular phone and/or utilizing a “pre-recorded or artificial voice,” within the meaning of 47 U.S.C. § 227(b)(1)(A).

35. The Defendants’ telephone calls to Plaintiff’s cellular phone were placed by an “automatic telephone dialing system” and/or utilizing a “pre-recorded or artificial voice,” for non-emergency purposes and in the absence of plaintiff’s prior express consent violated 47 U.S.C. § 227(b)(1)(A).

36. The Defendants’ telephone calls to Plaintiff’s cellular phone were placed by an “automatic telephone dialing system” and/or utilizing a “pre-recorded or artificial voice,” for non-emergency purposes after Plaintiff revoked her consent.

**COUNT I – CLASS TCPA CLAIMS (CELLULAR CALLS)**

37. Plaintiff incorporates the above factual allegations herein.

38. The Defendants made telephone calls to the wireless telephone numbers of Plaintiff and the other members of the class using artificial or prerecorded voice as evidenced by the above calls that make it clear no live person was on this call.

39. The Defendants made telephone calls to the wireless telephone numbers of Plaintiff and the other members of the class using an automatic telephone dialing system.

40. These phone calls were made without the prior express consent of Plaintiff or the class.

41. The Defendants therefore violated the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), which makes it unlawful for any person within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice .

..” As a result of the Defendants’ illegal conduct, the members of the class suffered actual damages and, under section 227(b)(3)(B), are each entitled to, *inter alia*, a minimum of \$500.00 in damages for each such violation of the TCPA.

### **CLASS ALLEGATIONS**

42. Plaintiff proposes the following class definition, subject to amendment as appropriate:

(1) All persons in the United States (2) to whose cellular telephone number (3) Uptain placed a non-emergency telephone call (4) using an artificial or prerecorded voice and/or an automatic telephone dialing system (5) on or after June 9, 2011 (6) with respect to a debt allegedly owed to Alere (7) where Uptain did not have express consent to call said cell phone numbers.

Direct Revocation Sub-class

(1) All persons in the United States (2) to whose cellular telephone number (3) Uptain placed a non-emergency telephone call (4) using an artificial or prerecorded voice and/or an automatic telephone dialing system (5) on or after June 9, 2011 (6) with respect to a debt allegedly owed to Alere (7) where Uptain was directly informed to stop calling or cease communication.

The TCPA Bankruptcy Stay Sub-Class consists of:<sup>1</sup>

The TCPA Cease Communication Represented By Attorney Sub-Class consists of:

(1) All persons in the United States (2) to whose cellular telephone number (3) Uptain placed a non-emergency telephone (4) using an artificial or

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<sup>1</sup> Plaintiff acknowledges that the Court dismissed her class claims based upon revocation of consent in its Dec. 22, 2015 Order (Dkt. 83). Plaintiff has incorporated the allegations into her Second Amended Complaint herein for the purpose of preservation of the issue for appeal. The Bankruptcy sub-class Plaintiff seeks to preserve is (1) All persons in the United States (2) to whose cellular telephone number (3) Uptain placed a non-emergency telephone call (4) using an artificial or prerecorded voice (5) with respect to a debt allegedly owes to Alere (6) within 4 years of the complaint (7) during the period of an automatic stay from a Bankruptcy Court.



prerecorded voice (5) with respect to a debt allegedly owed to Alere (6) within 4 years of the complaint (7) where Uptain or Alere received written notice that the person was represented by an attorney and to cease communication.

43. Plaintiff does not know the exact number of members in the Class and Sub-Classes, but based upon the representations of Defendants, Plaintiff reasonably believes that class members number at minimum in the tens of thousands.

44. Plaintiff and all members of the class Sub-Classes have been harmed by the acts of the Defendants.

45. This Class Action Complaint seeks money damages.

46. The joinder of all class members is impracticable due to the size and relatively modest value of each individual claim. The disposition of the claims in a class action will provide substantial benefit the parties and the Court in avoiding a multiplicity of identical suits. The class can be identified easily through records maintained by the Defendants.

47. There are questions of law and fact common to the members of the classes, which common questions predominate over any questions that affect only individual class members. Those common questions of law and fact include, but are not limited to, the following:

- a. Whether the Defendants engaged in a pattern of using pre-recorded voices and/or an automatic telephone dialing system to place calls to cellular telephones;
- b. Whether the Bankruptcy Court's Automatic Stay and/or the Discharge Injunction revoked consent for any calls to be placed to cellular telephone numbers;
- c. Whether the Defendants thereby violated the TCPA;

- d. Whether Defendants ignored notices of consumer's bankruptcy filings or attorney representation and/or cease communications and instead kept calling and texting those consumers; and,
- e. Whether Defendants ignored consumer's instructions to stop calling and instead kept calling after those consumers revoked consent.

44. As a person who received numerous and repeated telephone calls using an automatic telephone dialing system or an artificial or prerecorded voice, without her prior express consent, or after her consent had been revoked, within the meaning of the TCPA, Plaintiff asserts claims that are typical of each class member. Plaintiff will fairly and adequately represent and protect the interests of the class, and she has no interests which are antagonistic to any member of the Class or Sub-Classes.

45. Plaintiff has retained counsel experienced in handling class action claims involving violations of federal and state consumer protection statutes such as the TCPA.

46. A class action is the superior method for the fair and efficient adjudication of this controversy. Class wide relief is essential to compel Defendants to comply with the TCPA. The interest of class members in individually controlling the prosecution of separate claims against the Defendants is small because the statutory damages in an individual action for violation of the TCPA are small. Management of these claims is likely to present significantly fewer difficulties than are presented in many class claims because the calls at issue are all automated and the class members, by definition, did not provide the prior express consent required under the statute, or otherwise revoked their consent, to authorize calls to their cellular telephones.

47. The Defendants have acted on grounds generally applicable to the class, thereby making declaratory relief with respect to the class as a whole appropriate.

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of plaintiff and the class members and against the Defendants for:

a. As a result of the Defendants' negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member \$500.00 in statutory damages for each and every call that violated the TCPA;

b. As a result of the Defendants' willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiff seeks for herself and each Class member treble damages, as provided by statute, of up to \$1,500.00 for each and every call that violated the TCPA;

c. An order certifying this action to be a proper class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court deems appropriate, finding that Plaintiff is a proper representative of the Class, and appointing the lawyers and law firms representing Plaintiff as counsel for the Class;

d. An award of attorney's fees and costs out of the recovery;

e. Such other relief as the Court deems just and proper.

April 21, 2016

Respectfully submitted,

/s/ Amy L. Wells

One of Plaintiff's attorneys

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**JURY DEMAND**

Plaintiff demands trial by jury.

/s/ Amy L. Wells

**CERTIFICATE OF SERVICE**

I, Amy L. Wells, an attorney, hereby certify that I shall cause to be served a copy of the foregoing upon all counsel of record via the Court's Case Management/Electronic Case Filing System ("ECF") as indicated, on April 21, 2016.

/s/ Amy L. Wells