

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

Kristie Farnham, on behalf of herself  
and all others similarly situated,

**Civil No. 16-CV-295**

Plaintiff,

vs.

Caribou Coffee Company, Inc.,

**DEFENDANT’S AMENDED  
ANSWER TO FIRST AMENDED  
CLASS ACTION COMPLAINT  
(JURY TRIAL DEMANDED)**

Defendant.

Defendant Caribou Coffee Company, Inc. (“Caribou”) now answers Plaintiff’s First Amended Class Action Complaint (the “Amended Complaint”) against it, as follows:

Except as expressly admitted or qualified hereafter, Caribou denies each and every allegation of the Amended Complaint.

**NATURE OF ACTION**

1. *Plaintiff brings this action for legal and equitable remedies resulting from the illegal actions of Caribou Coffee Company, Inc. in negligently, knowingly, and/or willfully transmitting SMS text messages en masse to Plaintiff’s cellular telephone and the cellular telephones of thousands of other individuals across the country, without prior express written consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”).*

**Answer:**

Caribou admits that Plaintiff brings the above-captioned action and purports to seek damages and injunctive relief. Caribou denies the remaining allegations in Paragraph 1.

**JURISDICTION AND VENUE**

2. *This Court has jurisdiction over this putative class action lawsuit under 28 U.S.C. § 1331 and 47 U.S.C. § 227.*

**Answer:**

Caribou admits that this Court has subject matter jurisdiction, except that it denies that Plaintiff has standing pursuant to Article III of the U.S. Constitution. Caribou denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

3. *Defendant is subject to specific personal jurisdiction in Wisconsin because it directed numerous unsolicited SMS text messages into the state of Wisconsin, because Plaintiff received such unsolicited SMS text messages while residing in the state of Wisconsin (and on a cellular telephone assigned a Wisconsin-based telephone number), because thousands of absent Class members likewise received unsolicited SMS text messages sent by Defendant into the state of Wisconsin, and because the injuries to Plaintiff and thousands of absent Class members occurred in Wisconsin and arose from and are related to Defendant's business activities in Wisconsin. Moreover, the Court also has personal jurisdiction over Defendant because Defendant owns and operates 13 brick and mortar stores throughout Wisconsin and further sells its products at 191 grocery stores throughout Wisconsin, and because Defendant's marketing text messages directed to Plaintiff and thousands of other absent Class members were intended to promote Defendant's products sold at these locations in Wisconsin.*

**Answer:**

Caribou admits that this Court has personal jurisdiction over Caribou as Caribou operates brick-and-mortar stores throughout Wisconsin and further sells its products at grocery stores throughout Wisconsin. Caribou further admits that a substantial portion of the events complained of occurred in this District. Caribou lacks knowledge or information sufficient to form a belief as to the truth of the allegations that Plaintiff received SMS text messages while residing in Wisconsin or that Plaintiff owns or is the

regular user of a cellular telephone assigned a Wisconsin-based telephone number.

Caribou denies the remaining allegations in Paragraph 3.

4. *Venue is proper in the United States District Court for the Western District of Wisconsin pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1441(a) because Defendant is a corporation that is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. Defendant's contacts with this District, including directing text message advertisements into this District with the intent of delivering them to residents of this District (and, in fact, ultimately delivering them to residents of this District), are sufficient to subject it to personal jurisdiction in this District.*

**Answer:**

Caribou admits only that it does not dispute jurisdiction and venue in the above-captioned Court, and denies any remaining allegations in paragraph 4.

**PARTIES**

5. *Plaintiff is, and at all times mentioned herein was, an individual and a "person" as defined by 47 U.S.C. § 153(10). Plaintiff is, and at all times mentioned herein was, a citizen and resident of Hudson, Wisconsin.*

**Answer:**

Caribou denies that 47 U.S.C. § 153(10) defines "person." Caribou admits on information and belief that Plaintiff is an "individual." With respect to the remaining allegations in paragraph 5, Caribou lacks information or knowledge sufficient to form a belief as to the truth of those allegations and therefore denies them.

6. *Defendant is, and at all times mentioned herein was, a company whose primary corporate headquarters is in Brooklyn Center, Minnesota. Defendant is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153(10).*

**Answer:**

Caribou admits that its primary corporate headquarters is in Brooklyn Center, Minnesota. Caribou denies that 47 U.S.C. § 153(10) defines “person,” and denies all remaining allegations in paragraph 6.

**THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**

7. *To address consumer complaints regarding certain telemarketing practices, Congress enacted the TCPA, 47 U.S.C. § 227, in 1991. The TCPA prohibits, inter alia, the use of automated telephone equipment, or “autodialers,” to make any call, including sending a text message, to a wireless number absent an emergency or the prior express written consent of the party called.*

**Answer:**

With respect to the allegations in paragraph 7, Caribou states that the Telephone Consumer Protection Act (“TCPA”) speaks for itself. To the extent that Plaintiff’s characterizations of the statute are incomplete and out of context, Defendant denies the allegations in paragraph 7.

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

**Answer:**

With respect to the allegations in paragraph 8, Caribou states that the Telephone Consumer Protection Act (“TCPA”) and Federal Communications Commission (“FCC”) interpretations of the TCPA speak for themselves. To the extent that Plaintiff’s

characterizations of the statute or FCC interpretations of the statute are incomplete and out of context, Defendant denies the allegations in paragraph 8.

9. *One of the most prevalent bulk advertising methods employed by companies today involves the use of “Short Message Services” (or “SMS”), which is a system that allows for the transmission and receipt of short text messages to and from wireless telephones. Indeed, according to a recent study conducted by the Pew Research Center, “Spam isn't just for email anymore; it comes in the form of unwanted text messages of all kinds — from coupons to phishing schemes — sent directly to user's cell phones.”<sup>1</sup>*

**Answer:**

Caribou admits that SMS is a system that allows for the transmission and receipt of text messages to and from wireless telephones. Caribou lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 9 and therefore denies them.

10. *SMS messages are directed to a wireless device through a telephone number assigned to the device. When an SMS message is successfully transmitted, the recipient's wireless phone alerts the recipient that a message has been received. Because wireless telephones are carried on their owner's person, SMS messages are received virtually anywhere in the world.*

**Answer:**

Caribou admits that SMS messages may be directed to a wireless device through a telephone number assigned to the device. Caribou lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 10 and therefore denies them.

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<sup>1</sup> Amanda Lenhart, Cell Phones and American Adults: They Make Just as Many Calls, but Text Less than Teens, Pew Research Center (2010), <http://www.pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults.aspx> (last visited May 21, 2015).

11. *Unlike more conventional advertisements, SMS message advertisements can actually cost their recipients money because wireless phone users must pay their wireless service providers either for each text message they receive or incur a usage allocation deduction to their text messaging or data plan, regardless of whether the message is authorized.*

**Answer:**

Caribou lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 and therefore denies them.

12. *Moreover, the transmission of an unsolicited SMS text message to a cellular device is distracting and aggravating to the recipient; invades the recipient's privacy; intrudes upon the recipient's seclusion; requires the recipient to waste time accessing, reading and ultimately disposing of the message; wastes data and reduces the available data storage capacity on the recipient's cellular device; diminishes the available battery power and shortens the battery life of the recipient's cellular device; and requires expending energy (i.e., electricity) to recoup the battery power lost as a result of receiving the message.*

**Answer:**

Caribou denies the allegations in paragraph 12.

**FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS**

13. *Plaintiff is, and at all times mentioned herein was, the subscriber of the cellular telephone number (715) 245-0640 (the "0640 Number"). The 0640 Number is, and at all times mentioned herein was, assigned to a cellular telephone service as specified in 47 U.S.C. § 227 (b) (1) (A) (iii).*

**Answer:**

Caribou lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 and therefore denies them.

14. *Between in or about early March 2016 and the date of the filing of this First Amended Class Action Complaint, Defendant transmitted or caused to be transmitted, by itself or through an intermediary or intermediaries, approximately fifty (50) SMS text message advertisements to the 0640 Number without Plaintiff's express consent, written or otherwise.*

**Answer:**

Caribou denies the allegations in paragraph 14.

15. *The source of each of the unsolicited SMS text messages sent by Defendant to the 0640 Number was “65017”, which is an SMS short code leased by Defendant or Defendant's agent(s) or affiliate(s), and is used for operating Defendant's text message marketing program.*

**Answer:**

Caribou admits that it leased the SMS short code “65017” between early March 2016 and the date of the filing of the Amended Complaint for purposes of operating its text message marketing program and that it used that short code to send SMS text messages to the 0640 Number. Caribou denies all remaining allegations in paragraph 15.

16. *Because Plaintiff is alerted by her cellular device whenever she receives an SMS text message, by auditory and/or visual means, each unsolicited SMS text message that Defendant transmitted to Plaintiff's cellular device invaded Plaintiff's privacy and intruded upon Plaintiff's seclusion upon receipt.*

**Answer:**

Caribou denies the allegations in paragraph 16.

17. *Each unsolicited SMS text message that Defendant transmitted to Plaintiff's cellular device distracted and aggravated Plaintiff upon receipt.*

**Answer:**

Caribou denies the allegations in paragraph 17.

18. *Upon receiving each of Defendant's unsolicited SMS text messages, Plaintiff wasted valuable time interacting with her cellular device in order to access the message, and then wasted more valuable time reading the message and ultimately disposing of the message.*

**Answer:**

Caribou denies the allegations in paragraph 18.

19. *Each unsolicited SMS text message that Defendant transmitted to Plaintiffs cellular device wasted available data storage on Plaintiffs cellular device, and thus reduced the overall data storage capacity of Plaintiff's cellular device.*

**Answer:**

Caribou denies the allegations in paragraph 19.

20. *The SMS text messages that Defendant transmitted to Plaintiff's cellular device diminished the available battery power (and shortened the battery life) of Plaintiff's cellular device on receipt of these messages, and thus required Plaintiff to expend energy (i.e., electricity) to recoup the battery power lost as a result of receiving these messages.*

**Answer:**

Caribou denies the allegations in paragraph 20.

21. *All telephone contact by Defendant and/or affiliates, subsidiaries, or agents of Defendant to Plaintiff at the 0640 Number occurred via an "automated telephone dialing system" as defined by 47 U.S.C. § 227(b)(1)(A).*

**Answer:**

Caribou denies that 47 U.S.C. § 227(b)(1)(A) defines "automated telephone dialing system." The remaining allegations in paragraph 21 constitute a legal conclusion to which no response is required. To the extent a response is required, Caribou denies the allegations.

22. *Specifically, Defendant utilized an "automated telephone dialing system" because the SMS messages to the 0640 Number were sent from "65017", which is a short code telephone number used to message consumers en masse, and because the hardware and software used by Defendant to send such messages have the capacity to store, produce, and dial random or sequential numbers, and/or receive and store lists of telephone numbers, and to dial such numbers, en masse, in an automated fashion and without human intervention. Defendant's automated dialing equipment includes features substantially similar to a predictive dialer, inasmuch as it is capable of making numerous calls and/or texts simultaneously (all without human intervention).*

**Answer:**

The allegations in paragraph 22 constitute a legal conclusion to which no response is required. To the extent a response is required, Caribou denies the allegations.

23. *The complained of SMS messages to the 0640 Number constituted calls not made for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).*

**Answer:**

Caribou admits the allegations in paragraph 23.

24. *The complained of SMS messages to the 0640 Number constituted telephone solicitations as defined by 47 U.S.C. § 227(a)(4).*

**Answer:**

Caribou denies the allegations in paragraph 24.

25. *The complained of SMS messages to the 0640 Number constituted advertisements as defined by 47 C.F.R. 64.1200(f)(1).*

**Answer:**

The allegations in paragraph 25 constitute a legal conclusion to which no response is required. To the extent a response is required, Caribou denies the allegations.

26. *Plaintiff never provided “prior express written consent” or any other form of consent allowing Defendant and/or any affiliate, subsidiary, or agent of Defendant to transmit SMS messages to the 0640 Number by means of an “automatic telephone dialing system,” within the meaning of 47 U.S.C. § 227(b)(1)(A). In fact, at no time did Plaintiff ever provide Defendant with the 0640 Number.*

**Answer:**

Caribou continues to research the truth of the allegations in paragraph 26 and therefore currently denies them.

### **CLASS ACTION ALLEGATIONS**

27. *Class Definition.* Plaintiff brings this civil class action on behalf of herself individually and on behalf of all other similarly situated persons as a class action pursuant to Fed. R. Civ. P. 23. The “Class” which Plaintiff seeks to represent is comprised of and defined as follows:

*All persons within the United States who received an SMS text message from Caribou Coffee Company, Inc. and/or an affiliate, subsidiary, or agent of Caribou Coffee Company, Inc. to a cellular telephone through the use of an automatic dialing system and who did not provide prior express written consent to receive such SMS text messages.*

**Answer:**

Caribou admits that Plaintiff purports to bring this action on behalf of the class described in paragraph 27 but denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

28. *Defendant, its employees and agents are excluded from the Class.*

**Answer:**

Caribou admits that it is excluded from the class. With respect to the remaining allegations in paragraph 28, Caribou lacks information or knowledge sufficient to form a belief as to the truth of the allegations and therefore denies them.

29. *Plaintiff reserves the right to modify the definition of the Class (or add one or more subclasses) after further discovery.*

**Answer:**

Caribou denies the allegations in paragraph 29 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

30. *Plaintiff and all Class members have been impacted and harmed by the acts of Defendant and/or their affiliates or subsidiaries.*

**Answer:**

Caribou denies the allegations in paragraph 30 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

31. *This First Amended Class Action Complaint seeks injunctive relief and monetary damages.*

**Answer:**

With respect to the allegations in paragraph 31, Caribou admits that Plaintiff purports to seek damages and injunctive relief. Caribou denies that Plaintiff is entitled to the relief sought or to pursue this action on behalf of the identified Class.

32. *This action may properly be brought and maintained as a class action pursuant to Fed. R. Civ. P. 23(a) and (b). This class action satisfies the numerosity, typicality, adequacy, commonality, predominance and superiority requirements.*

**Answer:**

Caribou denies the allegations in paragraph 32 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

33. *Upon application by Plaintiff's counsel for certification of the Class, the Court may also be requested to utilize and certify subclasses in the interests of manageability, justice and/or judicial economy.*

**Answer:**

Caribou denies the allegations in paragraph 33 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

34. *Numerosity. The number of persons within the Class is substantial, believed to amount to tens of thousands of persons dispersed throughout the United States. It is, therefore, impractical to join each member of the Class as a named Plaintiff. Further, the size and relatively modest value of the claims of the individual members of the Class renders joinder impractical. Accordingly, utilization of the class action mechanism is the*

*most economically feasible means of determining and adjudicating the merits of this litigation.*

**Answer:**

Caribou denies the allegations in paragraph 34 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

35. *Typicality.* Plaintiff received at least one SMS text message through the use of an automatic telephone dialing system, without providing her prior express written consent to Defendant within the meaning of the TCPA. Consequently, the claims of Plaintiff are typical of the claims of the members of the Class, and Plaintiff's interest is consistent with and not antagonistic to those of the other Class members she seeks to represent. Plaintiff and all members of the Class have been impacted by, and face continuing harm arising out of, Defendant's violations and/or misconduct as alleged herein.

**Answer:**

Caribou denies the allegations in paragraph 35 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

36. *Adequacy.* As Class representative, the Plaintiff has no interests that are adverse to, or which conflict with, the interests of the absent members of the Class and is able to fairly and adequately represent and protect the interests of such a Class. Plaintiff has raised viable statutory claims of the type reasonably expected to be raised by members of the Class, and will vigorously pursue those claims. If necessary, Plaintiff may seek leave to amend this First Amended Class Action Complaint to add additional Class representatives or assert additional claims.

**Answer:**

Caribou lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36 and therefore denies the allegation. Caribou denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

37. *Competency of Class Counsel.* Plaintiff has retained and is represented by experienced, qualified and competent counsel committed to prosecuting this action. These counsel are experienced in handling complex class action claims.

**Answer:**

Caribou lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37 and therefore denies the allegation. Caribou denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

38. *Commonality and Predominance.* There are well defined common questions of fact and law that exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual questions, which do not vary from Class member to Class member and may be determined without reference to the individual circumstances of any class member, include (but are not limited to) the following:

a) *Whether Defendant and/or affiliates, subsidiaries, or agents of Defendant transmitted non-emergency text messages to Plaintiff's and Class members' cellular telephones using an automatic telephone dialing system;*

b) *Whether Defendant and/or affiliates, subsidiaries, or agents of Defendant can meet their burden to show Defendant obtained prior express written consent (as defined by 47 C.F.R. 64.1200(f)(8)) to send the text messages complained of;*

c) *Whether the complained of conduct was knowing and/or willful;*

d) *Whether Defendant is liable for damages, and the amount of such damages;*

e) *Whether Defendant and/or affiliates, subsidiaries, or agents of Defendant should be enjoined from engaging in such conduct in the future.*

**Answer:**

Caribou denies the allegations in paragraph 38 and its subparts a) through e) and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

39. *Superiority.* A class action is superior to other available methods for the fair and efficient adjudication of this controversy because individual litigation of the claims of all Class members is impracticable. Even if every member of the Class could afford to pursue individual litigation, the Court system could not. It would be unduly burdensome to the courts in which individual litigation of numerous cases would proceed. Individualized litigation would also present the potential for varying,

*inconsistent or contradictory judgments, and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues. By contrast, the maintenance of this action as a class action, with respect to some or all of the issues presented herein, presents few management difficulties, conserves the resources of the parties and of the court system and protects the rights of each member of the Class. Plaintiff anticipates no difficulty in the management of this action as a class action. Class wide relief is essential to compel compliance with the TCPA. The interest of Class members in individually controlling the prosecution of separate claims 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 text messages at issue are all automated and the Class members, by definition, did not provide the prior express written consent required under the statute to authorize such text messages to their cellular telephones. The Class members can be readily located and notified of this class action through Defendant's records and, if necessary, the records of cellular telephone providers.*

**Answer:**

Caribou denies the allegations in paragraph 39 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

40. *Additionally, the prosecution of separate actions by individual Class members may create a risk of multiple adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other members of the Class who are not parties to such adjudications, thereby substantially impairing or impeding the ability of such nonparty Class members to protect their interests. The prosecution of individual actions by Class members could further establish inconsistent results and/or establish incompatible standards of conduct for Defendant.*

**Answer:**

Caribou denies the allegations in paragraph 40 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

41. *Defendant and/or any affiliates, subsidiaries, or agents of Defendant have acted on grounds generally applicable to the Class, thereby making final injunctive relief and corresponding declaratory relief with respect to the Class as a whole appropriate. Moreover, on information and belief, Plaintiff alleges that the TCPA violations complained of herein are substantially likely to continue in the future if an injunction is not entered.*

**Answer:**

Caribou lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding its unspecified “affiliates, subsidiaries, or agents.” Caribou denies the remaining allegations in paragraph 41 and denies that Plaintiff is entitled to pursue this action on behalf of the identified Class.

**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF**  
**NEGLIGENT VIOLATION OF THE TELEPHONE**  
**CONSUMER PROTECTION ACT**  
**(47 U.S.C. § 227)**

42. *Plaintiff incorporates by reference paragraphs 1-41 of this First Amended Class Action Complaint as if fully stated herein.*

**Answer:**

Caribou incorporates its responses to paragraphs 1–41 as though fully stated herein.

43. *The foregoing acts and omissions constitute negligent violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C. § 227.*

**Answer:**

Caribou denies the allegations in paragraph 43.

44. *As a result of the alleged negligent violations of 47 U.S.C. § 227, Plaintiff and all Class members are entitled to, and do seek, injunctive relief prohibiting such conduct violating the TCPA in the future.*

**Answer:**

Caribou denies the allegations in paragraph 44.

45. *Plaintiff and all Class members are also entitled to, and do seek, an award of \$500.00 in statutory damages for each and every SMS message transmitted in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3).*

**Answer:**

Caribou denies the allegations in paragraph 44.

46. *Plaintiff and Class members also seek an award of attorneys' fees and costs.*

**Answer:**

Caribou denies the allegations in paragraph 45.

**SECOND CLAIM FOR RELIEF**  
**KNOWING AND/OR WILLFUL VIOLATION OF THE**  
**TELEPHONE CONSUMER PROTECTION ACT**  
**(47 U.S.C. § 227)**

47. *Plaintiff incorporates by reference paragraphs 1-41 of this First Amended Class Action Complaint as if fully stated herein.*

**Answer:**

Caribou incorporates its responses to paragraphs 1–46 as though fully stated herein.

48. *The foregoing acts and omissions constitute knowing and/or willful violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C. § 227.*

**Answer:**

Caribou denies the allegations in paragraph 48.

49. *As a result of alleged knowing and/or willful violations of 47 U.S.C. § 227, Plaintiff and all Class members are entitled to, and do seek, injunctive relief prohibiting such conduct violating the TCPA in the future.*

**Answer:**

Caribou denies the allegations in paragraph 49.

50. *Plaintiff and all Class members are also entitled to, and do seek, treble damages of up to \$1,500.00 for each and every SMS message transmitted in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3).*

**Answer:**

Caribou denies the allegations in paragraph 50.

51. *Plaintiff and Class members also seek an award of attorneys' fees and costs.*

**Answer:**

Caribou admits that Plaintiff purports to seek an award of attorneys' fees and costs. Caribou denies that Plaintiff, or the putative class is entitled to such an award and denies that the TCPA provides for an award of attorney's fees or costs.

**AFFIRMATIVE DEFENSES**

For its affirmative defenses, Defendant Caribou states the following and also reserves the right to seek the Court's permission to assert additional affirmative defenses as they are discovered through the course of discovery:

**First Affirmative Defense: Lack of Standing**

1. To establish standing under Article III of the United States Constitution, Plaintiff, and the proposed class, must show a concrete and particularized invasion of a legally protected interest.

2. To the extent Plaintiff and members of the proposed class have not paid money, lost title to goods of value, or suffered any other concreted or particularized harm as a result of the conduct alleged, Plaintiff and members of the proposed class lack standing to bring this suit under Article III of the United States Constitution.

**Second Affirmative Defense: Lack of Damages**

3. Caribou incorporates the allegation stated in its Affirmative Defenses, paragraphs 1 through 2, as though stated herein.

4. To the extent Plaintiff and members of the proposed class have not paid money, lost title to goods of value, or suffered any cognizable nonpecuniary harm as a result of the conduct alleged, Plaintiff and members of the proposed class have suffered no actual damages and cannot recover any damages in this action.

**Third Affirmative Defense: Lack of Causation**

5. Caribou incorporates the allegation stated in its Affirmative Defenses, paragraphs 1 through 4, as though stated herein.

6. Some or all of the alleged SMS text messages sent Plaintiff and members of the proposed class were sent to cellular telephone numbers provided to Caribou by Caribou customers.

7. Some of those cellular telephone numbers may have been reassigned after being provided to Caribou by Caribou customers.

8. It is industry practice for wireless carriers to “unsubscribe” or reject SMS text messages sent after a cellular telephone number is disconnected and prior to reassignment to a new cellular telephone customer.

9. Wireless carriers, including but not limited to Sprint and Republic Wireless, may have failed to “unsubscribe” or reject SMS text messages sent on behalf of Caribou to cellular telephone numbers that were reassigned to new cellular telephone customers.

10. There is no industry-wide database or tracking of reassigned cellular telephone numbers upon which Caribou can rely; therefore, Caribou must rely on wireless carriers to “unsubscribe” or reject SMS text messages sent to cellular telephone numbers that will be reassigned to new cellular telephone customers.

11. Thus, Plaintiff’s damages and damages of members of the proposed class, if any, were caused, in whole or in part, by the actions and/or inactions of third parties and/or intervening causes over which Caribou has no control.

**Fourth Affirmative Defense: Failure to Mitigate Damages**

12. Caribou incorporates the allegation stated in its Affirmative Defenses, paragraphs 1 through 11, as though stated herein.

13. When Plaintiff contacted Caribou to request that Caribou stop sending her SMS text messages, she did not provide Caribou with the cellular telephone number to which Caribou’s messages were directed. Plaintiff instead provided a different telephone number, to which no Caribou messages were sent, to communicate her requests that the text messages stop.

14. On information and belief, Plaintiff knew that her carrier was Republic Wireless, and knew or should have known that Republic Wireless operated by assigning her multiple telephone numbers.

15. Caribou explained this to Plaintiff and requested she contact her wireless carrier to request assistance because Caribou had no way to identify the additional cellular telephone number assigned to Plaintiff.

16. If Plaintiff did not know the additional cellular telephone number assigned to her by her carrier, on information and belief, she could have learned the number by contacting her carrier or by reviewing information in her cellular telephone number, as identified on the Republic Wireless website at <https://community.republicwireless.com/people/carlh/blog/2013/11/21/moto-x-how-to-find-out-your-phones-sprint-number> (last visited July 6, 2016).

17. If Plaintiff had identified the correct telephone number to Caribou, the messages would have stopped.

18. Plaintiff failed to identify the correct cellular telephone number and instead sued Caribou.

19. Plaintiff therefore has failed to mitigate her damages.

#### **Fifth Affirmative Defense: Consent**

20. Caribou incorporates the allegation stated in its Affirmative Defenses, paragraphs 1 through 19, as though stated herein.

21. The Telephone Consumer Protection Act does not prohibit SMS text messages to cellular telephones made using an automatic telephone dialing system or using an artificial or prerecorded voice where the called party has given his or her consent.

22. Caribou can establish consent by demonstrating that the called party or an agent of the called party provided prior express written consent to receive SMS text messages.

23. To the extent Caribou has received consent to send SMS text messages to the cellular telephone numbers identified by Plaintiff or members of the proposed class, the claims are barred.

**Sixth Affirmative Defense: Excessive Fines and Due Process**

24. Caribou incorporates the allegation stated in its Affirmative Defenses, paragraphs 1 through 24, as though stated herein.

25. The Telephone Consumer Protection Act provides for statutory damages of \$500 to \$1,500 for each violation of the law.

26. When directed at SMS text messages, statutory damages under the Telephone Consumer Protection Act could quickly rise to millions of dollars.

27. Viewing and deleting an SMS text message takes no more than a few seconds. A recipient of a misdirected message need not take even those actions.

28. Receiving an SMS text message costs nothing for many cellular telephone subscribers. For others it costs a few cents at most.

29. Receiving an SMS text message on a cellular telephone involves no noticeable use of the telephone's battery or system resources.

30. In this light, Plaintiff's and the proposed class's claim for statutory damages is grossly disproportionate to the conduct alleged, constitutes an excessive fine, and violates Caribou's due process rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

**Seventh Affirmative Defense: Claims Not Properly Certifiable Under Rule 23**

31. Caribou incorporates the allegations stated in its Affirmative Defenses, paragraphs 1 through 30 as though stated herein.

32. Plaintiff purports to represent a class of individuals allegedly contacted by Caribou, or on Caribou's behalf, in violation of the Telephone Consumer Protection Act.

33. Plaintiff further claims that common questions of law and fact predominate over questions affecting any individual member of the class.

34. Plaintiff's claims cannot properly be certified under Federal Rule of Civil Procedure 23 because, among other reasons, questions of fact relating to each individual putative class member predominate over the questions relating to the class, including:

- b) Whether each individual was allegedly contacted by Caribou or on Caribou's behalf;
- c) Whether each individual or an agent of that individual provided consent prior to the contact;
- d) Whether each individual allegedly requested that Caribou discontinue SMS text messages; and
- e) Who was the owner or regular user of each cellular telephone number called at the time each message was placed.

WHEREFORE, Caribou respectfully requests that the Court:

- a. Dismiss all of Plaintiffs' claims against Caribou with prejudice and on the merits;

- b. Deny class certification;
- c. Award Caribou all costs, disbursements, and reasonable attorney fees allowed by law; and
- d. Grant Caribou any such further relief to which it may be entitled.

Respectfully submitted:

CARIBOU COFFEE COMPANY, INC.

Dated: July 6, 2016

**FAEGRE BAKER DANIELS LLP**

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