

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

MICHAEL KAISER-NYMAN, individually	)	
and on behalf of a class of all persons and	)	Case No. 1:17-cv-05472
entities similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FIRST CHOICE PAYMENT SOLUTIONS	)	Hon. Judge Thomas M. Durkin
G.P., d/b/a SEKURE MERCHANT	)	Hon. Mag. Judge Young B. Kim
SOLUTIONS,	)	
	)	<b>Jury Trial Demanded</b>
Defendant.	)	

**FIRST AMENDED CLASS ACTION COMPLAINT**

**Preliminary Statement**

1. Plaintiff Michael Kaiser-Nyman (“Plaintiff”), brings this action under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, a federal statute enacted in response to widespread public outrage about the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).

2. “Month after month, unwanted robocalls and texts, both telemarketing and informational, top the list of consumer complaints received by” the FCC.<sup>1</sup>

3. The TCPA is designed to protect consumer privacy by prohibiting unsolicited, autodialed telemarketing calls to cellular telephones, unless the caller has the “prior express written consent” of the called party.

4. Plaintiff alleges that Defendant First Choice Payment Solutions G.P., d/b/a Sekure Merchant Solutions (“Sekure”), made automated telemarketing calls using equipment prohibited by the TCPA, despite the fact that it had no business relationship with him.

---

<sup>1</sup> *Omnibus TCPA Order*, GC Docket 02-278, FCC 15-72, 2015 WL 4387780, ¶1 (July 10, 2015).

5. Because the call to the Plaintiff was transmitted using technology capable of generating thousands of similar calls per day, Plaintiff brings this action on behalf of a proposed nationwide class of other persons who were sent the same illegal telemarketing call.

6. A class action is the best means of obtaining redress for the Defendant's illegal telemarketing, and is consistent both with the private right of action afforded by the TCPA and the fairness and efficiency goals of Rule 23 of the Federal Rules of Civil Procedure.

### **Parties**

7. Plaintiff Michael Kaiser-Nyman is a resident of this District.

8. Defendant First Choice Payment Solutions G.P. is a Québec general partnership doing business as Sekure Merchant Solutions. Sekure's principal place of business is located at 333-1000 Rue Saint-Antoine O, Montréal, QC H3C 3R7, Canada, but it maintains locations in the United States, including at 1501 Broadway, 12th Floor, New York, New York, 10036. Sekure engages in telemarketing directed into the United States nationwide, including specifically into this District. *See, e.g.,* <http://content.eluta.ca/top-employer-sekure-merchant-solutions> ("Sekure's call centre is the hub of a sales operation that contacts merchants and companies across the United States to offer them cheaper ways of collecting customer card payments, whether at the store checkout or online.") (last accessed Aug. 30, 2017).

### **Jurisdiction & Venue**

9. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005 ("hereinafter referred to as CAFA") codified as 28 U.S.C. 1332(d)(2). The matter in controversy exceeds \$5,000,000.00, in the aggregate, exclusive of interest and costs, as each member of the proposed Class of at least tens of thousands is entitled to up to \$1,500.00 in statutory damages for each call that has violated the TCPA. Further, Plaintiff alleges a national

class, which will likely result in at least one Class member from a different state.

10. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because the Plaintiff's claims arise under federal law.

11. Sekure regularly engages in business in this District, including making telemarketing calls into this District, as it did with the Plaintiff.

12. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this District, as the automated calls to the Plaintiff were made into this District. Furthermore, venue is proper because a substantial part of property that is the subject of the action is situated in this District; the Plaintiff's cell phone.

### **TCPA Background**

#### **The Telephone Consumer Protection Act**

13. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy [.]” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

#### **The National Do Not Call Registry**

14. The National Do Not Call Registry allows consumers to register their telephone numbers and thereby indicate their desire not to receive telephone solicitations at those numbers. *See* 47 C.F.R. § 64.1200(c)(2). A listing on the Registry “must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.” *Id.*

15. The TCPA and implementing regulations prohibit the initiation of telephone solicitations to phone subscribers to the Registry. 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2).

The TCPA Prohibits Automated Telemarketing Calls

16. The TCPA prohibits “mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii). It provides a private cause of action to persons who receive calls violating this provision. 47 U.S.C. § 227(b)(3).

17. 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.

18. The FCC also recognized that “wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.” *In re Rules & Regs. Implementing the TCPA*, CG Docket No. 02-278, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003).

19. In 2013, the FCC required prior express written consent for all autodialed or prerecorded telemarketing calls (“robocalls”) to wireless numbers and residential lines.

Specifically, it ordered that:

[A] consumer’s written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received “clear and conspicuous disclosure” of the consequences of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.[] In addition, the written agreement must be obtained “without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.[]”

*In re Rules & Regs. Implementing the TCPA*, 27 FCC Rcd. 1830, 1844 (2012) (notes omitted).

**Factual Allegations**

20. Sekure provides payment processing services to companies.
21. Sekure uses telemarketing to promote its products.
22. Sekure's telemarketing efforts include the use of automated dialing equipment to send automated calls.
23. On July 20, 2017, the Plaintiff received a telemarketing call on his cellular telephone number, (916) 595-XXXX.
24. This telephone number was registered on the National Do Not Call Registry on November 7, 2008.
25. The telemarketing call began with a distinctive click and pause after the Plaintiff answered.
26. In fact, while waiting for a human being to arrive on the line, the Plaintiff repeatedly said "hello" into his telephone with no response.
27. Furthermore, the Plaintiff, who formerly operated a dialer, recognized the automated dialing system being used as one with answering machine detection.
28. These facts, as well as the geographic distance between the Plaintiff and the Defendant, as well as the fact that this call was part of a nationwide telemarketing campaign, demonstrate that the call was made using an automatic telephone dialing system ("ATDS" or "autodialer") as that term is defined in 47 U.S.C. § 227(a)(1).
29. When a human being arrived on the phone line, the Plaintiff received a scripted sales pitch about payment processing services.
30. The call was then transferred to "Vivianne", who attempted to sell the Plaintiff Sekure services.

31. As a result of the automated call, Vivianne White, [vivianne@sekurecostreview.com](mailto:vivianne@sekurecostreview.com), contacted the Plaintiff by e-mail attempting to get the Plaintiff to purchase Sekure's payment processing services.

32. On July 21, 2017, Ms. White called the Plaintiff's cell phone number again.

33. On this call, she again offered Sekure's services via a high-pressured sales pitch.

34. When the Plaintiff informed her that he was not interested, and asked to be placed on their Do Not Call list, she ignored him and informed him that "his rates would go up" if he did not work with them.

35. The Plaintiff again requested to be placed on their Do Not Call list.

36. Ms. White responded that Plaintiff should "enjoy the overcharges" and hung up.

37. Prior to these unsolicited calls, the Plaintiff has never done any business with Sekure, and Plaintiff never provided Sekure with his cellular telephone number.

38. Sekure did not have the Plaintiff's prior express written consent to make this call.

39. Unfortunately, the Plaintiff's experience with the Defendant is not unique, as other individuals have complained about Sekure's telemarketing practices, including a number of complaints to the Better Business Bureau:

Sekure Merchant Services has been harassing my office for months, trying to get the doctor who owns the practice on the phone.

This company called my business to look at my credit card sales to see if they could provide a better rate. I told them I was not interested. They repeated to call and call, each time, I said I was not interested.

This company has harassed me to my breaking point. I do not want to be rude but I feel you just have no choice with these guys!

See <https://www.bbb.org/new-york-city/business-reviews/credit-card-processing-service/sekure-merchant-solutions-in-new-york-ny-132569/reviews-and-complaints> (last visited July 21, 2017).

40. In fact, employees of Sekure have referred to their job as making “cold calls”. *See* <https://www.glassdoor.com/Reviews/Sekure-Merchant-Solutions-Reviews-E913383.htm> (last visited July 21, 2017).

41. Plaintiff and the other call recipients were harmed by these calls. They were temporarily deprived of legitimate use of their phones because the phone line was tied up, they were charged for the calls, and their privacy was improperly invaded.

42. Moreover, these calls injured Plaintiff because they were frustrating, obnoxious, annoying, were a nuisance, and disturbed the solitude of Plaintiff and the class.

### **Class Action Allegations**

43. As authorized by Rule 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of all other persons or entities similarly situated throughout the United States.

44. The class of persons Plaintiff proposes to represent include:

All persons within the United States: (a) Defendant and/or a third party acting on its behalf, made one or more non-emergency telephone calls; (b) promoting Defendant’s products or services; (c) to their cellular telephone number; (d) using an automatic telephone dialing system or an artificial or prerecorded voice; and (e) at any time since four years prior to the filing of this action.

45. Excluded from the class are the Defendant, any entities in which the Defendant has a controlling interest, the Defendant’s agents and employees, any Judge to whom this action is assigned, and any member of the Judge’s staff and immediate family.

46. The class is identifiable through phone records and phone number databases.

47. The automated technology used to contact the Plaintiff is capable of contacting hundreds of thousands of people a day, and so the potential class members number in the thousands, at least. Individual joinder of these persons is impracticable.

48. Plaintiff is a member of the class.

49. There are questions of law and fact common to Plaintiff and to the proposed class, including but not limited to the following:

- a. Whether the Sekure used an automatic telephone dialing system to make the calls at issue;
- b. Whether the Sekure placed telemarketing calls without obtaining the recipients' valid prior express consent; and
- c. Damages, including whether the Sekure's violations of the TCPA were negligent, willful, or knowing.

50. Plaintiff's claims are based on the same facts and legal theories as the claims of all class members, and are therefore typical of the claims of class members, as the Plaintiff and class members all received telephone calls through the same or similar dialing system on a cellular telephone line.

51. Plaintiff is an adequate representative of the class because his interests do not conflict with the interests of the class, he will fairly and adequately protect the interests of the class, and he is represented by counsel skilled and experienced in class actions, including TCPA class actions. In fact, the Plaintiff has foregone a simpler path to recovery by filing this matter as a putative class action, as opposed to an individual claim.

52. The actions of the Sekure are generally applicable to the class and to Plaintiff.

53. Common questions of law and fact predominate over questions affecting only individual class members, and a class action is the superior method for fair and efficient adjudication of the controversy. The only individual question concerns identification of class members, which will be ascertainable from records maintained by Sekure and/or its agents.



54. The likelihood that individual class members will prosecute separate actions is remote due to the time and expense necessary to prosecute an individual case, and given the small recoveries available through individual actions.

55. Plaintiff is not aware of any litigation concerning this controversy already commenced by others who meet the criteria for class membership described above.

**COUNT ONE**  
**Violation of the TCPA, 47 U.S.C. § 227(b)**

56. Plaintiff incorporates all foregoing allegations as if fully set forth herein.

57. The foregoing acts and omissions of Sekure and/or its affiliates, agents, and/or other persons or entities acting on Sekure's behalf constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227, by making calls, except for emergency purposes, to the cellular telephone numbers of Plaintiff and members of the Class using an ATDS.

58. As a result of Sekure's and/or its affiliates, agents, and/or other persons or entities acting on Sekure's behalf's violations of the TCPA, 47 U.S.C. § 227, Plaintiff and members of the class are entitled to an award of \$500 in damages for each and every call made to their cellular telephone numbers using an ATDS and/or artificial or prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

59. Plaintiff and members of the class are also entitled to and do seek injunctive relief prohibiting Sekure and/or its affiliates, agents, and/or other persons or entities acting on Sekure's behalf from violating the TCPA, 47 U.S.C. § 227, by making non-emergency calls to any cellular telephone numbers using an ATDS and/or artificial or prerecorded voice in the future.

60. The Defendant's violations were negligent, willful, or knowing.

**Relief Sought**

For himself and all class members, Plaintiff requests the following relief:

- A. Certification of the proposed Class;
- B. Appointment of Plaintiff as representative of the Class;
- C. Appointment of the undersigned counsel as counsel for the Class;
- D. A declaration that Sekure and/or its affiliates, agents, and/or other related entities' actions complained of herein violate the TCPA;
- E. An order enjoining Sekure and/or its affiliates, agents, and/or other related entities, as provided by law, from engaging in the unlawful conduct set forth herein;
- F. An award to Plaintiff and the Class of damages, as allowed by law;
- G. Leave to amend this Complaint to conform to the evidence presented at trial; and
- H. Orders granting such other and further relief as the Court deems necessary, just, and proper.

**Plaintiff requests a jury trial as to all claims of the complaint so triable.**

MICHAEL KAISER-NYMAN

Dated: August 30, 2017

By: /s/ Alexander H. Burke

Alexander H. Burke  
Daniel J. Marovitch  
BURKE LAW OFFICES, LLC  
155 N. Michigan Ave., Suite 9020  
Chicago, IL 60601  
Telephone: (312) 729-5288  
[aburke@burkelawllc.com](mailto:aburke@burkelawllc.com)  
[dmarovitch@burkelawllc.com](mailto:dmarovitch@burkelawllc.com)

Anthony I. Paronich (*pro hac vice*)  
BRODERICK & PARONICH, P.C.  
99 High St., Suite 304  
Boston, MA 02110  
Telephone: (508) 221-1510  
[anthony@broderick-law.com](mailto:anthony@broderick-law.com)

*Counsel for Plaintiff*