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WILLIAM HOPWOOD, individually and on behalf of all others similarly situated,

Plaintiff,

v.

NUANCE COMMUNICATIONS, INC., a Delaware corporation, and INFINITY CONTACT, INC., an Iowa corporation,

Defendants.

Case No. CV-13-2132-YGR

SECOND AMENDED CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

1 **CLASS ACTION COMPLAINT AND JURY DEMAND**

2 Plaintiff William Hopwood brings this Class Action Complaint against Defendants Nuance
3 Communications, Inc. and Infinity Contact, Inc. to stop Defendants’ practice of making
4 unsolicited phone calls to the cellular telephones of consumers nationwide and to obtain redress
5 for all persons injured by its conduct. Plaintiff, for his Second Amended Class Action Complaint,
6 alleges as follows upon personal knowledge as to himself and his own acts and experiences, and,
7 as to all other matters, upon information and belief, including investigation conducted by his
8 attorneys.

9 **NATURE OF THE ACTION**

10 1. Defendant Nuance Communications is a multinational computer software
11 technology corporation that provides speech and imaging applications, including products focused
12 on speech recognition, telephone call steering systems, automated telephone directory services,
13 medical transcription software, optical character recognition software, and desktop imaging
14 software.

15 2. Defendant Infinity Contact is a third-party provider of consumer telemarketing
16 services with a focus on customer retention and acquisition. Infinity Contact asserts on its website
17 that it “will work with you to tailor and implement multi-channel retention campaigns designed to
18 communicate special offers, promotions, referrals, and rewards. We also recognize important
19 milestones in your relationship with them, such as birthdays and anniversaries.”

20 3. Likewise, Infinity Contact asserts that it will “[m]aximize the results of your direct
21 marketing campaigns by partnering with a proven expert in enhancing direct response programs.
22 Each interaction is an opportunity to connect with your customers and drive more sales. You need
23 a partner who has extensive experience in up- and cross-selling to maximize the revenue generated
24 from every interaction.”

25 4. In an effort to promote and sell its various consumer and business products,
26 Defendant Nuance worked directly with Defendant Infinity Contact to make thousands of
27 unsolicited phone calls to consumers. Specifically, Nuance hired Infinity Contact to make
28 telephone solicitations on its behalf.

1 calls to Plaintiff Hopwood’s cellular telephone from the phone number (866) 459-2530. The
2 telemarketer attempted to sell Plaintiff a product he had already purchased.

3 26. On a call with Defendants occurring in or around November 2012, Plaintiff
4 Hopwood expressly requested that he no longer be called by Defendants and that his information
5 be removed from their call database.

6 27. Plaintiff Hopwood thereafter received a telemarketing call from Defendants on
7 January 23, 2013, from the phone number (866) 771-6288, wherein he again requested to no
8 longer be called.

9 28. Plaintiff Hopwood received additional calls from Defendants on February 19,
10 February 20, and February 22, 2013. These calls also came from (866) 771-6288.

11 29. Defendants placed additional calls to Plaintiff Hopwood between November 2012
12 and February 2013 that Plaintiff Hopwood did not answer.

13 30. The calls Plaintiff Hopwood received were made using equipment that had the
14 capacity to store or produce telephone numbers to be called using a random or sequential number
15 generator, and to dial such numbers. Additionally, Defendants’ calls utilized interactive voice
16 recognition technology, also known as a predictive dialer, in which calls are placed by a machine,
17 and when a consumer answers the phone, there is a noticeable pause prior to the recipient being
18 connected to a live representative of Defendants. This technology, on information and belief, dials
19 several numbers simultaneously and connects the call to only those who answer first.

20 31. Defendants were and are aware that the above described telephone calls were and
21 are being made to consumers who had expressly requested to no longer receive them.

22 **CLASS ALLEGATIONS**

23 32. Plaintiff Hopwood brings this action pursuant to Federal Rules of Civil Procedure
24 23(b)(2) and 23(b)(3) on behalf of himself and a class (“Class”) defined as follows:

25 All individuals who received a call on a United States wireless telephone number
26 from Infinity for the purpose of offering one or more Nuance products between
May 8, 2009 and the present.

27 Excluded from the Class are 1) Defendants, their officers and directors, and the members
28 of their immediate families; 2) the Judge or Magistrate Judge to whom this case is assigned

1 and the Judge's or Magistrate Judge's immediate family, 4) persons who have had their
2 claims finally adjudicated or otherwise released, 5) the legal representatives, successors, or
3 assigns of any such excluded person, and 6) Plaintiff's counsel and Defendants' counsel.

4 33. **Numerosity:** The exact size of the Class is unknown and not available to Plaintiff
5 at this time, but it is clear that individual joinder is impracticable. On information and belief,
6 Defendants have made telephone calls to thousands of consumers who fall into the definition of
7 the Class. Class members can be identified through Defendants' records.

8 34. **Typicality:** Plaintiff's claims are typical of the claims of other members of the
9 Class, in that Plaintiff and the Class members sustained damages arising out of Defendants'
10 uniform wrongful conduct and unsolicited telephone calls.

11 35. **Adequate Representation:** Plaintiff will fairly and adequately represent and
12 protect the interests of the Class and have retained counsel competent and experienced in complex
13 class actions. Plaintiff has no interests antagonistic to those of the Class, and Defendants have no
14 defenses unique to Plaintiff.

15 36. **Commonality and Predominance:** There are many questions of law and fact
16 common to the claims of Plaintiff and the Class, and those questions predominate over any
17 questions that may affect individual members of the Class. Common questions for the Class
18 include, but are not necessarily limited to, the following:

- 19 (a) whether Defendants' conduct constitutes a violation of the TCPA;
20 (b) whether the equipment Defendants used to make telephone calls to the
21 Class members was an automatic telephone dialing system as contemplated
22 by the TCPA;
23 (c) whether Defendants systematically made telephone calls to members of the
24 Class who did not previously provide Defendants with their prior express
25 consent to receive such telephone calls;
26 (d) whether Defendants made telephone calls to members of the Class more
27 than seven days after they requested to no longer receive telephone calls
28 from them; and

1 (e) whether Defendants systematically made telephone calls to members of the
2 Class whose telephone numbers were registered with the National Do Not
3 Call Registry.

4 37. **Superiority:** This case is also appropriate for class certification as class
5 proceedings are superior to all other available methods for the fair and efficient adjudication of
6 this controversy because joinder of all parties is impracticable. The damages suffered by the
7 individual members of the Class will likely be relatively small, especially given the burden and
8 expense required for individual prosecution of the complex litigation necessitated by Defendants'
9 actions. Thus, it would be virtually impossible for the individual members of the Class to obtain
10 effective relief from Defendants' misconduct. Even if members of the Class could sustain such
11 individual litigation, it would still not be preferable to a class action, because individual litigation
12 would increase the delay and expense to all parties due to the complex legal and factual
13 controversies presented in this Complaint. By contrast, a class action presents far fewer
14 management difficulties and provides the benefits of single adjudication, economy of scale, and
15 comprehensive supervision by a single court. Economies of time, effort, and expense will be
16 fostered and uniformity of decisions ensured.

17 **COUNT I**

18 **Violation of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii)**
19 **(On behalf of Plaintiff Hopwood and the Class)**

20 38. Plaintiff Hopwood incorporates by reference the foregoing allegations as if fully set
21 forth herein.

22 39. Defendants made, or directed to be made, unsolicited telephone calls to cellular
23 telephone numbers belonging to Plaintiff Hopwood and other members of the Class without their
24 prior express consent to receive such calls.

25 40. Defendants also made unsolicited telephone calls to cellular telephone numbers
26 belonging to Plaintiff Hopwood and other members of the Class who requested to no longer
27 receive calls from Defendants but received such calls more than seven days after their express
28 requests. As such, the calls made to Class members after they revoked any purported consent were

1 made without Plaintiff Hopwood's and the Class members' prior express consent to receive such
2 calls.

3 41. Defendants made the telephone calls, or directed them to be made, using equipment
4 that had the capacity to store or produce telephone numbers to be called using a random or
5 sequential number generator, and to dial such numbers.

6 42. Defendants utilized equipment that made, or had made on its behalf, the telephone
7 calls to Plaintiff Hopwood and other members of the Class simultaneously and without human
8 intervention.

9 43. By making, or having made on its behalf, the unsolicited telephone calls to Plaintiff
10 Hopwood and the Class members' cellular telephones without their prior express consent, and by
11 utilizing an automatic telephone dialing system to make those calls, Defendants have violated 47
12 U.S.C. § 227(b)(1)(A)(iii).

13 44. By making, or directing to be made, the unsolicited telephone calls to Plaintiff
14 Hopwood and the Class members' cellular telephones more than seven days after the requests
15 were made to stop such calls (thereby revoking any purported consent), and by utilizing an
16 automatic telephone dialing system to make those calls, Defendants have violated 47 U.S.C. §
17 227(b)(1)(A)(iii).

18 45. As a result of Defendants' unlawful conduct, Plaintiff Hopwood and the members
19 of the Class suffered actual damages in the form of monies paid to receive the unsolicited
20 telephone calls on their cellular phones and under section 227(b)(3)(B) are each entitled to, *inter*
21 *alia*, statutory damages for each such violation of the TCPA.

22 COUNT II

23 **Violation of the TCPA, 47 U.S.C. § 227(c)(5)** 24 **(On behalf of Plaintiff Hopwood and the Class)**

25 46. Plaintiff incorporates by reference the foregoing allegations as if fully set forth
26 herein.

27 47. 47 U.S.C. § 227(c) provides that any "person who has received more than one
28 telephone call within any 12-month period by or on behalf of the same entity in violation of the

1 regulations prescribed under this subsection may,” bring a private action based on a violation of
2 said regulations, which were promulgated to protect telephone subscribers’ privacy rights to avoid
3 receiving telephone solicitations to which they object.

4 48. The Telephone Consumer Protection Act’s implementing regulation, 47 C.F.R. §
5 64.1200 (c), provides that “No person or entity shall initiate any telephone solicitation” to “...(2)
6 A residential telephone subscriber who has registered his or her telephone number on the national
7 do-not-call registry of persons who do not wish to receive telephone solicitations that is
8 maintained by the federal government.”

9 49. 47 C.F.R. §64.1200 (e), provides that §64.1200 (c) and (d) “are applicable to any
10 person or entity making telephone solicitations or telemarketing calls to wireless telephone
11 numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278,
12 FCC 03-153, ‘Rules and Regulations Implementing the Telephone Consumer Protection Act of
13 1991,’” which Report and Order, in turn, provides as follows:

14 The Commission’s rules provide that companies making telephone solicitations to
15 residential telephone subscribers must comply with time of day restrictions and must
16 institute procedures for maintaining do-not-call lists. For the reasons described above, we
17 conclude that these rules apply to calls made to wireless telephone numbers. We believe
18 that wireless subscribers should be afforded the same protections as wireline subscribers.

19 50. 47 C.F.R. § 64.1200 (d) further provides that “No person or entity shall initiate any
20 call for telemarketing purposes to a residential telephone subscriber unless such person or entity
21 has instituted procedures for maintaining a list of persons who request not to receive telemarketing
22 calls made by or on behalf of that person or entity. The procedures instituted must meet the
23 following minimum standards:

24 (1) Written policy. Persons or entitles making calls for telemarketing purposes must have a
25 written policy, available upon demand, for maintaining a do-not-call list.

26 (2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of
27 telemarketing must be informed and trained in the existence and use of the do-not-call list.

28 (3) Recording, disclosure of do-not-call requests. If a person or entity making a call for
telemarketing purposes (or on whose behalf such a call is made) receives a request from a
residential telephone subscriber not to receive calls from that person or entity, the person
or entity must record the request and place the subscriber's name, if provided, and
telephone number on the do-not-call list at the time the request is made. Persons or entities
making calls for telemarketing purposes (or on whose behalf such calls are made) must
honor a residential subscriber's do-not-call request within a reasonable time from the date

1 such request is made. This period may not exceed thirty days from the date of such request.
2 . . .

3 (4) Identification of sellers and telemarketers. A person or entity making a call for
4 telemarketing purposes must provide the called party with the name of the individual
5 caller, the name of the person or entity on whose behalf the call is being made, and a
6 telephone number or address at which the person or entity may be contacted. The
7 telephone number provided may not be a 900 number or any other number for which
8 charges exceed local or long distance transmission charges.

9 (5) Affiliated persons or entities. In the absence of a specific request by the subscriber to
10 the contrary, a residential subscriber's do-not-call request shall apply to the particular
11 business entity making the call (or on whose behalf a call is made), and will not apply to
12 affiliated entities unless the consumer reasonably would expect them to be included given
13 the identification of the caller and the product being advertised.

14 (6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing
15 purposes must maintain a record of a consumer's request not to receive further
16 telemarketing calls. A do-not-call request must be honored for 5 years from the time the
17 request is made.”

18 51. Defendants violated § 64.1200 (c) by initiating telephone solicitations to wireless
19 subscribers, such as Plaintiff Hopwood and the Class members, who registered their respective
20 telephone numbers on the National Do Not Call Registry, a listing of persons who do not wish to
21 receive telephone solicitations that is maintained by the federal government. These consumers
22 requested not to receive calls from Defendants, as set forth in § 64.1200 (d)(3).

23 52. Defendants made, or directed to be made, more than one unsolicited telephone call
24 to Plaintiff Hopwood and the Class members' cellular telephone numbers that were registered on
25 the National Do Not Call Registry within a 12-month period, without their prior express consent to
26 receive such calls.

27 53. Defendants affirmatively and publically represent that any request to no longer be
28 called by Defendants will be honored within seven days or less. As such, for purposes of 47
C.F.R. § 64.1200 (d), Defendants identify seven days as a reasonable time period to honor a
consumer's do-not-call request.

54. Plaintiff and members of the Class expressly requested that Defendants no longer
place calls to them, after which Defendants failed to place Plaintiff and members of the Class on
Defendants' internal do-not-call list(s) (or failed to do so within its stated seven-day time period).

55. More than seven days following Plaintiff's and the Class members' express
requests to not receive calls from Defendants, Defendants placed additional calls to them without

1 their consent and in violation of their request not to be called.

2 56. Defendants violated § 64.1200 (d) by initiating calls for telemarketing purposes to
3 wireless telephone subscribers, such as Plaintiff and the Class, without instituting procedures that
4 comply with the regulatory minimum standards for maintaining a list of persons who request not
5 to receive telemarketing calls from them.

6 57. Defendants violated 47 U.S.C. § 227(c)(5) because Plaintiff and the Class received
7 more than one telephone call within a 12-month period made by or on behalf of the Defendants in
8 violation of 47 C.F.R. § 64.1200, as described above. As a result of Defendants' conduct as
9 alleged herein, Plaintiff and the Class suffered actual damages and, under section 47 U.S.C. §
10 227(c), are each entitled, *inter alia*, statutory damages for such violations of § 64.1200.

11 58. To the extent Defendants' misconduct is determined to be willful and knowing, the
12 Court should, pursuant to § 227(c)(5), treble the amount of statutory damages recoverable by the
13 members of the Class.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff William Hopwood, individually and on behalf of the Class, prays
16 for the following relief:

- 17 1. An order certifying the Class as defined above, appointing Plaintiff William
18 Hopwood as the Class representative and appointing his counsel as Class Counsel;
- 19 2. An award of actual and/or statutory damages;
- 20 3. An injunction requiring Defendants to cease all unsolicited telephone calling
21 activities, and otherwise protecting the interests of the Class;
- 22 4. An award of reasonable attorneys' fees and costs; and
- 23 5. Such other and further relief that the Court deems reasonable and just.

24 **JURY DEMAND**

25 Plaintiff requests a trial by jury of all claims that can be so tried.
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Respectfully submitted,

WILLIAM HOPWOOD, individually and on behalf of all others similarly situated,

Dated: February 12, 2015

By: /s/ Benjamin H. Richman
One of Plaintiff's Attorneys

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