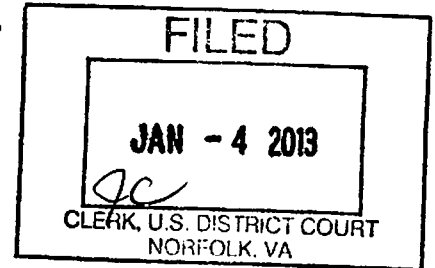


UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NEWPORT NEWS DIVISION



FRANCIS W. HOOKER, JR.,  
For himself and on behalf of all  
similarly situated individuals,

Plaintiff,

v.

CASE NO.: 4:13cv3

SIRIUS XM RADIO, INC.,

Defendant.

**CLASS COMPLAINT**

COMES NOW Plaintiff, Francis W. Hooker, Jr. ("Hooker" or "Plaintiff"), on behalf of himself and all similarly situated individuals, and alleges the following claims against Sirius XM Radio, Inc. ("Sirius XM" or "Defendant"):

**I. INTRODUCTION**

1. This action is brought for violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, et seq. ("TCPA" or "the Act"), arising out of several telephone solicitation calls made by or on behalf of Defendant to Plaintiff's cell phone number, including calls after 9:00 p.m., using an automatic telephone dialing system.

**II. SUBJECT MATTER JURISDICTION AND VENUE**

2. This court has original jurisdiction of this civil action as one arising under the laws of the United States. *See 28 U.S.C. § 1331* and *Mims v. Arrow Fin. Serv., LLC*, 565 U.S. \_\_\_, 132 S. Ct. 740, 181 L. Ed.2d 881 (2012).

3. Venue is proper in this Court under 28 U.S.C. § 1391(b) because Defendant victimized Plaintiff on his cell phone line in the City of Hampton, Virginia where Plaintiff lives and works.

4. Venue is also proper in this Court under 28 U.S.C. § 1391(b) as Defendant

regularly does business in the district and division, is subject to this Court's personal jurisdiction with respect to this civil action in the district and, as such, "resides" in the district.

5. Plaintiff maintains all of the documents relevant to this dispute at his home in Hampton, Virginia.

### III. PARTIES AND PERSONAL JURISDICTION

6. Plaintiff Hooker is an individual and natural person, and an Air Force Airman First Class stationed at Langley Air Force Base in Hampton, Virginia.

7. Defendant Sirius XM is a Delaware corporation with its principle place of business located at 1221 Avenue of the Americas, New York, NY 10020.

8. At all times pertinent, Defendant was and is in the business of providing radio programming for a fee.

9. Defendant transacts business throughout the United States, including in Virginia and specifically in this district and division.

10. In addition to transacting business in Virginia, Defendant contracts to supply services or things in Virginia, including in this district and division.

11. Defendant regularly does or solicits business, or engages in other persistent courses of conduct, or derives substantial revenue from goods used or consumed or services rendered in the Commonwealth of Virginia, including in this district and division.

12. In addition, through its acts in sending or causing to be sent to Plaintiff unsolicited text messages using an autodialer, Defendant caused tortious injury in the nature of an invasion of Plaintiff's privacy rights in this Commonwealth, either by its acts in this Commonwealth or, alternatively, by acts outside the Commonwealth while regularly doing or soliciting business or engaging in a persistent course of conduct and deriving substantial revenue from goods used or consumed or services rendered in this Commonwealth.

13. Personal jurisdiction may be exercised over Defendant pursuant to Va. Code § 8.01-328.1.A.1, A.2, A.3, and A.4.

14. Plaintiff intends to serve Defendant through the Virginia Secretary of the Commonwealth.

15. At all times pertinent, Defendant was and is engaged in interstate commerce, and Defendant used and is using instrumentalities of interstate commerce, including telephone lines, satellites, cell phone towers, and the mail, in the course of its activities set forth herein.

#### IV. GENERAL OVERVIEW OF THE TCPA

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

17. The TCPA regulates, among other things, the use of automated telephone dialing systems or “autodialers” and the use of artificial or prerecorded voices in telephone calls, both as to telemarketing and non-telemarketing calls. Specifically, the plain language of § 227(b)(1)(A) prohibits the use of autodialers or artificial or prerecorded voices to make any non-emergency call to a cellular or wireless phone number in the absence of prior express consent of the called party.

18. According to findings by the Federal Communications Commission (“FCC.”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, calls made using an autodialer or an artificial or prerecorded voice are a greater nuisance and invasion of privacy than live 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.

19. Under the TCPA and pursuant to the FCC’s January 2000 Declaratory Ruling, the burden is on Defendant to demonstrate that Plaintiff and the other members of the classes and sub-classes which Plaintiff seeks to represent provided prior express consent within the meaning of the Act.

20. In 47 U.S.C. § 227(c), Congress directed the FCC to prescribe rules and regulations to protect residential telephone subscribers’ privacy rights to avoid receiving

telephone solicitations to which they object.

21. Pursuant to this Congressional directive, the FCC has adopted rules and regulations prohibiting any person or entity from initiating any telephone solicitation to any residential telephone subscriber before 8:00 a.m. or after 9:00 p.m.(local time at the called party's location) as set forth in 47 C.F.R. § 64.1200(c).

22. Pursuant to 47 C.F.R. § 64.1200(e), this prohibition against telephone solicitations initiated before 8:00 a.m. or after 9:00 p.m. is also applicable to any person or entity initiating telephone solicitations to any wireless telephone number.

#### **V. FACTS AS TO NAMED PLAINTIFF**

23. On or about August 19, 2011, Plaintiff and his wife, Alexandra Rae Hooker, purchased a 2012 Hyundai Elantra four door sedan.

24. As part of the purchase the dealership provided Plaintiff with three months of Defendant's satellite radio programming at no charge.

25. Approximately halfway through the three monthly complimentary trial period, Plaintiff received the first autodialed call made by or on behalf of Defendant (as used in this section, "Defendant" shall refer to Sirius XM and/or its agent(s) and/or anyone acting on Defendant's behalf) to Plaintiff's cellular phone.

26. Defendant urged Plaintiff to extend his complimentary subscription into a paid continuing subscription.

27. Not only did Plaintiff decline Defendant's unsolicited offer, but he demanded that Defendant never call him again on his cell phone number or otherwise.

28. Plaintiff could tell that the call was placed by an autodialer because at first there was no one on the phone, but several seconds after he answered, a representative of Defendant initiated a conversation with Plaintiff.

29. The next night Defendant placed a second autodialed call to Plaintiff's cell phone number. Plaintiff again declined to extend his subscription and told the representative of

Defendant not to call again.

30. The next night Defendant placed yet another autodialed call to Plaintiff's cell phone number.

31. Plaintiff again told Defendant he did not want to extend his subscription and not to call again.

32. In response, Defendant's representative said that it would take at least ten days to remove Plaintiff from the list of individuals that Defendant was soliciting.

33. Thereafter, the Defendant continued to place a number of autodialed calls to Plaintiff's cell phone number.

34. Upon receiving the third autodialed call, Plaintiff demanded to speak to a supervisor. After holding for a considerable period of time, the call was disconnected through no fault of Plaintiff without a supervisor coming to the phone.

35. Immediately after the third autodialed call was disconnected, Plaintiff called the Defendant's number back and eventually spoke to a supervisor. The supervisor acknowledged that the calls to Plaintiff were being made by a computer using an autodialer. The supervisor also informed Plaintiff that the contact information used to call Plaintiff had been obtained by Defendant from the motor vehicle dealer from which Plaintiff and his wife had purchased their new vehicle.

36. At no time did Plaintiff provide Defendant with his cell phone number, nor did he authorize the automobile dealership to provide Defendant with his cell phone number.

37. At no time prior to his receipt of the autodialed calls did Plaintiff have any communication with Defendant, written, oral or electronic, whether initiated by Plaintiff or Defendant.

38. The calls were made not only without Plaintiff's consent, but (as to all but the first call) after Plaintiff told Defendant never to call his cell phone again.

39. Plaintiff answered at least three calls and on each occasion told Defendant to stop

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