

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

JAMES BULL, on behalf of himself and others similarly situated,	)	
	)	
	)	Case No. 1:14-cv-05789
Plaintiff,	)	
	)	Judge Rebecca R. Pallmeyer
v.	)	
	)	Magistrate Judge Daniel G. Martin
US COACHWAYS, INC.,	)	
a New Jersey Corporation,	)	
	)	
Defendant.	)	

**US COACHWAYS, INC.’S ANSWER AND  
AFFIRMATIVE DEFENSES TO PLAINTIFFS’ AMENDED COMPLAINT**

US Coachways, Inc., (“US Coachways” or “Defendant”), by and through its attorneys, Gordon & Rees, LLP, respectfully submits its Answer and Affirmative Defenses to Plaintiff’s Amended Class Action Complaint (“Complaint”), and states as follows:

**Preliminary Statement**

“Consumer complaints about abuses of telephone technology – for example, computerized calls to private homes – prompted Congress to pass the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227. Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls.” *Mims v. Arrow Financial Services, LLC*, Slip Opinion, Case No. 10–1195 (United States Supreme Court January 18, 2012) (internal citations omitted). In an effort to enforce this fundamental federal right to privacy, Plaintiff files the instant class action complaint alleging violations of 47 U.S.C § 227 *et seq.*, the Telephone Consumer Protection Act (“TCPA”).

Defendant has sent out thousands of unlawful text messages in violation of the TCPA. By effectuating these unauthorized text message calls (also known as “SMS Messages”), Defendant has caused consumers actual harm, not only because consumers were subjected to the aggravation that necessarily accompanies mobile spam, but also because consumers frequently have to pay their cell phone service providers for the receipt of such spam and such messages diminish cellular battery life, waste data storage capacity, and are an intrusion upon seclusion.

In order to redress these injuries, Plaintiff, on behalf of himself and the proposed class of similarly situated individuals, brings this suit under the TCPA, which specifically prohibits unsolicited voice and text calls to cell phones. Defendant has sent unwanted text messages in a manner that violates the right of privacy of the putative class members. On behalf of the class, Plaintiff seeks an injunction requiring Defendant to cease all unlawful text messages and an award of statutory damages to the class members, together with costs and reasonable attorney’s fees.

All allegations contained herein are based upon information and belief of Plaintiff or the investigative efforts of the undersigned counsel:

**ANSWER:** Defendant avers that the above “Preliminary Statement” is violative of Rule 10(b) of the Federal Rules of Civil Procedure; therefore, it should be stricken. Furthermore, Plaintiff’s commentary regarding the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, *et seq.*, sets forth legal conclusions to which no response is required. To the extent that any response to the “Preliminary Statement” is necessary, Defendant admits that Plaintiff has accurately cited a section of the *Mims v. Arrow Financial Services, LLC* opinion and admits that Plaintiff purports to bring this action against Defendant pursuant to the TCPA, but denies liability under those statutory provisions set forth in the Complaint.

Answering further, Defendant denies any characterizations of wrongdoing on its part, denies that Plaintiff has any valid claim as against it, denies that this matter is appropriate for class treatment, and denies that Plaintiff is entitled to any of the requested relief prayed for therein.

### **Parties**

1. Plaintiff James Bull is a resident of the state of Ohio.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint, and on that basis denies same.

2. Defendant US Coachways, Inc. (“USCI”) is a New Jersey corporation with three office locations in Illinois, including one at 180 N. Stetson St., Suite 3500, Chicago, IL 60601.

**ANSWER:** Defendant admits the allegations contained in Paragraph 2 of the Complaint.

### **Jurisdiction & Venue**

3. The Court has federal question subject matter jurisdiction over these TCPA claims. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012).

**ANSWER:** Defendant admits that this Court has federal question subject matter jurisdiction over this action.

4. The Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because: (a) at least one member of the putative class is a citizen of a state different from Defendant, (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection apply to this action.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 4 of the Complaint, and on that basis denies same.

5. This Court has personal jurisdiction in this manner because USCI does business throughout the United States, including operating multiple office locations within the State of Illinois. USCI therefore has established minimum contacts showing it has purposefully availed itself to the resources and protection of the State of Illinois.

**ANSWER:** Defendant admits that it does business throughout the United States and that it operates multiple office locations within the State of Illinois. Defendant does not contest that the Court has personal jurisdiction in this matter.

6. Venue is proper in the United States District Court for the District of Illinois as USCI is subject to personal jurisdiction in this district, and Defendant is deemed to reside in any judicial district in which they are subject to personal jurisdiction at the time the action is commenced, and because Defendant's contacts with this District are sufficient to subject it to personal jurisdiction. See 28 U.S.C. § 1391. In addition, Defendant has sent text messages to individuals residing in this District that are the subject of this action.

**ANSWER:** Defendant does not contest the propriety of venue. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 6 of the Complaint, and on that basis denies same.

### **TCPA and Text Messaging Background**

7. 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 [.]” Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

**ANSWER:** Defendant admits that Plaintiff has accurately cited a portion of Section 2, Paragraph 5 of Public Law 102-243, but denies any liability under the TCPA.

8. An “SMS message” is a text message call directed to a wireless device through the use of the telephone number assigned to the device. When an SMS message call is successfully made, the recipient’s cell phone rings, alerting him or her that a call is being received.

**ANSWER:** Defendant admits that a “SMS message” is a text message delivered by a cellular carrier to a wireless telephone through the use of the telephone number assigned to the cellular telephone. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations of Paragraph 8 of the Complaint and on that basis denies same.

9. Unlike more conventional advertisements, SMS calls, and particularly wireless or mobile spam, can actually cost their recipients money, because cell phone users must frequently pay their respective wireless service providers either for each text message call they receive or incur a usage allocation deduction to their text plan, regardless of whether or not the message is authorized.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 9 of the Complaint and on that basis denies same.

10. Most commercial SMS messages are sent from “short codes” (also known as “short numbers”), which are special cellular telephone exchanges, typically only five or six digit extensions, that can be used to address SMS messages to mobile phones. Short codes are generally easier to remember and are utilized by consumers to subscribe to such services such as television program voting or more benevolent uses, such as making charitable donations.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 10 of the Complaint and on that basis denies same.

11. A short code is sent to consumers along with the actual text message and conclusively reveals the originator of the SMS message.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 11 of the Complaint and on that basis denies same.

***The TCPA prohibits telemarketing calls to numbers listed on the Do Not Call Registry, unless the caller has the recipient’s signed, written consent***

12. 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.*

**ANSWER:** Defendant admits only that Plaintiff has accurately cited a portion of 47 C.F.R. § 64.1200(c)(2), but denies that Plaintiff has accurately cited that provision in its entirety, and denies any liability under the TCPA.

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

**ANSWER:** Defendant admits only that, under certain circumstances, the TCPA and implementing regulations prohibit the initiation of telephone solicitations to residential telephone subscribers to the Registry, but denies any liability under the TCPA.

14. A person whose number is on the Registry, and who has received more than one telephone call within any twelve-month period by or on behalf of the same entity in violation of the TCPA, can sue the violator and seek statutory damages. 47 U.S.C. § 227(c)(5).

**ANSWER:** Defendant admits only that, under certain circumstances, the TCPA provides a private right of action to a person whose number is on the national Do Not Call Registry, but denies any liability under the TCPA.

15. The regulations exempt from liability a caller who has obtained the subscriber's signed, written agreement to receive telephone solicitations from the caller. *See* 47 C.F.R. § 64.1200(c)(2)(ii). That agreement must also include the telephone number to which the calls may be placed. *Id.*

**ANSWER:** Defendant admits that the TCPA provides certain exemptions from liability, including an exemption from liability where the entity obtains the subscriber's signed, written agreement, including the telephone number to which the calls may be placed, pursuant to 47 C.F.R. 64,1200(c)(2)(ii).

***The TCPA bans autodialer  
calls to cell phones***

16. The TCPA's most stringent restrictions pertain to computer-generated telemarketing calls placed to cell phones.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 16 of the Complaint and on that basis denies same.

17. The TCPA categorically bans persons and entities from initiating telephone calls using an automated telephone dialing system (or “autodialer”) to any telephone number assigned to a cellular telephone service. *See* 47 C.F.R. § 64.1200(a)(1)(iii); *see also* 47 U.S.C. § 227(b)(1).

**ANSWER:** Defendant denies the allegations of paragraph 17 of the Complaint.

**Factual Allegations**

**THE PLAINTIFF PLACES HIS TELEPHONE NUMBER ON THE NATIONAL DO NOT CALL REGISTRY**

18. The Plaintiff placed his telephone number that the Defendant called, XXX-XXX-9808 on the National Do Not Call Registry on July 17, 2005, and has not removed it at any time since then.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 18 of the Complaint and on that basis denies same.

**US COACHWAYS, INC.’S REPEATED TEXTS TO THE PLAINTIFF**

19. Beginning in at least the end of 2013, while Plaintiff’s telephone number was on the National Do Not Call Registry, and continuing for months thereafter, Defendant USCI caused mass transmissions of wireless spam to the cell phones of what they apparently hoped were potential customers of Defendant’s charter bus and limo services.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of Plaintiff’s allegations regarding the placement of his telephone number on the



National Do Not Call Registry, and on that basis denies same. Answering further, Defendant denies the remaining allegations of paragraph 19 of the Complaint.

20. For example, on or about December 16, 2013, Plaintiff's cell phone rang, indicating that a text call was being received.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 20 of the Complaint and on that basis denies same.

21. The "from" field of the transmission was identified cryptically as "302-41" which is an abbreviated telephone number described above as the SMS short code operated by Defendant and/or its telemarketing agents. The body of such text message read:

Happy Holidays from US Coachways: For holiday party rentals of buses, limos & mini-buses call 800-359-5991. Text HELP for help, STOP to end.  
Msg&DataRatesMayAply

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 21 of the Complaint and on that basis denies same.

22. On January 28, 2014, Plaintiff's cell phone rang again, indicating a text call was being received.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 22 of the Complaint and on that basis denies same.

23. The "from" field of the transmission was "302-41" and the body of such text message read:

US Coachways: Call 800-359-5991 to learn about great winter deals! Be sure to book early. Msg&data rates may apply. Text HELP for help, STOP to unsubscribe.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 23 of the Complaint and on that basis denies same.

24. On March 5, 2014, Plaintiff's cell phone rang for a third time indicating a message was being received from "302-41" and this time the body of the text message read:

US Coachways: Learn about great winter deals as low as \$399! Book now at [uscoachways.com](http://uscoachways.com) or call 800-359-5991. Text HELP for help, STOP to unsubscribe.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 24 of the Complaint and on that basis denies same.

25. The Defendant's persistent text spamming of Plaintiff continued on April 15, 2014, when Plaintiff's cell phone rang indicating a text message was being received once again from "302-41" and the body of the text read:

US Coachways Bus Rentals: Book before we're sold out! Availability is limited. Go to <http://uscoachways.com> or call 800-359-5991. Text HELP for help, STOP to end.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 25 of the Complaint and on that basis denies same.

26. Defendant and/or its agents' use of an SMS short code enabled Defendant's mass transmission of wireless spam to a list of cellular telephone numbers.

**ANSWER:** Defendant denies the allegations of paragraph 26 of the Complaint.

27. At no time did Plaintiff consent to the receipt of the above-referenced messages or any other such wireless spam text messages from Defendant.

**ANSWER:** Defendant denies the allegations of paragraph 27 of the Complaint.

28. When sending text messages *en masse* "SMS Short Codes" are used. SMS short codes are essentially shortened phone numbers, and, like phone numbers, are used to identify the sender.

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 28 of the Complaint and on that basis denies same.

29. A number of the text messages received by the Plaintiff were sent from SMS Short Code, “302-41.”

**ANSWER:** Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 29 of the Complaint and on that basis denies same.

30. This fact, as well as the generic content of the text message designed to offer a location wide promotion, the impersonal advertising content of the text message received, and the fact that the Defendant harvested telephone numbers from consumers to send the text messages, demonstrate that the Defendant used an automatic telephone dialing system to place the text message to the Plaintiff.

**ANSWER:** Defendant denies the allegations of paragraph 30 of the Complaint.

31. Because the text message campaign utilized by the Defendant was designed to contact potential customers en masse, the ATDS used by the Defendant had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

**ANSWER:** Defendant denies the allegations of paragraph 31 of the Complaint.

#### **Class Action Allegations**

32. As authorized by Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of a class of all other persons or entities similarly situated throughout the United States.

**ANSWER:** Defendant admits only that Plaintiff purports to bring this action on behalf of a putative class of individuals but denies that certification of the purported putative class is

appropriate pursuant to Rule 23 of the Federal Rules of Civil Procedure, and further denies all allegations of fact concerning any wrongdoing.

33. The Plaintiff seeks to represent two classes, which are tentatively defined, subject to modification after discovery and case development, as:

Class One

All persons within the United States who received one or more text message advertisements on behalf of USCI at any time in the four years prior to the filing of the Complaint continuing through the date any class is certified.

Class Two

All persons within the United States who received more than one text message advertisements on behalf of USCI at any time in the four years prior to the filing of the Complaint continuing through the date any class is certified while the telephone number that the text message was sent to was on the National Do Not Call Registry;

**ANSWER:** Defendant admits only that Plaintiff purports to bring this action on behalf of putative classes of individuals as defined in Paragraph 33, but denies that certification of the purported putative classes is appropriate pursuant to Rule 23 of the Federal Rules of Civil Procedure, and further denies all allegations of fact concerning any wrongdoing.

34. Collectively, all these persons will be referred to as “Class members.”

**ANSWER:** Defendant admits that Plaintiff purports to bring this action on behalf of putative “Class members,” but denies that certification of the any class is appropriate pursuant to Rule 23 of the Federal Rules of Civil Procedure, and further denies all allegations of fact concerning any wrongdoing.

35.

36. Excluded from the Class are all Class members who have obtained a settlement or payment from USCI in satisfaction of claims arising from the receipt of unauthorized text messages are excluded from the proposed Class.

**ANSWER:** Defendant admits only that Plaintiff purports to bring this action on behalf of putative classes of individuals as further defined in Paragraph 36, but denies that certification of the purported putative class is appropriate pursuant to Rule 23 of the Federal Rules of Civil Procedure, and further denies all allegations of fact concerning any wrongdoing.

37. Class members are identifiable through phone records and phone number databases.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 37 of the Complaint.

38. Given the nature of the automated technology used to transmit the SMS text messages, the potential Class members number at least in the thousands. Individual joinder of these persons is impracticable.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 38 of the Complaint.

39. Plaintiff is a member of the Classes.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of the Complaint, and on that basis denies same.

40. The Plaintiff and the Classes have all been harmed by the actions of the Defendant.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 40 of the Complaint, and on that basis denies same.

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

- a. Whether the Defendant violated the TCPA by advertising via unsolicited text messages;
- b. Whether the Defendant can meet their burden of proof with respect to statutory defenses for the telemarketing calls;
- c. Whether the Defendant's conduct was knowing and/or willful;
- d. Whether the Plaintiff and the Class members are entitled to statutory damages as a result of Defendant's actions;
- e. Whether Defendant should be enjoined from engaging in such conduct in the future.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 41 of the Complaint.

42. Plaintiff is an adequate representative of the classes because his interests do not conflict with Class member interests, he will fairly and adequately protect Class member interests, and he is represented by counsel skilled and experienced in class actions, including TCPA class actions.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 42 of the Complaint.

43. 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 Defendant and its agents.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 43 of the Complaint.

44. The likelihood that individual Class members will prosecute separate actions is remote due to the time and expense necessary to prosecute an individual case.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of the Complaint, and on that basis denies same.

45. The interest of the Class members in individually pursuing claims against the Defendant is slight because the statutory damages for an individual action are relatively small, and are therefore not likely to deter the Defendant from engaging in the same behavior in the future.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45 of the Complaint, and on that basis denies same.

46. Defendant has 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.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 46 of the Complaint.

47. The Plaintiff has retained counsel experienced in handling class action claims involving violations of federal consumer protection statutes, including claims under the TCPA.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 47 of the Complaint.

48. Plaintiff is unaware of litigation concerning this controversy already commenced by others who meet the proposed class definition.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 48 of the Complaint, and on that basis denies same.

### **CAUSES OF ACTION**

#### **FIRST COUNT**

#### **KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227 ET SEQ.**

49. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully stated herein.

**ANSWER:** Defendant incorporates its answers to Paragraphs 1 through 48 of this Complaint as its answer to Paragraph 49, as though fully set forth herein.

50. The foregoing acts and omissions of the Defendant constitute numerous and multiple 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 *et seq.*

**ANSWER:** Defendant denies that any actions of Defendant give rise to Plaintiff's claim, and further denies it has engaged in any wrongdoing.

51. As a result of the Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and each member of the Class is entitled to treble damages of up to \$1,500 for each and every call in violation of the statute.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 51 of the Complaint.



52. Plaintiff and all Class members are also entitled to and do seek injunctive relief prohibiting such conduct violating the TCPA by the Defendant in the future.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 52 of the Complaint.

WHEREFORE, Defendant denies any wrongdoing and/or liability, and therefore denies that Plaintiff is entitled to any relief, including the relief enumerated and requested under the Complaint's prayer for relief.

### **SECOND COUNT**

#### **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT** **47 U.S.C. § 227 ET SEQ.**

53. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

**ANSWER:** Defendant incorporates its answers to Paragraphs 1 through 52 of this Complaint as its answer to Paragraph 53, as though fully set forth herein.

54. The foregoing acts and omissions of the Defendant constitute numerous and multiple violations of the TCPA, including but not limited to each of the above cited provisions of 47 U.S.C. § 227 *et seq.*

**ANSWER:** Defendant denies that any actions of Defendant give rise to Plaintiff's claim, and further denies it has engaged in any wrongdoing.

55. As a result of the Defendant's violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and Class members are entitled to an award of \$500 in statutory damages for each and every call in violation of the statute.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 55 of the Complaint.

56. Plaintiff and Class members are also entitled to and do seek injunctive relief prohibiting the Defendant's violation of the TCPA in the future.

**ANSWER:** Defendant denies that this matter is appropriate for class action treatment, and denies the allegations in paragraph 56 of the Complaint.

WHEREFORE, Defendant denies any wrongdoing and/or liability, and therefore denies that Plaintiff is entitled to any relief, including the relief enumerated and requested under the Complaint's prayer for relief.

### **AFFIRMATIVE DEFENSES**

Pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, US Coachways, pleading in the alternative and without prejudice to the general denials in its Answer to Plaintiffs' Complaint, for its Affirmative Defenses, hereby states as follows:

#### **First Affirmative Defense**

Plaintiff lacks standing to assert the claim asserted in the Complaint because Plaintiff has not been harmed or suffered "injury in fact" by the alleged conduct at issue regardless of whether Plaintiff seeks only statutory damages. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It would appear self-evident that the recipient of a cell phone call would first be required to demonstrate cognizable injury; that is, that he was both (1) charged, and (2) paid, for the call. *See* 47 U.S.C. §227(b)(1)(A)(iii).

#### **Second Affirmative Defense**

Defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under the TCPA. 47 U.S.C. § 227(C)(5).

**Third Affirmative Defense**

Plaintiff's claims are barred by the applicable statutes of limitations.

**Fourth Affirmative Defense**

Plaintiff's claims are barred by the doctrine of unclean hands because, *inter alia*, Plaintiff has attempted to induce Defendant to violate the TCPA by specifically requesting that Defendant contact Plaintiff on his cell phone.

**Fifth Affirmative Defense**

Plaintiff is estopped from bringing any claims or from claiming any damages, if any, or has otherwise waived any such claims or damages, because he assisted, directed, ordered, approved and/or ratified Defendant's conduct by specifically requesting that Defendant contact Plaintiff on his cell phone and Defendant relied on Plaintiff's actions to its detriment.

**Sixth Affirmative Defense**

Plaintiff's claims are barred, in whole or in part, because at all times Plaintiff and one or more of the purported members of the putative class provided express or implied consent to Defendant's conduct as described in Plaintiff's Complaint including, but not limited to, by providing his or her cellular telephone number and agreeing to receive text messages. The Complaint and each cause of action contained therein are barred as a matter of law.

**Seventh Affirmative Defense**

The Complaint and each cause of action contained therein are barred because Plaintiff and the purported class members had a duty to take reasonable steps to mitigate and/or avoid their alleged damages. *Thomas v. Exxon Mobil Corp.*, No. 07-C-7131, 2009 U.S. Dist. LEXIS 11109, \*11 (N.D. Ill. February 11, 2009) (Guzman, J.) (“[W]here discovery has barely begun, the failure to mitigate defense is sufficiently pled without additional facts.”). Had Plaintiff and

the purported class members timely and diligently taken reasonable steps to mitigate and/or avoid their alleged damages, such alleged damages, if any, would have been reduced or avoided altogether.

#### **Eighth Affirmative Defense**

Plaintiff, by his own actions and conduct, has failed to exercise reasonable care and diligence on his own behalf, thereby causing or contributing to his alleged injury and damages, if any. Plaintiff's recovery therefore must be reduced or eliminated altogether by the proportion of damages caused by his own acts and conduct.

#### **Ninth Affirmative Defense**

To the extent that the Complaint seeks putative class damages, the aggregated statutory damages, if any, may result in potential ruinous liability for Defendant and may constitute excessive fines in violation of the United States Constitution, Eighth Amendment.

#### **Tenth Affirmative Defense**

The TCPA allows a person to recover actual damages resulting from a violation of the statute or to receive \$500.00 per violation, whichever is greater. The TCPA provides for the trebling of damages if the violation was willful. If for the sake of argument a TCPA class was certified and the class contained several thousand people, Defendant's liability to the class could potentially be so great as to result in its insolvency. The due process clause of the Fifth Amendment to the U.S. Constitution prohibits awards that would result in Defendant's insolvency, especially where, as here, the conduct that allegedly violated the TCPA did not cause actual injury or damages to Plaintiff or members of the putative class.

#### **Eleventh Affirmative Defense**

Plaintiff has failed to name all necessary and indispensable parties to this action.

**Twelfth Affirmative Defense**

No act or omission of US Coachways was a substantial factor in bringing about the damages alleged, nor was any act or omission of US Coachways a contributing cause thereof. Any alleged acts or omissions of US Coachways were superseded by the acts or omissions of others, including Plaintiff, putative class members, or other third parties named or not named as in the Complaint, which were the independent, intervening and proximate cause of the damage or loss allegedly sustained by Plaintiff.

**Thirteenth Affirmative Defense**

The subject telephone system is not an “automatic telephone dialing system” under the TCPA because the telephone system does not use a “random or sequential number generator” to store or produce telephone numbers and/or the equipment lacks current capacity to generate and dial random or sequential numbers.

**Fourteenth Affirmative Defense**

Rights and causes of action arising under the TCPA are not assignable. Any proposed or putative assignment of such rights and causes of action to Plaintiff are therefore invalid, and Plaintiff lacks standing to sue or recover thereon.

**Fifteenth Affirmative Defense**

Violations of the technical requirements of the TCPA are not enforceable by private litigants, and Plaintiff lacks standing to sue or recover based thereon.

**Sixteenth Affirmative Defense**

Where, as here, the parties had an “established business relationship,” the TCPA’s prohibitions do not apply, and Defendant’s action cannot – as a matter of law – violate the TCPA. 47 C.F.R. § 64.1200(a)(2)(iv).

**Seventeenth Affirmative Defense**

Plaintiff's claims against US Coachways are barred, in whole or in part, by the TCPA's "safe harbor provision," as provided for by 47 C.F.R. § 64.1200(c)(2).

**Eighteenth Affirmative Defense**

Plaintiff cannot hold US Coachways liable for alleged violations of the TCPA for the alleged conduct of a third party, as Defendant is not vicariously liable for such conduct,

**PRAYER FOR RELIEF**

WHEREFORE, US Coachways, Inc. prays for judgment against Plaintiff as follows:

1. That Plaintiff takes nothing by virtue of his Complaint;
2. That Plaintiff's Complaint be dismissed with prejudice;
3. For costs and disbursements incurred herein, including attorneys' fees.
4. For such other relief as the Court may deem appropriate.

**JURY DEMAND**

US Coachways, Inc. demands trial by a jury on all issues triable by a jury.

Respectfully submitted,

By: /s/ Paul Gamboa  
*Attorney for Defendant*  
*US Coachways, Inc.*

Paul Gamboa, ARDC #6282923  
GORDON & REES LLP  
One North Franklin  
Suite 800  
Chicago, Illinois 60606  
Tel: (312) 565-1400  
Fax: (312) 565-6511

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, states that on December 26, 2014, a true and complete copy of the filed foregoing document was served upon the below attorneys by filing same electronically with the United States District Court, Northern District of Illinois, via the CM/ECF electronic filing system.

Edward A. Broederick  
Anthony Paronich  
Broderick Law, P.C.  
125 Summer St., Suite 1030  
Boston, MA 02360  
ted@broderick-law.com  
[anthony@broderick-law.com](mailto:anthony@broderick-law.com)

Brian Kevin Murphy  
Murray Murphy Moul Basil LLP  
1533 Lake Shore Drive  
Columbus, OH 43204  
[murphy@mmb.com](mailto:murphy@mmb.com)

Lauren E. Snyder  
1350 N. Wells Street  
Apt. A214  
Chicago, IL 60610  
[lauren.elizabeth.snyder@gmail.com](mailto:lauren.elizabeth.snyder@gmail.com)

Matthew P. McCue  
The Law Office of Matthew P. McCue  
1 South Avenue, Third Floor  
Natick, Massachusetts 01760  
[mmccue@massattorneys.net](mailto:mmccue@massattorneys.net)

/s/ Paul Gamboa  
Paul Gamboa, ARDC #6282923  
GORDON & REES LLP  
One North Franklin  
Suite 800  
Chicago, Illinois 60606  
Tel: (312) 565-1400  
Fax: (312) 565-6511  
Email: [pgamboa@gordonrees.com](mailto:pgamboa@gordonrees.com)