

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO.

ANDREA FONSECA, individually and on behalf
of all others similarly situated,

CLASS REPRESENTATION

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

_____ /

CLASS ACTION COMPLAINT

Plaintiff Andrea (“Plaintiff”), individually and on behalf of all those similarly situated, sues Defendant Bank of America Corporation (“Defendant”), and states:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to Florida Rule of Civil Procedure 1.220 and Fla. Stat. § 26.012(2). The matter in controversy exceeds the sum or value of \$30,000 exclusive of interest, costs, and attorney’s fees.
2. This Court has personal jurisdiction over Defendant because Defendant is operating, present, and/or doing business within this jurisdiction and because the complained of conduct of Defendant occurred within Miami-Dade County, Florida.
3. Venue of this action is proper in this Court because, pursuant to Fla. Stat. § 47.011, et seq., the cause of action alleged below arose in Miami-Dade County Florida.
4. Plaintiff has standing to maintain this action because Plaintiff suffered a legal injury as a result of Defendant’s violations of the FCCPA, and because Plaintiff is not requesting an

advisory opinion from this Court. Thus, Plaintiff has a sufficient stake in a justiciable controversy and seeks to obtain judicial resolution of that controversy.

PARTIES

5. Plaintiff is a natural person, and a citizen of the State of Florida, residing in Miami-Dade County, Florida.

6. Defendant is a Delaware Corporation, with its principal place of business located in Charlotte, North Carolina.

DEMAND FOR JURY TRIAL

7. Plaintiff respectfully demands a trial by jury on all counts and issues so triable.

ALLEGATIONS

8. On a date better known by Defendant, Defendant began attempting to collect a debt (the “Consumer Debt”) from Plaintiff.

9. The Consumer Debt is an obligation allegedly had by Plaintiff to pay money arising from a transaction between the creditor of the Consumer Debt, Defendant, and Plaintiff (the “Subject Service”).

10. Plaintiff is the alleged debtor of the Consumer Debt.

11. The Subject Service was primarily for personal, family, or household purposes.

12. The FCCPA defines “communication” as “the conveying of information regarding a debt directly or indirectly to any person through any medium.” Fla. Stat. § 559.55(2).

13. Defendant is a “person” within the meaning of Fla. Stat. § 559.72.

14. Section 559.72(17) of the FCCPA prohibits persons from communicating with a debtor between the hours of 9:00 PM and 8:00 AM in the debtor’s time zone without the prior consent of the debtor.

THE FIRST COMMUNICATION

15. During the relevant statute of limitations, Defendant sent an electronic mail communication to Plaintiff (the “First Communication”).

16. The First Communication was a communication in connection with the collection of the Consumer Debt and delivered to Plaintiff’s personal e-mail address.

17. The First Communication was sent by Defendant and received by Plaintiff between the hours of 9:00pm and 8:00am Plaintiff’s local time.

CLASS ALLEGATIONS

PROPOSED CLASS

18. Plaintiff brings this lawsuit as a class action on behalf of Plaintiff, individually and on behalf of all other similarly situated persons as a class action. The “Class” that Plaintiff seeks to represent is the below defined “FCCPA Class.”

19. The “FCCPA Class” consists of: **All Florida residents (1) who were sent a Communication¹ not known to be undeliverable (2) between 9:00 PM and 8:00 AM in the resident’s local Florida time zone, (3) by Bank of America² or on Bank of America’s behalf (4) regarding a Consumer Account³, (5) where such communication occurred on or between April 22, 2020 and the date of this Order.**

¹ “**Communication**” includes email, text/SMS, push alerts, and any other electronic notifications, including bill pay notifications, concerning amounts owed to Bank of America or third parties.

² “**Bank of America**” includes Bank of America, N.A., its parent, subsidiary, and affiliate companies.

³ “**Consumer Account**” includes any financial or other account, debt, or obligation, which accounts, debts, or obligations relate to or are primarily a consumer transaction (i.e., used for household, family, or personal purposes), including as applicable business and small business accounts to the extent used primarily for consumer purposes. This definition includes any account

20. Defendant and its employees or agents are excluded from the Class.

NUMEROSITY

21. Defendant has sent thousands electronic mail communication to Florida consumers between 9:00 PM and 8:00 AM, whereby such electronic mail communication(s) violate 559.72(17). The members of the Class, therefore, are believed to be so numerous that joinder of all members is impracticable.

22. Identification of the Class members is a matter capable of ministerial determination from Defendant's e-mail records.

COMMON QUESTIONS OF LAW AND FACT

23. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are: [1] Whether Defendant sent an electronic communication to Plaintiff and members of the Class in connection with the collection of a consumer debt; [2] Whether Defendant sent such communication(s) between 9:00 PM and 8:00 AM; [3] Whether Defendant should be enjoined from such conduct in the future.

24. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendant routinely sends electronic mail communication(s) that violate 559.72(17) is accurate, Plaintiff and members of the Class will have identical claims capable of being efficiently adjudicated and administered in this case.

for which a natural person is obligated or allegedly obligated to pay any amount arising out of a consumer transaction.

TYPICALITY

25. Plaintiff's claims are typical of the claims of the members of the Class, as they are all based on the same factual and legal theories.

PROTECTING THE INTERESTS OF THE CLASS MEMBERS

26. Plaintiff is a representative who will fully and adequately assert and protect the interests of the Class and has retained competent counsel. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

SUPERIORITY

27. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by members of the Class are in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant's wrongful conduct are too small to warrant the expense of individual lawsuits. The likelihood of individual members of the Class prosecuting their own separate claims is remote, and, even if every member of the Class could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases.

28. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another may not. Additionally, individual actions may be dispositive of the interests of the Class, although certain class members are not parties to such actions.

COUNT I
VIOLATION OF FLA. STAT. § 559.72(17)

29. Plaintiff, individually and on behalf of the FCCPA Class, incorporates by reference the preceding paragraphs.

30. Pursuant to § 559.72(17) of the FCCPA, in collecting consumer debts, no person shall: “[c]ommunicate with the debtor between the hours of 9 p.m. and 8 a.m. in the debtor’s time zone without the prior consent of the debtor.” Fla Stat. § 559.72(17) (emphasis added).

31. As set forth above, Defendant sent an electronic communication to Plaintiff in connection with the collection of the Consumer Debt. The Electronic Communication was sent to Plaintiff between the hours of 9:00 PM and 8:00 AM in the time zone of Plaintiff. Defendant did not have the consent of Plaintiff to communication with Plaintiff between the hours of 9:00 PM and 8:00 AM. As such, by and through *each* of the Electronic Communications, Defendant violated § 559.72(17) of the FCCPA.

32. WHEREFORE, Plaintiff, individually and on behalf of the FCCPA Class, requests relief and judgment as follows:

- (a) Determine this action is a proper class action under Florida Rule of Civil Procedure;
- (b) Award Plaintiff and members of the FCCPA Class statutory damages pursuant to Fla. Stat., § 559.77(2);
- (c) Award Plaintiff and members of the FCCPA Class reasonable attorneys’ fees and costs, including expert fees, pursuant to Fla. Stat., § 559.77(2); and
- (d) Any other relief that this Court deems appropriate under the circumstances.

Dated: June 12, 2023

Respectfully submitted,

HIRALDO P.A.

/s/ Manuel S. Hiraldo

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