

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA**

**CHRISTOPHER JAMES WALKER, KIM
STERLING, and ERNIE FISHER** on
behalf of themselves and all others similarly
situated,

Plaintiff,

v.

**HIGHMARK BCBSD HEALTH
OPTIONS, INC.; COTIVITI, INC.**

Defendant.

Civil Case No.: 20-cv-1975
Hon. Christy Criswell Wiegand

THIRD AMENDED CLASS ACTION COMPLAINT

INTRODUCTION

1. This action arises out of Defendant Highmark BCBSD Health Options' ("Highmark") practice of placing, through its vendor Defendant Cotiviti, Inc. ("Cotiviti"), prerecorded/artificial voice telephone calls to individuals such as Plaintiffs without their consent in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA").

2. Accordingly, Plaintiffs bring this TCPA action on behalf of themselves and a class of similarly situated individuals under 47 U.S.C. § 227(b).

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction under 28 U.S.C. § 1331, as this action arises under the TCPA, which is a federal statute.

4. This Court has jurisdiction over Defendants because Defendants conduct significant business transactions in this District and has committed tortious acts in this District.

5. Venue is proper in this District because Defendants conduct significant amounts of business transactions within this District and because some of the wrongful conduct giving rise to this case occurred in, was directed to, and/or emanated from this District.

6. Specifically, while Defendant Highmark itself is located in Delaware, Defendant's parent company, Highmark Health, is located at 120 Fifth Avenue, Pittsburgh, PA 15122.

7. In addition, Defendant Highmark's fax number is a 412 area code (Pittsburgh) and the IP Address associated with Defendant Highmark's domain name is located in Pittsburgh (and is shared with other Highmark brands and programs).

8. On its website, Defendant Highmark lists its address for provider appeals as in Pittsburgh. *See* <https://www.highmarkhealthoptions.com/contact/>

9. Also on Defendant Highmark's website, however, it lists its mailing address and its

address for “Claims Inquiries” and “Administrative Reviews” as in Camp Hill (Cumberland County), Pennsylvania.

10. The phone numbers that appeared on Plaintiff Walker’s caller ID for some of the calls at issue used area code 267 (Philadelphia).

11. Upon information and belief, while Defendant Highmark maintains its headquarters in Delaware and some operations in Cumberland and Philadelphia Counties, its operations—including those operations, contracts, and/or decisions that led to the calls at issue here—are most likely conducted through the location of its parent (i.e. Allegheny County), making venue proper here.

PARTIES

12. Plaintiff Walker is currently a resident of Citrus Springs, Florida, but at all times mentioned herein was a citizen and resident of Middletown, Delaware.

13. Plaintiff Walker is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153(39).

14. Plaintiff Sterling is, and all times herein was, a citizen and resident of Dover, Delaware.

15. Plaintiff Sterling is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153(39).

16. Plaintiff Fisher is, and at all times herein was, a citizen and resident of St. Augustine, Florida.

17. Plaintiff Fisher is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153(39).

18. Defendant Highmark is, and at all times mentioned herein was, a Delaware

corporation with its headquarters at 800 Delaware Avenue, Wilmington, DE 19801.

19. Defendant Highmark is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153(39).

20. Defendant Cotiviti is, and at all times herein was, a Delaware corporation with its headquarters at 10701 South River Front Parkway, Suite 200, South Jordan, UT 84095.

21. Defendant Cotiviti is, and at all times herein was, a “person” as defined by 47 U.S.C. § 153(39).

FACTUAL ALLEGATIONS

22. Defendant Highmark, through its vendor Defendant Cotiviti, has placed telephone calls to Plaintiff Walker’s cellular telephone number ending in 7195.

23. Defendant Highmark, through its vendor Defendant Cotiviti, has placed telephone calls to Plaintiff Sterling’s cellular telephone number ending in 1729.

24. Defendant Highmark, through its vendor Defendant Cotiviti, has placed telephone calls to Plaintiff Walker’s cellular telephone number ending in 7170.

25. While Defendant Cotiviti most directly initiated the calls—i.e. it was the entity that finally “dialed” the calls—it did so for the benefit of and at the request of Defendant Highmark.

26. Defendant Highmark provided Defendant Cotiviti with the telephone numbers to be called.

27. Defendant Highmark provided Defendant Cotiviti with the details on when and in what circumstances those numbers should be called.

28. Defendant Highmark created or assisted in creating the scripts to be used on the calls.

29. Defendant Highmark permitted Defendant Cotiviti to use Defendant Highmark’s

tradenames and to provide call back numbers that ring back directly to Defendant Highmark.

30. Defendant Highmark was responsible for keeping track of any do-not-call or wrong number requests.

31. For Plaintiff Walker, these calls began in early 2020 and continued through at least December 4, 2020.

32. For Plaintiff Sterling, these calls began in September 2019 and continued through at least October 2021.

33. For Plaintiff Fisher, these calls began in October 2018 and continued through at least January 2021.

34. Each of Defendants' calls used a prerecorded or artificial voice message which either played when Plaintiffs answered or left a prerecorded or artificial voice message when they did not.

35. Plaintiffs are aware that these telephone calls used a prerecorded or artificial voice message because of their familiarity with normal human interaction, intonation, manners of speaking, and their inability to engage the prerecorded or artificial voice in reciprocal, sensical communication or banter.

36. As one example, on September 23, 2020, Plaintiff Walker received a prerecorded/artificial voice message from telephone number 267-954-2945, which stated:

Hello, this is Highmark Health Options calling for Joseph Nahodil. Please call us back 24/7 toll free at 1-844-607-5151. Again, the number is 1-844-607-5151. TTY users should call 711. Thank you and have a good day. Good bye.

37. This call was dialed by Defendant Cotiviti, but was made on Defendant Highmark's behalf.

38. As another example, on September 28, 2020, Plaintiff Walker received an additional prerecorded/artificial voice message from telephone number 267-954-2945, which

contained the following message:

Hello, this is Highmark Health Options trying again to reach Joseph Nahodil with important health information that can help you stay healthy this flu season. Please call us back 24/7 toll free at 1-844-607-5151. Again, the number is 1-844-607-5151. TTY users should call 711. Thank you and have a good day. Good bye.

39. This call was dialed by Defendant Cotiviti, but was made on Defendant Highmark's behalf.

40. Those call back numbers ending in 5151 ring back directly to Defendant Highmark.

41. Plaintiff Walker received at least 14 other prerecorded calls for Joseph Nahodil including on, among other dates, October 2, October 8, November 9, and November 16.

42. Plaintiff Walker is not Joseph Nahodil and has no familiarity or known association with this person.

43. Plaintiff Walker is not, and has never been, Defendant Highmark's customer.

44. Plaintiff Walker never provided his phone number or any other form of consent to Defendant Highmark or Defendant Cotiviti for the calls.

45. Similarly, Plaintiff Sterling received at least 21 prerecorded telephone calls for a person with whom she has no familiarity or known association.

46. Some of the calls to Plaintiff Sterling were survey calls and rewards program calls.

47. Plaintiff Sterling is not, and has never been, Defendant Highmark's customer.

48. Plaintiff Sterling never provided her phone number or any other form of consent to Defendant Highmark or Defendant Cotiviti for the calls.

49. Similarly, Plaintiff Fisher received at least 24 prerecorded telephone calls for a person with whom he has no familiarity or known association.

50. Some of the calls to Plaintiff Fisher were survey calls and rewards program calls.

51. Plaintiff Fisher is not, and has never been, Defendant Highmark's customer.

52. Plaintiff Fisher never provided his phone number or any other form of consent to Defendant Highmark or Defendant Cotiviti for the calls.

53. Accordingly, Defendants' calls to Plaintiffs using a prerecorded/artificial voice violated 47 U.S.C. § 227(b).

54. For violations of 47 U.S.C. § 227(b), Plaintiffs are entitled to \$500 to \$1500 per call.

CLASS ACTION ALLEGATIONS

55. Plaintiffs bring this action under Fed. R. Civ. P. 23 on behalf of a proposed Class, defined as follows:

- A. During the Class Period, all persons within the United States who are subscribers or primary users of a cellular telephone number to which Defendant Highmark BCBSD Health Options Inc. placed (or had placed on its behalf by Defendant Cotiviti, Inc.) a telephone call using a pre-recorded or artificial voice
- 1) when such a call to that telephone number had previously resulted in (a) a "WRONG_NUMBER" disposition or (b) a "MSG_DECLINED" disposition without a subsequent disposition of "CORRECT_PERSON" or "MSG_HUMAN" and
 - 2) when at least one subsequent call to that telephone number had the disposition "WRONG_NUMBER", "MSG_MACHINE", "CORRECT_PERSON", "MSG_HUMAN", "HANGUP", "NO_CONTINUE", or "MSG_DECLINED".
- B. Excluding those persons who *only* received calls as part of a COVID Campaign, as well as Defendants and any entities in which Defendants have a controlling interest; Defendants' agents and employees; any Judge and Magistrate Judge to whom this action is assigned and any member of their staffs and immediate families.

Numerosity and Ascertainability

56. The Members of the Class for whose benefit this action is brought are so numerous that joinder of all members is impracticable.

57. The exact number and identities of the persons who fit within the Class are ascertainable in that Defendants maintains written and electronically stored data showing:

- a. The time period(s) during which Defendants placed the telephone calls;
- b. The telephone numbers to which Defendants placed the telephone calls;
- c. Which numbers it believed were wrong numbers or that it lacked consent to call;

58. The Class is comprised of thousands of persons nationwide.

59. Plaintiffs are members of the Class in that Defendants placed prerecorded or artificial voice calls to their cellular telephone numbers even though Plaintiffs did not provide consent and their telephone numbers did not belong to the person for whom the calls were intended.

Commonality

60. There are common questions of law and fact affecting the rights of the Members of the Class, including, *inter alia*, the following:

- a. Whether Defendants placed telephone calls using an artificial or prerecorded voice;
- b. Whether Defendants had any processes or protocols in place to stop calls to persons who asked that the calls stop or told Defendants that they had the wrong number;
- c. Whether Defendants had any processes or protocols in place to stop calls to re-assigned or wrong numbers;
- d. Whether Defendants continued to place telephone calls to Class members after they asked Defendants to stop or told Defendants that they were reaching a wrong number;
- e. Whether Plaintiffs and the Class were damaged thereby, and the extent of damages for such violations; and
- f. Whether Defendants should be enjoined from engaging in such conduct in the future.

Typicality

61. Plaintiffs' claims are typical of the claims of Class members in that they arise from Defendants' uniform conduct and are based on the same legal theories as these claims.

62. Plaintiffs have no interests antagonistic to, or in conflict with, the Class.

63. On information and belief, Plaintiffs aver that Defendants treated them in same manner as they have treated hundreds, if not thousands of individuals.

Adequacy of Representation

64. Plaintiffs will thoroughly and adequately protect the interests of the Class, as Plaintiffs and their retained counsel do not have any conflicts of interest with the proposed Class, are experienced in class actions of this type and can adequately represent the interests of the class, and Plaintiffs and their counsel have adequate financial resources to assure that the interests of the class will not be harmed.

Superiority

65. Defendants have acted and refused to act on grounds generally applicable to the Class, thereby making injunctive and declaratory relief appropriate for the Class.

66. The prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications.

67. A class action provides a fair and efficient method for adjudication of the controversy.

68. Common questions will predominate, and there will be no unusual manageability issues.

69. The prosecution of separate actions would risk confronting Defendants with incompatible standards of conduct, and may also prove dispositive of the interests of other members not parties.

70. There does not appear to be any litigation already commenced by or against members of the class involving the same issues.

71. The forum is appropriate, as discussed above.

72. The expense of individual litigation and the limited recovery in individual litigation justify a class action.

FIRST CAUSE OF ACTION
Violations of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii)
(On Behalf of Plaintiffs and the Class)

73. Plaintiffs and the proposed Class incorporate the foregoing allegations as if fully set forth herein.

74. Defendant Highmark placed, through its vendor Defendant Cotiviti, prerecorded or artificial voice calls to Plaintiffs' and putative Class members' cellular telephone numbers.

75. These calls occurred without prior express consent, as they were made either to non-customers of Defendant Highmark who had not provided their telephone numbers to Defendant Highmark or Defendant Cotiviti, or to persons after those persons asked Defendants to stop calling and/or informed Defendants that they had the wrong number.

76. The calls were not placed for "emergency purposes" as defined by 47 U.S.C. § 227(b)(1)(A)(i).

77. Accordingly, Plaintiffs and Class Members are entitled to an award of \$500 in statutory damages for each call, pursuant to 47 U.S.C. § 227(b)(3)(B).

78. Plaintiffs and Class Members are entitled to an award of treble damages of up to \$1,500 for each call made knowingly and/or willfully, pursuant to 47 U.S.C. § 227(b)(3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Walker, Plaintiff Sterling, and Plaintiff Fisher, individually and on behalf of the proposed Class, prays for the following relief:

- A. An order certifying the Class as defined above, appointing Plaintiffs as the representatives of the Class and appointing their counsel as Class Counsel;
- B. An order declaring that Defendants' actions, as set out above, violate 47 U.S.C. § 227(b);
- C. An award of injunctive and other equitable relief as necessary to protect the interests of the Class, including, *inter alia*, an order prohibiting Defendants from engaging in the wrongful and unlawful acts described herein;
- D. An award of statutory damages for violations of 227(b);
- E. An award of treble damages;
- F. An award of reasonable attorneys' fees and costs; and
- G. Such other and further relief that the Court deems reasonable and just.

JURY DEMAND

Plaintiffs request a trial by jury of all claims that can be so tried.

[Signatures appear on following page]

Dated: November 16, 2022

THE GLAPION LAW FIRM LLC

s/ Jeremy M. Glapion

Jeremy M. Glapion
THE GLAPION LAW FIRM, LLC
1704 Maxwell Drive
Wall, New Jersey 07719
Tel: 732-455-9737
Fax: 732-965-8006
jmg@glapionlaw.com
(*Pro Hac Vice*)

**FEINSTEIN DOYLE PAYNE
& KRAVEC, LLC**

James M. Pietz (Pa. I.D. #55406)
429 Fourth Avenue
Law & Finance Building, Suite 1300
Pittsburgh, PA 15219
Telephone: 412-281-8400
Fax: 412-281-1007
Email: jpietz@fdpklaw.com

Counsel for Plaintiffs and the Class