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18 *Attorneys for Plaintiff and the Proposed Class*

19 UNITED STATES DISTRICT COURT  
20 FOR THE NORTHERN DISTRICT OF CALIFORNIA

21 ABANTE ROOTER AND PLUMBING,  
22 INC., individually and on behalf of all others  
23 similarly situated,

24 Plaintiff,

25 v.

26 PIVOTAL PAYMENTS INC., d/b/a  
27 CAPITAL PROCESSING NETWORK and  
CPN,

Defendant.

NO.

**CLASS ACTION COMPLAINT FOR  
DAMAGES AND INJUNCTIVE RELIEF**

Plaintiff Abante Rooter and Plumbing, Inc. (hereinafter "Plaintiff"), by its undersigned counsel, for this class action complaint against Pivotal Payments Inc. d/b/a Capital Processing Network and CPN, and its present, former, or future direct and indirect parent companies,

1 subsidiaries, affiliates, agents, and/or other related entities (“Pivotal Payments” or “Defendant”),  
2 allege as follows:

3 **I. INTRODUCTION**

4 1. Nature of Action. Plaintiff, individually and as class representative for all others  
5 similarly situated, brings this action against Pivotal Payments for violations of the Telephone  
6 Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”).

7 **II. PARTIES**

8 2. Plaintiff Abante Rooter and Plumbing, Inc. (“Plaintiff”) is a corporation based in  
9 California, with its principal place of business in Alameda County, California.

10 3. Defendant Pivotal Payments Inc. d/b/a Capital Processing Network and CPN  
11 (“Pivotal Payments”) is a Delaware corporation with its principal place of business in Plano,  
12 Texas. Pivotal Payments is registered to do and is doing business in California and throughout  
13 the United States.

14 **III. JURISDICTION AND VENUE**

15 4. Subject Matter Jurisdiction. This Court has subject matter jurisdiction over  
16 Plaintiff’s TCPA claims pursuant to 28 U.S.C. § 1331 because Plaintiff’s TCPA claims arise  
17 under the laws of the United States, specifically 47 U.S.C. § 227. Furthermore, this Court has  
18 original jurisdiction over Plaintiff’s claims pursuant to the “Class Action Fairness Act,”  
19 28 U.S.C. §§ 1332(d), 1435. While it is anticipated that neither Plaintiff nor any individual class  
20 member’s claims exceeds \$75,000, the aggregate amount in controversy for the Class exceeds  
21 \$5 million exclusive of interest and costs, and Plaintiff is a citizen of a different state from  
22 Defendant.

23 5. Personal Jurisdiction. This Court has personal jurisdiction over Pivotal Payments  
24 because it has submitted to California jurisdiction by registering with the Secretary of State to do  
25 business in this state, and a substantial part of the wrongful acts alleged in this Complaint were  
26 committed in California.

1           6.     Venue. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2)  
2 because Plaintiff resides in this District and a substantial part of the events giving rise to  
3 Plaintiff's claims occurred in this District.

4           **IV. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 47 U.S.C. § 227**

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

7           8.     The TCPA makes it unlawful “to make any call (other than a call made for  
8 emergency purposes or made with the prior express consent of the called party) using an  
9 automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone  
10 number assigned to a ... cellular telephone service.” *See* 47 U.S.C. § 227(b)(1)(A)(iii). The  
11 TCPA provides a private cause of action to persons who receive calls in violation of 47 U.S.C.  
12 § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).

13           9.     According to findings by the Federal Communication Commission (“FCC”), the  
14 agency Congress vested with authority to issue regulations implementing the TCPA, such calls  
15 are prohibited because, as Congress found, automated or prerecorded telephone calls are a  
16 greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly  
17 and inconvenient.

18           10.    The FCC also recognized that “wireless customers are charged for incoming calls  
19 whether they pay in advance or after the minutes are used.” *In re Rules and Regulations*  
20 *Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Report and Order,  
21 18 F.C.C. Rcd. 14014, 14115 ¶ 165 (2003).

22           11.    In 2013, the FCC required prior express written consent for all autodialed or  
23 prerecorded telemarketing calls (“robocalls”) to wireless numbers and residential lines.

24 Specifically, it ordered that:

25                   [A] consumer’s written consent to receive telemarketing robocalls  
26 must be signed and be sufficient to show that the consumer: (1)  
27 received “clear and conspicuous disclosure” of the consequences  
of providing the requested consent, i.e., that the consumer will  
receive future calls that deliver prerecorded messages by or on



1           18.     One of Pivotal Payments’ strategies for marketing its credit card processing  
2 services involves the use of an automatic telephone dialing system (“ATDS”) to solicit business.

3           19.     Pivotal Payments uses ATDS equipment that has the capacity to store or produce  
4 telephone numbers to be called and which includes autodialers and predictive dialers, and plays a  
5 prerecorded message once the calls connect.

6           20.     Recipients of these calls, including Plaintiff, did not consent to receive such  
7 telephone calls.

8           21.     Pivotal Payments also make calls using an ATDS to cellular telephones whose  
9 owners have also not provided prior express written consent to receive such calls.

10     **B.    Factual Allegations Regarding Plaintiff**

11           22.     Plaintiff is, and at all times mentioned herein was, a “person” as defined by  
12 47 U.S.C. § 153(39).

13           23.     Plaintiff is a small plumbing company that provides an array of commercial and  
14 residential draining and plumbing services, including emergency draining and plumbing services.

15           24.     Plaintiff does business in the San Francisco Area with several cellular telephone  
16 numbers that are assigned to different cities around the San Francisco Bay Area, including (209)  
17 383-XXXX, (925) 253-XXXX, and (510) 351-XXXX.

18           25.     Each of the cellular telephone numbers listed above are regularly answered by  
19 Plaintiff’s owner, Fred Heidarpour.

20           26.     Plaintiff receives important, and often urgent, calls from current and potential  
21 customers on each of the above-listed cellular telephone numbers.

22           27.     It is imperative for Plaintiff to answer every call made to its telephone numbers in  
23 order to provide prompt, quality customer service to Plaintiff’s customers, especially in response  
24 to emergency draining and plumbing issues.

25           28.     Similarly, because Plaintiff’s business provides emergency services, every call  
26 made to its telephone number could be new customer with a crisis situation.

1           29.     On or around July 15, 2016, Plaintiff received a telemarketing call on its cellular  
2 telephone number, (925) 253-XXXX, from, or on behalf of, Pivotal Payments.

3           30.     The caller ID showed the telephone call was from (941) 208-8241.

4           31.     When the call was answered, there was a lengthy pause and a click followed by  
5 silence before any voice came on the line, which indicated to him that the call was made using an  
6 ATDS.

7           32.     Following the lengthy pause and extended silence, a prerecorded message played,  
8 stating words to the effect that the call was marketing credit card processing services. The called  
9 party was instructed to press a button on their telephone for further information.

10          33.     In an attempt to determine the identity of the caller, Plaintiff pressed the button  
11 for further information and was instructed to leave a voice message with a telephone number by  
12 another prerecorded voice.

13          34.     In a further attempt to determine the identity of the caller, Plaintiff left a voice  
14 message requesting a call back at telephone number (510) 534-XXXX.

15          35.     Shortly after leaving the voice message, Plaintiff received a call on Plaintiff's  
16 cellular telephone number, (925) 253-XXXX, from a person who identified himself as Leif  
17 Gates.

18          36.     Shortly after Mr. Gates identified himself, the call unintentionally disconnected.

19          37.     Later on July 15, 2016, Plaintiff received a telemarketing call on its cellular  
20 telephone number, (209) 383-XXXX, from, or on behalf of, Pivotal Payments.

21          38.     The caller ID showed the telephone call was from (941) 208-8241.

22          39.     When the call was answered, there was again a lengthy pause and a click followed  
23 by silence before any voice came on the line, which indicated to him that the call was made  
24 using an ATDS.

25          40.     Following the lengthy pause and extended silence, a prerecorded message played  
26 stating words to the effect that the call was marketing credit card processing services. The called  
27 party was instructed to press a button on their phone for further information.

1           41.     Again, in an attempt to determine the identity of the caller, Plaintiff pressed the  
2 button for further information and was instructed to leave a voice message with a telephone  
3 number by another prerecorded voice.

4           42.     In a further attempt to determine the identity of the caller, Plaintiff left a voice  
5 message requesting a call back at telephone number (510) 459-XXXX.

6           43.     After leaving the voice message, Plaintiff received a call on Plaintiff's cellular  
7 telephone number, (510) 459-XXXX, on July 18, 2016 from a person who identified herself as  
8 "Amanda of CPN USA."

9           44.     Amanda informed Plaintiff that the purpose of the call was to offer Plaintiff credit  
10 card processing services provided by CPN.

11          45.     On July 18, 2016, after speaking with Amanda, Plaintiff received a follow up  
12 email from Amanda Hanf at ahanf@cpnusa.com, which identified Ms. Hanf as a senior account  
13 executive at CPN.

14          46.     The email further encouraged Plaintiff to "check out our website at  
15 www.cpnusa.com" and detailed the cost saving credit card processing services CPN could  
16 provide.

17          47.     On August 19, 2016, Amanda called Plaintiff twice to market CPN's credit card  
18 processing services.

19          48.     In response to these two telephone calls from Amanda, Plaintiff requested that  
20 CPN cease calling.

21          49.     On or around July 19, 2016, Plaintiff received another telemarketing call on its  
22 cellular telephone number, (510) 351-XXXX, from, or on behalf of, Pivotal Payments.

23          50.     The caller ID showed the telephone call was from (251) 263-0995.

24          51.     When Plaintiff answered the telephone call, there was again a lengthy pause and a  
25 click followed by silence before any voice came on the line, which indicated to him that the call  
26 was made using an ATDS.  
27

1           52.     Following the lengthy pause and extended silence, a prerecorded message played  
2 stating words to the effect that the call was marketing credit card processing services. The called  
3 party was instructed to press a button on their telephone for further information.

4           53.     Again, in an attempt to determine the identity of the caller, Plaintiff pressed the  
5 button for further information and was instructed to leave a voice message with a telephone  
6 number by another prerecorded voice.

7           54.     On or around July 28, 2016, Plaintiff received another telemarketing call on its  
8 cellular telephone number, (925) 253-XXXX, from, or on behalf of, Pivotal Payments.

9           55.     The caller ID showed the telephone call was from (828) 548-6764.

10          56.     When Plaintiff answered the telephone call, there was again a lengthy pause and a  
11 click followed by silence before any voice came on the line, which indicated to him that the call  
12 was made using an ATDS.

13          57.     Following the lengthy pause and extended silence, a prerecorded message played  
14 stating words to the effect that the call was marketing credit card processing services. The called  
15 party was instructed to press a button on their telephone for further information.

16          58.     Again, in an attempt to determine the identity of the caller, Plaintiff pressed the  
17 button for further information and was instructed to leave a voice message with a telephone  
18 number by another prerecorded voice.

19          59.     In a further attempt to determine the identity of the caller, Plaintiff left a voice  
20 message requesting a call back at telephone number (209) 383-XXXX.

21          60.     On July 28, 2016, shortly after leaving the voice message, Plaintiff received a call  
22 on Plaintiff's cellular telephone number, (209) 383-XXXX, from Leif Gates at CPN USA.

23          61.     Mr. Gates informed Plaintiff that the purpose of the call was to offer Plaintiff  
24 credit card processing services provided by CPN.

25          62.     On July 28, 2016, after speaking with Mr. Gates, Plaintiff received a follow up  
26 email from Leif Gates-Suppah at lgsuppah@cpnusa.com, which identified Mr. Gates as a senior  
27 account executive at CPN.



1           63.     Immediately after sending his email, Mr. Gates called Plaintiff again to confirm  
2 that he had received the email.

3           64.     Plaintiff promptly responded to Mr. Gates' email on July 28, 2016 with simply  
4 the words "not interested."

5           65.     Not to be deterred, Mr. Gates then sent Plaintiff another email marketing CPN's  
6 credit card processing services.

7           66.     On or around July 28, 2016, Plaintiff received another telemarketing call on its  
8 Oakland cellular telephone number, (510) 351-XXXX, from, or on behalf of, Pivotal Payments.

9           67.     The caller ID showed the telephone call was from (828) 548-6764.

10          68.     When Plaintiff answered the telephone call, there was again a lengthy pause and a  
11 click followed by silence before any voice came on the line, which indicated to him that the call  
12 was made using an ATDS.

13          69.     Following the lengthy pause and extended silence, a prerecorded message played  
14 stating words to the effect that the call was marketing credit card processing services. The called  
15 party was instructed to press a button on their telephone for further information.

16          70.     Again, in an attempt to determine the identity of the caller, Plaintiff pressed the  
17 button for further information and was instructed to leave a voice message with a telephone  
18 number by another prerecorded voice.

19          71.     In a further attempt to determine the identity of the caller, Plaintiff left a voice  
20 message requesting a call back at telephone number (510) 385-XXXX.

21          72.     Only July 28, 2016, shortly after leaving the voice message, Plaintiff received a  
22 call on Plaintiff's Oakland cellular telephone number, (510) 385-XXXX, from Amanda at CPN  
23 USA.

24          73.     Plaintiff has never been a customer of Pivotal Payments, nor has it ever been  
25 interested in being a customer of Pivotal Payments.

1           74. Plaintiff did not provide prior express written consent to receive ATDS generated  
2 or prerecorded calls on any of its cellular telephone numbers from, or on behalf of, Pivotal  
3 Payments.

4           75. Plaintiff's privacy has been violated by the above-described calls from, or on  
5 behalf of, Pivotal Payments, and they constitute a nuisance as they are annoying and harassing.

6           76. Pivotal Payments is responsible for making the above-described ATDS-generated  
7 and/or prerecorded calls.

8           77. Pivotal Payments has made a significant number of ATDS generated and/or  
9 automated or prerecorded calls to persons on their cellular telephones in California and  
10 throughout the entire United States.

11           78. Pivotal Payments intends to continue to make similar ATDS-generated and/or  
12 automated or prerecorded calls to persons on their cellular telephones in California and  
13 throughout the entire United States.

14           79. Plaintiff and all members of the Class, defined below, have been harmed by the  
15 acts of Pivotal Payments because their privacy has been violated, they were subjected to  
16 annoying and harassing calls that constitute a nuisance, and they were charged for incoming  
17 calls. The calls also occupied Plaintiff's and all members of the Class' cellular telephone lines  
18 from legitimate communication.

19 **C. Factual Allegations Regarding Additional Consumer Complaints**

20           80. Unfortunately, Plaintiff's experience with Pivotal Payments is not unique, as  
21 many others have lodged similar complaints after having received telemarketing calls from  
22 Pivotal Payments.

23           81. For example, the website [findwhocallsyou.com](http://findwhocallsyou.com) details the following complaint  
24 regarding calls from telephone number (941) 208-8241, which is one of the same caller IDs that  
25 appeared on a number of the prerecorded calls from Pivotal Payments to Plaintiff:  
26  
27

1 Called my business line. Recorded message trying to sell some sort  
2 of merchant processing discount (credit cards). Too cheap to even  
3 start message at the beginning.

4 Posted on 15 Jul 2016.

5 <http://findwhocallsyou.com/9412088241> (last visited September 14, 2016).

6 82. Similarly, the website 800notes.com also details complaints regarding calls from  
7 another caller ID that robocalled Plaintiff, (828) 548-6764:

8 **Office Flunky**

9 28 Jul 2016

10 This number called the office this morning before hours. There  
11 was a message waiting, albeit partially cut off, from a robo-caller  
12 talking about lower rates for credit card processing.

13 Caller: BETTER MERCHANT

14 **Pissed**

15 28 Jul 2016

16 Voicemail about CC processor not passing along savings. This  
17 isn't a business # and I don't accept CC's. Blocked.

18 Caller: Recording

19 <http://800notes.com/Phone.aspx/1-828-548-6764> (last visited September 14, 2016).

20 **VI. CLASS ACTION ALLEGATIONS**

21 83. Class Definition. Pursuant to CR 23(b)(2) and (b)(3), Plaintiff brings this case as  
22 a class action on behalf of a National Class defined as follows:

23 All persons to whom: (a) Pivotal Payments and/or a third party  
24 acting on Pivotal Payments' behalf, made one or more non-  
25 emergency telephone calls; (b) promoting Pivotal Payments'  
26 products or services; (c) to their cellular telephone number; (d)  
27 through the use of an automatic telephone dialing system or an  
artificial or prerecorded voice; and (e) at any time in the period that  
begins four years before the date of filing this Complaint to trial.

Excluded from the Class are Pivotal Payments, any entity in which Pivotal Payments has a  
controlling interest or that has a controlling interest in Pivotal Payments, and Pivotal Payments'  
legal representatives, assignees, and successors. Also excluded are the judge to whom this case  
is assigned and any member of the judge's immediate family.

1           84.    Numerosity. The Class is so numerous that joinder of all members is  
2 impracticable. On information and belief, Plaintiff alleges that the Class has more than 100  
3 members. Moreover, the disposition of the claims of the Class in a single action will provide  
4 substantial benefits to all parties and the Court.

5           85.    Commonality. There are numerous questions of law and fact common to Plaintiff  
6 and members of the Class. These common questions of law and fact include, but are not limited  
7 to, the following:

8           a.    Whether Pivotal Payments and/or its affiliates, agents, and/or other  
9 persons or entities acting on Pivotal Payments' behalf violated 47 U.S.C. § 227(b)(1)(A) by  
10 making any call, except for emergency purposes, to a cellular telephone number using an ATDS  
11 and/or artificial or prerecorded voice;

12           b.    Whether Pivotal Payments and/or its affiliates, agents, and/or other  
13 persons or entities acting on Pivotal Payments' behalf knowingly and/or willfully violated  
14 47 U.S.C. § 227(b)(1)(A) by making any call, except for emergency purposes, to a cellular  
15 telephone number using an ATDS and/or artificial or prerecorded voice, thus entitling Plaintiff  
16 and the Class to treble damages;

17           c.    Whether Pivotal Payments is liable for ATDS generated and/or automated  
18 or prerecorded calls promoting Pivotal Payments' products or services made by Pivotal  
19 Payments' affiliates, agents, and/or other persons or entities acting on Pivotal Payments' behalf;  
20 and

21           d.    Whether Pivotal Payments and/or its affiliates, agents, and/or other  
22 persons or entities acting on Pivotal Payments' behalf should be enjoined from violating the  
23 TCPA in the future.

24           86.    Typicality. Plaintiff's claims are typical of the claims of the Class. Plaintiff's  
25 claims, like the claims of the Class arise out of the same common course of conduct by Pivotal  
26 Payments and are based on the same legal and remedial theories.

1           87.    Adequacy. Plaintiff will fairly and adequately protect the interests of the Class.  
2 Plaintiff has retained competent and capable attorneys with significant experience in complex  
3 and class action litigation, including consumer class actions and TCPA class actions. Plaintiff  
4 and its counsel are committed to prosecuting this action vigorously on behalf of the Class and  
5 have the financial resources to do so. Neither Plaintiff nor its counsel has interests that are  
6 contrary to or that conflict with those of the proposed Class.

7           88.    Predominance. Pivotal Payments has engaged in a common course of conduct  
8 toward Plaintiff and members of the Class. The common issues arising from this conduct that  
9 affect Plaintiff and members of the Class predominate over any individual issues. Adjudication  
10 of these common issues in a single action has important and desirable advantages of judicial  
11 economy.

12           89.    Superiority. A class action is the superior method for the fair and efficient  
13 adjudication of this controversy. Classwide relief is essential to compel Pivotal Payments to  
14 comply with the TCPA. The interest of individual members of the Class in individually  
15 controlling the prosecution of separate claims against Pivotal Payments is small because the  
16 damages in an individual action for violation of the TCPA are small. Management of these  
17 claims is likely to present significantly fewer difficulties than are presented in many class claims  
18 because the calls at issue are all automated. Class treatment is superior to multiple individual  
19 suits or piecemeal litigation because it conserves judicial resources, promotes consistency and  
20 efficiency of adjudication, provides a forum for small claimants, and deters illegal activities.  
21 There will be no significant difficulty in the management of this case as a class action.

22           90.    Injunctive and Declaratory Relief is Appropriate. Pivotal Payments has acted on  
23 grounds generally applicable to the Class, thereby making final injunctive relief and  
24 corresponding declaratory relief with respect to the Class appropriate on a classwide basis.  
25  
26  
27



1 emergency purposes, to the cellular telephone numbers of Plaintiff and members of the Class  
2 using an ATDS and/or artificial or prerecorded voice.

3 97. As a result of Pivotal Payments' and/or its affiliates, agents, and/or other persons  
4 or entities acting on Pivotal Payments' behalf's knowing and/or willful violations of the TCPA,  
5 47 U.S.C. § 227(b)(1)(A), Plaintiff and members of the Class are entitled to treble damages of up  
6 to \$1,500 for each and every call made to their cellular telephone numbers using an ATDS  
7 and/or artificial or prerecorded voice in violation of the statute, pursuant to 47 U.S.C. §  
8 227(b)(3).

9 **IX. PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff, on its own behalf and on behalf of all members of the Class,  
11 prays for judgment against Pivotal Payments as follows:

- 12 A. Certification of the proposed Class;
- 13 B. Appointment of Plaintiff as representative of the Class;
- 14 C. Appointment of the undersigned counsel as counsel for the Class;
- 15 D. A declaration that Pivotal Payments and/or its affiliates, agents, and/or other  
16 related entities' actions complained of herein violate the TCPA;
- 17 E. An order enjoining Pivotal Payments and/or its affiliates, agents, and/or other  
18 related entities, as provided by law, from engaging in the unlawful conduct set forth herein;
- 19 F. An award to Plaintiff and the Class of damages, as allowed by law;
- 20 G. An award to Plaintiff and the Class of attorneys' fees and costs, as allowed by law  
21 and/or equity;
- 22 H. Leave to amend this Complaint to conform to the evidence presented at trial; and
- 23 I. Orders granting such other and further relief as the Court deems necessary, just,  
24 and proper.
- 25  
26  
27

**X. DEMAND FOR JURY**

Plaintiff demands a trial by jury for all issues so triable.

RESPECTFULLY SUBMITTED AND DATED this 26th day of September, 2016.

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