

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA**

MARCELO PENA,

Plaintiff,

v.

JOHN C. HEATH, ATTORNEY AT LAW,  
PLLC d/b/a LEXINGTON LAW FIRM,

Defendant.

**Case No. 1:18-cv-24407-UU**

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**DEFENDANT JOHN C. HEATH ATTORNEY AT LAW, PLLC dba LEXINGTON LAW  
FIRM'S ANSWER TO PLAINTIFF'S CLASS ACTION COMPLAINT**

Defendant, John C. Heath Attorney at Law, PLLC dba Lexington Law Firm ("Lexington"), by counsel, submits the following Answer to Plaintiff's Class Action Complaint ("Complaint").

Lexington denies, generally and specifically, any and all allegations in the Complaint not specifically admitted in the paragraphs below. Lexington further states that its investigation of the present matter is ongoing. Accordingly, Lexington reserves the right to amend this Answer. Lexington denies any and all allegations contained in the headings and/or unnumbered paragraphs in the Complaint.

In response to the separately numbered paragraphs in the Complaint, Lexington states as follows:

1. Paragraph 1 of the Complaint contains a general description of the lawsuit to which no response is required. Lexington denies all claims in the Complaint alleging that it violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA").

**NATURE OF THE ACTION**

2. Paragraph 2 of the Complaint contains a general description of the lawsuit to which no response is required. Lexington denies all claims in the Complaint alleging that it violated the TCPA.

3. Lexington admits to being a full-service law firm with a particular emphasis on consumer advocacy. Lexington denies the remaining allegations in paragraph 3 of the Complaint.

4. Lexington denies the allegations in paragraph 4 of the Complaint.

5. Lexington admits to being aware of all relevant federal and state laws. Lexington admits that it has been a defendant in previous TCPA lawsuits but denies that any of those lawsuits have resulted in a finding of liability. Lexington denies the remaining allegations in paragraph 5 of the Complaint.

6. Paragraph 6 of the Complaint contains a general description of the lawsuit to which no response is required. Lexington denies all claims in the Complaint alleging that it violated the TCPA and denies that Plaintiff is entitled to any of the requested relief.

**JURISDICTION AND VENUE**

7. Paragraph 7 of the Complaint states conclusions of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies the remaining allegations in paragraph 7 of the Complaint.

8. Paragraph 8 of the Complaint states conclusions of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies the remaining allegations in paragraph 8 of the Complaint.

**PARTIES**

9. Lexington is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint, and therefore denies the same.

10. Lexington admits the allegations in paragraph 10 of the Complaint.

**THE TCPA**

11. Paragraph 11 of the Complaint states conclusions of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied.

12. Paragraph 12 of the Complaint states conclusions of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied.

13. Paragraph 13 of the Complaint states conclusions of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied.

14. The allegations in paragraph 14 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

15. The allegations in paragraph 15 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

16. The allegations in paragraph 16 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

17. Paragraph 17 of the Complaint states conclusions of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied.

18. The allegations in paragraph 18 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

19. The allegations in paragraph 19 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

20. The allegations in paragraph 20 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

21. The allegations in paragraph 21 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

22. Paragraph 22 of the Complaint states conclusions of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied.

23. The allegations in paragraph 23 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

24. The allegations in paragraph 24 of the Complaint refer to a document, which speaks for itself. To the extent the allegations vary from the text of the document itself, the allegations are denied.

**PLAINTIFF'S ALLEGED FACTS**

25. The allegations in paragraph 25 of the Complaint refer to text messages, which speak for themselves. To the extent the allegations vary from the text messages themselves, the allegations are denied.

26. Lexington is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, and therefore denies the same.

27. The allegations in paragraph 27 of the Complaint refer to text messages, which speak for themselves. To the extent the allegations vary from the text messages themselves, the allegations are denied. Lexington denies the remaining allegations in paragraph 27 of the Complaint.

28. Lexington is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the Complaint, and therefore denies the same.

29. The allegations in paragraph 29 of the Complaint refer to text messages, which speak for themselves. To the extent the allegations vary from the text messages themselves, the allegations are denied.

30. The allegations in paragraph 30 of the Complaint refer to text messages, which speak for themselves. To the extent the allegations vary from the text messages themselves, the allegations are denied.

31. Lexington is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the Complaint, and therefore denies the same.

32. Lexington is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 of the Complaint, and therefore denies the same.

33. Lexington is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the Complaint, and therefore denies the same.

34. Lexington denies the allegations in paragraph 34 of the Complaint. The remaining allegations in paragraph 34 of the Complaint refer to documents, which speak for themselves. To the extent the allegations vary from the text of the documents themselves, the allegations are denied.

35. Lexington denies the allegations in paragraph 35 of the Complaint.

36. Lexington denies the allegations in paragraph 36 of the Complaint.

37. Lexington is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the Complaint, and therefore denies the same.

38. Lexington denies the allegations in paragraph 38 of the Complaint.

39. Lexington denies the allegations in paragraph 39 of the Complaint.

### **PLAINTIFF'S CLASS ALLEGATIONS**

#### **PLAINTIFF'S PROPOSED CLASS**

40. Lexington admits that Plaintiff purports to bring this claim on behalf of a class. Lexington denies that this matter may be properly maintained against it as a class action.

41. Lexington admits that Plaintiff purports to define the class as stated in paragraph 41 of the Complaint. Lexington denies that this matter may be properly maintained against it as a class action as defined in paragraph 41 or otherwise.

42. Lexington admits that Plaintiff purports to exclude from the class the persons identified in paragraph 42 of the Complaint. Lexington denies that this matter may be properly maintained against it as a class action as defined in paragraphs 41 and 42 or otherwise. Lexington denies the remaining allegations in paragraph 42 of the Complaint.

**NUMEROSITY**

43. The allegations contained in paragraph 43 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies that this matter may be properly maintained against it as a class action.

44. The allegations contained in paragraph 44 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies that this matter may be properly maintained against it as a class action.

**COMMON QUESTIONS OF LAW AND FACT**

45. The allegations contained in paragraph 45 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies that this matter may be properly maintained against it as a class action.

46. The allegations contained in paragraph 46 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies that this matter may be properly maintained against it as a class action.

**TYPICALITY**

47. The allegations contained in paragraph 47 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies that this matter may be properly maintained against it as a class action.

**PROTECTING THE INTERESTS OF CLASS MEMBERS**

48. The allegations contained in paragraph 48 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies that this matter may be properly maintained against it as a class action.

**PROCEEDING VIA CLASS ACTION IS ALLEGEDLY SUPERIOR AND ADVISABLE**

49. The allegations contained in paragraph 49 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies that this matter may be properly maintained against it as a class action.

50. The allegations contained in paragraph 50 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. Lexington denies that this matter may be properly maintained against it as a class action.

**CLAIM I**  
**Alleged Violation of the TCPA, 47 U.S.C. § 227(b)**  
**On Behalf of Plaintiff and the Class**

51. Lexington incorporates and re-asserts the responses contained in paragraphs 1 through 50 as if fully stated herein.

52. The allegations contained in paragraph 52 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied.



53. The allegations contained in paragraph 53 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. The remaining allegations contained in paragraph 53 of the Complaint are denied.

54. The allegations contained in paragraph 54 of the Complaint call for a conclusion of law, to which no response is necessary. To the extent that the allegations are contrary to law, they are denied. The remaining allegations contained in paragraph 54 of the Complaint are denied.

55. Lexington denies the allegations in paragraph 55 of the Complaint.

56. Lexington denies the allegations in paragraph 56 of the Complaint.

57. Lexington denies the allegations in paragraph 57 of the Complaint.

## **CLAIM II**

### **Alleged Knowing and/or Willful Violation of the TCPA, 47 U.S.C. § 227(b) On behalf of Plaintiff and the Class**

58. Lexington incorporates and re-asserts the responses contained in paragraphs 1 through 57 as if fully stated herein.

59. Lexington denies the allegations in paragraph 59 of the Complaint.

60. Lexington denies the allegations in paragraph 60 of the Complaint.

61. Lexington denies the allegations in paragraph 61 of the Complaint.

62. Lexington denies the allegations in paragraph 62 of the Complaint.

63. Lexington denies that Plaintiff is entitled to any of the relief requested in the WHEREFORE paragraph following paragraph 62 of the Complaint.

## **JURY DEMAND**

64. Lexington admits that Plaintiff purports to demand a trial by jury. Lexington denies all remaining allegations.

Lexington denies all the remaining allegations in Plaintiff's Complaint to the extent not expressly admitted above, and otherwise denies that it is liable to Plaintiff for any of the requests for relief set forth in Plaintiff's Complaint.

**AFFIRMATIVE AND OTHER DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**  
**(Failure To State A Claim)**

Plaintiff's claims fail to the extent that the Complaint fails to set forth facts sufficient to state a claim upon which relief may be granted against Lexington and fails to state facts sufficient to entitle Plaintiff to the relief sought.

**SECOND AFFIRMATIVE DEFENSE**  
**(Compliance/Good Faith)**

Plaintiff's claims fail to the extent that, at all relevant times with respect to Plaintiff, Lexington acted in good faith and complied fully with the TCPA and any other applicable statute, regulation, or law.

**THIRD AFFIRMATIVE DEFENSE**  
**(Proximate Cause/Speculative Damages)**

Plaintiff's claims fail to the extent that Plaintiff's purported damages, which Lexington continues to deny, were the direct and proximate result of the conduct of Plaintiff or others for whom Lexington is not vicariously liable, or were otherwise too speculative, remote or *de minimis* for recovery.

**FOURTH AFFIRMATIVE DEFENSE**  
**(Failure To Mitigate Damages)**

Plaintiff's claims are barred, in whole or in part, to the extent that Plaintiff failed to mitigate his alleged damages.

**FIFTH AFFIRMATIVE DEFENSE**  
**(Injury-In-Fact/Standing)**

Plaintiff cannot recover from Lexington under the Complaint to the extent that he lacks standing and/or has not alleged or cannot maintain an actual injury-in-fact as this deprives the Court of Article III jurisdiction.

**SIXTH AFFIRMATIVE DEFENSE**  
**(Statute of Limitations/Laches)**

Plaintiff's Complaint fails to the extent that it is barred by the applicable statute of limitations or doctrine of laches.

**SEVENTH AFFIRMATIVE DEFENSE**  
**(Telephone System is Not an ATDS)**

Plaintiff's Complaint, in whole or in part, fails to state a claim upon which relief can be granted against Lexington because the telephone system allegedly used to contact Plaintiff does not constitute an automatic telephone dialing system ("ATDS") under the TCPA.

**EIGHTH AFFIRMATIVE DEFENSE**  
**(Consent)**

Plaintiff's claims are barred, in whole or in part, to the extent that Plaintiff consented to the alleged phone calls and/or text messages within the meaning of the TCPA.

**NINTH ADDITIONAL DEFENSE**  
**(Cannot Proceed as a Class Action)**

This action may not properly proceed as a class action under Federal Rule of Civil Procedure 23 to the extent that, among other reasons, Plaintiff's claims are not typical of the claims of each putative class member; questions of law and fact allegedly common to the putative class do not predominate over the numerous questions affecting only putative class members; a class action is not superior to other available methods for the fair and efficient adjudication of Plaintiff's claims and any claims of putative class members; Plaintiff and his counsel are unable to fairly and

adequately protect the interests of the putative class members; and there are insurmountable difficulties in any attempt to proceed as a class action.

**TENTH ADDITIONAL DEFENSE**  
**(Due Process)**

Plaintiff and the putative class members cannot recover from Lexington as a class action to the extent to which such class recovery would deprive Lexington of its due process rights to assert individualized defenses to claims of class members.

**ELEVENTH AFFIRMATIVE DEFENSE**  
**(Right To Assert Additional Defenses)**

Lexington reserves the right to assert additional affirmative defenses at such time and to such extent as warranted by discovery and the factual developments in this case.

WHEREFORE, Defendant John C. Heath Attorney at Law, PLLC dba Lexington Law Firm requests that the Court enter an order: (1) dismissing the Complaint with prejudice; (2) awarding Lexington its costs and expenses incurred herein; and (3) awarding Lexington such other and further relief as the Court may deem just and proper.

**JOHN C. HEATH ATTORNEY AT  
LAW, PLLC dba LEXINGTON LAW  
FIRM**

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2018, this document was electronically filed with the Clerk of Court using the CM/ECF electronic filing system, which electronically notifies the following:

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/s/ John S. Gibbs III