

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

JEFF WEINSTEIN and LEI SHEN,)	
individually and on behalf of a class of similarly)	
situated individuals,)	
)	
Plaintiffs,)	No. 06 C 0484
)	
v.)	Judge Wayne R. Anderson
)	
AIRIT2ME, INC., a Florida Corporation,)	
GSI COMMERCE, INC., a Delaware Corporation,)	
and THE TIMBERLAND COMPANY, a Delaware)	
Corporation,)	
Defendants.)	

GSI COMMERCE, INC.)	
)	
Third-Party Plaintiff)	
)	
v.)	
)	
MOBILE INFORMATION ACCESS)	
CORPORATION d/b/a MOBILE INTERACTIVE)	
AGENCY)	
)	
Third-Party Defendant.)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

In the Fall of 2005, as part of an effort to promote the sale of its merchandise, defendant The Timberland Company (“Timberland”), by and through its agents, defendants GSI Commerce, Inc. (“GSI”) and AirIt2Me, Inc. (“AirIt2Me”) (collectively “Defendants”), engaged in a marketing campaign in which it made tens of thousands of unsolicited telephone calls in the form of text message advertisements to cellular telephones of consumers throughout the country. In the industry, this practice is referred to as “text spamming.” Plaintiffs Jeffrey Weinstein and Lei Shen bring suit on behalf of a nationwide class, alleging that Defendants’ misconduct

violates the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (the “TCPA”).

This is a textbook example of a case suitable for class certification. For all relevant purposes, the factual and legal issues are identical for each member of the class: Does text spamming fall under the purview of the TCPA? Did Defendants transmit this spam through the use of an automatic telephone dialing system? Are the class members entitled to statutory damages as a result of Defendants’ illegal conduct? To the extent that any individual issues remain after these are decided (and, as described below, it is unlikely that any could), they are *de minimis* in comparison to the common issues of this case. The remaining prongs of the class certification test -- numerosity, typicality, adequacy of representation, and superiority -- are also easily satisfied.

THE TCPA

The TCPA was enacted in 1991 to “deal with various telemarketing practices arising out of the telemarketing industry’s use of sophisticated equipment, generically known as autodialers, to generate millions of automated telephone calls to residential and business telephone subscribers.” *Joffe v. Acacia Mortg. Corp.*, 211 Ariz. 325, 328 (Ariz. Ct. App. 2005), *cert. denied sub nom. Acacia Mortg. Corp. v. Joffe*, 127 S.Ct. 934 (2007) (hereinafter “*Joffe*”) As explained in *Joffe*, “Congress found consumers and businesses were especially frustrated by these calls, viewing them as a nuisance, an invasion of privacy and a threat to interstate commerce.” 211 Ariz. at 328. In order to combat this threat, the TCPA prohibits parties from making

any call (other than a call made for emergency purposes or *made with the prior express consent of the called party*) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or

other radio common carrier service, or any service for which the called party is charged for the call.

47 U.S.C. 227(b)(1)(A)(iii) (emphasis added).

The Federal Communication Commission -- which, under 47 U.S.C. § 227(b)(2), is required to “prescribe regulations to implement the requirements” of the TCPA -- has made clear that the transmission of text messages falls under the purview of the TCPA. *See, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 , 14115, 165, 2003 WL 21517853 (2003) (TCPA prohibition on unsolicited calls “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls provided the call is made to a telephone number assigned to such service”).

The TCPA sets statutory damages in the amount of \$500.00 per violation, with allowance for trebling. *See* 47 U.S.C. 227(b)(1)(A)(iii).

FACTS

The Problem of Text Message Spam

In response to laws limiting their ability to solicit customers via telephone and facsimile transmission, advertisers have in recent years sought alternative low-cost technologies to reach consumers *en masse*. *See*, Corrected First Amended Class Action Complaint (“Complaint”), attached hereto as Exhibit 1, ¶ 11. One of the newest types of inexpensive bulk marketing uses technology known as Short Message Services (“SMS”). SMS is a messaging system that allows for the transmission of short text message calls, usually limited to 160 or so text characters, to be made to and from cellular telephones. *Id.* ¶ 12. An “SMS message” is a text message call

directed to a wireless device through the use of the telephone number assigned to that device. *Id.* ¶ 13. When an SMS text message call is successfully made, the recipient's cellular telephone rings, alerting him or her that a call is being received. *Id.* ¶ 13.

Text spam is an especially pernicious form of advertising not only because consumers are subjected to a violation of their right to privacy, but also because of the annoyance and aggravation that necessarily accompanies unsolicited wireless spam. Adding insult to injury, the recipients most often have to *pay* their cell phone service providers for the receipt of such wireless spam or request that more such spam not be sent in the future, notwithstanding that it is sent in violation of specific legislation on the subject. *Id.* ¶ 14.

The Underlying Misconduct

Timberland is a nationwide retailer of outdoor apparel. *Id.* ¶ 1. Beginning in September 2005 and continuing into December 2005, Timberland and its agents GSI and AirIt2Me conducted an advertising campaign to promote the sale of apparel and other merchandise available through Timberland's website, Timberland.com. *Id.* ¶ 15. The campaign comprised the transmission, on several days, of unsolicited calls in the form of substantially identical text message advertisements to tens of thousands of cellular telephones belonging to consumers that Timberland hoped were potential customers. *See id.* ¶ 15; GSI Commerce, Inc.'s Third-Party Complaint, attached hereto as Exhibit 2, at ¶¶ 9, 11 and 15, and Exhibit A thereto; Group Exhibit 3 hereto (documents produced by Defendants and third parties).

For example, on or around December 1, 2005, Plaintiffs' cell phones -- along with the cell phones of thousands of other individuals around the country -- rang to indicate the receipt of a text call. *See* Complaint ¶ 17. The sender of these transmissions was designated in the message

only by the cryptic term, “36368.” *See id.* ¶ 18. The body of these message was in substantially the following form:

Save 20% at Timberland.com Exclusive offer!
Use Promo Code: CELLPHONE. Valid thru Dec 22.
Send to a Friend! Rply STOP 2 End Alerts.
PwdbyNextone Sender 36368.

Id. ¶ 16. Under Weinstein’s contract with his cell phone service provider, this call cost him ten cents, and under Shen’s contract with her cell phone service provider, this call cost her five cents.

See id. ¶ 17. At no time did either Weinstein, Shen, or any other recipient of the text calls at issue here consent to receive such text message advertisements. *See id.* ¶ 26.

The Class

Plaintiffs seek to represent a class consisting of:

All persons residing in the United States who, between September 1 and December 31, 2005, received a text message advertising the sale of goods on Timberland.com.¹

ARGUMENT

1. Standards for Class Certification

To obtain class certification, it is not necessary for the plaintiff to establish that he will prevail on the merits of the action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (“[T]he question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.”) (internal quotation marks and citation omitted). Further, “[f]or the purposes of a motion to certify a class,

¹ This class definition is somewhat different from that in the Complaint, due to new information acquired by plaintiff in discovery.

the allegations in the complaint are presumed to be true.” *Maxwell v. Arrow Financial Services, LLC*, No. 03 C 1995, 2004 WL 719278, *1(N.D. Ill., March 31, 2004).

As this Court has noted, “Rule 23 establishes two main requirements for class certification. First, the action must satisfy all four elements of Rule 23(a): numerosity, commonality, typicality and adequacy of representation. Second, the proposed class must satisfy at least one of the three provisions under Rule 23(b).” *Maxwell*, 2004 WL 719278, *2. In this case, the class should be certified pursuant to Rule 23(b)(3).

2. The Plaintiff’s class satisfies all of the prerequisites for certification under Rule 23(a).

A. The putative class is sufficiently numerous.

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” “Courts have found this element satisfied when the putative class consists of as few as 10 to 40 members,” and “the court is permitted to make common sense assumptions in order to find support for numerosity” where the plaintiff has shown “some evidence or reasonable estimate of the number of class members.” *Maxwell*, 2004 WL 719278, *2 (internal quotation marks and citations omitted).

Here, it is manifest that the instant class is in the thousands and that this satisfies the numerosity requirement. *See, e.g., Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669 (N.D. Ill. 1989) (classes numbering in thousands “clearly” satisfy numerosity requirement).²

² It is well established that the numerosity requirement can be met without determining the precise number of class members, but, instead, relying on good-faith estimates. *See, Smith v. Nike Retail Services, Inc.*, 234 F.R.D. 648, 659 (ND. Ill 2006).

During the relevant period, as part of Timberland's advertising campaign, Defendants caused tens of thousands of unsolicited text calls to be placed to cellular telephones. *See* Exhibits 2 & 3 hereto.³ Numerosity is satisfied.

B. Common questions of law or fact exist.

Under Rule 23(a)(2) there must be at least one common question of law or fact. As discussed more fully in the section on predominance below, the instant case presents many such common questions, including:

- * Are text message transmissions under the purview of the TCPA?
- * Did Defendants use an automatic telephone dialing system when they transmitted these calls?
- * Are the class members entitled to statutory damages as a result of Defendants' misconduct?
- * Are the class members entitled to injunctive relief?

Where, as in this case, "a defendant has allegedly directed standardized conduct toward the putative class members," the commonality requirement is met. *Maxwell*, 2004 WL 719278, *3.

C. Plaintiffs' claims are typical.

Under Rule 23(a)(3), a plaintiff's claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her

³ Not surprisingly, Defendants have not challenged the Court's subject-matter jurisdiction over this case, which flows from the Class Action Fairness Act and for which the amount in controversy must be a minimum of \$5,000,000. In this case, that is tantamount to a concession that there are at least 10,000 members (at the statutory damage amount of \$500 each) in the putative class.

claims are based on the same legal theory.” *Maxwell*, 2004 WL 719278, *4 (internal quotation marks and citation omitted). Here, there can be no question that Plaintiffs’ claims are typical; indeed, Plaintiffs have been subjected to precisely the same practice as has each member of their class.

D. Plaintiffs and class counsel will adequately represent the class.

Rule 23(a)(4) requires that “both the class representative and counsel for the named plaintiff must be able to zealously represent and advocate on behalf of the class as a whole.” *Maxwell*, 2004 WL 719278, *5. The class representatives must not have “antagonistic or conflicting claims with other members of the class,” and must have a “sufficient interest in the outcome of the case to ensure vigorous advocacy.” *Id.* (internal quotation marks and citation omitted).

In the instant case, Plaintiffs’ interests are not antagonistic, but rather are fully congruent with, the interests of other class members, and their pursuit of this matter has demonstrated that they will be “zealous advocate[s] as the named representative[s] on behalf of the class.” *Id.* Similarly, Plaintiffs’ attorneys have broad experience in class litigation and other complex litigation (including being found to be suitable class counsel in a similar “text spam” case brought under the TCPA. *See* Group Exhibit 4 hereto (proposed class counsel’s firm resumes, describing *Shen v. Distributive Networks*).

3. This action satisfies the requirements of Rule 23(b)(3).

In addition to satisfying the requirements of Rule 23(a), class certification also requires the satisfaction of one of the three conditions in sub-parts of 23(b). This case patently meets the standards of Rule 23(b)(3), which mandates, first, that common issues of law or fact must

predominate over any individual issues and, second, that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See, e.g., Maxwell*, 2004 WL 719278, *5.

A. Common issues predominate.

The predominance requirement is generally satisfied where a “common nucleus of operative facts” exists. *Maxwell*, 2004 WL 719278, *5. The Seventh Circuit recently explained that class certification is not defeated even if there is some possibility that “separate proceedings of some character will be required to determine the entitlements of the individual class members to relief.” *Carnegie v. Household Int’l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

While the common issues must predominate, they “need not be exclusive.” *Maxwell*, 2004 WL 719278, *5; *see also, Pleasant v. Risk Management Alternatives, Inc.*, No. 02 C 6886, 2003 WL 22175390, at *5 (N.D. Ill. Sept. 19, 2003) (certifying class where “the central factual inquiry will be common to all” the class members); *Kremnitzer*, 202 F.R.D. at 242 (finding predominance met in class action where “[l]iability in this case is predicated on the same legal theory and the same alleged misconduct[.]”). In the most concrete terms possible, all that Rule 23(b)(3) requires is that the resolution of the common issues will significantly move all of the claims forward. This is unquestionably the case here, because Defendants’ have allegedly wronged each class member in the same way. As discussed above, the key -- and essentially only -- issues in this case are common ones.

B. This class action is a superior method for the adjudication of the controversy.

Under Rule 23(b)(3), plaintiff must demonstrate that a class action vehicle is superior to other available methods of adjudicating this controversy. Here, because of the costs associated

with bringing the claims made in this case, few if any class members could pursue their rights individually -- and to Plaintiffs' knowledge there is no related litigation by any class member. Indeed, the most reasonable assumption is that few if any of the class members even know of the violation of their rights. Finally, there are no potential difficulties in managing a class action here, and the use of the class action form will save considerable judicial resources. Every one of these factors militates for a finding of superiority. *See, e.g., Maxwell*, 2004 WL 719278, *6.

CONCLUSION

As the foregoing discussion demonstrates, the instant case handily satisfies all of the requirements of Rule 23. Therefore, Plaintiffs Jeff Weinstein and Lei Shen respectfully request that the Court enter an order certifying the class as defined above pursuant to Rule 23(b)(3).

Respectfully submitted,

Jeff Weinstein and Lei Shen, individually and on behalf of a class of similarly situated individuals

/s/ John Blim

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