

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

CHRISTOPHER CLINE, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

ULTIMATE FITNESS GROUP, LLC
d/b/a ORANGETHEORY FITNESS,

Defendant.

Case No. _____

CLASS ACTION COMPLAINT

CLASS ACTION

JURY TRIAL DEMANDED

Plaintiff, Christopher Cline (“Plaintiff”), individually and on behalf of all other persons similarly situated, by and through the undersigned counsel, hereby files this Class Action Complaint and Jury Demand against Ultimate Fitness Group, LLC d/b/a Orangetheory Fitness (“Defendant” or “Orangetheory”) for damages, injunctive relief, equitable relief, and any other relief deemed just and proper arising from Defendant’s violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, *et seq.*, and the Federal Communications Commission (“FCC”) rules promulgated thereunder, 47 C.F.R. §§ 64.1200(d) and (e) (“Rules”).

NATURE OF CASE

1. Plaintiff brings this Class Action Complaint against Defendant to seek redress for Defendant’s willful violations of the TCPA, and the Rules, by sending telemarketing texts to Plaintiff’s telephone using automatic telephone dialing systems (“ATDS”) without their express written consent, and by placing telemarketing texts to Plaintiff’s and other class members’ cellular telephones in the absence of or after they had withdrawn any consent for such calls.

JURISDICTION AND VENUE

2. This Court has original federal question and subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227, *et seq.* This action arises under the laws of the United States.

3. Venue is proper under 28 U.S.C. § 1391 inasmuch as the Defendant is based here, and a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

4. At all times relevant, Defendant maintained its principal offices in this district, and it conducted, and continues to conduct, a substantial amount of business activity and violated the TCPA and Rules, in whole or in part, in this judicial district. Defendant is registered to conduct business in Florida and this district, and engaged in interstate commerce when it called or attempted to call Plaintiff and the members of the proposed class (defined below). Defendant also advertised and promoted its business and derived substantial revenue in this district.

PARTIES

5. Plaintiff Christopher Cline is a citizen of Florida.

6. Defendant Orangetheory is a limited liability company organized under the laws of Delaware with its principal place of business at 6000 Broken Sound Pkwy NW, Suite 201, Boca Raton, FL 33487. It is a franchisor of fitness studios. Orangetheory has over 650 franchises in the United States and had revenue of some \$450 million in 2016.

7. Whenever in this Complaint it is alleged that Defendant committed any act or omission, it is meant that the Defendant's officers, directors, agents, servants, or employees committed such act or omission and that, at the time such act or omission was committed, it was done with the actual or apparent authority, ratification or approval of the Defendant, or was done

in the routine normal course and scope of employment of the Defendant's officers, directors, vice-principals, agents, servants, or employees.

LEGAL BASIS FOR COMPLAINT

8. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In doing so, Congress recognized that “[u]nrestricted telemarketing ... can be an intrusive invasion of privacy....” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 § 2(5) (1991) (codified at 47 U.S.C. § 227). The statute requires the FCC to promulgate rules to protect telephone subscribers’ privacy rights, 47 U.S.C. § 227(c), and permits a private right of action for violations of such rules. 47 U.S.C. § 227(c)(5).

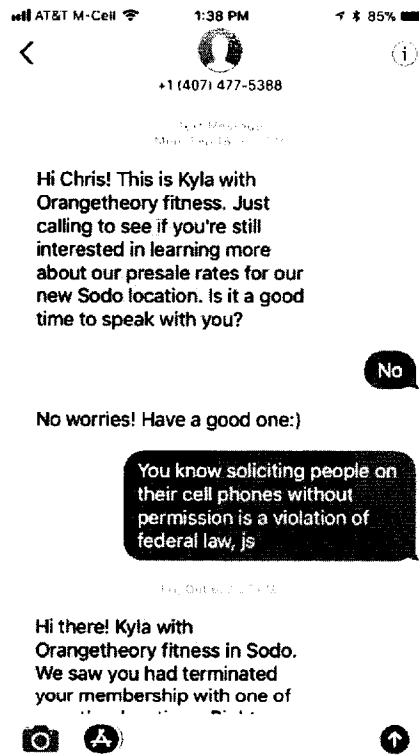
9. All calls to cellular telephones placed using an ATDS violate the TCPA if the calling party does not first obtain prior express consent from the called party. 47 U.S.C. § 227(b)(i)(A)(iii) and (B). The FCC has determined that this statute encompasses calls placed by text messaging, as well as voice calls. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, Report and Order, 18 FCC Red. 14014, 14115, ¶ 165 (2003); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, Report and Order, 30 FCC Red. 7961, 8016-18, ¶¶ 107-110 (2015) (“2015 FCC Order”). The FCC has defined prior express consent as “an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.” 47 C.F.R. § 464.1200(f)(8).

10. The TCPA provides for statutory damages of \$500 for each call placed in violation of TCPA and the Rules, which may be trebled if the violation is willful. 47 U.S.C. § 227(b)(3).

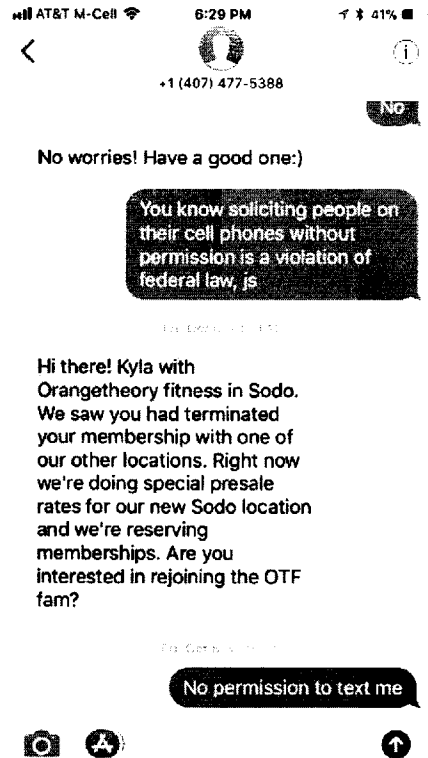
FACTS RELATING TO PLAINTIFF

11. Plaintiff joined an Orangetheory gym in May or June 2016, and withdrew from membership by the Fall of 2016.

12. On September 18, 2017, long after Plaintiff's membership with Orangetheory had lapsed, Defendant sent an unsolicited text to Plaintiff's cellular phone advertising an offer to join a new Orangetheory location. Plaintiff responded by indicating that he did not wish to be contacted again and admonished Defendant for unlawfully contacting him on his cellular phone without permission. A screenshot copy of the texts is attached below.



13. On October 6, 2017, Plaintiff received on his cellular phone a second text from Defendant, again advertising a new Orangetheory location. Plaintiff again responded by indicating that he had not provided permission to be contacted and did not want to be contacted. A screenshot copy of the texts is attached below.



14. The caller ID on Plaintiff's phone showed that the above texts were received from (407) 477-5388, which is the telephone number of Orangetheory's new location in the Sodo [South of Orlando] neighborhood.

15. Defendants' texts were made for the purpose of marketing services at a new Orangetheory location. Defendant's calls to place these texts were made without the prior express written consent of Plaintiff.

16. Orangetheory transmitted telemarketing texts to Plaintiff and other members of the class using an ATDS as defined by the FCC. During the proposed Class Period, Orangetheory contracted with Textmunication, a California-based company that specializes in advertising campaigns for the fitness industry using texting. Textmunication boasts on its website that it provides its clients with "direct carrier connections for text messaging," and an Orangetheory representative endorsed Textmunication, stating: "Texting is a very effective tool to get your message to clients and potential clients. Textmunication allows you to use that tool in a very user

friendly and simple platform with an online dashboard that allows you to monitor results.” The FCC has found, “the equipment used to originate Internet-to-phone text messages to wireless numbers via email or via a wireless carrier’s web portal is an ‘automatic telephone dialing system.’” *See* 2015 FCC Order at 8018, ¶ 111.

CLASS ACTION ALLEGATIONS

17. Plaintiff brings this action pursuant to Federal Rules of Civil Procedure 23(a), (b)(2), and (b)(3) on behalf of himself and the following class (the “Class”):

All individuals in the United States whose telephone numbers had been assigned to cellular phones, and who between January 1, 2014 and the date this Class is certified received texts sent by or on behalf of Defendant placed through the use of an automatic telephone dialing system either (a) without their prior express written consent, or in the alternative, (b) who, according to Defendant’s business records, purportedly provided prior express written consent in the same manner that Plaintiff purportedly provided prior express written consent.

18. The following individuals are excluded from the proposed class: (1) Defendant, Defendant’s subsidiaries, parents, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest, and the current or former officers and directors of any of the foregoing; (2) persons who properly execute and file a timely request for exclusion from the Class; (3) the legal representatives, successors or assigns of any such excluded persons; and (4) persons whose claims against Defendant have otherwise been fully and finally adjudicated and/or released.

19. Plaintiff reserves the right to amend the Class definition and to seek recovery on behalf of additional persons as warranted as additional facts are learned in further investigation and discovery.

20. Plaintiff and the members of the proposed Class were harmed by Defendant’s acts in at least the following ways: Defendant, either directly or through agents, illegally contacted Plaintiff and the Class members without their express written consent, thereby invading the privacy

of Plaintiff and Class members, and subjecting Plaintiff and the Class members to annoying and harassing texts that constitute a nuisance.

NUMEROSITY

21. The exact size of the Class is unknown and not available to Plaintiff at this time, but it is clear that individual joinder is impracticable.

22. According to a “case study” published by Textmunication, Defendant’s texting campaign directed at former members and guests at just one Orangetheory location in Placerville, California involved transmission of 1,434 texts. Defendant has over 650 locations in the United States, opening about 100 new locations in 2017. Even if unconsented texts were limited to new locations, this alone would represent thousands of texts sent in the past four years. Moreover, in light of the fact that Plaintiff lives more than 40 miles from the Sodo Orangetheory location and the message he received was sent, *at a minimum*, to all former Orangetheory members in the greater Orlando region for which Orangetheory had a text-capable telephone number, it is likely that several hundred texts were sent in relation to that location alone.

COMMONALITY

23. There are many questions of law and fact common to the claims of Plaintiff and the proposed Class, and those questions predominate over any questions that may affect individual members of the proposed Class.

24. Common questions for the proposed Class include, but are not necessarily limited to the following:

- a. Whether Defendant had a practice of texting persons for telemarketing purposes on their cellular phones without their prior express written consent;
- b. Whether Defendant used an ATDS for its telemarketing via text program;
- c. Whether Defendant’s conduct violated the TCPA;

- d. Whether Class members are entitled to treble damages based on the willful and/or knowing nature of Defendant's conduct; and
- e. Whether Defendant should be enjoined from engaging in such conduct in the future.

TYPICALITY

25. Plaintiff's claims are typical of the claims of the other members of the Class.

26. Plaintiff and the Class sustained damages as a result of Defendant's uniform wrongful conduct during transactions with Plaintiff and the Class.

ASCERTAINABILITY

27. Among other things, members of the proposed Class can be ascertained through Defendant's records. Defendant maintains computerized records showing the names and telephone numbers that it calls.

ADEQUACY OF REPRESENTATION

28. Plaintiff will fairly and adequately represent and protect the interests of the Class, and has retained counsel competent and experienced in complex class actions involving violations of federal and state consumer protection statutes, including claims under the TCPA.

29. Plaintiff has no interest antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff.

SUPERIORITY

30. This case is also appropriate for class certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy given, among other things, that joinder of all parties is impracticable. Classwide relief is essential to compel Defendant to comply with the TCPA.

31. The damages suffered by the individual members of the Class will likely be relatively small, especially given the burden and expense of individual prosecution of the complex litigation necessitated by Defendant's actions.

32. Even if members of the proposed Class could sustain such individual litigation, it would still not be preferable to a class action, because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies alleged herein. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Economies of time, effort and expense will be fostered and uniformity of decisions ensured. Defendant has acted on grounds generally applicable to the Class, thereby making final injunctive relief and corresponding declaratory relief with respect to the Class as a whole appropriate. Moreover, on information and belief, Plaintiff alleges that the TCPA and Rules complained of herein are substantially likely to continue in the future if an injunction is not entered.

CLAIMS FOR RELIEF

(Violations of the TCPA, 47 U.S.C. §227, *et seq.*)

33. Plaintiff re-alleges and incorporates by reference each and every allegation of this Complaint contained in each of the previous paragraphs, as if more fully set forth herein.

34. Defendant transmitted texts to Plaintiff on his cellular phone that were made using an ATDS, without his express written consent, in violation of 47 U.S.C. § 227(b)(1)(A)(iii).

35. Defendant's acts and omissions constitute numerous and multiple violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

36. As a result of Defendant's violations of 47 U.S.C. § 227 *et seq.*, and accompanying regulations, Plaintiff and each member of the proposed Class are entitled to damages for each and every violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

37. Plaintiff and the members of the proposed Class are also entitled to, and do seek, injunctive relief prohibiting such conduct violating the TCPA by Defendant in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, respectfully requests the following relief:

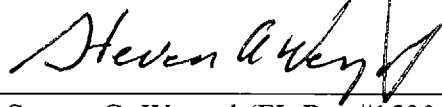
- a. An order certifying this matter as a class action pursuant to Federal Rules of Civil Procedure 23 with Plaintiff as Class Representative;
- b. An order designating Berger & Montague, P.C. and Hunter & Kmiec as Class Counsel;
- c. An award of actual and statutory damages of \$500 for each and every statutory violation to each member of the Class pursuant to 47 U.S.C. § 227(b)(3)(B);
- d. An award of actual and statutory damages of up to \$1,500 for each and every willful/and or wanton violation to each member of the Class pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C);
- e. Injunctive relief prohibiting such violations of the TCPA and Rules by Defendant in the future;
- f. Pre-judgment interest on monetary relief;
- g. Post-judgment interest on monetary relief; and
- h. An award of attorneys' fees and costs to the fullest extent permitted by law.

JURY DEMAND

Plaintiff requests a trial by jury on all issues so triable.

Dated: December 18, 2017

WENZEL FENTON CABASSA, P.A.

By: 
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*Attorneys for Plaintiff and
the Proposed Class*

kal7848002

JS 44 (Rev. 06/17) FLSD Revised 06/01/2017

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS CHRISTOPHER CLINE, individually and on behalf of all others similarly situated

DEFENDANTS ULTIMATE FITNESS GROUP, LLC d/b/a ORANGETHEROY FITNESS

(b) County of Residence of First Listed Plaintiff Palm Beach County (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Palm Beach County (IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address, and Telephone Number) WENZEL FENTON CABASSA, P.A. 1110 N. Florida Ave., Suite 300, Tampa, FL 33602

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State PTF DEF
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT TORTS FORFEITURE/PENALTY LABOR IMMIGRATION BANKRUPTCY SOCIAL SECURITY FEDERAL TAX SUITS OTHER STATUTES
110 Insurance
120 Marine
130 Miller Act
140 Negotiable Instrument
150 Recovery of Overpayment & Enforcement of Judgment
151 Medicare Act
152 Recovery of Defaulted Student Loans (Excl. Veterans)
153 Recovery of Overpayment of Veteran's Benefits
160 Stockholders' Suits
190 Other Contract
195 Contract Product Liability
196 Franchise
210 Land Condemnation
220 Foreclosure
230 Rent Lease & Ejectment
240 Torts to Land
245 Tort Product Liability
290 All Other Real Property
310 Airplane
315 Airplane Product Liability
320 Assault, Libel & Slander
330 Federal Employers' Liability
340 Marine
345 Marine Product Liability
350 Motor Vehicle
355 Motor Vehicle Product Liability
360 Other Personal Injury
362 Personal Injury - Med. Malpractice
440 Other Civil Rights
441 Voting
442 Employment
443 Housing/Accommodations
445 Amer. w/Disabilities - Employment
446 Amer. w/Disabilities - Other
448 Education
365 Personal Injury - Product Liability
367 Health Care/Pharmaceutical Personal Injury Product Liability
368 Asbestos Personal Injury Product Liability
370 Other Fraud
371 Truth in Lending
380 Other Personal Property Damage
385 Property Damage Product Liability
463 Alien Detainee
510 Motions to Vacate Sentence
530 General
535 Death Penalty
540 Mandamus & Other
550 Civil Rights
555 Prison Condition
560 Civil Detainee
Conditions of Confinement
625 Drug Related Seizure of Property 21 USC 881
690 Other
625 Drug Related Seizure of Property 21 USC 881
690 Other
710 Fair Labor Standards Act
720 Labor/Mgmt. Relations
740 Railway Labor Act
751 Family and Medical Leave Act
790 Other Labor Litigation
791 Empl. Ret. Inc. Security Act
422 Appeal 28 USC 158
423 Withdrawal 28 USC 157
820 Copyrights
830 Patent
835 Patent - Abbreviated New Drug Application
840 Trademark
861 HIA (1395ff)
862 Black Lung (923)
863 DIWC/DIWW (405(g))
864 SSID Title XVI
865 RSI (405(g))
870 Taxes (U.S. Plaintiff or Defendant)
871 IRS-Third Party 26 USC 7609
375 False Claims Act
376 Qui Tam (31 USC 3729 (a))
400 State Reapportionment
410 Antitrust
430 Banks and Banking
450 Commerce
460 Deportation
470 Racketeer Influenced and Corrupt Organizations
480 Consumer Credit
490 Cable/Sat TV
850 Securities/Commodities/Exchange
890 Other Statutory Actions
891 Agricultural Acts
893 Environmental Matters
895 Freedom of Information Act
896 Arbitration
899 Administrative Procedure Act/Review or Appeal of Agency Decision
950 Constitutionality of State Statutes

V. ORIGIN

- 1 Original Proceeding
2 Removed from State Court
3 Re-filed (See VI below)
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation Transfer
7 Appeal to District Judge from Magistrate Judgment
8 Multidistrict Litigation - Direct File
9 Remanded from Appellate Court

VI. RELATED/ RE-FILED CASE(S)

(See instructions): a) Re-filed Case YES NO b) Related Cases YES NO

JUDGE:

DOCKET NUMBER:

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity): Violation of TCPA, 47 U.S.C. Section 227; violation of FCC rules, 47 C.F.R. Sections 64.1200(d) and (e)

LENGTH OF TRIAL via days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

DATE SIGNATURE OF ATTORNEY OF RECORD

12/18/17

[Signature]

FOR OFFICE USE ONLY RECEIPT #

AMOUNT

IFP

JUDGE

MAG JUDGE

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida



CHRISTOPHER CLINE, individually and on behalf of
all others similiary situated,

Plaintiff(s)

v.

ULTIMATE FITNESS GROUP, LLC d/b/a
ORANGETHEORY FITNESS,

Defendant(s)

Civil Action No. 9:17-cv-81364

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) ULTIMATE FITNESS GROUP, LLC
d/b/a ORANGETHEORY FITNESS
c/o PARACORP INC., Registered Agent
155 Office Plaza Drive, 1st Floor
Tallahassee, FL 32301

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Steven G. Wenzel, Esquire
Wenzel Fenton Cabassa, P.A.
1110 N. Florida Ave., Suite 300
Tampa, FL 33602
(813) 223-6545
swenzel@wfcclaw.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Orangetheory Fitness Facing Lawsuit Over Telemarketing Text Messages](#)
