

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

CASE NO.

AMY LIVINGSTONE, individually
and on behalf of all others similarly situated

Plaintiff,

vs.

GYM CONSULTING, INC. d/b/a
MY GYM ENTERPRISES,

Defendant,

_____ /

CLASS ACTION COMPLAINT

Plaintiff, AMY LIVINGSTONE (hereinafter “Plaintiff”), brings this class action under Rule 23 of the Federal Rules of Civil Procedure against GYM CONSULTING, INC. d/b/a MY GYM ENTERPRISES (My Gym” or “Defendant”) for its violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (hereinafter “the TCPA”), and the regulations promulgated thereunder. In support, Plaintiff alleges as follows:

PRELIMINARY STATEMENT

1. Plaintiff brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Defendant in negligently or willfully contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to herself and her own

acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

2. The TCPA was designed to prevent calls like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

3. Additionally, the FCC has explicitly stated that the TCPA’s prohibition on automatic telephone dialing systems “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls.” U.S.C.A. Const. Amend. 5; Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(A)(iii). *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165 (N.D. Cal. 2010)

4. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them and made specific findings that “[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that:

[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

Id. at § 12; *see also Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL 3292838, at* 4 (N.D. Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s purpose).

5. Congress also specifically found that “the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also, *Mims*, 132 S. Ct. at 744. 5. As Judge Easterbrook of the Seventh Circuit recently explained in a TCPA case regarding calls to a non-debtor similar to this one:

The Telephone Consumer Protection Act ... is well known for its provisions limiting junk-fax transmissions. A less-litigated part of the Act curtails the use of automated dialers and prerecorded messages to cell phones, whose subscribers often are billed by the minute as soon as the call is answered—and routing a call to voicemail counts as answering the call. An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.

6. The Ninth Circuit recently affirmed certification of a TCPA class action remarkably similar to this in *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036 (9th Cir. 2012)

JURISDICTION AND VENUE

7. This Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227.

8. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to the claims in this case occurred in this District, including the transmission of the subject unauthorized text advertisements.

9. The Court has personal jurisdiction over Defendants because it conducts business in this state, markets its services within this state, and has availed itself to the jurisdiction of the State of Florida by transmitting the subject unauthorized text advertisements to Plaintiff and Class Members in this state.

PARTIES

10. Plaintiff's domicile is in Broward County, Florida. Plaintiff is a citizen of the state of Florida.

11. Class Members are citizens of the state of Florida and throughout the United States.

12. Defendant, My Gym, is a California company and is citizen of California. My Gym lists its principal address and registered agent as Jamie Bertisch, 15300 Ventura Blvd, Ste. 414, Sherman Oaks, CA 91403. Upon information and belief, My Gym also does substantial business in Florida, including throughout Broward County.

13. Defendant is an international corporation which operates the number one children's program worldwide in more than 550 locations in over 30 countries.

14. Defendant has a business model whereby it promotes its business, in part, by sending unsolicited text messages to promote the services it offers at its My Gym locations.

15. Defendant, directly or through other persons, entities or agents acting on its behalf, conspired to, agreed to, contributed to, authorized, assisted with, and/or otherwise caused all of the wrongful acts and omissions, including the dissemination of the unsolicited text messages that are the subject matter of this Complaint.

FACTUAL ALLEGATIONS

16. At all times relevant, Plaintiff was a citizen of the State of Florida. Plaintiff is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153 (39).

17. Defendant is, and at all times mentioned herein was, a corporation and "persons," as defined by 47 U.S.C. § 153 (39).

18. At all times relevant Defendant conducted business in the State of Florida and in Broward County, within this judicial district.

19. Defendant utilizes bulk SPAM text messaging, or SMS marketing, to send unsolicited text messages, marketing and advertising Defendant's merchant services, including at least 3 unsolicited text messages to Plaintiff.

20. For example, on or about September 25, 2018, Defendant sent its first unsolicited text message to Plaintiff's cellular telephone ending in "0497." This text message, read:

"MyGymPembrokePines: Come
join us for a free event at My
Gym Plantation (9775 West Broward Blvd.
Plantation, FL 33324)

—

Text back to reply"

21. Defendant then sent another unsolicited text message to Plaintiff's cellular telephone ending in "0497." This text message, read:

"MyGymPembrokePines: Meet the teachers. ! We can't wait to meet you.
Open House Play date:
Saturday October 6, 2018
11:45-12:45

-

Text back to reply"

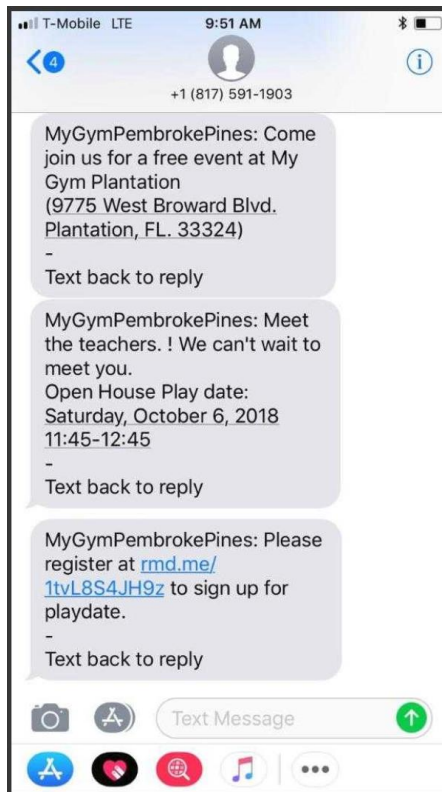
22. On September 27, 2018, Defendant then sent another unsolicited text message to Plaintiff's cellular telephone ending in "0497." This text message, read:

"MyGymPembrokePines: 10/7
11:30-1:30pm is Girls Day Out.
This is a 2 hour drop off event
w/ makeup, nails, face painting
& activities GALORE! \$20
Members \$25 non"

23. Defendant sent all of these unsolicited texts from a number ending "1903" to Plaintiff's cellular telephone.

24. Defendant, either directly or through its agents, has sent additional unsolicited text messages to Plaintiff, the number of which will be ascertained throughout discovery.

25. A screen shot of an example of the unsolicited text messages sent to Plaintiff are depicted below for demonstrative purposes:



26. The above unsolicited text messages were sent to Plaintiff to promote My Gym's Pembroke Pines location.

27. Based upon information and belief, the at-issue text messages were sent by My Gym directly, or by an affiliate, franchisee, agent, servant, and/or employee of My Gym or on behalf of My Gym.

28. Plaintiff further alleges on information and belief that, the retailers, clinics, and franchisees of My Gym (including the Pembroke Pines location), as well as their respective

employees, were Defendant's agents, servants and employees, and at all times herein, each was acting within the purpose and scope of that agency and employment.

29. Defendant is the franchisor and principal for all My Gym locations in Florida and throughout the United States. Based upon information and belief, all My Gym locations are operated and managed pursuant to standard operating procedures and standards required by Defendant.

30. Plaintiff was at no time given an option to "opt-out" of receiving future unsolicited text messages from Defendant.

31. At no time did Plaintiff provide Plaintiff's cellular phone number to Defendant through any medium to receive text messages, nor did Plaintiff consent to receive such an unsolicited text message.

32. Plaintiff has never signed-up for, and has never used, Defendant's services or products, and has never had any form of consumer business relationship with Defendant.

33. Moreover, Plaintiff's cell phone has been registered on the do not call registry since 2004.

34. Through the unsolicited SPAM text message, Defendant contacted Plaintiff several times on Plaintiff's cellular telephone regarding an unsolicited service via an "automatic telephone dialing system," ("ATDS") as defined by 47 U.S.C. § 227(a)(1) and prohibited by 47 U.S.C. § 227(b)(1)(A).

35. Upon information and belief, this ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

36. Upon information and belief, this ATDS has the capacity to store numbers on a list and to dial numbers from a list without human intervention.

37. The telephone number Defendant called was assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227(b)(1).

38. This text message constituted a call that was not for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

39. Plaintiff did not provide Defendant or its agents prior express consent to receive text messages, including unsolicited text messages, to her cellular telephone, pursuant to 47 U.S.C.

40. The unsolicited text message by Defendant, or their agents, violated 47 U.S.C. § 227(b)(1).

41. Defendant is and was aware that it is placing unsolicited robocalls to Plaintiff and other consumers without their prior express consent.

42. Plaintiff was damaged by Defendant's text messages. In addition to using Plaintiff's cellular data, her privacy was wrongfully invaded, and Plaintiff has become understandably aggravated with having to deal with the frustration of repeated, unwanted robo-text messages forcing her to divert attention away from her work and other activities.

CLASS ACTION ALLEGATIONS

43. Plaintiff brings this class action under rules 23(a) and 23(b)(2) & (b)(3) of the Federal Rules of Civil Procedure on behalf of itself and of a similarly situated "Class" or "Class Members" defined as:

All subscribers within the United States (i) who were sent a text message within the four years prior to the filing of the Complaint, (ii) from Defendant and/or its agents, (iii) promoting the availability of employment with Defendant.

Excluded from the Class are: any Defendant, and any subsidiary or affiliate of that Defendant, and the directors, officers and employees of that Defendant or its subsidiaries or affiliates, and members of the federal judiciary.

44. This action has been brought and may properly be maintained as a class action against Defendants pursuant to Rule 23 of the Federal Rules of Civil Procedure because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable. Plaintiff reserves the right to amend the Class definition if discovery and further investigation reveal that any Class should be expanded or otherwise modified.

45. **Numerosity:** At this time, Plaintiff does not know the exact number of Class Members, but among other things, given the nature of the claims and that Defendants' conduct consisted of a standardized SPAM text messaging campaign electronically sent to particular telephone numbers, Plaintiff believes, at a minimum, there are greater than forty (40) Class Members. Plaintiff believes that the Class is so numerous that joinder of all members of the Class is impracticable and the disposition of their claims in a class action rather than incremental individual actions will benefit the Parties and the Court by eliminating the possibility of inconsistent or varying adjudications of individual actions.

46. Upon information and belief, a more precise Class size and the identities of the individual members thereof are ascertainable through Defendant's records, including, but not limited to Defendant's text and marketing records.

47. Members of the Class may additionally or alternatively be notified of the pendency of this action by techniques and forms commonly used in class actions, such as by published notice, e-mail notice, website notice, fax notice, first class mail, or combinations thereof, or by other methods suitable to this class and deemed necessary and/or appropriate by the Court.

48. **Existence and Predominance of Common Questions of Fact and Law:** There is a well-defined community of common questions of fact and law affecting the Plaintiff and members of the Class. Common questions of law and/or fact exist as to all members of the Class

and predominate over the questions affecting individual Class members. These common legal and/or factual questions include, but are not limited to, the following:

- a. Whether, within the four years prior to the filing of this Complaint, Defendant or its agents sent any unsolicited text message/s (other than a message made for emergency purposes or made with the prior express consent of the called party) to a Class member using any automatic dialing and/or SMS texting system to any telephone number assigned to a cellular phone service;
- b. How the Defendant obtained the numbers of Plaintiff and Class members;
- c. Whether the dialing system used to send the subject text messages is an Automatic Telephone Dialing System;
- d. Whether Defendant engaged in telemarketing when it sent the text messages which are the subject of this lawsuit;
- e. Whether the text messages sent to Plaintiff and Class Members violate the TCPA and its regulations;
- f. Whether Defendant willfully or knowingly violated the TCPA or the rules prescribed under it;
- g. Whether Plaintiff and the members of the Class are entitled to statutory damages, treble damages, and attorney fees and costs for Defendant's acts and conduct;
- h. Whether Plaintiff and members of the Class are entitled to a permanent injunction enjoining Defendant from continuing to engage in its unlawful conduct; and
- i. Whether Plaintiff and the Class are entitled to any other relief.

49. One or more questions or issues of law and/or fact regarding Defendant's liability are common to all Class Members and predominate over any individual issues that may exist and may serve as a basis for class certification under Rule 23(c)(4).

50. **Typicality:** Plaintiff's claims are typical of the claims of the members of the Class. The claims of the Plaintiff and members of the Class are based on the same legal theories and arise from the same course of conduct that violates the TCPA.

51. Plaintiff and members of the Class each received at least one SPAM text advertisement, advertising the casino and betting services, which contained no purported opt-out notice, which Defendant sent or caused to be sent to Plaintiff and the members of the Class.

52. **Adequacy of Representation:** Plaintiff is an adequate representative of the Class because Plaintiff's interests do not conflict with the interests of the members of the Class. Plaintiff will fairly, adequately and vigorously represent and protect the interests of the members of the Class and has no interests antagonistic to the members of the Class. Plaintiff has retained counsel, who are competent and experienced in litigation in the federal courts, TCPA litigation and class action litigation.

53. **Superiority:** A class action is superior to other available means for the fair and efficient adjudication of the claims of the Class. While the aggregate damages which may be awarded to the members of the Class are likely to be substantial, the damages suffered by individual members of the Class are relatively small. As a result, the expense and burden of individual litigation makes it economically infeasible and procedurally impracticable for each member of the Class to individually seek redress for the wrongs done to them. Plaintiff does not know of any other litigation concerning this controversy already commenced against Defendant by any member of the Class. The likelihood of the individual members of the Class prosecuting

separate claims is remote. Individualized litigation would also present the potential for varying, inconsistent or contradictory judgments, and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. In contrast, the conduct of this matter as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and would protect the rights of each member of the Class. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

54. **Class-Wide Injunctive Relief and Rule 23(b)(2):** Moreover, as an alternative to or in addition to certification of the Class under Rule 23(b)(3), class certification is warranted under Rule 23(b)(2) because Defendant has acted on grounds generally applicable to Plaintiff and members of Class, thereby making appropriate final injunctive relief with respect to Plaintiff and Class Members as a whole. Plaintiff seeks injunctive relief on behalf of Class Members on grounds generally applicable to the entire Class in order to enjoin and prevent Defendants' ongoing violations of the TCPA, and to order Defendant to provide notice to them of their rights under the TCPA to statutory damages and to be free from unwanted faxes

COUNT I
NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227(b)

55. Plaintiff incorporates by reference all of the allegations contained in paragraphs 1 through 54 of this Complaint as though fully stated herein.

56. The foregoing acts and omissions of Defendant constitutes numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

57. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq., Plaintiff and the Class are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

58. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

WHEREFORE, Plaintiff respectfully requests the Court grant Plaintiff and the Class members relief against Defendant, as set forth in the Prayer for Relief below.

COUNT II
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227(b)

59. Plaintiff incorporates by reference all of the allegations contained in paragraphs 1 through 54 of this Complaint as though fully stated herein.

60. The foregoing acts and omissions of Defendant constitutes numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227(b).

61. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and The Class are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

62. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

WHEREFORE, Plaintiff respectfully requests the Court grant Plaintiff and the Class members relief against Defendant, as set forth in the Prayer for Relief below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court enter judgment in her favor and in favor

of the class, against Defendants for:

- a. An order certifying this case as a class action, certifying Plaintiff as representative of the Class, and designating Plaintiff's attorneys Class counsel;
- b. Statutory damages of \$500 per text;
- c. Willful damages at \$1,500 per text;
- d. A declaration that Defendants' practices described herein violate the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A)(iii);
- e. An injunction prohibiting Defendants from using an automatic telephone dialing system to text numbers assigned to cellular telephones without the prior express written consent of the called party;
- f. Reasonable attorney's fees and costs; and
- g. Such further and other relief as this Court deems reasonable and just.

DEMAND FOR JURY TRIAL

Plaintiff is entitled to, and demands, a trial by jury.

Dated: November 09, 2018

Respectfully submitted,

/s/ Seth M. Lehrman

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

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

AMY LIVINGSTONE, individually
and on behalf of all others
similarly situated

Plaintiff(s)

v.

GYM CONSULTING, INC. d/b/a
MY GYM ENTERPRISES,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) GYM CONSULTING, INC. d/b/a MY GYM ENTERPRISES
Jamie Bertisch, as Registered Agent
15300 Ventura Blvd, Ste. 414
Sherman Oaks, CA 91403.

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:

Joshua H. Eggnatz
EGGNATZ PASCUCCI, P.A.
5400 S. University Dr., Suite 417,
Davie, FL 33328
(954) 889-3359

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

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [My Gym Enterprises Sued Over Allegedly Sending Unsolicited Promotional Text Messages](#)
