

1 Eugene Y. Turin (IL Bar No. 6317282)
2 (*pro hac vice to be submitted*)
3 eturin@mcgpc.com
4 MCGUIRE LAW, P.C.
5 55 W. Wacker Dr., 9th Floor
6 Chicago, IL 60601
7 Tel: (312) 893-7002
8 Fax: (312) 275-7895

7 Deval R. Zaveri (CA Bar No. 213501)
8 dev@zaveritabb.com
9 ZAVERI TABB, APC
10 402 West Broadway, Suite 1950
11 San Diego, CA 92101
12 Tel: (619) 831-6987
13 Fax: (619) 239-7800

12 *Attorneys for Plaintiff and the Putative Class*

13
14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

15 KELLY SAUNDERS, individually and)
16 on behalf of a class of similarly situated)
17 individuals,)

18 Plaintiff,)

19 v.)
20)

21 FIVESTARS LOYALTY, INC., a)
22 California Corporation)
23)

24 Defendant.)
25)

Case No. '17CV0702 CAB AGS

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

**Violation of the Telephone
Consumer Protection Act
(47 U.S.C. § 227, et seq.)**

**DEMAND FOR JURY
TRIAL**

1 227”) (the “TCPA”), which prohibits unsolicited text message advertisements
2 to cell phones.

3 4. On behalf of the class, Plaintiff seeks an injunction requiring
4 Defendant to cease sending all unauthorized automated text messages, an award
5 of the greater of actual or statutory damages to the class, together with costs and
6 reasonable attorneys’ fees, as well as pre-judgment interest from the date of
7 filing this suit.

8 **PARTIES**

9 5. Plaintiff is a citizen and a resident of Nevada.

10 6. Defendant FiveStars Loyalty, Inc. is a California Corporation with
11 its principal place of business located in San Francisco, California. A provider
12 of digital marketing services and customer loyalty programs, Defendant does
13 business throughout the United States, including in this District.

14 **JURISDICTION & VENUE**

15 7. This Court has federal question subject matter jurisdiction under
16 28 U.S.C. § 1331, as the action arises under the federal Telephone Consumer
17 Protection Act, 47 U.S.C. § 227.

18 8. This Court has personal jurisdiction over Defendant because
19 Defendant does business in this District.

20 9. Venue is proper in the Southern District of California, because
21 Defendant conducts business in this District, and because a substantial part of
22 the events concerning the conduct at issue occurred in this District, as the
23 unauthorized text message calls originated from a short code utilized by
24 Defendant in this District.

25 **COMMON ALLEGATIONS OF FACT**

26 10. One of the newer types of inexpensive marketing is text messages
27 that are delivered in bulk through “short codes.” The term “short code” refers
28 to a messaging system that allows mobile marketing providers such as

1 Defendant, and other businesses, to transmit short text messages (usually
2 limited to 160 characters) *en masse* to consumers' cellular telephones with
3 minimal effort, expense and oversight.

4 11. Short codes are regularly utilized by marketing and advertising
5 companies – such as Defendant FiveStars – to send generic text messages
6 advertising their customers' services, goods and promotions to thousands of
7 consumers instantaneously.

8 12. Unlike more conventional advertisements, text message
9 advertisements sent via short codes invade consumers' privacy and can actually
10 cost recipients money, because cell phone users like Plaintiff have to pay their
11 respective wireless service providers for each text message call they receive,
12 incur a usage allocation deduction to their text plan, or pay a fixed or variable
13 usage fee, regardless of whether or not the message is authorized.

14 13. In addition, wireless spam is particularly invasive because when
15 such text message calls are made the recipient's cell phone rings, alerting him
16 or her that a call is being received. As cellular telephones are inherently mobile
17 and are frequently carried on their owner's person, text message calls may be
18 received by the called party virtually anywhere worldwide, at anytime.

19 14. Beginning at least as early as 2014, Defendant has caused the mass
20 transmission of wireless spam to the cell phones of individuals it hoped were
21 potential purchasers of its customers' products and services.

22 15. For instance, on or about January 13, 2017, Plaintiff's cellular
23 telephone rang, indicating that a text call was being received.

24 16. The "from" field of the transmission was identified cryptically as
25 "578277," which is a short-code owned and operated by Defendant and/or its
26 agents. The body of the text message read:
27
28

1 behalf of the members of the Class and have the financial resources to do so.
2 Neither Plaintiff nor her counsel has any interest adverse to those of the other
3 members of the Class.

4 23. A class action is superior to other available methods for fairly and
5 efficiently adjudicating this controversy because, among other things, (a)
6 joinder of all members of the Class is impracticable; (b) absent a class action,
7 most members of the Class would find the cost of litigating their claims to be
8 prohibitive, and would have no effective remedy; and (c) the class treatment of
9 common questions of law and fact conserves the resources of the courts and the
10 litigants, and promotes consistency and efficiency of adjudication.

11 24. Defendant has acted and failed to act on grounds generally
12 applicable to the Plaintiff and the other members of the Class in transmitting the
13 wireless spam at issue, requiring the Court's imposition of uniform relief to
14 ensure compatible standards of conduct toward the members of the Class.

15 25. The factual and legal bases of Defendant's liability to Plaintiff and
16 to the other members of the Class are the same, resulting in injury to the
17 Plaintiff and to all of the other members of the Class as a result of the
18 transmission of the wireless spam alleged herein. Plaintiff and the other
19 members of the Class have all suffered harm and damages as a result of
20 Defendant's unlawful and wrongful conduct alleged herein.

21 26. There are many questions of law and fact common to the claims of
22 Plaintiff and the other members of the Class, and those questions predominate
23 over any questions that may affect individual members of the Class. Common
24 questions for the Class include, but are not limited, to the following:

- 25 (a) Did Defendant and/or its agents send one or more text
26 message advertisements to the members of the Class?
27
28

- 1 (b) Did Defendant and/or its agents use an automatic telephone
2 dialing system to transmit the text message advertisements
3 at issue?
- 4 (c) Did Defendant and/or its agents transmit text message
5 advertisements after October 16, 2013, to persons who did
6 not previously provide Defendant with prior express written
7 consent to receive such messages?
- 8 (d) Did the text message advertisements distributed by
9 Defendant violate the TCPA?
- 10 (e) Are the Class members entitled to treble damages based on
11 the willfulness of Defendant's conduct?
- 12 (f) Should Defendant be enjoined from engaging in such
13 conduct?

14 **FIRST CAUSE OF ACTION**
15 **Violation of the Telephone Consumer Protection Act (47 U.S.C. § 227)**
16 **on behalf of Plaintiff and the Class**

17 27. Plaintiff incorporates by reference the foregoing allegations as if
18 fully set forth herein.

19 28. Defendant sent unsolicited and unauthorized text message
20 advertisements, including the message identified in Paragraph 16 above, to a list
21 of wireless telephone numbers of Plaintiff and the other members of the Class
22 using equipment that had the capacity at the time the calls were placed to store
23 or produce telephone numbers to be called using a random or sequential number
24 generator and to dial such numbers.

25 29. These text message advertisements were generic, did not contain
26 any individualized content, and were sent using an automated system that
27 transmitted the text messages *en masse* without human intervention from a short
28 code registered to Defendant and/or its agents. In fact, Defendant specifically

1 notes on its website that it “automatically send[s] marketing & promotions to
2 your members” and that Defendant “take[s] care of your customer needs with
3 our AutoPilot product. AutoPilot sends automated mobile app, text message,
4 and email campaigns[.]”

5 30. These text message advertisements were sent without the prior
6 express written consent of the Plaintiff and the other members of the Class

7 31. Defendant has, therefore, violated the TCPA, 47 U.S.C. §
8 227(b)(1)(A)(iii). As a result of Defendant’s conduct, Plaintiff and the other
9 members of the Class have had their privacy rights violated, have suffered
10 statutory and actual damages and, under section 227(b)(3)(B), are each entitled
11 to, *inter alia*, a minimum of \$500.00 in damages for each such violation of the
12 TCPA.

13 32. To the extent Defendant knew or should have known that the class
14 members did not provide prior express written consent to be sent the text
15 message advertisements at issue, the Court should, pursuant to section
16 227(b)(3)(C), treble the amount of statutory damages recoverable by Plaintiff
17 and the other members of the Class.

18 WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for the
19 following relief:

- 20 1. An order certifying the Class as defined above;
- 21 2. An award of the greater of statutory or actual damages;
- 22 3. An injunction requiring Defendant to cease sending all
23 unauthorized automated text messages via SMS short codes;
- 24 4. Pre-judgment interest from the date of filing this suit;
- 25 5. An award of reasonable attorneys’ fees and costs; and
- 26 6. Such further and other relief the Court deems reasonable and
27 just.

JURY DEMAND

Plaintiff requests trial by jury of all claims that can be so tried.

Dated: April 6, 2017

Respectfully submitted,

MCGUIRE LAW, P.C.
ZAVERI TABB, APC

By: s/ Deval R. Zaveri
Deval R. Zaveri

*Attorneys for Plaintiff Kelly Saunders
and the Putative Class*

Email: dev@zaveritabb.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JS 44 (Rev. 12/12)

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.)

I. (a) PLAINTIFFS

Saunders, Kelly, on behalf of herself and all others similarly situated

(b) County of Residence of First Listed Plaintiff Clark, Nevada
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Deval R. Zaveri Zaveri Tabb, APC 402 W. Broadway Ste. 1950
 San Diego, CA 92101 (619) 831-6988

DEFENDANTS

FiveStars Loyalty, Inc.

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

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'17CV0702 CAB AGS

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

- 1 U.S. Government Plaintiff
 2 U.S. Government Defendant
 3 Federal Question (U.S. Government Not a Party)
 4 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)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from Another District (specify)
 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
47 U.S.C. s. 227 Telephone Consumer Protection Act

Brief description of cause:
Unauthorized text advertisements sent in violation of the Telephone Consumer Protection Act.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
 DEMAND \$ 5,000,000.00+
 CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE
 04/06/2017

SIGNATURE OF ATTORNEY OF RECORD

Deval R. Zaveri

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [FiveStars Loyalty Pegged with Lawsuit Over Unsolicited Texts](#)
