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5 ATTORNEYS FOR PLAINTIFF

6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
9

10 NEIL SMITH, individually and on behalf of a) Case No. '11CV1958 JLS BGS
class of similarly situated individuals,)
11)
Plaintiff,) **CLASS ACTION COMPLAINT**
12) **FOR DAMAGES AND**
v.) **INJUNCTIVE RELIEF**
13)
14) 1) Violation of 47 U.S.C. § 227
MICROSOFT CORPORATION, a)
15 Washington corporation,)
16) **DEMAND FOR JURY TRIAL**
Defendant.)
17)

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19 **CLASS ACTION COMPLAINT**

20 Plaintiff Neil Smith brings this class action complaint against Defendant Microsoft
21 Corporation (“Microsoft”) to stop Defendant’s practice of making unsolicited text message
22 calls to cellular telephones, and to obtain redress for all persons injured by its conduct.
23 Plaintiff, for his class action complaint, alleges as follows upon personal knowledge as to
24 himself and his own acts and experiences, and, as to all other matters, upon information and
25 belief, including investigation conducted by his attorneys.
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NATURE OF THE CASE

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2 1. Wireless spam is a growing problem in the United States. According to a
3 recent study conducted by the Pew Research Center, “Spam isn’t just for email anymore; it
4 comes in the form of unwanted text messages of all kinds—from coupons to phishing
5 schemes—sent directly to user’s cell phones.” In fact, “57% of adults with cell phones have
6 received unwanted or spam text messages on their phone.” Amanda Lenhart, Cell Phones
7 and American Adults: They Make Just as Many Calls, but Text Less than Teens, Pew
8 Research Center (2010) at <http://pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults.aspx>.
9

10 2. In one such effort to promote its new Xbox video game console, Defendant
11 Microsoft, one of the world's largest software companies, engaged in an especially pernicious
12 form of marketing: the transmission of unauthorized advertisements in the form of “text
13 message” calls to the cellular telephones of consumers throughout the nation.

14 3. By effectuating these unauthorized text message calls (hereinafter, “wireless
15 spam”), Defendant has caused consumers actual harm, not only because consumers were
16 subjected to the aggravation that necessarily accompanies wireless spam, but also because
17 consumers frequently have to pay their cell phone service providers for the receipt of such
18 wireless spam.

19 4. In order to redress these injuries, Plaintiff, on behalf of himself and a
20 nationwide class of similarly situated individuals, brings suit under the Telephone Consumer
21 Protection Act, 47 U.S.C. § 227, *et seq.* (“47 U.S.C. § 227”), which prohibits unsolicited
22 voice and text calls to cell phones.

23 5. On behalf of the class, Plaintiff seeks an injunction requiring Defendant to
24 cease all wireless spam activities and an award of statutory damages to the class members,
25 together with costs and reasonable attorneys’ fees.

PARTIES

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27 6. Plaintiff is a resident of Illinois.
28

1 owner's person, calls to cellular telephones, including SMS messages, may be instantly
2 received by the called party virtually anywhere worldwide.

3 14. Unlike more conventional advertisements, wireless spam can actually cost its
4 recipients money, because cell phone users must frequently pay their respective wireless
5 service providers either for each text message call they receive or incur an usage allocation
6 deduction to their text plan, regardless of whether or not the message is authorized.

7 15. Over the course of an extended period beginning in at least 2008, Defendant
8 and its agents directed the mass transmission of wireless spam to the cell phones nationwide
9 of what they hoped were potential customers of Defendant's Xbox.

10 16. For instance, on or about September 12, 2008, Plaintiff's cell phone rang,
11 indicating that a text call was being received.

12 17. The "from" field of such transmission was identified cryptically as "88202,"
13 a format which is an abbreviated telephone number known as an SMS short code licensed
14 and operated by Defendant's agents. The body of such text message read:

15
16 FREE XBOX GAMES CONTENT! HTTP://XBOX.MOBI/SM1.
17 PERSONALIZE YOUR PHONE WITH RINGTONES,
18 WALLPAPER, TRAILERS AND GAME UPDATES.
19 TO OPT-OUT REPLY END.

20 18. The website contained in the above text message is owned and operated by
21 Defendant and/or its agents and similarly promoted Defendant's products.

22 19. Defendant's and its agents' use of an SMS short code enabled Defendant's
23 mass transmission of wireless spam to a list of cellular telephone numbers.

24 20. At no time did Plaintiff consent to the receipt of the above-referenced text
25 message or any other wireless spam from Defendant.

26 CLASS ACTION ALLEGATIONS

27 21. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure
28 23(b)(2) and Rule 23(b)(3) on behalf of himself and a class (the "Class") defined as follows:

1 all persons in the United States and its Territories who received one or more unauthorized
2 text message advertisements on behalf of Microsoft.

3 22. In order to make its *en masse* transmissions of text message advertisements
4 economical, Defendant and its agents used one or more short codes to transmit the text
5 messages to thousands of consumers' cellular telephone numbers. As such, the Class consists
6 of thousands of individuals and other entities, making joinder impractical.

7 23. Plaintiff will fairly and adequately represent and protect the interests of the
8 other members of the Class. Plaintiff has retained counsel with substantial experience in
9 prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to
10 vigorously prosecuting this action on behalf of the members of the Class, and have the
11 financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to
12 those of the other members of the Class.

13 24. Absent a class action, most members of the Class would find the cost of
14 litigating their claims to be prohibitive, and will have no effective remedy. The class
15 treatment of common questions of law and fact is also superior to multiple individual actions
16 or piecemeal litigation in that it conserves the resources of the courts and the litigants, and
17 promotes consistency and efficiency of adjudication.

18 25. Defendant has acted and failed to act on grounds generally applicable to the
19 Plaintiff and the other members of the Class in transmitting the wireless spam at issue,
20 requiring the Court's imposition of uniform relief to ensure compatible standards of conduct
21 toward the members of the Class.

22 26. The factual and legal bases of Defendant's liability to Plaintiff and to the other
23 members of the Class are the same, resulting in injury to the Plaintiff and to all of the other
24 members of the Class as a result of the transmission of the wireless spam alleged herein.
25 Plaintiff and the other Class members have all suffered harm and damages as a result of
26 Defendant's unlawful and wrongful conduct as a result of the transmission of the wireless
27 spam.

1 27. There are many questions of law and fact common to the claims of Plaintiff
2 and the other members of the Class, and those questions predominate over any questions that
3 may affect individual members of the Class. Common questions for the Class include but are
4 not limited to the following:

- 5 (a) Does the wireless spam Defendant distributed violate 47 U.S.C. § 227?
6 (b) Are the Class's members entitled to treble damages based on the
7 willfulness of Defendant's conduct?
8 (c) Did the conduct described above violate the Class's right to privacy?

9 **FIRST CAUSE OF ACTION**
10 **(Violation of 47 U.S.C. § 227: On behalf of the Class)**

11 28. Plaintiff incorporates by reference the foregoing allegations as if fully set
12 forth herein.

13 29. Defendant made unsolicited commercial text calls, including the message
14 transcribed above, to the wireless telephone numbers of the Class. Each such text message
15 call was made using equipment that had the capacity to store or produce telephone numbers
16 using a random or sequential number generator and to dial such numbers. By using such
17 equipment, Defendant was able to effectively send text messages to thousands of consumers'
18 wireless telephone numbers without human intervention.

19 30. These text calls were made *en masse* through the use of a short code without
20 the prior express consent of the Plaintiff and the other members of the Class to receive such
21 wireless spam.

22 31. Defendant has, therefore, violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result of
23 Defendant's conduct, the members of the class suffered actual damages by having to pay
24 their respective wireless carriers for their receipt of such text messages where applicable and,
25 under section 227(b)(3)(B), are each entitled to, *inter alia*, a minimum of \$500.00 in damages
26 for each violation of such act.

27 32. Because Defendant had knowledge that Plaintiff and the Class did not consent
28 to the receipt of the aforementioned wireless spam, the Court should, pursuant to section 47

1 U.S.C. § 227(b)(3)(C), treble the amount of statutory damages recoverable by the Plaintiff
2 and the other members of the Class.

3 WHEREFORE, Plaintiff Neil Smith, on behalf of himself and the Class, prays for the
4 following relief:

- 5 1. An order certifying the Class as defined above;
- 6 2. An award of actual and statutory damages;
- 7 3. An injunction requiring Defendant to cease all wireless spam
8 activities;
- 9 4. An award of reasonable attorneys' fees and costs; and
- 10 5. Such further and other relief the Court deems reasonable and just.

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12 **JURY DEMAND**

13 Plaintiff requests trial by jury of all claims that can be so tried.
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15
16 Respectfully submitted,

17 Dated: August 24, 2011
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19 By: /s Sean P. Reis
20 Sean P. Reis
21 EDELSON MCGUIRE LLP
22 Attorneys for NEIL SMITH,
23 individually and on behalf of a class of
24 similarly situated individuals
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