

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of the** )  
 )  
**Rules and Regulations Implementing** )  
 ) **CG Docket No's. 02-278 and 05-338**  
**the Telephone Consumer Protection** )  
 )  
**Act of 1991** )

**Comments of Joe Shields on the Bijora Inc. Petition for Declaratory Ruling and/or  
Waiver**

I hereby submit these comments in response to the Commission seeking comments on the Bijora Inc. Petition for Declaratory Ruling and/or Waiver. The petition seeks what the Commission cannot grant. The opt out notice requirement for facsimiles, solicited or unsolicited, does not and cannot apply to text message calls. Simple logic dictates that text message calls that are limited to 160 characters cannot be required to spend most if not all of those 160 characters on a **facsimile** (emphasis added) opt out notice. Further, the plain language of 64.1200(a)(4)(iii) and 64.1200(a)(4)(iv) are clearly limited to facsimiles and do not and cannot apply to text message calls.

It is a typical ruse used by defense attorneys to mix and mash separate sections of the TCPA in an attempt to confuse the court or to create a defense where none exists. The original and amended complaints in Blow v. Bijora, Case No.: 1:11-cv-03468, (US District Court, ND IL) do not contain any reference to either 64.1200(a)(4)(iii) or 64.1200(a)(4)(iv). The complaint is based on the initiation of text message calls without consent of the called party and the identification requirements for all automated calls under 47 U.S.C. §227(d)(3)(A). See attached 3<sup>rd</sup> Amended Complaint. Consequently, the sought waiver as it applies to facsimile opt out notice requirement cannot be granted

since any facsimile opt out notice requirement cannot in any ones wildest dreams apply to text message calls.

Petitioner claims that: “The plaintiff suing Petitioner relies on a regulation, Section 64.1200(a)(4)(iv), issued by the Commission in an order implementing amendments to the TCPA.” As pointed out above nowhere in the original or amended complaints is there any reference to 64.1200(a)(4)(iv). Thus, the petitioner has, in typical fashion of the majority of petitioners that are being sued, misrepresented the facts of the matter to the Commission.

It is clear from the petition that the petitioner is attempting an end run around the court’s jurisdiction in the matter. Petitioner is asking the Commission to intervene in and thwart litigation that has legal merit! Consequently, the Commission is **not** being asked to: “...issue a declaratory ruling terminating a controversy or removing uncertainty”. See 47 C.F.R. §1.2. It is entirely up to the court to decide if recipients of petitioner’s text message calls provided prior express consent, suffered harm from petitioner’s text message calls or if petitioner’s text message calls provided proper identification of the caller. If the Commission must interfere with the courts duty to adjudicate the claim then the Commission should do so in a proper intervention and not in a back door waiver that would thwart litigation that has legal merit.

The Commission cannot: “...issue a retroactive waiver of Section 64.1200(a)(4)(iv) with respect to solicited text messages...” since Section 64.1200(a)(4)(iv) cannot and does not apply to text message calls. Further, as the Commission has already determined in its Order, FCC 14-164 (rel. Oct. 30, 2014) there is

no controversy or uncertainty on facsimile opt out notices that the Commission needs to address.

The Commission must deny the petition for Declaratory Ruling and/or Waiver since section 64.1200(a)(4)(iv) does not and cannot apply to text message calls.

The Commission should exercise its authority to protect the privacy and safety of cell phone users and deny petitioner's request for Declaratory Ruling and/or Waiver since section 64.1200(a)(4)(iv) does not and cannot apply to text message calls..

The Commission can and should deny the Bijora petition in its entirety since section 64.1200(a)(4)(iv) has never applied to text message calls and does not and cannot apply to text message calls.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_

Joe Shields  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

NICOLE BLOW an individual,	)	
on behalf of herself and the class	)	
members described below,	)	
	)	
Plaintiff,	)	Case No. 1:11-cv-03468
	)	
vs.	)	
	)	
BIJORA, INC. doing business as	)	
AKIRA, and Illinois Corporation,	)	
	)	
Defendant,	)	
	)	

**THIRD AMENDED COMPLAINT – CLASS ACTION**

**MATTERS COMMON TO MULTIPLE CLAIMS**

1. Plaintiff, Nicole Blow brings this action to secure redress from unlawful telecommunications by Bijora, Inc., d/b/a Akira (“Bijora”). Plaintiff alleges violations of the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”) and the Illinois Consumer Fraud Act, 815 ILCS 505/2 et seq. (“ICFA”).

**VENUE AND JURISDICTION**

2. This court has jurisdiction under 28 U.S.C. §§ 1331 and 28 U.S.C. 1367.
3. Venue and personal jurisdiction are proper because:
  - a. Defendants’ telecommunications were received within this District;
  - b. Defendants do or transact business within this District.

**PARTIES**

4. Plaintiff Nicole Blow is an individual residing in Chicago, Illinois in the Northern District of Illinois. She owns or otherwise controls the cellular telephone number 708-646-9506.
5. Defendant Bijora, Inc., is a corporation organized under Illinois law with its principal place of business located at 1817 West North Avenue, Chicago, IL. It does business in Illinois. Its registered agent and office is Xiaonong E. Wang, 1837 W. North Ave., Ground Floor, Chicago, IL 60622.
6. Bijora, Inc., is engaged in the business of retail clothing sales and uses telemarketing to advertise its products and sales. It does business under the name “Akira”.

**FACTS**

7. Beginning in September of 2009 and continuing through May of 2011, Bijora sent text messages advertising its products, goods, and/or services (“the Texts”) to Plaintiff’s cellular telephones and thousands of other Illinois consumers.
8. Bijora used an automatic telephone dialing system created by its agent, Opt It, Inc., (the “System”) to send the Texts.
9. The System utilized by Bijora to send the Texts has a web interface that allows Bijora to run text message marketing campaigns. Bijora provides the System with a list of phone numbers, which are loaded and stored in the System. Bijora then used the System to “push” the Texts to Plaintiff and thousands of other Illinois Consumers.

10. The System has the capacity to send text messages without human intervention at a predetermined date and/or time in the future. Specifically, Bijora can direct the System to send the texts to masses of telephone numbers immediately or in the future by selecting the time and date. The System stores the request until the scheduled time and then pushes the messages out to the list of phone numbers provided by Bijora without human intervention.
11. The System has the capacity to and is contracted to send 100 messages per second in mass with one click of a button.
12. Plaintiff never provided prior express consent to Bijora to send text messages to her cellular telephones utilizing an automatic telephone dialing system.
13. Bijora sent at least sixty (60) text messages to Plaintiff's cellular telephone with an automatic telephone dialing system without her express consent to do so, including but not limited to the texts listed below:
14. In September 2009 Plaintiff received the following text messages from Bijora:
  - a. 9/24/09, AKIRA fashion show tonight at MANOR--- 642 N. Clark. Hot FORD models walk the runway in rock inspired fashions. Present this text msg. before 11 for FREE ADMISSION.
  - b. 9/29/09, Rcv 30% OFF any purchase @ any AKIRA location between now & end of Thurs 10/1! Must show this text to cashier! Fwd to ur friends!
  - c. 9/30/09, Sexy Avalanche Fashion Show! RSVP required! Thurs 10/1 @ VLIVE 2047 N. Milwaukee. Doors open @ 6pm...Show @ 7pm.
  - d. 9/30/09, Avalanche Fashion Show! RSVP & rcv FREE ADMISSION for this event by texting AKIRARSPV to46786 or call 3123240348. 4 DJs & Snow Machine!
15. In October 2009, Plaintiff received the following text messages from Bijora:

- a. 10/19/09, SALE FOR MENS store only! Today-- close WED spend \$100 SAVE \$25 spend \$200 SAVE \$40, Spend \$300 SAVE \$60 + Show this txt to the cashier, fwd. to ur friends.
  - b. 10/23/09, Come join us 4 Chicagos Fashion Focus tmw at the Harris thtre. 201 E. Randolph on the rooftop, drinks, fun & shop AKIRA merch! 10am- - 6pm. See you there!
16. In November 2009, Plaintiff received the following text messages from Bijora:
- a. 11/13/09, Meet us 2nite @ LE PASSAGE for a HOT Midnight Fashion Show hosted by Jesse Metcalfe of Desperate Houswives. Show this text B4 12am for NO COVER!
  - b. 11/14/09, BLOWOUT SALE@ALL WOMEN'S STORES! 20% OFF designer dresses, cont. brands & COATS. ALL DENIM-- 1 pair 20%off/ 30% 2 pairs/ 40% off 3 pairs. This wknd only.
  - c. 11/26/09, AKIRA presents: BLACK FRIDAY Blow-- Out Sale! On 11/27 -- All Purchases @ All Locations -- 8am-- NOON = 30% OFF! NOON-- 9pm = 15% OFF!
17. In December 2009, Plaintiff received the following text messages from Bijora:
- a. 12/2/09, Mas Sale First Week of X-- Mas Sale! 12/2-- 12/6..Spend \$100-- rcv \$20GiftCert/\$200-- rcv \$40GiftCert/\$300-- rcv \$60GiftCert. Must show text to qualify! In-- Store only.
  - b. 12/9/09, Mas Sale Second Week of X-- Mas Sale! 12/9-- 12/13..Buy 1 item-- rcv 10% off/2 items-- rcv 20% off/3 items-- rcv 30% off! Must show text to qualify! In-- Store only.
  - c. 12/16/09, Mas Sale Third Week of X-- Mas Sale! 12/16-- 12/20...Buy 1 item -- get 50% OFF 2<sup>nd</sup> item of equal or lesser value! Must show text to qualify! In-- Store only.
  - d. 12/17/09, Join us 2nite 5-- 9pm @ our Diversey locations for AKIRA's Winter Wonderland Party! FREE gifts, FREE drinks & FREE food! 20-- 40% OFF select items!
  - e. 12/26/09, Pre-- NYE party in Bucktown! FREE drinks! FREE food! FREE prizes! HUGE SALES! Sunday, Dec 27<sup>th</sup> ALL DAY!
  - f. 12/26/09, Come, hang out and get your NYE outfits! North Ave.(Bucktown Stores) only!

18. In January 2010, Plaintiff received the following text messages from Bijora:
  - a. 1/6/10, 30% OFF EVERYTHING ONLINE @ shop.akirachicago.com -- Text Club Exclusive! Use promo-- code TEXT5 to rcv an additional 5% OFF! Valid NOW thru 1/8/10.
  - b. 1/19/10, Lyric Opera Tix almost gone 4 a magical night @ Lyric Opera-- Thu 1/21. Fashion Show, FREE Cocktails & Food for \$25 -- VIP for \$50. Purchase @ shop.akirachicago.com.
  - c. 1/29/10, All Stores First 100 Customers @ EVERY AKIRA location to show THIS TEXT receives 30% OFF ENTIRE PURCHASE!!! Show it ANYTIME THIS WEEKEND for 20% OFF! Ends Sunday.
  
19. In February 2010, Plaintiff received the following text messages from Bijora:
  - a. 2/4/10, Join us Friday 2/5 at Victor Hotel for a sensory experience and the best fashion from AKIRAs top footwear labels. 10pm to 2am. Free Admission with text.
  - b. 2/11/10, Join us 2nite 5-- 9pm @ all Diversey locations for our pre-- Valentine Party. FREE gifts, FREE drinks & FREE food! 30% OFF-- Text Exclusive-- MUST show text!
  - c. 2/25/10, 3 DAY SALE at <http://shop.akirachicago.com> Use coupon code \WEB10\" for an additional 10% off already reduced shoes -- save up to 50% off! Ends SUN 2/28".
  
20. In March 2010, Plaintiff received the following text messages from Bijora:
  - a. 3/5/10, TONIGHT: AKIRA presents Alice in Wonderland Fashion Show at Enclave (220W. Chicago Ave.) Free admission before 11pm. Great Party. Get there EARLY!!!
  - b. 3/15/10, For a chance to win a \$30 AKIRA Gift Certificate simply reply AKIRA CONTEST to 46786 before 5pm today...Good Luck!
  - c. 3/30/10, Spring Showers SALE! One-- day-- only...TOMORROW! 20% OFF ALL HUNTER BOOTS @ all AKIRA Locations that have Hunters. Hurry! Sale ends at 9pm on 3/31/10.
  
21. In April 2010, Plaintiff received the following text messages from Bijora:
  - a. 4/3/10, Bucktown & Diversey Womens Clothing Stores OPEN Easter Sunday! Buy 1 Get 1 1/2 OFF the Entire Store! Egg Hunt with prizes! Bring the family! Dont miss out...

- b. 4/3/10, Don't miss out on the EGGstragavant SALES!
  - c. 4/8/10, TOMS SHOE StyleSole Party 2nite @ 668 W Diversey. TOMS Artists,FREE drinks,BIG discounts & more! 4-- 9p. 4 every pair purchased 1 goes 2 a child in need.
  - d. 4/24/10, Annual Spring Fashion Show THIS SUNDAY 4/25 @ 7pm -- 659 W. Diversey. Show this text at any AKIRA location 2day or 2mrw to rcv 20% OFF your look!
22. In May 2010, Plaintiff received the following text messages from Bijora:
- a. 5/13/10, Join us TODAY in celebrating AKIRA Water Tower's 1 year anniversary. 20% OFF EVERYTHING. Cocktails & hors d'oeuvres! 5-- 9pm @ Water Tower Place 4<sup>th</sup> flr
  - b. 5/20/10, You're invited! AKIRA's Island Hop & Shop Party-- TODAY, 5/20 4-- 9 pm @ all Diversey locations. FREE FOOD and FREE DRINKS! Buy 2 items get 1 FREE!
23. In June 2010, Plaintiff received the following text messages from Bijora:
- a. 6/16/10, Dad's Day Sale -- Buy1 Get1 ½ OFF! Today-- Sunday @ Bucktown & Diversey Men's Stores. FREE Gift w/ \$100 purchase. BONUS -- SHOW TEXT & rcv a FREE CD.
  - b. 6/25/10, Come celebrate the launch of shopakira.com 2.0! Griffin Lounge: 326 W. Chicago Ave. -- Party starts @ 7pm. Fashion show, exclusive gifts & giveaways!
24. In July 2010, Plaintiff received the following text messages from Bijora:
- a. 6/16/10, Dad's Day Sale -- Buy1 Get1 ½ OFF! Today-- Sunday @  
7/13/10, HUGE AKIRA 8 Yr Anni PARTY THUR 4-- 9p @ Bucktown stores! 1814-- 1910 W North. Free Drinks&Food,GREAT TIMES. ALL ITEMS BUY 2 GET 1 FREE! THANK YOU CHICAGO.
  - b. 7/13/10, HUGE AKIRA 8 Yr Anni PARTY THUR 4-- 9p @ Bucktown stores! 1814-- 1910 W North. Free Drinks&Food,GREAT TIMES. ALL ITEMS BUY 2 GET 1 FREE! THANK YOU CHICAGO.
  - c. 7/15/10, HUGE AKIRA 8 Yr Anniversary PARTY TONIGHT 4-- 9pm @ Bucktown stores! 1814-- 1910 W North Ave. Free Drinks&Food, GREAT TIMES. ALL ITEMS BUY 2 GET 1 FREE!

- d. 7/15/10, HUGE AKIRA 8 Yr Anniversary PARTY TONIGHT 4-- 9pm @ Bucktown Stores! 1814-- 1910 W North Ave. Free Drinks&Food, GREAT TIMES. ALL ITEMS BUY 2 GET 1 FREE!
25. In August 2010, Plaintiff received the following text messages from Bijora:
- a. 8/19/10, AKIRA Diversey Presents a Red Carpet Affair. NOW -- 9pm. Buy 1 get 1 ½ off entire store. FREE Drinks, Food, and Prizes!!! 643-- 668 W Diversey.
  - b. 8/24/10, AKIRA SHOES AKIRASHOE: Huge Summer Blowout @AKIRA Shoes: Show this txt for an additional 60% OFF SALE ITEMS. This week only. 122 S. State / 1849 W. N. Ave / 668 W. Diversey.
  - c. 8/27/10, AKIRA Fashion Show TONIGHT at Enclave (220 West Chicago Ave.) Show this text at the door for complimentary admission -- before midnight!
26. In September 2010, Plaintiff received the following text messages from Bijora:
- a. 9/5/10, LABOR DAY SALE tomorrow! Bring this txt into any AKIRA location & receive your ENTIRE purchase BUY 1 ITEM GET 2<sup>nd</sup> HALF OFF! Tons of New Fall Arrivals.
  - b. 9/22/10, Galleria Marchetti FashionShow THIS SUNDAY!Our Biggest Charity Evnt of the Yr!Get tickets TODAY & receive 25%OFF ur purchase w/this text!773-- 489-- 0818
27. In October 2010, Plaintiff received the following text messages from Bijora:
- a. 10/29/10, Spooktacular Blowout SALE this WEEKEND! Buy 1 Item Get 2<sup>nd</sup> Item ½ OFF @ any AKIRA location. Promotion valid for the ENTIRE STORE! Friday thru Sunday.
28. In November 2010, Plaintiff received the following text messages from Bijora:
- a. 11/4/10, Invitation 2 an EXCLUSIVE preview of Chicago's newest nightclub:HEARTS Chicago:1115 N.North Branch [St.TONIGHT@9.Show](#) this txt 4 entry.Open bar 9-- 10pm.
  - b. 11/19/10, Attn:Ladies! TODAY from 5pm-- 8pm enjoy 20% OFF all ankle booties & pumps at AKIRA Bucktown Footwear. No coupon required, just bring your pretty smile.

- c. 11/25/10, Black Friday Blowout! Going ALL DAY LONG. 8am-- Noon: 30% OFF Entire Store! Noon-- 6pm: 20% OFF Entire Store! 6pm-- 10pm: 30% OFF Entire Store! Exclusions may apply.
  - d. 11/27/10, The SALE continues ALL WEEKEND LONG 11/27-- 11/28 @ all AKIRA locations: BUY 1 item GET 2<sup>nd</sup> item 1/2 OFF! Exclusions may apply. Don't Miss out ;-- ).
29. In December 2010, Plaintiff received the following text messages from Bijora:
- a. 12/8/10, GOLDEN TICKET 2 AKIRA & TONY MACEY'S NYE Party: \$75! 1 wk only. OPENBAR, gourmet food, 8 DJs + live band. Party w/ the best crowd! Tix @ AKIRA or shop AKIRA.com.
  - b. 12/29/10, Join AKIRA 4 the hottest NYE party! Enter \LASTCALL\" when purchasing tickets online @ shopakira.com & pay only \$100 per ticket (Save \$50). Gen ad only"
30. In January 2011, Plaintiff received the following text messages from Bijora:
- a. 1/1/11, AKIRA Open on New Years Day! Nurse your hangovers with Mimosas and Shopping! BUY 2 GET 1 FREE @ ALL AKIRA LOCATIONS. Some exclusions may apply.
  - b. 1/28/11, Designer Denim BLOWOUT! 40% off ALL Designer Denim @ Men's & Women's Locations! Perfect time to grab that pair you have been eyeing! THIS WEEKEND ONLY.
31. In February 2011, Plaintiff received the following text messages from Bijora:
- a. 2/7/11, Spring Show @ Lyric Opera, Feb 10. Complimentary cocktail reception, gourmet appetizers + Fashion Show! Limited tickets @ stores / <http://shopakira.com>.
32. In March 2011, Plaintiff received the following text messages from Bijora:
- a. 3/11/11, Fashion Show TONIGHT @ 11 pm premiering Christina Yi's \East & West\" collection @ Lumen 839 W. Fulton Market. Complimentary cover with this text. "
  - b. 3/11/11, Fashion show tonight at 11 p.m. @ Lumen 839 W. Fulton Market. Complimentary admission with this text!
  - c. 3/31/11, Only for our mobile club customers! Show this text at ANY Akira location today and receive 20% off your ENTIRE purchase! Today only on non-- sale items.

33. In April 2011, Plaintiff received the following text messages from Bijora:
- a. 4/23/11, Non-- mall AKIRA Open Easter! Show text for exclusive Buy 1 Get 2<sup>nd</sup> ½ OFF ENTIRE STORE! Text Special is only valid Sunday 4/24! Toms shoes excluded.
  - b. 4/24/11, Non-- mall AKIRA Exclusive EASTER Blowout Sale! Buy 1 Get 2<sup>nd</sup> ½ OFF ENTIRE STORE! Text Special today ONLY! Toms shoes excluded.
34. In May 2011, Plaintiff received the following text messages from Bijora:
- a. 5/26/11, Studio 54 Party at AKIRA Diversey Today Thurs 5/26! Buy 1 get one ½ OFF ALL DAY! FREE food drinks manicure and gift with purchase 3-- 9P (773)649-- 9257
  - b. 5/27/11, The party doesn't stop! Studio 54 continues at AKIRA Diversey today, Friday 5/27! Buy 1 get one ½ OFF ALL DAY! FREE DRINKS!!! 773.649.9257.
35. In the texts sent by Bijora specifically described *supra*, Bijora did not include any advisement to Plaintiff describing her right to opt out of receiving future messages or advising her of the method to do so.
36. On information and belief, Bijora did not maintain an entity-specific do-not-call-list or proper procedures for ensuring the individuals are added to it upon request.
37. Bijora did not communicate a telephone number in the texts described *supra* at which to contact them should the recipient wish to discontinue receiving texts.
- The text messages described above constitute artificial or prerecorded telephone message solicitations and were sent “in mass” to thousands of other Illinois Consumers besides Plaintiff using the short code “46786” through the System.
38. In the texts sent by Bijora described *supra*, Bijora did not provide reasonable means for Plaintiff or other recipients of the texts to discontinue receiving them, .

**COUNT I – TCPA – INDIVIDUAL CLAIM**

39. Plaintiffs incorporate paragraphs 1-38.

40. The TCPA, 47 U.S.C. §227, provides:

**§ 227. Restrictions on use of telephone equipment**

**... (b) Restrictions on use of automated telephone equipment.**

**(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States-**

**(A) to make 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-**

**(iii) 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; ...**

**41. The FCC implemented additional requirements codified in 47 C.F.R. § 64.1200, pursuant to its authority granted under the TCPA, which places additional requirements on telephone solicitations made by artificial or prerecorded messages. They provide, in relevant part:**

**a. At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and**

**b. During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.**

42. The TCPA, 47 U.S.C. §227(b)(3), further provides:

**Private right of action.**

**A person or entity may, if otherwise permitted by the laws or rules of the court of a State, bring in an appropriate court of that State-**

**(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,**

**(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or**

**(C) both such actions.**

**If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.**

43. A text message constitutes a call for purposes of the TCPA. *Lozano v. Twentieth Century Fox Film Corp.*, 702 F.Supp. 2d 999 (N.D.Ill March 23, 2010); *Abbas v. Selling Source, LLC*, 2009 U.S. Dist. LEXIS 116697 (N.D.Ill. December 14, 2009).

44. Bijora violated the TCPA by placing automated calls to Plaintiff's cellular telephone without Plaintiff's prior express consent.

45. Bijora further violated the TCPA by sending artificial or prerecorded messages to Plaintiff's cellular telephone without identifying the (1) identity of the business placing the call or (2) the telephone number that placed the call.

46. Defendant violated the TCPA even if its actions were only negligent.

47. Defendant willfully and knowingly sent the texts to Plaintiff.

48. Defendant should be enjoined from committing similar violations in the future.

### **COUNT II- TCPA CLASS CLAIM**

49. Plaintiff and the proposed class incorporate paragraphs 1-48.

50. The TCPA, 47 U.S.C. §227, provides:

**§ 227. Restrictions on use of telephone equipment**

... (b) **Restrictions on use of automated telephone equipment.**

**(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States-**

**(A) to make 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-**

**(iii) 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; ...**

51. The TCPA, 47 U.S.C. §227(b)(3), further provides:

**Private right of action.**

**A person or entity may, if otherwise permitted by the laws or rules of the court of a State, bring in an appropriate court of that State-**

**(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,**

**(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or**

**(C) both such actions.**

**If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.**

52. Pursuant to Fed. R. Civ. P. 23(a) and (b)(3), Plaintiff brings this claim on behalf of a class, consisting of all persons with Illinois area codes (217, 224, 309, 312, 331, 464, 618, 630, 708, 773, 779, 815, 847, or 872) who, on or after a date four years prior to the filing of this action and on or before a date 20 days following the filing of this action, received texts from Bijora sent using an automated telephone dialing system.

53. Pursuant to Fed. R. Civ. P. 23(a) and b(3), Plaintiff alternatively brings this claim on behalf of a class consisting of all persons with Illinois area codes (217, 224, 309, 312, 331, 464, 618, 630, 708, 773, 779, 815, 847, or 872) who, on or after a date four years prior to the filing of this action and on or before a date 20 days following the filing of this action, received automatic or prerecorded text messages from Bijora which did not contain (1) the identity of the business placing the call or (2) the telephone number that placed the call and sent using an automated telephone dialing system.
54. The class is so numerous that joinder of all members is impractical.
55. Upon information and belief, there are thousands of called parties who received identical automatic text messages from Bijora utilizing an automated telephone dialing system.
56. Upon information and belief, there are thousands of persons who received text messages from Bijora utilizing an automatic telephone dialing system who did not provide prior express consent.
57. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:
  - a. Whether the System qualifies as an automatic telephone dialing system and whether Bijoria used it to make calls to cellular telephones;
  - b. Whether Bijora placed the calls using the System without having the prior express consent of the called parties.
  - c. Whether Bijora sent automatic or prerecorded text message solicitations which did not contain (1) the identity of the sbuiness placing the call or (2) the telephone number that placed the call and sent using an automatic telephone dialing system.

d. Whether defendant thereby violated the TCPA.

58. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might case them not to vigorously pursue this action.
59. A class action is an appropriate method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.
60. Several courts have certified class actions under the TCPA. *Sadowski v. Medl Online, LLC*, 2008 U.S. Dist. Lexis 41766 (N.D.Ill., May 27, 2008); *Hinman, Inc. v. Omnipack Corp.*, 246 F.R.D. 642 (W.D.Wash. 2007); *Gortho, Ltd. v. Websolv*, 03 CH 15615 (Cir. Ct. Cook Co., March 6, 2008); *Travel 100 Group, Inc. v. Empire Cooler Service, Inc.*, 2004 WL 310679 (Cook Co. Cir. Ct. Oct. 19, 2004).
61. Management of this class action is likely to present significantly fewer difficulties than those presented by many other class actions, such as those for securities fraud.

**COUNT III - ILLINOIS CONSUMER FRAUD ACT – INDIVIDUAL CLAIM**

62. Plaintiff and the proposed class incorporate paragraphs 1-61.
63. Defendant has engaged in unfair and deceptive acts and practices, in violation of the Illinois Consumer Fraud Act, ICFA § 2, 815 ILCS 505/2 et seq., by sending unauthorized and unsolicited text messages to Plaintiffs without their prior express consent. Plaintiff suffered damages as a result of receipt of the

unauthorized and unsolicited text messages. These damages include the costs to receive the text messages and/or the dilution of the number or texts that Plaintiff may be able to use under a particular call plan, and damages for an invasion of the Plaintiffs' privacy and/or being forced to incur nuisance, unwanted advertising texts.

64. Defendant engaged in this conduct in the course of trade and commerce.
65. Defendant engaged in this conduct knowingly, or willfully disregarding the fact that it was causing the Plaintiff damage.
66. Defendant's illegal conduct gave Defendant an unfair competitive advantage over businesses that advertise lawfully, such as by direct mail, authorized fax transmission, authorized telephone solicitation, authorized text messaging marketing, etc.
67. Defendant's conduct was contrary to public policy, as established by the TCPA and case law.
68. Defendant knowingly and deliberately engaged in unlawful acts.
69. Unless enjoined from doing so, Defendant is likely to commit similar violations in the future.

**COUNT IV- ILLINOIS CONSUMER FRAUD ACT - CLASS CLAIM**

70. Plaintiff and the proposed class incorporate paragraphs 1-69.
71. Defendant has engaged in unfair and deceptive acts and practices, in violation of the Illinois Consumer Fraud Act, ICFA § 2, 815 ILCS 505/2 et seq., by sending unauthorized and unsolicited text messages to Plaintiff without their prior express consent.

72. Plaintiff suffered damages as a result of receipt of the unauthorized and unsolicited text messages. These damages include the costs to receive the text messages and/or the dilution of the number or texts that Plaintiff may be able to use under a particular call plan, and damages for an invasion of the Plaintiff's privacy and/or being forced to incur nuisance, unwanted advertising texts.
73. Defendant engaged in this conduct in the course of trade and commerce.
74. Defendant engaged in this conduct knowingly, or willfully disregarding the fact that it was causing the Plaintiff damage.
75. Defendant's illegal conduct gave Defendant an unfair competitive advantage over businesses that advertise lawfully, such as by direct mail, authorized fax transmission, authorized telephone solicitation, authorized text messaging marketing, etc.
76. Defendant's conduct was contrary to public policy, as established by the TCPA and case law.
77. Defendant knowingly and deliberately engaged in unlawful acts.
78. Unless enjoined from doing so, Defendant is likely to commit similar violations in the future.
79. Pursuant to Fed. R. Civ. P. 23(a) and (b)(3), Plaintiff bring this claim on behalf of a class, consisting of all persons with Illinois area codes (217, 224, 309, 312, 331, 464, 618, 630, 708, 773, 779, 815, 847, or 872) who, on or after a date four years prior to the filing of this action and on or before a date 20 days following the filing of this action, received texts from Bijora sent using an automatic telephone dialing system. These persons include the following subclasses:

- a. persons who received a text without first giving express consent;
80. The class is so numerous that joinder of all members is impractical.
81. Upon information and belief, there are more than twenty thousand called parties who received text messages from Bijora utilizing an automatic telephone dialing system.
82. Upon information and belief, there are more than 40 persons who received text messages from Bijora utilizing an automatic telephone dialing system who did not provide prior express consent, thus resulting in unfair or deceptive business practices amounting to a violation of the ICFA.
83. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:
- a. Whether Bijora placed the calls using the System without having the prior express consent of the called parties.
  - b. Whether Bijora engaged in unfair and deceptive business practices in violation of the ICFA.
  - c. Whether Bijora's conduct was contrary to public policy, as established by the TCPA and case law.
  - d. Whether Bijora knowingly and deliberately engaged in unlawful acts and thereby violated the ICFA.
84. Plaintiff will fairly and adequately protect the interests of the class. Plaintiffs have retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might case them not to vigorously pursue this action.

85. A class action is an appropriate method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.
86. This Court has certified class actions under the ICFA. *See, Johnson v. Aronson Furniture Co.*, 1998 U.S. Dist. LEXIS 14454 (N.D. Ill. Sept. 10, 1998); *Cirone-Shadow v. Union Nissan*, 1995 U.S. Dist. LEXIS 5232 (N.D. Ill. Apr. 19, 1995 ; *Murry v. America's Mortg. Banc, Inc.*, 2006 U.S. Dist. LEXIS 42900 (N.D. Ill. June 5, 2006).
87. Management of this class action is likely to present significantly fewer difficulties than those presented by many other class actions, such as those for securities fraud.

WHEREFORE, Plaintiff requests that the Court enter judgment in favor of Plaintiff and the class and against Defendant for:

- (1) Statutory damages pursuant to the TCPA;
- (2) Actual economic damages pursuant to the ICFA;
- (3) Punitive damages pursuant to the ICFA;
- (4) Reasonable attorney fees pursuant to the ICFA
- (5) Treble damages as allowed for willful and knowing violations of the TCPA;
- (6) An injunction against further violations pursuant to both the TCPA and the ICFA;
- (7) Costs of suit;
- (8) Such other or further relief as the Court deems just and proper.

**TRIAL BY JURY DEMANDED**

NICOLE BLOW,

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2013, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to the following:

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