

SUMMONS ISSUED

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

20 OMAR ATEBAR, an individual, on behalf
21 of himself and all others similarly situated

22 Plaintiff,

23 v.

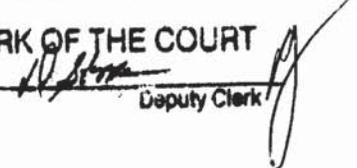
24 TEXTME, INC., a Delaware corporation;
25 and DOES 1-50, inclusive,

26 Defendants.

FILED
Superior Court of California
County of San Francisco

JAN 06 2014

CLERK OF THE COURT

BY:  Deputy Clerk

CGC-14-536605

Case No.

CLASS ACTION COMPLAINT FOR:

- 1. VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227

DEMAND FOR JURY TRIAL

1 Plaintiff Omar Atebar (“Plaintiff”), on behalf of himself and the Class of all other
2 similarly situated persons defined below, demands a trial by jury and hereby complains and
3 alleges upon information and belief as follows:

4 **NATURE OF THE ACTION**

5 1. This action is brought on behalf of all consumers who have received unsolicited
6 and un-consented to text messages on their cellular telephones from TextMe, Inc. which is a
7 mobile application created and maintained by Defendant TextMe, Inc. (“Defendant”), in
8 violation of the Federal Telephone Consumer Protection Act.

9 2. Defendant created, maintains, and operates a mobile application wherein
10 individuals who have downloaded Defendant’s mobile application are able to send text
11 messages, pictures, music and other files to other mobile phone users without the need for a
12 mobile text message plan from a wireless carrier. In an attempt to promote its service, Defendant
13 made (or directed to be made on its behalf) unauthorized promotional text message calls to the
14 cellular telephones of consumers throughout the country – without prior consent – in violation of
15 the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”).

16 3. Neither Plaintiff nor any other member of the putative Class has ever provided
17 Defendant with their cellular telephone numbers, let alone provided it with consent to send them
18 promotional text messages.

19 4. By making these unauthorized text message calls, Defendant has caused
20 consumers actual harm, not only because consumers were subjected to the aggravation that
21 necessarily accompanies the receipt of unauthorized text message calls, but also because
22 consumers frequently have to pay their cell phone service providers for the receipt of such
23 unauthorized text message calls.

24 5. On behalf of himself and the putative Class, Plaintiff seeks an injunction requiring
25 Defendant to cease all unauthorized text message call activities alleged herein and an award of
26 statutory damages to Plaintiff and the other members of the putative Class, together with costs
27 and reasonable attorneys’ fees.

28 ///

1 **JURISDICTION AND VENUE**

2 6. The Superior Court of the State of California has jurisdiction over this action
3 pursuant to Article VI, section 10 of the California Constitution, because this case is not a cause
4 given by statute to other trial courts.

5 7. This Court has personal jurisdiction over Defendant because Defendant is
6 registered with the California Secretary of State to do business in California, and did sufficient
7 business in, has sufficient contacts with, and intentionally availed itself to the laws and markets
8 of California through the promotion, sale, marketing, distribution and operation of its products
9 and services, as to render exercise of jurisdiction by this Court permissible.

10 8. Venue is proper in San Francisco County because Defendant is currently doing
11 and has done during the relevant time period significant amounts of business in the County of
12 San Francisco. In addition, many of the acts and practices giving rise to Plaintiff's claims
13 occurred in San Francisco County.

14 9. The amount in controversy exceeds the jurisdictional minimum of this Court.

15 **PARTIES TO THE ACTION**

16 10. Plaintiff Omar Atebar is a real person residing in the State of California who
17 received an unsolicited and un-consented to text message from Defendant on or about November
18 8, 2013.

19 11. On information and belief, Defendant is a Delaware corporation with its principal
20 place of business located at 480 Second Street, Suite 115, San Francisco, California 94107,
21 engaged in the business of developing applications for mobile telephone devices.

22 12. Plaintiff is currently ignorant of the true names and capacities, whether individual,
23 corporate, associate, or otherwise, of the Defendants sued herein under the fictitious names Does
24 1 through 100, inclusive, and therefore, sue such Defendants by such fictitious names. Plaintiff
25 will amend this complaint to allege the true names and capacities of said fictitiously named
26 Defendants when their true names and capacities have been ascertained. Plaintiff is informed
27 and believes and thereon alleges that each of the fictitiously named Doe Defendants is legally
28 responsible in some manner for the events and occurrences alleged herein, and for the damages

1 suffered by Plaintiff and the Class. Each reference in this complaint to “Defendants,”
2 “Defendant,” or a specifically named defendant refers also to all Defendants sued under fictitious
3 names.

4 13. Plaintiff is informed, believes, and thereon alleges that all Defendants were at all
5 relevant times acting as actual agents, conspirators, aiders and abettors who provided substantial
6 assistance with knowledge of the wrongful conduct, ostensible agents, partners and/or joint
7 venturers and employees of all other Defendants, and that all acts alleged herein occurred within
8 the course and scope of said agency, employment, partnership, joint venture, conspiracy and/or
9 enterprise, and with the express and/or implied permission, knowledge, consent, authorization
10 and ratification of their Co-Defendants; however, this allegation is pleaded as an “alternative”
11 theory wherever not doing so would result in a contradiction with other allegations.

12 14. As an alternative theory, Plaintiff is informed and believes, and on that basis
13 alleges, that Defendants are alter egos of each other. Plaintiff is informed, believes, and on that
14 basis alleges, that there is common control over Defendants, and they operate pursuant to a
15 common business plan. There is unity of interest among Defendants. The alternative alter-ego
16 relationship among the Defendants should be recognized to prevent an injustice. If the alter-ego
17 relationship among Defendants is not recognized, an inequity will result because an entity
18 responsible for wrongdoing will be shielded from liability. Moreover, the Co-Defendant entities
19 that make, in whole or in part, the decisions concerning the wrongdoing alleged herein would
20 escape liability, which is inequitable. Furthermore, the alter-ego relationship should be
21 recognized to ensure effective injunctive and declaratory relief, so that the wrongful practices
22 alleged herein are not relocated to an affiliated company.

23 GENERAL ALLEGATIONS

24 15. In the past decade, communications via short message service (SMS) technology
25 and/or multimedia message service (MMS) has proliferated throughout the United States.

26 16. Today, billions of consumers worldwide have telephonic devices which permit
27 them to receive SMS and/or MMS messages, permitting consumers throughout California and
28 the rest of the United States to engage in telephone conversations utilizing such messages.

1 17. For many consumers (e.g., hearing impaired persons), SMS and/or MMS
2 messages are the only way that they converse on the telephone. However, marketing (a/k/a
3 commercial solicitation) through message service messages is inherently injurious to consumers
4 who have telephonic devices with SMS and/or MMS message capabilities (e.g., cellular
5 telephones and pagers). In fact, such marketing has injured consumers. For example, as a
6 consequence of marketing via message service messages:

- 7 a. Consumers incur increased monetary costs for their message services;
8 b. Consumers lose storage capacity on their telephones and related devices;
9 c. The limited storage capacity of telephonic devices can be exhausted by
10 unwanted message service messages resulting in the inability of consumers to
11 receive necessary and/or expected communications;
12 d. Consumers are deprived of the opportunity to immediately question a seller of
13 goods and services about the veracity of the seller's claims;
14 e. The privacy of consumers is invaded;
15 f. The telephone networks upon which consumers rely are used inefficiently and
16 harmed to the detriment of consumers;
17 g. Consumers are annoyed and harassed;
18 h. Consumers and their property are susceptible to injury and/or are injured in
19 other ways in accord with proof to be presented at trial.

20 18. On November 8, 2013, Defendant sent (or caused to be sent) Plaintiff an
21 unsolicited and un-consented to text message which solicited Plaintiff to install Defendant's
22 mobile application by downloading the application to his mobile device. Specifically, the
23 message read as follow:

24 "Hey it is nevotti32240575. Can you install TextMe please
25 so we can call and text each other for free?
26 <http://i.xtme.us/v/PFqa5>."

27 19. The caller identification associated with the received text message was +1 (585)
28 282-2549, a number that, on information and belief, is owned by Defendant.

1 c. **Common Questions Predominate:** There are questions of law and fact common
2 to the Class, which questions predominate over any questions affecting only individual members.

3 The principal issues include, *inter alia*:

4 i. Whether Defendants negligently caused violations of the Telephone Consumer
5 Protection Act, 47 U.S.C. section 227, when sending unsolicited and un-
6 consented to SMS or MMS messages to Plaintiff and the Class;

7 ii. Whether Defendants willfully caused violations of the Telephone Consumer
8 Protection Act, 47 U.S.C. section 227, when sending unsolicited and un-
9 consented to SMS or MMS messages to Plaintiff and the Class;

10 iii. Whether Defendants used an automatic telephone dialing system to send
11 unsolicited and un-consented to SMS or MMS messages to Plaintiff and the
12 Class;

13 iv. Whether Plaintiff and the Class are entitled to damages for Defendant's actions;

14 v. Whether Defendants should be enjoined from engaging in such conduct in the
15 future.

16 d. **Typicality:** Based on the conduct described above, Plaintiff's claims are typical of
17 the claims of the members of the Class. Plaintiff and all members of the Class have similar
18 claims and remedies arising out of Defendants' common course of conduct complained of herein.

19 e. **Adequacy:** Plaintiff will fairly and adequately protect the interests of the
20 members of the Class. Plaintiff is committed to vigorously litigating this matter, and has
21 retained counsel experienced in handling class claims. Neither Plaintiff nor Plaintiff's counsel
22 have any irreconcilable conflicting interests that might cause them not to vigorously pursue this
23 claim.

24 f. **Superiority:** A class action is a superior method for the fair and efficient
25 adjudication of this controversy. Class-wide damages are essential to induce Defendants to
26 comply with federal law. Management of these claims is likely to present significantly fewer
27 difficulties than those presented in many class claims. A class action is superior to other
28 available means for the fair and efficient adjudication of this controversy since individual joinder

1 of all members would be impracticable. Class action treatment will permit a large number of
2 similarly situated persons to prosecute their common claims in a single forum simultaneously,
3 efficiently, and without the unnecessary duplication of effort and expense that numerous
4 individual actions would engender. Furthermore, since individual member's claims for damages
5 are relatively modest, the expenses and burdens of litigating individual actions would make it
6 difficult or impossible for individual members of the Class to redress the wrongs done to them.
7 An important public interest will be served by addressing the matter as a class action, substantial
8 economies to the litigants and to the judicial system will be realized, and the potential for
9 inconsistent or contradictory adjudications will be avoided.

10 **FIRST CAUSE OF ACTION**

11 **Violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227**

12 28. Plaintiff reasserts and re-alleges the allegations set forth in the above paragraphs
13 as if the same were alleged herein this count.

14 29. At all times material herein, Plaintiff has been entitled to the rights, protections,
15 and benefits provided under the Telephone Consumer Protection Act, 47 U.S.C. § 227.

16 30. Negligently, recklessly, willfully, and/or intentionally, Defendants directly and/or
17 vicariously engaged in acts, omissions, and/or other conduct as referenced herein this complaint
18 that violates the Telephone Consumer Protection Act. Defendants directly and/or vicariously
19 used automatic telephone dialing systems to initiate unsolicited and un-consented to telephone
20 calls to Plaintiff's cellular telephone and/or pager numbers.

21 31. Plaintiff is entitled to recover \$500 in damages from the Defendants for each
22 violation of the Telephone Consumer Protection Act.

23 32. Additionally, Plaintiff is entitled to all damages referenced herein and in accord
24 with proof, attorneys' fees, costs, treble damages, injunctive relief, and other remedies allowed
25 by the Telephone Consumer Protection Act.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, on behalf of himself and all others similarly situated, Plaintiff demands
28 judgment against Defendants and prays that this Court do the following:

1 A. Order Defendants to make Plaintiff and the Class whole with an award of
2 damages in accord with the allegations of this Complaint and proof to be presented at trial.

3 B. Order Defendants to make Plaintiff and the Class whole by providing appropriate
4 prejudgment interest, in an amount to be determined at trial, and other affirmative relief
5 necessary to eradicate the effects of its unlawful practices.

6 C. Order Defendants to pay Plaintiff and the Class punitive and/or treble damages to
7 the fullest extent allowed by law.

8 D. Order injunctive relief prohibiting such conduct in the future.

9 E. Award Plaintiff and the other class members the costs of this action, including
10 attorneys' fees,

11 F. In accord with proof at trial, grant any additional or further relief as provided by
12 law or equity that the Court finds appropriate, equitable, or just.

13
14 Dated: January 3, 2014

KEARNEY LITTLEFIELD, LLP
STONEBARGER LAW, APC

15
16
17 By: 
18 Richard D. Lambert
19 Attorneys for Plaintiff and the Class

20 **DEMAND FOR JURY TRIAL**

21 Plaintiff hereby demands trial by jury.

22
23 Dated: January 3, 2014

KEARNEY LITTLEFIELD, LLP
STONEBARGER LAW, APC

24
25
26 By: 
27 Richard D. Lambert
28 Attorneys for Plaintiff and the Class