

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

ALEJANDRO BORGES, individually)	
and on behalf of all others similarly)	
situated,)	Case No.: 21-cv-23011
)	
Plaintiff,)	
)	
v.)	
)	(Removed from the Circuit Court for the
SMILEDIRECTCLUB, LLC,)	Eleventh Judicial Circuit for Miami-Dade
)	County, Florida, Case No. 2021-017561-CA-
Defendant.)	01)

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332(d), 1441, and 1446, Defendant SmileDirectClub, LLC (“SDC”), by and through its counsel of record, hereby gives notice of removal of this action from the State of Florida, Eleventh Judicial Circuit Court in and for Miami-Dade County to the United States District Court for the Southern District of Florida. In support thereof, SDC respectfully states as follows:

I. THE STATE COURT ACTION

1. On July 21, 2021, Plaintiff Alejandro Borges (“Plaintiff”) initiated this case against SDC by filing a Complaint in the Eleventh Judicial Circuit Court in and for Miami-Dade County captioned *Alejandro Borges v. SmileDirectClub, LLC*, No. 2021-017561-CA-01 (“State Court Action”). A copy of the complaint is attached hereto as **Exhibit 1**.

2. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings, and orders that have been filed and served in the State Court Action is attached hereto as **Exhibit 2**.

3. SDC was sent a waiver of service and waived service of the summons and complaint on July 21, 2021. The waiver was filed with the court. A copy of the waiver is attached hereto as **Exhibit 3**.

4. This Notice of Removal is therefore timely filed under 28 U.S.C. § 1446(b)(1).

5. On August 10, 2021, Plaintiff improperly served discovery. *See Exhibit 2*. Discovery was inappropriate under Florida state rules because it was served prior to service of the pleading. *See* Fla. R. Civ. P. §§ 1.340(a), 1.350(b) (permitting discovery on a defendant “with or after service of the process and initial pleading on that party.”) Because service was waived on July 21, 2021, service under Florida law would not have occurred until August 31, *see* Fla. R. Civ. P. § 1.070(i)(4), some three weeks after Plaintiff attempted to serve his discovery. Furthermore, upon removal, discovery issued in state court is moot. *See, e.g., Wilson ex rel. Est. of Wilson v. Gen. Tavern Corp.*, No. 05-81128 CIV RYSKAMP, 2006 WL 290490, at *1 (S.D. Fla. Feb. 2, 2006) (“Discovery served in state court becomes null and ineffective upon removal.”). Plaintiff withdrew this discovery on August 16, 2021 without notifying SDC. *See Exhibit 2*.

6. More than three weeks after service had been waived (which waiver had been filed with the state court), Plaintiff inexplicably served SDC with the Complaint and Summons on August 12, 2021 and then served a now second set of identical discovery. *See Exhibits 4-5*. Such discovery remains improper because service had been waived and, in any event, becomes null upon removal. *Wilson*, 2006 WL 290490, at *1; *see also LCI Constr. Of S. Fla., Inc. v. Compass Bank*, No. 12-62515-CVI, 2013 WL 12144066, at *1 (S.D. Fla. Jan. 16, 2013) (“Fed. R. Civ. P. 26(d) prohibits parties from seeking discovery from any source prior to conferring as required by Rule 26(f).”).

7. In his Complaint, Plaintiff contends SDC violated the Florida Telephone Solicitation Act (“FTSA”), Fla. Stat. § 501.059, by sending “telephonic sales calls [] to solicit the sale of consumer goods and/or services” using “a computer software system that automatically selected and dialed” telephone numbers, to “individuals residing in Florida” without “express

written consent.” (Ex. 1, Compl. at ¶¶ 11-13, 15-16.) The Complaint specifically includes two text messages from SDC on July 13, 2021 and July 19, 2021. (*Id.* at ¶ 11.)

8. Plaintiff asserts a single FTSA claim and alleges that as a result of Defendant’s conduct, “Plaintiff and class members were harmed and are each entitled to a minimum of \$500.00 in damages for each violation.” (*See id.* at ¶¶ 33-35.)

9. Plaintiff seeks, on behalf of himself and a putative class, various forms of relief including (i) an award of statutory damages; (ii) an order declaring that SDC’s actions violate the FTSA; and (iii) an injunction to “otherwise protect the interests of the Class.” (*See id.* at Prayer for Relief.)

II. THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO THE CLASS ACTION FAIRNESS ACT

10. This Court has jurisdiction over Plaintiff’s claims pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), which provides that “district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interests or costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant. . . .”

11. First, the State Court Action is a “class action” for purposes of 28 U.S.C. § 1332(d)(2), as Plaintiff brings claims on her own behalf and as a representative of all other similarly situated individuals pursuant to Florida Rule of Civil Procedure § 1.220(b)(2) and (b)(3). (Ex. 1, Compl. ¶ 18); *Senger Bros. Nursery, Inc. v. E.I. Dupont de Nemours & Co.*, 184 F.R.D. 674, 682 (M.D. Fla. 1999) (“Florida Rule of Civil Procedure 1.220 is patterned after Federal Rule of Civil Procedure 23.”).

12. Second, Plaintiff seeks damages at a minimum of \$500.00 for each violation individually and on behalf of a putative class of persons similarly situated. (Ex. 1, Compl. ¶¶ 18,

35.) Plaintiff claims that damages are in the “millions of dollars.” (*Id.* ¶ 26.) The Class that Plaintiff seeks to represent consists of “[a]ll persons in Florida who, (1) were sent a telephonic sales call regarding Defendant’s goods and/or services, (2) using the same equipment or type of equipment utilized to call Plaintiff.” (*Id.* at ¶ 18.)

13. There are more than 10,000 persons with Florida area codes and/or Florida zip codes that were sent text messages by SDC regarding its good and/or services after July 1, 2021. *See Exhibit 6* at ¶ 4 (Declaration of Caitlin Lindner.) Plaintiff’s proposed class surpasses the 100-person requirement of 28 U.S.C. § 1332(d)(5)(B). It bears noting that Plaintiff imposes no time restriction on his putative class, though the statutory damages provision at hand and pertinent amendments to the FTSA went into effect July 1, 2021 (and thus any message sent before that time period could not possibly be actionable, and indeed there are other serious retroactive application issues as a general matter).

14. Third, there is minimal diversity between members of the proposed class and Defendant, which satisfies the Diversity requirements pursuant to 28 U.S.C. § 1332(d).

15. SDC is a Delaware limited liability company, and its principal place of business is in Nashville, Tennessee. *See Exhibit 7* at ¶ 3 (Declaration of Troy Crawford.) Therefore, SDC is a citizen of Delaware and Tennessee for the purpose of CAFA removal. 28 U.S.C. § 1332(d)(10).

16. Plaintiff is a citizen of Florida. Plaintiff is a current resident of Florida. (Ex. 1, Compl. ¶¶ 9, 11.) Publicly available information reflects that Plaintiff has a Florida phone number, a Florida address, Florida driver’s license, a car registered in Florida and has lived in Florida for at least the last decade. *See Exhibit 8* at ¶¶ 2-4 (Declaration of Mark Eisen.)

17. Further, Plaintiff seeks to represent a class of “all persons in Florida” and it naturally follows that at least one class member is a Florida citizen. *See* 28 U.S.C. § 1332(d)(2)(A)

(“The district courts shall have original jurisdiction of any civil action in which [the amount in controversy threat is met] and is a class action in which... any member of a class of plaintiffs is a citizen of a State different from any defendant.”); 28 U.S.C. § 1332(d)(1)(D) (defining “class members” as “the persons (**named or unnamed**) who fall within the definition of the proposed or certified class in a class action”) (emphasis added); *Cooper v. R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312, 1315 (M.D. Fla. 2008) (minimal diversity existed because “by definition all valid plaintiffs are citizens of Florida” and defendant was a citizen of Virginia); *see also Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1062 (11th Cir. 2010) (“[C]ourts may use ... common sense in determining whether the case stated in the complaint meets federal jurisdictional requirements.”).

18. Plaintiff, in fact, specifically alleges that “[u]pon information and belief, Defendant caused similar telephonic sales calls to be sent to individuals residing in Florida” and that messages were sent “throughout Florida” (Ex.1, Compl. ¶¶ 13, 20.) Plaintiff also predicates personal jurisdiction on the contention that the messages at issue were sent into Florida. (*Id.* ¶ 9.)

19. Because at least one plaintiff and Defendant are citizens of different states, the minimal diversity requirement is satisfied. 28 U.S.C. § 1332(d).

20. For purposes of assessing the amount in controversy, Plaintiff’s allegations are accepted as true. *See, e.g., McDaniel v. Fifth Third Bank*, 568 Fed. Appx. 729, 731 (11th Cir. 2014) (“That a court would, based on the pleadings, find that a claim fails as a matter of law does not factor into the court’s jurisdictional analysis.”).

21. There are more than 10,000 persons with Florida area codes and/or Florida zip codes that were sent a text message by SDC regarding its goods and/or services after July 1, 2021, using the same equipment that was utilized to send the messages Plaintiff alleges he received. (*See*

the Declaration of Caitlin Lindner at ¶ 4.)¹ Plaintiff, by his own allegations, notes that the Class members number is in the “several thousands, if not more.” (Ex. 1, Compl. ¶ 19.) Plaintiff claims that damages are in the “millions of dollars.” (*Id.* ¶ 26.) Plaintiff also seeks, by his own allegations, a minimum of \$500.00 in statutory damages per class member. (*Id.* ¶ 35.) The FTSA also provides the possibility of treble damages. Fla. Stat. § 501.059(10)(b). This yields a total amount in controversy for the putative class that exceeds \$5,000,000, exclusive of interests and costs. *See* 28 U.S.C. § 1332(d)(2).

22. Finally, Plaintiff has Article III standing for this case to proceed in federal court. SDC is aware of the Eleventh Circuit’s decision in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019). However, unlike the TCPA, the FTSA is different in critical respect. The TCPA section in *Salcedo* did not specifically enumerate “text messages,” but rather disallowed unauthorized “calls.” 47 U.S.C. § 227(b)(1)(A)(iii). The Court in *Salcedo* found this distinction in language to be key. *See Salcedo*, 936 F.3d at 1168–69 (“We first note what Congress has said in the TCPA’s provisions and findings about harms from telemarketing via text message generally: *nothing*.”) (emphasis court’s). The FTSA, conversely, applies *specifically to text messages*. *See* Fla. Stat. § 501.059 (applying to “telephone call[s], text message[s], or voicemail transmission[s]. . . .”). By specifically enumerating text messages in the FTSA, the Florida legislature intended to identify the receipt of *any* unsolicited telephonic sales contact, including by text message, as a concrete injury.²

¹ Plaintiff’s allegations are accepted as true, SDC does not believe a class is appropriately certifiable and reserves the right to challenge anyone as an appropriate class member.

² SDC includes this brief Article III discussion here, though it notes that it need not establish Plaintiff’s Article III standing in a notice of removal. *See, e.g., Gonzalez v. TCR Sports Broad. Holding, LLP*, No. 18-CV-20048, 2018 WL 4292018, at *2 (S.D. Fla. Sept. 10, 2018) (“[A] defendant must make a plausible jurisdictional allegation—that is, a plausible allegation of either federal question jurisdiction or diversity jurisdiction—in its notice of removal,” and ruling that the

23. In addition, the *Salcedo* court specifically noted that “[s]ome harms that are intangible and ephemeral may [constitute an injury in fact] but Salcedo’s allegations of the harm he suffered from receiving a single text message do[es] not.” *Salcedo*, 936 F.3d at 1173. Here, Plaintiff received more than one text message. Plaintiff also claims that he and the Class members were harmed through “inconvenience, invasion of privacy, aggravation, [and] annoyance.” (Ex. 1, Compl. ¶ 17.) These alleged harms must be taken as true for purposes of jurisdictional analysis. *McDaniel*, 568 Fed. Appx. at 731.

24. Finally, the standing inquiry here is aided by the Supreme Court’s recent decision *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), which post-dates the *Salcedo* opinion and is the Supreme Court’s most recent guidance on standing. *TransUnion* involved a certified class under the Fair Credit Reporting Act (“FCRA”), which persons all had negative information in their credit report file (namely, that they were identified as potential matches to persons on a terrorist watch list). *See id.* at 2201-02. While some of these persons had this information disseminated to third parties, most did not. *See id.* at 2208-08. The Supreme Court determined that those whose information was disclosed to a third party had standing, while the remainder did not. *See id.* at 2210 (“The standing inquiry in this case thus distinguishes between (i) credit files that consumer reporting agencies maintain internally and (ii) the consumer credit reports that consumer reporting agencies disseminate to third-party creditors.”).

25. The Supreme Court in *TransUnion* simply looked to the fact of dissemination, not the effect of dissemination. To the extent the *Salcedo* court evaluated the quality of the alleged harm, *TransUnion* overrides that holding. As the *TransUnion* Court did, the distinction can be

defendant need not establish Article III standing for a plaintiff in a notice of removal); *Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1005 (9th Cir. 2001) (finding standing is different entirely from removability).

made here between persons who actually received unsolicited text messages and persons who (i) did not receive the message (*i.e.*, a busy or disconnected line) or (ii) persons who provided consent. While Plaintiff's allegations may prove unfounded, his contention that he received unsolicited text messages that invaded his privacy must be accepted at this stage. (*See* Compl. ¶¶ 16, 17.)

26. Accordingly, the Court has jurisdiction over the class action pursuant to 28 U.S.C. § 1332(d) and removal is proper under 28 U.S.C. § 1441.

III. ALL PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED

27. SDC waived formal service of process on July 21, 2021. (**Exhibit 3**).

28. SDC was improperly re-served on August 12, 2021. (**Exhibit 4**).

29. This Notice of Removal is therefore timely filed pursuant to 28 U.S.C. § 1446(b)(1).

30. Pursuant to 28 U.S.C. § 1446(d), SDC will file a copy of this Notice of Removal with the Clerk of the State of Florida, Eleventh Judicial Circuit. SDC will also serve Plaintiff with a copy of this Notice of Removal.

31. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings and orders received by SDC (other than the summons and Complaint) as well as all documents available publicly on the state court docket are attached hereto as **Exhibit 2**.

32. Pursuant to 28 U.S.C. § 1446(a), venue for this case is proper in the Southern District of Florida because it is the district court of the United States for the district and division within which the State Court Action is pending. *See* 28 U.S.C. § 89(c).

33. Based on the foregoing, this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1332(d) and 1441, and the claims may be removed to this Court pursuant to 28 U.S.C. §§ 1441 and 1446.

WHEREFORE, Defendants SDC hereby removes this civil action to this Court.

DATED: August 18, 2021

Respectfully submitted,

/s/ Jordan S. Kosches

Jordan S. Kosches, Esq.
jordan.kosches@gray-robinson.com
GRAYROBINSON, P.A.
333 SE 2nd Avenue, Suite 3200
Miami, Florida 33131
Telephone: (305) 416-6880
Facsimile: (305) 416-6997
Florida Bar No.: 49881

David S. Almeida, Esq.
(to be admitted *pro hac vice*)
Mark S. Eisen, Esq.
(to be admitted *pro hac vice*)
**BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP**
71 South Wacker Drive, Suite 1600
Chicago, Illinois 60606
Telephone: (312) 212-4949
Facsimile: (312) 767-9192
dalmeida@beneschlaw.com
meisen@beneschlaw.com

*Attorneys for Defendant
SmileDirectClub, LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **NOTICE OF REMOVAL** was served upon all interested parties using this Court's ECF filing system this 18th day of August 2021.

/s/ Jordan S. Kosches

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Case 1:21-cv-23011-XXXX Document 1-1 Entered on FLSD Docket 08/18/2021 Page 1 of 2

DEFENDANTS

SmileDirectClub, LLC

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)

GrayRobinson, P.A.; 333 SE 2nd Ave, Ste 3200, Miami, FL 33131

Attorneys (If Known)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff)
(For Diversity Cases Only) and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated <i>or</i> 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 <i>and</i> Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" 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

Click here for: [Nature of Suit Code Descriptions](#)

Click here for: [Nature of Suit Code Descriptions](#)

☐ 1 Original Proceeding ☒ 2 Removed from State Court ☐ 3 Re-filed (See VI below) ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation Transfer ☐ 7 Appeal to District Judge from Magistrate Judgement ☐ 8 Multidistrict Litigation – Direct File ☐ 9 Remanded from Appellate Court

(See instructions): a) Re-filed Case ☐ YES ☐ NO b) Related Cases ☐ YES ☒ NO

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (*Do not cite jurisdictional statutes unless diversity*):
 Plaintiff brings this case for receipt of text messages under Fla. Stat. § 501.059; removed Class Action Fairness Act
 LENGTH OF TRIAL via Unknown days estimated (for both sides to try entire case)

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ Unknown; \$5 million+ in controversy

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

SIGNATURE OF ATTORNEY OF RECORD

/s/ Jordan S. Kosches

AMOUNT

JUDGE

MAG JUDGE

Plaintiff's Counsel Continued

Andrew J. Shamis, Esq.
ashamis@shamisgentile.com
Garrett O. Berg, Esq.
gberg@shamisgentile.com
Shamis & Gentile P.A.
14 NE 1st Ave., Suite 705
Miami, Florida 33132
Telephone: 305-479-2299

Scott Edelsberg, Esq.
20900 NE 30th Ave., Suite 417
Edelsberg Law P.A.
Aventura, Florida 33180
Telephone: 305-975-3320
Email: scott@edelsberglaw.com

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO. 2021-017561-CA-01

ALEJANDRO BORGES, individually and on behalf
of all others similarly situated,

CLASS ACTION

Plaintiff,

JURY TRIAL DEMANDED

vs.

SMILEDIRECTCLUB, LLC,

Defendant.

SUMMONS

THE STATE OF FLORIDA:

To Each Sheriff/Certified Process Server of the State:

YOU ARE COMMANDED to serve this summons and a copy of the Complaint, in this action on Defendant:

SmileDirectClub, LLC
Attn: Corporation Service Company- Registered Agent
1201 Hays Street
Tallahassee, FL 32301

Each Defendant is required to serve written defenses to the Complaint or petition on: **Andrew Shamis, Esq, Shamis & Gentile, P.A., 14 NE 1st Ave STE 705, Miami, Florida 33132**, within **twenty (20) days** after service of this summons on that Defendant, exclusive of the date of service, and to file the original of the defenses with the Clerk of this Court either before service on Plaintiff's attorney or immediately thereafter. If a Defendant fails to do so, a default will be entered against that Defendant for the relief demanded in the complaint or petition.

Dated this _____ day of _____, 7/28/2021, 2021.

As Clerk of the Court

By: _____

As Deputy Clerk



EXHIBIT 1

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO.

ALEJANDRO BORGES,
individually and on behalf of all,
others similarly situated,

Plaintiff,

CLASS ACTION

JURY TRIAL DEMANDED

v.

SMILEDIRECTCLUB, LLC,

Defendant.

_____ /

CLASS ACTION COMPLAINT

Plaintiff Alejandro Borges brings this class action against Defendant SmileDirectClub, LLC and alleges as follows upon personal knowledge as to Plaintiff and Plaintiff's own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by Plaintiff's attorneys.

NATURE OF THE ACTION

1. This is a class action under the Florida Telephone Solicitation Act ("FTSA"), Fla. Stat. § 501.059, as amended by Senate Bill No. 1120.¹
2. Defendant an international orthodontic device company that specializes in teeth alignment products. It offers its products to consumers on-line.
3. To promote its goods and services, Defendant engages in telephonic sales calls to consumers without having secured prior express written consent as required by the FTSA.

¹ The amendment to the FTSA became effective on July 1, 2021.

4. Defendant's telephonic sales calls have caused Plaintiff and the Class members harm, including violations of their statutory rights, statutory damages, annoyance, nuisance, and invasion of their privacy.

5. Through this action, Plaintiff seeks an injunction and statutory damages on behalf of himself and the Class members, as defined below, and any other available legal or equitable remedies resulting from the unlawful actions of Defendant.

PARTIES

6. Plaintiff is, and at all times relevant hereto was, an individual and a "called party" as defined by Fla. Stat. § 501.059(1)(a) in that he was the regular user of telephone number ***-***-7828 (the "7828 Number") that received Defendant's telephonic sales calls.

7. Defendant is, and at all times relevant hereto was, a foreign corporation and a "telephone solicitor" as defined by Fla. Stat. § 501.059(f). Defendant maintains its primary place of business and headquarters in Nashville, Tennessee. Defendant directs, markets, and provides business activities throughout the State of Florida.

JURISDICTION AND VENUE

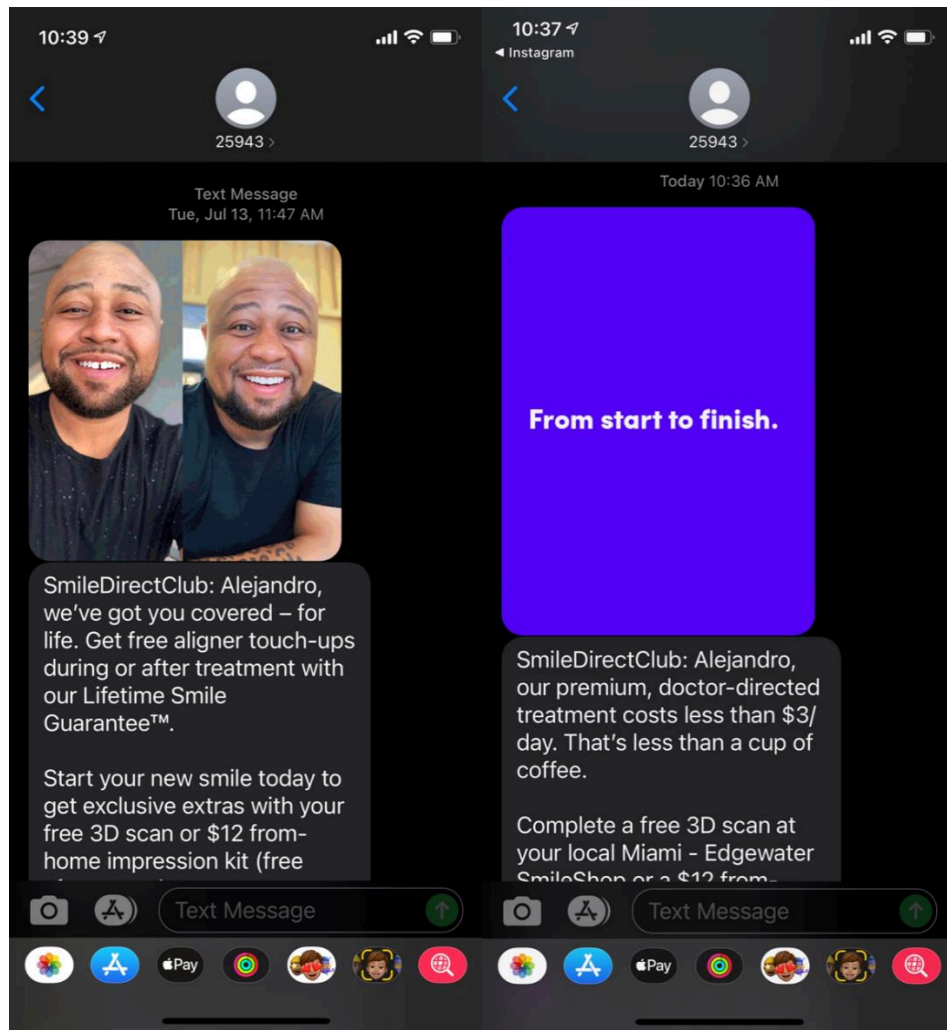
8. This Court has subject matter jurisdiction pursuant to Florida Rule of Civil Procedure 1.220 and Fla. Stat. § 26.012(2). The matter in controversy exceeds the sum or value of \$30,000 exclusive of interest, costs, and attorney's fees.

9. Defendant is subject to personal jurisdiction in Florida because this suit arises out of and relates to Defendant's contacts with this state. Defendant made or caused to be made telephonic sales calls into Florida without the requisite prior express written consent in violation of the FTSA. Plaintiff received such calls while residing in and physically present in Florida.

10. Venue for this action is proper in this Court pursuant to Fla. Stat. § 47.051 because Defendant (1) is a foreign corporation doing business in this state; and (2) has an agent or other representative in Florida.

FACTS

11. On or about July 13, 2021, and July 19, 2021, Defendant sent the following telephonic sales calls to Plaintiff's cellular telephone number:



12. As demonstrated by the above screenshots, the purpose of Defendant's telephonic sales calls was to solicit the sale of consumer goods and/or services.

13. Upon information and belief, Defendant caused similar telephonic sales calls to be sent to individuals residing in Florida.

14. Plaintiff is the regular user of the telephone number that received the above telephonic sales calls.

15. To transmit the above telephonic sales calls, Defendant utilized a computer software system that automatically selected and dialed Plaintiff's and the Class members' telephone numbers.

16. Plaintiff never provided Defendant with express written consent authorizing Defendant to transmit telephonic sales calls to Plaintiff's cellular telephone number utilizing an automated system for the selection or dialing of telephone numbers.

17. Defendant's telephonic sales calls caused Plaintiff and the Class members harm, including statutory damages, inconvenience, invasion of privacy, aggravation, annoyance.

CLASS ALLEGATIONS

PROPOSED CLASS

18. Plaintiff brings this lawsuit as a class action on behalf of himself individually and on behalf of all other similarly situated persons as a class action pursuant to Florida Rule of Civil Procedure 1.220(b)(2) and (b)(3). The "Class" that Plaintiff seeks to represent is defined as:

All persons in Florida who, (1) were sent a telephonic sales call regarding Defendant's goods and/or services, (2) using the same equipment or type of equipment utilized to call Plaintiff.

19. Defendant and its employees or agents are excluded from the Class. Plaintiff does not know the exact number of members in the Class but believes the Class members number in the several thousands, if not more.

NUMEROSITY

20. Upon information and belief, Defendant has placed telephonic sales calls to telephone numbers belonging to thousands of consumers listed throughout Florida without their prior express written consent. The members of the Class, therefore, are believed to be so numerous that joinder of all members is impracticable.

21. The exact number and identities of the Class members are unknown at this time and can be ascertained only through discovery. Identification of the Class members is a matter capable of ministerial determination from Defendant's call records.

COMMON QUESTIONS OF LAW AND FACT

22. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are: [1] Whether Defendant initiated telephonic sales calls to Plaintiff and the Class members; [2] Whether Defendant can meet its burden of showing that it had prior express written consent to make such calls; and [3] Whether Defendant is liable for damages, and the amount of such damages.

23. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendant routinely transmits telephonic sales calls without prior express written consent is accurate, Plaintiff and the Class members will have identical claims capable of being efficiently adjudicated and administered in this case.

TYPICALITY

24. Plaintiff's claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

PROTECTING THE INTERESTS OF THE CLASS MEMBERS

25. Plaintiff is a representative who will fully and adequately assert and protect the interests of the Class and has retained competent counsel. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

SUPERIORITY

26. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant's wrongful conduct are too small to warrant the expense of individual lawsuits. The likelihood of individual Class members prosecuting their own separate claims is remote, and, even if every member of the Class could afford individual litigation, the court system would be unduly burdened by individual litigation of such cases.

27. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another may not. Additionally, individual actions may be dispositive of the interests of the Class, although certain class members are not parties to such actions.

COUNT I
VIOLATION OF FLA. STAT. § 501.059
(On Behalf of Plaintiff and the Class)

28. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

29. It is a violation of the FTSA to "make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers

or the playing of a recorded message when a connection is completed to a number called without the prior express written consent of the called party.” Fla. Stat. § 501.059(8)(a).

30. A “telephonic sales call” is defined as a “telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.” Fla. Stat. § 501.059(1)(g).

31. “Prior express written consent” means an agreement in writing that:

1. Bears the signature of the called party;
2. Clearly authorizes the person making or allowing the placement of a telephonic sales call by telephone call, text message, or voicemail transmission to deliver or cause to be delivered to the called party a telephonic sales call using an automated system for the selection or dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail;
3. Includes the telephone number to which the signatory authorizes a telephonic sales call to be delivered; and
4. Includes a clear and conspicuous disclosure informing the called party that:
 - a. By executing the agreement, the called party authorizes the person making or allowing the placement of a telephonic sales call to deliver or cause to be delivered a telephonic sales call to the called party using an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called; and
 - b. He or she is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

Fla. Stat. § 501.059(1)(g).

32. Defendant failed to secure prior express written consent from Plaintiff and the Class members.

33. In violation of the FTSA, Defendant made and/or knowingly allowed telephonic sales calls to be made to Plaintiff and the Class members without Plaintiff's and the Class members' prior express written consent.

34. Defendant made and/or knowingly allowed the telephonic sales calls to Plaintiff and the Class members to be made utilizing an automated system for the selection or dialing of telephone numbers.

35. As a result of Defendant's conduct, and pursuant to § 501.059(10)(a) of the FTSA, Plaintiff and Class members were harmed and are each entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and the Class members are also entitled to an injunction against future calls. *Id.*

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for the following relief:

- a) An order certifying this case as a class action on behalf of the Class as defined above, and appointing Plaintiff as the representative of the Class and Plaintiff's counsel as Class Counsel;
- b) An award of statutory damages for Plaintiff and each member of the Class;
- c) An order declaring that Defendant's actions, as set out above, violate the FTSA;
- d) An injunction requiring Defendant to cease all telephonic sales calls made without express written consent, and to otherwise protect the interests of the Class;
- e) Such further and other relief as the Court deems necessary.

JURY DEMAND

Plaintiff, individually and on behalf of the Class, hereby demand a trial by jury.

DOCUMENT PRESERVATION DEMAND

Plaintiff demands that Defendant take affirmative steps to preserve all records, lists, electronic databases or other itemization of telephone numbers associated with the communications or transmittal of the calls as alleged herein.

DATED: July 20, 2021

Respectfully Submitted,

SHAMIS & GENTILE P.A.

/s/ Andrew Shamis

Andrew J. Shamis, Esq.
Florida Bar No. 101754
ashamis@shamisgentile.com

/s/ Garrett Berg

Garrett O. Berg, Esq.
Florida Bar No. 1000427
gberg@shamisgentile.com
14 NE 1st Ave., Suite 705
Miami, Florida 33132
Telephone: 305-479-2299

EDELSBERG LAW P.A.

/s/ Scott Edelsberg

Scott Edelsberg, Esq.
Florida Bar No. 0100537
20900 NE 30th Ave., Suite 417
Aventura, Florida 33180
Telephone: 305-975-3320
Email: scott@edelsberglaw.com

Counsel for Plaintiff and the Class.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [SmileDirectClub Hit with Class Action Over Alleged Telemarketing Texts](#)
