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12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 PHILLIP NGHIEM, individually and
16 on behalf of a class of similarly
17 situated individuals,

18 Plaintiff,

19 v.

20 DICK'S SPORTING GOODS, INC.,
21 and DOES 1-10, inclusive,

22 Defendant.
23
24

Case No.: 8:16-cv-00097

CLASS ACTION COMPLAINT

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

DEMAND FOR JURY TRIAL

1 Plaintiff Phillip Nghiem brings this class action complaint against Defendant
2 Dick's Sporting Goods, Inc. ("DSG") to stop Defendant's transmission of
3 unauthorized text messages to cellular telephones and to obtain redress for all persons
4 injured by Defendant's conduct. For his class action complaint, Plaintiff alleges as
5 follows based upon his personal knowledge and upon information and belief,
6 including investigation conducted by his attorneys.

7 **PRELIMINARY STATEMENT**

8 1. In 1991, Congress enacted the Telephone Consumer Protection Act
9 ("TCPA") to protect consumers against unsolicited and unconsented telephone
10 communication. Relevant here, the TCPA prohibits unsolicited and unconsented
11 telephone calls and text messages to wireless phones.

12 2. Beginning in at least 2010, Defendant DSG, in an effort to market itself
13 to consumers, has operated a "mobile alerts" program which uses an automatic
14 telephone dialing system to send general and non-personalized text message
15 advertising to consumers. Under the terms of program, consumers can opt to receive
16 text message alerts from DSG sent directly to their cell phones. Consumers may also
17 choose to end their participation in the program at any time by texting the word
18 "STOP" to the "short code" telephone number established by DSG for this program.

19 3. After previously opting-in to the DSG mobile alerts program, in
20 December 2015 Plaintiff indicated that he no longer wished to participate by texting
21 the word "STOP" to DSG's designated "short code." Although DSG acknowledged
22 Plaintiff's termination of his consent to receive DSG's automated text advertisements,
23 DSG continued to automatically and instantaneously send Plaintiff's cell phone SMS
24 text messages containing a generic, non-personalized advertisement.

25 4. On behalf of himself and the proposed class (as defined below), Plaintiff
26 seeks an injunction requiring Defendant to cease the unlawful activities alleged herein
27 and an award of statutory or actual damages pursuant to the TCPA to himself and all
28 members of the class, together with the costs of suit and reasonable attorneys' fees.

1 **JURISDICTION AND VENUE**

2 5. This Court has subject matter jurisdiction pursuant to 28 *U.S.C.* § 1331,
3 as the action arises from a federal statute, the Telephone Consumer Protection Act (47
4 *U.S.C.* § 227 *et seq.*). Moreover, this Court has jurisdiction under 28 *U.S.C.* § 1332,
5 as amended by the Class Action Fairness Act of 2005.

6 6. This Court has personal jurisdiction over Defendant because Defendant
7 does business in this District, is registered to do business in California (and
8 nationwide), and a substantial number of the events giving rise to the claims alleged
9 herein took place in California.

10 7. Venue is proper in this district pursuant to 28 *U.S.C.* § 1391(b) because
11 Defendant does business in this District and a substantial number of the events giving
12 rise to the claims alleged herein took place in this District, including the messages
13 received by Plaintiff.

14 **PARTIES**

15 8. Plaintiff Phillip Nghiem is a citizen and resident of California who
16 resides in Orange County.

17 9. Defendant DSG is a Delaware corporation with its principal place of
18 business located in Coraopolis, Pennsylvania. DSG operates sporting goods stores
19 throughout the United States and sells a variety of sporting goods directly to
20 consumers. DSG markets its products to consumers (including those in this District)
21 through in-store promotions, television advertisements, Internet-based advertising, and
22 via text message marketing as alleged herein.

23 10. Plaintiff is unaware of the names, identities, or capacities of the
24 defendants sued as Does 1-10, but is informed and believes and thereon alleges that
25 each such fictitiously-named defendant is responsible in some manner for the damages
26 and abridgement of rights described in this Complaint. Plaintiff will amend his
27 Complaint to state the true names, identities or capacities of such fictitiously-named
28 defendants when ascertained.

1 **COMMON ALLEGATIONS OF FACT**

2 11. Like many marketers, DSG has a “short message service,” or “SMS,”
3 text message program which allows the company to cheaply and quickly send
4 solicitations to many customers. This program is especially attractive in light of
5 several federal laws which significantly curtail the use telephonic, facsimile, and other
6 means of solicitation to consumers.

7 12. An “SMS” message is a short (usually around 150 character) text
8 message call directed to wireless and cellular telephones. Upon receipt, the receiving
9 cell phone alerts its owner that a text message call has been received. In common
10 parlance, mass SMS messages sent to many individual consumers are referred to as
11 “wireless spam.”

12 13. Contrary to other forms of solicitation, such as direct mail, SMS
13 messages, particularly wireless spam, often result in actual costs for the consumer
14 under the terms and conditions of each consumer’s cellular phone plan. That is
15 because, depending on the particular terms of the plan, consumers must either pay
16 their cellular service providers for each SMS text they send or receive or incur a
17 deduction to the total amount of SMS texts allotted to their plan each month,
18 regardless as to whether the SMS text is authorized or not.

19 14. The TCPA governs promotional or marketing SMS text messages sent to
20 consumer’s wireless phones from automated dialing technology. In short, the TCPA
21 requires that any such SMS text be sent from automated dialing technology only with
22 the “prior express consent” of the receiving consumer.

23 15. Pursuant to the TCPA, the Federal Communications Commission has the
24 power to promulgate rules to define “prior express consent.” Beginning on October
25 16, 2013, the FCC’s current rules (the “October 2013 rules”) became effective. Those
26 rules, which are contained at 47 *C.F.R.* § 64.1200, required the following
27 characteristics and requirements for “prior express consent”:

- 28 a. The agreement must be in writing;

- b. The agreement must bear the signature of the person who will receive the SMS text message;
- c. The language of the agreement must clearly authorize the sender (*i.e.*, DSG) to deliver or cause to be delivered ads or marketing messages via automated dialing technology, including SMS texts;
- d. The agreement must include the telephone number of the person agreeing to receive the marketing SMS texts; and
- e. The agreement must contain a clear and conspicuous disclosure informing the consumer that the sender (*i.e.*, DSG) is utilizing automated dialing technology to send the SMS text messages and that enrollment in the program is not a condition of purchase of the sender's goods or services.

16. The FCC's prior express consent rules do not allow "grandfathered" consent obtained prior to the implementation of the October 2013 rules. Instead, the FCC has further ruled as follows: "[S]hould any question about the consent arise, the seller [*i.e.*, DSG] will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained." *See* 27 FCC Record at 1844 ¶ 33. Thus, senders such as DSG bear the burden of showing that each of their promotional SMS text messages as described herein were sent with the "prior express consent" required by the FCC's rules.

17. Since at least 2010, and continuing to the present, DSG began a marketing program centered on "mobile alerts" in the form of SMS text messages. Pursuant to that campaign, consumers could either sign up for mobile alerts on DSG's website or send an SMS text message with the word "JOIN" to the "short code" number, which is a number akin to a telephone number used to receive SMS text messages, of 34257. The use of a "short code" permitted Defendant to transmit thousands of wireless spam to different mobile phone numbers.

1 18. DSG acknowledges in its “terms and conditions” for the mobile alerts
2 program, available on DSG’s website, that the SMS text messages DSG sent pursuant
3 to the program “will be sent to your mobile phone number using automated dialing
4 technology.”

5 19. However, on information and belief, DSG’s description for the program
6 from 2010 to at least February 28, 2013 did not contain the characteristics and
7 requirements mandated by the FCC’s October 2013 rules. Namely, none of these
8 disclosures, either on DSG’s “mobile alerts” page or in the “terms and conditions,”
9 contained information indicating that DSG’s “mobile alerts” would be sent using
10 automated dialing technology or that enrollment in the program was not a condition of
11 purchasing DSG’s goods or services.

12 20. DSG’s mobile alerts terms and conditions further provide as follows:

13 By entering your mobile phone number you are subscribing to
14 receive promotional text messages and alerts from DICK’S Sporting
15 Goods. ... You may cancel the DICK’S Sporting Goods Mobile
16 Alerts program at any time by texting the keyword “STOP” to the
17 short code 34257.

18 21. On or about May 4, 2015, Plaintiff enrolled in DSG’s mobile alert
19 program by text messaging the word “JOIN” to the “short code” of 34257. As a
20 result, Plaintiff became enrolled in DSG’s “mobile alerts” program pursuant to the
21 applicable terms and conditions.

22 22. Thereafter, on or about December 6, 2015, Plaintiff texted the word
23 “Stop” to DSG’s “short code” of 34257, indicating that he no longer wished to
24 participate in DSG’s mobile alerts program in conformance with DSG’s mobile alert
25 program’s terms of service. Moments later, DSG sent Plaintiff an SMS text message
26 that read as follows:

27 DSG Mobile Alerts: You have been unsubscribed and will no longer
28 receive messages from us. Reply HELP for help. 877-846-9997.

1 27. Common questions of law and fact exist as to all class members such that
2 those questions predominate over questions affecting Plaintiff or individual class
3 members. These common questions include, but are not limited to, the following:

- 4 a. Did Defendant and/or its agents send one or more unauthorized
5 text messages to class members?
- 6 b. Did Defendant and/or its agents send text messages to persons who
7 did not provide prior express consent as mandated by the TCPA to
8 receive them?
- 9 c. Did Defendant and/or its agents use an automatic telephone dialing
10 system to send the text messages at issue?
- 11 d. Should the Court enjoin Defendant from engaging in such conduct
12 in the future?
- 13 e. Are class members entitled to treble damages based upon the
14 willfulness of Defendant's conduct?

15 28. In transmitting the unauthorized and unconsented text messages at issue,
16 Defendant has acted and failed to act on grounds generally applicable to Plaintiff and
17 other class members. Such conduct requires the Court's imposition of uniform relief
18 to ensure compatible standards of conduct toward class members and to make
19 injunctive or corresponding declaratory relief appropriate for all class members.

20 29. The factual and legal bases of Defendant's liability to Plaintiff and each
21 class member are the same, resulting in injury to Plaintiff and each class member as a
22 result of Defendant's unlawful transmission of the unauthorized and unconsented text
23 messages described herein.

24 30. Plaintiff will fairly and adequately represent and protect the interests of
25 other class members. Plaintiff has retained counsel with substantial experience in
26 litigating complex cases, including class actions. Both Plaintiff and his counsel will
27 vigorously prosecute this action on behalf of the class and have the financial ability to
28 do so. Neither Plaintiff nor counsel has any interest adverse to other class members.

1 31. Most class members would find the costs of litigating their claims
2 prohibitive and therefore would have no effective remedy without a class action.
3 Further, class treatment of common questions of law and fact is superior to multiple,
4 individual litigation or piecemeal adjudication because it preserves the resources of
5 the courts and litigants as well as promotes consistent and efficiency of adjudication.

6 **FIRST CAUSE OF ACTION**

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

8 32. Plaintiff hereby incorporates by reference the foregoing allegations as if
9 fully set forth herein.

10 33. Defendant directed the placement of unauthorized and unconsented
11 commercial text message calls to a list of wireless telephone numbers of Plaintiff and
12 other class members using equipment that had the capacity at the time the calls were
13 placed to store or produce telephone numbers to be called using a random or
14 sequential number generator and to automatically dial those numbers without human
15 intervention.

16 34. The generic text messages described herein were made through the use of
17 a short code without the prior, express consent of Plaintiff or the class.

18 35. Defendant has therefore violated the TCPA. Namely, Defendant has
19 violated 47 U.S.C. § 227(b)(1)(A)(iii).

20 36. As a result of Defendant's unlawful conduct, Plaintiff and class members
21 have had their privacy rights violated, have suffered actual and statutory damages,
22 and, under 47 U.S.C. § 227(b)(3)(B), are each entitled to, among other things, a
23 minimum of \$500.00 in damages for each of Defendant's violations of the TCPA.

24 37. To the extent Defendant knew or should have known that Plaintiff and
25 class members did not provide prior, express consent to be sent the text messages at
26 issue, the Court should, pursuant to 47 U.S.C. § 227(b)(3)(C), treble the amount of
27 statutory damages recoverable by Plaintiff and class members.

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PRAYER FOR RELIEF

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

- 1. For an order certifying the class as defined above;
- 2. For an award of the greater of actual or statutory damages pursuant to 47 U.S.C. § 227(b)(3)(B);
- 3. For an award of treble damages pursuant to 47 U.S.C. § 227(b)(3)(C);
- 4. For reasonable attorney’s fees and expenses;
- 5. For taxable costs;
- 6. For pre and post-judgment interest as allowed by law; and
- 7. For any other relief the Court deems just.

JURY DEMAND

Plaintiff requests trial by jury of all claims that are so triable.

Dated: January 22, 2016

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