

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-cv-60171-COHN

BRANDON M. BUSLEPP, an individual, on
behalf of himself and all others similarly situated,

Plaintiff,

v.

IMPROV MIAMI, INC., a Florida corporation,

Defendant.

MOTION TO DISMISS

Defendant, IMPROV MIAMI, INC., by and through its undersigned counsel, pursuant to Fed. R. Civ. P. 12 (b) and Local Rule 7 .1, hereby moves this Honorable Court to enter an Order dismissing all counts of Plaintiff's Complaint – Class Action for the reasons set forth in detail below. As grounds for this Motion, Defendant states as follows:

1. The instant Complaint is a purported class action pursuant to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*

2. Plaintiff purports to bring this action on behalf of himself and similarly situated individuals alleging the receipt of unsolicited voice and text calls to cell phones. However, the Complaint only describes alleged facts which apply to the representative Plaintiff, BRANDON M. BUSLEPP ("BUSLEPP"). Specifically, the facts identified in the Complaint state fact:

- a. BUSLEPP purchased a gift certificate from the "Fort Lauderdale Improve" a nightclub that is independently owned from the Defendant corporation;

- b. BUSLEPP provided his cell phone number as part of the transaction with the Fort Lauderdale Improv;
- c. BUSLEPP had never been to the Defendant corporation's nightclub or provided his cell phone number;
- d. BUSLEPP received a text from the Defendant corporation;
- e. Upon information and belief, identical texts were sent to a bulk list; and,
- f. The cell phone numbers were obtained from another entity.

3. Separately, in the Class Action Allegations, BUSLEPP attempts to define the class as all persons in the United States who were sent commercial text messages from Defendant from short code 82257 to their cell phone by auto dialer and the cell phone number was obtained from another entity and sent without the expressed consent of recipient during a four year period. The class further excludes all entrants who were previously subscribed to text message advertising. The Complaint goes on to state that there are more than 41 alleged members of the class. However, there is no basis plead for the belief that the class would consist of more than 41 members.

4. Moreover, in regard to both BUSLEPP and alleged class members there is no allegation that BUSLEPP or any class member were charged for such calls.

MEMORANDUM OF LAW

Defendant moves this Court to Dismiss Counts I & II in the above styled action for failure to state a claim upon which relief can be granted. As an initial matter Counts I & II are identical except for an unsupported claim in Count II that the acts complained of were willful.

The Court is guided by the principal that all well pled factual allegations in the complaint are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974),

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), *Miccosukee Tribe of Indians of Fla. v. Florida State Athletic Comm'n*, 226 F.3d 1226, 1234 (11th Cir. 2000). To reach this determination, a court must view the allegations of the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969), *Sofarelli v. Pinellas County*, 931 F.2d 718, 721 (11th Cir. 1991). “It is well settled that a complaint should not be dismissed unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle [him] to relief.” *Banco Latino v. Gomez Lopez*, 17 F. Supp. 2d 1327, 1331 (S.D. Fla. 1988) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)); *see also Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001).

However, Plaintiff must still provide enough factual allegations to raise a right to relief above the speculative level. *Bell Aft. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In other words, the “[f]actual allegations must be enough to raise a right to relief above the speculative level,” and a complaint that merely offers “labels and conclusions,” or “a formulaic recitation of the elements of a cause of action,” is insufficient. *Twombly* at 555. In the Instant Action, BUSLEPP has plead in a manner specifically addressed as defective in *Twombly*.

Specifically, in Counts I & II of the Complaint BUSLUPP merely recites elements required by the Act but fails to identify an essential factual element of the act on behalf of him personally or any member of the class. The TCPA ostensibly provides a private right of action

for actual and statutory damages. But, the statute itself contemplates that an essential element of the claim is that the “called party is charged.” (See, e.g., TCPA, 47 U.S.C. § 227(b)(1)(A)(iii); 2008 TCPA Order, ¶ 3 at p. 4.) In construing the Plaintiff must first establish that he or she suffered “*actual injury*” as the result of the alleged conduct in order to possess standing to sue for actual, *or even statutory*, damages under the TCPA. *Actual damages* have been defined as follows: “Compensation for actual injuries or loss. (Citations.) Term used to denote the type of damage award as well as the nature of injury for which recovery is allowed; thus, actual damages flowing from injury-in-fact are to be distinguished from damages which are nominal, exemplary or punitive. (Citation.) ‘Actual damages’ are synonymous with compensatory damages.” (*Black’s Law Dictionary*. (6th ed. 1990) p.35, col. 1.). However, there are no allegations of actual or compensatory damages in the Instant Action. Indeed, the Plaintiff does not even request compensation in the wherefore clause for actual damages.

Given that BUSLEPP has failed to allege actual damage resulting from the acts described in the complaint the Plaintiff has failed to state a cause of action under the TCPA.

Moreover, the matter as pled in the Instant Action, with regards to the TCPA is not suitable for class representation. As one Federal District Court has recognized: “A class action would be inconsistent with the specific *and personal remedy* provided by Congress.” *Fried v. SunGard Recovery Servs.*, 164 F.R.D. 405, 1996 U.S. Dist. LEXIS 784 (E.D. Pa. 1996) . Moreover, other notable “consumer protection” statutes include the Fair Debt Collection Practices Act, 15 U.S.C. 1692, et seq., and the Truth in Lending Act, 15 U.S.C. 1601 , et seq. Both of these statutory schemes *expressly provide for class treatment*, but significantly, both also contain a cap on maximum class-wide recovery in the event of class-action litigation. See, e.g., FDCPA, 15 U.S.C. § 1692k(a)(2)(B), and TILA, 15 U.S.C. § 1640(a)(2)(B) (both setting a

maximum statutory recovery for class as the lesser of \$500,000 or 1% of the class-defendant's net worth). Notably, both statutes also expressly grant the court *discretion* to award less than the maximum permitted statutory damages to any or all prevailing plaintiffs. These features prevent excessive damages. However, there are no such features or authorizations in the TCPA. In the instant action BUSLEPP has a very specific factual recitation of facts that do not appear plausible in application to every alleged class member. Therefore, under *Twombly* the class commonality allegations must fail.

WHEREFORE, Defendant, IMPROV MIAMI, INC., respectfully requests this Honorable Court enter an Order dismissing all counts of Plaintiff's Complaint – Class Action.

Dated: April 2, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 2, 2012, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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