

1 SEAN P. REIS (SBN 184044)
sreis@edelson.com
2 EDELSON MCGUIRE LLP
30021 Tomas Street, Suite 300
3 Rancho Santa Margarita, California 92688
Telephone: (949) 459-2124
4 Facsimile: (949) 459-2123

5 JAY EDELSON*
jedelson@edelson.com
6 RAFEY S. BALABANIAN*
rbalabanian@edelson.com
7 BENJAMIN H. RICHMAN*
brichman@edelson.com
8 EDELSON MCGUIRE LLC
350 North LaSalle Street, Suite 1300
9 Chicago, Illinois 60654
Telephone: (312) 589-6370
10 Facsimile: (312) 589-6378

11 *Pro hac vice admission to be sought.
12 Attorneys for Plaintiff FRED WEISS

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 FRED WEISS, individually and on
16 behalf of all others similarly
situated,

17 *Plaintiff,*

18 v.

19 LEMIEUX GROUP, L.P. d/b/a
20 THE PITTSBURGH PENGUINS, a
Pennsylvania limited partnership,

21 *Defendant.*

Case No. CV12 - 4585 CBM (JCx)

CLASS ACTION COMPLAINT FOR:

- 1. Violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227; and,
- 2. Breach of Contract.

DEMAND FOR JURY TRIAL

CLASS ACTION

2012 MAY 25 AM 11:29
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
SANTA ANA
BY _____

FILED OR
VAI

BY FAX

12-5/12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLASS ACTION COMPLAINT

Plaintiff Fred Weiss brings this Class Action Complaint (“Complaint”) against Defendant Lemieux Group L.P. d/b/a the Pittsburgh Penguins (“Lemieux”) to stop Defendant’s practice of transmitting text message calls in excess of the agreed upon weekly limit to the cellular telephones of consumers nationwide and to obtain redress for all persons injured by Defendant’s conduct. Plaintiff, for his Complaint, alleges as follows upon personal knowledge as to himself and his own acts and experiences and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

NATURE OF THE ACTION

1. In an effort to promote its professional hockey team—the Pittsburgh Penguins—Defendant Lemieux encourages individuals to sign up for text message notifications, which purportedly provide notice to consumers of player trades, breaking news, and special offers by the making of text message calls directly to consumers’ cell phones.

2. With respect to its text message alert program, Defendant presents and consumers agree to certain terms and conditions wherein Defendant represents that it will limit the number of text messages calls to each consumer to no more than three (3) per week. Despite that express term, however, Defendant has intentionally and systematically transmitted text messages to individual consumers in excess of that weekly limit.

3. By exceeding the authorized limits on weekly text message calls made to Plaintiff and the other members of the putative class (the “Class,” as defined below), Defendant has caused Plaintiff and the other members of the Class actual harm, not only because they were subjected to the aggravation that necessarily accompanies the invasion of privacy caused by unsolicited text message calls, but also because

1 consumers frequently have to pay their cell phone service providers for the receipt of
2 such wireless calls.

3 4. In order to redress these injuries, Plaintiff, on behalf of himself and the
4 Class, brings this lawsuit under the Telephone Consumer Protection Act, 47 U.S.C.
5 §§ 227, *et seq.* (“TCPA”), which prohibits unsolicited text message calls to cellular
6 phones. Plaintiff, on behalf of himself and the Class, also brings a claim for breach of
7 contract.

8 5. Plaintiff seeks an injunction requiring Defendant to cease all text
9 messaging activities beyond the agreed upon three text messages per week and an
10 award of statutory damages to the members of the Class, together with costs and
11 reasonable attorneys’ fees.

12 **PARTIES**

13 6. Plaintiff Fred Weiss is a natural person and citizen of the state of
14 California.

15 7. Defendant Lemieux Group L.P. is a Pennsylvania limited partnership
16 with its headquarters and principal place of business located at 1001 Fifth Avenue,
17 Pittsburgh, Pennsylvania 15219. Defendant does business throughout the state of
18 California and the United States.

19 **JURISDICTION AND VENUE**

20 8. This Court has original jurisdiction over the claims in this action
21 pursuant to 28 U.S.C. § 1331 because they arise under the laws of the United States
22 and further, pursuant to 28 U.S.C. § 1332(d), because (a) at least one Class member is
23 a citizen of a different state than Defendant, (b) the amount in controversy exceeds
24 \$5,000,000.00, exclusive of interest and costs, and (c) none of the exceptions under
25 that subsection apply to this action.

26 9. This Court has personal jurisdiction over Defendant because it conducts
27
28

1 business in this District.

2 10. Venue is proper in this District under 28 U.S.C. § 1391(a) as Plaintiff is
3 a resident of this District and because a substantial part of the events giving rise to the
4 claims asserted herein occurred here. Venue is additionally proper because Defendant
5 transacts significant business in this District.

6 **FACTUAL BACKGROUND**

7 11. In recent years, companies like Defendant have increasingly used “Short
8 Message Service” alerts to distribute bulk advertisements directly to consumers’
9 cellular telephones. The term “Short Message Service” or “SMS” describes a
10 messaging system that allows cellular telephone subscribers to use their cellular
11 telephones to send and receive short text messages, usually limited to 160 characters.

12 12. An “SMS message” is a text message call directed to a wireless device
13 through the use of the telephone number assigned to the device. When an SMS
14 message call is successfully made, the recipient’s cell phone rings, alerting him or her
15 that a call is being received.

16 13. Notably, SMS calls can actually cost their recipients money because cell
17 phone users commonly must pay their respective wireless service providers either for
18 each text message call they receive or incur a usage allocation deduction to their text-
19 messaging plan, regardless of whether the message is authorized.

20 14. Since at least March 2012 and continuing through the present, Defendant
21 Lemieux has solicited individuals to sign up to receive promotional SMS text
22 message alerts related to its Pittsburgh Penguins hockey team.

23 15. Defendant maintains a dedicated web page through which consumers
24 may input their cell phone numbers to register to receive its text message alerts.

1 Alternatively, a consumer may register to receive Defendant's text alerts by
2 themselves texting the word "PENS" to the number 32623.¹

3 16. While consumers sign up to receive text message alerts from Lemieux,
4 the terms and conditions governing Defendant's delivery of SMS text messages
5 expressly provide that Defendant will transmit no more than three text message alerts
6 to an individual consumer in a single week:

7 By subscribing, you consent to receiving, from time to time, further text
8 messages from us which may include offers from us, our affiliates and
9 partners. Available on participating carriers. Maximum of 3 messages a
10 week.

11 17. Defendant and its agents systematically and intentionally ignore these
12 express limitations and direct the mass transmission of more than three SMS text
13 messages to individual consumers each week in violation of its own terms and
14 conditions.

15 18. On or about March 11, 2012, Plaintiff subscribed to receive a maximum
16 of three text message alerts per week from Defendant by texting the word "PENS"
17 from his cellular telephone to Defendant's short code, 32623.

18 19. In his first week after subscribing, Plaintiff Weiss received
19 approximately five (5) text messages from Defendant between March 11, 2012 and
20 March 17, 2012. Specifically, Plaintiff received two text messages from Defendant
21 on March 11th and one text message on each of the days March 13th, 15th, and 17th.

22 20. In the second week after subscribing, Plaintiff Weiss received
23 approximately four (4) text messages from Defendant between the dates March 18,
24 2012 and March 24, 2012. Specifically, Plaintiff received one text message from
25 Defendant on each of the days March 18th, 20th, 22nd, and 24th.

26 ¹ This five-digit number is known as a "short code." Rather than a traditional
27 ten-digit phone number, some companies, like Defendant, use registered short codes
28 to enable the mass transmission of unauthorized SMS messages to a list of cellular
telephone numbers.

1 of Defendant's uniform wrongful conduct during transactions with Plaintiff and the
2 Class. Plaintiff's claims are typical of the claims of all of the other members of the
3 Class.

4 26. **Adequate Representation:** Plaintiff will fairly and adequately represent
5 and protect the interests of the Class, and has retained counsel competent and
6 experienced in complex litigation and class actions. Plaintiff has no interests
7 antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff.
8 Plaintiff and his counsel are committed to vigorously prosecuting this action on
9 behalf of the members of the Class, and have the financial resources to do so. Neither
10 Plaintiff nor his counsel have any interest adverse to those of the other members of
11 the Class.

12 27. **Commonality and Predominance:** Common questions of law and fact
13 exist as to all members of the Class and predominate over any questions affecting
14 only individual members, including:

- 15 a) whether Defendant's conduct constitutes a violation of the TCPA;
16 b) whether Class members are entitled to treble damages based upon
17 the willfulness of Defendant's conduct; and
18 c) whether Defendant's conduct of transmitting more than three
19 SMS messages in a weekly period to Plaintiff and the Class
20 constitutes a breach of contract.

21 28. **Superiority:** This class action is appropriate for certification because
22 class proceedings are superior to all other available methods for the fair and efficient
23 adjudication of this controversy and joinder of all members of the Class is
24 impracticable. The damages suffered by the individual members of the Class are
25 small relative to the burden and expense of individual prosecution of the complex
26 litigation necessitated by Defendant's conduct. Thus, it would be virtually impossible
27
28

1 for the individual members of the Class to obtain effective relief from Defendant's
 2 misconduct. Even if members of the Class could sustain such individual litigation, it
 3 would not be preferable to a class action because individual litigation would increase
 4 the delay and expense to all parties due to the complex legal and factual controversies
 5 presented in this Complaint. By contrast, a class action presents far fewer
 6 management difficulties and provides the benefits of single adjudication, economy of
 7 scale, and comprehensive supervision by a single court. Economies of time, effort,
 8 and expense will be fostered and uniformity of decisions will be ensured.

9 **29. Policies Generally Applicable to the Class:** This class action is also
 10 appropriate for certification because Defendant has acted or refused to act on grounds
 11 generally applicable to the Class, thereby requiring the Court's imposition of uniform
 12 relief to ensure compatible standards of conduct toward the members of the Class,
 13 and making final injunctive relief appropriate with respect to the Class as a whole.
 14 Defendant's policies challenged herein apply and affect members of the Class
 15 uniformly and Plaintiff's challenge of these policies hinges on Defendant's conduct
 16 with respect to the Class as a whole, not on facts or law applicable only to Plaintiff.
 17 Defendant has acted and failed to act on grounds generally applicable to Plaintiff and
 18 the other members of the Class, requiring the Court's imposition of uniform relief to
 19 ensure compatible standards of conduct toward members of the Class.

20 **30.** Plaintiff reserves the right to revise the foregoing "Class Allegations"
 21 and "Definition of the Class" based on facts learned in discovery.

22 **FIRST CAUSE OF ACTION**
 23 **Violation of the Telephone Consumer Protection Act**
 47 U.S.C. § 227
 24 **(On Behalf of Plaintiff and the Class)**

25 **31.** Plaintiff incorporates by reference the foregoing allegations as if fully
 26 set forth herein.

27 **32.** Defendant made commercial text message calls in excess of the
 28

1 authorized number to a list of cellular telephone numbers belonging to Plaintiff and
2 the other members of the Class using equipment that had the capacity to store or
3 produce telephone numbers to be called using a random or sequential number
4 generator, and to dial such numbers.

5 33. These excess text message calls were made *en masse* and without the
6 prior express consent of Plaintiff and the other members of the Class.

7 34. Defendant has, therefore, violated the TCPA, 47 U.S.C. §
8 227(b)(1)(A)(iii). As a result of Defendant's unlawful conduct, Plaintiff and the
9 members of the Class have suffered actual damages by, *inter alia*, having to pay their
10 respective wireless carriers for the text messages where applicable and, under 47
11 U.S.C. § 227(b)(3)(B), are entitled to, *inter alia*, a minimum of \$500.00 in statutory
12 damages for each such violation of the TCPA.

13 35. Defendant's misconduct was willful and knowing, and thus, the Court
14 may, pursuant to 47 U.S.C. § 227(b)(3)(C), treble the amount of statutory damages
15 recoverable by Plaintiff and the other members of the Class.

16 **SECOND CAUSE OF ACTION**
17 **Breach of Contract**
18 **(On Behalf of Plaintiff and the Class)**

19 36. Plaintiff incorporates by reference the foregoing allegations 1 through 30
20 as if fully set forth herein.

21 37. In order to receive text message alerts from Defendant, Plaintiff and the
22 other members of the Class were required to assent to Defendant's terms and
23 conditions.

24 38. The terms and conditions governing Defendant's text message alerts
25 provide, in relevant part, that Defendant would transmit a "[m]aximum of 3 messages
26 a week."

27 39. By registering to receive Defendant's text message alerts and providing
28

1 their cellular phone numbers to do so, Plaintiff and the Class entered into valid and
2 enforceable contracts with Defendant, the terms of which are set forth in Defendant's
3 terms and conditions.

4 40. Plaintiff and the Class have performed all of their obligations under their
5 agreement with Defendant.

6 41. Defendant intentionally and systematically transmitted in excess of three
7 text messages in a weekly period to Plaintiff and the members of the Class in breach
8 of its terms and conditions.

9 42. Defendant's failure to limit the number of text messages it transmitted to
10 Plaintiff and the members of the Class to no more than three each week constitutes a
11 material breach of the terms and conditions governing Defendant's text message
12 alerts and its agreement with Plaintiff and the other members of the Class.

13 43. As a result of Defendant's breach of its agreements with Plaintiff and the
14 Class, Plaintiff and the other members of the Class suffered damages in an amount to
15 be proven at trial.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff Fred Weiss, on behalf of himself and the Class,
18 respectfully requests that this Court enter an order:

19 A. Certifying this case as a class action on behalf of the Class defined
20 above, appointing Fred Weiss class representative, and appointing his counsel class
21 counsel;

22 B. Awarding damages, including statutory and punitive damages where
23 applicable, to Plaintiff and the Class in an amount to be determined at trial;

24 C. Awarding injunctive and other equitable relief as is necessary to protect
25 the interests of the Class, including, *inter alia*, an order requiring Defendant to cease
26 its transmission of text messages in excess of the agreed upon weekly limit;
27
28

1 D. Awarding Plaintiff and the Class their reasonable litigation expenses and
2 attorneys' fees;

3 E. Awarding Plaintiff and the Class pre- and post-judgment interest, to the
4 extent allowable; and,

5 F. Awarding such other and further relief as equity and justice may require.

6 **DEMAND FOR JURY TRIAL**

7 Plaintiff demands a trial by jury for all claims so triable.

8 Respectfully submitted,

9 Dated: May 25, 2012

FRED WEISS, individually and on behalf of
all others similarly situated,

11 By: /s/ Sean P. Reis 
One of Plaintiff's Attorneys

12 SEAN P. REIS (SBN 184044)
13 sreis@edelson.com
EDELSON MCGUIRE LLP
14 30021 Tomas Street, Suite 300
Rancho Santa Margarita, California 92688
15 Telephone: (949) 459-2124
Facsimile: (949) 459-2123

16 JAY EDELSON*
17 jedelson@edelson.com
18 RAFEY S. BALABANIAN*
rbalabanian@edelson.com
19 BENJAMIN H. RICHMAN*
brichman@edelson.com
EDELSON MCGUIRE LLC
20 350 North LaSalle Street, Suite 1300
Chicago, Illinois 60654
21 Telephone: (312) 589-6370
22 Facsimile: (312) 589-6378

23 **Pro hac vice admission to be sought.*