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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Sharyl Duboise, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

Infinite Bloom LLC d/b/a Bloom Dispensaries, an Arizona limited liability company,

Defendant.

Case No.
CLASS ACTION
COMPLAINT

Plaintiff, Sharyl Duboise, brings this action against Defendant, Infinite Bloom LLC d/b/a Bloom Dispensaries, to secure redress for violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227.

NATURE OF THE ACTION

1. This is a putative class action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.* (the “TCPA”).

THE TCPA

1
2 9. The TCPA prohibits: (1) any person from calling a cellular telephone
3 number; (2) using an automatic telephone dialing system; (3) without the recipient’s prior
4 express consent. 47 U.S.C. § 227(b)(1)(A).

5 10. The TCPA defines an “automatic telephone dialing system” (“ATDS”) as
6 “equipment that has the capacity - (A) to store or produce telephone numbers to be called,
7 using a random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C.
8 § 227(a)(1).

9 11. In an action under the TCPA, a plaintiff must only show that the defendant
10 “called a number assigned to a cellular telephone service using an automatic dialing system
11 or prerecorded voice.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319
12 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).

13 12. The Federal Communications Commission (“FCC”) is empowered to issue
14 rules and regulations implementing the TCPA. According to the FCC’s findings, calls in
15 violation of the TCPA are prohibited because, as Congress found, automated or
16 prerecorded telephone calls are a greater nuisance and invasion of privacy than live
17 solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized
18 that wireless customers are charged for incoming calls whether they pay in advance or after
19 the minutes are used. *Rules and Regulations Implementing the Telephone Consumer*
20 *Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014
21 (2003).

22 13. In 2012, the FCC issued an order tightening the restrictions for automated
23 telemarketing calls, requiring “prior express *written* consent” for such calls to wireless
24 numbers. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot.*
25 *Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012) (emphasis supplied).

26 14. To obtain express written consent for telemarketing calls, a defendant must
27 establish that it secured the plaintiff’s signature in a form that gives the plaintiff a “clear

1 and conspicuous disclosure’ of the consequences of providing the requested consent....and
2 having received this information, agrees unambiguously to receive such calls at a telephone
3 number the [plaintiff] designates.” *In re Rules & Regulations Implementing the Tel.*
4 *Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33, 1857 ¶
5 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

6 15. The TCPA regulations promulgated by the FCC define “telemarketing” as
7 “the initiation of a telephone call or message for the purpose of encouraging the purchase
8 or rental of, or investment in, property, goods, or services.” 47 C.F.R. § 64.1200(f)(12). In
9 determining whether a communication constitutes telemarketing, a court must evaluate the
10 ultimate purpose of the communication. *See Golan v. Veritas Entm’t, LLC*, 788 F.3d 814,
11 820 (8th Cir. 2015).

12 16. “Neither the TCPA nor its implementing regulations ‘require an explicit
13 mention of a good, product, or service’ where the implication of an improper purpose is
14 ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918
15 (9th Cir. 2012)).

16 17. “‘Telemarketing’ occurs when the context of a call indicates that it was
17 initiated and transmitted to a person for the purpose of promoting property, goods, or
18 services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R. §
19 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone Consumer*
20 *Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at *49).

21 18. The FCC has explained that calls motivated in part by the intent to sell
22 property, goods, or services are considered telemarketing under the TCPA. *See In re Rules*
23 *and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC
24 Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients are encouraged to
25 purchase, rent, or invest in property, goods, or services during the call *or in the future*. *Id.*

26 19. In other words, offers “that are part of an overall marketing campaign to sell
27 property, goods, or services constitute” telemarketing under the TCPA. *See In re Rules*

1 *and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC
2 Rcd. 14014, ¶ 136 (2003).

3 20. If a call is not deemed telemarketing, a defendant must nevertheless
4 demonstrate that it obtained the plaintiff's prior express consent. *See In the Matter of Rules*
5 *and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961,
6 7991-92 (2015) (requiring express consent "for non-telemarketing and non-advertising
7 calls").

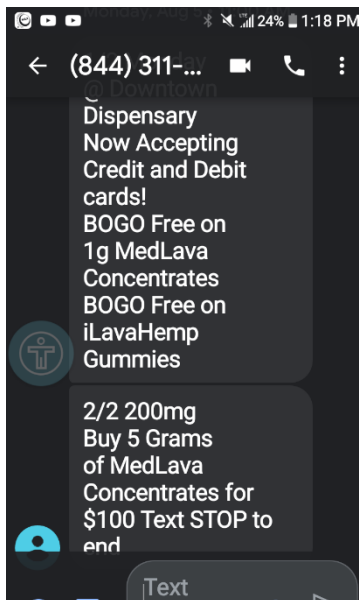
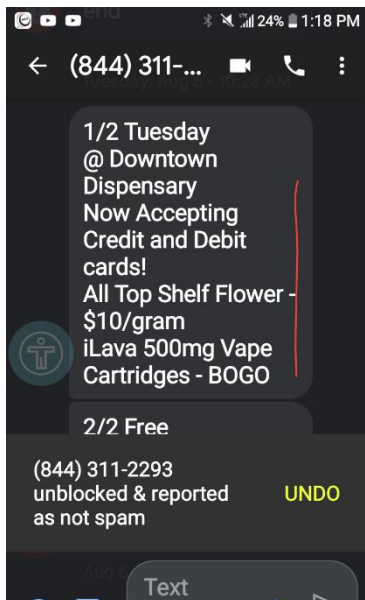
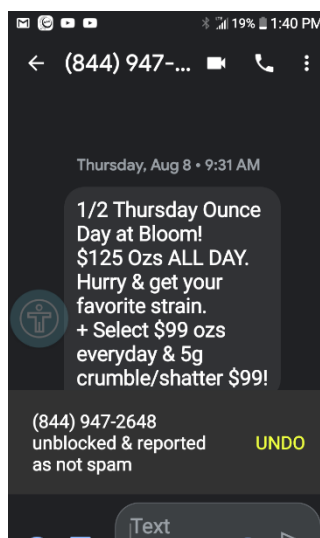
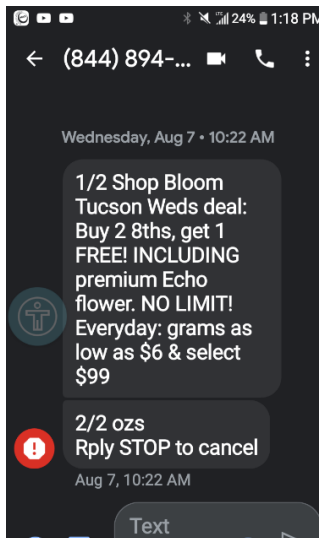
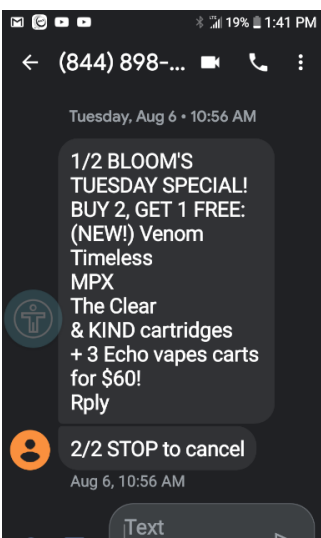
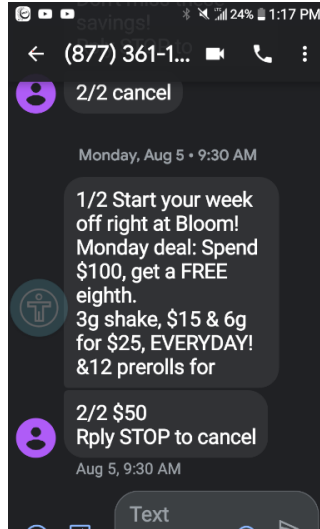
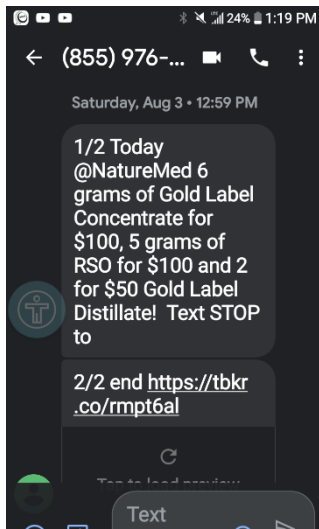
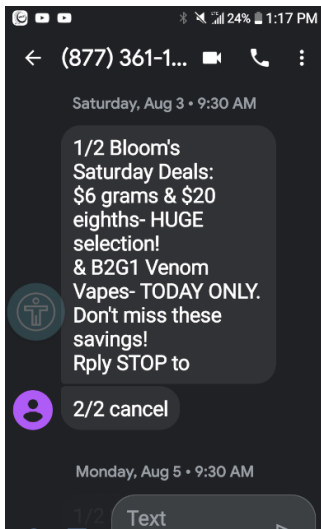
8 21. Further, the FCC has issued rulings and clarified that consumers are entitled
9 to the same consent-based protections for text messages as they are for calls to wireless
10 numbers. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) (The
11 FCC has determined that a text message falls within the meaning of "to make any call" in
12 47 U.S.C. § 227(b)(1)(A)); *Toney v. Quality Res., Inc.*, 2014 WL 6757978, at *3 (N.D. Ill.
13 Dec. 1, 2014) (Defendant bears the burden of showing that it obtained Plaintiff's prior
14 express consent before sending him the *text message*). (emphasis added).

15 22. As recently held by the United States Court of Appeals for the Ninth Circuit:
16 "Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy
17 and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA
18 'need not allege any *additional* harm beyond the one Congress has identified.'" *Van Patten*
19 *v. Vertical Fitness Grp.*, No. 14-55980, 2017 U.S. App. LEXIS 1591, at *12 (9th Cir. May
20 4, 2016) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (emphasis original)).

21 **FACTUAL ALLEGATIONS**

22 23. Beginning on or about August 2019, Defendant sent the following
23 telemarketing text messages to Plaintiff's cellular telephone number ending in 6300 (the
24 "6300 Number"):

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1 24. Defendant's text messages were transmitted to Plaintiff's cellular telephone,
2 and within the time frame relevant to this action.

3 25. Defendant's text messages constitute telemarketing because they encouraged
4 the future purchase or investment in property, goods, or services, i.e., selling Plaintiff
5 medical marijuana.

6 26. The information contained in the text message advertises Defendant's
7 various discounts and promotions, which Defendant sends to promote its business.

8 27. Plaintiff received the subject texts within this judicial district and, therefore,
9 Defendant's violation of the TCPA occurred within this district. Upon information and
10 belief, Defendant caused other text messages to be sent to individuals residing within this
11 judicial district.

12 28. At no point in time did Plaintiff provide Defendant with his express written
13 consent to be contacted using an ATDS.

14 29. Plaintiff is the subscriber and sole user of the 6300 Number and is financially
15 responsible for phone service to the 6300 Number.

16 30. The impersonal and generic nature of Defendant's text message demonstrates
17 that Defendant utilized an ATDS in transmitting the messages. *See Jenkins v. LL Atlanta,*
18 *LLC*, No. 1:14-cv-2791-WSD, 2016 U.S. Dist. LEXIS 30051, at *11 (N.D. Ga. Mar. 9,
19 2016) ("These assertions, combined with the generic, impersonal nature of the text message
20 advertisements and the use of a short code, support an inference that the text messages were
21 sent using an ATDS.") (citing *Legg v. Voice Media Grp., Inc.*, 20 F. Supp. 3d 1370, 1354
22 (S.D. Fla. 2014) (plaintiff alleged facts sufficient to infer text messages were sent using
23 ATDS; use of a short code and volume of mass messaging alleged would be impractical
24 without use of an ATDS); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D.
25 Cal. 2010) (finding it "plausible" that defendants used an ATDS where messages were
26 advertisements written in an impersonal manner and sent from short code); *Hickey v.*
27 *Voxernet LLC*, 887 F. Supp. 2d 1125, 1130; *Robbins v. Coca-Cola Co.*, No. 13-CV-132-

1 IEG NLS, 2013 U.S. Dist. LEXIS 72725, 2013 WL 2252646, at *3 (S.D. Cal. May 22,
2 2013) (observing that mass messaging would be impracticable without use of an ATDS)).

3 31. The text messages originated from telephone numbers (844) 898-0253, (844)
4 311-2293, (877) 361-1659, and (855) 976-0807, numbers which upon information and
5 belief are owned and operated by Defendant.

6 32. The numbers used by Defendant ((844) 898-0253, (844) 311-2293, (877)
7 361-1659, and (855) 976-0807) are known as a “long code,” a standard 10-digit code that
8 enables Defendant to send SMS text messages *en masse*, while deceiving recipients into
9 believing that the message was personalized and sent from a telephone number operated
10 by an individual.

11 33. Long codes work as follows: Private companies known as SMS gateway
12 providers have contractual arrangements with mobile carriers to transmit two-way SMS
13 traffic. These SMS gateway providers send and receive SMS traffic to and from the mobile
14 phone networks' SMS centers, which are responsible for relaying those messages to the
15 intended mobile phone. This allows for the transmission of a large number of SMS
16 messages to and from a short code.

17 34. Specifically, upon information and belief, Defendant utilized a combination
18 of hardware and software systems to send the text messages at issue in this case. The
19 systems utilized by Defendant have the capacity to store telephone numbers using a random
20 or sequential number generator, and to dial such numbers from a list without human
21 intervention.

22 35. To send the text messages, Defendant used a messaging platform (the
23 “Platform”) that permitted Defendant to transmit thousands of automated text messages
24 without any human involvement.

25 36. The Platform has the capacity to store telephone numbers, which capacity
26 was in fact utilized by Defendant.

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1 37. The Platform has the capacity to generate sequential numbers, which
2 capacity was in fact utilized by Defendant.

3 38. The Platform has the capacity to dial numbers in sequential order, which
4 capacity was in fact utilized by Defendant.

5 39. The Platform has the capacity to dial numbers from a list of numbers, which
6 capacity was in fact utilized by Defendant.

7 40. The Platform has the capacity to dial numbers without human intervention,
8 which capacity was in fact utilized by Defendant.

9 41. The Platform has the capacity to schedule the time and date for future
10 transmission of text messages, which occurs without any human involvement.

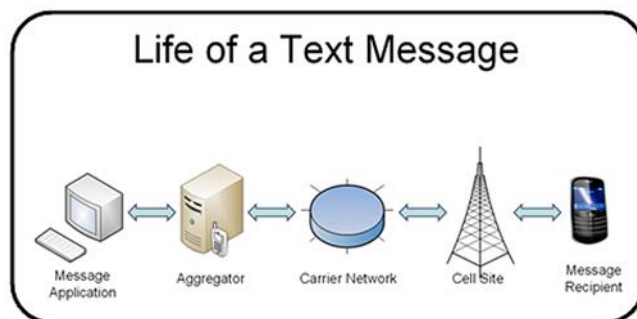
11 42. To transmit the messages at issue, the Platform automatically executed the
12 following steps:

- 13 a) The Platform retrieved each telephone number from a list of numbers in
14 the sequential order the numbers were listed;
- 15 b) The Platform then generated each number in the sequential order listed
16 and combined each number with the content of Defendant's message to
17 create "packets" consisting of one telephone number and the message
18 content;
- 19 c) Each packet was then transmitted in the sequential order listed to an SMS
20 aggregator, which acts an intermediary between the Platform, mobile
21 carriers (e.g. AT&T), and consumers.
- 22 d) Upon receipt of each packet, the SMS aggregator transmitted each packet
23 – automatically and with no human intervention – to the respective
24 mobile carrier for the telephone number, again in the sequential order
25 listed by Defendant. Each mobile carrier then sent the message to its
26 customer's mobile telephone.

1 43. The above execution these instructions occurred seamlessly, with no human
2 intervention, and almost instantaneously. Indeed, the Platform is capable of transmitting
3 thousands of text messages following the above steps in minutes, if not less.

4 44. Further, the Platform “throttles” the transmission of the text messages
5 depending on feedback it receives from the mobile carrier networks. In other words, the
6 platform controls how quickly messages are transmitted depending on network congestion.
7 The platform performs this throttling function automatically and does not allow a human
8 to control the function.

9 45. The following graphic summarizes the above steps and demonstrates that the
10 dialing of the text messages at issue was done by the Platform automatically and without
11 any human intervention:



17 46. Defendant’s unsolicited text messages caused Plaintiff actual harm,
18 including invasion of her privacy, aggravation, annoyance, intrusion on seclusion, trespass,
19 and conversion. Defendant’s text messages also inconvenienced Plaintiff and caused
20 disruption to her daily life.

21 47. Defendant’s unsolicited text messages caused Plaintiff actual harm.
22 Specifically, Plaintiff estimates that she spent approximately thirty minutes investigating
23 the unwanted text messages including how they obtained her number and who the
24 Defendant was.

25 48. Furthermore, Defendant’s text messages took up memory on Plaintiff’s
26 cellular phone. The cumulative effect of unsolicited text messages like Defendant’s poses
27

1 a real risk of ultimately rendering the phone unusable for text messaging purposes as a
2 result of the phone's memory being taken up. *See*
3 <https://www.consumer.ftc.gov/articles/0350-text-message-spam#text> (finding that text
4 message solicitations like the ones sent by Defendant present a "triple threat" of identity
5 theft, unwanted cell phone charges, and slower cell phone performance).

6 49. Defendant's text messages also can slow cell phone performance by taking
7 up space on the recipient phone's memory. *See*
8 <https://www.consumer.ftc.gov/articles/0350-text-message-spam#text> (finding that spam
9 text messages can slow cell phone performance by taking up phone memory space).

10 CLASS ALLEGATIONS

11 PROPOSED CLASS

12 50. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on
13 behalf of herself and all others similarly situated.

14 51. Plaintiff brings this case on behalf of the Class defined as follows:

15 **All persons in the United States who, within four years**
16 **prior to the filing of this action, (1) were sent a text**
17 **message by or on behalf of Defendant, (2) using an**
18 **automatic telephone dialing system, (3) for the purpose**
19 **of soliciting Defendant's goods and services, (4) without**
20 **prior express consent of the recipient, or with the same**
21 **manner of purported consent Defendant claims to have**
22 **obtained from Plaintiff, if any.**

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

26 NUMEROSITY

27 53. Upon information and belief, Defendant has placed automated calls to
cellular telephone numbers belonging to thousands of consumers throughout the United
States without their prior express consent. The members of the Class, therefore, are
believed to be so numerous that joinder of all members is impracticable.

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

4 **COMMON QUESTIONS OF LAW AND FACT**

5 55. There are numerous questions of law and fact common to members of the
6 Class which predominate over any questions affecting only individual members of the
7 Class. Among the questions of law and fact common to the members of the Class are:

- 8 a) Whether Defendant made non-emergency calls to Plaintiff's and Class
9 members' cellular telephones using an ATDS;
- 10 b) Whether Defendant can meet its burden of showing that it obtained prior
11 express written consent to make such calls;
- 12 c) Whether Defendant's conduct was knowing and willful;
- 13 d) Whether Defendant is liable for damages, and the amount of such
14 damages; and
- 15 e) Whether Defendant should be enjoined from such conduct in the future.

16 56. The common questions in this case are capable of having common answers.
17 If Plaintiff's claim that Defendant routinely transmits text messages to telephone numbers
18 assigned to cellular telephone services is accurate, Plaintiff and the Class members will
19 have identical claims capable of being efficiently adjudicated and administered in this case.

20 **TYPICALITY**

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

23 **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

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

27 **PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE**

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

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

16 **COUNT I**
17 **Violations of the TCPA, 47 U.S.C. § 227(b)**
18 **(On Behalf of Plaintiff and the Class)**

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

21 62. It is a violation of the TCPA to make “any call (other than a call made for
22 emergency purposes or made with the prior express consent of the called party) using any
23 automatic telephone dialing system ... to any telephone number assigned to a ... cellular
24 telephone service” 47 U.S.C. § 227(b)(1)(A)(iii).

25 63. Defendant – or third parties directed by Defendant – used equipment having
26 the capacity to dial numbers without human intervention to make non-emergency telephone
27 calls to the cellular telephones of Plaintiff and the other members of the Class defined
below.

- i) An award of reasonable attorneys’ fees and costs;
- j) Such further and other relief as the Court deems necessary.

JURY DEMAND

Plaintiff hereby demand a trial by jury.

Dated: June 2, 2020

Respectfully submitted,

By: /s/ Andrew J. Shamis

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Counsel for Plaintiff and the Proposed Class

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the District of Arizona.

**The completed cover sheet must be printed directly to PDF and filed as an attachment to the
Complaint or Notice of Removal.**

Plaintiff(s): Sharyl Duboise

**Defendant(s): Infinite Bloom LLC d/b/a Bloom
Dispensaries**

County of Residence: Pima

County of Residence: Maricopa

County Where Claim For Relief Arose: Pima

Plaintiff's Atty(s):

Defendant's Atty(s):

**Andrew J Shamis (Sharyl Duboise)
14 NE 1st Avenue, Suite 705
Miami, Florida 33132
3054792299**

II. Basis of Jurisdiction:

3. Federal Question (U.S. not a party)

III. Citizenship of Principal
Parties (Diversity Cases Only)

Plaintiff:- N/A

Defendant:- N/A

IV. Origin :

1. Original Proceeding

V. Nature of Suit:

890 Other Statutory Actions

VI. Cause of Action:

Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq.

VII. Requested in Complaint

Class Action: **Yes**

Dollar Demand:

Jury Demand: **Yes**

VIII. This case is not related to another case.

Signature: /s/ Andrew Shamis

Date: 6/2/2020

If any of this information is incorrect, please go back to the Civil Cover Sheet Input form using the *Back* button in your browser and change it. Once correct, save this form as a PDF and include it as an attachment to your case opening documents.

Revised: 01/2014