

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ZAK HURICKS, et al.,

Plaintiffs,

v.

SHOPKICK, INC.,

Defendant.

No. C-14-2464 MMC

**ORDER DENYING DEFENDANT’S
MOTION TO DISMISS; DENYING
WITHOUT PREJUDICE DEFENDANT’S
MOTION TO DISQUALIFY CLASS
COUNSEL AND CLASS
REPRESENTATIVES; VACATING
HEARING**

Before the Court are two motions filed by defendant Shopkick, Inc. (“Shopkick”): (1) “Motion to Dismiss First Amended Complaint,” filed August 25, 2014; and (2) “Motion to Disqualify Class Counsel and Class Representatives,” filed August 25, 2014. Plaintiffs Zak Huricks and Trista Robinson have filed opposition to each motion; Shopkick has replied. Having read and considered the papers filed in support of and in opposition to the motions, the Court deems the matters suitable for determination on the parties’ respective written submissions, VACATES the hearing scheduled for October 3, 2014, and rules as follows.

A. Motion to Dismiss

Plaintiffs allege that “Shopkick and/or its authorized agents, vendors, and/or contractors” sent to their respective cellular telephones unconsented “[s]pam messages.” (See First Amended Complaint (“FAC”) ¶¶ 35, 40.) Specifically, plaintiffs allege they each received an identical text message, purportedly sent by a friend, which text message, in

1 addition to containing a “link to Shopkick’s website,” read as follows: “Hey, just gave you
2 50 bonus points on shopkick – a cool new app that rewards you for shopping. Check it out.”
3 (See FAC ¶¶ 23, 35-36, 38.) According to plaintiffs, such text messages were sent to them
4 in violation of 47 U.S.C. § 227, which provides that it is unlawful “to make any call (other
5 than a call made for emergency purposes or made with the prior express consent of the
6 called party) using any automatic telephone dialing system . . . to any telephone number
7 assigned to a . . . cellular telephone service.” See 47 U.S.C. § 227(b)(1)(A)(iii); Satterfield
8 v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009) (holding “a text message is a
9 ‘call’ within the meaning of [§ 227]”).

10 By order filed July 24, 2014, the Court dismissed the initial complaint, with leave to
11 amend, for the reason that plaintiffs had failed to allege any facts to support a finding that
12 the text messages they received were made using an automatic telephone dialing system
13 (“ATDS”). Shopkick argues plaintiffs have failed to cure such deficiency in the FAC. As
14 discussed below, the Court disagrees.

15 An ATDS is defined in § 227 as “equipment which has the capacity - - (A) to store or
16 produce telephone numbers to be called, using a random or sequential number generator;
17 and (B) to dial such numbers.” See 47 U.S.C. § 227(a)(1). As district courts have
18 observed, given the “difficulty a plaintiff faces in knowing the type of calling system used
19 without the benefit of discovery, . . . courts can rely on details about the call to infer the use
20 of an ATDS.” See Hickey v. Voxernet LLC, 887 F. Supp. 2d 1125, 1129-30 (W.D. Wash.
21 2012) (internal quotation and citation omitted).

22 Here, although the FAC does not contain detailed facts regarding the telephone
23 system allegedly used to send the above-referenced identical text messages, plaintiffs
24 have alleged sufficient facts from which it can be inferred that said text messages were
25 sent using an ATDS. In particular, plaintiffs allege that a “user” downloads Shopkick’s
26 “shopping application” (hereinafter “the App”) (see FAC ¶¶ 18-19), that the App “uploads
27 and stores” the user’s cell phone contacts (see FAC ¶ 21), that Shopkick “commandeers
28 the functionalities of the user’s cell phone to cause it to formulate an automated . . . [s]pam

1 [message] and transmit it to those uploaded and stored contact cell phone numbers (see
2 FAC ¶ 30; see also FAC ¶ 26), and that the system by which Shopkick accomplishes such
3 result has the capacity to “randomly generate cell phone numbers to send Shopkick . . .
4 [s]pam messages” and to “generate[] cell phone numbers to send . . . [s]pam using a
5 program that constructs new cell phone numbers in sequence from previously generated
6 cell phone numbers” (see FAC ¶ 32). See, e.g., Pimental v. Google, Inc., 2012 WL
7 691784, at *2 (N.D. Cal. March 2, 2012) (denying motion to dismiss claim brought under
8 § 227(b)(1)(A)(iii); finding allegation that text messages were sent “en masse, using one
9 common cellular telephone number provided by [d]efendants,” together with allegation that
10 defendants “harvested phone numbers,” was sufficient at pleading stage to “plausibly
11 suggest[] the use of an ATDS”).

12 Accordingly, the motion to dismiss will be denied.

13 **B. Motion to Disqualify**

14 Plaintiffs seek to proceed on behalf of class of persons who were sent Shopkick’s
15 “[s]pam.” (See FAC ¶ 41.) Shopkick, pursuant to Rule 23(a)(4) of the Federal Rules of
16 Civil Procedure, seeks an order disqualifying plaintiffs from acting as class representatives
17 and disqualifying plaintiffs’ counsel from acting as counsel for the putative class.

18 In its motion, Shopkick asserts that plaintiffs are personal friends of Arlyne Sorrells,
19 a paralegal employed by putative class counsel and through whom the subject text
20 messages were sent, and, consequently, that an actual or potential conflict of interest
21 between the putative class and the named plaintiffs exists due to such relationships.
22 Shopkick also argues that the initial complaint and the FAC both contain “false” information
23 concerning the circumstances under which the text messages were sent to plaintiffs (see
24 Def.’s Mot. to Disqualify at 10:4-7, 17:21), and that the lawsuit was “manufactured” by
25 putative class counsel, who is assertedly the “driving force behind this lawsuit” (see id. at
26 15:7-8, 26). In sum, Shopkick contends disqualification is appropriate because “there are
27 simply too many unanswered questions about [p]laintiffs’ connections to [Arlyne] Sorrells
28 and [putative class counsel], [p]laintiffs’ personal motives, their involvement in the genesis

1 of this lawsuit, and their credibility and candor.” (See id. at 24:13-15.)

2 Plaintiffs, in addition to disagreeing with Shopkick’s characterizations of the
3 relationships between the parties and the circumstances under which they filed the instant
4 action, argue that the issue of whether they and their chosen counsel can adequately
5 represent the putative class is premature at the pleading stage. As discussed below, the
6 Court agrees.

7 Rule 23 provides that “representative parties” may only bring suit on behalf of a
8 class if, inter alia, they “will fairly and adequately protect the interests of the class.” See
9 Fed. R. Civ. P. 23(a)(4). At present, plaintiffs are proceeding with their individual claims
10 only, and have not sought class certification. The issues Shopkick addresses in its motion
11 have no bearing on plaintiffs’ individual claims, and, indeed, where courts have considered
12 the type of issue raised by Shopkick, such courts have considered it in the context of a
13 motion for class certification. See, e.g., Susman v. Lincoln American Corp., 561 F.2d 86,
14 95 (7th Cir. 1977) (affirming order denying motion for class certification; finding lead
15 plaintiffs, respectively, brother and tenant of putative class counsel, were not adequate
16 class representatives given “likelihood of conflict” arising from close relationships between
17 lead plaintiffs and counsel); Bodner v. Oreck Direct, LLC, 2007 WL 1223777, at *2 (N.D.
18 Cal. April 25, 2007) (denying motion for class certification; finding lead plaintiff failed to
19 meet “threshold typicality or adequacy requirements of Rule 23(a),” where it was “clear
20 from the record that plaintiff’s counsel, and not plaintiff, [was] the driving force behind [the]
21 action”).

22 Although Shopkick has cited several district court opinions in which an asserted
23 failure to satisfy Rule 23(a)(4) was raised other than in response to a motion to certify, the
24 cases on which Shopkick relies do not address such issue at the pleading stage. Rather, in
25 those cases, the defendant sought relief in response to the lead plaintiff’s having taken, or
26 failed to take, certain action on behalf of the class during the course of the litigation. See
27 Calvert v. Red Robin Int’l, 2012 WL 1668980, at *2-4 (N.D. Cal. May 11, 2012) (granting
28 motion to disqualify plaintiff as class representative where motion was based on lead

1 plaintiff's testimony at evidentiary hearing on plaintiff's motion to compel classwide
2 discovery; finding plaintiff's testimony established his "dishonesty"); In re Terayon
3 Communications Systems, Inc., 2004 WL 413277, at *7-8 (N.D. Cal. February 23, 2004)
4 (granting, in securities fraud case, motion to disqualify two lead plaintiffs who had engaged
5 in "short selling," where motion was filed in response to motion for class certification filed by
6 three other lead plaintiffs); Lyon v. Arizona, 80 F.R.D. 665, 667-69 (D. Ariz. 1978) (granting
7 motion to dismiss class allegations where lead plaintiff had taken no steps to seek class
8 certification during three years in which action was pending). Indeed, one such district
9 court observed: "Normally, these issues would have been raised at the time the lead
10 plaintiffs moved to be appointed as class representatives." See Terayon, 2004 WL 413277,
11 at *7 (explaining "[p]laintiffs' counsel [had] circumvented this inquiry" by the manner in
12 which they had framed their motion for appointment as class representatives).

13 Here, as noted, the case remains at the pleading stage, and nothing in the limited
14 record presently before the Court indicates that any issue pertaining to the adequacy of the
15 two named plaintiffs, or their chosen counsel of record, should be addressed other than in
16 the ordinary manner, i.e., at the time plaintiffs move to certify a class and to be appointed
17 as class representatives.

18 Accordingly, the motion to disqualify will be denied, without prejudice.

19 **CONCLUSION**

20 For the reasons stated above, Shopkick's motion to dismiss and motion to disqualify
21 are hereby DENIED.

22 **IT IS SO ORDERED.**

23
24 Dated: October 1, 2014

25 
26 MAXINE M. CHESNEY
27 United States District Judge
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