

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

MICHAEL CRISSWELL, individually and on )  
behalf of a class of similarly situated individuals, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MYSPLACE, INC., a Delaware corporation, )  
 )  
Defendant. )  
 )

FILED  
March 18, 2008 TG  
No. 08cv1578  
Judge SHADUR  
Magistrate Judge SCHENKIER

**NOTICE OF REMOVAL**

Pursuant to 28 U.S.C. §§ 1331, 1332, 1441, and 1446, as amended in relevant part by the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. 109-2, 119 Stat. 4 (2005), defendant MySpace, Inc. (“MySpace”) hereby removes to the United States District Court, Northern District of Illinois, Eastern Division, the above-styled action, pending as Case No. 08 CH 05929 in the Circuit Court of Cook County, Illinois, Chancery Division (the “State Court Action”). As grounds for removal, MySpace states the following:

**INTRODUCTION**

1. On February 15, 2008, plaintiff Michael Crisswell commenced a putative class action against MySpace. A true and correct copy of the Class Action Complaint is attached hereto as Exhibit 1, and cited here as “Compl.” In the Class Action Complaint, Plaintiff alleges that MySpace has sent Plaintiff unauthorized text messages and provided no means for Plaintiff to opt out of receiving future text messages. (Compl. ¶¶ 2, 4, 21-23.) Plaintiff alleges, among other claims, that as a result of these text messages, Plaintiff

has been charged a fee of around \$0.15 for the receipt of each text message and has lost all or some of the use of his cell phone. (Compl. ¶¶ 4, 14-15.) Specifically, the Class Action Complaint asserts claims for tortious interference with a contract (Count I), restitution/unjust enrichment (Count II), trespass to chattels (Count III), invasion of privacy (Count IV), computer tampering in violation of 720 ILCS 5/16D-3 (Count V), and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Count VI). (Compl. ¶¶ 32-59.)

### **BASIS OF JURISDICTION UNDER CAFA**

2. MySpace moves to remove the State Court Action pursuant to the Class Action Fairness Act (“CAFA”), codified under 28 U.S.C. § 1332(d). CAFA provides this Court with original jurisdiction over this action and permits MySpace to remove the State Court Action from the Illinois state court.

3. CAFA vests United States District Courts with original jurisdiction when the aggregate amount in controversy for all class members exceeds \$5,000,000 exclusive of interest and costs and any member of the class of plaintiffs is a citizen of a state different from any defendant. Those requirements are satisfied in this action, as set forth below in more detail and as established by Plaintiff’s Class Action Complaint.

4. Neither the permissive nor mandatory provisions of CAFA for declining original jurisdiction are applicable to this action. Accordingly, as established in more detail below, federal jurisdiction is mandatory under CAFA.

**Original Jurisdiction.**

5. CAFA vests United States District Courts with original jurisdiction as follows:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which – (A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .

28 U.S.C. § 1332(d)(2). Each of these requirements is satisfied in this action.

**Class Actions as Defined by CAFA**

6. The State Court Action is a class action as defined by CAFA. CAFA provides:

[T]he term “class action” means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.

§ 1332(d)(1)(B).

7. Plaintiff filed the State Court Action as a putative class action on behalf of himself, a Class, and a Sub-Class. (Compl. ¶ 24.)

8. The Illinois statute governing the maintenance of class actions, 735 ILCS 5/2-801, is analogous to Federal Rule of Civil Procedure 23.

9. As set forth above, Plaintiff’s Class Action Complaint falls within the definition of a class action under CAFA.

### **Citizenship Requirement Under CAFA**

10. CAFA liberalizes the diversity requirements under traditional diversity jurisdiction by providing that CAFA applies when:

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .

§ 1332(d)(2)(A).

11. Plaintiff is a citizen of Illinois. (Compl. ¶6.)

12. MySpace is a corporation that is organized under the laws of Delaware with its principal place of business in California. (Compl. ¶ 7.)

13. The diversity of citizenship between Plaintiff and MySpace satisfies the diversity requirements of CAFA. Moreover, while Plaintiff's citizenship satisfies the CAFA diversity requirements, CAFA requires only that the citizenship of "any member of a class" be diverse from "any defendant." Because Plaintiff's putative multi-state class attempts to include citizens of numerous states, CAFA diversity jurisdiction is further established.

### **Amount in Controversy Requirement under CAFA**

14. CAFA creates original jurisdiction for "any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs." § 1332(d)(2). Unlike traditional amount in controversy review, CAFA requires that the claims of individual class members be aggregated:

In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)(6).

15. The amount in controversy requirement is met by showing “a reasonable probability that the stakes exceed the minimum.” *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005); *see also Espinosa v. Philip Morris USA, Inc.*, 2007 U.S. Dist. LEXIS 21135, \*\*6-7 (N.D. Ill. 2007) (“Even when applying conservative estimates to the facts alleged in the complaint, the amount in controversy in this case far exceeds the \$5,000,000 threshold for CAFA.”). “Once the proponent of jurisdiction has set out the amount in controversy, only a ‘legal certainty’ that the judgment will be less forecloses jurisdiction.” *Brill* at 448. The amount in controversy as required by CAFA is met for this action as pleaded.

16. This Notice of Removal is based solely on the allegations of the Class Action Complaint. In arguing that the plaintiff has alleged facts sufficient to meet the amount in controversy requirement, MySpace does not admit the facts alleged in Plaintiff’s Class Action Complaint; even if the facts are true, MySpace does not admit that they state a claim; and even if the facts are true and state a claim, MySpace does not admit that there are any damages. *See id.* at 449 (“The demonstration [for a notice of removal] concerns what the plaintiff is claiming (and thus the amount in controversy between the parties), not whether plaintiff is likely to win or be awarded everything he seeks.”).

17. Plaintiff alleges that “due in part to its vast user base (in excess of 100 million users), MySpace has transmitted mass amounts of unauthorized mobile content to the nation’s cellular telephone consumers.” (Compl. ¶ 17.) Plaintiff alleges that the

charge for receiving unauthorized text messages “ranges around \$0.15.” (Compl. ¶ 14.) Without admitting Plaintiff’s allegations, those allegations establish that if each MySpace user received only one unauthorized text message, the amount in controversy for those claims would be in excess of \$15,000,000.00. Plaintiff, however, alleges that his claims are typical of all Class members (Compl. ¶ 25) and that he alone received and was charged for receiving “well over one hundred” text messages from Defendant from October 2007 through December 2007 (Compl. ¶ 21). Plaintiff claims that he and the Class are entitled to “money belonging to Plaintiff and the Class resulting from [MySpace’s] billing and collecting of a significant sum in unauthorized mobile content charges.” (Comp. ¶ 38.)

18. The amount in controversy with respect to the claims made by Plaintiff and the putative class members is thus well in excess of \$5,000,000.<sup>1</sup> The compensatory damages alleged for unauthorized mobile content charges alone satisfy CAFA’s amount in controversy requirement.

19. Aside from charges incurred from unauthorized text messages, Plaintiff also seeks to collect advertising revenue MySpace has received (Comp. ¶ 38), damages for MySpace’s making use of his and the Class’s wireless handsets (Compl. ¶ 42),

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<sup>1</sup> In a strikingly similar Class Action Complaint filed October 22, 2007, in the Northern District of California (San Jose), the same Plaintiffs’ counsel alleged: “This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332. The aggregate claims of plaintiffs and the proposed class members *exceed the sum or value of \$5,000,000.*” Class Action Complaint at ¶ 8, *Abrams v. Facebook, Inc.*, Case No. 07-cv-05378-JF (Oct. 22, 2007 N.D. Cal.) (emphasis added) (“Facebook Class Action Complaint” or “Facebook Compl.” attached as Exhibit 2). As in the instant case, the Facebook Class Action Complaint includes allegations arising out of alleged unauthorized text messaging. However, Facebook users alleged equal in excess of 34 million (Facebook Compl. at ¶ 21), whereas the instant case involves an allegation of MySpace users in excess of 100 million (Compl. at ¶ 17). Additionally, the Facebook Class Action Complaint alleges the named plaintiff received approximately 20 unauthorized text messages (Facebook Compl. at ¶ 26), whereas the instant Class Action Complaint alleges the named plaintiff received well over 100 unauthorized text messages (Compl. at ¶ 21).

damages for MySpace's intruding on his and the Class's solitude (Compl. ¶ 46), fees obtained while MySpace was allegedly tampering with the handsets and statutory attorney's fees (Compl. ¶ 54), and damages for alleged acts of unfair competition (Compl. ¶ 58).

**Discretionary or Mandatory Declining of Jurisdiction**

20. CAFA contains additional provisions under which a District Court may or must decline jurisdiction. § 1332(d)(3) & (4). However, neither of these provisions applies when the defendant is a citizen of a state other than the forum state. Because MySpace is not a citizen of Illinois, neither of these provisions applies to this action.

**BASIS OF JURISDICTION UNDER CAN-SPAM ACT**

21. Plaintiff brings a claim for computer tampering in violation of 720 ILCS 5/16D-3 (Count V). Though Plaintiff alleges claims under Section 5/16D-3(a)(4), which covers programs being inserted on computers, if the facts alleged state any claim (which MySpace does not concede), it is a claim under 5/16D-3(b)(4), which covers unsolicited bulk electronic mail. Section 5/16D-3(b)(4) makes no mention of falsity or deception.

22. The federal CAN-SPAM Act "supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b)(1).

23. Federal courts have ruled that the CAN-SPAM Act preempts state statutes that attempt to regulate the use of electronic mail to send commercial messages without

prohibiting falsity or deception. *See Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 353-56 (4th Cir. 2006) (holding that CAN-SPAM Act preempted an Oklahoma statute regulating electronic mail messages); *Facebook, Inc. v. ConnectU LLC*, 489 F. Supp. 2d 1087, 1094 (N.D. Cal. 2007) (holding that CAN-SPAM Act preempted a California statute regulating electronic mail without requiring falsity or deception as an element); *Gordon v. Virtumundo, Inc.*, 2007 U.S. Dist. LEXIS 35544 \*\*34-40 (D. Wash. 2007) (holding that CAN-SPAM Act preempted Washington’s Commercial Electronic Mail Act when plaintiff’s claims did not allege any false information); *see also Kleffman v. Vonage Holdings Corp.*, 2007 U.S. Dist. LEXIS 40487 (D. Cal. 2007) (holding that CAN-SPAM Act preempted California statute).

24. The courts in *Omega* and *Gordon* also found that the CAN-SPAM Act preempted consumer protection act claims when the claims’ basis was harm alleged under the electronic message claim. *Omega* at 352 n.1; *Gordon* at \*41.

25. Even if a plaintiff pleads only state causes of action, the claims that come within the scope of the federal cause of action necessarily “arise under” federal law for federal question purposes when the federal cause of action has powerful preemptive force. *Ben. Nat’l Bank v. Anderson*, 539 U.S. 1, 7 (2003) (*quoting Franchise Tax Bd.*, 463 U.S. 1, 23-24 (1983)).

26. CAN-SPAM Act preemption is as complete as to unsolicited bulk electronic mail as the Labor Management Relations Act is to collective bargaining, *see Id.* at 6 (*citing Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)), ERISA is to employee disability benefits, *see id.* at 7 (*citing Metropolitan Life Ins. Co. v. Taylor*, 481



U.S. 58 (1987)), the Federal Communications Act is to telephone rate challenges, *see Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 990 (7th Cir. 2000), the Indian Gaming Regulatory Act is to American Indian gaming, *see Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 547 (8th Cir. 1996), and the Nonintercourse Act is to American Indian land grant rights, *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

27. Plaintiff's computer tampering and consumer protection claims are completely preempted by the CAN-SPAM Act, give rise to federal question jurisdiction, and should be removed, on this additional, alternative ground.

#### **28 U.S.C. § 1446 REQUIREMENTS**

28. Removal is Timely. A notice of removal may be filed within 30 days after the defendant receives a copy of the initial pleading, motion, or other paper from which it may be ascertained that the case is removable. 28 U.S.C. § 1446(b). Defendant received a copy of the initial pleading when it was served with the Complaint on February 18, 2008. This Notice of Removal is timely filed on or before March 19, 2008.

29. Removal to Proper Court. This Court is part of the “district and division embracing the place where” this action was filed – Cook County, Illinois. 28 U.S.C. §§ 1446(a).

30. Pleadings and Process. Pursuant to 28 U.S.C. § 1446(a), a “copy of all process, pleadings, and orders served upon” Defendant is attached to this Notice of Removal as Exhibit 1. Defendant MySpace has not answered or otherwise filed a response to the Class Action Complaint.

31. Notice to the State Court. A copy of this Notice of Removal is being filed with the Clerk of the Circuit Court of Cook County, Illinois, and is being served on counsel of record, consistent with 28 U.S.C. §§ 1446(a), (d). The Circuit Court of Cook County, Illinois is located within this District.

32. Defendant MySpace hereby reserves all defenses and objections to Plaintiff's Class Action Complaint, including but not limited to: lack of personal jurisdiction, improper venue, *forum non conveniens*, insufficiency of process, insufficiency of service of process, failure to state a claim, and failure to satisfy the requirements for class certification.

WHEREFORE, defendant MySpace, Inc. removes this action to this Court for further proceedings according to law.

Dated: March 18, 2008

Respectfully submitted,  
MYSPACE, INC.

By: /s/ David R. Geerdes  
One of its attorneys

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**CERTIFICATE OF SERVICE**

I am an attorney and hereby certify that on March 18, 2008, I caused true copies of the foregoing NOTICE OF REMOVAL to be served by messenger upon the following counsel for Plaintiff:

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/s/ David R. Geerdes  
David R. Geerdes  
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