

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 2:19-cv-14462-KAM

DIANNE SOLDEVILLA,
individually and on behalf of all
others similarly situated,

Plaintiff,

CLASS ACTION

JURY TRIAL DEMANDED

v.

ON THE BARRELHEAD, INC.,

Defendant.

_____ /

FIRST AMENDED CLASS ACTION COMPLAINT¹

Plaintiff Dianne Soldevilla brings this class action against Defendant On the Barrelhead, Inc., and alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

NATURE OF THE ACTION

1. This is a putative class action under Florida’s Electronic Mail Communications Act, Fla. Stat. §§ 668.601-668.610 (“FEMCA”).

2. FEMCA “is intended to promote the integrity of electronic commerce and shall be construed liberally in order to protect the public and legitimate businesses from deceptive and unsolicited commercial electronic mail.” Fla. Stat. § 668.601.

3. In pertinent part, FEMCA prohibits the transmission from a computer in Florida, or to

¹ Pursuant to Fed. R. Civ. P. 15(a)(1), Plaintiff hereby amends her complaint as a matter of course, thereby mooting Defendant’s pending Motion to Dismiss.

an electronic mail address that is held by a resident of Florida, of any e-mail that contains false or misleading information in the subject line. *See* Fla. Stat. § 668.603(1)(c).

4. To solicit customers for its loan matching services, Defendant sends misleading spam e-mails with no regard for the rights of the recipients of those e-mails.

5. Spam e-mails like Defendant's undermine the integrity of electronic commerce in Florida.

6. As described below, Defendant caused thousands of misleading e-mails to be sent to Plaintiff and Class Members, causing them injuries, including lost productivity and resources, annoyance, consumption of valuable digital storage space, and/or financial costs.

7. Through this action, Plaintiff seeks injunctive relief to halt Defendant's illegal conduct. Plaintiff also seeks statutory damages on behalf of herself and Class Members, as defined below, and any other available legal or equitable remedies resulting from the illegal actions of Defendant.

PARTIES, JURISDICTION, AND VENUE

8. Plaintiff is a natural person who, at all times relevant to this action, was a citizen of and domiciled in St. Lucie County, Florida.

9. Defendant is a foreign corporation with its principal place of business located at 835 Main Ave., Suite 205, Durango, CO 81301.

10. This Court has personal jurisdiction over Defendant pursuant to Fla. Stat. § 668.606(4). Further, this Court has personal jurisdiction over Defendant because Defendant's tortious conduct against Plaintiff occurred in part within this district and, on information and belief, Defendant sent the same e-mail communications complained of by Plaintiff to other individuals within this judicial district, such that some of Defendant's acts have occurred within this district, subjecting Defendant to jurisdiction here.

11. This court has subject matter jurisdiction under 28 U.S.C. § 1332(d)(2) because Plaintiff alleges a national class, which will result in at least one Class member belonging to a different state than Defendant. Plaintiff seeks \$500.00 in damages for each violation, which, when aggregated among a proposed class numbering in the thousands, or more, exceeds the \$5,000,000.00 threshold for federal court jurisdiction under the Class Action Fairness Act (“CAFA”).

12. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) because Defendant is deemed to reside in any judicial district in which it is subject to personal jurisdiction, and because a substantial part of the events or omissions giving rise to the claim occurred in this District.

FLORIDA’S ELECTRONIC MAIL COMMUNICATIONS ACT

13. In pertinent part, FEMCA prohibits the following:

(1) Initiate or assist in the transmission of an unsolicited commercial electronic mail message from a computer located in this state or to an electronic mail address that is held by a resident of this state which:

* * *

(c) Contains *false or misleading information in the subject line*;

Fla. Stat. § 668.603 (emphasis supplied).

14. Under section 668.602(3), “[c]ommercial electronic mail message” is “an electronic mail message sent to promote the sale or lease of, or investment in, property, goods, or services related to any trade or commerce...” Fla. Stat. § 668.602(3).

15. Under section 668.602(14), “[u]nsolicited commercial electronic mail message” is “any commercial electronic mail message that is not a transactional or relationship message and is sent to a recipient without the recipient’s affirmative or implied consent.” Fla. Stat. § 668.602(14).

16. A “prevailing plaintiff” in an action under FEMCA is entitled:

(a) An injunction to enjoin future violations of s. 668.603.

(b) Compensatory damages equal to any actual damage proven by the plaintiff to have resulted from the initiation of the unsolicited commercial electronic mail message or liquidated damages of \$500 for each unsolicited commercial electronic mail message that violates s. 668.603.

(c) The plaintiff's attorney's fees and other litigation costs reasonably incurred in connection with the action.

Fla. Stat. § 668.606(3).

17. FEMCA provides for a private right of action, allowing consumers like Plaintiff here to seek the relief outlined in section 668.606(3).

18. Specifically, section 668.6075 provides:

Unfair and deceptive trade practices.—A violation of s. 668.603 shall be deemed an unfair and deceptive trade practice within the meaning of part II of chapter 501. In addition to any remedies or penalties set forth in that part, a violator shall be subject to the penalties and remedies provided for in this part.

19. Thus, by incorporating Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201-.213, into FEMCA, the Florida Legislature provided consumers a civil remedy. Stated differently, the declaration by the Florida Legislature that a FEMCA violation is deemed an "unfair and deceptive trade practice" and thus "unlawful," triggers the private right of action afforded under FDUTPA.

20. This is further supported by the statute's reference to a "prevailing plaintiff" and the "plaintiff's attorney's fees and other litigation costs..." referenced under the section outlining the relief available to consumers like Plaintiff. *See* Fla. Stat. § 668.606(3).

21. Legislative history further supports the existence of a private right of action under FEMCA. Indeed, the Preamble to the Senate Bill that enacted FEMCA stated that the statute "...authorize[s] the department *and* persons receiving...unsolicited electronic mail to bring an action

against persons transmitting that mail...” 2004 Fla. Sess. Law Serv. Cha. 2004-233 (S.B. 2574) (emphasis supplied).

FACTS

22. On or about September 30, 2019, Defendant sent an e-mail to Plaintiff with the following subject line: “New loan offer alert”.

23. Defendant’s promise of a “New loan offer” was false or misleading, as Defendant does not make loans, did not offer Plaintiff a loan, and there was no loan offer being made to Plaintiff by anyone. Instead, the purpose of the e-mail was to dupe Plaintiff into visiting Defendant’s website, where Defendant markets its loan matching services.

24. On its own website, Defendant confirms that there was never a “New loan offer”:

The operator of this website **is not a lender**, does not broker loans to lenders and **does not make loans** or credit decisions. **This website does not constitute an offer or solicitation to lend. Providing your information on this website does not guarantee that you will be approved for a loan.** The operator of this website is not an agent, representative or broker of any lender and does not endorse or charge you for any service or product.²

25. Consumers like Plaintiff who have similarly been misled by Defendant’s spam e-mails have taken to the Internet to voice their complaints:

- I believe this company is not using ethical advertising practices. They sent me an email with subject line: “Your “pre-approved” loan offer is waiting.” Advising I have been Pre “Approved” leading me and likely other to believe they have actually been “approved” therefore enticing Me to enter all of my personal information to obtain an “Approved” loan. To later find out after the process of giving all my personal information that I have only been pre-qualified for a secured loan with a first title on a vehicle, which I don't even have, which does not mean approved.
- I am recently retired as a Senior Deputy Attorney General from the Nevada Attorney General's Office Bureau of Consumer Protection.

² <https://www.personalloanpro.com/>; (emphasis supplied) (last visited on Dec. 3, 2019).

I have recently been receiving spam email advertisements from OnTheBarrelhead LLC advertising for new and refinance loans. I have never been in contact with this company and being a renter, have no need for a home loan or refinance....

- I received an email on 1/4/19 from "***** ****" with the opening line - "This email is to verify your new account that you created..." I have not opened any new account with anyone for any loan. This email alarmed me, suggested that someone had stolen my identity and was applying for loans using my info. I called On the Barrelhead in Durango and repeatedly received a recording that no representatives were available. Last week when I finally did reach the receptionist, I explained my complaint and also wanted to know how Barrelhead had gotten my email address. She indicated that Tim C***** would return my call. This email made it through my junk filter and with the opening line clearly was fraudulently indicating that I had opened an account. Most advertising emails do not cross the line but this one does because it implied referencing my personal credit/loan activity. C***** never returned my call. My understanding is that there are regulations/laws governing this industry that prevent this type of gross misleading advertising. If the BBB cannot take any action, let me know and I'll pursue other avenues.
- This company routinely sends over 100 emails a day and I have never contacted these individuals. I put in two requests for them to stop emailing me and they still continue to send them.³

26. Astonishingly, approximately seven months before it sent Plaintiff the subject deceptive e-mail, Defendant responded to one of the above consumer complaints by conceding that its e-mails containing supposed offers and pre-approvals were confusing: "**Apologies for the confusion with respect to pre-approved and pre-qualified. You raise a good point and I will update that subject line so that others are not confused.**"⁴

27. Notwithstanding, Defendant continued to send deceptive and misleading e-mails to

³<https://www.bbb.org/us/co/durango/profile/loan-originator/on-the-barrelhead-llc-080699150007/complaints#311526103>; (last accessed Dec. 3, 2019).

⁴<https://www.bbb.org/us/co/durango/profile/loan-originator/on-the-barrelhead-llc-080699150007/complaints#311526103>; (emphasis supplied) (last accessed Dec. 3, 2019).

consumers.

28. Defendant's e-mail constitutes an unsolicited commercial electronic mail message under FEMCA because (1) it was sent to promote the sale or lease of, or investment in, property, goods, or services related to any trade or commerce; and (2) it was sent without Plaintiff's affirmative or implied consent.

29. Plaintiff is the sole user of the e-mail address to which Defendant transmitted the violative e-mail.

30. Defendant's unsolicited e-mail caused Plaintiff actual harm including lost productivity and resources, annoyance, and consumption of valuable digital storage space.

31. Plaintiff was induced by the misleading subject line in Defendant's e-mail to click on and view Defendant's e-mail.

32. Plaintiff estimates that she wasted approximately 20 seconds reviewing Defendant's misleading e-mail.

33. Furthermore, Defendant's e-mail took up approximately 75KB of space on Plaintiff's e-mail inbox. The cumulative effect of unsolicited spam e-mails like Defendant's poses a real risk of ultimately rendering a consumer's e-mail inbox unusable and/or requiring the consumer to pay for additional space.

CLASS ALLEGATIONS

PROPOSED CLASS

34. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of herself and the following "Class" (including "Class Members" and "Members"):

All residents of Florida who, within the four years prior to the filing of this Complaint, were sent the same unsolicited commercial electronic mail message sent to Plaintiff, as alleged herein, from Defendant or anyone on Defendant's behalf.

35. Defendant and its employees or agents are excluded from the Class.

36. Plaintiff does not know the exact number of members in the Class but believes the Class members number in the several thousands, if not more.

NUMEROSITY

37. Upon information and belief, Defendant has sent unsolicited commercial electronic mail messages like the ones sent to Plaintiff to thousands of consumers. The members of the Class, therefore, are believed to be so numerous that joinder of all members is impracticable.

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

COMMON QUESTIONS OF LAW AND FACT

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

- (1) Whether Defendant's e-mails constitute unsolicited commercial electronic mail messages;
- (2) Whether Defendant's e-mails contain false or misleading information in the subject line;
- (3) Whether Defendant is liable for damages, and the amount of such damages; and
- (4) Whether Defendant should be enjoined from such conduct in the future.

40. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendant routinely transmits unsolicited commercial electronic mail messages containing misleading subject lines is accurate, Plaintiff and the Class members will have identical claims capable

of being efficiently adjudicated and administered in this case.

TYPICALITY

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

PROTECTING THE INTERESTS OF THE CLASS MEMBERS

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

SUPERIORITY

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

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

COUNT I
Violation of Florida's Electronic Mail Communications Act
(On Behalf of Plaintiff and the Class)

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

46. Defendant initiated the transmission of an unsolicited commercial electronic mail message to electronic mail addresses held by residents of this state that contained false or misleading information in the subject line.

47. Defendant failed to secure affirmative or implied consent to transmit the subject e-mails to Plaintiff and members of the Class.

48. Defendant caused harm to Plaintiff and members of the Class, including lost productivity and resources, annoyance, consumption of valuable digital storage space and/or financial costs.

49. Defendant's conduct undermined the integrity of electronic commerce in this state.

50. Plaintiff and members of the Class are therefore entitled to an injunction to prohibit Defendant from further harming consumers, liquidated damages of \$500 for each unsolicited commercial electronic mail message sent by Defendant to Plaintiff and members of the Class, as well as their attorney's fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Dianne Soldevilla, on behalf of herself and the other members of the Class, prays for the following relief:

a. A declaration that Defendant's practices described herein violate Florida's Electronic Mail Communications Act;

b. An injunction to enjoin future violations of Florida's Electronic Mail Communications Act;

- c. Liquidated damages of \$500 for each unsolicited commercial electronic mail message sent to Plaintiff and members of the Class;
- d. Attorney's fees and other litigation costs reasonably incurred in connection with this action; and
- e. Such further and other relief the Court deems reasonable and just.

JURY DEMAND

Plaintiff and Class Members hereby demand a trial by jury.

DOCUMENT PRESERVATION DEMAND

Plaintiff demands that Defendants take affirmative steps to preserve all records, lists, electronic databases or other itemization associated with e-mails alleged herein.

Date: December 3, 2019

Respectfully submitted,

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