

1 SEAN REIS (SBN 184004)  
sreis@edelson.com  
2 EDELSON MCGUIRE, LLP  
30021 Tomas Street, Suite 300  
3 Rancho Santa Margarita, California 92688  
T: (949) 459-2124  
4 F: (949) 459-2123

5 JAY EDELSON (admitted *pro hac vice*)  
jedelson@edelson.com  
6 MICHAEL J. McMORROW  
7 mjmcorrow@edelson.com  
EDELSON MCGUIRE, LLC  
8 350 North LaSalle Street, Suite 1300  
Chicago, Illinois 60654  
9 T: (312) 589-6370  
10 F: (312) 589-6378

11 **UNITED STATES DISTRICT COURT**  
12 **SOUTHERN DISTRICT OF CALIFORNIA**  
13 **SAN DIEGO DIVISION**

14 IN RE: JIFFY LUBE INTERNATIONAL,  
15 INC., TEXT SPAM LITIGATION

Case No. 3:11-md-02261-JM -JMA

MDL No. 2261

Honorable Jeffrey T. Miller

**MASTER CONSOLIDATED CLASS  
ACTION COMPLAINT FOR  
DAMAGES AND INJUNCTION**



1 with costs and reasonable attorneys' fees.

2 **PARTIES**

3 5. Plaintiff Rene Heuscher is, and all times mentioned herein was, an individual  
4 citizen and resident of the State of Washington.

5 6. Plaintiff Lawrence Cushnie is, and all times mentioned herein was, an individual  
6 citizen and resident of the State of Washington.

7 7. Plaintiff Joseph Crowl is, and all times mentioned herein was, an individual  
8 citizen and resident of the State of California.

9 8. Plaintiff Dawn Souder is, and all times mentioned herein was, an individual  
10 citizen and resident of the State of California.

11 9. Plaintiff Tramy Duong is, and all times mentioned herein was, an individual  
12 citizen and resident of the State of California.

13 10. Plaintiff Ed Koeller is, is, and all times mentioned herein was, an individual  
14 citizen and resident of the State of Missouri.

15 11. Defendant Heartland Automotive Service is a Minnesota corporation that  
16 maintains its principal place of business at 11308 Davenport Street, Omaha, Nebraska 68154.  
17 Heartland operates approximately 435 Jiffy Lube locations throughout the United States,  
18 including in California and this District. Heartland is, and all times mentioned herein was, a  
19 "person(s)" as defined by 47 U.S.C. §153 (32).

20 12. Defendant TextMarks is a California corporation that maintains its principal place  
21 of business at 2235 Octavia Street, San Francisco, California 94109. It does business throughout  
22 the United States, including in California and this District. TextMarks is, and all times mentioned  
23 herein was, a "person(s)" as defined by 47 U.S.C. §153 (32).

24 **JURISDICTION & VENUE**

25 13. As to those actions that originated in this District, the Court has subject matter  
26 jurisdiction pursuant to 28 U.S.C. § 1332 (d), because (a) at least one member of the putative  
27 class is a citizen of a state different from each Defendant, (b) the amount in controversy exceeds  
28 \$5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection

1 apply to this action. As to those actions that the Judicial Panel on Multidistrict Litigation  
2 (“JPML”) transferred to this Court, this Court’s jurisdiction is invoked pursuant to 28 U.S.C. §§  
3 1332, 1367, and 1407.

4 14. This Court has personal jurisdiction over the Defendants under Cal. Code Civ.  
5 Proc. § 410.10 because certain of the acts alleged herein were committed in California and  
6 because the defendants do business in California.

7 15. As to those actions originally filed in state courts contained within this District,  
8 venue properly lies in this District pursuant to 28 U.S.C. § 1391 and 1441(a), because a  
9 substantial part of the events or omissions giving rise to such claims occurred in this District,  
10 Defendants transact a substantial amount of business in this District, and/or Defendants  
11 otherwise have sufficient contacts with this District to justify them being fairly brought into court  
12 in this District. As to those actions transferred to this District by the JPML, venue properly lies in  
13 this District pursuant to 28 U.S.C. §§ 1391 and 1407.

#### 14 **COMMON ALLEGATIONS OF FACT**

15 16. In recent years, marketers who have often felt stymied by federal laws limiting  
16 solicitation by telephone, facsimile machine, and e-mail have increasingly looked to alternative  
17 technologies through which to send bulk solicitations cheaply.

18 17. One of the newest types of such bulk marketing is to advertise through Short  
19 Message Services. The term “Short Message Service” or “SMS” is a messaging system that  
20 allows cellular telephone subscribers to use their cellular telephones to send and receive short  
21 text messages, usually limited to 160 characters.

22 18. An “SMS message” is a text message call directed to a wireless device through  
23 the use of the telephone number assigned to the device. When an SMS message call is  
24 successfully made, the recipient’s cell phone rings, alerting him or her that a call is being  
25 received. As cellular telephones are inherently mobile and are frequently carried on their  
26 owner’s person, calls to cellular telephones, including SMS messages, may be received by the  
27 called party virtually anywhere worldwide.

28 19. Unlike more conventional advertisements, wireless spam actually costs its

1 recipients money, because cell phone users must frequently pay their wireless service providers  
2 either for each text message call they receive or incur an usage allocation deduction to their text  
3 plan, regardless of whether or not the message is authorized.

4 20. Over the course of an extended period beginning in 2011, Defendants and their  
5 agents directed the mass transmission of wireless spam to the cell phones nationwide of what  
6 they hoped were potential customers of Defendants Heartland's "Signature Oil Change" service.

7 21. For instance, on or about April 22, 2011, Plaintiff Heuscher's cell phone rang,  
8 indicating that a text call was being received.

9 22. The "from" field of such transmission was identified cryptically as "72345,"  
10 which is an abbreviated telephone number known as an SMS short code licensed and operated by  
11 TextMarks and its agents. The body of such text message read:

12 JIFFY LUBE CUSTOMERS 1 TIME OFFER:  
13 REPLY Y TO JOIN OUR ECLUB FOR 45% OFF A  
14 SIGNATURE SERVICE OIL CHANGE! STOP TO UNSUB  
15 MSG&DATA RATES MAY APPLY T&C: JIFFYTOS.COM

16 23. On or about April 22, 2011, Plaintiffs Crawl, Cushnie, Duong, Souder, and  
17 Koeller also each received a text message advertisement from Defendants substantially identical  
18 to the aforementioned.

19 24. Defendants' use of an SMS short code enabled Defendants' mass transmission of  
20 wireless spam to a list of cellular telephone numbers.

21 25. At no time did Plaintiffs Huescher, Crawl, Cushnie, Duong, Souder, or Koeller  
22 consent to the receipt of the above-referenced message or any other such wireless spam text  
23 messages from Defendants.

#### 24 CLASS ACTION ALLEGATIONS

25 26. Plaintiffs bring this action pursuant to Federal Rule of Civil Procedure 23(b)(2)  
26 and Rule 23(b)(3) on behalf of themselves and a class (the "Class") defined as follows:

27 All persons in the United States and its Territories who received one or more  
28 unauthorized text message advertisements sent on behalf of Heartland.

1           27. Defendants and their employees or agents are excluded from the Class.

2           28. Plaintiffs, on information and belief, allege that the Class members number in the  
3 thousands, such that joinder of all members is impracticable.

4           29. Plaintiffs will fairly and adequately represent and protect the interests of the other  
5 members of the Class. Plaintiffs have retained counsel with substantial experience in  
6 prosecuting complex litigation and class actions. Plaintiffs and their counsel are committed to  
7 vigorously prosecuting this action on behalf of the members of the Class, and have the financial  
8 resources to do so. No Plaintiff, nor their counsel, has any interest adverse to those of the other  
9 members of the Class or each other.

10           30. Absent a class action, most members of the Class would find the cost of litigating  
11 their claims to be prohibitive, and will have no effective remedy. The class treatment of  
12 common questions of law and fact is also superior to multiple individual actions or piecemeal  
13 litigation in that it conserves the resources of the courts and the litigants, and promotes  
14 consistency and efficiency of adjudication.

15           31. Defendants have acted and failed to act on grounds generally applicable to the  
16 Plaintiffs and the other members of the Class in transmitting the wireless spam at issue, requiring  
17 the Court's imposition of uniform relief to ensure compatible standards of conduct toward the  
18 members of the Class.

19           32. The factual and legal bases of Defendants' liability to Plaintiffs and to the other  
20 members of the Class are the same, resulting in injury to Plaintiffs and to all of the other  
21 members of the Class as a result of the transmission of the wireless spam alleged herein.  
22 Plaintiffs and the other Class members have all suffered harm and damages as a result of  
23 Defendants' unlawful and wrongful conduct as a result of the transmission of the wireless spam.

24           33. There are many questions of law and fact common to the claims of Plaintiffs and  
25 the other members of the Class, and those questions predominate over any questions that may  
26 affect individual members of the Class. Common questions for the Class include but are not  
27 limited to the following:

28           (a) Does the wireless spam Defendants distributed violate 47 U.S.C. § 227?

1 (b) Are the Class members entitled to treble damages based on the willfulness  
of Defendants' conduct?

2 (c) Did the conduct described above violate the Class's right to privacy?  
3

4 **FIRST CLAIM FOR RELIEF**  
**(Violation of 47 U.S.C. § 227: On behalf of the Class)**

5 34. Plaintiffs incorporate by reference the foregoing allegations as if fully set forth  
6 herein.

7 35. Defendants made unsolicited commercial text calls, including the messages  
8 referenced in paragraphs 22-23, to the wireless telephone numbers of the Plaintiffs and the Class.  
9 Each such text message call was made using equipment that, upon information and belief, had  
10 the capacity to store or produce telephone numbers to be called, using a random or sequential  
11 number generator. By using such equipment, Defendants were able to effectively send thousands  
12 of text messages simultaneously to lists of thousands of wireless phone numbers of consumers  
13 without human intervention.

14 36. These text calls were made *en masse* through the use of a short code and without  
15 the prior express consent of the Plaintiffs and the other members of the Class to receive such  
16 wireless spam.

17 37. Defendants have, therefore, violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result of  
18 Defendants' conduct, the members of the Class suffered actual damages by having to pay their  
19 respective wireless carriers for the text messages and, under section 227(b)(3)(B), are each  
20 entitled to, *inter alia*, a minimum of \$500.00 in damages for each violation of such act, and an  
21 injunction to prevent further violations.

22 38. Because Defendants had knowledge that Plaintiffs and the Class did not consent  
23 to the receipt of the aforementioned wireless spam, the Court should, pursuant to section 47  
24 U.S.C. § 227(b)(3)(C), treble the amount of statutory damages recoverable by the Plaintiffs and  
25 the other members of the Class.  
26

27 WHEREFORE, Plaintiffs Rene Heuscher, Joseph Crowl, Lawrence Cushnie, Tramy  
28 Duong, Dawn Souder, and Ed Koeller, on behalf of themselves and the Class, pray for the

1 following relief:

- 2 1. An order certifying the Class as defined above;
- 3 2. An award of actual and statutory damages;
- 4 3. An injunction requiring Defendants to cease all wireless spam activities;
- 5 4. An award of reasonable attorneys' fees and costs; and
- 6 5. Such further and other relief the Court deems reasonable and just.

7  
8 **JURY DEMAND**

9 Plaintiffs request trial by jury of all claims that can be so tried.

10 Respectfully submitted,

11  
12 Dated: September 23, 2011

**RENE HEUSCHER**, individually and on behalf of  
all others similarly situated,

13  
14 By: /s/ Michael J. McMorrow  
One of Plaintiff's Attorneys

15  
16 (signatures of additional Plaintiffs'  
Counsel appear on following page)

17  
18 SEAN P. REIS (sreis@edelson.com) - SBN 184044  
EDELSON MCGUIRE, LLP  
19 30021 Tomas Street, Suite 300  
Rancho Santa Margarita, California 92688  
20 Telephone: (949) 459-2124  
Fax: (949) 459-2123

21 JAY EDELSON (jedelson@edelson.com)  
22 MICHAEL J. MCMORROW (mjcmorrow@edelson.com)  
EDELSON MCGUIRE, LLC  
23 350 North LaSalle Street, Suite 1300  
Chicago, Illinois 60654  
24 Telephone: (312) 589-6370  
Fax: (312) 589-6378

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

By: /s/ Douglas J. Campion

Douglas J. Campion  
Law Offices of Douglas J. Campion  
409 Camino Del Rio South  
Suite 303  
San Diego, CA 92108  
(619) 299-2091 (phone)  
(619) 858-0034 (fax)

*Attorney for Joseph Crowl*

By: /s/ Richard E. Grey

Richard E. Grey  
GREY LAW GROUP  
409 Camino Del Rio South  
Suite 303  
San Diego, CA 92108  
(619) 543-9300 (phone)  
(619) 543-9307 (fax)

*Attorney for Dawn Souder*

By: /s/ Daniel R. Forde

Daniel R. Forde  
HOFFMAN & FORDE, ATTYS AT LAW  
3033 Fifth Ave.  
Suite 225  
San Diego, CA 92103  
(619) 546-7880 (phone)  
(619) 546-7881 (fax)

*Attorney for Tramy Duong*

By: /s/ Joshua B. Swigart

Joshua B. Swigart  
Robert L. Hyde  
HYDE & SWIGART  
411 Camino Del Rio South  
Suite 301  
San Diego, CA 92108  
(619) 233-7770 (phone)  
(619) 297-1022 (fax)

*Attorneys for Joseph Crowl*

By: /s/ Clifford A. Cantor

Clifford A. Cantor  
LAW OFFICES OF CLIFFORD A.  
CANTOR, P.C.  
627 208<sup>th</sup> Ave., SE  
Sammamish, WA 98074  
(425) 868-7813 (phone)  
(425) 868-7870 (fax)

*Attorney for Lawrence Cushnie*

By: /s/ Jordan L. Lurie

Jordan L. Lurie  
WEISS & LURIE  
10940 Wilshire Blvd.  
Los Angeles, CA 90024  
(310) 208-2800 (phone)  
(310) 209-2348 (fax)

*Attorney for Edward Koeller*

**CERTIFICATE OF SERVICE**

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

I, Michael J. McMorrow, an attorney, certify that on September 23, 2011, I served the above and foregoing Master Consolidated Class Action Complaint by causing true and accurate copies of such paper to be filed and transmitted to the persons registered to receive such notice via the Court's CM/ECF electronic filing system.

/s/ Michael J. McMorrow