

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-23352-Civ-COOKE/TORRES

RAY MOHAMED, individually and
on behalf of all others similarly situated,

Plaintiffs,

vs.

AMERICAN MOTOR COMPANY, LLC,
a Florida limited liability company doing
business as instantcaroffer.com doing
business as ICO and OFF LEASE ONLY,
INC., a Florida corporation,

Defendants.

**ORDER PARTIALLY ADOPTING MAGISTRATE'S REPORT AND
RECOMMENDATION ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

THIS MATTER was referred to the Honorable Edwin G. Torres, United States Magistrate Judge, pursuant to 28 U.S.C. §636(b)(1)(B), for a Report and Recommendation on Plaintiff's Motion for Class Certification ("Report") (ECF No. 213). On May 24, 2017, Judge Torres held an evidentiary hearing on the Motion. On June 8, 2017, he issued a Report and Recommendation (ECF No. 279). The Parties each filed their objections to the Report and Recommendation on June 22, 2017, and subsequently filed responses to each others' objections on July 6, 2017. I have considered Judge Torres' Report, the Parties' objections and responses to objections, and made a *de novo* review of the record. I find Judge Torres' Report clear, cogent, and compelling.

Therefore, Judge Torres' Report (ECF No. 279) is **AFFIRMED and ADOPTED *in part***. I only differ with Judge Torres' well-reasoned Recommendation as discussed below. In light of the Parties' objections and responses, the certified class shall be defined as follows:

All subscribers within the United States (i) who received a text message (ii) on his or her cellular telephone (iii) from InstantCarOffer.com, on behalf of Off Lease Only, Inc., (iv) through the use of the Twilio platform (v) after placing an advertisement on craigslist.org in connection with the sale of a vehicle (vi)

for a period of four (4) years prior to the filing of the initial Complaint – September 4, 2011 – to the date of class certification.

I find that narrowing the proposed class to individuals who posted their information on Craigslist.org (“Craigslist”) is a reasonable narrowing based on Plaintiff’s claims in his Amended Complaint (ECF No. 20) and the evidence in the record. As stated in Judge Torres’ Recommendation, “[t]he class proposed by Plaintiff contains no limitations as to the means in which ICO allegedly obtained the telephone numbers that resulted in the messages that allegedly violated the TCPA . . . and could include individuals that received texts from ICO after their numbers were obtained through other means. The record does not support inclusion of any such class members, and even if it did, we would have grave doubts as to Plaintiff’s typicality with these additional class members.” ECF No. 279, p. 10. I agree. However, I have expanded the class somewhat to allow for Plaintiff’s allegations that the texts allegedly sent on behalf of Defendant constitute telemarketing, which would require Defendant to have had prior express *written* consent rather than prior express consent in advance of sending any autodialed text messages, rendering the content of a Craigslist ad relatively immaterial. As both Plaintiff and Defendant admit, the issue of prior express written consent can be decided easily on a classwide basis. Should the finder of fact ultimately find that Defendant’s text messages did not constitute telemarketing, the issue of prior express consent remains and can still be resolved without resorting to mini-trials.

Regarding Plaintiff’s claim that including “through the use of an automatic telephonic dialing system” makes notice to the class “impossible” because Plaintiff could not notify the class until a merits issue had been resolved (a rather hyperbolic claim), the concern is easily resolved by substituting “the Twilio platform” for “an automatic telephonic dialing system.” It has been demonstrated on the record that the only dialing platform at issue in this case is Twilio, and the issue of whether Twilio constitutes an automatic telephonic dialing system as defined by the Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(1), is an issue to be resolved on a classwide basis.

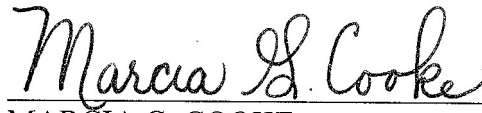
In all other respects, Judge Torres’ Report and Recommendation is adopted.

Accordingly, it is **ORDERED and ADJUDGED** as follows:

1. Plaintiff’s Motion for Class Certification (ECF No. 213) is **GRANTED in part**, in accordance with and as outlined above and in Judge Torres’ Report and

Recommendation (ECF No. 279).

DONE and ORDERED in Chambers, at Miami, Florida, this 12th day of July 2017.

A handwritten signature in black ink that reads "Marcia G. Cooke". The signature is written in a cursive style with a horizontal line underneath it.

MARCIA G. COOKE
United States District Judge

Copies furnished to:

Edwin G. Torres, U.S. Magistrate Judge

Counsel of record