

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

Phil Hollingsworth and Steve Yankee, *on their
own behalf and on behalf of all others similarly
situated,*

Plaintiffs,

v.

Jackson Hewitt Inc.; American Express
Company; Restaurant.com, Inc.,

Defendants.

Civil Action No.: 16-CV-50059

**FIRST AMENDED CLASS ACTION
COMPLAINT**

For this First Amended Class Action Complaint, Plaintiffs Phil Hollingsworth and Steve Yankee, by and through undersigned counsel, pleading on their behalf and on behalf of all others similarly situated, state as follows:

INTRODUCTION

1. Plaintiff Phil Hollingsworth (“Hollingsworth”) brings this class action for damages resulting from the illegal actions of Jackson Hewitt Inc. (“Jackson Hewitt”), American Express Company (“American Express”) and Restaurant.com, Inc. (“Restaurant.com,” and together with Jackson Hewitt and American Express, “Defendants”). Plaintiff Steve Yankee (“Yankee” and with Hollingsworth the “Plaintiffs”) joins this action with Hollingsworth for damages resulting from the illegal actions of Jackson Hewitt Inc.

2. Defendants sent unauthorized text messages to Hollingsworth’s cellular phone in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. (the “TCPA”). Jackson Hewitt sent unauthorized text messages to both Plaintiffs’ cellular telephones in violation of the TCPA.

3. Wireless spam is a growing problem in the United States. In April 2012, the Pew Research Center found that 69% of texters reported receiving unwanted spam text messages, while 25% reported receiving spam texts weekly. <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (last visited February 9, 2016); *see also* Nicole Perlroth, Spam Invades a Last Refuge, the Cellphone, N.Y. Times, April 8, 2012, at A1 (“In the United States, consumers received roughly 4.5 billion spam texts [in 2011], more than double the 2.2 billion received in 2009 . . .”).

4. Jackson Hewitt is one of the nation’s largest providers of tax-preparation services.

5. American Express is one of the nation’s largest credit card companies.

6. Restaurant.com is an internet-based restaurant marketing and promotional company.

7. In a combined effort to market and advertise their respective products and services, Defendants jointly sent automated text messages to consumers marketing Jackson Hewitt’s tax-preparation services in conjunction with the American Express Serve® card and coupons and membership at Restaurant.com. As part of this text messaging campaign, Defendants sent Hollingsworth and other consumers automated telemarketing text messages without obtaining clear and conspicuous prior express written consent as required by the TCPA.

8. Defendants devised, created and approved this joint text messaging campaign.

9. Defendants did not provide consumers clear and conspicuous disclosure of the consequence of providing Jackson Hewitt their phone number, *i.e.* that the consumer agrees unambiguously to receive automated texts messages from or on behalf of Defendants.

10. Moreover, Defendants wholly disregard consumers’ requests for Defendants’ text messages to stop. Indeed, Defendants continues to send consumers their text messages even

after consumers text “STOP” as instructed in Defendants’ text messages.

11. The telemarketing messages were sent to consumers’ cell phones by or on behalf of Defendants using a fully automated system. The messages were unauthorized and not sent for emergency purposes. Accordingly, Defendants’ messages violated the TCPA.

JURISDICTION AND VENUE

12. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331. *Mims v. Arrow Fin. Serv., LLC*, 132 S. Ct. 740, 751-53 (2012).

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391, because Plaintiff Hollingsworth resides in this District and a substantial part of the events giving rise to the claim occurred in this District.

PARTIES

14. Hollingsworth is, and at all times mentioned herein was, an adult individual residing in Marengo, Illinois, and is a “person” as defined by 47 U.S.C. § 153(39).

15. Yankee is, and at all times mentioned herein was, an adult individual residing in East Lansing, Michigan, and is a “person” as defined by 47 U.S.C. § 153(39).

16. Jackson Hewitt is a New Jersey business entity with an address of 3 Sylvan Way, Parsippany, New Jersey, and is a “person” as defined by 47 U.S.C. § 153(39).

17. American Express is a New York business entity with an address of 200 Vesey Street, New York, New York, and is a “person” as defined by 47 U.S.C. § 153(39).

18. Restaurant.com is a Delaware business entity with an address of 160 Greentree Drive, Suite 101, Dover, Delaware, and is a “person” as defined by 47 U.S.C. § 153(39).

THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

19. The TCPA regulates, among other things, the use of automated telephone dialing

systems (“ATDS”).

20. Specifically, 47 U.S.C. § 227(1)(A)(iii) prohibits any call using an ATDS to a cellular phone without prior express consent by the person being called, unless the call is for emergency purposes.

21. 47 U.S.C. § 227(a)(1) defines an ATDS as equipment having the capacity–

- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
- (B) to dial such numbers.

22. “Prior express written consent” is required before making automated telemarketing calls, meaning there must be a written agreement, signed by the person receiving the call or text, with a “clear and conspicuous disclosure” that specifically authorizes the seller to send telemarketing communications using an automatic telephone dialing system or an artificial or prerecorded voice. 47 C.F.R. § 64.1200.

23. The FCC has clarified that text messages qualify as “calls” under the TCPA:

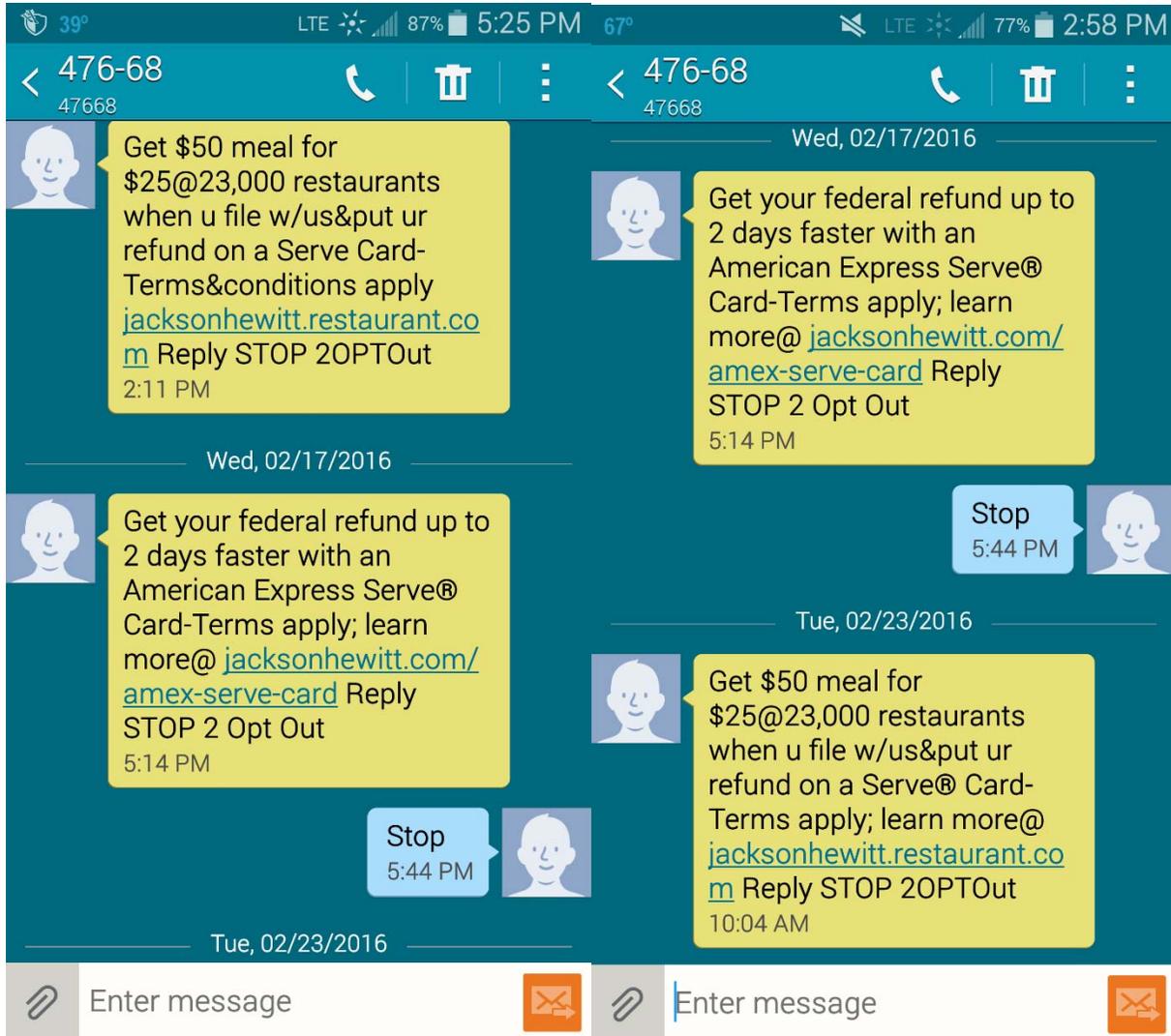
We affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. Both the statute and our rules prohibit these calls, with limited exceptions, “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the party is charged.” This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.

In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd. 14014, 14115 (July 3, 2003); *see Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009).

**ALLEGATIONS APPLICABLE TO HOLLINGSWORTH’S CLAIMS
AGAINST ALL DEFENDANTS**

24. On February 10, 2016, Defendants began sending text messages to

Hollingsworth's cellular telephone number, 262-XXX-4538. True and correct copies of text messages received by Hollingsworth from Defendants are produced below¹:



25. Defendants' text messages to Hollingsworth advertised a promotion wherein Hollingsworth could allegedly receive a coupon to certain restaurants issued by Restaurants.com if he retained Jackson Hewitt to file his income tax return and agreed to accept any income tax return he was entitled to on an American Express "Serve®" credit card.

¹ The images below reflect three text messages. The message sent on February 17, 2016 is duplicated in these two screenshots.

26. Defendants' text messages stated that Hollingsworth could "Reply STOP [to] OPT Out" of the messages. Hollingsworth responded "Stop," yet Defendants proceeded to send Hollingsworth a subsequent unwanted text message despite knowing that they did not have Hollingsworth's consent to do so.

27. Hollingsworth never provided Defendants with his cell phone number or his prior express consent to message his cell phone number with automated text messages.

28. The text messages sent to Hollingsworth's cellular phone by Defendants advertised the availability of Defendants' products and services and thus constitute 'telemarketing.'

29. The text messages received by Hollingsworth were fully automated. The content of the messages received by Hollingsworth was not individualized to Hollingsworth in any way. The exact same text messages were automatically sent to thousands of consumers as a part of the pre-planned telemarketing campaign.

30. The text messages sent to Hollingsworth's cellular phone were made with an ATDS as defined by 47 U.S.C. § 227(a)(1). The ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

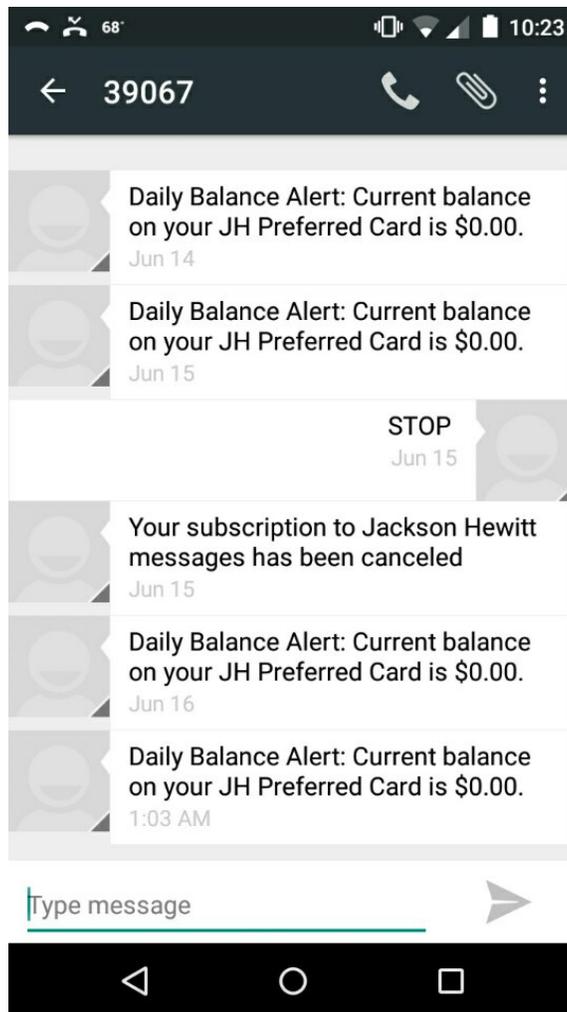
31. The telephone number messaged by Defendants was assigned to a cellular telephone service for which Hollingsworth incurs charges for incoming messages pursuant to 47 U.S.C. § 227(b)(1).

32. The messages from Defendants to Hollingsworth were not placed for "emergency purposes" as defined by 47 U.S.C. § 227(b)(1)(A)(i).

33. Defendants' messages to Hollingsworth, and his inability to stop the same, has caused Hollingsworth frustration, anger and annoyance. They are an invasion of his privacy and in the use and enjoyment of his cellular telephone.

**ALLEGATIONS APPLICABLE TO YANKEE'S CLAIMS
AGAINST ALL JACKSON HEWITT**

34. Yankee has been receiving daily automated text messages from Jackson Hewitt to his cellular telephone number, 231-XXX-1041. True and correct copies of text messages received by Yankee from Jackson Hewitt are produced below²:



² The images below reflect three text messages. The message sent on February 17, 2016 is duplicated in these two screenshots.

35. As shown in the texts above, like Hollingsworth, Yankee texted back “STOP” to make the messages cease but the messages continued.

36. Yankee never provided Jackson Hewitt with his cell phone number or his prior express consent to message his cell phone number with automated text messages. Yankee is not a customer of Jackson Hewitt and he has not asked that it send him text messages.

37. The text messages received by Plaintiff were fully automated. They were part of Jackson Hewitt’s daily automated account notification program. Each day, a program would compile a list of telephone numbers that met preset criteria and then send those numbers the pre-crafted message concerning the account balance.

38. As set forth in the messages, Jackson Hewitt acknowledged receipt of the “STOP” directive (“[y]our subscription to Jackson Hewitt messages has been canceled”) but sent additional message regardless.

39. The text messages sent to Hollingsworth’s cellular phone were made with an ATDS as defined by 47 U.S.C. § 227(a)(1). The ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

40. The telephone number messaged by Jackson Hewitt was assigned to a cellular telephone service for which Yankee incurs charges for incoming messages pursuant to 47 U.S.C. § 227(b)(1).

41. The messages from Jackson Hewitt to Yankee were not placed for “emergency purposes” as defined by 47 U.S.C. § 227(b)(1)(A)(i).

42. Jackson Hewitt’s messages to Yankee, and his inability to stop the same, has caused Yankee frustration, anger and annoyance. They are an invasion of his privacy and in the use and enjoyment of his cellular telephone.

CLASS ACTION ALLEGATIONS

A. The Class

43. Plaintiffs bring this case as a class action pursuant to Fed. R. Civ. P. 23 on behalf of themselves and all others similarly situated.

44. Hollingsworth represents, and is a member of the following classes:

Class 1: All persons within the United States who did not provide Defendants clear and conspicuous prior express written consent to send automated telemarketing text messages and who received one or more automated telemarketing text messages, from or on behalf of Defendants, to said person's cellular telephone, made through the use of any automatic telephone dialing system within four years prior to the filing of the Complaint

Class 2: All persons within the United States who, after notifying Defendants that it no longer wished to receive automated telemarketing text messages received one or more text messages, from or on behalf of Defendants, to said person's cellular telephone, made through the use of any automatic telephone dialing system within four years prior to the filing of the Complaint.

45. Hollingsworth and Yankee represent, and are members of the following class:

Class 3: All persons within the United States who, after notifying Jackson Hewitt that they no longer wished to receive automated text messages received one or more text messages, from or on behalf of Jackson Hewitt, to said person's cellular telephone, made through the use of any automatic telephone dialing system within four years prior to the filing of the Complaint.

46. Defendants and their employees or agents are excluded from the Classes.

Plaintiffs do not know the number of members in the Classes, but believes the class members number in the tens of thousands, if not more. Thus, this matter should be certified as a class action to assist in the expeditious litigation of this matter.

B. Numerosity

47. Upon information and belief, Defendants sent automated telemarketing text messages to cellular telephone numbers belonging to thousands of consumers throughout the

United States without their prior express written consent. The members of the Classes, therefore, are believed to be so numerous that joinder of all members is impracticable.

48. Upon information and belief, Jackson Hewitt sent automated text messages to cellular telephone numbers belonging to thousands of consumers throughout the United States after such consumers told Jackson Hewitt to “STOP.” The members of the Class, therefore, are believed to be so numerous that joinder of all members is impracticable.

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

C. Common Questions of Law and Fact

50. There are questions of law and fact common to the Classes that predominate over any questions affecting only individual Class members. These questions include:

- a. Whether Defendants sent non-emergency text messages to Plaintiffs and Class members’ cellular telephones using an ATDS;
- b. Whether Defendants can meet their burden of showing they obtained prior express written consent to send each message;
- c. Whether Defendants’ conduct was knowing and/or willful;
- d. Whether Defendants are liable for damages, and the amount of such damages; and
- e. Whether Defendants should be enjoined from such conduct in the future.

51. The common questions in this case are capable of having common answers. If Plaintiffs’ claim that Defendants routinely send automated text messages to telephone numbers assigned to cellular telephone services without prior express written consent, or after reviving a stop directive, is accurate, Plaintiffs and the Class members will have identical claims capable of

being efficiently adjudicated and administered in this case.

D. Typicality

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

E. Protecting the Interests of the Class Members

53. Plaintiffs will fairly and adequately protect the interests of the Classes and have retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither Plaintiffs nor their counsel have any interests which might cause them not to vigorously pursue this action.

F. Proceeding via Class Action is Superior and Advisable

54. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of Class members in individually controlling the prosecutions of separate claims against Defendants is small because it is not economically feasible for Class members to bring individual actions.

55. Management of this class action is unlikely to present any difficulties. Several courts have certified classes in TCPA actions. These cases include, but are not limited to: *Mitchem v. Ill. Collection Serv.*, 271 F.R.D. 617 (N.D. Ill. 2011); *Sadowski v. Med1 Online, LLC*, 2008 WL 2224892 (N.D. Ill., May 27, 2008); *CE Design Ltd. V. Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D. Ill. 2009); *Lo v. Oxnard European Motors, LLC*, 2012 WL 1932283 (S.D. Cal., May 29, 2012).

COUNT I
Violations of the Telephone Consumer Protection Act,
47 U.S.C. § 227, et seq., as to All Defendants

56. Hollingsworth repeats and realleges the above paragraphs of this Complaint and

incorporates them herein by reference.

57. Defendants sent multiple automated text messages to cellular numbers belonging to Hollingsworth and the other members of Class 1 and Class 2 without their prior express written consent.

58. Each of the aforementioned messages by Defendants constitutes a violation of the TCPA.

59. Hollingsworth and the Classes are entitled to an award of \$500.00 in statutory damages for each message sent in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B). Hollingsworth and the Classes are entitled to an award of \$1,500.00 in statutory damages for each message sent in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B) willfully or knowingly.

60. Additionally, Hollingsworth and the Classes are entitled to and seek injunctive relief prohibiting such conduct by Defendants in the future.

61. Hollingsworth and the Classes are also entitled to and do seek a declaration that:

- a. Defendants violated the TCPA;
- b. Defendants placed telemarketing text messages;
- c. Defendants placed text messages to the Hollingsworth and the Classes without prior express written consent;
- d. Defendants' conduct was knowing and willful; and
- e. It is Defendants' practice and history to place telemarketing text messages to non-customers without their prior express consent.

COUNT II
Violations of the Telephone Consumer Protection Act,
47 U.S.C. § 227, et seq., as to Jackson Hewitt

62. Yankee repeats and realleges paragraphs 1-55 this Complaint and incorporates them herein by reference.

63. Jackson Hewitt sent multiple automated text messages to cellular numbers belonging to Yankee and the other members of Class 3 after being instructed to “STOP.”

64. Each of the aforementioned messages by Jackson Hewitt constitutes a violation of the TCPA.

65. Yankee and Class 3 are entitled to an award of \$500.00 in statutory damages for each message sent in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B). Yankee and Class 3 are entitled to an award of \$1,500.00 in statutory damages for each message sent in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B) willfully or knowingly.

66. Additionally, Yankee and Class 3 are entitled to and seek injunctive relief prohibiting such conduct by Jackson Hewitt in the future.

67. Yankee and Class 3 are also entitled to and do seek a declaration that:

- a. Jackson Hewitt violated the TCPA;
- b. Jackson Hewitt placed telemarketing text messages;
- c. Jackson Hewitt placed text messages without prior express written consent; and
- d. Jackson Hewitt’s conduct was knowing and willful.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant Plaintiffs and the Classes the following relief against Defendants as follows:

1. Injunctive relief prohibiting such violations of the TCPA by Defendants in the future;

2. Declaratory relief as requested;
3. Statutory damages of \$500.00 for each and every call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B);
4. Treble damages of up to \$1,500.00 for each and every call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(C);
5. An award of attorneys' fees and costs to counsel for Plaintiffs; and
6. Such other relief as the Court deems just and proper.

TRIAL BY JURY DEMANDED ON ALL COUNTS

Dated: July 18, 2016

Respectfully submitted,

By */s/ Stephen Taylor* _____

Stephen Taylor
Sergei Lemberg
LEMBERG LAW, L.L.C.
43 Danbury Road, 3rd Floor
Wilton, CT 06897
Telephone: (203) 653-2250
Facsimile: (203) 653-3424
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this, the 18th day of July, 2016, the foregoing was filed with the Court through the CM/ECF system which sent notice of such filing to the following:

Joseph E. Hopkins
Locke Lord LLP
44 Whippany Road
Morristown, NJ 07960

Martin Wojslaw Jaszczuk
Keith L. Gibson
Locke Lord LLP
111 South Wacker Drive
Chicago, IL 60606

Stephen J. Newman
Stroock & Stroock & Lavan LLP
2029 Century Park East
Los Angeles, CA 90067

Riley C. Mendoza
Shook, Hardy & Bacon LLP
111 S. Wacker Drive
Suite 5100
Chicago, IL 60606

Edward Joseph Underhill
David Joseph Stein
Jiwon Juliana Yhee
Masuda, Funai, Eifert & Mitchell, Ltd.
203 N. LaSalle
Suite 2500
Chicago, IL 60601

/s/ Stephen Taylor _____

Stephen Taylor