

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

WADDELL WILLIAMS, on behalf of himself
and others similarly situated,

CASE NO. 8:17-CV-01971-T-27AAS

Plaintiff,

v.

BLUESTEM BRANDS, INC.,

Defendant.

**DEFENDANT BLUESTEM BRANDS, INC.'S ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF'S CLASS ACTION COMPLAINT**

Defendant Bluestem Brands, Inc. ("Bluestem"), by and through its undersigned counsel, answers Plaintiff's Class Action Complaint ("Complaint") as follows:

Except as expressly admitted or qualified, Bluestem denies each and every allegations of the Complaint.

Nature of this Action

1. Bluestem admits that Plaintiff alleges claims based on the Telephone Consumer Protection Act ("TCPA"). Bluestem denies it violated the TCPA and denies any remaining allegations in Paragraph 1.

2. Bluestem admits that Paragraph 2 accurately quotes a portion of 47 U.S.C. § 227(b)(1)(A)(iii). Bluestem denies it violated the TCPA and denies any remaining allegations in Paragraph 2.

3. Bluestem denies the allegations in Paragraph 3.

Jurisdiction and Venue

4. Bluestem admits that this Court has subject matter jurisdiction but denies that Plaintiff has Article III standing under the United States Constitution. Bluestem denies any remaining allegations in Paragraph 4.

5. Bluestem admits that it does not dispute venue in this District. Bluestem lacks information or knowledge sufficient to form a belief as to the truth of the allegation that Plaintiff resides in this District and therefore denies the allegation. Bluestem denies the remaining allegations in Paragraph 5.

Parties

6. Bluestem admits on information and belief that Plaintiff is a person. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 6 and therefore denies them.

7. Bluestem admits the allegations in Paragraph 7.

8. Bluestem admits the allegations in Paragraph 8.

9. Bluestem admits the allegations in paragraph 9.

10. Bluestem admits that it partners with WebBank to offer credit to consumers to facilitate purchases through Fingerhut. Bluestem denies that it offers credit and denies any remaining allegations in paragraph 10.

11. Bluestem admits the allegations in Paragraph 11.

Factual Allegations

12. Bluestem admits it placed calls to (813) 479-xxxx to reach "Betty Smith." Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 12 and therefore denies them.

13. Bluestem admits it called (813) 479-xxxx on May 26, 2017, July 1, 2017, and July 3, 2017. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 13 and therefore denies them.

14. Bluestem admits it called (813) 479-xxxx on two other dates in May 2017. Bluestem admits that, on occasion, it places calls with technology that meets the Federal Communications Commission's current interpretation of what constitutes an automatic telephone dialing system for purposes of the Telephone Consumer Protection Act. Should the FCC change its interpretation during the pendency of this matter or should the FCC's interpretation be reversed, modified, vacated, or revised by a United States Court of Appeals, Bluestem reserves the right to amend its answer. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 14 and therefore denies them.

15. Bluestem admits that it placed calls to (813) 479-xxxx from (844) 349-8918 and (844) 349-6203, which are used by its Fingerhut brand. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 15 and therefore denies them.

16. Bluestem admits it placed calls to (813) 479-xxxx to reach "Betty Smith." Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 16 and therefore denies them.

17. Bluestem denies the allegations in Paragraph 17.

18. Bluestem denies the allegations in Paragraph 18.

19. Bluestem denies the allegations in Paragraph 19.

20. Bluestem admits that, on occasion, it places calls with technology that meets the Federal Communications Commission's current interpretation of what constitutes an automatic

telephone dialing system for purposes of the Telephone Consumer Protection Act. Should the FCC change its interpretation during the pendency of this matter or should the FCC's interpretation be reversed, modified, vacated, or revised by a United States Court of Appeals, Bluestem reserves the right to amend its answer. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 20 and therefore denies them.

21. Bluestem admits that, on occasion, it places calls with technology that meets the Federal Communications Commission's current interpretation of what constitutes an automatic telephone dialing system for purposes of the Telephone Consumer Protection Act. Should the FCC change its interpretation during the pendency of this matter or should the FCC's interpretation be reversed, modified, vacated, or revised by a United States Court of Appeals, Bluestem reserves the right to amend its answer. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 21 and therefore denies them.

22. Bluestem admits that, on occasion, it places calls with technology that meets the Federal Communications Commission's current interpretation of what constitutes an automatic telephone dialing system for purposes of the Telephone Consumer Protection Act. Should the FCC change its interpretation during the pendency of this matter or should the FCC's interpretation be reversed, modified, vacated, or revised by a United States Court of Appeals, Bluestem reserves the right to amend its answer. Bluestem denies any remaining allegations in Paragraph 22.

23. Bluestem admits that, on occasion, it places calls with technology that meets the Federal Communications Commission's current interpretation of what constitutes an automatic

telephone dialing system for purposes of the Telephone Consumer Protection Act. Should the FCC change its interpretation during the pendency of this matter or should the FCC's interpretation be reversed, modified, vacated, or revised by a United States Court of Appeals, Bluestem reserves the right to amend its answer. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 23 and therefore denies them.

24. Bluestem denies the allegations in Paragraph 24.

25. Bluestem denies the allegations in Paragraph 25.

26. Bluestem denies the allegations in Paragraph 26.

27. Bluestem lacks information or knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 27 and therefore denies them.

28. Bluestem admits that, when it placed calls to make payment arrangements on its customer's past-due WebBank/Fingerhut account, it did not place those calls for emergency purposes. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 28 and therefore denies them.

29. Bluestem admits that it places calls under its own free will. Bluestem denies the calls violated the law. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 29 and therefore denies them.

30. Bluestem admits that, on occasion, it places calls with technology that meets the Federal Communications Commission's current interpretation of what constitutes an automatic telephone dialing system for purposes of the Telephone Consumer Protection Act. Should the FCC change its interpretation during the pendency of this matter or should the FCC's interpretation be reversed, modified, vacated, or revised by a United States Court of Appeals,

Bluestem reserves the right to amend its answer. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 30 and therefore denies them.

31. Bluestem denies the allegations in Paragraph 31.

32. Bluestem denies the allegations in Paragraph 32.

Class Action Allegations

33. Bluestem admits that Plaintiff purports to bring this action on behalf of the class described in Paragraph 33 but denies that Plaintiff is entitled to pursue this action on behalf of the identified class and denies any remaining allegations in Paragraph 33.

34. Bluestem denies the allegations in Paragraph 34.

35. Bluestem denies the allegations in Paragraph 35.

36. Bluestem denies the allegations in Paragraph 36.

37. Bluestem denies the allegations in Paragraph 37.

38. Bluestem denies the allegations in Paragraph 38.

39. Bluestem admits that, on occasion, it places calls with technology that meets the Federal Communications Commission's current interpretation of what constitutes an automatic telephone dialing system for purposes of the Telephone Consumer Protection Act. Should the FCC change its interpretation during the pendency of this matter or should the FCC's interpretation be reversed, modified, vacated, or revised by a United States Court of Appeals, Bluestem reserves the right to amend its answer. Bluestem lacks information and knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 39 and therefore denies them.

40. Bluestem denies the allegations in Paragraph 40.

41. Bluestem denies the allegations in Paragraph 41.
42. Bluestem denies the allegations in Paragraph 42.
43. Bluestem denies the allegations in Paragraph 43.
44. Bluestem denies the allegations in Paragraph 44.
45. Bluestem denies the allegations in Paragraph 45.
46. Bluestem denies the allegations in Paragraph 46, including subparts a. through d.
47. Bluestem denies the allegations in Paragraph 47.

Count I
Violation of 47 U.S.C. § 227(b)(1)(A)(iii)

48. Bluestem incorporates its responses to Paragraphs 1–47 as though set forth herein.
49. Bluestem denies the allegations in Paragraph 49.
50. Bluestem denies the allegations in Paragraph 50. Bluestem further denies that Plaintiff is entitled to the relief requested in the “WHEREFORE” paragraph immediately following Paragraph 50, including subparts a. through e.

Jury Trial Demanded

Bluestem admits only that Plaintiff demands a jury trial.

AFFIRMATIVE DEFENSES

For its affirmative defenses, Defendant Bluestem states the following:

First Affirmative Defense: Consent

1. The Telephone Consumer Protection Act does not prohibit calls made using an automatic telephone dialing system or using an artificial or pre-recorded voice where the called party has given his or her consent.

2. A creditor or debt collector can establish consent by demonstrating that the called party or an agent of the called party provided the cellular telephone number to the creditor or to the debt collector in connection with the particular debt.

3. To the extent that Bluestem has received consent to make calls to the cell phone numbers identified by Plaintiff or the proposed class, whether through customer agreements, written, or verbal statements, or otherwise, the claims are barred.

Second Affirmative Defense: Claims Not Properly Certifiable Under Rule 23

4. Bluestem incorporates the allegations stated in its Affirmative Defenses, paragraphs 1 through 3 as though stated herein.

5. Plaintiff purports to represent a class of individuals allegedly contacted by Bluestem in violation of the Telephone Consumer Protection Act.

6. Plaintiff further claims that common questions of law and fact predominate over questions affecting any individual member of the class.

7. Plaintiff's claims cannot properly be certified under Federal Rule of Civil Procedure 23 because, among other reasons, questions of fact relating to each individual putative class member predominate over the questions relating to the class, including:

- a. Whether each individual was allegedly contacted by Bluestem;
- b. Whether each individual or an agent of that individual provided consent prior to the contact;
- c. Who was the owner or regular user of each cellular telephone number called at the time each call was placed; and

- d. Whether and when Bluestem had actual knowledge that a call did not reach its intended recipient or that a cellular telephone number had changed owner or regular user.

Third Affirmative Defense: Constitutionality of Statutory Damages

8. Bluestem incorporates the allegations stated in its Affirmative Defenses, paragraphs 1 through 7 as though stated herein.

9. The Telephone Consumer Protection Act provides for statutory damages of \$500 to \$1,500 for each violation of the law.

10. When directed at telephone calls, statutory damages under the Telephone Consumer Protection Act could quickly rise to millions of dollars for alleged actions that caused little or no actual damage to Plaintiff or other called individuals and such a calculation would be excessive, improper, and/or unreasonable.

11. Statutory damages would constitute an excessive fine or penalty without the substantive or procedural safeguards guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Fourth Affirmative Defense: Accord and Satisfaction

12. Bluestem incorporates the allegations stated in its Affirmative Defenses, paragraphs 1 through 11 as though stated herein.

13. Bluestem has and will offer amounts to resolve claims brought by some of the individuals Plaintiff seeks to represent.

14. These individuals have accepted or will accept Bluestem's offers and have resolved or will resolve their claims against Bluestem in written confidential settlements.

15. Bluestem has tendered or will tender funds to complete the terms of the settlements.

16. These individuals' claims against Bluestem have been or will be released.

17. Plaintiff cannot represent these individuals.

Fifth Affirmative Defense: Lack of Standing

18. Bluestem incorporates the allegations stated in its Affirmative Defenses, paragraphs 1 through 17 as though stated herein.

19. To establish standing, Plaintiff, and the proposed class, must show a concrete and particularized invasion of a legally protected interest and that he, and the proposed class, are in the zone of interests the TCPA is intended to protect.

20. To the extent Plaintiff and members of the proposed class have not paid money, lost title to goods of value, suffered any other concreted or particularized harm, or is not in the zone of interests protected by the TCPA as a result of the conduct alleged, Plaintiff and members of the proposed class lack standing to bring this suit under Article III of the United States Constitution.

Sixth Affirmative Defense: Reservation of Rights

21. Bluestem incorporates the allegations stated in its Affirmative Defenses, paragraphs 1 through 20 as though stated herein.

22. Bluestem expressly reserves the right to assert other affirmative defenses as may be appropriate as this action proceeds.

WHEREFORE, Bluestem respectfully requests that the Court:

- a. Dismiss all of Plaintiff's claims against Bluestem with prejudice and on the merits;

- b. Deny class certification;
- c. Award Bluestem all costs, disbursements, and reasonable attorney fees allowed by law; and
- d. Grant Bluestem any such further relief to which it may be entitled.

DATED, this 27th day of October, 2017.

/s/ Ailen Cruz

Kimberly A. Koves (FBN: 100282)

kkoves@wiandlaw.com

Ailen Cruz (FBN: 105826)

acruz@wiandlaw.com

WIAND GUERRA KING P.A.

5505 W. Gray Street

Tampa, FL 33609

Phone: (813) 347-5100

Fax: (813) 347-5198

Attorneys for Defendant Bluestem Brands, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 27, 2017, I e-filed this document using the CM/ECF system which will send notification of electronic filing to all counsel of record.

/s/ Ailen Cruz

Ailen Cruz (FBN: 105826)