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Plaintiffs Lawyer Calls 'Gotcha' On Uber

Ross Todd, The Recorder

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SAN FRANCISCO — Uber Technologies Inc. is having trouble keeping its story straight. Or so suggests a "gotcha!" court filing by a plaintiffs attorney suing the company for alleged text-message spamming.

Hassan Zavareei notes that in the spam case, lawyers for Uber say text messages sent to would-be drivers are OK because they constitute recruiting materials. But in litigation over employment benefits in the Northern District, Uber has insisted that it is merely a software company and its drivers are not employees.

"In Uber's eyes, drivers are every bit as much its customers as its passengers," Zavareei states in opposition to Uber's motion to dismiss.

The Washington, D.C.-based lawyer [sued Uber in December](#) under the Telephone Consumer Protection Act (TCPA) on behalf of individuals who say they were bombarded with unsolicited text messages from Uber. The suit, styled as a class action, includes a proposed subclass of plaintiffs who provided their telephone numbers to the company by signing up as drivers on Uber's website.

According to the complaint, some individuals chose not to drive for Uber but subsequently received automated texts encouraging them to "Get on the road ASAP" or "Earn up to \$31/hr on the biggest night of the year." Justin Bartolet of Toledo alleges he received 44 texts from 23 phone numbers, which continued even after he responded "Stop texting this number."

As part of [their motion to dismiss the suit](#), Uber's lawyers at Locke Lord claimed that the text messages to potential drivers were hiring solicitations, which don't constitute telemarketing or advertising under the TCPA. But, as Zavareei was quick to point out, Uber has argued that drivers don't qualify as employees under California's labor laws in unrelated [employment litigation](#) before U.S. District Judge Edward Chen.

"In short, Uber's own admissions in another case in this courthouse establish that Uber was not trying to hire the Class B plaintiffs. It was marketing to them to entice them to license its lead-generation service," he wrote.

Uber's lawyers have accused Zavareei taking the company's litigation positions out of context and improperly invoking them in an unrelated case. In any event, the lawyers argue, Uber has

consistently described its drivers as independent contractors, not customers.

U.S. District Judge Jon Tigar, who is overseeing the TCPA case, seems poised to decide whether to let the case move forward on a separate question. The judge on Tuesday [asked for supplemental briefing](#) on whether class members who never completed their applications to become Uber drivers can be considered to have given consent to be contacted.

Uber's lawyer, Locke Lord's Susan Welde, declined to comment other than to say the company plans to address the concerns laid out in Tuesday's order from Tigar.

Tycko & Zavareei's Zavareei wasn't immediately available for comment.

Contact the reporter at rtodd@alm.com.

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