

## Up in Smoke: TCPA Class Action against Cannabis Delivery Company Wacked on Numerosity Grounds

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Sometimes worlds collide. Indeed, these days, the Controlled Substances Act is not the only federal law that may hound cannabis pioneers. Rather, TCPAWorld continues to butt heads with the growing world of legal cannabis, as demonstrated by the case *Derval v. Xaler*, Case No 2:19-CV-01881-ODW (JEMx), 2020 U.S. Dist. LEXIS 13912 (C.D. Cal. Jan. 28, 2020).

Xaler, the defendant, is a cannabis delivery company in California (what a time to be alive). The plaintiff's complaint contained typical TCPA allegations, including that Xaler was texting its customers pursuant to a "uniform policy" of doing so without its customers' prior express consent. In asserting its class claims, Plaintiff alleged that "the proposed class number[ed] in the thousands." But, in moving to certify the class, what evidence did Plaintiff point to in order to demonstrate that the numerosity element was satisfied? Only that Xaler "has . . . reviews from different [online] customers" and submitted "screenshots of seventy-eight Xaler reviews" from a website devoted to hosting reviews of cannabis companies. Plaintiff argued that these reviews represent the fact that Xaler has many customers, and "at least some of those customers must have received unwanted text messages." Not so, said the court.

According to the court, even assuming Plaintiff's screenshots were proper evidence for the court to consider at certification, the "screenshots" only supported Plaintiff's allegation that Xaler **had seventy-eight customers**. The allegation did not, however, "support that any of those customers received unwanted text messages after revocation," as Plaintiff contended. For this reason, the court determined that Plaintiff failed to satisfy his obligation to demonstrate numerosity because "[e]vidence of **possible** class membership" is not enough. Rather, on certification, the Plaintiff was required to present evidence on "actual numerosity." Certification was denied.

Interesting stuff. As relatively new market participants, cannabis companies face all kinds of regulatory and legal hurdles. It is important that the TCPA does not get lost in that mix.

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