

628 Fed.Appx. 551  
United States Court of Appeals,  
Ninth Circuit.

Paul GANNON, individually and on behalf of all  
others similarly situated, Plaintiff–Appellant,

v.

NETWORK TELEPHONE SERVICES,  
INC., a California corporation; Decade  
Communications, Inc., a California corporation;  
Frontier Credit, Inc., a California corporation;  
American Operator Services, Inc., a California  
corporation; [Joseph Preston](#), individually; Gary  
Passon, individually, Defendants–Appellees.

No. 13–56813.

|  
Argued and Submitted Dec. 10, 2015.

|  
Filed Jan. 12, 2016.

#### Attorneys and Law Firms

[Michael Duane Daudt](#), Daudt Law PLLC, [Beth Ellen Terrell](#),  
Terrell Marshall Daudt & Willie PLLC, Seattle, WA,  
[Gretchen Maria Nelson](#), I, Esquire, Kreindler and Kreidler  
LLP, Los Angeles, CA, for Plaintiff–Appellant.

[Robert H. Platt](#), [Benjamin G. Shatz](#), Manatt, Phelps &  
Phillips, LLP, Los Angeles, CA, for Defendants–Appellees.

Appeal from the United States District Court for the Central  
District of California, [R. Gary Klausner](#), District Judge,  
Presiding.

Before: [PREGERSON](#), [CALLAHAN](#), and [HURWITZ](#),  
Circuit Judges.

#### MEMORANDUM\*

Paul Gannon challenges the district court's denial of class  
certification in his suit under the Telephone Consumer  
Protection Act, 47 U.S.C. § 227. We have jurisdiction of this  
appeal under 28 U.S.C. § 1291 because the parties stipulated  
to dismissal of Gannon's Second Amended Complaint. We  
affirm.

1. [Federal Rule of Civil Procedure 23\(b\)\(3\)](#) provides that  
a class action may be maintained if “questions of law  
or fact common to class members predominate over any  
questions affecting only individual members.” “To meet this  
requirement, the common questions must be a significant  
aspect of the case” that “can be resolved for all members of the  
class in a single adjudication.” [Berger v. Home Depot USA,  
Inc.](#), 741 F.3d 1061, 1068 (9th Cir.2014) (internal quotation  
marks omitted).

2. Gannon's proposed class includes all recipients of  
“unauthorized” text messages from Network Telephone  
Services (“NTS”). The central issue in the case is whether  
the text messages were unauthorized. But, the proposed class  
includes at least the following groups: (a) those, like Gannon,  
who claim to have called an NTS phone line by mistake  
and may have discontinued the call before hearing the “mid-  
amble” that informed the caller of NTS's intent to send future  
text messages; (b) those who heard the mid-amble and did  
not follow its instructions as to how to opt out of receiving  
text messages; and (c) those who called the NTS phone  
line in response to an advertisement that expressly promised  
future text messages. To determine liability, the district court  
would \*552 be required to determine whether under each  
of these different factual scenarios—and undoubtedly others  
—the caller agreed to receive text messages. Given “the  
significance of those uncommon questions,” the district court  
did not abuse its discretion by finding the requirements  
of [Rule 23\(b\)\(3\)](#) unsatisfied. *See Amchem Prods., Inc. v.  
Windsor*, 521 U.S. 591, 624, 117 S.Ct. 2231, 138 L.Ed.2d 689  
(1997).

3. The district court did not abuse its discretion by finding  
that the members of the proposed class were not readily  
ascertainable. *See, e.g., Williams v. Oberon Media, Inc.*,  
468 Fed.Appx. 768, 770 (9th Cir.2012); *In re NJOY, Inc.  
Consumer Class Action Litig.*, 120 F.Supp.3d 1050, 1091–  
92, 2015 WL 4881091, \*23 (C.D.Cal. Aug. 14, 2015).  
The district court appropriately determined that it would be  
extremely difficult to ascertain the identities of the individuals  
who had not consented to receive the messages.

**AFFIRMED.**

**All Citations**

628 Fed.Appx. 551

Footnotes

- \* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

---

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.