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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NICOLE PIMENTAL and JESSICA FRANKLIN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GOOGLE INC., a Delaware corporation, and SLIDE, INC., a Delaware corporation,

Defendants.

This Document Relates to All Actions.

Case No. 11-cv-02585-SBA

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT UNDER FED. R. CIV. P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: February 28, 2012
Time: 1:00 p.m.
Place: Courtroom 1, 4th Floor
Judge: Hon. Saundra Brown Armstrong

NOTICE OF MOTION

TO THE COURT, ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on February 28, 2012, at 1:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 1, 4th Floor of the United States District Courthouse, 1301 Clay Street, Oakland, California, 94612, before the Honorable Saundra Brown Armstrong, Defendants Google Inc. and Slide, Inc. will, and hereby do, move the Court for an order dismissing the Consolidated Class Action Complaint ("Complaint" or "CCAC"). The Motion is made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that (a) the Complaint fails to allege facts sufficient to state a claim under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, upon which relief can be granted; and (b) construing the TCPA to prohibit the Disco SMS messages would violate the First Amendment.

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, any reply memorandum, the pleadings and files in this action, and such other matters as may be presented at or before the hearing.

DATED: October 14, 2011

PERKINS COIE LLP

By: /s/ Bobbie J. Wilson
BOBBIE J. WILSON

Attorneys for Defendants
GOOGLE INC. and SLIDE, INC.

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INTRODUCTION

This lawsuit fails. It fails because Plaintiffs do not plead facts establishing an essential element of their claim under the Telephone Consumer Protection Act ("TCPA") and, in any event, the TCPA cannot be interpreted to reach the communications at issue here without violating the First Amendment.

This case centers on Defendants' Disco service, which provides a platform for its users to send group text messages to their friends and invite potential new users to "disco"; that is, to engage by text message in what has become a popular form of social networking activity. Using the phone numbers that its users provide, Disco sends the initial messages to invitees informing them how to use the service or opt out of the group. That's it. No commercial messages; no telemarketing; no haranguing to use the service. It is these informational text messages sent by Disco that Plaintiffs say violate the TCPA. Not so for at least two reasons.

First, the TCPA requires that a sender use an "automatic telephone dialing system" with the capacity to store or produce telephone numbers to be called, using a random or sequential number generator. But the Complaint fails to sufficiently allege this essential element of the claim. Instead of well-pleaded factual allegations, Plaintiffs use "upon information and belief" to merely recite the statute's automatic dialer definition in the Complaint. In fact, the allegations actually defeat the inference of an automatic dialer because they disclose that the phone numbers to which the subject text messages are sent are supplied directly by Disco users. Plaintiffs therefore have failed to state a claim and the complaint should be dismissed.

Second, Disco's messages are truthful, noncommercial speech sent to invitees of Disco's users so they can participate in the speech of their choosing. An interpretation of the TCPA to encompass Disco's service and the informational messages it sends would result in an unconstitutional restriction on speech in violation of the First Amendment. To avoid that result, the Court should narrowly construe the TCPA to not apply to messages like Disco's at all.

For these reasons, the Court should dismiss the Complaint with prejudice.

SUMMARY OF RELEVANT ALLEGATIONS

A. The Disco Service.

The Complaint alleges that Defendants operate a "group texting service" known as Disco, which enables users of the service to transmit SMS text messages simultaneously to all the members of groups that users—not Defendants—create. CCAC ¶11.[1] To create a Disco group, a user first registers for the service using the Disco website or mobile application ("Disco App"). CCAC ¶14. The group creator then manually enters the mobile phone number of each individual that the group creator wishes to be part of the group. CCAC ¶14. A group creator can add no more than 99 individuals to a Disco group. CCAC ¶14. Once the group members receive an SMS message through Disco, they are then able to send SMS messages directly to everyone else in the group. CCAC ¶¶13, 17.

B. Plaintiffs' Disco Experience.

Plaintiffs allege that, upon the creation of a group by a Disco user, "every member of the group instantly receives several text messages directly by Defendants without the consent of the group leader or the invitee." CCAC ¶21. Plaintiffs each claim to have received such messages. They purport to have first received an SMS message informing them and the other group members of, among other things, the following: (a) that Disco is group texting service; (b) the availability of a free Internet application for the Disco service; (c) how to receive help regarding the service; and (d) how to be removed from a group (*i.e.*, respond to the message by texting "*leave"). CCAC ¶¶22, 25, 30.

After receiving that initial SMS message, Plaintiffs allege they each received another SMS message through the Disco service. CCAC ¶¶27, 32. This message (a) welcomed Plaintiffs to the Disco service; (b) explained that they had been added to a Disco group; (c) identified the group creator; and (d) informed them of how to join the group "chat" and obtain a roster of group members. CCAC ¶¶27, 32. Plaintiffs claim that after receiving these messages, they

[1] As of October 11, 2011, the Disco product has been discontinued by Defendants as part of the wind-down of the Slide products and services. *See* http://www.slide.com/byebye/?app=disco.

unsuccessfully tried to stop receiving further messages from Disco by texting "leave" in response to the messages. CCAC ¶¶28, 33.[2]

Plaintiffs allege that Defendants sent them the foregoing SMS messages "using equipment that, upon information, and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." CCAC ¶50. Based on these allegations, the Complaint asserts a single cause of action for alleged violations the TCPA—specifically, 47 U.S.C. § 227(b)(1)(A)(iii).

ARGUMENT

I. LEGAL STANDARD.

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The allegations must "plausibly suggest[]," and not merely be consistent with, the claimed wrongful conduct. *Id*. at 557. Thus, although the plaintiff's factual allegations are assumed to be true, the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id*. at 555. Courts are "not bound to accept as true a legal conclusion couched as a factual allegation," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. - -, 129 S. Ct. 1937, 1949 (2009).

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF UNDER THE TCPA BECAUSE THEY DO NOT SUFFICIENTLY ALLEGE THAT DEFENDANTS USED AN AUTOMATIC TELEPHONE DIALING SYSTEM.

To prevail on a TCPA claim, a plaintiff must prove that (1) a "call" was made; (2) using an "automatic telephone dialing system"; (3) the number called was assigned to a cellular telephone service; and (4) the "call" was not made with the "prior express consent" of the receiving party. 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1). The statute defines "automatic telephone dialing system" ("ATDS") as "equipment which has the capacity" to both

[2] Plaintiffs' lack of success in this regard may owe to the fact that the correct command for quitting a Disco group is not "leave," but rather "*leave." *See* CCAC ¶¶25, 30.

(1) "store or produce telephone numbers to be called, using a random or sequential number generator"; *and* (2) "dial such numbers." 47 U.S.C. § 227(a)(1).

Here, Plaintiffs' allegations offer no more than "[t]hreadbare recitals of the elements of a cause of action"—precisely what the Supreme Court has ruled is insufficient to state a claim. *Iqbal*, 129 S. Ct. at 1949. Specifically, the Complaint does not contain a single factual allegation from which it is "plausible" that Defendants violated Section 227 by using an ATDS. The lone allegation in the Complaint concerning the equipment used by Defendants is that "Defendants made unsolicited text message calls . . . using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." CCAC ¶50. This naked conclusion merely parrots the statute's language and need not be accepted as true. *Iqbal*, 129 S. Ct. at 1949-50; *Anderson v. Blockbuster, Inc.*, 2010 WL 1797249, at *3 (E.D. Cal. May 4, 2010) (to withstand a motion to dismiss, "[i]t is not enough to simply parrot the statutory language for each purported claim.").

The Complaint contains no factual allegations to support the conclusion that Defendants' equipment has the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator." *See* 47 U.S.C. § 227(a)(1). Nor does the Complaint contain factual allegations that Defendants' equipment has the capacity to "dial such numbers." *See id*. Accordingly, Plaintiffs' TCPA claim must be dismissed for failure to state a claim. *See Knutson v. Reply!, Inc.*, 2011 WL 291076 (S.D. Cal. Jan. 27, 2011) (granting motion to dismiss TCPA claim where complaint's allegations did not permit an inference that defendant used an ATDS).

Further, the allegations in the Complaint defeat, rather than support, any inference of an ATDS. The allegations disclose that the group to which SMS messages are sent is created not by Defendants, but by the Disco users themselves. CCAC ¶¶12-13. Further, Defendants do not generate or supply the telephone numbers to which text messages are sent. Rather, it is the group creator who provides those numbers. CCAC ¶¶14, 19-20. And it is the group creator—not Defendants—who, by creating a group in the first place, sets in motion the SMS messages informing members about the group and the Disco service. CCAC ¶¶14, 21. The SMS messages that are the basis of this lawsuit are sent only upon initiation by a user—*i.e.*, after the user

registers for the Disco service, selects specific individuals to be members of the group, and enters those individuals' telephone numbers. *See* CCAC ¶¶14, 21. There is nothing random or sequential about the choice of recipients of the messages.

Decisions upholding the sufficiency of ATDS allegations are distinguishable from the present case. In those cases, unlike here, the messages were clearly solicitations, were not initiated by a user, were impersonal in nature, and the defendants had no other reason to contact the plaintiffs. *See e.g., Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010); *Kazemi v. Payless Shoesource Inc.*, 2010 WL 963225, at *2 (N.D. Cal. Mar. 15, 2010); and *Abbas v. Selling Source, LLC*, 2009 WL 4884471, at *3 (N.D. Ill. Dec. 14, 2009). The courts found such allegations—taken as a whole—sufficient, at the pleading stage, to draw the inference that an ATDS was used to transmit the messages. *Id.*

Here, in contrast, the Complaint establishes that Disco did not send impersonal messages for marketing purposes. Rather, acting at the behest of the creator of a group, Disco notified group members that Disco is a "group texting service," identified the recipient and group creator by name, explained that the group creator had added the recipient to a particular group, and informed the recipient that s/he was invited to join Disco's group texting service. CCAC ¶¶25, 27, 30, 32. More importantly, none of the cases above involved allegations that the text messages (or calls) were prompted by a user of the service, as is the case here, or that the telephone numbers dialed were actually supplied by such user. For these reasons, the *Kramer*/*Kazemi*/*Abbas* line of cases should not control. Further demonstrating the importance of allegations that go beyond a "formulaic recitation" is the fact that the question of whether SMS technology falls within the definition of an ATDS is still an open issue. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 950-51 (9th Cir. 2009) (remanding case where, among other things, the record disclosed "a genuine issue of material fact whether this telephone system has the requisite capacity to be considered an ATDS under the TCPA.").[3]

[3] The *Satterfield* case settled shortly after remand. *See Satterfield v. Simon & Schuster*, No. 06-cv-2893 (N.D. Cal. 2010), Dkt. 112 and 119.

Failing to sufficiently allege the use of an ATDS is alone sufficient to warrant dismissal. But here, the Complaint also reveals that Disco is fundamentally different from the text messaging in any published TCPA case, which all involved the transmission of bulk advertisements in connection with a promotional campaign. It is undisputed, and Plaintiffs acknowledge, that by enacting the TCPA, Congress intended to stop the harassment of individuals and businesses by "bulk" automated advertising campaigns and was not concerned about individualized, user-created groups and communications:

> In recent years, marketers who have felt stymied by federal laws limiting solicitation by telephone, fax machine, and email have increasingly looked to alternative technologies through which to send bulk messages cheaply.
>
> Bulk text messaging, or SMS marketing, has emerged as a new and direct method of communicating and soliciting consumer business.

CCAC ¶¶8, 9.

Here, by contrast, and as the Complaint itself shows, the Disco service provides a platform for users to engage in group texting and the Disco messages are merely informational and only transmitted based on a user decision. Plaintiffs do not allege that the SMS messages they received were solicitations, advertising, or promotions unrelated to the fact that another user had added them to a Disco group. Accordingly, the allegations in this case demonstrate that the Disco messages are of a substantially different nature than the bulk solicitations that have been at issue in other TCPA text message cases; they do not provide any basis from which an inference can be drawn that these messages are transmitted using an ATDS.

III. CONSTRUING THE TCPA TO PROHIBIT THE DISCO MESSAGES WOULD VIOLATE THE FIRST AMENDMENT.

Putting aside Plaintiffs' pleading deficiencies, an independent basis for dismissal exists: the interpretation of the TCPA advanced by the Complaint—which would prohibit *any* type of SMS message sent with an ATDS, including user-initiated noncommercial messages such as those at issue here (*see*, *e.g.*, CCAC ¶¶25, 27)—would result in an unconstitutional restriction on speech in violation of the First Amendment.

The Court should reject Plaintiffs' invitation to construe the TCPA so broadly as to encompass noncommercial informational messages such as those sent by Disco. "It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 330-31 (1988) (citations omitted).

The Disco messages at issue here are noncommercial, and are the direct result of conscious choice by users who want to create groups comprised of individuals of their own selection, with whom they wish to engage in expressive speech. The legislative history of the TCPA, some of the statute's other provisions, as well as the FCC Regulations and Orders, establish that the TCPA was intended to control abusive commercial solicitations. While that goal is consistent with the First Amendment, extending the TCPA to noncommercial speech is not.

The Disco messages at issue here do not propose a commercial transaction[4] and do not fall within the definitions of solicitation or advertisement under the TCPA and FCC Regulations as described below. Rather, they merely notify a new user that "Disco is a group texting service," that the user can download the app for free, and instruct the user how to participate or not participate in the service. CCAC ¶¶25-30. This information is sent to the recipient only because another user signed up for the service and provided the recipient's mobile phone number.

Unlike the statute's restrictions on calls to homes and fax machines, the portion of the TCPA that has been held to apply to text messages—Section 227 (b)(1)(A)(iii)—is content-neutral and does not distinguish between commercial and noncommercial communications. It makes it unlawful to:

> make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to . . . a cellular telephone service . . .

47 U.S.C. § 227 (b)(1)(A)(iii).

[4] *See Va. St. Bd of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (defining commercial speech as that which does "no more than propose a commercial transaction") (internal quotations and citations omitted).

Where a regulation is "content-neutral," the First Amendment analysis involves whether the regulation, as applied, would amount to an unconstitutional time, place and manner restriction. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Such a regulation must be "narrowly tailored to serve a significant governmental interest and [must] leave open ample alternative channels for communication of that information." *Reed v. Town of Gilbert*, 587 F.3d 966, 979 (9th Cir. 2009) (quoting *Ward*, 491 U.S. at 791). Here, construing the content-neutral ATDS provision narrowly to apply only to commercial messages, and not to the type of user-initiated noncommercial communications at issue here, would advance Congress's goal in enacting the statute, while protecting expressive speech.

A. Legislative History And FCC Regulations And Orders Establish That The Governmental Interest Underlying The TCPA Does Not Support Restrictions On Noncommercial SMS Messages.

The TCPA was enacted to "address a growing number of telephone *marketing* calls and certain *telemarketing practices* thought to be an invasion of consumer privacy and even risk to public safety." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 F.C.C.R. 19215, 2004 WL 2104233 at ¶IIA (Sept. 21, 2004) (emphasis added), Request for Judicial Notice ("RJN") Ex. 1; 47 C.F.R. § 64.1200(f)(10). The restrictions on calls to residential numbers are directed to calls made using artificial or pre-recorded voice which are telephone solicitations; and the restrictions on messages sent to fax machines are directed at unsolicited advertisements. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 F.C.C.R. 14014, 2003 WL 21517853 at ¶¶4, 139-41 (Jul. 3, 2003) ("2003 Report and Order"), RJN Ex. 2.

The terms "telemarketing" and "telephone solicitation" are defined as "the initiation of a telephone call or message **for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services,** which is transmitted to any person . . . ." 47 C.F.R. § 64.1200(f)(10), (12) (emphasis added). Similarly, an "unsolicited advertisement" is "any material advertising the **commercial availability or quality of any property, goods, or services** which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 C.F.R. § 64.1200(f)(13) (emphasis added). Moreover, if the

telemarketer has a "personal relationship" with the recipient, defined as "any family member, friend, or acquaintance of the telemarketer making the call" of the call, the telemarketer will not be liable for violating the restrictions on calls to residential subscribers. 47 C.F.R. § 64.1200(c)(2)(iii); 47 C.F.R. § 64.1200(f)(14).

The informational Disco messages do not fall within these definitions and are therefore, not "commercial" messages. They are not advertising or advocating the purchase of any goods or services—they merely inform the new user how to use the Disco platform. Hence, the Disco messages are not "encouraging the purchase" of any goods or service and are not advertising the "commercial availability . . . of any goods, property, or services"—which are the types of "calls" prohibited by the other provisions of the TCPA.

These definitions reflect Congress's overall focus on the conduct that the TCPA was designed to address. In enacting the TCPA, "Congress was responding to the significant increase in the use of the telephone to market goods and services that had left '[m]any customers . . . outraged over the proliferation of intrusive, nuisance calls to their homes **from telemarketers**.'" *Hovila v. Tween Brands, Inc.*, 2010 WL 1433417, at *9 (W.D. Wash. Apr. 7, 2010) (quoting Congressional Statement of Findings, § 2 of Pub. L. 102-243) (emphasis added). Congress noted the nuisance of rampant telemarketing and the consequent costs of money, time, and the invasion of privacy to consumers. S. Rep. No. 102-178, at 1-2 (1991); H.R. Rep. No. 102-317, at 2 (1991); RJN Ex. 3-4. Further, with respect to fax messages, in passing the TCPA, Congress noted the cost-shifting involved in the sending of unwanted faxes, including the cost and inconvenience of the wasted ink and paper and making the fax machine unavailable for legitimate business messages. S. Rep. No. 102-178 (1991); H.R. Rep. No. 102-317, at 9 (1991). Indeed, "[b]ecause Congress's goal was to prevent the shifting of advertising costs, limiting its regulation to faxes containing advertising was justified." *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54, 56 (9th Cir. 1995).

The TCPA's ATDS provision was designed to address a certain type of telephone solicitation that Congress found to be especially pernicious: automated devices that make a

number of calls that can "tie up" phone lines, including those of hospitals and other emergency services, because the numbers were randomly or sequentially generated and dialed.

This automation was oppressive, seemingly limitless, and imposed social costs. Congress determined that banning the use of automatic telephone dialing systems was necessary because such systems "are programmed to dial sequential blocks of telephone numbers, including those of emergency public organizations and unlisted subscribers":

> Since an [automatic telephone dialing system] can "seize" a recipient's telephone line once a phone connection is made and may not release the line when the recipient hangs up, they can result in intrusive and potentially dangerous use of telecommunications equipment.

H.R. Rep. No. 101-633, at 2 (1990), RJN Ex. 5.

In contrast, SMS messages sent to numbers based on a user providing another user's phone number for the purpose of engaging in group communications do not implicate these concerns. In addressing the rationale for prohibiting only *commercial* fax messages, Congress found that "non-commercial calls . . . are less intrusive to consumers because they are more expected." H.R. Rep. No. 102-317, at 13 (1991). It is for this reason that the statute, FCC Regulations and Orders focus on the commercial aspect of the prohibited conduct—calls with the ultimate goal of selling a good or service.

Congress, in passing the TCPA, and the FCC in implementing it, has recognized the different interests involved as between commercial and noncommercial calls and messages. The FCC has ruled that certain categories of prerecorded messages or calls are not covered by the TCPA ban—these include calls made for "noncommercial" purposes, including those that deliver "informational" messages.[5] *Notice of Proposed Rulemaking In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 25 F.C.C.R. 1501, 2010 WL 276614 at ¶3 (Jan. 22, 2010) ("Jan. 2010 NPRM"), RJN Ex. 6. Similarly, the restriction on sending fax messages only applies to unsolicited advertisements, not

[5] These categories also include calls by or on behalf of tax exempt non-profit organizations and calls made for political purposes. Jan. 2010 NPRM at ¶3.

noncommercial fax messages.[6] *Holmes v. Back Doctors, Ltd.*, 2009 WL 3425961, at *4 (S.D. Ill. Oct. 21, 2009) (holding that fax from chiropractic practice to personal injury law firm was "noncommercial" where it contained mostly "bona fide medical information," even though one seventh of the space in the fax was advertising, and stating that Congress "intended non-commercial fax messages to fall outside the ban [of the TCPA])." In *Holmes*, the court further noted that "it is not the purpose of the TCPA to prohibit all fax communications between businesses, and indeed Congress could not prohibit all such communications without violating the First Amendment." *Id.*

The statutory prohibition on "calls" to cellular numbers is the only restriction that does not on its face distinguish between commercial calls and noncommercial communications. Thus, where SMS messages are concerned, "informational" SMS messages to cellular telephones are prohibited, but "informational" robocalls to a residential number are not. This anomalous result supports an interpretation of the TCPA as permitting the informational Disco SMS messages sent as the result of the conscious selection of group members by a user.

If the statute as applied prohibits this type of speech, it would be unconstitutional as there is no significant government interest that is served in treating the SMS messages differently from the residential calls or fax messages, and prohibiting expressive, noncommercial communications among individuals who know each other.[7] A narrow construction of the statute to allow noncommercial, informational SMS messages (as it does for residential calls and faxes), serves the dual purpose of preserving the statute and while vindicating its goal of controlling intrusive

[6] The TCPA permits unsolicited fax advertisements where there is an established business relationship or the number was obtained in certain enumerated ways. 47 U.S.C. § 227(b)(1)(C).

[7] First Amendment constitutional challenges have been raised in TCPA cases involving SMS messages in other jurisdictions. *See, e.g.*, *Abbas*, 2009 WL 4884471, *7-9; *Lozano v. Twentieth Century Fox*, 702 F. Supp. 2d 999, 1011-12 (N.D. Ill. 2010). But those cases are distinguishable, as they did not confront the First Amendment issue raised here. *Abbas*, for example, addressed whether the TCPA was unconstitutional because SMS technology did not exist at the time the statute was enacted and therefore was not considered by Congress. 2009 WL 4884471, at *7-9. In *Lozano*, the defendant unsuccessfully argued that the TCPA was unconstitutionally overbroad because it prohibits use of equipment with the "capacity" to be an autodialer without requiring that calls actually be made through autodialing. 702 F. Supp. 2d at 1011-12.

and burdensome commercial speech. As such, the TCPA is inapplicable here and the complaint fails to state a claim and should be dismissed.

B. If The TCPA Reaches Noncommercial Text Messages, It Is Not Narrowly Tailored To Serve A Significant Government Interest.

As reflected in the legislative history and the FCC Regulations and Orders, the significant government interest that the statute and subsequent implementing rules were designed to address involved unwanted advertising and solicitation calls that "tied up" phone lines or made the phone or fax machines unusable, or shifted advertising costs to the recipients—not informational SMS messages initiated by users.[8] None of Congress's concerns apply to SMS messages—particularly noncommercial, informational messages.

It is well settled that a "narrowly tailored time, place or manner restriction on speech is one that does not 'burden substantially more speech than is necessary' to achieve a substantial government interest." *Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) (quoting *Ward*, 491 U.S. at 799). Additionally, the restriction must be targeted and eliminate "'no more than the exact source of the 'evil' it seeks to remedy.'" *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474 (1988)). *Accord, Reed*, 587 F.3d at 979.

If noncommercial speech communicated via an ATDS is entirely foreclosed absent prior express consent, the means *are* substantially broader than necessary to achieve the government's interest of preventing the nuisance of telemarketing calls. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 726 (2000). At least one court has held that the TCPA prohibitions do not apply to *any* noncommercial messages. *Ashland Hospital Corp. v. International Brotherhood of Electrical Workers Local 575*, 2011 WL 2938151, at *8 (E.D. Ky. July 19, 2011) ("The reach of the TCPA is narrowly confined, then, to the perils of automated and prerecorded calls. The possible 'nuisance' of noncommercial calls is not protected."). Further, it is axiomatic that noncommercial speech is accorded a greater degree of protection than commercial speech.

[8] Indeed, the situation here is more akin to the situation where a telemarketing call is made to someone with a "personal relationship" to the telemarketer, which under the Rules is not subject to the same restrictions if made to a residential subscriber.

Metromedia v. City of San Diego, 453 U.S. 490, 513 (1981). In fact, "[r]egulations valid as to commercial speech may be unconstitutional as to noncommercial." *Reed,* 587 F.3d at 981. (citation omitted). To avoid this result, the Court should narrowly construe this provision as not prohibiting the protected speech at issue here.

In this case, the challenge to the ATDS provisions in the TCPA is an "as-applied attack." *Hoye v. City of Oakland,* 2011 WL 3198233, at *17 (9th Cir. July 28, 2011) ("A paradigmatic as-applied attack…challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance, under the assumption that a court can 'separate valid from invalid subrules or applications." [citations omitted]). Further, "[a]n as applied First Amendment challenge contends that a given statute or regulation is unconstitutional as it has been applied to a litigant's particular speech activity." *Legal Aid Services of Oregon v. Legal Services Corp.,* 608 F.3d 1084, 1096 (9th Cir. 2010) (citing *Members of City Council of City of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 802-03 (1984)). Here, the as-applied challenge attacks the application of the statutory provision to the specific factual circumstance of the Disco SMS messages which are not the types of "calls" or messages the statute was enacted to prohibit. Thus, this motion does not seek an order establishing the TCPA is unconstitutional. It asks the Court, instead, to interpret the TCPA so as to avoid sweeping the noncommercial free speech activities at issue here into the purview of the statute.

The Disco messages—unlike the unwanted telemarketing robocalls to a residential number, unsolicited faxes, and unwanted (randomly or sequentially) autodialed calls—do not interfere with a user's ability to use the phone. These messages do not implicate the same concerns that the TCPA was enacted to address. The Disco messages are noncommercial, informational messages which simply inform the user, whose number was provided by another user, how the user can participate in group texting using the free Disco platform. If the TCPA is applied to ban such messages, it is not narrowly tailored and would be an unconstitutional restriction on speech—indeed it would prohibit willing friends and family from effectively participating in the Disco group messaging platform (if the friend or family member did not first

obtain explicit consent). However, a narrow reading of this statute would allow for this type of protected speech.

C. The TCPA's Application To The Disco SMS Messages Will Not Leave Open Ample Alternative Channels Of Communication.

As noted, to withstand constitutional scrutiny, a content neutral regulation must "leave open ample alternative channels of communication" of the information. *Reed*, 587 F.3d at 979. Given the proliferation of mobile phone usage, interpreting the ATDS provision to prohibit noncommercial SMS messages would deprive many people of access to such communications.

It is self-evident that mobile phones are ubiquitous and are now one of the primary modes of telecommunication, if not *the* primary mode of telecommunication—83% of adults in the United States have mobile phones.[9] Group SMS messaging is an efficient way for a number of people to simultaneously communicate. Any suggestion that there are ample alternate means to communicate this type of noncommercial speech fails. In fact, several years ago, the FCC recognized the proliferation of mobile phones, and noted that "there is a growing number of consumers who no longer maintain wireline phone service, and rely only on their wireless telephone service." 2003 Report and Order, at ¶35. Accordingly, the FCC decided that wireless subscribers who ask to be put on the national do-not-call list will be presumed to be "residential subscribers [for purposes of section 227]." 2003 Report and Order, at ¶36 and n.139. Significantly, as noted by Soundbite Communications in its comments to the January 2010 NPRM:

> Informational calls, whether made to a residential phone or a wireless phone are an "efficient method to communicate a message to a large number of people" and "do not tread heavily on privacy concerns" the TCPA was adopted to protect. The FCC has made a logical distinction between telemarketing and informational calls with regard to calls made to residential phones. ***There is no reason not to apply a similar logical distinction to create differing levels of protection for consumers with regard to autodialed and prerecorded telemarketing and informational calls to wireless phones.***

[9] *See* "Americans and their cell phones," http//pewinternet.org/Reports/2011/Cell-Phones.aspx, reporting the results in August 2011 of a recent survey by the Pew Internet & American Life Project, a project of the Pew Research Center.

Soundbite Communications Comments, CG Docket No. 02-278, at 12 (filed May 21, 2010) (emphasis added), RJN Ex. 7. Indeed, for nearly 80% of households in the 25-34 demographic age group, there is no other effective or "ample alternate means" of communicating informational or administrative messages other than by mobile telephone as required for a content-neutral regulation to be upheld.[10] If the TCPA is applied to these types of messages, it would abrogate speech protected by the First Amendment.

CONCLUSION

As explained above, the Complaint should be dismissed because it does not contain sufficient allegations regarding the use of an ATDS. In addition, and more importantly, the TCPA should be interpreted to permit the noncommercial, informational text messages alleged here. Any other interpretation would unconstitutionally restrict noncommercial speech initiated by users of the Disco service. Accordingly, the Court should grant this motion and enter an order dismissing the Consolidated Class Action Complaint with prejudice.

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[10] Nearly 80% of adults between the ages of 25-34 have wireless only residences. *See* Comments of Wells Fargo & Co., CG Docket No. 02-278, at 11 (filed May 21, 2010). ("[N]early half of all adults aged 25-29 (45.8%) live in households with only wireless telephones, and approximately one-third of adults aged 30-34 (33.5%) live in households with only wireless phones."), RJN Ex. 8.