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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.

Case No. 11-cv-02585-SBA
Consolidated with:
Case No. 11-cv-3333-SBA

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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

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INTRODUCTION

In April 2011, Defendants Google, Inc. and Slide, Inc. jointly released the Disco group messaging service to allow groups of consumers to communicate with each other simultaneously via text message using their mobile phones. As part of their efforts to distribute their mobile application software to a wider audience, Defendants transmitted a promotional text message to every phone number submitted to them by so called "group creators" that advertised the application and provided a download link. Plaintiffs Nicole Pimental and Jessica Franklin both received these promotional text messages without having consented to Defendants contacting them at all, or requesting to participate in a Disco group in any manner.

As a result of receiving unsolicited text message advertisements from Defendants, Plaintiffs brought suit under the Telephone Consumer Protection Act, 47 U.S.C. §227, *et seq.* ("TCPA") to stop Defendants' wrongful conduct and recover damages owed to them. Defendants have moved to dismiss the single count Consolidated Complaint ("Complaint") pursuant to Rule 12(b)(6). In support of dismissal, Defendants argue, *inter alia*, that the TCPA does not apply to the offending text messages because they are noncommercial and informational, and if the TCPA did apply to such messages, it would violate the First Amendment. Defendants further argue that Plaintiffs fail to sufficiently plead facts necessary to state a TCPA claim. As explained blow, Defendants' arguments do not reflect an honest reading of the Complaint, and cannot withstand scrutiny.

On their face, the offending text messages (defined in the Complaint as the "Disco Mobile App Text") are purely commercial, and application of the TCPA to them would not violate the First Amendment. But, regardless of whether the messages are commercial in nature, the TCPA may restrict their transmission without implicating the First Amendment because the TCPA serves a substantial government interest, the statute directly advances that interest, and it is not more restrictive than necessary. Plaintiffs have also pleaded the facts

necessary to satisfy each element of their TCPA claim by alleging Defendants used a single, dedicated telephone number, to transmit generic, impersonal messages "en masse" to each person that found themselves part of a Disco group. Nothing additional need be pleaded to state a claim under the TCPA. Defendants' motion to dismiss should be summarily denied.

FACTUAL BACKGROUND

The meteoric rise of text message based communications has changed the face of how consumers interact with one another. Such communications have evolved from single person-to-person messages into robust "group text messaging" services that allow up to one hundred individuals to communicate in a "group chat" forum. (Compl. ¶ 11.) Defendants Google and Slide entered the group messaging business in April 2011 with their service named Disco. (Compl. ¶ 12.) The Disco service was designed to function through a mobile phone's built-in text message capabilities, but Defendants additionally offered their own mobile phone application for transmitting messages. (Compl. ¶¶ 13, 14.)

Defendants designed their Disco service to be "opt-out" rather than "opt-in." (Compl. ¶ 16.) In other words, *anyone* can create a Disco group through Defendants' website and add *any* mobile phone number as a group member. (Compl. ¶ 14.) Defendants do not seek the consent of any new group members before adding them to a Disco group, nor does the group creator need to provide any proof of consent. (Compl. ¶ 15.) Once all group members receive a message, they too can respond to everyone else in the group an unlimited number of times, creating an ongoing "chat room" effect of nearly constant text messages. (Compl. ¶ 17.)

However, the consumer-to-consumer messages are not the only messages transmitted by or through the Disco service. Instead, Defendants harvest all phone numbers added by group creators in order to independently transmit their own text message advertisements promoting their service and mobile application. (Compl. ¶ 20.) Indeed, the moment a consumer creates a Disco texting group, but before the group creator actually sends any group messages, every member of the group receives a text message sent directly by

Defendants without the consent of the group leader or the invitee. (Compl. ¶ 21.) The text message calls from Defendants include a specific advertisement for Disco's service and mobile application – the Disco Mobile App Text. (Compl. ¶ 22.) The Disco Mobile App Text contains a direct link to download the Disco mobile application, and reads:

> Disco is a group texting service Standard SMS rates may apply or chat for FREE w/our app - http://disco.com/d More info? Text *help to quit? Text *leave

(Compl. ¶ 25.) The initial Disco Mobile App Text is transmitted directly by Defendants to every group member, and its transmission is neither controlled by nor disclosed beforehand to the group leader or any group member. (Compl. ¶ 24.)

Plaintiffs Nicole Pimental and Jessica Franklin were both involuntarily added to two different Disco groups in June 2011, and both received the Disco Mobile App Text from Defendants. (Compl. ¶¶ 25, 30.) Additionally, both Plaintiffs received numerous other text messages from other group members, as well as from Defendants, even after they attempted to remove themselves (*i.e.*, opt-out) from the Disco group. (Compl. ¶¶ 27, 32-33.)

Plaintiffs never requested, authorized, or consented to receive text message calls from Slide or Google. (Compl. ¶ 36.) In response to these unauthorized text message advertisements, Plaintiffs collectively brought this class action on behalf of other similarly situated individuals who received the Disco Mobile App Text from Defendants, as well as a subclass of individuals who continued to receive text message calls through the Disco service after they affirmatively requested to opt-out. (Compl. ¶ 36.)[1] In response to Plaintiffs' Consolidated Complaint, Defendants moved to dismiss. (Dkt. 29.)

[1]Pimental filed her original class action complaint on May 27, 2011, and Plaintiff Franklin filed her complaint on July 7, 2011; both cases were filed in the Northern District of California. This Court consolidated both cases on September 22, 2011 (Dkt. 24), and the Plaintiffs filed a Consolidated Complaint. (Dkt. 25.)

ARGUMENT

I. THE DISCO MOBILE APP TEXT IS COMMERCIAL SPEECH

Defendants' principal argument in support of dismissal is that the TCPA is unconstitutional as applied to their "noncommercial" and "informational" SMS messages. (Defendants' Motion to Dismiss (Dkt. 29) ("Def. Mot."), 11.) Defendants further claim that their messages 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." (Def. Mot. at 7.) That statement, however, willfully ignores the Complaint's allegations in an attempt to conflate the commercial messages solely initiated by Defendants (*i.e.* the Disco Mobile App Text) with personal consumer-to-consumer messages. Plaintiffs' Complaint expressly targets the Disco Mobile App Text.[2] The Disco Mobile App Text, which Plaintiffs contend violate the TCPA, reads,

> Disco is a group texting service Standard SMS rates may apply or chat for FREE w/our app - http://disco.com/d More info? Text *help to quit? Text *leave

As described below, it is beyond dispute that the Disco Mobile App Text is commercial speech designed to promote Defendants' Disco service and invite consumers to download the Disco mobile application.

Defendants' attempt to reclassify the Disco Mobile App Text as a noncommercial and informational message utterly fails. The "core notion of commercial speech is that it 'does no more than propose a commercial transaction.'" *Mattel, Inc. v. MCA Records, Inc.,* 296 F.3d 894, 906 (9th Cir. 2002) (quoting *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 66 (1983)); *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989) (stating that the proposal of a commercial transaction test is "the test for identifying commercial speech"). The Supreme Court has further defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central*

[2] Plaintiffs are also seeking redress for text message calls made after they attempted, to no avail, to affirmatively opt-out of receiving any further messages by or through the Disco service. (Dkt. 24, ¶ 38.)

Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980). In any event, any analysis of whether speech is commercial should rest on common sense – "the touchstone of the commercial speech doctrine" – and distinguish between "speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Dex Media W., Inc. v. City of Seattle*, --- F.Supp.2d ----, (C10-1857JLR) 2011 WL 2559391, *3 (W.D. Wash. June 28, 2011) (citing *Bolger,* 463 U.S. at 64).

Moreover, where the facts present a close question on what is or is not commercial speech, "'strong support' that the speech should be characterized as commercial speech is found [1] where the speech is an advertisement; [2] the speech refers to a particular product, and [3] the speaker has an economic motivation." *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bolger*, 463 U.S. at 66-67).

A. Defendants' Disco Mobile App Text "does no more than propose a commercial transaction."

As a threshold matter, the Disco Mobile App Text in no uncertain terms proposes that the recipient enter into a commercial transaction with Defendants. But, Defendants argue the Disco messages "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," and the "information is sent to the recipient only because another user signed up for the service and provided the recipient's mobile phone number." (Def. Mot. at 7.) Besides acting as an outright admission that Defendants did not have Plaintiffs' consent to transmit text messages, this argument willfully ignores the meaning and commercial import apparent on the face of the Disco Mobile App Text.

By its express terms, the Disco Mobile App Text invites the recipient to visit a website where he or she can download a mobile application. Doing so involves visiting an online commercial establishment (such as Defendant Google's very own Android Market, or Apple's App Store), creating an account there, agreeing to the terms of service, then electing to download a piece of software to a mobile phone. Millions of similar commercial

transactions occur on a daily basis, with some mobile applications having an upfront charge, and others being monetized in alternative ways, such as through advertising.[3] The mobile application economy has grown significantly in recent years, with Google's Android Market and Apple's App Store projected revenue expected to exceed $425 million and $2 billion in 2011, respectively.[4] It is here, into this bustling economy, that the Disco Mobile App Text directs consumers. As such, Defendants cannot seriously claim the Disco Mobile App Text is noncommercial. As described in more detail below, Defendants' purpose for distributing the mobile application was to make money.

The facts here *do not* present a close question of whether the Disco Mobile App Text may be classified as commercial speech – it is. Nevertheless, an analysis of the *Bolger* factors provides further confirmation that the Disco Mobile App Text is commercial speech in that it advertised the Disco service and mobile application with the distinct goal of generating a profit.

1. The Disco Mobile App Text is an advertisement.

The Disco Mobile App Text is an advertisement promoting the Disco service. The *Satterfield* case is instructive on this point. In *Satterfield*, the Ninth Circuit described an unsolicited text message as an advertisement where it contained the name of a product, an invitation to join a club, and a link to that site. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 949 (9th Cir. 2009); *see also Gomez v. Campbell-Ewald Co.*, (CV 10-2007 DMG CWX) 2010 WL 7345680 *1, 5 (C.D. Cal. 2010) (describing an unsolicited text message that promoted free material as an advertisement); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1168 (N.D. Cal. 2010) (describing unsolicited text messages that contained the price of a car, a website address, and a method for recipients to further communicate with the sender as an advertisement).

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[3] Google's Android Market is projected to have 8.1 billion downloads in 2011, and Apple's App Store is projected to have 6 billion. See http://news.cnet.com/8301-1035_3-20103230-94/android-to-overtake-apple-in-app-downloads/.

[4] http://www.bgr.com/2011/05/05/major-mobile-app-store-revenue-will-grow-77-7-in-2011/.

In the present case, the Disco Mobile App Text identifies the Disco brand ("Disco is a group texting service"), specifically identifies the Disco mobile application ("chat for FREE w/our app"), a price ("FREE"), and a web address for acquiring the product ("http://disco.com/d"). (Compl. ¶ 25.) While Defendants suggest that unsolicited text messages offering a free service should be exempt from the TCPA (Def. Mot. at 10-11.), in the analogous context of unsolicited fax transmissions, the FCC has specifically rejected the notion that unsolicited advertisements offering "free" services are not actionable under the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 FR 25967-01 (May 3, 2006) ("May 2006 FCC Rules"). The FCC has ruled that such fax transmissions, regardless of whether they offer "free" services, are "unsolicited advertisements under the TCPA's definition." *Id*. The FCC noted that the "free" nomenclature often "serve[s] as a pretext to advertise commercial products and services." *Id.* The Disco Mobile App Text should be viewed no differently.

2. The Disco Mobile App Text identifies a specific product.

The Disco Mobile App Text has a singular focus on the Disco brand and Disco mobile application. As described above, the Disco mobile application is an identifiable product that a consumer could have acquired through major online "app stores" such as those operated by Google and Apple. It is a specific piece of software designed to operate on mobile phones and its distribution is fully controlled by Defendants and their business partners. Even if the Disco Mobile App Text made no mention of the mobile application, it would still identify a product because it specifically promotes the Disco group messaging service by providing the name of a product, the price, and method to acquire it. Thus, the Disco Mobile App Text unquestionably identifies a commercial product offered by Defendants.

3. Defendants had an economic motivation in operating the Disco service.

Defendants Google and Slide are far from not-for-profit companies, and did not operate, distribute, or advertise the Disco service and mobile application for public benefit.

Thus, and despite Defendants' claims that any free service is noncommercial, the mobile application's status as "free" is nothing more than a "pretext to advertise commercial products and services." *See* May 2006 FCC Rules. It is common knowledge that Google's own business model is built upon providing free services in exchange for viewing paid advertisements. *See Perfect 10, Inc. v. Amazon.com, Inc.,* 508 F.3d 1146, 1156 (9th Cir. 2007) (describing Google's corporate strategy of providing a free search engine for consumers by displaying paid advertisements of its business partners within consumers search results). Further, Defendant Google acquired Defendant Slide for $182,000,000, and thereafter developed and jointly released the Disco messaging service.[5] Google's public filings state that its investments and acquisitions, including in Slide, are an "important element of [its] overall corporate strategy" of "delivering relevant, cost-effective online advertising."[6] While the Disco service may not have reached its full revenue generating potential before Google decided to shutter its doors, to be sure, Defendants launched the Disco service as a vehicle for serving advertisements for profit and building brand recognition. (Compl. ¶¶ 19, 20, 22, 38.)

B. Defendants' Disco Mobile App Text messages are not an "informational" communication.

Defendants' claim that the Disco Mobile App Text is purely informational is misguided, and arguably misleading, as that characterization implies that Plaintiffs expected or requested to receive information about the Disco service. As the Complaint clearly demonstrates, Plaintiffs did not consent or request to receive *any* type of text message from or through the Disco service, let alone an unexpected commercial solicitation from Defendants. (Compl. ¶¶ 29, 34.) Defendants do not, and cannot, supply any valid basis on which to conclude that the Disco Mobile App Text is informational.

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[5] PCMag.com, Google Launches Disco, A Group-Texting Web and… iPhone App?, pcmag.com/article2/0,2817,2382675,00.asp (Nov 1, 2011).

[6] Google.com, *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, http://investor.google.com/documents/20101231_google_10K.html, at 3, 11 (Nov 1, 2011).

As an initial matter, and even under the FCC rules and regulations cited in Defendants' brief, the offending text messages do not fit into the definition of an "informational" communication. (Def. Mot. at 10); *see 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) (providing examples of "informational" messages as calls "notify[ing] recipients of a workplace or school closing")). Communications are informational when they are sent regularly to individuals sharing a commonality with the sender, and have a primary purpose to relay information rather than advertisements. *Id.*; *see also* May 2006 FCC Rules. Additionally, to determine whether the advertisement is for a "bona fide 'informational communication,'" the FCC considers whether the communication is "issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership." May 2006 FCC Rules.

Moreover, the more physical space a communication dedicates to advertising, the higher the inference of the message being a non-informational communication. May 2006 FCC Rules. While courts have interpreted this guideline to allow for the mixture of some branding, price quotes, service availability and other advertisements along with informational content, no such mixture exists here. *See Peter Strojnik, P.C. v. Signalife, Inc.*, (CV081116PHXFJM) 2009 WL 605411 (D. Ariz. 2009) (concluding that defendant's faxes were not informational but commercial because they invited the recipient to visit a website, induced them to buy defendant's stock, and the message did not dedicate any space to actual information); *Holtzman v. Turza*, (08 C 2014) 2010 WL 4177150 (N.D. Ill. 2010) (holding that defendant's main purpose in sending unsolicited faxes was to build brand recognition and solicit business rather than educating recipients on industry related topics).

Here, the Disco Mobile App Text is dissimilar to any type of informational message identified by courts or the FCC. Defendants fail to identify any part of the message that can

be deemed "informational," rather than commercial, such as "industry news articles, legislative updates, or employee benefit information." *See* May 2006 FCC Rules. Instead, Defendants tersely assert that because they received Plaintiffs' phone numbers from a third-party who wanted to use Disco, all messages sent thereafter advertising the Disco service should be exempt from the TCPA since they were sent at the insistence of the group creators. (Def. Mot. at 13.) But this is simply not true. In reality, Defendants transmitted the Disco Mobile App Text, which contained only advertising and no relevant informational content, without the knowledge, consent or involvement of the group creators, to individuals who knew nothing of the service and had no relationship with Defendants. (Compl. ¶ 25.) The recipients of the Disco Mobile App Text were not members of Disco, had not requested to join the Disco service, and did not consent to receive communications from them. (Compl. ¶¶ 29, 34.) Further, the Disco Mobile App Text was not sent at regular intervals, and the content of the text message did not change (*i.e.*, from issue to issue).

Additionally, Defendants had no reason to believe that any recipient of the Disco Mobile App Text would be interested in the service because no prior relationship existed. (*See* Compl. ¶ 34.) At best, Defendants could try to claim that the statements "Standard SMS rates may apply" and "More info? Text *help To quit? Text *leave," are informational, the plain fact remains that, absent a prior relationship, these statements were not relevant information to the recipients, as they neither expected nor requested to receive the Disco Mobile App Text. Thus, because the Disco Mobile App Text presented the brand, product price, and commercial availability of the Disco mobile application, it smacks of commercial advertisement.

Finally, Defendants assert that the Disco Mobile App Text is informational because it is sent to "simply inform the [recipient], whose number was provided by another user, how the [recipient] can participate in group texting using the free Disco platform." (Def. Mot. at 13.) A simple example highlights the absurdity of this statement. Under Defendants' theory, any company could similarly "inform" recipients of their products and services using an

unlimited number of unsolicited text messages (*e.g.*, Wal-Mart could "inform" consumers that "Wal-Mart's website is www.walmart.com"). Likewise, any such company could shore up its TCPA defense by representing that *another* customer had turned over the recipient's phone number and represented they had consent to do so. Simply put, there is little to distinguish between Defendants' view of "information," on the one hand, and an "advertisement," on the other. This result both defies logic and flies in the face of the TCPA. Ultimately, because Defendants sent the offending text message indiscriminately to individuals with no relationship with Disco, the Disco Mobile App Text is not informational and violates the TCPA.

C. The Disco Mobile App Text is not "inextricably intertwined" with fully protected speech.

Finally, Defendants cannot plausibly make the argument that the Disco Mobile App Text is hybrid speech, combining both commercial and non-commercial parts. The Supreme Court has held that "commercial speech does not retain its commercial character 'when it is inextricably intertwined with otherwise fully protected speech.'" *Hunt*, 638 F.3d at 715-16 (quoting *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc*., 487 U.S. 781, 796 (1988)). Therefore, and implicit in this standard, where the two components of speech can be easily separated, they are not "inextricably intertwined." *Hunt*, 638 F.3d at 715-16. Thus, for example, "commenting on public issues in the context of a commercial transaction does not elevate speech from commercial to political rank." *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 120 (5th Cir.1992). Where the speech at issue is merely tangential to and distinct from the speaker's predominantly commercial purpose, the noncommercial aspect should not be viewed as the core purpose of the speech. *Dex Media W., Inc.*, 2011 WL 2559391, *7.

The latter circumstance is applicable here. The Disco Mobile App text itself does not contain any noncommercial speech. Further, and even assuming *arguendo* that it did, the core of Defendants' speech is clearly profit-motivated and not intertwined with noncommercial aspects. Specifically, and in less than 160 characters, the Disco Mobile App Text directly identifies the Disco brand ("Disco is a group texting service"), Disco mobile

application ("chat for FREE w/our app"), price ("FREE"), and web address for acquiring the product ("http://disco.com/d") – leaving little to no room for any noncommercial speech. (Compl. ¶ 25.) Additionally, Defendants' attempt to lump the person-to-person messages in with the Disco Mobile App Text (Def. Mot. at 13) should be disregarded since the singular focus of the Complaint is very clearly the Disco Mobile App Text. (Compl. ¶ 38.) In sum, and considering all of the evidence, there is simply no meaningful nexus between the service and products being advertised (*i.e.*, the commercial speech) and any other speech. Consequently, the Disco Mobile App Text is within the purview of the TCPA.

II. CONSTRUING THE TCPA TO PROHIBIT THE DISCO MOBILE TEXT APP WOULD NOT VIOLATE THE FIRST AMENDMENT

A. Because Defendants' messages are commercial speech, the test articulated in Central Hudson *governs Defendants' as-applied challenge.*

The Court should use the test articulated in *Central Hudson* to decide Defendant's First Amendment challenge. At the outset, determining the constitutionality of a statute begins with the well-established rule that "acts of Congress enjoy a strong presumption of constitutionality[.]" *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir. 2000) (citing *United States v. X-Citement Video, Inc*., 513 U.S. 64, 73 (1994)) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court."). The Supreme Court has held that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Fox*, 492 U.S. at 477. (internal citations omitted). The *Fox* Court further noted that in determining whether a statute violated the plaintiff's First Amendment rights, and as a prerequisite to applying the *Central Hudson* test, the "first question" confronted is "whether the principal type of expression at issue is commercial speech." *Id*. at 473. Here, having established the Disco Mobile App Text may properly be characterized as commercial speech, the analysis now turns to whether regulation of Defendants' messages would violate the First Amendment under the intermediate *Central Hudson* standard applicable to commercial speech.

Defendants disagree, arguing that content-neutral restrictions on speech should be analyzed under the test set forth in *Ward v. Rock Against Racism*.[7] Plaintiffs do not dispute that Section 227(b)(1)(A)(iii) of the TCPA is content-neutral. *See Moser v. FCC*, 46 F.3d 970, 973-74 (9th Cir. 1995) (construing TCPA Section 227(b)(1) prohibiting "any telephone call to any residential line using an artificial or prerecorded voice" as content-neutral in rejecting First Amendment challenge).[8] Even so, courts facing facts similar to those at issue here (*i.e.*, a First Amendment challenge to the TCPA) have utilized *Central Hudson* where the speech at issue is facially commercial. *See Lozano*, 702 F. Supp. 2d at 1011 (finding that, in regards to a text messaging advertising a new DVD release, "[c]ourts analyze restrictions on commercial speech using the four-part test set forth in *Central Hudson . . .*").

Furthermore, under the facts presented here, the TCPA would survive Defendants' as-applied First Amendment challenge under either test, as the analyses under both *Ward* and *Central Hudson* are "substantially similar." *See Moser*, 46 F.3d at 973 (citing *Fox*, 492 U.S. at 476) ("we note that the tests for time, place, and manner restrictions for content-neutral speech and regulations for commercial speech regulations are essentially identical"). Thus, because commercial speech (and application of *Central Hudson*) and content-neutral restrictions (and application of *Ward*) are subject to "essentially identical" scrutiny, it is noteworthy that numerous courts facing similar First Amendment challenges have recognized that "the constitutionality of the TCPA as applied to facsimile transmissions has been

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[7] Under that test, a statue will survive a First Amendment challenge if it: (i) serves "a significant governmental interest," (ii) is "narrowly tailored" to serve that interest, and (iii) leaves "open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[8] While the *Moser* court applied *Ward*, the holding there is distinguishable from the present case in that the challenge to the TCPA there was a facial attack, seeking to invalidate an entire provision on grounds that "a selective ban on automated, commercial calls is unjustified because there is no evidence that such calls are more intrusive than either "live" or noncommercial calls." *Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995). By contrast, here, Defendants' "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." (Def. Mot., 13.)

challenged repeatedly and upheld consistently [under *Central Hudson*]." *Lozano*, 702 F. Supp. 2d at 1012, n. 2 (quoting *Abbas v. Selling Source, LLC*, (09 CV 3413) 2009 WL 4884471, *7 (N.D. Ill. Dec. 14, 2009) (collecting cases)); *accord Italia Foods, Inc. v. Marinov Enterprises, Inc*., No. 07 C 2494, 2007 WL 4117626, *2 (N.D. Ill. Nov. 16, 2007) (collecting cases).

Accordingly, as set forth above, the speech put at issue by Defendants, and at the core of their "as applied" challenge, puts the test articulated in *Central Hudson* properly at play here.

B. The TCPA, as applied to the Disco Mobile App Text, satisfies each element of the Central Hudson *test.*

In this case, the TCPA fulfills each element of the *Central Hudson* test as it applies to Defendants' speech, because (1) the government interest is substantial; (2) the regulation directly advances that interest; and (3) the regulation is not more extensive than necessary. *Central Hudson*, 447 U.S. at 566.

1. The TCPA serves a significant governmental interest of minimizing the invasion of privacy caused by unsolicited text message calls.

In passing the TCPA, Congress reviewed "significant evidence" regarding "consumer concerns about telephone solicitation in general and about automated calls in particular," and made "extensive findings." *Moser*, 46 F.3d at 973. "[W]hen Congress makes findings on essentially fact issues . . . those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Id*. at 974. Accordingly, in enacting the TCPA, Congress found that it had "a substantial interest in protecting the privacy of consumers and in preventing the [ ] nuisances" of "rampant telemarketing and the consequent costs of money, time, and the invasion of privacy to consumers." *Moser*, 46 F.3d at 974 ("We conclude that Congress accurately identified automated telemarketing calls as a threat to privacy"); *Abbas*, 2009 WL 4884471, at *7 (citing S. Rep. 102-178, at 1 & 4, reprinted in 1991 U.S.C.C.A.N. at 1969, 1971-72 (noting, that "unsolicited calls placed to . . . cellular

telephone numbers often impose a cost on the called party [as] cellular users must pay for each incoming call")); *see also Bland v. Fessler*, 88 F.3d 729, 734-35 (9th Cir. 1996) (finding California's interest in personal privacy and the avoidance of unwanted calls and faxes is substantial).

The TCPA "serves a significant government interest of minimizing the invasion of privacy caused by unsolicited telephone communications to consumers" and "[r]educing the number of unsolicited calls results in less invasion of privacy for consumers." *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1011 (N.D. Ill. 2010). The TCPA directly advances this interest by limiting unsolicited calls to consumers. *Id.* at 1011 (citing *Abbas,* 2009 WL 4884471, *7 ("Congress found that consumers were helpless to prevent such unwanted telemarketing calls, and were particularly unable to stop the calls via direct requests to the telemarketers themselves")). Text messages pose the "same irritation, interruption and potential costs to consumers as voice calls." *Lozano,* 702 F. Supp. 2d at 1008 (citing *Abbas*, 2009 WL 4884471, *7 ("Congress, for its part, found that cheap, pervasive telemarketing practices needed to be controlled")). Accordingly, under Ninth Circuit law, "[t]he purpose and history of the TCPA indicate that Congress was trying to prohibit the use of [automatic telephone dialing systems] to communicate with others by telephone in a manner that would be an invasion of privacy" and therefore "a voice message or text message are not distinguishable in being an invasion of privacy." *Satterfield*, 569 F.3d at 954.

Another purpose and governmental interest underlying the TCPA is to prevent advertisers from shifting the cost of advertising to consumers. *See In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14128 (2003). As the FCC has stated:

> The legislative history indicates that one of Congress' primary concerns was to protect the public from bearing the costs of unwanted advertising. Certain practices were treated differently because they impose costs on consumers. For example, under the TCPA, calls to wireless phones and numbers for which the called party is charged are prohibited in the absence of an emergency or without the prior express consent of the called party.

Congress has a substantial interest in limiting the circumstances in which a consumer will be required to bear costs related to commercial advertisement. *See Destination Ventures, Ltd. v. F.C.C.*, 844 F.Supp. 632, 637 (D. Org. 1994) (finding that "Congress' interest in protecting consumers from economic harm resulting from the unfair shifting of the cost of advertising to the unwitting consumer" associated with fax spam is a substantial interest which is identified in the TCPA's legislative history"). Accordingly, "there is a substantial governmental interest in protecting the public from the cost shifting." *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (8th Cir. 2003). Combining the overarching privacy interest with the goal of deterring cost shifting, the TCPA serves a significant and substantial government interest, which satisfies the first prong of the *Central Hudson* test.

2. The TCPA directly advances the government's interest and its regulations are no more restrictive than necessary.

The Supreme Court has effectively "collapsed the last two *Central Hudson* elements into a single inquiry of whether there is a "reasonable fit" between the government's ends and the means chosen to accomplish those ends." *Dex Media W., Inc.*, 2011 WL 2559391 (citing *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 415 (1993)). "A regulation need not be absolutely the least severe that will achieve the desired end, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the fit between ends and means is reasonable." *Ballen v. City of Redmond*, 466 F.3d 736, 742 (9th Cir. 2006). In other words, the First Amendment and *Central Hudson* require only that, in the commercial context, "the speech-restrictive means chosen provide more than 'ineffective or remote support' for a legitimate governmental policy goal." *Ass'n of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 732 (9th Cir. 1994).

At the outset, and because Congress has identified a substantial interest in protecting consumers from the invasion of privacy and potential economic harm resulting from unsolicited calls made by an "automatic telephone dialing system" ("ATDS"), the prohibition of those calls directly advances that interest. *See Destination Ventures, Ltd. v. F.C.C.*, 844 F.

Supp. 632, 637 (D. Or. 1994), aff'd, 46 F.3d 54 (9th Cir. 1995). Relevant here, and as described above, the "evil" Congress focused on throughout the legislative history of the TCPA was the widespread placement of calls to unwilling recipients using an ATDS. *See Ward*, 491 U.S. at 800, fn. 7 (noting that a speech restriction does not ban all speech, but "focuses on the source of the evils the city seeks to eliminate"). As the TCPA now stands, any call originating from an ATDS (with specific and limited exceptions), made to a consumer who has not consented to receive it, violates the statute. Accordingly, Section 227(b)(1)(A)(iii) of the TCPA directly advances Congress's goal.

Likewise, Section 227(b)(1)(A)(iii) of the TCPA is no more restrictive than necessary. The TCPA only prohibits calls made to "paging services, cellular phone services, specialized mobile radio services, or any service for which the party is charged for the call." *Lozano*, 702 F. Supp. 2d at 1011-12. As such, the TCPA does not prohibit calls in which "consumers have consented to the call, or where the party is not charged for the call." *Id*.[9]

Defendants additionally remain free to publicize their products through any number of legal alternative channels; they just cannot do so by using an ATDS to transmit text messages without permission. *See Abbas*, 2009 WL 4884471, *8 ("Congress left open ample alternative channels through which telemarketers and other would-be automated callers can communicate"). In fact, if Defendants went so far as to gain the consent of the called party,

[9] Similarly, the TCPA's restrictions are and have been held to be "narrowly tailored." The *Lozano* court, for example, held that "[r]educing the number of unsolicited calls results in less invasion of privacy . . . [and] [t]he TCPA directly advances this interest by limiting unsolicited calls to consumers. *Lozano*, 702 F. Supp. 2d at 1011. There, the court went on to hold that "the fact that the TCPA only prohibits the use of equipment with the capacity to randomly dial numbers does not [make it] overbroad [as] . . . the limitations on the prohibition of the use of equipment with certain capacities reflects the restriction is not excessive in proportion to the interest it serves." *Id.* at 1011-12. Case law in the Ninth Circuit reaches a similar conclusion. In *Moser*, the Ninth Circuit rejected a First Amendment challenge to an analogous section of the TCPA and found that restricting automated calls was narrowly tailored to Congress's interest in lessening the threat such calls pose to residential privacy. 46 F.3d at 975. Accordingly, Congress has prohibited no more speech than necessary to protect consumer's interest in privacy and from increased costs attendant with autodialed calls.

they would not be prohibited (at least not by the TCPA) from sending text messages using an ATDS. Defendants could obtain consent for their messages through a variety of means (other than accepting a representation from the group creator that he/she has the consent of all individuals on his/her contact list to upload their phone numbers into Defendants' system), including making the Disco service opt-in, rather than opt-out. Through that method, if a consumer is added to a Disco group, she could be contacted by email, or through a social network such as Facebook, and thereafter take affirmative action on Defendants' website to confirm their participation in the Disco group. Following such action, and depending on the language of Disco's terms of service, Defendants would be free to thereafter contact consumers by text messages and promote their products and services. Moreover, there is little if any restriction placed on Defendants' ability to advertise their service and mobile application and numerous alternative means remain available, including: online banner ads, magazines, mobile ad networks, television commercials, or through any of the myriad advertising options Defendant Google has at its disposal. In short, while Defendants may not text their advertisements indiscriminately, they do have ample alternative avenues to reach out to their target audience. *See Green v. Anthony Clark Int'l Ins. Brokers, Ltd*., (09 C 1541) 2010 WL 431673 (N.D. Ill. Feb. 1, 2010). The TCPA is no more restrictive than necessary and Defendants' constitutional challenge fails.

III. PLAINTIFF HAS SUFFICIENTLY PLEADED A TCPA VIOLATION.

A. Legal standard applicable to a Rule 12(b)(6) motion.

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, Plaintiffs' Complaint need only contain a "short and plain statement of the claim showing that [they are] entitled to relief." Here, Defendants claim that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as further modified by *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), has somehow radically altered Rule 8(a)(2) and created a fact-pleading standard that Plaintiff has failed to meet.[10] That is

[10] Courts nationwide, including this District, have noted that "*Erickson v. Pardus*, …decided two weeks after *Twombly*, the Court clarified that *Twombly* did not signal a switch to fact-pleading in the federal courts." *Airborne Beepers & Video, Inc. v. AT&T Mobility*

simply not the case and Defendants' argument has been rejected time and again by federal courts nationwide, including this District, on similar facts. *See*, *e.g.*, *Kramer*, 759 F. Supp. 2d at 1171; *Kazemi v. Payless Shoesource Inc*., (C 09-5142 MHP) 2010 WL 963225 (N.D. Cal. Mar. 16, 2010).

While *Twombly* and *Iqbal* did much to clarify the standard of review applicable to motions under Rule 12(b)(6), they did not, as Defendants suggest, radically alter federal pleading standards under Rule 8. Under *Twombly*, a complaint should not be dismissed under Rule 12(b)(6) if two minimum hurdles are cleared: (1) the Complaint must describe the claim in sufficient detail to give the Defendant fair notice of what the claim is and the grounds upon which it rests; and (2) the Complaint's allegations must plausibly suggest that the Plaintiff has a right to relief, raising the possibility above a level of speculation. *Twombly*, 550 U.S. at 544-55. This is consistent with the requirements of Rule 8(a)(2), which requires that a complaint "provide a 'short and plain statement of the claim showing that [he] is entitled to relief.' This is not an onerous burden. 'Specific facts are not necessary; the statement need only give the defendant[s] fair notice of what . . . the claim is and the grounds upon which it rests.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89 (2007)); *see also Coupons, Inc. v. Stottlemire*, 588 F. Supp. 2d 1069, 1073 (N.D. Cal. 2008) (citing *Twombly*, 550 U.S. 544) ("'heightened fact pleading of specifics' is not required to survive a motion to dismiss."). What's more, "[t]he defendant bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

B. Plaintiff has sufficiently pleaded the use of an ATDS.

Defendants' attack on the legal sufficiency of the Complaint is premised on the notion that Plaintiffs fail to present allegations that create the "inference" that Defendants

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LLC, 499 F.3d 663, 667-668 (7th Cir. 2007). *Erickson* reaffirms that under Rule 8 "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Villegas v. J.P. Morgan Chase & Co*., No. C09-00261, 2009 WL 605833 (N.D. Cal., Mar. 9, 2009) (citing *Airborne Beepers & Video, Inc.*, 499 F.3d at 667-668.).

utilized an ATDS. Ignoring numerous well-pleaded supporting facts, Defendants claim that Plaintiffs allege a "naked conclusion [that] merely parrots the statute's language." (Def. Mot. at 4.) This precise argument has been repeatedly rejected by federal courts and similarly does not warrant dismissal here.

To state a claim under the TCPA, a plaintiff must allege facts demonstrating that Defendants made calls with certain equipment termed an ATDS, which Congress defines as "equipment which *has the capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(A)(1)(iii); *see also Satterfield*, 569 F.3d at 951 citing 47 U.S.C. § 227(b)(1)(A)(iii)); *Kazemi*, 2010 WL 963225. Moreover, whether Plaintiffs and the members of the proposed class provided their prior express consent to receive these messages is an affirmative defense to, not an element of, demonstrating a TCPA violation. *Green v. Serv. Master On Location Corp.*, (07 C 4705) 2009 WL 1810769, *2 n. 2 (N.D. Ill. June 22, 2009) (citing *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1159 (N.D. Ill. 2009)); *Sadowski v. MediOnline, LLC*, No. 07 C 2973, 2008 WL 2224892, at *3-4 (N.D. Ill. May 27, 2008) (noting that in a TCPA case that the issue of consent is an affirmative defense)). Plaintiffs' allegations squarely meet each element of their TCPA claim and it is more than plausible that the text messages, which were all uniform and went out *en masse* and within minutes of the group leaders creating the group (Compl. ¶¶ 13, 25, 30, 51), were not sent by an individual, but rather necessarily by a machine with the capacity to store the numbers of the group members and the capacity to dial them automatically.

The TCPA unambiguously defines an ATDS as "equipment which has the *capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1) (emphasis added). The plain language of the TCPA does not require use of the system's capacity to actually send the unlawful text messages. *Satterfield*, 569 F.3d at 950 ("a system need not actually store, produce or call randomly or sequentially generated telephone numbers, it need only have the

capacity to do it."); *Lozano*, 702 F. Supp. 2d at 1011.

While allegations that merely restate the TCPA's definition of an ATDS may, in and of themselves, fall short of Rule 8(a)'s minimal pleading guidelines, additional allegations that a defendant used a dedicated SMS short or long code to transmit generic, impersonal messages *"en masse"* to consumers are sufficient to allege the use of an ATDS in satisfaction of federal pleading requirements. *See Kramer*, 759 F. Supp. 2d at 1172; *Kazemi*, 2010 WL 963225, at *2; *Abbas,* 2009 WL 4884471, at *3.[11]

Precisely like the plaintiffs in *Kramer, Kazemi,* and *Abbas*, Plaintiffs support their allegations that Defendants used an ATDS with specific facts regarding the nature of the text messages received and the method in which those text messages were transmitted. In particular, Plaintiffs allege that the text messages were transmitted "*en masse*, using one common cellular telephone number provided by Defendants." (Compl. ¶¶ 13, 51.) Plaintiff also provides the content of the message, including the generic and impersonal institutional message advertising Defendants' mobile application. (*Id*. ¶¶ 25, 30.) And finally, Plaintiffs allege that they had no prior relationship with Defendants and had no reason to be in contact with Defendants. (*Id.* ¶ 29.) Defendants' attempt to distinguish *Kramer, Kazemi,* and *Abbas* is futile.

To be sure, nothing about the Disco Mobile App Text is personal in nature; rather, it is a generic advertisement sent identically to thousands of consumers:

> Disco is a group texting service Standard SMS rates may apply or chat for FREE w/our app - http://disco.com/d More info? Text *help to quit? Text *leave

[11] Defendants misguidedly rely on *Knutson v. Reply!, Inc.* to support their argument. 2011 WL 291076 (S.D. Cal. Jan. 27, 2011). In the first instance, *Knutson* actually misstates the entire pleading requirement for a TCPA claim in the Ninth Circuit. *Id*. at 1 (including that the plaintiff must plead he "was charged for the call.") However, more relevant to this case, the court there found that the plaintiff's allegations were insufficient because they did not make additional allegations like those in *Kramer*, and specifically used *Kramer* as the example of what would suffice to infer the existence of an ATDS. *Id*. at 2. Plaintiffs' allegations here are substantially similar to those pleaded in Kramer, and therefore, meet the minimum pleading requirements.

Moreover, Defendants' argument that the Disco Mobile App Text is sent at the "behest" of, at the "initiation" of, "prompted" by, or "set in motion" by the group creator is demonstrably false. (Def. Mot. at 4-5.) In reality, and as alleged, a group creator creates a Disco group, and before he or she sends *any* personal message to the group, Defendants intercede, commandeer group members' phone numbers, and simultaneously transmit the Disco Mobile App Text to up to 100 members of each Disco group. (Compl. ¶ 21.) The group creator does not request that the Disco Mobile App Text be sent, nor does he or she have any knowledge of its transmission until after the fact. (Compl. ¶¶ 21-24.)

Despite these well-pleaded facts that establish that the equipment used to send the Disco Mobile App Text plausibly constitutes an ATDS, Defendants insist that dismissal is warranted because it did not *actually use* the features of an ATDS to send the unauthorized text messages to Plaintiff. But equipment need only have the *capacity* to store and produce phone numbers – use of that capacity is not an element of a TCPA claim. *See Satterfield*, 569 F.3d at 951. In the end, Plaintiffs allege sufficient facts to demonstrate that Defendants' equipment has the requisite capacity to store and produce phone numbers, and thus, the contention that they did not use that capacity is irrelevant in the context of the TCPA. The Court should deny Defendants' motion to dismiss in its entirety.

CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests that this Court deny Defendants Google's and Slide's motion to dismiss and for such other relief as the Court deems reasonable and just. In the event the Court finds that Plaintiffs' claims are insufficiently pleaded under Federal Rule of Civil Procedure 8, Plaintiffs respectfully request leave to add further detail, or otherwise take such other steps necessary to cure any defects found by this Court. *See Schreiber Distrib. Co. v. Serv-Well Furniture Co*., 806 F.2d 1393, 1401 (9th Cir. 1986) ("If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency."); *Doe*

v. U.S., 58 F.3d 494, 497 (9 th Cir. 1995) (leave to amend should be granted even if the plaintiff did not request leave, unless it is clear that the complaint cannot be cured by the allegation of different facts.).

Dated: November 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean P. Reis, an attorney, certify that on November 11, 2011, I served the above and foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss by causing true and accurate copies of such paper to be filed and transmitted to the persons registered to receive such notice via the Court's CM/ECF electronic filing system.

/s/ Sean P. Reis