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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' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT

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

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INTRODUCTION

The Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), cannot reach the introductory Disco text message that is the sole basis for Plaintiffs' claim because the message proposes no economic transaction, and is therefore expressive, non-commercial speech entitled to full constitutional protection. An interpretation of the statute as reaching non-commercial speech would run afoul of the First Amendment because the government lacks a significant interest in prohibiting communications to members of texting groups that are not indiscriminate and intrusive commercial solicitations.

Moreover, Plaintiffs' assertion that the TCPA bans all "calls" based solely on the alleged "capacity" of Defendants' equipment—including texts that are not sent by random or sequential dialing, but are sent to individuals selected by other Disco users—impermissibly burdens expressive speech without advancing the government's goal of reducing telemarketing. To avoid an unconstitutional restriction on speech, the Court should narrowly construe the TCPA, and hold that no claim can be based on informational text messages such as the introductory Disco text.[1]

In addition, Plaintiffs are unable to plead an essential element of their claim—that Defendants sent text messages using an "automatic telephone dialing system" ("ATDS"). Plaintiffs cannot get around the key allegation in their Consolidated Class Action Complaint ("Complaint" or "CCAC") that other Disco users—and not an ATDS—supplied the phone numbers that received the introductory Disco text.

Plaintiffs' claim therefore fails and the Complaint should be dismissed with prejudice.

[1] Plaintiffs filed a notice pursuant to 28 U.S.C. § 2403(a) and Fed R. Civ. P. 5.1 seeking certification that Defendants have drawn the constitutionality of the TCPA into question. *See* Dkt. 39. Those provisions do not apply here, however. Defendants contend that the TCPA should be interpreted to permit directed, non-commercial text messages, while Plaintiffs' interpretation would unconstitutionally restrict expressive speech by users of the Disco service.

ARGUMENT

I. PLAINTIFFS SEEK TO USE A STATUTE RESTRICTING INDISCRIMINATE TELEMARKETING TO PROHIBIT EXPRESSIVE SPEECH SPECIFICALLY DIRECTED TO PEOPLE SELECTED BY USERS OF DEFENDANTS' SERVICE.

A. The Introductory Disco Text Is Non-Commercial Speech.

Plaintiffs have reduced their claim to a standard message sent to new members of a texting group. Opp. at 1, 12 (introductory Disco text is the "singular focus of the Complaint"). They acknowledge that their entire theory of liability rests on the notion that the introductory Disco text message is "commercial" and therefore subject to regulation. Plaintiffs must do this because they realize that there is no rationale, even under intermediate scrutiny, for punishing a text message unless it is a commercial solicitation—*i.e.*, a proposal to engage in an economic transaction.

The introductory Disco text—"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" (CCAC ¶25)—is informational, and is not a solicitation, and even Plaintiffs understand it that way. Plaintiffs Pimental and Franklin were "added to two different Disco groups in June 2011, and both received the [introductory text] from Defendants." Opp. at 3. Pimental and Franklin received other text messages "from other group members, "even after they attempted to remove themselves (*i.e.*, opt-out) from the Disco group." *Id*. Thus, Plaintiffs are griping that they were involuntarily selected by their friends to participate in texting groups, and presented by the introductory Disco text with the convenient opportunity to *leave* the group.

The Disco introductory text is not a commercial solicitation, then, since the alleged transaction—joining a Disco texting group—occurred before the text was transmitted. All of Plaintiffs' case law defining commercial speech (*see* Opp. at 4-6) necessarily confirms the standard established long ago by the Supreme Court: Commercial speech is that which does nothing more than propose a commercial transaction. *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 762 (1976). The introductory Disco text (1) describes the Disco service to people who already have been signed up by others; (2) tells them the service can result in carrier fees; and (3) tells them how to avoid the fees or leave the service altogether. The text does not ask recipients to engage in any commercial transaction.

Plaintiffs try to sidestep this problem by asserting that the introductory text "promotes" Disco and invites consumers to download a Disco mobile application. But there is nothing "promotional" about the introductory Disco text—it merely states that "Disco is a group texting service." It says nothing about Defendants or about any product or service other than that in which they already have been enrolled by a friend. The Disco mobile app is mentioned merely as a free alternative to carrier SMS charges.

Plaintiffs also try to characterize the introductory Disco text as luring recipients into the "bustling economy" of mobile apps, that "Defendants' purpose for distributing the mobile application was to make money." *Id.* Plaintiffs offer no facts to support this accusation, but even accepting it as true for sake of argument, it does not transform the introductory Disco text into commercial speech.

The Supreme Court has never held that speech that is motivated by or generates profits is "commercial." If this were so, the entire content of a newspaper or a magazine, and every television news broadcast, would be commercial speech. "[T]he degree of First Amendment protection is not diminished merely because . . . speech is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 756 n.5 (1988). *See also Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139 (3d Cir. 1982) (rejecting contention that community paper comprised mostly of ads was commercial speech); *Edwards v. District of Columbia*, 765 F. Supp. 2d 3, 12-13 (D.D.C. 2011) (rejecting argument that licensing tour guides was regulation of commercial speech).

In *Nissan Motor Co. v. Nissan Computer Corp.,* the Ninth Circuit rejected the argument that linking to web sites critical of the plaintiff auto manufacturer was commercial speech because it disparaged plaintiff and interfered with the full use of plaintiff's trademark. 378 F.3d 1002, 1017 (2004). The court made clear that speech is commercial—and subject to reduced protections under the First Amendment—only when it merely proposes a commercial transaction. "[W]e have never adopted an 'effect on commerce' test to determine whether speech is commercial and decline to do so here." *Id. See also Hunt v. City of Los Angeles*, 638 F.3d 703, 715 & n.6 (2011) (observing that the Supreme Court limits commercial speech to "the proposal of

a commercial transaction" and no longer refers to it more broadly as speech "related solely to the economic interests of the speaker and its audience"); *Virginia Vermiculite Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541 (4th Cir. 1998) (explaining that "the dispositive inquiry is whether the *transaction* is commercial, not whether the *entity* engaging in the transaction is commercial").

Unable to identify any proposed commercial transaction, Plaintiffs suggest that describing the Disco service, and offering information to group members (who were brought aboard by acquaintances) about carrier fees and the option of leaving the service, is advertising because "[i]t is common knowledge that Google's own business model is built upon providing free services in exchange for viewing paid advertisements," and Google has an overall corporate strategy of delivering online advertising. Opp. at 7-8. This is nothing more than a variation of the "effects on commerce" argument rejected by the Ninth Circuit in *Nissan.* Other Circuits also consistently rebuff attempts to categorize non-transactional communications as commercial speech. *See, e.g., Commodity Futures Trading Com'n v. Vartuli***,** 228 F.3d 94, 110 (2d Cir. 2000) (trade recommendations generated by computer software were not commercial speech); *CPC Intern., Inc. v. Skippy Inc*., 214 F.3d 456, 462 (4th Cir. 2000) (web site discussing origins of "Skippy" character is not commercial speech).

Plaintiffs' alternative assertion that Disco's name and reference to the free mobile app are commercial elements infecting the rest of the text message gets them nowhere. Those words are merely incidental to and intertwined with the primary message, which informs recipients of what the service is, and how to participate for free, and how to leave. As discussed above, when recipients get the text, they *already are* group members, and no commercial transaction is proposed. Plaintiffs' citations to cases involving faxed business solicitations are inapposite. *See Holtzman v. Turza*, 2010 WL 4177150, *4 (N.D. Ill. Oct. 19, 2010) (accountant solicitation for business); *Strojnik v. Signalife, Inc.*, 2009 WL 605411, *5 (D. Ariz. Mar. 9, 2009) (exhorting recipients to research sending company's stock).[2] The defendants in those cases were unabashedly trying to sell something.

[2] The FCC's guidelines for determining whether a fax has "incidental" advertising also support a finding that the introductory Disco text is informational. The text is issued on a regular schedule (upon the addition of individuals to a Disco group); the text is issue-specific, in that it provides

Hunt, on which Plaintiffs heavily rely, actually defeats their entire analysis. The Ninth Circuit reiterated the rule that "[c]ommercial speech does not retain its commercial character 'when it is inextricably intertwined with otherwise fully protected speech.'" 638 F.3d at 715 (quoting *Riley v. National Fed'n of the Blind,* 487 U.S. 781, 796 (1988)). Where "two components of speech can be easily separated, they are not 'inextricably intertwined.'" *Id.* Thus, the court held that the city could bar the sale of shea butter and incense on the Venice boardwalk even though vendors extolled the items' spiritual benefits. "Nothing in the nature of Plaintiffs' products requires their sales to be combined with a noncommercial message." *Id.* at 716.

Here, in contrast, it would be impossible to convey the informational message in the introductory text without referring to Disco by name and the URL where the free app is available. Making no reference to Disco or its web site would leave recipients mystified as to what group texting service they have been enrolled in, whether there might be fees, and where they can go to get more information about the service and the app that can make the texting free. Plaintiffs' conclusory assertions that the entire text is commercial speech because it is "profit motivated and not intertwined with non-commercial aspects" are simply wrong. Plaintiffs both misstate the legal standard that applies here, and ignore the actual words and context of the communication they are suing over.

B. The TCPA Does Not Target Non-Commercial Speech.

Plaintiffs next try to rationalize their broad view of the TCPA as extending to the introductory Disco text by asserting that a ban on such texts complies with *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.,* 447 U.S. 557, 561 (1980). Opp. at 12-18. The *Central Hudson* test does not apply because, as explained above, the text is not commercial speech, and section 227(b)(1)(A)(iii) appears on its face to be content-neutral, in that it prohibits all "calls"

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information relevant to new participants regarding what the service is, and how to avoid fees or leave the service; and the text is directed specifically to those individuals selected by the creator of the Disco group. There is no solicitation in the text, and the reference to the free mobile app is a mere five words and a URL. The text contains no space and is not transmitted for someone other than the sender. Further, the FCC properly focuses on the "transactional" nature of an advertisement—something which is nowhere in the introductory Disco text. *See In the Matter of Rules & Regs. Implementing the Tel. Consumer Protection Act of 1991 and the Junk Fax Prevention Act of 2005,* 2006 WL 901720, 21 F.C.C.R. 3787, at 3814-15 & n.187 (Apr. 6, 2006).

using an ATDS. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) (distinguishing content-based and content-neutral laws). Content-neutral regulation of non-commercial speech must meet the reasonable time, place and manner standard explained in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).[3] *See also Bland v. Fessler*, 88 F.3d 729, 733 (9th Cir. 1996) (applying *Ward* to California automatic dialer ban).

Interpreting the TCPA as prohibiting informational text messages would run afoul of the First Amendment because such a ban fails all three prongs in *Ward*:

No Significant Government Interest: The asserted justifications for TCPA all seek to control telemarketing. *See* Mot. at 8-9. No justification is offered by Plaintiffs that does not depend on the commercial nature of the prohibited communications. Congress sought to restrict "'automated telemarketing calls as a threat to privacy.'" Opp. at 14 (quoting *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995)). Congress also wanted to protect consumers from having to pay "costs related to commercial advertisement." *Id.* at 16. The legislative history of the TCPA and the cases applying the Act have focused—correctly—on automatic dialing of numbers that were randomly or sequentially generated. *See* Mot. at 8-10. It is not surprising, then, that the TCPA has withstood challenge in its regulation of blanket, indiscriminate distribution of *commercial solicitations*, including by text message. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999 (N.D. Ill. 2010); *Abbas v. Selling Source, LLC*, 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009). "The TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls. The consumers complained that such calls are a 'nuisance and an invasion of privacy.'" *Satterfield*, 569 F.3d at 954.

If section 227(b)(1)(A)(iii) is extended to non-commercial texting, however, the ban loses its rationale and fails under the First Amendment.[4] The intrusion resulting from automated

[3] In other words, Plaintiffs confusingly attempt to use a standard for evaluating certain content restrictions to justify a content-neutral statute. Both tests are a form of intermediate scrutiny. Plaintiff's broad interpretation of the TCPA, if adopted by the Court, creates constitutional problems under either test.

[4] This critical distinction was recognized by the Ninth Circuit in *Moser*, where it found that a ban on automated telemarketing calls met the *Central Hudson* test because the regulated

random and sequential calling by telemarketers does not justify a prohibition on informational, non-commercial speech—particularly here, where the introductory Disco text was sent only to people whom other users believed would like to participate in group texting.

The Ban Is Not Narrowly Tailored: A regulation of speech is "narrowly tailored" if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. There must be a "reasonable fit" between the interest and the restriction: It cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

There is no "fit" in Plaintiffs' lawsuit for at least two reasons. First, prohibiting non-commercial "calls" does not stop the personal intrusion that concerned Congress when it enacted the TCPA. Put in the context of this case, punishing Defendants for the introductory Disco text does not advance the government's interest in reducing telemarketing calls. Plaintiffs unsuccessfully try to obscure this "disconnect" by mischaracterizing the legislative history as focusing on "widespread placement of calls to unwilling participants." Opp. at 17. The legislative history, the FCC's rules, and the cases all recognize a government interest in harnessing a tsunami of *automated, abusive telemarketing* communications. *See* Mot. at 10-11. To avoid constitutional infirmity, the Court should interpret section 227(b)(1)(A)(iii) as prohibiting commercial solicitations only.

Second, imposing liability merely for alleged use of equipment with an alleged "capacity" for random or sequential telemarketing calls restricts an array of other types of speech, while not directly advancing the government's interest. Although some district courts have accepted the notion of "capacity" liability under section 227(b)(1)(A)(iii), they were presented in those cases with actual commercial solicitations that were indiscriminate blasts of advertising on behalf of businesses with no relationship to the many thousands of recipients. *See Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1167-68 (N.D. Cal. 2010); *Lozano*, 702 F. Supp. 2d at 1001; *Abbas*, 2009 WL 4884471, *1. Here, in contrast, Plaintiffs are contending that the government can ban

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communications were commercial speech *and* it was those particular calls that were correctly viewed by Congress as a threat to privacy justifying regulation. *Moser*, 46 F.3d at 973-74.

all "calls," no matter what their content and purpose, and without consideration to the actual source of the numbers dialed, simply because of the capabilities of *equipment* used by the caller. Even if this might be acceptable under *Central Hudson*, which is doubtful, the statute fails under *Ward* because forbidding non-commercial texts lacks a "close and substantial relation to the government interests asserted." *Edenfield v. Fane*, 507 U.S. 761, 773 (1993) (ban on in-person solicitations by CPAs was unconstitutional because it did not advance the asserted state interest in "a direct and effective way").[5] *See also Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial'—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection."); *Hornstein v. Hartigan*, 676 F. Supp. 894, 896 (C.D. Ill. 1988) (invalidating statute prohibiting unlicensed solicitation of advertising for firefighters magazine because it burdened dissemination of non-commercial speech).[6]

No Alternative Means: Other than a text message, there is no effective way to tell group members what the Disco service is, the possibility of carrier fees and how to avoid them, and how to leave the service with the immediacy inherent in SMS messaging. Plaintiffs apparently do not contend that Disco users violate the law by enrolling friends for group texting. But they seek a remedy for the communication of accurate, important information about the service. Print and broadcast advertisements are costly and ineffective in these circumstances, and unlikely to reach everyone who is included in a texting group by a friend.[7] Plaintiffs try to distract by asserting that Defendants can use other means to advertise the Disco service. Opp. at 17. But we are not litigating about general advertising; Plaintiffs are suing over texts specifically directed to people who are already enrolled and who are likely to have an interest in the communication's content.

[5] None of the cases cited by Plaintiffs considered whether section 227(b)(1)(A)(iii) passed constitutional muster if the statute was interpreted as reaching non-commercial texts.

[6] Even if the introductory Disco text is commercial speech, section 227(b)(1)(A)(iii) runs afoul of the First Amendment by prohibiting all calls using an ATDS simply because of its "capacity." A speech restriction based on equipment capacity, divorced from whether that capacity was actually used, does not alleviate to a material degree the asserted evils of telemarketing. *See Edenfield*, 507 U.S. at 771.

[7] The email alternative proposed by Plaintiffs also is not a true alternative because many people who use texting to communicate are not email users. The only reliable way to reach people who are included in Disco groups is to text them.

What Plaintiffs seek here is a broad ban on all group texting. Not being able to speak to group members about a service in which they have been enrolled by an acquaintance will create confusion and antagonize users (and possibly wreck friendships). It will interfere with the development of an efficient, instantaneous means for expressive communication among countless people. By rejecting Plaintiffs' contention that even informational texts are prohibited by section 227(A)(1)(iii), this Court avoids "regulat[ing] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799.

II. PLAINTIFFS CANNOT PLEAD A CLAIM FOR RELIEF UNDER THE TCPA.

Plaintiffs' allegations offer no more than conclusory recitals of the TCPA to support an essential element of the claim—specifically, the use of an ATDS, which the TCPA defines as equipment with the capacity to (1) "store or produce telephone numbers to be called, using a random or sequential number generator"; *and* (2) "dial such numbers." Opp. at 20; 47 U.S.C. § 227(a)(1). Instead of alleging facts to support both prongs of that definition, Plaintiffs simply assert "on information and belief" that Defendants used an ATDS. *See* Mot. at 4.

In opposition to the Motion, Plaintiffs identify but three types of allegations in the Complaint that they claim are sufficient to establish the ATDS element: (i) the texts were sent "*en masse*"; (ii) the texts were "generic and impersonal"; and (iii) Plaintiffs "had no prior relationship with Defendants and had no reason to be in contact with Defendants." Opp. at 21.

Plaintiffs' position, however, ignores the other allegations in the Complaint that defeat any inference that an ATDS was used. For example, the Complaint discloses that the groups to which the text messages are sent are created by the Disco users themselves, not Defendants. CCAC ¶¶12-13. Thus, Plaintiffs concede that Defendants do not generate or supply the numbers to which text messages are sent; rather, it is the group creator (a Disco user) who provides those numbers. CCAC ¶¶14, 19-20. This is a critical fact not present in the *Kramer, Kazemi,* or *Abbas* cases cited by Plaintiffs. Plaintiffs' own allegations concede that none of the putative class members' numbers were randomly or sequentially generated.

Further undercutting Plaintiffs' position and distinguishing this case from the *Kramer*/*Kazemi*/*Abbas* line is that the Complaint establishes that Defendants did not send

impersonal messages for marketing purposes. Instead, group members received the information that Disco is a "group texting service," the names of the recipient and group creator, and an explanation that the group creator had added the recipient to a particular group. CCAC ¶¶25, 27, 30, 32. These allegations establish that Defendants did not arbitrarily contact Plaintiffs as part of a blanket, indiscriminate advertising campaign, and defeat any inference that Defendants sent the text messages using an ATDS.

Plaintiffs also attempt to skirt their pleading deficiencies in two other ways. First, they argue that Defendants send text messages to group members before the group creators do and Defendants do so not at the group creators' request. Opp. at 22. But that does not change the fact that it is the group creators—not some machine—who supply the dialed phone numbers to Disco.

Second, Plaintiffs mischaracterize Defendants' position by claiming that "Defendants insist that dismissal is warranted because [they] did not *actually use* the features of an ATDS to send the unauthorized text message to Plaintiff[s]." Opp. at 22 (emphasis in original). Plaintiffs protest that an ATDS "need only have the *capacity*" to store and produce telephone numbers using a random or sequential number generator and dial such numbers; and "use of that capacity is not an element of a TCPA claim." *Id*. But that misses the point. Defendants' position—and what the Motion demonstrates—is that Plaintiffs are unable to allege that Defendants actually used equipment with such "capacity." *See* Mot. at 3-6. Plaintiffs lack the necessary facts to support a reasonable inference that an ATDS was used in sending the introductory Disco text. *Id.*

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court issue an order granting the Motion and dismissing the Consolidated Class Action Complaint with prejudice.

DATED: December 2, 2011

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