
Docket No. 13-55678

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**DAVID M. EMANUEL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED
PLAINTIFF-APPELLANT,**

v.

**THE LOS ANGELES LAKERS INC.,
DEFENDANT-APPELLEE.**

**ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

DISTRICT COURT CASE No.: 12-cv-09936-GW-SH

OPENING BRIEF FOR PLAINTIFF-APPELLANT

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I. JURISDICTIONAL STATEMENT

A. BASIS FOR THE DISTRICT COURT'S JURISDICTION

The United States District Court for the Central District of California had jurisdiction over this case because it arises out of violation of federal law under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”). 47 U.S.C. § 227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).

B. BASIS FOR THE COURT OF APPEALS' JURISDICTION

The United States Court of Appeals for the Ninth Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

C. FILING DATE OF THE APPEAL

The District Court issued the order that is the subject of this appeal on April 18, 2013. Appellant filed a timely Notice of Appeal four days later, on April 22, 2013.

D. ASSERTION THAT APPEAL IS FROM A FINAL ORDER OR JUDGMENT THAT DISPOSES OF ALL PARTIES' CLAIMS

This appeal is from a final order dismissing the First Amended Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), and appealable pursuant to the “final judgment rule.” *See* 28 U.S.C. § 1291.

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II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err when it found the unsolicited commercial text message sent by Appellee to Appellant's cellular telephone via short message script 525377 using an automatic telephone dialing system was not actionable under § 227(b)(1)(A) of the Telephone Consumer Protection Act as a matter of law where Appellee did not warn Appellant that by sending a text message via short message script 525377 to display a personal message on Appellee's scoreboard that Appellee would then capture the Appellant's cellular telephone number and send future unsolicited commercial text messages to Appellant's cellular telephone?
2. Did the District Court err when it found the Appellant gave Appellee prior express consent pursuant to § 227(b)(1)(A) of the Telephone Consumer Protection Act to send an unsolicited commercial text message to Appellant's cellular telephone using an automatic telephone dialing system where Appellant was not warned that by sending a text message via short message script 525377 for the sole purpose of displaying a personal message on Appellee's scoreboard that Appellee would send Appellant future unsolicited commercial

text messages via short message script 525377 stating, among other things, that Appellant could sign up for news alerts from Appellee?

III. STATEMENT OF THE CASE

This appeal concerns an order of the District Court for the Central District of California dismissing Appellant David M. Emanuel (“Mr. Emanuel” or “Appellant”) first amended putative class action complaint for damages and injunctive relief against The Los Angeles Lakers Inc. (“The Lakers” or “Appellee”) for sending an unsolicited commercial text message to the cellular telephone of Mr. Emanuel and the putative class members in negligent and/or intentional violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* The Complaint in this action was filed on November 20, 2012 (E.R. 116; Dkt. No. 1). The First Amended Complaint (“FAC”) was filed on February 8, 2013 (E.R. 117; Dkt. No. 15).

On January 21, 2013, The Lakers filed a Motion to Dismiss Plaintiff’s First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), or In The Alternative, Motion For Summary Judgment (“Motion to Dismiss”) (E.R. 040-057, 117; Dkt. No. 17). Mr. Emanuel filed an Opposition on March 28, 2013 (E.R. 058-092, 117; Dkt. No. 18). The Lakers filed a Reply on April 4, 2013 (E.R. 093-113, 117; Dkt. No. 19). The District Court heard The Lakers’ Motion to Dismiss on April 18, 2013 and granted The Lakers’ Motion to Dismiss on the same date (E.R. 014-019, 118; Dkt. No. 24).

Mr. Emanuel filed a Notice of Appeal on April 22, 2013 (E.R. 114; and 118; Dkt. No. 25). The parties filed a Stipulation Extending Deadline To File Opening Brief, Answering Brief And Reply Brief with this Court on September 5, 2013, which was granted on September 9, 2013, extending the deadline for filing the Opening Brief to October 15, 2013.

IV. STATEMENT OF FACTS

Mr. Emanuel alleged in the FAC that “[o]n or about October 13, 2012, [Mr. Emanuel] attended [The Lakers’] game held at the Staples Center.” E.R. 005 (FAC, ¶ 15). “At some point during the game, [Mr. Emanuel] observed a message from [The Lakers] that stated ‘TEXT your message to 525377.’” E.R. 005 (FAC at ¶ 16; *see also* E.R. 013 (Exhibit A to FAC)). “Notably absent from [The Lakers’] statement is any statement that by sending a message to 525377, [Mr. Emanuel] would be consenting to receive future text messages from [The Lakers].” E.R. 017 (FAC at ¶ 17).

“As such, [Mr. Emanuel] sent the following text message from [Mr. Emanuel’s] cell phone to [The Lakers] for the sole purpose of having [The Lakers] put a personal message on the scoreboard: ‘I love you Facey. Happy Date Night’.” E.R. 005 (FAC at ¶ 18). “Thereafter, [Mr. Emanuel] received an unsolicited text message from the 525-377 number attributed to [The Lakers]. This text message stated:

“Thnx! Txt as many times as u like. Not all msgs go on screen. Txt ALERTS for Lakers News alerts. Msg&Data Rates May Apply. Txt STOP to quit. Txt INFO for info”

E.R. 005 (FAC at ¶ 19).

By sending this text message to Mr. Emanuel, “[The Lakers] utilized an ‘automatic telephone dialing system,’ (“ATDS”) as defined by 47 U.S.C. § 227(a)(1) using text messages sent to [Mr. Emanuel’s] cellular telephone as prohibited by 47 U.S.C. § 227(b)(1)(A)(iii) in order to attempt to solicit business from [Mr. Emanuel].” E.R. 005 (FAC at ¶ 20). “This ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.” E.R. 005 (FAC at ¶ 21). “The telephone number [The Lakers] called was assigned to a cellular telephone service for which [Mr. Emanuel] incurred a charge for incoming calls and texts pursuant to 47 U.S.C. § 227(b)(1).” E.R. 005 (FAC at ¶ 22). This text message was not sent for an emergency purpose. E.R. 006 (FAC at 23). “[Mr. Emanuel] did not provide prior express consent to receive calls or messages on [Mr. Emanuel’s] cellular telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).” E.R. 006 (FAC at ¶ 26). “These telephone communications by [The Lakers], or its agent, violated 47 U.S.C. § 227(b)(1).” E.R. 006 (FAC at ¶ 27).

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V. SUMMARY OF ARGUMENT

A. STANDARD OF REVIEW

The Ninth Circuit reviews de novo a dismissal of a complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure, 12(b)(6). *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199 (9th Cir. 2003). “A motion to dismiss under Fed. R. Civ. P. 12(b)(6) challenges the legal sufficiency of the pleadings.” *In re Jiffy Lube Int'l, Inc.*, 847 F. Supp. 2d 1253, 1256 (S.D. Cal. 2012) (citing *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978)).

A Rule 12b(6) dismissal is proper only in “extraordinary” cases. *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981); *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). “As the text of Rule 8(a)(2) itself makes clear, even a ‘short and plain’ statement can state a claim for relief. *See* Fed. R. Civ. P. 8(a)(2).” *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1049 (9th Cir. Or. 2012).

The complaint must be construed in a light most favorable to the plaintiff. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The court must accept as true all material allegations in the complaint as well as reasonable inferences to be drawn from those allegations. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998); *Broam*, 320 F.3d at 1028.

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B. THE DISTRICT COURT ERRED IN FINDING THAT THE UNSOLICITED COMMERCIAL TEXT MESSAGE SENT BY THE LAKERS TO MR. EMANUEL’S CELL PHONE VIA SHORT MESSAGE SCRIPT 525377 USING AN AUTOMATIC TELEPHONE DIALING SYSTEM DID NOT VIOLATE THE TELEPHONE CONSUMER PROTECTION ACT AS A MATTER OF LAW

The District Court erred in finding that The Lakers’ automated commercial text message sent to Mr. Emanuel via short message script 525377 using an automatic telephone dialing system was not actionable as a matter of law because: Section 227(b)(1)(A) is unambiguous in that it applies to “any call” (including a text message call) using an ATDS; (2) Section 227(b)(1)(A) is content-neutral; (3) Section 227(b)(1)(A) applies to even a single call rather than bulk text messaging; (4) Section 227(b)(1)(A) does not require or permit a “common sense” approach to liability; and (5) The Lakers’ text message was not a “confirmatory” text message recently exempted by the Federal Communications Commission (“FCC”).

C. THE DISTRICT COURT ERRED IN FINDING THAT MR. EMANUEL PROVIDED THE LAKERS WITH PRIOR EXPRESS CONSENT TO SEND AN UNSOLICITED COMMERCIAL TEXT MESSAGE USING AN AUTOMATIC TELEPHONE DIALING SYSTEM TO MR. EMANUEL’S CELLULAR TELEPHONE

The District Court erred in finding that Mr. Emanuel provided “prior express consent” to receive The Lakers’ automated commercial text message because: (1) implied consent based on the circumstance of receipt of the text message fails to measure up to express consent; (2) even if Mr. Emanuel had consented to receive a

text message, he did not consent specifically to receive an automated text message; (3) The Lakers essentially captured Mr. Emanuel's cellular telephone number without his permission; (4) The District Court relied upon non-controlling, and wrongly decided and/or distinguishable cases despite the express text of the TCPA and controlling authority in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009); and (5) The District Court was required to accept as true Mr. Emanuel's allegation that Mr. Emanuel sent a text message to short message script 525377 for the sole purpose of displaying a personal message on The Lakers' scoreboard.

VI. ARGUMENT

A. THE TELEPHONE CONSUMER PROTECTION ACT

Congress enacted the TCPA in 1991 amidst an unprecedented increase in the volume of telemarketing calls to consumers in America, as the TCPA combats the threat to privacy being caused by the automated telephone practices, stating:

It shall be **unlawful** for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) **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—. . .

(iii) **to any telephone number assigned to a paging service, cellular telephone service** . . .

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

The TCPA applies with equal force to the making of text message calls as it does to the making of voice calls to cellular telephones. *Satterfield, supra*, 569 F.3d at 954. The TCPA’s prohibition at issue requires the calls to be made with 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) (emphasis added).¹

¹ The District Court stated in its order granting The Lakers’ Motion to Dismiss (“Order”), “[t]hough it need not reach the issue to decide this motion, the Court would similarly conclude that the FAC fails to adequately plead that Defendant used an ATDS system,” “[a]s Defendant points out, Plaintiff does not allege that he received the Lakers’ text ‘randomly’ but rather in direct response to Plaintiff’s initiating text.” E.R. 017 (Order, p. 4, n. 3). Had the District Court actually held that Mr. Emanuel’s FAC failed to adequately allege use of an ATDS by The Lakers, this would have been in error because the “system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it” (*Satterfield, supra*, 569 F.3d at 951). Mr. Emanuel specifically alleged that “[t]his ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator” (E.R. 005 (FAC at ¶ 21)). Also, it cannot be said that Mr. Emanuel “merely parroted]” the definition of an ATDS in the statute (*see* Order, p. 4, n. 3), given Mr. Emanuel’s additional allegations that: (1) “Defendant utilized an ‘automatic telephone dialing system, (“ATDS”) as defined by 47 U.S.C. § 227(a)(1) using text messages sent to Plaintiff’s cellular telephone as prohibited by 47 U.S.C. § 227(b)(1)(A)(iii) in order to attempt to solicit business from Plaintiff” (E.R. 005 (FAC at ¶ 20)); and (2) the FAC alleged the specific SMS code, 525377, used by The Lakers to send the text message to Mr. Emanuel’s cell phone (E.R. 005 (FAC at ¶¶ 15-19); *see also In re Jiffy Lube Int’l, Inc.*, 847 F. Supp. 2d 1253, 1260 (S.D. Cal. 2012) (“Plaintiffs have stated that they received a text message from an SMS short code and that the message was sent by a machine with the capacity to store or produce random telephone numbers. While additional factual details about the

“The TCPA violations, if any, occurred when the messages were sent...” *Lee v. Stonebridge Life Ins. Co.*, 2013 U.S. Dist. LEXIS 19774, *9 (N.D. Cal. Feb. 12, 2013). “The only exemptions in the TCPA that apply to cellular phones are for emergency calls and calls made with prior express consent.” *Gager v. Dell Fin. Servs., LLC*, 2013 U.S. App. LEXIS 17579, *20 (3d Cir. Pa. Aug. 22, 2013). The TCPA sets statutory damages in the amount of \$500 per negligent violation. *See* 47 U.S.C. § 227(b)(3)(B).

B. THE DISTRICT COURT ERRED IN RESORTING TO LEGISLATIVE HISTORY AND EVIDENCE OF CONGRESSIONAL INTENT TO INTERPRET 47 U.S.C. § 227(B)(1)(A) OF THE TCPA BECAUSE THAT SECTION OF THE STATUTE IS CONTENT-NEUTRAL

At the motion to dismiss hearing on April 18, 2013, Mr. Emanuel argued that § 227(b)(1)(A) of the TCPA is unambiguous, as found by the Ninth Circuit Court of Appeals in *Satterfield, supra*, 569 F.3d at 951, and therefore, it was improper for the District Court to ignore binding authority from this Court in resorting to legislative history and evidence of Congressional intent regarding the statutory language of this section. *See* E.R. 023 (Hearing Transcript, 4:16-22). Nevertheless, the District Court resorted the legislative history and evidence of Congressional intent to interpret § 227(b)(1)(A) without finding this statutory

machines might be helpful, further facts are not required to move beyond the pleading stage.”)).

section to be unambiguous. *See* E.R. 023 (Hearing Transcript, 4:23-5:6, 7:21-23); and E.R. 016-017 (Order, pp. 2-3).

1. Section § 227(b)(1)(A) is unambiguous on its face, as it applies to “any call” using an ATDS without prior express consent

In *Satterfield, supra*, 569 F.3d at 951, this Court analyzed the relevant section of the TCPA and explained:

In construing the provisions of a statute, we first look to the language of the statute to determine whether it has a plain meaning. *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008). The preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous. *Id.* (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004) (internal quotation marks omitted)). **Reviewing this statute, we conclude that the statutory text is clear and unambiguous.**

Satterfield, supra, at 951 (emphasis added).²

Therefore, the relevant section of the TCPA is unambiguous on its face, as previously determined by this Court in 2009, which means that resort to legislative

² “[I]t is important to note that this Circuit also recognizes the principle that ‘legislative history - no matter how clear – can’t override statutory text. Where the statute’s language ‘can be construed in a consistent and workable fashion,’ [this Court] must put aside contrary legislative history.’” *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 834-835 (9th Cir. Or. 1996) (quoting *Hearn v. Western Conf. of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995). (citations omitted)).

history and Congressional intent to interpret this section of the TCPA is inappropriate.

2. The District Court improperly resorted to legislative history and evidence of Congressional intent in interpreting § 227(b)(1)(A)(iii)

At the motion to dismiss hearing, Mr. Emanuel argued:

The first issue is that I think the – the legislative history and whether that, you know, should be considered by the court. The *Satterfield* case said that the statute, the TCPA, is unambiguous, and if it's unambiguous, it's inappropriate to look a legislative history because Congress wrote -- what it [writes], it means, and what it means, it [writes].

E.R. 023 (Hearing Transcript, 4:16-22). In response, the District Court stated:

Well, that's -- I know we're supposed to accept that as being true, but that is kind of like a reality that is fictional, but I understand that the general rule is, yes, if the statute is clear, then we don't look at legislative history; but the justification for that rule is -- I think, you know, what can one say? But oftentimes Congress enacts things that Congress has no idea what it's done.

E.R. 023-024 (Hearing Transcript, 4:23-5:4 (emphasis added)).

In the District Court's Order, the District Court improperly and expressly relied on the non-binding decisions in *Ibey*, *Ryabyshchuk* and *Pinkard*, which are decisions that either improperly resorted to legislative history and/or evidence of Congressional intent, or relied on cases that did. *See* E.R. 017 (Order, p. 3 (“the Court concluded that the challenged text message is not actionable under the

TCPA.”)).

i. Ibey decision as to Issue 1

In citing to *Ibey*, the District Court relied upon the flawed reasoning in *Ibey* that “the statute’s purpose is to prevent unsolicited automated telemarketing and bulk communications” only. See E.R. 016-017 (Order, pp. 2-3); see also *Ibey v. Taco Bell Corp.*, 2012 U.S. Dist. LEXIS 91030, *7 (S.D. Cal. June 18, 2012) (citing S. Rep. 102-178, at 4-5 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1972). The *Ibey* Court held that a text message confirming an opt-out request was not “an invasion of privacy contemplated by Congress” (*Ibey, supra*, at *8). However, as explained by the court in *Melingonis v. Network Communs. Int’l Corp.*, 2010 U.S. Dist. LEXIS 125348, *4 (S.D. Cal. Nov. 29, 2010), “...**this prohibition ... is not limited only to calls that constitute telephone solicitations.**” (Bold face is from the court) (internal quotations omitted).

Moreover, this section of the TCPA does not require “bulk” text messaging (the TCPA applies to “any call,” § 227(b)(1)(A)) before the protections of the TCPA are implicated, as even a single text message violates the TCPA if sent using an ATDS to a cell phone without prior express consent, as was the case in *Satterfield*. See E.R. 076 (Pl.’s Opp., 10:15-25).

Ibey is also factually distinguishable from the present case because *Ibey* concerned a situation where the plaintiff sent a text message to Taco Bell for the

purpose of taking a survey regarding a recent purchase, and necessarily received a text message in response with the link to take the survey (*see Ibey, supra*, 2012 U.S. Dist. LEXIS 91030 at *2).³ Here, however, Mr. Emanuel did not send a text message to The Lakers for the purpose of receiving a text message back from The Lakers. Instead, Mr. Emanuel sent the text message to SMS code 525377 for the “sole purpose” of displaying a message on the scoreboard⁴ (*see* E.R. 005 (FAC, ¶¶ 16-19)), which stated, “I love Facey. Happy Date Night” (E.R. 005 (FAC at ¶ 18)).

The *Ibey* decision is factually distinguishable for a second reason, as it concerned a true confirmatory text message confirming the plaintiff’s later decision to opt out of receiving further text messages from Taco Bell. *See Olney v. Job.Com, Inc.*, 2013 U.S. Dist. LEXIS 141339, *20 (E.D. Cal. Sept. 30, 2013) (the *Ibey* decision concerned a “confirmatory text message[] and [is] therefore not directly analogous.”). A true confirmatory text message exempted by the FCC is a “one-time text[] confirming a request that no further text messages be sent...”⁵

Here, the text message from The Lakers was not a “confirmatory” text

³ *See also* E.R. 018 (Order, p. 4), where the District Court explained the holding in *Ibey* as follows: “dismissing TCPA claim where ‘Plaintiff expressly consent to contact by Defendant was he initially texted 9138 to Defendant.’”

⁴ Also referred to as the “Jumbotron.”

⁵ *In re Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 15391, Declaratory Ruling, 27 FCC Rcd. 15391, 15394, 2012 WL 5986338, *3 (released November 29, 2012).

message as defined by the FCC, as Mr. Emanuel had not even sent The Lakers a text message requesting to be opted out of further text messages (Mr. Emanuel had not elected to opt in to receive text messages from The Lakers either) before The Lakers sent the unsolicited commercial text message to Mr. Emanuel's cell phone. *See* E.R. 005 (E.R. 005 (FAC, ¶¶ 16-19)); *see also* Section VI.D., *infra*.

Therefore, not only is the *Ibey* decision factually distinguishable, but the reasoning behind the decision was legally flawed, and it was therefore improper for the District Court to rely on such decision in finding that the text message here did not violate the TCPA.

ii. Ryabyshchuk decision as to Issue 1

In its Order, the District Court quoted the *Ryabyshchuk* decision where the *Ryabyshchuk* Court stated, “In construing the extent and contour of [THE TCPA], courts consistently and properly look to the purpose and history of the statute.” E.R. 017 (Order, p. 3 (quoting *Ryabyshchuk v. Citibank (S.D.) N.A.*, 2012 U.S. Dist. LEXIS 156176, at *5-6)). The District Court then relied on *Ryabyshchuk* in finding that the TCPA was designed to target “the proliferation of intrusive, nuisance calls” (E.R. 017 (Order, p. 3 (quoting *Ryabyshchuk, supra*, 2012 U.S. Dist. LEXIS 156176, at *6)), and then held that “the challenged message here is not the kind of ‘intrusive, nuisance [telemarketing] call[]’ that Congress sought to prohibit” (E.R. 017 (Order, p. 3 citing *Mims, supra*, 132 S. Ct. at 745)).

The *Ryabyshchuk* Court was incorrect to find that “not every text message or call constitutes an actionable offense” (*Ryabyshchuk, supra*, 2012 U.S. Dist. LEXIS 156176 at *6), as § 227(b)(1)(A) is content-neutral⁶ and applies regardless of purpose, unless the text or call is for “emergency purposes” (*see* 47 U.S.C. § 227(b)(1)(A)).

Also, the *Ryabyshchuk* Court improperly found that “context is indisputably relevant to determine whether a particular call is actionable under the TCPA” (*Ryabyshchuk, supra*, at *8; *see* E.R. 017 (Order, p. 3)), since once again, the relevant section of the TCPA applies regardless of purpose, unless an emergency purpose is involved (*see* 47 U.S.C. § 227(b)(1)(A)). In the FAC here, there is no allegation that the text message was sent for an emergency purpose (and Mr. Emanuel expressly alleged that text was *not* sent for an emergency purpose, FAC, ¶ 25), nor could The Lakers credibly claim that its text message inviting Mr. Emanuel to “Txt ALERTS for Lakers News alerts” (E.R. 005 (FAC, ¶ 19)) was sent for an emergency purpose. *See* E.R. 015 (Order, p. 1).

Like the *Ibey* decision, the *Ryabyshchuk* decision also concerned a true confirmatory text message (*see Olney, supra*, 2013 U.S. Dist. LEXIS 141339 at *20), which makes *Ryabyshchuk* factually distinguishable as well. *See also* Section

⁶ *See Joffe v. Acacia Mortg. Corp.*, 211 Ariz. 325, 336 (Arizona Ct. of App. Sept. 20, 2005) (treating the TCPA as a content-neutral regulation for purposes of a First Amendment challenge).

VI.D., *infra*.

Consequently, the District erred in relying on the *Ryabyshchuck* decision to find that the text message at issue was not actionable under the TCPA.

iii. Pinkard decision as to Issue 1

The District Court followed the *Pinkard* Court's reasoning based on what the *Pinkard* Court called the "overwhelming weight of social practice: that is, distributing one's telephone number is an invitation to be called[.]" E.R. 017 (Order, p. 3 (quoting *Pinkard v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 160938, *14 (N.D. Ala. Nov. 9, 2012))). This was improper for three reasons.

First, the district court in *Pinkard* was not permitted look to what it called "social practice" (*id.* at *14) in determining whether the plaintiff consented to automated text messages by providing the plaintiff's cell phone number to the pharmacy at Wal-Mart for purposes related to the Plaintiff's prescription, as social practice is not the standard for prior express consent (the standard is "clearly and unmistakably stated" consent, *Satterfield, supra* at 955, not implied consent). This means the District Court in the present case should not have relied on such flawed reasoning in *Pinkard*. See E.R. 016 (Order, p. 4).

Second, *Pinkard* is factually distinguishable because Mr. Emanuel did not

*provide*⁷ his cell phone number to The Lakers for the purpose of receiving text messages from The Lakers (*see* E.R. 005 (FAC, ¶¶ 18 and 19)), unlike the plaintiff in *Pinkard* who provided a cell phone number *upon request* by Wal-Mart's employees, which telephone number was needed by *Pinkard* "in case there were any questions that came up" regarding the plaintiff's prescription.⁸

Third, the court in *Pinkard* improperly interpreted this Court's decision in *Satterfield* to find the plaintiff in *Pinkard* provided prior express consent to receive *automated* text messages on the plaintiff's cell phone by providing the cell phone number to the employees at Wal-Mart's pharmacy in connection with her

⁷ Mr. Emanuel disputes having *provided* Mr. Emanuel's cellular telephone number to The Lakers in the sense that the word "provided" means Mr. Emanuel gave out his cell phone number for purposes of being contacted at the number by The Lakers, since Mr. Emanuel contends that The Lakers "captured" his telephone number. *See* Section VI.E.3., *infra*.

⁸ In *Pinkard*, the plaintiff, Stephanie Pinkard, dropped off a prescription with the Russellville Wal-Mart pharmacy at some unspecified date and time prior to initiating the lawsuit in that case. *Pinkard, supra*, 2012 U.S. Dist. LEXIS 160938 at *5. The Wal-Mart employees asked plaintiff for several pieces of personal information, including her cellular telephone number. *Id.* The plaintiff provided that information. *Id.* The employees noted that plaintiff's telephone number was needed "in case there were any questions that came up." *Id.* None of the defendant's employees explicitly sought permission to send plaintiff text messages. *Id.* The plaintiff received an undisclosed number of text messages on her cellular telephone from defendant within hours of leaving her prescription at defendant's pharmacy. *Id.* When the plaintiff inquired with the pharmacy's staff why she was receiving text messages from defendant, one of Wal-Mart's employees informed plaintiff that Wal-Mart automatically enrolls individuals who fill prescriptions at its pharmacies into a program that provides the enrollees with "Wal-Mart related" text messages. *Id.*

prescription. *See* Section VI.E.4.ii., *infra*.

iv. Mims decision as to Issue 1

While the Supreme Court in *Mims* looked to Congress' intent in enacting the TCPA, the Supreme Court was interpreting a different section of the TCPA when it took up the issue of whether Section 227(b)(3) vested jurisdiction exclusively in state courts over private TCPA actions and divested federal district courts of federal question jurisdiction under 28 U.S.C.S. § 1331 (*Mims, supra*, 132 S. Ct. at 749), which called for a determination of statutory construction. Unlike in *Mims*, however, the statutory section at issue in this case concerns automated calls (i.e., including automated text message calls) to a cellular telephone without prior express consent (*see* § 227(b)(1)(A)), which means that *Mims* does not provide support for the District Court's apparent belief that courts may consider evidence of Congressional intent regarding § 227(b)(1)(A) of the TCPA in ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

Therefore, the District Court could not properly consider evidence of Congressional intent regarding the TCPA in ruling on The Lakers' motion because the statutory text of § 227(b)(1)(A) is unambiguous, as determined by this Court in *Satterfield* and the plain reading of the statute. *See* E.R. 017 (Order, p. 3).

In sum, the District Court erred in relying on the flawed and distinguishable holdings in *Ibey*, *Ryabyshchuk*, and *Pinkard*. The District Court also erred in

relying upon the decision in *Mims* to find that district courts may consider evidence of Congressional intent to interpret § 227(b)(1)(A) of the TCPA.

3. Notably, The Lakers did not even argue that § 227(b)(1)(A) is ambiguous, nor did the District Court so find

The Lakers did not even argue in their Motion to Dismiss or at the motion to dismiss hearing that § 227(b)(1)(A) of the statute was ambiguous in any manner, which is a threshold requirement that was not satisfied here. *See Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. Or. 1996) (“...our approach to statutory interpretation is to look to legislative history only where we *conclude* the statutory language does not resolve an interpretive issue.”) (emphasis added). Nor could The Lakers have credibly argued that the words “any call” are ambiguous, as the meaning of such words in the statute is clear – it means *any* call,⁹ regardless of content, for this statutory section is content-neutral (*see Gager, supra*, 2013 U.S. App. LEXIS 17579 at *20). Further, there is also no mention of the statute being ambiguous in the District Court’s Order (E.R. 014-019) or in the Hearing Transcript (E.R. 020-039).

Since § 227(b)(1)(A) is unambiguous on its face, as found by this Court in *Satterfield*, the District Court erred in resorting to legislative history and evidence

⁹ “The TCPA clearly prohibits making any call ‘using any automatic telephone dialing system or an artificial or prerecorded voice’ to a wireless number.” *Iniguez v. CBE Group*, 2013 U.S. Dist. LEXIS 127066, *10-11 (E.D. Cal. Sept. 5, 2013) (emphasis added).

of Congressional intent of the TCPA to hold that the text message at issue was not actionable under § 227(b)(1)(A).

C. THE DISTRICT COURT ERRED IN MISAPPLYING THE NINTH CIRCUIT COURT OF APPEAL’S DECISION IN *CHESBRO V. BEST BUY STORES, L.P.* TO FIND THAT COURTS TAKE A “COMMON SENSE” APPROACH TO LIABILITY FOR CALLS TO CELLULAR TELEPHONES

The District Court agreed with the argument by The Lakers that courts should take a “common sense” approach to determining liability for calls and text messages pursuant to 47 U.S.C. § 227(b)(1)(A)(iii). *See* E.R. 017 (Order, p. 3). However, the “common sense” approach articulated by this Court in *Chesbro* applies only to calls to a *residential* telephone number, not a *cellular* telephone number.¹⁰ *See Chesbro v. Best Buy Stores, L.P.*, 697 F.3d 1230, 1233-1234 (9th Cir. Wash. 2012).

This Court in *Chesbro* addressed the question of whether a prerecorded message to a residential telephone from Best Buy constituted an “unsolicited advertisement” or “telephone solicitation.” *See Chesbro, supra*, 697 F.3d at 1233-1234.¹¹ This Court was not applying § 227(b)(1)(A)(iii) in the *Chesbro* case, but

¹⁰ “[W]hen Chesbro said let’s take a common-sense approach, [it was] discussing a different section of the TCPA, which was undecided, and the case law was undecided. They were talking about ... automated calls to landlines.” E.R. 024 (Hearing Transcript, 5:4-20).

¹¹ The content of the prerecorded message was as follows: “This is a very important message regarding the Best Buy Reward Zone program. We’re making

rather § 227(b)(1)(B). Under such section, a prerecorded call must constitute an “unsolicited advertisement” or “telephone solicitation” in order to violate the TCPA; for the FCC has exempted from the prohibition on making prerecorded calls to landlines those calls that do not include a “telephone solicitation” or an “unsolicited advertisement.” See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14095 ¶¶ 136 and 141, 2003 WL 21517853 (F.C.C. July 3, 2003) (“2003 Order”). See also *Iniguez, supra*, 2013 U.S. Dist. LEXIS 127066 at *10:

Under the prohibition related to residential lines, the Federal Communications Commission (“FCC”) is permitted to make exceptions for certain calls that are not made for a commercial purpose or those made for a commercial purpose that do not contain an unsolicited advertisement and will not adversely affect privacy rights. 47 U.S.C. § 227(b)(2)(B). The statute does not permit the FCC to make similar exceptions for calls made to wireless numbers.

Section 227(b)(1)(A), however, is content-neutral, as determined by this Court in 1995. See *Moser v. F.C.C.*, 46 F.3d 970, 973 (9th Cir. 1995) (“we conclude that the statute should be analyzed as a *content-neutral* time, place, and manner restriction.”) (emphasis added); *Melingonis v. Network Communs. Int’l*

some changes to increase the security of the program and be more environmentally friendly. Please listen to the entire message and then go to MyRewardZone.com for details and to update your membership.” *Chesbro, supra*, 697 F.3d at 1232.

Corp., 2010 U.S. Dist. LEXIS 125348, *3 (S.D. Cal. Nov. 29, 2010), the Court recognized, “**that this prohibition applies regardless of the content of the call...**” (quoting *In re the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R 559, 565 (Jan. 4, 2008)) (Bold face is from court).¹² It was thus improper for the District Court to ignore binding authority from this Court in *Moser*.¹³ There is simply no need to take a “common sense” approach to determining whether a call or text message to a cell phone violates the TCPA, as “any call” to a cell phone using an ATDS violates the TCPA unless made with the called party’s prior express consent.¹⁴ *See Lemieux v. Schwan's Home Serv.*, 2013 U.S. Dist. LEXIS 127032, *20 (S.D. Cal. Sept. 5, 2013):

¹² For the same reason, the *Ryabyshchuk* Court incorrectly applied “a measure of common sense” in determining whether a one-time text message confirming a consumer’s opt-out request violated the TCPA (*Ryabyshchuk, supra*, 2012 U.S. Dist. LEXIS 156176 at *6), since the relevant section of the TCPA is content-neutral.

¹³ The District Court stated, “There’s no dispute that the -- apparently the text, the first word of it, is ‘Thanks. Text as many times as you like. Not all the messages go to screen. Text alerts’ -- et cetera, et cetera. It also says, ‘Text stop to quit; text info for info.’ Why isn't that responsive?” E.R. 027 (Hearing Transcript, 8:8-12). The District Court also stated, “Well, acknowledging that they got the message that he sent and also providing him with information.” E.R. 029 (Hearing Transcript, 10:19-20).

¹⁴ “[W]hy take a common-sense approach when the Ninth Circuit has already laid out the standard[?]” E.R. 025 (Hearing Transcript, 6:7-8).

Defendants characterize their calls as ‘courtesy calls,’ arguing the TCPA was not enacted to prohibit such calls but was instead enacted to prevent unwanted telemarketing. Section 227(b)(1)(A)(iii), however, does not make such a distinction.

Given that 47 U.S.C. § 227(b)(1) is content-neutral, there is no common sense application even permitted in determining a violation of this section regulating calls to a cell phone, since the actual content of the message, whether an advertisement or not, is wholly irrelevant to the liability issue.¹⁵ The simple fact that The Lakers sent a text message to Mr. Emanuel’s cell phone using an ATDS without prior express consent is enough to establish liability under the TCPA. *See* 47 U.S.C. § 227(b)(1)(A)(iii); *see also Jachimiec v. Regent Asset Mgmt. Solutions*, 2011 U.S. Dist. LEXIS 56956, *3 (S.D. Cal. May 26, 2011) (“Plaintiff alleges that Regent telephoned him on his cellular telephone eight times using an automated dialer and/or an artificial or prerecorded voice, all in violation of the TCPA. These allegations are undisputed. Plaintiff is entitled to summary judgment on his claim that Regent violated the TCPA.”).

In any event, common sense dictates that the text message at issue was completely “unsolicited” by Mr. Emanuel (E.R. 005 (FAC at ¶ 18), and The Lakers

¹⁵ Plaintiff argued that “[c]ommon sense is not the standard ... for prior express consent with this specific portion of the TCPA...” E.R. 029 (Hearing Transcript, 10:1-2).

failed to warn or advise Mr. Emanuel that The Lakers would send the automated text message at issue in this case to Mr. Emanuel's cell phone (*see* E.R. 005 (FAC at ¶ 17)). Common sense also dictates that The Lakers did not obtain "clearly and unmistakably stated" consent (*Satterfield, supra*, 569 F.3d at 955) to send the automated marketing¹⁶ text message to Mr. Emanuel's cell phone. Additionally, common sense dictates that the text message at issue was not confirming an opt-out request and was therefore not a "confirmatory" text message as defined by the FCC¹⁷ Lastly, common sense dictates that Mr. Emanuel's cellular telephone number was captured by The Lakers.¹⁸

Thus, § 227(b)(1)(A) of the TCPA must be interpreted as a content-neutral regulation without looking at the content or context (unless for an emergency purpose) of the text message to determine liability, and therefore, the District Court erred in applying the "common sense" approach articulated in *Chesbro* to calls to a *cellular* telephone using an ATDS (E.R. 017-018 (Order, pp. 3-4)).

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¹⁶ *See* E.R. 005 (FAC, ¶¶ 19 and 20).

¹⁷ *See* Section VI.D., *infra*.

¹⁸ *See* Section VI.E.3., *infra*.

D. THE DISTRICT COURT ERRED IN FINDING THAT THE LAKERS' TEXT MESSAGE TO MR. EMANUEL'S CELLULAR TELEPHONE WAS A "CONFIRMATORY" TEXT MESSAGE PURSUANT TO THE FEDERAL COMMUNICATION COMMISSION'S NOVEMBER 2012 DECLARATORY RULING

The District Court erred in concluding that the text message at issue was a "confirmatory" text message exempted from liability by the FCC in the November 26, 2013 Declaratory Ruling. *See* E.R. 016 (Order, p. 4); *see also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc., supra*, 27 FCC Rcd. 15391, 2012 WL 5986338. In the District Court's Order, the District Court stated, "[Mr. Emanuel] ... consented to the Lakers *confirmatory* text ..." E.R. 016 (Order, p. 4 (emphasis added)). After mentioning the *Ibey* case¹⁹ concerning a true confirmatory text message,²⁰ the District Court went on to characterize the text message from The Lakers as a confirmatory text comparable to the confirmatory text message in *Ibey*,

¹⁹ The District Court found the *Ibey* and *Ryabyshchuk* cases "more applicable than the other cases that the plaintiff is citing to, because those cases deal more in that type of context," referring to the confirmatory text message context. *See* E.R. 026 (Hearing Transcript, 7:7-10). However, as stated by the court in *Roberts v. PayPal, Inc.*, 2013 U.S. Dist. LEXIS 76319, *8-9 (N.D. Cal. May 30, 2013), "PayPal's text message was not sent in response to an opt-out request, so *Ryabyshchuk* and *Ibey* are distinguishable."

²⁰ Mr. Emanuel explained that a "real confirmatory text message" is one that essentially says "I want to opt out ... And then [the entity] send[s] a text to say, 'we won't send you any more text[s].'" *See* E.R. 027 (Hearing Transcript, 8:4-6).

merely because it appeared to the District Court to be responsive to the text message from Mr. Emanuel. The District Court asked at the hearing:

There's no dispute that the – apparently the text, the first word of it, is 'thanks. Text as many times as you like. Not all the messages go to screen. Text alerts' – et cetera, et cetera. It also says, 'Text stop to quit; info for info.' Why isn't that responsive?

E.R. 027 (Hearing Transcript, 8:8-13) (emphasis added).²¹ The District Court further stated that the text message from The Lakers was sent “acknowledging that they got the message that he sent and also providing him with information.” E.R. 029 (Hearing Transcript, 10:19-20).

According to the FCC, the agency that regulates calls under the TCPA, a “confirmatory” text message is one that “confirm[s] receipt of that subscriber’s request to optout of receiving future text messages.” *In re Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 15391, *1, Declaratory Ruling, 27 FCC Rcd. 15391, 57 Communications

²¹ Mr. Emanuel did not request that “information,” nor did The Lakers indicate on the Jumbotron that “not all messages will ... appear on this board” (see E.R. 030 (Hearing Transcript, 11:4-5)), although it could have and should have done so to at the very least provide notice to Mr. Emanuel that an automated text message would be sent to Mr. Emanuel’s cell phone, especially an automated commercial message inviting Mr. Emanuel to “Txt ALERTS for Lakers News alerts” (see E.R. 015 (Order, p. 1)). See E.R. 030 (Hearing Transcript, 11:2-5 (Mr. Emanuel argued that “it would be very easy to just have one little phrase that says not all messages will – you know, will appear on this board.”)).

Reg. (P&F) 107, 2012 WL 5986338 (released November 29, 2012) (“2012 FCC Declaratory Ruling”) (emphasis added.) Indeed, this 7-page Declaratory Ruling explaining the permissibility of a single confirmatory text message under the TCPA states, “[o]ur ruling will allow organizations that send text messages to consumers from whom they have obtained prior express consent to continue the practice of sending a final, one-time text to confirm receipt of a consumer’s optout request.” *Id.* at *1 (emphasis added.)

The Lakers, and other TCPA defendants, have twisted the meaning of the FCC’s “confirmatory” text message into something that it is not in an attempt to avoid liability under the TCPA for SPAM text messages. At no point in the Mr. Emanuel’s First Amended Complaint does Mr. Emanuel refer to the text message received from The Lakers as a “confirmatory” text message. It was The Lakers who mischaracterized the SPAM text message at issue in this case by calling it a “confirmatory” text message (E.R. 048 (Def.’s Memo., p. 5, ln. 10)) with the hope of escaping liability. The text message at issue was sent to Mr. Emanuel after Mr. Emanuel sent a single text message to SMS code 525377 in order to have a message displayed on the scoreboard at the Staples Center. *See* E.R. 005-006 (FAC, ¶¶ 19-23).

Unlike the text message sent by The Lakers in the present case, a confirmatory text confirms a consumer's decision to opt out of further text messages by sending instructions such as "STOP" (*see In re Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 15391, *1, Declaratory Ruling, 27 FCC Rcd. 15391, 57 Communications Reg. (P&F) 107, 2012 WL 5986338, n. 11) in a reply text message. The Lakers' text message was not sent in response to an opt-out text message from Mr. Emanuel; indeed, the text message from The Lakers could not have been a text message confirming an opt-out request because it was the first text message to inform Mr. Emanuel that he was apparently opted in to The Lakers' text message campaign and that Mr. Emanuel could opt out by replying "STOP to quit" (E.R. 005 (FAC, ¶¶ 17-19)).

The District Court's belief that the text message may have had the "beneficial effect of tempering Plaintiff's (or his date's) expectations" (E.R. 017 (Order, p. 3)) does not alter the fact that any such expectation is wholly irrelevant to the issue of liability. A possible "beneficial effect" to the called party is not the standard for determining a violation of § 227(b)(1)(A)(iii), nor is it the standard that Mr. Emanuel may not have "been certain that the Lakers received his message *without* a confirmatory response." E.R. 017 (Order, p. 3). The only confirmatory

text that the FCC has exempted from the TCPA's coverage is a text message that

confirms an opt-out request, as explained above. And, the FCC's rationale behind its 2012 Declaratory Ruling²² is markedly different than the rationale offered by the District Court.²³

Furthermore, Mr. Emanuel did not request to receive a text message communication with information relating to Mr. Emanuel's text message. Indeed, Mr. Emanuel requested only that his message sent to SMS code 525377 be displayed on the scoreboard (*see* E.R. 005 (FAC, ¶ 18)). It does not matter that The Lakers' text message indicated "Not all msgs on screen" (E.R. 017 (Order, p. 3)), since the text message itself was unsolicited and sent without any warning whatsoever. In fact, the District Court recognized that The Lakers "failed to warn" Mr. Emanuel that the text message would be sent. *See* E.R. 017 (Order, p. 3 ("the Lakers allegedly failed to warn Plaintiff that he might receive a response...")).

²² *See* 27 F.C.C.R. 15391, ¶ 9 ("[O]pt-out confirmation texts are critical to the purposes of the underlying, ongoing text messages that the consumers originally elected to receive. For example, confirmation that a consumer no longer wishes to receive fraud prevention alerts on bank accounts ensures that the opt-out request did not come from a third party seeking to stop such texts to conceal fraudulent activities. As a result, we believe our conclusion that a consumer's prior express consent can be reasonably construed to include consent to receive a confirming text is supported by the best available evidence from consumers themselves.") (emphasis added).

²³ *See* E.R. 017 (Order, p. 3 ("Had [Mr. Emanuel] been planning to inform his date that a special message was forthcoming, [The Lakers'] confirmatory response may have had the beneficial effect of tempering [Mr. Emanuel's] (or his date's) expectations"))).

Simply stated, the text message at issue here is not a one-time confirmatory text message of the type exempted from the TCPA's coverage by the FCC. Instead, the text message sent by The Lakers was exactly the type of SPAM text message prohibited by the TCPA because it was unsolicited and sent via an ATDS without Plaintiff's prior express consent. *See* E.R. 005 (FAC, ¶¶ 19, 24-27); 47 U.S.C. § 227(b)(1)(A). Therefore, the District Court erred in finding the text message here was anything other than a SPAM text message that violates the TCPA, as it was certainly not a "confirmatory" text message as defined in the FCC's November 2012 Declaratory Ruling, was not for emergency purposes, and was certainly not with Mr. Emanuel's prior express consent.

Thus, the District Court erred in holding that the text message at issue is not actionable under § 227(b)(1)(A) of the TCPA. *See* E.R. 018-019 (Order, pp. 4-5).

E. THE DISTRICT COURT ERRED IN FINDING THAT MR. EMANUEL PROVIDED "CLEARLY AND UNMISTAKABLY STATED" CONSENT TO RECEIVE AN AUTOMATED TEXT MESSAGE ON HIS CELLULAR TELEPHONE FROM THE LAKERS WHEN MR. EMANUEL SENT A TEXT MESSAGE TO SHORT MESSAGE SCRIPT 525377 TO DISPLAY A MESSAGE ON THE LAKERS' SCOREBOARD

The TCPA does not define the term "prior express consent." Nevertheless, this Court held in *Satterfield* that "[e]xpress consent is '[c]onsent that is clearly and unmistakably stated.'" *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (citing, Black's Law Dictionary 323 (8th ed. 2004)). For several

reasons, the District Court erred in finding that Mr. Emanuel provided such consent to receive an automated commercial text message from The Lakers.

1. The District Court’s holding that sending a text message to The Lakers’ short code 525377 in order to display a message on The Lakers’ scoreboard constituted prior express consent is mistakenly premised on the doctrine of implied consent

The District Court held that Mr. Emanuel “consented to receiving a confirmatory text from the Lakers” by “voluntarily text[ing] the Lakers for the purpose of displaying a personal message during [the Lakers’] basketball game” (E.R. 018 (Order, p. 4)). The District Court followed a line of cases that found mere provision of a cellular telephone number to an entity evidences prior express consent for that entity to use an ATDS or an artificial or prerecorded voice to call the cell phone number. Such reasoning, however, is based not on the requisite prior “express” consent (47 U.S.C. § 227(b)(1)(A)), but rather “implied”²⁴ consent.

²⁴ See *Travel Travel Kirkwood, Inc. v. Jen N.Y., Inc.*, 206 S.W.3d 387, 392 (Mo. Ct. App. 2006) (telemarketing case; “If consent is not manifested by explicit and direct words, but rather is gathered only by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties, it is not express consent. Rather, it is merely implied consent.”); *Edeh v. Midland Credit Management, Inc.*, 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010) (debt collection; “express” means “explicit” and not “implicit;” defendant debt collector “was not permitted to make an automated call” unless debtor “had previously said something like this: ‘I give you permission to use an automatic telephone dialing system to call my cellular phone.’”).

The District Court explained that “it is difficult to imagine how [Mr. Emanuel] could have been certain that the Lakers received his text message *without* a confirmatory response.” E.R. 017 (Order, p. 3). The District Court thus inferred consent for the automated text message from what the District Court believed may have been a “beneficial effect of tempering [Mr. Emanuel’s] (or his date’s) expectations” [h]ad [Mr. Emanuel] been planning to inform his date that a special message was forthcoming” (*id.*). Further, the District Court apparently believed that because the text message from The Lakers’ “provided [Mr. Emanuel] with information relevant to his request” (*see id.*) that Mr. Emanuel must have wanted, or consented to, the commercial text message sent to “to solicit business from [Mr. Emanuel]” (E.R. 005 (FAC, ¶ 20)). Such is not the standard articulated by this Court in *Satterfield*, nor does such comport with the statutory text of § 227(b)(1)(A).

Notably, the District Court recognized that “the Lakers [allegedly] failed to warn [Mr. Emanuel] that he might receive a response” to Mr. Emanuel’s text message (E.R. 017 (Order, p. 3)), which demonstrates that Mr. Emanuel could not have given prior express consent because Mr. Emanuel was not even aware The Lakers might send him an automated text message. As alleged by Mr. Emanuel, “absent from Defendant’s statement is any statement that by sending a message to 525377, Plaintiff would be consenting to receive future text messages from

Defendant.” E.R. 005 (FAC, ¶ 17); E.R. 013 (Exhibit A to FAC). *See Mais v. Gulf Coast Collection Bureau, Inc.*, 2013 U.S. Dist. LEXIS 65603, 28 (S.D. Fla. May 8, 2013) (“The TCPA plainly requires ... ‘prior express consent’ before a party may be called; mere ‘implied consent’ will not do.”).

Assuming, *arguendo*, that Mr. Emanuel had provided the prior express consent to receive communications in connection with Mr. Emanuel’s text message to The Lakers – which was not the case here – Mr. Emanuel could not have given prior express consent to receive an unsolicited commercial text message inviting Mr. Emanuel to “Txt ALERTS for Lakers News alerts” (E.R. 005 (FAC, ¶ 19)).²⁵ As the District Court acknowledges, the purpose of Mr. Emanuel’s text message was to “display [Mr. Emanuel’s] love for ‘Facey’ on the Staples Center jumbotron via text” (E.R. 017 (Order, p. 3)), not to be receive an “unsolicited” SPAM text message from the Lakers (*see* E.R. 005 (FAC, ¶ 18)). *See In re Jiffy Lube Int’l, Inc.*, 847 F. Supp. 2d at 1258-59 (court denied a motion to dismiss a plaintiff’s TCPA claim where the defendant alleged the plaintiffs provided prior express consent to autodialed marketing text messages by merely providing a cell phone number on invoices for oil changes).

²⁵ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 F.C.C.R. 12391, 12408 ¶ 37 (1995) (“We do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements...”)

2. The prior express consent required by the TCPA must be *specifically* to receive calls using an automated dialer or an artificial or prerecorded voice

As argued by Mr. Emanuel, “just simply giving your telephone number to somebody in the Ninth Circuit does not allow the[m] to ... call you with an automated message...” E.R. 030 (Hearing Transcript, 11:25-12:2). Section 227(b)(1)(A) of the TCPA requires prior express consent *specifically* to receive calls using an ATDS and/or an artificial or prerecorded voice. As aptly explained by the court in *Thrasher-Lyon v. CCS Commer., LLC*, 2012 U.S. Dist. LEXIS 125203, *7-8 (N.D. Ill. Sept. 4, 2012):

The exception for ‘prior express consent’ appears parenthetically within a broad prohibition on contacting cell phone subscribers using ‘any automatic telephone dialing system or an artificial or prerecorded voice.’ See § 227(b)(1)(A). Thus, the sentence in which the exception appears applies specifically, and *only*, to calls made with robocall technology. Because the prohibition applies only to robocalls, the exception is similarly limited; otherwise the statute would exempt a broader class of calls than it bans in the first place. Other textual indicators confirm this reading.

Thrasher-Lyon, supra, 2012 U.S. Dist. LEXIS 125203 at *7-8.

The *Thrasher* Court further explained that the consumer must give ‘prior express consent’ to robocalls—not to telephone calls in general—if they are to receive the automated calls that the legislature deemed invasive.” *Id.* at *9 (emphasis added). Even the District Court recognized that “[t]he TCPA allows autodialed

and prerecorded message calls if the called party expressly consents to their use.” E.R. 016 (Order, p. 2 (quoting 7 FCC Rcd. 8752, 8769, ¶ 29) (emphasis added)). Other decisions support this conclusion.

In *Connelly*, the court expressed, “[r]egarding the booking of reservations, Hilton has failed to explain how the mere registration of a cellular telephone number at the time of booking a hotel reservation constitutes prior express consent for the telephone calls at issue here.” *Connelly v. Hilton Grand Vacations Co.*, 2012 U.S. Dist. LEXIS 81332, *10 (S.D. Cal. June 11, 2012). Further, the Court in *Edeh*, *supra*, 748 F. Supp. 2d at 1038 explained that to constitute prior express consent, the consumer must state in effect, “I give you permission to use an automatic telephone dialing system to call my cellular phone.” The *Satterfield* decision is also instructive, as the facts that demonstrated prior express consent were much more than mere provision of a cell phone number; for Ms. Satterfield submitted her telephone number on a form with a checked box indicating, “Yes! I would like to receive promotions from Nextones affiliates and brands,” with the following language: “By checking Submit, you agree that you have **read and agreed** to the *Terms and Conditions*” (*Satterfield, supra*, 569 F.3d at 949).²⁶

²⁶ The Lakers had argued in their motion to dismiss that “unlike *Satterfield* the Plaintiff in this case received communications from the same party ... to whom he granted consent.” E.R. 052 (Def.’s Memo., 9:19-21). Here, however, there are simply no facts in the FAC to show that Mr. Emanuel granted prior express

Furthermore, the FCC's 2007 Ruling "encourage[d] creditors to include language on credit applications and other documents informing the consumer that, by providing a wireless telephone number, the consumer consents to receiving autodialed and prerecorded message calls from the creditor or its third party debt collector at that number." 23 F.C.C.R. 559, 2007 FCC Ruling at p. 10, n. 37. And, on February 15, 2012, the FCC made clear that entities must obtain prior express written consent (i.e., with a clear and conspicuous disclosure) specifically to make automated and/or prerecorded telemarketing calls to a consumer's cell phone. *See* E.R. 086-088, 091 (Pl.'s Opp., 20:25-22:10, 25:12-16); *In Re Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 1830, 1863, 27 FCC Rcd. 1830, 55 Communications Reg. (P&F) 356, 2012 WL 507959, *24 (Feb. 15, 2012).²⁷

Here, Mr. Emanuel's text message to SMS code 525277 did not invite The Lakers to communicate with Mr. Emanuel by sending an automated text message to Mr. Emanuel's cell phone (*see* E.R. 005 (FAC, ¶ 16-19)), nor did Mr. Emanuel

consent to receive the unsolicited SPAM text message from The Lakers; the facts alleged in the FAC point to the conclusion that Mr. Emanuel did not give the requisite prior express consent. *See* E.R. 005-006 (FAC ¶¶ 10-27).

²⁷ The requirement that entities obtain prior express *written* consent goes into effect on October 16, 2013. *See Carlson v. Nevada Eye Care Professionals*, 2013 WL 2319143 *4 (D. Nev. May 28, 2013).

invite communication from The Lakers by any means other than to display the requested message on The Lakers' scoreboard (*see* E.R. 005 (FAC at ¶¶ 16-18)). Thus, it cannot be said that Mr. Emanuel expressly consented to receive the automated text message sent by The Lakers. *See* E.R. 006 (FAC, ¶ 26).

Therefore, the District Court erred in finding that merely sending a text message to SMS code 525377 for the purpose of displaying a message on The Lakers' scoreboard amounted to express consent to receive the automated commercial text message from the Lakers (*see* E.R. 018 (Order, p. 4)), as there is no indication that Mr. Emanuel "clearly and unmistakably stated" to The Lakers that it was permissible to send Mr. Emanuel an automated text message or to opt Mr. Emanuel in to receiving commercial text messages from The Lakers (*see* E.R. 005-006 (FAC, ¶¶ 16-26)).

3. The Lakers captured Mr. Emanuel's cellular telephone number, which does not evidence prior express consent to receive an automated text message from The Lakers

It appears the District Court found that Mr. Emanuel's voluntary act of sending a text message to SMS code 525377 was sufficient to constitute having "knowingly release[d]" Mr. Emanuel's cell phone number to the Lakers for purposes of being contacted at the number by automated text message. *See* E.R. 017 (Order, p. 3 (the District Court cited to *In Re Rules and Regulations*, 7 FCC Rcd. At 8769, ¶ 31, and later stated on page 4 of the Order that Mr. Emanuel

“voluntarily texted the Lakers...”). While Mr. Emanuel sent a text message to SMS code 525377, Mr. Emanuel did not “knowingly release [his] phone number” for the purpose of “giv[ing] [his] invitation or permission to be called at that number” (*see id.*) by the Lakers via an automated text message, as The Lakers essentially captured Mr. Emanuel’s cell phone number (*see* E.R. 091 (Pl.’s Opp., 25:4-12)) to then send a SPAM text message to Mr. Emanuel’s cell phone (E.R. 005 (*see* FAC at ¶¶ 19-20)).

As explained by the Federal Communications Commission in the same ruling relied upon by the District Court, companies who capture telephone numbers by utilizing caller ID or an Automatic Number Identification device without notice to the telephone subscriber will be in violation of the TCPA’s rules, as capturing a telephone number does not indicate the called party’s invitation or permission to receive autodialed or prerecorded calls. *See 1992 TCPA Order*, 7 FCC Rcd at 8769, ¶ 31.²⁸ This is what occurred here, as the Lakers “captured” Mr. Emanuel’s cell phone number when Mr. Emanuel sent the text message to SMS

²⁸ Furthermore, under the same 1992 Order from the FCC, the Lakers did not provide Mr. Emanuel with an opportunity to give “instructions to the contrary” (*see* 7 FCC Rcd at 8769, ¶ 31; *see also* E.R. 091 (Pl.’s Opp., 25, n. 14), meaning that the Lakers cannot legitimately claim Mr. Emanuel wanted or consented to the SPAM text message where The Lakers did not provide means to submit a message to be placed on the scoreboard without receiving an unsolicited commercial text from The Lakers in return.

code 525377 for the “sole purpose of having Defendant put a personal message on the scoreboard” (E.R. 005 (FAC, ¶ 18)), under circumstances that do not indicate Mr. Emanuel’s express permission to receive autodialed texts at such cell phone number. *See Castro v. Green Tree Servicing LLC*, 2013 U.S. Dist. LEXIS 115089, *60 (S.D.N.Y. Aug. 14, 2013) (“Accordingly, Defendants’ argument that Plaintiffs ‘consented’ to the calls at issue by initiating calls to Defendants using their cell phones must fail.”) (emphasis added).

Thus, the District Court erred in finding that Mr. Emanuel’s cell phone number was anything but impermissibly captured by The Lakers using caller ID in order to send Mr. Emanuel an unsolicited commercial text message.

4. The cases relied upon by the District Court were wrongly decided and/or distinguishable, and are not controlling

The District Court improperly relied upon the non-controlling decisions in *Ibey, Ryabyshchuk, Pinkard, Saunders* and *Greene* (see E.R. 017-018 (Order, pp. 3-4)), despite the express text of the TCPA and controlling authority in *Satterfield*.²⁹

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²⁹ *See Olney v. Job.Com, Inc.*, 2013 U.S. Dist. LEXIS 141339, 21-22 (E.D. Cal. Sept. 30, 2013) (referring to *Ibey, Ryabyshchuk* and the instant action brought by Mr. Emanuel, the court stated, “[t]hese cases bear almost no relation to the facts of the present case, where it is alleged that Plaintiff never directly communicated with Job.com *in a manner that would expressly indicate consent to be called.*”) (emphasis added).

i. *Ibey and Ryabyshchuk* decisions as to Issue 2

The District Court erred in relying on the decisions in *Ibey* and *Ryabyshchuk* to find prior express consent because those cases, which concerned a true “confirmatory” text message not applicable in the case at bar, improperly equated “implied” consent with “express” consent to receive an automated text message. *See* E.R. 017-018 (Order, pp. 3-4). The *Ibey* Court reasoned that the plaintiff “voluntarily provided his phone number by sending the initial text message,” despite the fact that the plaintiff had opted out of further text messages by replying “STOP” before receiving the allegedly offensive text message. *See Ibey, supra*, 2012 U.S. Dist. LEXIS 91030 at *8.

Also, the TCPA plainly does not require an individualized showing that the text message was in invasion of privacy, despite the *Ibey* Court’s holding that “sending a single, confirmatory text message ... does not appear to demonstrate an invasion of privacy contemplated by Congress in enacting the TCPA.” *Ibey*, at *8. *See* 47 U.S.C. § 227(b)(1)(A). As explained by the court in *Lemieux, supra*, 2013 U.S. Dist. LEXIS 127032 at *20, n. 2, “Defendants characterize their calls as ‘courtesy calls,’ arguing the TCPA was not enacted to prohibit such calls but was instead enacted to prevent unwanted telemarketing. Section 227(b)(1)(A)(iii), however, does not make such a distinction.” Also, this Court explained in *Meyer, supra*, 696 F.3d at 951 (9th Cir. Cal. 2012) that “Prohibiting the use of automatic

dialers to call cellular telephones without express prior consent is a rational means of achieving [Congress'] objective.”

The *Ryabyshchuk* Court incorrectly reasoned that “common sense” demonstrated that the plaintiff consented to the automated text message based on the context (*see Ryabyshchuk, supra*, 2012 U.S. Dist. LEXIS 156176 at *6-7), as such is not the standard for prior express consent (*see Satterfield, supra*, 569 F.3d at 955).

Thus, the reasoning in both cases was incorrect because implied consent to receive the text automated message in each case simply fails to measure up to the demanding requirement of express prior consent (*see* 47 U.S.C. § 227(b)(1)(A)), which means the District Court erred in relying on such non-controlling decisions.³⁰

³⁰ Notably, the *Ibey* (decided June 18, 2012) and *Ryabyshchuk* (decided October 30, 2012) decisions were decided prior to the FCC’s November 26, 2012 Declaratory Ruling specifically addressing the propriety of a one-time text message confirming a consumer’s opt-out request (i.e., a confirmatory text message). However, even the FCC’s Declaratory Ruling impermissibly relied upon implied consent based upon consumers’ desire to receive a confirmatory text message. *See* 27 F.C.C.R. 15391, ¶ 3 (“we conclude that a consumer’s prior express consent to receive text messages from an entity can be *reasonably construed* to include consent to receive a final, one-time text message confirming that such consent is being revoked at the request of that consumer.”) (emphasis added). As explained by the court in *Mais, supra*, 2013 U.S. Dist. LEXIS 65603 at *27 regarding an earlier ruling by the FCC, which essentially engrafted implied consent onto the express consent language of the statute, “The FCC’s construction is inconsistent with the statute’s plain language because it impermissibly amends

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ii. ***Pinkard* decision as to Issue 2**

The *Pinkard* Court was incorrect to hold that providing a cell phone number for purposes of being contacted with any questions regarding a prescription from the pharmacy at Wal-Mart amounted to permission to be contacted by automated text message on the plaintiff's cell phone. *See Pinkard, supra*, 2012 U.S. Dist. LEXIS 160938 at *10. The plaintiff in *Pinkard* at most provided express consent to Wal-Mart's pharmacy to *manually* call the plaintiff with a live person regarding her prescription. Indeed, the plaintiff in *Pinkard* had no idea that providing her cell phone number would automatically enroll her in Wal-Mart's text messaging program. *See Pinkard*, 2012 U.S. Dist. LEXIS 160938, at *5. Here, Mr. Emanuel had no reason to suspect or desire that The Lakers contact him with an unsolicited commercial text message, nor did Mr. Emanuel give out his cell number in order for The Lakers to contact him, unlike the plaintiff in *Pinkard*.

The *Pinkard* Court was also wrong to look to what the court called "the overwhelming weight of social practice" to find that distributing a cell phone number to a pharmacy constituted consent to receive *autodialed* calls. *See Pinkard*, 2012 U.S. Dist. LEXIS 160938 at *14. Distributing a cell phone number by itself does not give free reign to the calling party to send *autodialed* text messages to the

the TCPA to provide an exception for "prior express *or implied* consent." Congress could have written the statute that way, but it didn't."

called party's cell phone (as explained by Mr. Emanuel above), which is essentially what The Lakers argued in the present case. *See* E.R. 050 (Def.'s Memo., 7:6-25).

Under The Lakers' construction of the TCPA (accepted by the District Court, *see* E.R. 017-018 (Order, pp. 3-4)), there is no need to obtain prior express consent to *autodialed* calls specifically, as merely obtaining a cell phone number by itself from the called party – even if that number is captured by caller ID – is enough to avoid liability under the TCPA. However, this is not the law under the TCPA, nor does it comply with this Court's controlling decision in *Satterfield*.

iii. Saunders decision as to Issue 2

In *Saunders v. NCO Fin. Sys.*, 910 F. Supp. 2d 464, 467 (E.D.N.Y. 2012), the plaintiff “concede[d] that by listing only his cell phone number with PACER, he gave both PACER and *Saunders*, its collection agent, ‘prior express consent.’” In the present case, however, Mr. Emanuel has made no such concession, and even expressly alleges that he “did not provide prior express consent” (E.R. 006 (FAC, ¶ 26)). Also, *Saunders* was a debt collection case (*Saunders, supra*, at 446-447), unlike the present action (which is more akin to a telemarketing case). This is significant because the FCC has essentially lowered the standard for prior express consent for debt collection calls in which the cell phone number called was provided at the time of the credit transaction. “In a subsequent ruling, the FCC

clarified ‘that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the ‘prior express consent’ of the called party.’” *Gutierrez v. Barclays Group*, 2011 U.S. Dist. LEXIS 12546, *5-6 (S.D. Cal. Feb. 9, 2011) (quoting *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559 (Jan. 4, 2008) (emphasis added)).³¹

iv. Greene decision as to Issue 2

The *Greene v. DirecTV, Inc.*, 2010 U.S. Dist. LEXIS 118270, *9 (N.D. Ill. Nov. 8, 2010), the “undisputed facts demonstrate[d] that Greene provided Equifax with her cellular telephone number knowing that potential creditors would use it as the contact number for fraud alert notifications. Additionally, the parties agree[d] that Greene placed no conditions on the use of her number for fraud alert purposes.”

Greene is factually distinguishable because it, like *Saunders*, concerned automated calls in the debt collection context. Also, unlike in *Greene*, Mr. Emanuel here did not wish to be contacted by The Lakers on his cell phone via

³¹ In *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir. Cal. 2012), this Court explained that “Pursuant to the FCC ruling, prior express consent is consent to call a particular telephone number in connection with a particular debt that is given before the call in question is placed.”).

“unsolicited” text message; and, Mr. Emanuel was not even warned that The Lakers might send the commercial text message (*see* E.R. 005 (FAC, ¶¶ 19)). *Greene* is also procedurally distinguishable because it was heard on a motion for summary judgment where extrinsic evidence is permitted.

5. The District Court was required to accept as true Mr. Emanuel’s allegation that the text message at issue was sent for the “sole purpose of having [The Lakers] put a personal message on the scoreboard”

Mr. Emanuel alleges that he “received an *unsolicited* text message from the 525-377 number attributed to [The Lakers]” (E.R. 005 (FAC, ¶ 19 (emphasis added))), after [Mr. Emanuel] sent a text message to such SMS code “for the sole purpose of having [The Lakers] put a personal message on the scoreboard” (E.R. 005 (FAC at ¶ 18)). The District Court was required to accept this factual allegation as true on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Thus, the District Court erred when holding that Mr. Emanuel “consented to receiving a confirmatory text from the Lakers” (E.R. 018 (Order, p. 4)).

Consequently, the District Court erred in finding that Mr. Emanuel gave prior express consent to receive the unsolicited automated text message of a commercial nature from The Lakers. *See* E.R. 018-019 (Order, pp. 4-5). Indeed, the District Court stated at the motion to dismiss hearing, “if I’m wrong, that’s why

they have appellate courts, and then the appellate courts can, you know, weigh in on the particular issue.” E.R. 033 (Hearing Transcript, 14:7-9).

VII. CONCLUSION

For the foregoing reasons, the District Court erred in granting The Lakers’ Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Therefore, Mr. Emanuel respectfully requests that this Court reverse the District Court’s ruling and find that: (1) The Lakers’ automated text message was the type of call covered by § 227(b)(1)(A)(iii) of the TCPA; and (2) Mr. Emanuel did not provide The Lakers with “prior express consent” to send the unsolicited automated text message to Mr. Emanuel’s cellular telephone.

Respectfully Submitted,

Dated: October 15, 2013

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, undersigned counsel declares that there are no known related cases pending in this Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Opening Brief of Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 11,674 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: October 15, 2013

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BY: /s/ ABBAS KAZEROUNIAN
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **OPENING BRIEF FOR PLAINTIFF-APPELLANT** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 15, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 15, 2013

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