

Appeal No. 13-55678

**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 THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE GEORGE H. WU
CASE NO. 2:12-09936-GW-SH

APPELLEE'S ANSWERING BRIEF

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**FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE
DISCLOSURE STATEMENT**

The Los Angeles Lakers, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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I. INTRODUCTION

This lawsuit is one of many similar putative class actions seeking to dramatically expand liability under the Telephone Consumer Protection Act of 1991 (“TCPA” or “Act”) in a manner Congress never intended. While the precise allegations vary from suit to suit, the underlying strategy remains the same: stretching the plain meaning and purpose of the TCPA to target legitimate, innocuous communications – not the spam, not the intrusive telemarketing, and not the invasion of privacy the Act was designed to curtail. Based upon contrived violations of the TCPA, the suits seek hundreds of millions of dollars in aggregated statutory and treble damages, often compelling defendants to settle even meritless cases rather than risk potentially crippling jury verdicts. Congress did not intend to cultivate litigation of this nature, and it is devoid of social utility.

A review of the First Amended Complaint (“FAC”) demonstrates that this action is not about the sort of intrusive, unsolicited telemarketing abuses Congress sought to curb. At issue in this case is a single communication involving two texts sent within one minute of each other: (1) an initiating text from Mr. Emanuel asking the Lakers to provide a service; and (2) a single 127-character confirmatory, near-instantaneous response by the Lakers. In sum and substance, this was a single real-time communication between Mr. Emanuel and the Lakers. It is the functional equivalent of a single voice call initiated by Mr. Emanuel in which a pre-recorded

message immediately responds to his inquiry, not two entirely separate communications, separated by days or even hours, with the second communication being nuisance spam disrupting Mr. Emanuel's privacy. Mr. Emanuel attended a Lakers' game. Via text, he requested that the Lakers display his message on the arena scoreboard during that game. The Lakers acknowledged receiving Mr. Emanuel's request, thanked him, and let him know that not all messages appear on the scoreboard. Nothing more took place. Nothing about this exchange implicates Mr. Emanuel's privacy interests – certainly no more than had this been a telephone call initiated by him with a pre-recorded message on the other end, rather than two texts delivered within seconds of each other. The subsection of the TCPA under which Mr. Emanuel sues does not subject texting to specialized, stricter proscriptions.

The district court correctly concluded that, based on this limited communication initiated by Mr. Emanuel, he did not and could not plead a violation of the TCPA. Consistent with common sense and the plain language of the TCPA, basic social customs and any reasonable person's expectations, the district court held that Mr. Emanuel consented to receiving the Lakers' direct, specific and *immediate* confirmatory response notifying him that not all requests could be accommodated. Certainly, a party initiating a telephone call consents to the recipient's response (pre-recorded or not). A text conversation should be no

different. Congress did not intend to create a windfall for parties communicating by text message, rather than by voice message. Nor did Congress intend to prohibit the sort of automated texting at issue here, which serves important functions and provides enormous social value. If Mr. Emanuel's expansive view of the TCPA were correct, a party would have a right of action any time they received an automated out-of-office auto-response email on their smart phone. All manner of texting and emailing services that legitimately require automated responsive messaging would run afoul of the TCPA.

Two alternative grounds raised by the Lakers stand as independent barriers to reversal. A text message or phone call is actionable under the TCPA only if made using an "automatic telephone dialing system" ("ATDS") as defined by the Act. The FAC is devoid of allegations plausibly suggesting that the Lakers used an "automatic telephone dialing system." Indeed, Mr. Emanuel's own allegations suggest the opposite. Second, the undisputed facts in the record actually confirm an ATDS was not used here, and thus Mr. Emanuel cannot set out specific facts showing a genuine issue for trial with respect to this essential element of his claim.

On appeal, Mr. Emanuel argues that the district court erred in taking a "common sense approach" to interpreting the TCPA, that this Court should ignore Congress' stated purpose in enacting the TCPA, and that several different district

court judges and the Seventh Circuit, interpreting the TCPA in the same manner, got it wrong. In short, Mr. Emanuel advances no persuasive argument for reversal.

The district court's judgment should be affirmed.

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed Mr. Emanuel's TCPA claims on the ground that Mr. Emanuel, by first initiating text communications with the Lakers, expressly consented to receiving the responsive, confirmatory text over which he sued.

2. Whether this Court can affirm the district court's dismissal on the alternative ground that Mr. Emanuel failed to plead sufficient facts plausibly suggesting the confirmatory text message over which he sues was sent using an ATDS.

3. Whether this Court can affirm on the alternative ground that the Lakers are entitled to summary judgment because undisputed evidence confirms the text message over which Mr. Emanuel sues was not sent by an ATDS.

IV. STATUTORY ADDENDUM

The relevant statutory provisions are set forth in the Lakers' Addendum.

V. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This action arises out of a one-minute long text communication between Mr. Emanuel and the Lakers. During a live game, the Lakers displayed a message on their scoreboard inviting spectators to text messages they wished to display on the scoreboard. Mr. Emanuel accepted that invitation and sent a text message to the Lakers. The Lakers responded with a single 127-character confirmatory text. Based upon this responsive text, Mr. Emanuel asserts two separate claims in this putative class action for violation of Section 227(b)(1)(A). ER 10. Mr. Emanuel's claims in the operative FAC (ER 1 - 13) are predicated on the notion that the Lakers did not have Mr. Emanuel's consent to respond to his request.

The Lakers filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. ER 40-57 (Dkt. No. 17). The Lakers' Motion rested on a straightforward proposition: by voluntarily initiating a text communication requesting a specific service of the Lakers, Mr. Emanuel expressly consented to receiving a confirmatory response. ER 44. That reality was reinforced in this case by the fact that the Lakers' response was sent immediately – effectively as part of the same communication as Mr. Emanuel's initiating text – and provided Mr. Emanuel with information about his request. ER 45; Dkt. No. 1 (Complaint ¶¶ 17-

19). The Lakers' motion also pointed out that Mr. Emanuel had not sufficiently alleged that the text at issue was sent by an ATDS. ER 44. In the alternative, the Lakers' moved for summary judgment on the ground that incontrovertible evidence establishes the system that sent the text message was not an ATDS. ER 49.

After full briefing and oral argument, the district court granted the Lakers' motion in a six-page written order. ER 14-19. The court held that Mr. Emanuel expressly consented to receiving the Lakers' confirmatory text. ER 18. As a result, the court did not reach the Lakers' alternative ground for summary judgment. *Id.*

B. COURSE OF PROCEEDINGS IN DISTRICT COURT

1. Motion Briefing

On November 20, 2012, Mr. Emanuel filed his initial complaint against the Lakers in the United States District Court for the Central District of California. Dkt. No. 1. On February 8, 2013, Mr. Emanuel filed the FAC and, shortly thereafter, the Lakers filed a Motion to Dismiss under Rule 12(b)(6) or Alternatively for Summary Judgment under Rule 56. ER 1-13, 40-57 (Dkt. Nos. 15, 17). In support of their motion, the Lakers submitted a declaration from the President of FanDriveMedia, the vendor that sent the text message at issue. Dkt. No. 17-3. The un rebutted testimony in that declaration demonstrates that the

system used to send the message cannot store telephone numbers for the purpose of sequentially or randomly producing them. The declaration further demonstrates that the system cannot randomly or sequentially dial stored telephone numbers. Dkt. No. 17-3 at 2-3. The Lakers concurrently filed a Separate Statement of Undisputed Facts. Dkt. No. 17-4.

On March 28, 2013, Mr. Emanuel filed his Opposition to the Lakers' Motion to Dismiss or Alternatively, for Summary Judgment. ER 58-92 (Dkt No. 18). Along with his opposition, Mr. Emanuel filed an Opposition to the Lakers' Separate Statement of Undisputed Facts. Dkt. No. 18-2. Mr. Emanuel also attached declarations from himself, his attorney, and a purported expert with automated messaging systems. Dkt. Nos. 18-3 - 18-9.

In his briefing, Mr. Emanuel argued that the Lakers' responsive text was unsolicited spam that he did not consent to receive. ER 91. Mr. Emanuel further argued that the district court could not consider either legislative history or Congress' intent in enacting the statute. ER 75. He also contended, in opposition to summary judgment, that the system used by the Lakers is an ATDS. ER 86. Mr. Emanuel did not, however, adduce competent evidence in support of this claim.

2. Oral Argument

On April 18, 2013, the court heard oral argument on the Lakers' motion. ER 20 (Dkt. No. 26). During argument, the district court commented on the context of the Lakers' text and its responsive nature, providing Mr. Emanuel's counsel an opportunity to address the point:

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?

ER 27 (lines 8-13). Notwithstanding the responsive, confirmatory nature of the Lakers' response, Mr. Emanuel's counsel argued that the text violated the TCPA because the TCPA is “content neutral.” ER 27 (line 22). Mr. Emanuel's counsel did not, however, explain why the TCPA applied given the context of the text message. Notwithstanding the Court's tentative ruling dismissing the FAC with prejudice, at no point during oral argument did Mr. Emanuel's counsel argue that leave to amend should be granted because additional allegations could rectify the flaws in the FAC. At the conclusion of oral argument, the court observed that the question of consent was a legal one and granted the Lakers' motion to dismiss the FAC with prejudice, in accordance with its tentative ruling. ER 34 (lines 2-3).

3. The District Court's Order

The district court's order was grounded on Mr. Emanuel's failure to satisfy the "without prior express consent" element of the TCPA. The district court began its analysis by noting that "not every text message or call constitutes an actionable offense; rather, the TCPA targets and seeks to prevent 'the proliferation of intrusive, nuisance calls.'" ER 17. The district court further took heed of the Ninth Circuit's admonition in *Chesbro v. Best Buy Stores*, 705 F.3d 913, 918 (9th Cir. 2012) "that courts should look to the surrounding circumstances in determining whether particular calls 'run afoul of the TCPA,' and in so doing, courts 'approach the problem with a measure of common sense.'" Applying *Chesbro*, the court reasoned that a "common sense reading of the TCPA indicates that, by sending his original message, [Mr. Emanuel] expressly consented to receiving a confirmatory text from the Lakers," as "distributing one's telephone number is an invitation to be called[.]" ER 17.

In approaching the issue with a "measure of common sense," the district court further noted the utility and function of the Lakers' responsive text:

[W]hen Plaintiff sought to display his love for "Facey" on the Staples Center jumbotron via text, it is difficult to imagine how he could have been certain that the Lakers received his message without a confirmatory response. Furthermore, given that the Lakers' reply notified Plaintiff that "Not all msgs go on screen," Defendant's message provided Plaintiff with information relevant to his request. Had Plaintiff been planning to inform his date that a special message was forthcoming, Defendant's confirmatory response may have had the beneficial effect of tempering Plaintiff's (or his

date's) expectations.

ER 17.

In ruling that Mr. Emanuel had given his prior express consent, the district court analogized to the “almost unanimous” authorities holding that voluntarily furnishing a cellphone number to a vendor or other contractual counterparty constitutes express consent. ER 18. Applying that case law to the text at issue here, the Court concluded that “because Plaintiff voluntarily provided his number to the Lakers in requesting that his personal message appear on the Staples Center jumbotron, . . . he consented to receiving a confirmatory text from the Lakers.” *Id.* The court noted in the alternative that it “would similarly conclude that the FAC fails to adequately plead that Defendant used an ATDS.” *Id.* The court found it unnecessary to reach the Lakers’ alternative motion for summary judgment, and the evidence on that motion of the system used to send the Lakers’ text. The court dismissed Mr. Emanuel’s claims with prejudice. *Id.*

The district court issued its order granting the Lakers’ motion to dismiss on April 18, 2013. Dkt. No. 24. On April 22, 2013, Mr. Emanuel appealed. Dkt. No. 25.

VI. STATEMENT OF FACTS

The factual record in this case consists of the allegations in the Complaint (Dkt. No. 1) and FAC (ER 1 - 13) and the undisputed facts submitted in support of the Lakers' alternative motions for summary judgment. Dkt. No. 17-1 – 17-5.

A. Mr. Emanuel Sends A Text To The Lakers, And Receives A Single, Confirmatory Text In Response

The facts alleged are straightforward. On October 13, 2012, Mr. Emanuel attended a Lakers' home game. ER 5 (FAC ¶ 15). The FAC alleges that during the game, Mr. Emanuel voluntarily texted the following message to the Lakers, which he wanted to appear on the arena scoreboard:

“I love you Facey. Happy Date Night”

ER 5 (FAC ¶ 18); *see also* Dkt. No. 1 (Complaint ¶ 16). Fan messages placed on the scoreboard appear in large, prominent lettering for all to see, directly below a massive television screen. ER 13 (FAC Ex. A). Mr. Emanuel does not allege that, in sending this initial text, he in anyway attempted to mask his telephone number or block caller ID. Within one minute (*see* Dkt No. 1 (Complaint ¶ 19)), the Lakers responded to Mr. Emanuel, confirming receipt of his text message. The Lakers responded:

“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”

ER 5 (FAC ¶ 19).

B. Unrebutted Evidence Shows The System Used To Send Mr. Emanuel The Text Is Not An ATDS

Mr. Emanuel's TCPA lawsuit targets a messaging system that is not used – and cannot be used – to send intrusive telemarketing calls. In support of their alternative motion for summary judgment, the Lakers submitted the declaration of Jeff Vick, the President of FanDriveMedia. Dkt. No. 17-3. The Lakers retained FanDriveMedia to design and host the mobile invitation and confirmatory components of the Lakers' program to display spectator messages on the arena scoreboard. *Id.* (Vick Decl. ¶ 2) FanDriveMedia's system cannot produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. *Id.* (Vick Decl. ¶ 4) The messaging system does not have the capacity to generate random or sequential lists of phone numbers or to call stored numbers randomly or sequentially. *Id.* (Vick Decl. ¶¶ 1, 4, 6) Instead, the FanDriveMedia system can only generate messages in direct response to consumer requests. *See id.* (Vick Decl. ¶ 6) To dial telephone numbers in any other manner requires human intervention. *Id.*

VII. STANDARD OF REVIEW

This Court reviews a dismissal under Rule 12(b)(6) *de novo*, and can affirm using any grounds supported by the record. *Corrie v. Caterpillar*, 503 F.3d 974, 979 (9th Cir. 2007) (citation omitted).

A sufficient complaint “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555. “Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

The court need not “assume the truth of legal conclusions merely because they are cast in the form of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (citation omitted). Accordingly, “[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.” *In re Stac Electronics Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996) (citation omitted).

In addition, this Court may affirm the dismissal of Mr. Emanuel’s complaint on any ground supported by the record, including those presented in the Lakers’

alternative motion for summary judgment. *River City Markets, Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1462 (9th Cir. 1992); *Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997) (“[I]f summary judgment is the correct disposition, we may convert and affirm on those grounds.”).

VIII. SUMMARY OF ARGUMENT

Congress enacted the TCPA to safeguard telephone users’ privacy interests and curtail abusive, nuisance telemarketing practices. Mr. Emanuel’s allegations involve a single text communication, voluntarily initiated by him, concerning his request to have a message publicly displayed in a sports arena filled with thousands of spectators during a televised NBA game. Nothing about those allegations implicates the TCPA’s purpose. Nothing about those allegations runs afoul of the TCPA’s plain language. The district court correctly ruled that Mr. Emanuel failed to state a claim under the TCPA.

The single provision under the TCPA Mr. Emanuel invokes makes it unlawful to “make” a non-emergency “call,” using an automatic telephone dialing system or artificial prerecorded voice, to any cellular telephone number, unless the call is “made with the prior express consent of the called party[.]” 47 U.S.C. § 227(b)(1)(A)(iii). Here, Mr. Emanuel’s own allegations make inescapable the conclusion that he provided prior express consent to receive the text at issue. Mr. Emanuel texted the Lakers with a message he wished to be displayed on the arena

scoreboard and, within sixty seconds, the Lakers responded to that request with relevant information.

In his opening brief in this Court, Mr. Emanuel seeks to avoid the plain language of the TCPA and Congress' stated purpose behind it. The thrust of Mr. Emanuel's argument is that, in texting a scoreboard message request to the Lakers, he could not consent to an immediate responsive text providing relevant information, absent some legalese prefatory statement by him to the effect of "I grant you permission to respond." This is not the standard of "express consent" mandated by the TCPA.

Just last year, this Court emphasized that questions concerning the application and reach of the TCPA be approached "with a measure of common sense." *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012). Mr. Emanuel not only discounts that important guiding principle, he explicitly disavows it. Appellant's Opening Brief ("AOB") at 23 n.14 ("Why take a common-sense approach when the Ninth Circuit has already laid out the standard?"). Mr. Emanuel's alternative construction impermissibly adds and substitutes words into the statute. His construction would also create an all-encompassing prohibition on legitimate text communications. If Congress had intended to modify "prior express consent" in the manner Mr. Emanuel seeks, it could easily have done so. *See, e.g.*, 18 U.S.C. § 2725 ("express consent" means

consent in writing”). Congress did not, and there is no basis for inferring that it intended the TCPA to embrace a case of this nature.

The district court in this case, as well as multiple other district courts, have held that voluntarily initiating text communications or furnishing a telephone number to a party constitutes express consent. Mr. Emanuel offers no reasoned basis for overruling those decisions. And here, Mr. Emanuel did much more – and the Lakers far less – than the plaintiffs and defendants in most of those cases. Mr. Emanuel did not merely furnish his telephone number as part of some credit application. He initiated a message to the Lakers affirmatively requesting that it be publicly displayed in the arena. The Lakers did not call Mr. Emanuel days later about some issue tangentially related to his initial text or send repeated communications to Mr. Emanuel – they simply responded to Mr. Emanuel within the same telephonic conversation he began. No party making a voice call could plausibly dispute consent to hearing what the person on the other line had to say. So too, Mr. Emanuel cannot plausibly dispute consent to that functional equivalent – a specific, direct, and relevant confirmatory text sent immediately in response to his request.

A construction of “prior express consent” that encompasses Mr. Emanuel’s initiating text is fully consonant with common sense, common usage, and the statute’s plain meaning and purpose. Because the facts as alleged show Mr.

Emanuel cannot proceed on the sole theory he advances, dismissal of the FAC with prejudice was appropriate.

IX. ARGUMENT

The three elements of a TCPA claim are: (1) the defendant called a cellular phone; (2) using an ATDS or an artificial or prerecorded voice; (3) without the recipient's "prior express consent." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). At issue here are the second and third elements. The district court correctly concluded that Mr. Emanuel provided his "prior express consent" to receive a responsive text from the Lakers. The district court's judgment can alternatively be affirmed on one of two independent grounds: (1) Mr. Emanuel failed to sufficiently allege that the Lakers sent the text using an ATDS; and (2) based on the undisputed facts in the record, there is no triable issue that the text was, in fact, not sent by ATDS.

A. Statutory Overview

Enacted in 1991 as an amendment to the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, the TCPA regulates abuses in automated telephone technology, particularly in the context of telemarketing – *i.e.*, the "use of the telephone to market goods and services to the home and other businesses." TCPA § 2(1), Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227. In passing the TCPA, Congress wished "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone

calls to the home and to facilitate interstate commerce by restricting certain uses of . . . automatic dialers.” 741 S.Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968; *see* Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243, 105 Stat. 2394 (1991) (current version at 47 U.S.C. § 227 (2010)). The TCPA thus seeks to curb abusive telemarketing practices that threaten the privacy of telephone subscribers.

To protect those privacy interests, the TCPA contains a number of restrictions on the use of automated telephone equipment, one of which is relevant here. Under Section 227(b)(1)(A)(iii), it is unlawful:

[t]o 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, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1)(A)(iii).

The TCPA is silent as to whether the term “call” includes texting, a technology that was not widely available at the time of the Act’s passage. The Federal Communications Commission (“FCC”) has construed “call” to include texting, and in view of the Act’s goal to curb misuse of telemarketing technology, the Ninth Circuit has held that interpretation to be reasonable. *See Satterfield v.*

Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009). While texting was unavailable when Congress passed the TCPA, *see id.*, it is now “a form of communication . . . ubiquitous to cell phone owners.” James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose & Hough, Linda Rexer, Jane Ribadeneyra, Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 Harv. J.L. & Tech. 241, 274 (2012). The Short Message Service (“SMS”) form of text messaging at issue here (ER 80) generally limits messages to no more than 140-160 characters in length.

Text messaging permits cellular phone users to engage in real time conversations, much like ordinary voice calls, as cellular phone users can exchange texts within seconds of one another. Indeed, the method of data transmission is functionally equivalent to voice calls. In a cellular telephone voice call, voice signals are transmitted instantly but not continuously; “instead, small chunks of voice data are recorded, digitized, and compressed.” Per Larsen, *Text Message Price Gouging: A Perfect Storm of Tacit Collusion*, 8 J. Telecomm. & High Tech. L. 217, 220 (2010). Similarly, text messages “are transmitted virtually instantaneously,” but not continuously: “[t]he sender initiates a message by entering it into a mobile device and sending it. The message is transmitted to a Short Message Center, where it is stored temporarily. The [Center] then forwards the message to the recipient’s mobile device.” Katharine M. O’Connor, *:o Omg*

They Searched My Txts: Unraveling the Search and Seizure of Text Messages, 2010 U. Ill. L. Rev. 685, 707 (2010). Thus, while the exchange of two texts during a real-time conversation involves separate data transmissions, it does not necessarily involve multiple “calls” any more than the multiple voice signals transmitted during a single telephone conversation would imply multiple “calls.”

Under § 227(b)(3), a person or entity may bring a private action to recover actual monetary loss for a violation of the above prohibition, or \$500 in statutory damages for each violation (which may be tripled in the event of a willful or knowing violation). *Id.* at § 227(b)(3).

Subsection (b) provides that the FCC “shall prescribe regulations to implement the requirements of [that] subsection.” § 227(b)(2). Accordingly, the FCC promulgated regulations governing automated telephone calls, messages using an artificial or prerecorded voice, and advertisements sent to telephone facsimile machines. *See* 47 C.F.R. § 64.1200(a). The FCC has ruled that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary,” and therefore a party does not violate the TCPA “by calling a number which was provided as one at which the called party wishes to be reached.” *In the Matter of Rules and Regulations Implementing the Telephone*

Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8769 (Oct. 16, 1992) (“1992 Ruling”).

The TCPA additionally provides an enforcement mechanism for state attorneys general to bring actions against persons engaging in a pattern or practice of calls or transmissions in violation of the Act or its regulations:

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

47 U.S.C. § 227(g)(1).

Much has changed in the past twenty-two years since Congress enacted the TCPA. Wireless communications, including text messaging, are now in pervasive use. Concurrent with the near-ubiquity of mobile phones, there has been a “dramatic rise in federal court filings” involving the TCPA. Katrina S. Christakis, *The TCPA: Year in Review*, 66 Consumer Fin. L.Q. Rep. 4, 5 (2012) (“The increasing pervasiveness of wireless technology in our society has generated a corresponding increase in TCPA litigation.”). Indeed, between 2011 and 2012 alone, TCPA suits increased by 63%. Doug Smith, Andrew Smith, *Robocalling*

and Wireless Numbers: Understanding The Regulatory Landscape, 2013-MAY
Bus. L. Today 1, 2.

B. The FAC Confirms That Mr. Emanuel Provided Prior Express Consent To Receive A Responsive, Confirmatory Text

The objective facts cognizable on the Lakers’ motion to dismiss under Rule 12(b)(6) show that Mr. Emanuel provided his prior express consent to receive the Lakers’ confirmatory text. As the district court correctly noted, Mr. Emanuel “voluntarily provided his number to the Lakers in requesting that his personal message appear on the Staples Center jumbotron.” ER 17. By doing so, “he consented to receiving a confirmatory text from the Lakers.” *Id.* The district court’s conclusion is fully consistent with the plain language of the TCPA, the intent of Congress in enacting the legislation, and “leads to a rational, common-sense result.” *Ariz. State Bd. For Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006).

1. Mr. Emanuel Provided His Prior Express Consent To Receiving The Lakers’ Text

“Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. As well, in interpreting the TCPA, as with any other statutory enactment, courts “approach the problem with a measure of common sense.” *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d

913, 918 (9th Cir. 2012); *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (“we must strive to give effect to the plain, common-sense meaning of the enactment without resorting to an interpretation that ‘def[ies] common sense.’”).

The district court correctly concluded that under a “common sense” reading of the TCPA, Mr. Emanuel expressly consented to receiving a confirmatory text from the Lakers. ER 17. The district court’s holding is in line with several other district courts concluding that, by voluntarily initiating text communications, a plaintiff provides express consent to receiving a responsive text. *See Freidman v. Massage Envy Franchising, LCC*, 3:12-CV-02962-L-RBB, 2013 WL 3026641, at *4 (S.D. Cal. June 13, 2013) (“[C]ourts recognize that not every single call constitutes a TCPA offense. One [text] message seeking clarification [to messages sent by the plaintiff] is not a ‘proliferation of intrusive, nuisance calls’ that the TCPA sought to prevent.”); *Ryabyshchuck v. Citibank (S. Dakota) N.A.*, 11-CV-1236-IEG WVG, 2012 WL 5379143, at *3 (S.D. Cal. Oct. 30, 2012), *appeal dismissed* (Feb. 4, 2013) (where “lone text message at issue was sent to a number voluntarily provided by Plaintiff to Defendant without caveat,” such “circumstances ‘unmistakably’ display some measure of prior consent”); *Ibey v. Taco Bell Corp.*, 12-CV-0583-H WVG, 2012 WL 2401972, at *3 (S.D. Cal. June 18, 2012), *appeal dismissed* (Nov. 28, 2012) (“Defendant’s single, confirmatory

text message did not constitute unsolicited telemarketing; Plaintiff had initiated contact with Defendant.”).

Mr. Emanuel’s argument that his initial text message did not constitute “prior express consent” is divorced of both context and common sense. Indeed, his contrary interpretation explicitly disavows the application of “common sense.”

AOB 23. Common sense, however, is relevant here and it is common sense that “a voice message or a text message are not distinguishable in terms of being an invasion of privacy.” *Satterfield*, 569 F.3d at 954. So too, a voice message or text message should not be distinguishable with respect to consent. There is no conceptual or logical difference – particularly with respect to privacy interests – between the one-minute long text communication Mr. Emanuel initiated with the Lakers and a one-minute long voice call in which the caller dials a number to obtain a service and listens to a pre-recorded voice message concerning his request. Had the Lakers instead implemented a voicemail line in which fans spoke rather than via text their requested scoreboard message, no caller could credibly dispute their consent to hearing a pre-recorded voice message during that call providing the same information as the Lakers’ text. A single text communication should not be treated differently.

The district court’s understanding of “prior express consent” is fully consistent with the Ninth Circuit’s. The TCPA does not define “prior express

consent” and “is silent on the issue of what form of express consent – oral, written, or some other kind – is required.” *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 1830, 1838 (Feb. 15, 2012) (“*SoundBite*”); *see also* 47 U.S.C. § 227(a) (TCPA definitions). This Court, however, has explained that this language, in the context of the TCPA, means “[c]onsent that is clearly and unmistakably stated.” *Satterfield*, 569 F.3d at 955 (quoting Black’s Law Dictionary 323 (8th ed. 2004)). A party that voluntarily initiates text communications in which he or she requests that the recipient take affirmative action “clearly and unmistakably” states consent to hear the recipient’s response to that request. *See Ibey*, 2012 WL 2401972, at *3 (“Here, Plaintiff expressly consented to contact by Defendant when he initially texted 91319 to Defendant.”); *Freidman*, 2013 WL 3026641, at *4 (“Common sense dictates that Plaintiff’s TCPA claims for the text message that Defendant sent in response are not actionable.”).

Indeed, federal courts hold that far less suffices to constitute “clear[] and unmistakabl[e]” consent. “The authorities are almost unanimous that voluntarily furnishing a cellphone number to a vendor or other contractual counterparty constitutes express consent.” *Saunders v. NCO Fin. Sys., Inc.*, 910 F. Supp. 2d 464, 467 (E.D.N.Y. 2012) (listing cases). “[I]n such instances ‘the called party has in essence requested the contact by providing the caller with their telephone

number for use in normal business communications.” *1992 Ruling*, 7 F.C.C.R. at 8769 n.57 (quoting H.R. REP. No. 102-317, at 13 (1991)). For example, in the context of debt collection, “the provision of a cell phone number to a creditor, e.g., as part of a credit application, *reasonably evidences* prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”

Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 F.C.C.R. 559, 563 (Jan. 4, 2008) (emphasis added) (“ACA”).

Numerous courts have rejected TCPA claims for precisely this reason. *See Roberts v. PayPal, Inc.*, C 12-0622 PJH, 2013 WL 2384242, at *4 (N.D. Cal. May 30, 2013) (“[T]he plaintiff in this case provided his cell phone number in order to receive information regarding PayPal’s mobile services . . . and then received a text message regarding PayPal’s mobile services. Thus, even if the court were to narrowly construe the scope of plaintiff’s ‘prior express consent,’ the text message at issue would fall within the scope of that consent.”); *Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv-02902-CLS, 2012 WL 5511039, at *6 (N.D. Ala. Nov. 9, 2012) (by “providing her cellular telephone number to” Wal-Mart, plaintiff gave Wal-Mart “‘clear and unmistakable’ consent to be contacted at that number”); *Greene v. DirecTV, Inc.*, No. 10 117, 2010 WL 4628734, *3 (N.D. Ill. Nov. 8, 2010) (plaintiff expressly consented to call at issue by providing her cell phone number to credit reporting agency for fraud alert notifications).

“Nothing compels a consumer to list his cell phone number with his counterparty when he opens an account, or to open an account at all, but if that is the number he chooses to provide, then he cannot complain about being called at that number.” *Saunders*, 910 F. Supp. 2d at 468. Likewise, nothing compelled Mr. Emanuel to text the Lakers with a request to display a message on the arena scoreboard. But he did – and he cannot now complain after the fact about receiving a responsive, confirmatory text back about his request. “[P]ersons who knowingly release their phone numbers have *in effect* given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” *ACA*, 23 F.C.C.R. at 564 (emphasis added).

Here, Mr. Emanuel did far more than “knowingly release” his telephone number. He started a text conversation with the Lakers. In that conversation, he asked that the Lakers take specific, affirmative conduct – to publicly and prominently display the contents of a message on the arena scoreboard. He did not attempt to mask his telephone number when he sent the text. He did not include in his initiating text any instruction that the Lakers not confirm receipt. The Lakers responded immediately, directly and specifically to Mr. Emanuel’s request, at the number by which they were contacted within one minute, while Mr. Emanuel was still at the game.

Mr. Emanuel’s decision to voluntarily text the Lakers with his request – a decision that included his “knowing[] release” of his phone number – was “in effect . . . [his] invitation or permission” to receive a text at that number regarding his request. *ACA*, 23 F.C.C.R. at 564. The underlying premise of Mr. Emanuel’s appeal – that although he sent the Lakers a request to have a message appear on a scoreboard, he did not expect that the Lakers would confirm having received the request, or otherwise notify him whether the message would appear on the scoreboard – is implausible and bears no reference to practical realities.

The meaning of statutory language depends critically on context. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013); *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1133 (9th Cir. 2010). “Law as expressed in statutes seeks to regulate human activities in particular ways. Law is tied to life.” *F.C.C. v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 311 (2003) (Breyer, J., dissenting). “A sign in a park that says ‘Keep off the grass’ is not properly interpreted to forbid the grounds crew to cut the grass.” *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (Posner, J.). “As the district court rightly concluded, to countenance Mr. Emanuel’s interpretation of “prior express consent” would “contradict the overwhelming weight of social practice: ‘that is, distributing one’s telephone number is an invitation to be called[.]’” ER 17 (quoting *Pinkard*, 2012 WL 5511039, at *6).

2. **The Purpose Of The TCPA Is To Safeguard Privacy Interests, Not To Foster Class Action Litigation Over Consensual Communications**

In construing the reach of the TCPA, this Court “consider[s] the purposes of the [Act].” *Satterfield*, 569 F.3d at 954; *Ryabyshchuck*, 2012 WL 5379143, at *2 (“In construing the extent and contour of [the TCPA], courts consistently and properly look to the purpose and history of the statute.”) (citing *Mims*, 132 S.Ct. at 744 and *Satterfield*, 569 F.3d at 954); *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 499-500 (2002) (rejecting a “plain-meaning argument [that] ignores the statutory setting in which [the provision at issue] occurs”). “It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose.” *United States v. Gallenardo*, 579 F.3d 1076, 1085 (9th Cir. 2009). Creating a private right of action over responsive, confirmatory text messages such as the one at issue here is decidedly not one of the Act’s purposes.

Congress enacted the TCPA in 1991 against the backdrop of “[v]oluminous consumer complaints about abuses of telephone technology,” and in particular, the “proliferation of intrusive, nuisance [telemarketing] calls.” *Mims*, 132 S. Ct. at 745. “Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls.” *Id.* Thus, at its core, the TCPA is about safeguarding

privacy. “The purpose and history of the TCPA indicate that Congress was trying to prohibit the use of ATDSs to communicate with others by telephone in a manner that would be an invasion of privacy.” *Satterfield*, 569 F.3d 946, 954 (9th Cir. 2009). Related Congressional concerns the TCPA was intended to address included “telemarketers contact[ing] the same number repeatedly, telemarketers mak[ing] calls during the dinner hour or late at night, calling parties do not identify themselves, and unsolicited calls placed to cellular numbers often impose costs on the called party.” *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1008 (N.D. Ill. 2010). None of these concerns are implicated by the Lakers’ confirmatory text.

Violations of the TCPA are accordingly tantamount to “‘invasions of privacy’ under [the] ordinary, lay meaning[] of the[] phrase [].” *Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 819 (8th Cir. 2012); *see also Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 157 F. App’x 201, 206 (11th Cir. 2005) (“the findings accompanying the TCPA legislation illustrate that Congress was expressly concerned about protecting privacy interests”); *Park Univ. Enters., Inc. v. Am. Cas. Co. Of Reading, PA*, 442 F.3d 1239, 1249 (10th Cir. 2006) (“Courts have consistently held the TCPA protects a species of privacy interest in the sense of seclusion. . . . [I]t is clear that Congress viewed violations of the Act as ‘private nuisances’ and ‘invasions of privacy’ under ordinary, lay meanings of these

phrases.”); *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 942 (7th Cir. 2004) (Easterbrook, J.) (explaining that the TCPA protects “interest in seclusion,” e.g., against “an unexpected fax [that] like a jangling telephone or a knock on the door, can disrupt a householder’s peace and quiet”).

Mr. Emanuel’s allegations do not implicate these privacy concerns. Mr. Emanuel was alongside thousands of other spectators at a professional sporting event. During the game, Mr. Emanuel voluntarily initiated communications with the Lakers in response to the Lakers’ invitation – to the thousands in attendance – to send messages they wished to have displayed on the Staples Center scoreboard. Mr. Emanuel accepted that invitation and sent the Lakers a text with the message he wanted displayed.

The Lakers did not respond by inundating him with non-responsive, intrusive telemarketing solicitations. The Lakers did not respond by sending Mr. Emanuel an invasive text disrupting his peace and quiet while he was at home. The Lakers responded within one minute – while Mr. Emanuel was still at the game and his request was pending – confirming receipt of his request and advising him that not all messages could be displayed. There is no basis for inferring that Congress, in enacting legislation to curtail intrusive telemarketing, intended to make a consensual text conversation actionable. *See 3550 Stevens Creek Associates v. Barclays Bank of Cal.*, 915 F.2d 1355, 1363 (9th Cir. 1990) (declining to infer

Congressional intent “to create . . . a far-reaching private cause of action” that “would have substantial and far-reaching legal, financial, and practical consequences”); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (“where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action”).

C. Mr. Emanuel’s Position That He Did Not Consent Conflicts With His Own Allegations, The Statutory Language, And The Case Law

Mr. Emanuel makes no effective response to the district court’s holding that he expressly consented to receiving the Lakers’ responsive text. Mr. Emanuel’s arguments depart from the plain language and purpose of the statute, well-reasoned case law by multiple district court judges and FCC rulings, and this Court’s “common sense” approach to interpreting the TCPA. Mr. Emanuel contends that, at best, he demonstrated “implied” consent, not express, and that he did not furnish his telephone number when he messaged the Lakers, but rather, the Lakers “captured” it. Mr. Emanuel further contends that a party initiating text communications does not expressly consent to receiving a confirmatory, responsive text absent some literal, explicit statement to the effect of “I give you permission to send back a confirmatory text.” These arguments fail.

1. **Mr. Emanuel Expressly, Not Impliedly, Consented To The Lakers' Responsive Communication**

Mr. Emanuel's contention that the district court held him to a standard of "implied" consent is simply inaccurate. As the district court noted, both federal courts and FCC rulings provide that voluntarily furnishing a cellphone number amounts to "express consent." *See supra* IX.B.1; *SoundBite*, 27 F.C.C.R. at 15394 ("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."). And here, Mr. Emanuel went a step further – he did not merely furnish the Lakers with his telephone number, he furnished his telephone number while reaching out to them via text to request a service.

Mr. Emanuel suggests that, to evidence consent, he must have literally communicated something to the effect of "I give you permission to use an automatic telephone dialing system to call my cellular phone." AOB 32 n.24. Mr. Emanuel's contention that express consent is lacking absent such prefatory legalese neither comports with the plain language of the Act nor common sense. Context, practical realities, and a plain reading of the TCPA compel the conclusion that in cases such as this, a telephone subscriber reaching out via text message to request a service has given "prior express consent" to receiving a responsive, confirmatory text about that request. *Ibey*, 2012 WL 2401972, at *3.

This conclusion is consistent with the requirement that consent be given in a “clear[] and unmistakabl[e]” way. *Satterfield*, 569 F.3d at 955. As explained above, a party initiating a telephone conversation has clearly and unmistakably consented to hearing the response of the recipient. So too, a party initiating a text conversation clearly and unmistakably consents to a responsive message from the recipient. Texting and voice calls should be treated the same under Section 227(b)(1)(A) and nothing suggests that liability under that provision should turn on whether the data packets being exchanged contain voice signals or text.

Mr. Emanuel recognizes that multiple federal courts hold that merely furnishing one’s telephone number can, under certain circumstances, suffice as “express consent.” AOB 40. Mr. Emanuel further recognizes that district courts in California have held that voluntarily providing one’s phone number by sending an initial text qualifies as prior express consent. AOB 41. He suggests, however, that every single one of these cases was wrongly decided, and that the Court should decree new law which ignores Congress’ intent and would dramatically expand the reach of the TCPA. Indeed, Mr. Emanuel’s proposed additional requirements simply add words that Section 227(b)(1)(A) does not contain. Had Congress intended to impose such a strict, heightened standard for prior express consent, “then it easily could have used such language in the statute.” *United States v. Watkins*, 278 F.3d 961, 968 (9th Cir. 2002); *see, e.g.*, 18 U.S.C. § 2725 (“express

consent’ means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section”).

2. The Course Urged By Mr. Emanuel – To Overrule Multiple District Court Orders – Is Unwarranted

Mr. Emanuel urges this Court to depart from well-reasoned opinions, throughout this circuit and others, holding that voluntarily furnishing one’s phone number, or voluntarily initiating text communications, constitutes prior express consent. Such a course is entirely unwarranted.

In urging that these cases were wrongly decided, Mr. Emanuel advances an argument that it is at odds with the repeatedly expressed intent of Congress – to protect privacy interests by curtailing the “proliferation of intrusive, nuisance calls.” *Mims*, 132 S. Ct. at 745; *Satterfield*, 569 F.3d at 954 (“Congress was trying to prohibit use of ATDSs in a manner that would be an invasion of privacy”). To apply the TCPA’s proscriptions to a single text responding to the original sender’s request would represent a radical expansion of liability under the TCPA well outside the bounds of “intrusive, nuisance” telemarketing calls. The district courts in *Ibey*, *Ryabyshchuck*, *Friedman*, *Pinkard* and *Saunders*, and the Seventh Circuit’s decision in *Soppett*, persuasively concluded that the provision of one’s telephone can suffice as express consent. Mr. Emanuel provides no reasoned basis for departing from their rationale or – in the case of *Ibey*, *Ryabyshchuck*, and *Friedman*, overruling them.

Indeed, “[t]he absurd results sought by [Mr. Emanuel] . . . simply constitute one more reason to reject its position—one leading to clearly unforeseen and undesired results by punishing conduct that Congress did not intend—in favor of the more common sense interpretation that Congress intended.” *United States v. Thompson*, 728 F.3d 1011, 1019 (9th Cir. 2013). If Mr. Emanuel’s expansive view of the TCPA were correct, a party could not lawfully activate the out-of-office auto-response feature on his email service, because any time an email was sent via cell phone, the auto-reply generated and sent back to that cell phone would violate the TCPA. Texting services that legitimately require automated responsive messaging, including mobile donating, informational alerts, live broadcast television audience voting and – as in this case – scoreboard messaging by spectators – would potentially run afoul of the Act if the service provider could not first somehow secure the strict, hyper-literal standard of consent posited by Mr. Emanuel. “[A] failure to understand how a statutory rule is . . . tied [to practical realities] can undermine the very human activity that the law seeks to benefit.” *NextWave Pers. Commc’ns Inc.*, 537 U.S. at 311 (Breyer, J., dissenting). Were Mr. Emanuel’s reading correct, the reach of the TCPA would expand to the point of stifling legitimate text messaging services, regardless of their social value.

Nothing in the statutory language or structure of the Act, nor any case interpreting the Act, suggests Congress intended to foster marginal claims over

telephonic conversations – whether by text or voice – initiated by consumers. The Court should reject Mr. Emanuel’s nonsensical construction of the TCPA. *United States v. Alfeche*, 942 F.2d 697, 698-99 (9th Cir. 1991) (interpretation that “is consistent with the language of the statute and avoids absurd results” is preferred when “nothing in the language or history” of the statute “suggest[s] Congress intended the absurd results possible under [the other proposed] construction”); *Soppet*, 679 F.3d at 642 (“Courts do try to avoid imputing nonsense to Congress”).

3. Mr. Emanuel Cannot Plausibly Allege He Unwittingly Allowed His Telephone Number To Be “Captured”

Mr. Emanuel further contends that he did not voluntarily furnish his number, but instead, the Lakers “essentially captured [it] without his permission.” AOB 8. Mr. Emanuel premises this argument on the FCC’s *1992 Ruling*, which stated that if a caller’s number is “captured” by a Caller ID or an ANI device *without notice* to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.” 7 F.C.C.R. at 8769 (emphasis added). Mr. Emanuel cannot plausibly allege that he was unaware that, by texting the Lakers (without any effort to mask his telephone number or otherwise block caller ID) he was volunteering the Lakers his phone number.

All modern cell phones and text messaging systems are equipped with caller ID functionality and indeed, the FCC promotes the availability of such

functionality. *People of State of Cal. v. F.C.C.*, 75 F.3d 1350, 1356 (9th Cir. 1996). It is thus common knowledge that “a party who receives a call [will] see the number of the person who placed the call unless the calling party blocks disclosure of the number.” *Id.* Twenty years ago, it might have been the case that “most individuals presumably thought of caller ID information as private,” but “today . . . the disclosure of the incoming telephone number is simply a standard part of placing a telephone call.” Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 586 (2009).

The Lakers did not set up a 1-800 line to “capture” the numbers of unwitting consumers so they could then call those numbers at some later date for some unrelated telemarketing purpose. Unlike the hypothetical addressed in the *1992 Ruling*, Mr. Emanuel reached out to the Lakers and initiated a text communication. During that communication, the Lakers immediately replied with information relevant and responsive to his initial text. Nothing in the FAC permits a plausible inference that the Lakers “captured” Mr. Emanuel’s phone number without his notice.

4. **The District Court Was Not Required To Accept Unsubstantiated Legal Conclusions That The Lakers' Text Was "Unsolicited"**

Finally, Mr. Emanuel argues that the district court was required to accept as true his allegation that the Lakers' confirmatory text was "unsolicited." AOB 46. The district court, however, is "not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004); *see also Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1191 (9th Cir. 2007) (courts should not accept as true "baseless allegations"). As such, the district court was not obligated to hold that the Lakers' confirmatory text was "unsolicited" just because Mr. Emanuel said so. To avoid dismissal, it was Mr. Emanuel's burden to plead *facts* showing that he did not consent to receiving a confirmatory text. *Twombly*, 550 U.S. at 556. Here, there are simply no particularized facts alleged in the FAC from which the district court could plausibly draw such an inference. Rather, based on the FAC's allegations concerning the content and context of the text messages and the surrounding circumstances in which they were sent, only the contrary inference – that Mr. Emanuel did consent – was plausible.

D. Mr. Emanuel's Remaining Arguments On Appeal Do Not Warrant Reversal

Mr. Emanuel also presents a series of arguments faulting various aspects of the district court's legal analysis. None of these criticisms are well-founded or warrant reversal. Indeed, because this Court's review is *de novo*, Mr. Emanuel's criticisms are legally irrelevant.

For instance, Mr. Emanuel faults the district court for referring to Congress' intent – as recognized by the Supreme Court and this Court – and argues that such intent must be ignored in interpreting the TCPA. Mr. Emanuel further argues that the district court erred in applying “common sense” to the TCPA and should have instead applied an interpretation entirely divorced of it. Mr. Emanuel also criticizes the district court for considering the content of the Lakers' text (notwithstanding the fact that Mr. Emanuel alleges the content in the FAC).

Alternatively, Mr. Emanuel argues that, in considering the content of the Lakers' text, the district court erred in characterizing the text as “confirmatory.” None of these arguments has merit.

1. The District Court Did Not Inappropriately Base Its Decision On Legislative History

Mr. Emanuel engages in a lengthy and irrelevant discussion regarding the propriety of the district court's minimal references to legislative history. As a threshold matter, review is *de novo*, and thus even if the district court improperly relied on legislative history (and it did not), this alone would not mandate reversal. Further, Mr. Emanuel's argument simply misrepresents the district court's order. The district court's holding – and affirmance of its order – are not dependent on a survey of passing comments from legislators, snippets from floor debates or citation to official committee reports; the district court simply cited the Supreme Court's opinion in *Mims* for the uncontroversial fact that Congress enacted the TCPA to address “the proliferation of intrusive, nuisance calls.” ER 17. Mr. Emanuel does not dispute that this was, in fact, Congress' intent in passing the TCPA. Instead he contends that Congressional intent should be ignored because the statute is “unambiguous.”

Invocation of the plain meaning rule, however, “does not require a court to operate under an artificially induced sense of amnesia about the purpose of legislation, or to turn a blind eye towards significant evidence of Congressional intent in the legislative history.” *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1093 (9th Cir. 2006) (quoting *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 871(9th Cir. 1981). As the

Supreme Court has emphasized, “[t]h[e] canons [of statutory construction] are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent.” *Scheidler v. Nat’l Org. of Women, Inc.*, 547 U.S. 9, 23 (2006).

In interpreting the reach of the TCPA, the Ninth Circuit has explicitly said that considering Congressional intent, as reflected in official committee reports, is appropriate. *See Satterfield*, 569 F.3d at 954 (“We also consider the purposes of the TCPA.”) (citing Congress’ intent in enacting TCPA as set forth in S.Rep. No. 102–178, at 1 (1991)). Mr. Emanuel contends the district court improperly relied on *Ibey*, *Ryabyshchuk* and *Pinkard* because these decisions also considered legislative history. Nowhere in *Pinkard*, however, does the district court review legislative history or even so much as mention the TCPA’s purpose. And the consideration of legislative history in *Ibey* and *Ryabyshchuk* is limited to the same history considered by this Court in *Satterfield* and the Supreme Court in *Mims*. *See Ibey*, 2012 WL 2401972, at *3 (“The TCPA’s statutory and legislative history emphasize that the statute’s purpose is to prevent unsolicited automated telemarketing and bulk communications.”) (citing S. Rep. 102-178, at 4-5 (1991)); *Ryabyshchuck*, 2012 WL 5379143, at *2 (citing *Mims* for the proposition that TCPA targets “the proliferation of intrusive, nuisance calls”).

Mr. Emanuel contends that even passing reference to Congressional intent is inappropriate if the statute is unambiguous. But reference to that same background material is as appropriate here as it was in *Satterfield* and *Mims*, and simply confirms the TCPA's plain meaning. See *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 779 n.14 (9th Cir. 2008) (“legislative history . . . remains a frequently-relied-upon additional tool of statutory interpretation” and even plain-language interpretations of statutes may also be “supported by legislative history”); *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199 WV/KY/OH*, 708 F.3d 737, 743 (6th Cir. 2013) (“Our construction has the additional virtue of conforming to Congress’s intent in passing the TCPA.”); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982) (“Resort to the legislative history, therefore, merely confirms that Congress intended the statute to mean exactly what its plain language says.”); *Aragon-Ayon v. I.N.S.*, 206 F.3d 847, 853 (9th Cir. 2000) (adopting interpretation of statute that was “also consistent with Congress’ stated intent”).

That Congress sought to protect consumers from abusive telemarketing practices – and not the consensual communications at issue here – is clear from a plain reading of the statute. Because Congress sought to address consumer outrage “over the proliferation of intrusive, nuisance [telemarketing] calls to their homes,” *Mims*, 132 S. Ct. at 745, the TCPA’s reach is explicitly limited to communications

made without the recipient's "prior express consent." Section 227(b)(1)(A). Consideration of the same legislative materials considered in *Satterfield* – to confirm, not contradict, the TCPA's plain language – are not grounds for reversal.

2. The District Court Properly Approached The Issue "With A Measure Of Common Sense"

Effectively conceding that the interpretation of the TCPA he advances does not comport with practical realities or reason, Mr. Emanuel argues that the district court erred in approaching the question of liability "with a measure of common sense" as instructed by *Chesbro*. 705 F.3d at 918. Mr. Emanuel contends that *Chesbro* is inapposite because that case involved a separate subsection of the TCPA that required the court to determine whether the calls at issue were non-commercial in nature. Mr. Emanuel argues that Section 227(b)(1)(A) is content-neutral under *Moser v. F.C.C.*, 46 F.3d 970, 973 (9th Cir. 1995), and therefore, "there is no common sense application even permitted in determining a violation of this section regulating calls to a cell phone." AOB 24.

Regardless of whether Section 227(b)(1)(A) is content-neutral, the application of "common sense" is not limited to particular provisions of particular statutes. The court in *Moser* did not shelve common sense in interpreting Section 227(b)(1)(A), and courts are free to rely on judicial experience and common sense in addressing a broad range of legal problems, including the meaning of a statute: "We need not leave our common sense at the doorstep when we interpret a

statute.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989), *abrogated by statute on other grounds as stated in Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2522 (2013); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004) (“[T]here is no canon against using common sense in construing laws as saying what they obviously mean.”) (quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929)); John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. Pa. L. Rev. 1373, 1383 (1992) (“The fifth canon of statutory construction requires judges to use a little common sense.”). The argument advanced by Mr. Emanuel here only underscores why his TCPA claim is untenable: he admits – and explicitly disavows – that his proffered interpretation of the TCPA comports with basic reason.

3. The District Court Properly Considered The Context Of The Parties’ Text Messages

In criticizing the district court’s decision to approach the issue with a “measure of common sense,” Mr. Emanuel suggests that what the Lakers’ actually said in their responsive text is irrelevant because Section 227(b)(1)(A) is content neutral under *Moser*, 46 F.3d at 973. AOB 22. Alternatively, Mr. Emanuel argues that the district court’s analysis of context was flawed because the Lakers’ responsive text was not “confirmatory.” Neither argument is persuasive.

First, *Moser* does not say that content (or context) is irrelevant under Section 227(b)(1)(A). Rather, *Moser* explains that this subsection “should be analyzed as a

content-neutral time, place, and manner restriction” insofar as it applies to “all automated telemarketing calls without regard to whether they are commercial or noncommercial.” *Id.* The district court’s order did not turn on a categorization of the Lakers’ responsive text as “commercial” or “noncommercial.” Rather, the district court sensibly considered the context of both Mr. Emanuel’s initiating text and the Lakers’ response.

As the district court in *Ryabyshchuck* explained in rejecting this precise argument, “context is indisputably relevant to determining whether a particular call is actionable under the TCPA.” 2012 WL 5379143, at *3. On its face, the TCPA “exempts certain calls in certain contexts,” including, as relevant here, when the recipient of the call provided his prior express consent. *Id.* Precisely because context is relevant, federal courts have held that calls are not actionable where the recipient voluntarily provided his cellular phone number to the defendant or initiated text communications with defendant. *See, e.g., Soppet*, 679 F.3d at 642-43; *Ibey*, 2012 WL 2401972, at *3 (“Defendant’s sending a single, confirmatory text message in response to an opt-out request from Plaintiff, who voluntarily provided his phone number by sending the initial text message, does not appear to demonstrate an invasion of privacy contemplated by Congress in enacting the TCPA.”); *see supra*, Section IX.B.1.

Mr. Emanuel's secondary argument – that the district court improperly characterized the Lakers' text as "confirmatory" – fares no better. Relying on the FCC's declaratory ruling in *SoundBite*, Mr. Emanuel contends a text is a non-actionable "confirmatory" message only if it "confirm[s] receipt of that subscriber's request to optout of receiving future text messages." AOB at 27. Mr. Emanuel attacks a strawman. The district court did not hold – and the Lakers do not argue – that the Lakers' text was to confirm receipt of an opt-out request. The salient question is whether Mr. Emanuel consented to receiving a near-instantaneous reply from the Lakers regarding his request to put up a message on the arena scoreboard. The district court correctly held that he did.

The question for the FCC in *SoundBite*, by contrast, was whether "a one-time text message confirming a consumer's request that no further text messages be sent" was actionable. 27 F.C.C.R. at 15391. The FCC delineated the characteristics of a permissible opt-out confirmation text, but it did not purport to hold that this was the *only* type of "confirmatory" text permissible under the TCPA. Indeed, the FCC explicitly noted that Congress did not intend to restrict "normal business communications . . . that are expected or desired . . . between businesses and their customers" including that "a service was scheduled or performed." *Id.* at 15394-95. The "confirmation" in this case was receipt of Mr. Emanuel's request – and the provision of information relevant to his request. As

the district court observed, “it is difficult to imagine how he could have been certain that the Lakers received his message without a confirmatory response.” ER

17. Given this context, Mr. Emanuel expressly consented to the Lakers’ text.

E. The District Court’s Judgment May Be Affirmed On Independent Grounds

The district court’s dismissal may also be affirmed for two independent reasons. First, the FAC fails to plead allegations plausibly suggesting the Lakers used an ATDS to send the text at issue. Second, incontrovertible evidence submitted by the Lakers in support of their alternative motion for summary judgment establishes that, in fact, an ATDS was not used. The parties fully briefed both grounds before the district court.

1. Mr. Emanuel Fails To Allege Facts Raising A Plausible Inference That The Lakers Used An ATDS

For a text to be actionable under the TCPA, it must be sent using an ATDS, defined 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). Affirmance is independently appropriate because, with respect to this essential element of Mr. Emanuel’s claims, the FAC fails to satisfy the pleading standards established under Federal Rule of Civil Procedure 8(a) by *Twombly* and *Iqbal*. Under those standards, a “conclusory” allegation that the Lakers used an “ATDS” is not enough; Mr.

Emanuel was required to allege facts that set forth a plausible basis for concluding that the Lakers in fact texted him via an ATDS.

To fall within the TCPA's definition of an ATDS, the equipment or software at issue must have the capacity to "store, produce, or call *randomly or sequentially generated telephone numbers*." *Satterfield*, 569 F.3d at 951 (emphasis added). In other words, the equipment must, as a threshold matter, be able to *generate* telephone numbers. Even assuming the statutory definition of ATDS includes equipment or software with the capacity to randomly or sequentially dial stored telephone numbers (as opposed to needing to have the capacity to create telephone numbers in the first place), Mr. Emanuel's allegations do not suffice. Simply affixing the "ATDS" label to the Lakers' system, as the FAC does here, is insufficient. Mr. Emanuel must plead "sufficient factual matter" – not "labels," "conclusions," or "naked assertions" – to "plausibly establish" each of these elements and eliminate "obvious alternative explanations." *Iqbal*, 556 U.S. at 677.

The FAC does not come close to satisfying this burden. While the FAC offers various conclusory allegations such as that the device at issue has the "capacity" to store or produce telephone numbers to be called (ER 5 (FAC ¶ 21)), reciting statutory terms, by itself, does not satisfy *Twombly* and *Iqbal*. See *Wood v. Motorola Mobility, Inc.*, Case No. C-11-04409-YGR, 2012 WL 892166, at *3 (N.D. Cal. Mar. 14, 2012) (allegation that "simply parrots the language of the

statute . . . fails to meet the *Twombly/Iqbal* standard”); *City of Fresno v. United States*, 709 F. Supp. 2d 888, 933 n.31 (E.D. Cal. 2010) (“*Iqbal* requires a party to ‘plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,’ not merely recite the relevant statutory language”).

Federal district courts have repeatedly granted motions to dismiss for similarly deficient complaints. *See, e.g., Jones v. FMA Alliance Ltd.*, -- F. Supp. 2d --, 2013 WL 5719515, at *1-2 (D. Mass. Oct. 17, 2013) (“The sufficiency of a plaintiff’s TCPA claim ‘turns on whether he plausibly pleads that defendants used an ATDS.’ A ‘bare allegation that defendants used an ATDS is not enough.’”); *Gragg v. Orange Cab Co., Inc.*, C12-0576RSL, 2013 WL 195466, at *2 (W.D. Wash. Jan. 17, 2013) (conclusory allegation that defendant used ATDS insufficient where “text message plaintiff received was customized” and “sent in response to a request for services from plaintiff”); *Ibey*, 2012 WL 2401972, at *3 (plaintiff failed to plead that text was placed using an ATDS where “Plaintiff alleges that Defendant sent an immediate reply directly to Plaintiff” and “the text message did not appear to be random but in direct response to Plaintiff’s message”); *Knutson v. Reply!, Inc.*, 10-CV-1267 BEN WMC, 2011 WL 291076, at *2 (S.D. Cal. Jan. 27, 2011) (allegation that defendant used an “automatic dialing system as defined by 47 U.S.C. § 227(a) (1)” insufficient to state a claim under TCPA); *Johansen v.*

Vivant, Inc., 12 C 7159, 2012 WL 6590551, at *3 (N.D. Ill. Dec. 18, 2012) (dismissing TCPA for failure to sufficiently allege use of ATDS, because while a plaintiff need not “elaborate on the specific technical details of a defendant’s alleged ATDS,” a plaintiff must “provide the circumstances surrounding [the calls] to establish his belief that the messages were . . . delivered via the ATDS”).

Once the Court subtracts out conclusory allegations, the FAC’s allegations on their own are entirely consistent with – and in fact suggest – that a system *without* the “capacity” to generate, or to sequentially or randomly dial, numbers was used. As Mr. Emanuel himself alleges, he did not receive the Lakers’ text “randomly” but rather in direct response to his initiating text. FAC ¶¶ 18-19. Indeed, Mr. Emanuel does not and cannot dispute that the Lakers’ text was sent *one minute* after Mr. Emanuel sent his, and that the Lakers’ text directly and specifically responds to his request to display a message on the arena scoreboard. There is no reason such a system, designed to send confirmatory texts, not to proactively telemarket, would need the additional, costly technology to randomly or sequentially dial stored numbers or generate numbers. Mr. Emanuel cannot reconcile these factual allegations contradicting the use of an ATDS with his conclusory assertions that such a device was used.

Further, such threadbare allegations provide no basis to open the doors of this case to discovery, particularly not in a potentially complex, wide-ranging class

action in which discovery costs will be enormous. “[S]ome threshold of plausibility must be crossed at the outset before a . . . case should be permitted to go into its inevitably costly and protracted discovery phase.” *Twombly*, 550 U.S. at 558 (deficiencies in the complaint “should be exposed at the point of minimum expenditure of time and money by the parties and the court,” especially given the prospect of costly discovery); *Grigsby v. Valve Corp.*, No. C12-0553JLR, 2012 WL 5993755, at *4-6 (W.D. Wash. Nov. 14, 2012) (“A complex, large-scale case such as a class action should naturally have a higher plausibility threshold than a simpler case.”). In any event, as discussed below, the facts Mr. Emanuel hopes to discover regarding the Lakers’ text messaging system are not unclear, they are simply unfavorable to him – the system does not and cannot randomly or sequentially dial or generate phone numbers.

2. Incontrovertible Evidence Confirms That The Lakers Did Not Use An ATDS

None of the relevant facts concerning the messaging system used by the Lakers can be credibly disputed. Before the district court, the Lakers presented the declaration of Jeff Vick, the President of FanDriveMedia, the vendor that sent the text message at issue. Dkt. No. 17-3. Mr. Vick testified that FanDriveMedia’s messaging system does not have the capacity to generate random or sequential lists of phone numbers or to call stored numbers randomly or sequentially. *Id.* (Vick Decl. ¶¶ 1, 4, 6) Instead, the system can only generate messages in direct response

to consumer requests. *See id.* (Vick Decl. ¶ 6)

Mr. Emanuel did not – and could not – come forward with any competent evidence contradicting the testimony of Mr. Vick. Instead, Mr. Emanuel attempted to rebut Mr. Vick’s testimony by submitting a declaration from Randall Snyder, a purported expert in messaging technologies. Mr. Snyder’s declaration, however, is riddled with conclusory *ipse dixit*. For instance, Mr. Snyder states, “it is my expert opinion that the Lakers violated the TCPA” and “it is my expert opinion that the Lakers utilized an ATDS.” Dkt. No. 18-5 (Snyder Decl. ¶¶ 6-7). Such facially conclusory statements do not defeat summary judgment. *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1252 (9th Cir. 2010) (conclusory assertions in expert declaration insufficient to avoid summary judgment); *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1119 (C.D. Cal. 2001) (a conclusory expert declaration is not sufficient to defeat summary judgment); *Smith v. Pac. Bell Tel. Co., Inc.*, 662 F. Supp. 2d 1199, 1215 (E.D. Cal. 2009) (“Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.”).

The Snyder Declaration is defective because it is based on unsupported (and incorrect) assumptions. It concludes that the FanDriveMedia system has the “capacity” to randomly or sequentially dial a group of stored numbers because the system has the capacity to store numbers. *See* Dkt. No. 18-6 (Snyder Decl. ¶ 22)

First, this is not the law – *Satterfield* requires that a system have the capacity to *create* phone numbers. Even if it were the law, the assumption is incorrect as technology to store numbers is entirely distinct from technology to randomly or sequentially dial them. Mr. Emanuel’s expert assumes, without foundation or evidence, that the mere storage of phone numbers implies the capability to randomly or sequentially dial them. As set forth in the Vick Declaration, that latter technology simply does not exist in the FanDriveMedia system. Mr. Emanuel’s expert ignores this distinction and his conflation of two separate technologies is based on no foundation or evidence.

“A party does not manufacture more than a merely colorable dispute simply by submitting an expert declaration asserting that something is black when the moving party’s expert says it is white; there must be some foundation or basis for the opinion.” *Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1080 (Fed. Cir. 2005). The Snyder Declaration’s logical leap cannot create a triable issue of fact. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) (summary judgment is proper despite contrary expert opinion “[w]hen [the] expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable”).

X. CONCLUSION

Congress enacted the TCPA to curb intrusive, nuisance telemarketing and safeguard consumers' privacy interests by placing restrictions on unsolicited automated calls. Nothing about this case implicates those concerns. Nor does anything about this case implicate the strictures of the TCPA, which by its plain terms exempts communications like the one here.

At issue in this case is a single communication initiated by Mr. Emanuel involving the near-simultaneous exchange of just two texts: (1) one from Mr. Emanuel requesting that the Lakers perform a service; and (2) a responsive, confirmatory text acknowledging receipt of that request. Certainly Congress did not intend to create a right of action any time a consumer made a voice call and listened to a pre-recorded message on the other end. With respect to privacy interests under the TCPA, there is no substantive differences between such a call and the sort of texting at issue here. When a party initiates telephonic communication, whether by voice or text, they obviously consent to hearing what the recipient has to say. Indeed, under Mr. Emanuel's reading of the statute, all manner of automated messaging, including automated "out-of-office" responsive emails, would run afoul of the Act. There is no basis for inferring that Congress, in enacting legislation to regulate nuisance telemarketing, intended to make actionable such consensual, socially useful messaging.

Taking a common sense approach to the case, the district court rightly concluded that the Lakers' confirmatory text did not violate the TCPA. That decision should be affirmed.

Dated: November 14, 2013

Respectfully submitted,

DLA Piper LLP (US)

By: s/ Joshua Briones

Joshua Briones

Attorneys for Defendant-Appellee
THE LOS ANGELES LAKERS, INC.

STATEMENT OF RELATED CASES

The Lakers are unaware of any pending case in this Court related to this appeal.

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that that attached brief is proportionately spaced, has a typeface of 14 points and contains 12,724 words.

Dated this fourteenth day of November, 2013.

By: s/ Joshua Briones

Joshua Briones

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Pursuant to Ninth Circuit Rule 28-2.7, the Lakers provide verbatim text of pertinent statutory authorities cited in this brief.

Telephone Consumer Protection Act, 47 U.S.C. § 227.....A-1

Telephone Consumer Protection Act, 47 U.S.C. § 227

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(1) The term “automatic telephone dialing system” means 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.

(2) The term “established business relationship”, for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G))1.

(3) The term “telephone facsimile machine” means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term “telephone solicitation” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

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--

(i) to any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship,

from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to

which the recipient voluntarily agreed to make available

its facsimile number for public distribution, except that

this clause shall not apply in the case of an unsolicited

advertisement that is sent based on an established

business relationship with the recipient that was in

existence before July 9, 2005, if the sender possessed the

facsimile machine number of the recipient before such

date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or (D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and
(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future

unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are

unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender,

in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship

has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific “do not call” systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State

law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.

If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is

sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or

after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

Not later than 6 months after December 22, 2010, the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with--

- (I) any authorized activity of a law enforcement agency; or
- (II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Report

Not later than 6 months after December 22, 2010, the Commission shall report to Congress whether additional legislation is necessary to prohibit the provision of inaccurate caller identification information in technologies that are successor or replacement technologies to telecommunications service or IP-enabled voice service.

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this Act. The amount of the forfeiture penalty determined under this paragraph shall not exceed \$10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice

required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 2-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice of apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than \$10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as *parens patriae*, on behalf of the residents of that State

in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right--

- (i) to intervene in the action;
- (ii) upon so intervening, to be heard on all matters arising therein; and
- (iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of Title 28.

(ii) Service of process

In an action brought under subparagraph (A)--

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term “caller identification information” means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service

The term “caller identification service” means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service

The term “IP-enabled voice service” has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency

of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk Fax Enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include--

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law,

regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)--

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)--

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery--

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

9th Circuit Case Number(s) 13-55678

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing 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 (date) November 14, 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.

Signature (use "s/" format) s/ Joshua Briones

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing 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 (date) .

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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