
No. _____

In the
Supreme Court of the United States

LUCINE TRIM, INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,
Petitioner,

v.

REWARD ZONE USA LLC; AND DOES 1-10 INCLUSIVE,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit**

APPENDIX

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APPENDIX A
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-5517
D.C. No. 2:20-cv-0127-SVW-KS

LUCINE TRIM, individually and on
behalf of all others similarly situated,

Plaintiff-Appellant,

v.

REWARD ZONE USA LLC; DOES, 1-10
inclusive,

Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted June 28, 2023**

Pasadena, California

Before: N.R. SMITH, LEE, and VANDYKE, Circuit
Judges.

* This disposition is not appropriate for publication and
is not precedent

** The panel unanimously concludes this case is suitable
for decision without oral argument. *See* Fed. R. App. P.
34(a)(2).

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Plaintiff Lucine Trim (Trim) appeals from the district court's partial judgment granting a motion to dismiss in favor of Defendant, Reward Zone USA, LLC (Reward Zone), in a putative class action lawsuit brought under the Telephone Consumer Protection Act (TCPA). Because the district court certified its interlocutory order pursuant to Federal Rule of Civil Procedure 54(b), we have jurisdiction under 28 U.S.C. § 1291. See *SEC v. Cap. Consultants LLC*, 453 F.3d 1166, 1174 (9th Cir. 2006) (per curiam). We review de novo a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). See *Brunette v. Humane Soc'y of Ventura Cnty.*, 294 F.3d 1205, 1209 (9th Cir. 2002). We affirm on the first cause of action.

Trim's argument in that cause of action is foreclosed by our decision in *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022). In *Borden*, we held that a system constitutes an autodialer regulated by the TCPA only if it "generate[s] and dial[s] random or sequential telephone numbers." *Id.* at 1231 (emphasis removed). Because Trim concedes that the subject dialing equipment did not generate telephone numbers using a random or sequential number generator, Reward Zone's text messages were not sent via use of an autodialer in violation of the TCPA.¹

AFFIRMED.

¹ We deny the Electronic Privacy Information Center and National Consumer Center's motion to become amicus curiae as moot. (Dkt. 14). We also deny as moot Trim's initial petition for rehearing en banc. (Dkt. 28).

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APPENDIX B
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:20-cv-01027-SVW-KS
[Filed January 28, 2022]

Tracy Eggeston et al,

v.

Reward Zone USA LLC, et al.

**ORDER GRANTING DEFENDANT’S MOTION TO
DISMISS [34]**

Before the Court is Defendant's motion to dismiss [34]. For the reasons below, the motion is granted; Plaintiff's first and second causes of action are dismissed with prejudice, while Plaintiff's third and fourth causes of action are dismissed with leave to amend.

I. Factual and Procedural Background

Plaintiff Lucine Trim¹ brought this putative class action against Defendant Reward Zone USA alleging four causes of action under the Telephone Consumer Protection Act (“TCPA”). Third Am. Compl. ¶¶ 65-80, ECF No. 33 (“TAC”).

¹ As originally filed, Tracy Eggleston and Monica Abboud were also named as plaintiffs on behalf of the proposed class, however they were dropped from the Second Amended Complaint, ECF No. 19, thus Lucine Trim is the sole remaining plaintiff.

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Plaintiff alleges that in 2020, she began receiving text messages from Defendant on her cell phone that contained “spam advertisements and/or promotional offers” that sought to “solicit [Defendant's] ‘rewards’ and other associated promotions.” Id. ¶¶ 17-19. Plaintiff claims that Defendant used an “automatic telephone dialing system” and a “prerecorded or artificial voice” to contact her without her prior express consent and in doing so, violated the TCPA. Id. ¶¶ 20-42. Plaintiff also claims that her phone number was on the National Do-Not-Call Registry and that Defendant's messages to her constituted telephone solicitations that further violated the TCPA. Id. ¶¶ 43-48. Plaintiff seeks to represent two classes: one consisting of persons who received similar unsolicited text messages from Defendant and the other consisting of such person who were registered on the Do-Not-Call Registry while receiving those messages. Id. ¶¶ 49-51.

After this case was originally filed in 2020, the complaint had been amended twice when this Court stayed the case pending a decision from the Supreme Court in a case that concerned which types of systems constituted an “automatic telephone dialing system” under the TCPA. ECF No. 26. The Supreme Court issued its opinion in that case, *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163 (2021), on April 1, 2021.

The Court then issued an order to show cause, noting that some of Plaintiff's claims might be barred under the Supreme Court's *Duguid* decision. ECF No. 28. Plaintiff responded, asserting that she believed she could re-plead her claims in a manner consistent with *Duguid*. ECF No. 29. The parties stipulated to filing a Third Amended Complaint (“TAC”). ECF No. 31.

Defendant now brings the instant motion to dismiss the TAC, claiming that, contrary to Plaintiff's assertion, Duguid still bars two of her claims, and that the other two claims fail because its messages did not constitute "telephone solicitations." Mot. to Dismiss 9-11, ECF No. 34 ("MTD").

II. Legal Standard

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and

then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679.

III. Application

Plaintiff brings four claims in her TAC: two of which assert that Defendant's messages used an “automatic telephone dialing system” or “an artificial or prerecorded voice” in violation of 47 U.S.C. § 227(b), and two of which allege that Defendant's messages constituted “telephone solicitations” to persons on the Do-Not-Call Registry in violation of § 227(c). The Court concludes that the § 227(b) claims fail as a matter of law and must be dismissed with prejudice and that the § 227(c) claims lack sufficient factual detail and must be dismissed with leave to amend.

A. Section 227(b) Claims

The TCPA, codified at 47 U.S.C. § 227, imposes restrictions on the use of automated telephone equipment. As relevant here, the TCPA makes it unlawful to “make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a [] cellular telephone service [...]” *Id.* § 227(b)(1)(A)(iii).² Thus, there are two ways to violate this provision: using an “automatic telephone dialing system” (hereinafter ‘autodialer’) and using an “artificial or prerecorded voice.” Plaintiff claims that Defendant's messages did both.

² In *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), the Ninth Circuit held that a text message is a “call” within § 227(b)(1)(A), applying *Chevron* deference and deferring to the FCC’s interpretation of the term. *Id.* at 953–54.

1. Use of an Autodialer

The TCPA defines an “automatic telephone dialing system” – or autodialer – as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers.” *Id.* § 227(a)(1) (emphasis added).

In *Duguid*, the Supreme Court clarified the impact of the phrase “using a random or sequential number generator” in this definition. There, the plaintiff sued Facebook, alleging that its security feature – which sent a text message to users when someone tried to log into their accounts from an unknown device – was an autodialer. *Duguid*, 141 S.Ct. at 1168. Users provided their phone number to opt-in to the feature, which would then store the number and send a text when triggered by an unknown login. *Id.*

In proceedings below, the Ninth Circuit had held that this feature constituted an autodialer because it had the capacity to (1) store phone numbers, and (2) dial them automatically, notwithstanding the fact that a number generator (whether random or sequential) was not used. *Id.* In essence, the Ninth Circuit's view was that the requirement of using a number generator only applied to producing the phone number – not to storing it. Thus, equipment which merely stored and automatically dialed phone numbers without any use of a number generator still met the definition of an autodialer.

The Supreme Court reversed, holding that the phrase “using a random or sequential number generator” modified both the words “store” and “produce.” *Id.* at 1169-73. Accordingly, the Court held that to constitute an

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autodialer, a “necessary feature” was “the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.” *Id.* at 1173.

The parties dispute the impact of *Duguid* on the instant case. In Defendant's view, *Duguid* squarely forecloses the § 227(b) claims. See MTD 10. In Plaintiff's view, *Duguid* clarified the definition of an autodialer, but its definition still covers the equipment Defendant used here. See Opp. MTD 16. The Court does not fully agree with either position but ultimately agrees with the great weight of post-*Duguid* authority that holds that equipment like Defendant's is not an autodialer.

Plaintiff alleges that Defendant obtained her phone number, along with a list of others, from a sales lead vendor called Deal Zingo. TAC ¶ 20. Plaintiff claims that Defendant then used a number generator in two ways: (1) to index the phone numbers obtained from Deal Zingo into a database, and (2) to select an indexed phone number to dial. *Id.* ¶¶ 25-28, 32-33. According to Plaintiff, this entails using a number generator to “store” and to then “produce” a number to be dialed, which is thus still an autodialer under *Duguid*. See Opp. MTD 16.

In Defendant's view, the fatal flaw in Plaintiff's claim is that she does not allege that Defendant uses a number generator to generate the phone numbers themselves. MTD 10. Defendant argues that *Duguid* “unequivocally stated it ‘granted certiorari to resolve a conflict among the Court of Appeals regarding whether an autodialer must have the capacity to generate random or sequential phone numbers,’ ” and answered that question in the affirmative. Reply ISO MTD 5, ECF No. 39 (citing 141 S.Ct. at 1168) (emphasis added by Defendant).

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Duguid clearly establishes that, to constitute an autodialer, the equipment must use a number generator in some way. 141 S.Ct. at 1173. However, in this Court's view, it does not conclusively resolve how that number generator must be used – whether it must be used to generate the phone number itself, or whether it may also be used for indexing and selecting phone numbers. Put differently, *Duguid* establishes that an autodialer must “use a random or sequential number generator to either store or produce phone numbers,” but it did not specify what it means to “store or produce” the phone numbers. See *id.*

While *Duguid* did not resolve this question, many district court decisions since *Duguid* have. Most notably, in this District, *Austria v. Alorica, Inc.*, 2021 WL 5968404, *6 (C.D. Cal. Dec. 16, 2021) considered this issue and concluded that, to be an autodialer, the equipment must use a number generator to generate the phone numbers themselves.

Austria began by setting out the four possible interpretations of the statutory definition of an autodialer, using a categorization originally articulated by the Seventh Circuit's in *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 464–67 (7th Cir. 2020):

- (1) to store telephone numbers using a random or sequential number generator, or to produce telephone numbers using a random or sequential number generator;
- (2) any storing or producing of telephone numbers to be called, provided that those telephone numbers were previously

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generated using a random or sequential number generator;

(3) to store, generally, telephone numbers to be called, or to produce telephone numbers using a random or sequential number generator;

(4) any storing or producing of telephone numbers to be called, provided that those telephone numbers are later dialed using a random or sequential number generator.

2021 WL 5968404 at *2. As *Austria* noted, the Supreme Court's decision in *Duguid* clearly eliminated interpretation (3), however it did not further specify which of the remaining three was correct. *Id.* at *3.

Austria concluded that interpretation (2) was correct in light of the text and purpose of the TCPA, as well as caselaw from other districts. *Id.* at *4. *Austria* noted that interpretation (4) contrasted with the grammatical structure of the definition and that interpretation (1) could lead to absurd results in which a company could incur TCPA liability simply by storing a list of phone numbers in an excel spreadsheet (which arguably uses a sequential number-generating feature to identify cells of data). *Id.* at *5. By contrast, interpretation (2) is a better fit for the text, in which the “number generator” specified in the definition implicitly refers back to the term “telephone numbers,” not some index number. *Tehrani v. Joie de Vivre Hospitality, Inc.*, 2021 WL 3886043, *4 (N.D. Cal. Aug. 31, 2021).

Further, *Austria* noted that interpretation (2) comports with one of the purposes of the TCPA as identified in

Duguid: preventing the inconvenience and threats to public safety that could arise from the random generation of phone numbers. *Id.* at *4 (citing 141 S.Ct. at 1167). These concerns are not implicated by using a number generator simply to select which number to dial from a list of phone numbers derived from a legitimate source. *Id.*

And finally, *Austria* accords with numerous other courts to have considered the issue, particularly those in the Ninth Circuit, which have concluded that equipment is only an autodialer if it uses a number generator to generate the phone numbers themselves – not if the number generator is used merely to index the phone numbers or select phone numbers from that index. *Id.* at *6 (discussing *Hufnuss v. DoNotPay, Inc.*, 2021 WL 2585488, *1 (N.D. Cal. June 24, 2021); see also *Tehrani*, 2021 WL 3886043 at *4-7 (collecting cases and concluding same); *Brickman v. Facebook, Inc.*, 2021 WL 4198512, *2-3 (N.D. Cal. Sept. 15, 2021) (same).

The Court agrees with the well-reasoned opinion in *Austria*, as well as these highly persuasive opinions from the Northern District. While *Duguid* did not directly address the issue, the text and purpose of the TCPA, as well as cases from around the Ninth Circuit, illustrate that, to be an autodialer under § 227(a)(1), the equipment must use a number generator to generate the phone numbers themselves. Plaintiff's claim, which concerns a program that merely uses a number generator to generate and select index numbers, thus does not state a claim as a matter of law.

2. Use of Artificial or Prerecorded Voice

Plaintiff also alleges that Defendant's text messages violated § 227(b) because they used an “artificial or prerecorded voice. The Court disagrees.

Neither the statute nor its implementing regulations provide a definition of what constitutes an “artificial or prerecorded voice.” Plaintiff's argument relies on selective dictionary definitions for the words in this phrase, namely that “artificial” means “humanly contrived, often on a natural model;” “prerecorded” means “to set down in writing in advance of presentation or use;” and “voice” means “an instrument or medium of expression.” Opp. MTD 17. Thus, in Plaintiff's view, Defendant's text messages constituted an “artificial or prerecorded voice.”

Plaintiff's interpretation is simply beyond the bounds of common sense. For one, the primary definition of “voice” in Webster's dictionary is “sound produced by vertebrates by means of lungs, larynx, or syrinx; especially sound so produced by human beings.” *Voice*, *Merriam-Webster's Online Dictionary*, accessed Jan. 27, 2022. “An instrument or medium of expression” is only the tertiary definition of “voice.” *Id.* Webster's tertiary definition includes an example sentence: “the party became the voice of the workers,” illustrating that this usage of “voice” has an almost metaphorical or symbolic connotation. See *id.*

Thus, Plaintiff's interpretation conflicts with a primary principle of statutory interpretation – that words in a statute should generally be given their most natural understanding unless circumstances suggest otherwise.

See *Duguid*, 141 S.Ct. at 1169. The most natural, commonplace understanding of “voice” is the sound produced by one's vocal system. Indeed, it is not plausible that Congress intended the word “voice” in the TCPA to carry the tertiary, metaphorical meaning that Plaintiff suggests over this primary, natural meaning – especially since if Congress had intended to adopt Plaintiff's broad meaning, it could have easily chosen clearer, more literal terms to do so, such as “medium of expression” or “communication.”

Tellingly, as Defendant points out, Plaintiff fails to point to even a single case interpreting “voice” in the TCPA in this strained way. See Opp. MTD 17-21. And Plaintiff's sweeping interpretation would lead to absurd results. Consider an ordinary individual who wants to invite ten guests to a party; she sends a text message to the first invitee, and then, to save time, copies that text and pastes it into messages to the other nine. Because the messages to the other nine were “prerecorded” (i.e., set down in writing ahead of time) and, in Plaintiff's interpretation, the messages constituted a “voice,” this would fall within the statute's prohibition. It nearly goes without saying that Congress did not intend this sort of result in passing the TCPA to crack down on mass commercial solicitations that used automated telephonic technology.

Nor is Plaintiff's argument saved by her generic reference to the purposes of the TCPA as a “remedial statute intended to protect consumers.” As the Supreme Court noted in *Duguid*, the fact that Congress was broadly concerned about intrusive telemarketing does not mean that it intended to define every word in the TCPA in the broadest way possible. 141 S.Ct. at 1172. Indeed, as illustrated by the absurd result discussed above,

Plaintiff's interpretation would "take a chainsaw" to the nuanced problems meant to be addressed by the TCPA "when Congress meant to use a scalpel." *Id.* at 1171.

For all of these reasons, Plaintiff's interpretation of an "artificial or prerecorded voice" lacks support. Defendant's text messages were just that – text messages. Given the natural meaning of "voice" as the sound produced by one's vocal chords, Defendant's text messages do not constitute a "voice" under the TCPA.

Thus, since Defendant's text messages did not involve an "automatic telephone dialing system" or an "artificial or prerecorded voice," Plaintiff's claims under § 227(b) fail as a matter of law. Accordingly, Plaintiff's first and second causes of action are dismissed without leave to amend.

B. Section 227(c) Claims

Plaintiff's third and fourth causes of action assert claims to relief under § 227(c). This subsection provided for the creation of the National Do-Not-Call Registry and for rulemaking by the FCC to regulate the bounds of permissible telemarketing directed at those on the Registry. The implementing regulations prohibit the initiation of any "telephone solicitation" to consumers who have registered their phone numbers on the Do-Not-Call Registry. 47 C.F.R. § 64.1200(c)(2), (e). The TCPA grants a private right of action to any consumer who receives more than one call in violation of that regulation within a 12-month period. 47 U.S.C. § 227(c)(5).

Plaintiff alleges that she registered her cell phone number on the Do-Not-Call Registry and then received multiple impermissible texts from Defendant within a 12-

month period. TAC ¶¶ 43-48. She seeks to represent a class of similarly situated individuals. *Id.* The key dispute between the parties at this stage is whether Defendant's messages constituted “telephone solicitations” in violation of the TCPA's implementing regulations. See MTD 11; Opp. MTD 21.

Title 47 U.S.C. § 227(a)(4) defines a “telephone solicitation” as:

the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, 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.

Plaintiff alleges that the text messages from Defendant were “spam advertisement and/or promotional messages” that “sought to solicit [Defendant's] ‘rewards’ and other associated promotions.” TAC ¶¶ 18-19. Defendant contends that these allegations are conclusory and do not provide sufficient factual detail and that Plaintiff's claim is thus subject to dismissal. MTD 27.

In the Court's view, this is something of a close call. Plaintiff argues that her allegations are not “simply parroting the statute.” Opp. MTD 21. While that may be true, the allegations don't go much further – referring to the messages as “spam advertisements and/or promotional messages” that solicited Defendant's

“rewards” and “associated promotions” does little more than allege that they were “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services” by other conclusory terms.

Iqbal makes clear that “a formulaic recitation of the elements of a cause of action will not do.” 556 U.S. at 678. However, plaintiffs cannot so easily avoid *Iqbal*’s requirements by rearranging a few clauses and breaking out the thesaurus. Even if not ‘parroting’ the statute, a claim that relies on mere “labels and conclusions” is still insufficient; the allegations must include enough factual detail to raise a plausible claim to relief. *Id.*; see also *Twombly*, 550 U.S. at 570.

Here, Plaintiff simply relies on conclusory labels such as “advertisement” and “promotion” without any supporting factual detail. This falls short of Plaintiff’s pleading burden to provide sufficient factual matter to state a plausible claim, particularly since rewards-related messages do not always constitute “telephone solicitations.”³

³ Defendant points to *Daniel v. Five Stars Loyalt, Inc.*, 2015 WL 7454260, 83–5 (N.D. Cal. Nov. 24, 2015), where the court held that a text message providing information about how to sign up for a free customer rewards program was not “telemarketing” (which is defined essentially identically to “telephone solicitation” in 47 C.F.R. § 64.1200(f)). On the other hand, in *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913 (9th Cir. 2012), the Ninth Circuit held that calls urging a customer to redeem his Best Buy “Reward Zone” points was effectively encouraging him to purchase at Best

Accordingly, Plaintiff's third and fourth claims are dismissed with leave to amend so that Plaintiff may add allegations regarding the specific content of the messages she received, which, according to Plaintiff, will show that they were "telephone solicitations" within the TCPA's definition. *See* Opp. MTD 10.

IV. Conclusion

For the foregoing reasons, Defendants' motion to dismiss [34] is GRANTED. Plaintiff's first and second causes of action are dismissed with prejudice. Plaintiff's third and fourth causes of action are dismissed without prejudice and with leave to amend. Plaintiff shall file an amended complaint within 14 days of this order.

IT IS SO ORDERED.

Buy, thus constituting "telemarketing" and "telephone solicitation." *Id.* at 917–18.

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APPENDIX C
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:20-cv-01027-SVW-KS
[Filed April 28, 2022]

LUCINE TRIM, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

REWARD ZONE USA LLC; DOES 1-10
Inclusive,

Defendant.

**ORDER ON PLAINTIFF’S UNOPPOSED MOTION
FOR CERTIFICATION OF PARTIAL FINAL
JUDGMENT PURSUANT TO FRCP 54(B)**

The Court having reviewed and considered Plaintiff Lucine Trim’s (“Plaintiff”) Unopposed Motion for Certification Of Partial Judgment Pursuant to FRCP 54(b) and GOOD CAUSE APPEARING hereby grants Plaintiff’s Motion and orders as follows:

“Three conditions must be satisfied before certification of a claim under Federal Rule of Civil Procedure 54(b): (1) multiple claims or parties are involved in the suit; (2) a final decision as to one or more

claims or parties has been rendered; and (3) the court finds that there is no just reason for delaying an appeal. *Sitrick v. Dreamworks, LLC*, No. CV034265SVWAJWX, 2007 WL 9711434, at *2 (C.D. Cal. Jan. 4, 2007) (citing *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7-8 (1980); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956)). “This determination is “vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay.” *Id.* (citing *Mackey*, 351 U.S. at 437).

Plaintiff’s Third Amended Complaint brought multiple claims, in particular two claims under 47 U.S.C. § 227(b) and two additional claims under 47 U.S.C. § 227(c). The Court’s Order Granting Defendant Reward Zone USA LLC’s (“Defendant”) Motion to Dismiss (Dkt. 42) dismissed Plaintiff’s claims under 47 U.S.C. § 227(b) with prejudice. This constituted a judgment because it was a decision upon Plaintiff’s cognizable claims for relief under 47 U.S.C. § 227(b) and was final in the sense that it was “an ultimate disposition of an individual claim entered in the course of a multiple claims action.” *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980) (citation omitted). This was not a final judgment as to all claims because Plaintiff’s claims under 47 U.S.C. § 227(c) remained. Thus, the Court finds that the first two prongs for certification of partial judgment under Fed. R. Civ. P. 54(b) are met.

The Court additionally finds that there is no just reason for delaying an appeal on the 47 U.S.C. § 227(b) claims. “Relevant factors for the just delay analysis include the judicial system’s interest in “preserving the historic federal policy against piecemeal appeals,” []

(quoting *Sears Robuck* at 438); *Morrison-Knudsen Co., v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981), the impact of the appeal on the immediate trial proceedings, *Alcan Aluminum Corp. v. Carlsberg Fin. Corp.*, 689 F.2d 815, 816-17 (9th Cir. 1982), and other practical effects, *Continental Airlines Inc., v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987)”. *Sitrick v. Dreamworks, LLC*, No. CV034265SVWAJWX, 2007 WL 9711434, at *3 (C.D. Cal. Jan. 4, 2007). The Court considers: (1) the interrelationship of the certified claims and the remaining claims in light of the policy against piecemeal review; and (2) equitable factors such as prejudice and delay. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 9-10 (1980); *Gregorian v. Izvestia*, 871 F.2d 1515, 1518-20 (9th Cir. 1989); *see also Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009) (the court of appeals must scrutinize the district court’s evaluation of factors such as “the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units”); *Wood v. GCC Bend, LLC*, 422 F.3d 873, 878-79 (9th Cir. 2005).

In this case, these factors weigh in favor of granting partial judgment. There is no imminent trial and permitting the appeal of the 47 U.S.C. § 227(b) claims at this time will prevent duplicative discovery and motion practice. The Court based its Order dismissing the ATDS claims on the recent U.S. Supreme Court case of *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) and two very recent district court cases interpreting *Duguid*. There has been no decision by the Ninth Circuit yet on the arguments raised by Plaintiff and impact of *Duguid* on such arguments such that permitting an immediate appeal to permit such consideration is appropriate. No

Party has asserted they will suffer any prejudice as a result of this order or further delay. The 47 U.S.C. § 227(b) claims are also substantially distinct from the 47 U.S.C. § 227(c) claims that permitting an appeal of the (b) claims at this point will also not create a risk of a duplicative appeal later based on how the Court may rule on the 47 U.S.C. § 227(c) claims.

Accordingly, this Court has fully weighed the factors and found that it is within its discretion to find that there is no just reason for delay and enter partial judgment immediately. The Court hereby orders that the clerk shall enter partial judgment for Defendant as to Plaintiff's first and second claim as alleged in the Third Amended Complaint (Dkt. 33) and dismissed with prejudice in the Court's Order Granting Defendant Reward Zone USA LLC's Motion to Dismiss (Dkt. 42).

IT IS SO ORDERED.

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APPENDIX D
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:20-cv-01027-SVW-KS
[Filed April 28, 2022]

LUCINE TRIM, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

REWARD ZONE USA LLC; DOES 1-10
Inclusive,

Defendant.

PARTIAL JUDGMENT

Pursuant to the Order of the Court, *Dkt. 48*, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Judgment is hereby entered for Defendant as to Plaintiffs' first and second claim as alleged in the Third Amended Complaint, *Dkt. 33*, and that Plaintiffs shall take nothing on these claims.

APPENDIX E

West's U.S.C.A., 47 U.S.C.A. § 227

(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), 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

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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--

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(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, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(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, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, 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--

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(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 July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

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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--

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(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;

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(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);

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(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--

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(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;

(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

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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;

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States; and

(I) shall ensure that any exemption under subparagraph (B) or (C) contains requirements for calls made in reliance on the exemption with respect to--

(i) the classes of parties that may make such calls;

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(ii) the classes of parties that may be called; and

(iii) the number of such calls that a calling party may make to a particular called party.

(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.

(4) Civil forfeiture

(A) In general

Any person that is determined by the Commission, in accordance with paragraph (3) or

(4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this subparagraph shall be determined in accordance with subparagraphs (A) through (F) of section 503(b)(2) of this title.

(B) Violation with intent

Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) of this title, to have violated this subsection with the intent to cause such violation shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this subparagraph shall be equal to an amount determined in accordance with subparagraphs (A) through (F) of section 503(b)(2) of this title plus an additional penalty not to exceed \$10,000.

(C) Recovery

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Any forfeiture penalty determined under subparagraph (A) or (B) shall be recoverable under section 504(a) of this title.

(D) Procedure

No forfeiture liability shall be determined under subparagraph (A) or (B) 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.

(E) Statute of limitations

Notwithstanding paragraph (6) of section 503(b) of this title, no forfeiture penalty shall be determined or imposed against any person--

(i) under subparagraph (A) if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) under subparagraph (B) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice of apparent liability.

(F) Rule of construction

Notwithstanding any law to the contrary, the Commission may not determine or impose a forfeiture penalty on a person under both subparagraphs (A) and (B) based on the same conduct.

(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

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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

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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

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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

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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)

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

(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

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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 misleading or inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, or any person outside the United States if

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the recipient is within the United States, in connection with any voice service or text messaging 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

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

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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) Repealed. Pub.L. 115-141, Div. P, Title IV, §
402(i)(3), Mar. 23, 2018, 132 Stat. 1089

(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
chapter. 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.

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(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection.

(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) 4-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 4 years prior to the date of issuance of the required notice or notice or 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

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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

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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)--

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(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 voice service or a text message sent using a text messaging 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

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telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service. Such term includes automatic number identification services.

(C) Text message

The term “text message”--

(i) means a message consisting of text, images, sounds, or other information that is transmitted to or from a device that is identified as the receiving or transmitting device by means of a 10-digit telephone number or N11 service code;

(ii) includes a short message service (commonly referred to as “SMS”) message and a multimedia message service (commonly referred to as “MMS”) message; and

(iii) does not include--

(I) a real-time, two-way voice or video communication; or

(II) a message sent over an IP-enabled messaging service to another user of the same messaging service, except a message described in clause (ii).

(D) Text messaging service

The term “text messaging service” means a service that enables the transmission or receipt of

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a text message, including a service provided as part of or in connection with a voice service.

(E) Voice service

The term “voice service”--

(i) means any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1) of this title; and

(ii) includes transmissions from a telephone facsimile machine, computer, or other device to a telephone facsimile machine.

(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) 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--

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(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), 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

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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

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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) Annual report to Congress on robocalls and transmission of misleading or inaccurate caller identification information

(1) Report required

Not later than 1 year after December 30, 2019, and annually thereafter, the Commission, after consultation with the Federal Trade Commission, shall submit to Congress a report regarding enforcement by the Commission of subsections (b), (c), (d), and (e) during the preceding calendar year.

(2) Matters for inclusion

Each report required by paragraph (1) shall include the following:

(A) The number of complaints received by the Commission during each of the preceding 5 calendar years, for each of the following categories:

(i) Complaints alleging that a consumer received a call in violation of subsection (b) or (c).

(ii) Complaints alleging that a consumer received a call in violation of the standards prescribed under subsection (d).

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(iii) Complaints alleging that a consumer received a call in connection with which misleading or inaccurate caller identification information was transmitted in violation of subsection (e).

(B) The number of citations issued by the Commission pursuant to section 503(b) of this title during the preceding calendar year to enforce subsection (d), and details of each such citation.

(C) The number of notices of apparent liability issued by the Commission pursuant to section 503(b) of this title during the preceding calendar year to enforce subsections (b), (c), (d), and (e), and details of each such notice including any proposed forfeiture amount.

(D) The number of final orders imposing forfeiture penalties issued pursuant to section 503(b) of this title during the preceding calendar year to enforce such subsections, and details of each such order including the forfeiture imposed.

(E) The amount of forfeiture penalties or criminal fines collected, during the preceding calendar year, by the Commission or the Attorney General for violations of such subsections, and details of each case in which such a forfeiture penalty or criminal fine was collected.

(F) Proposals for reducing the number of calls made in violation of such subsections.

(G) An analysis of the contribution by providers of interconnected VoIP service and non-interconnected VoIP service that discount high-

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volume, unlawful, short-duration calls to the total number of calls made in violation of such subsections, and recommendations on how to address such contribution in order to decrease the total number of calls made in violation of such subsections.

(3) No additional reporting required

The Commission shall prepare the report required by paragraph (1) without requiring the provision of additional information from providers of telecommunications service or voice service (as defined in section 227b(a) of this title).

(i) Information sharing

(1) In general

Not later than 18 months after December 30, 2019, the Commission shall prescribe regulations to establish a process that streamlines the ways in which a private entity may voluntarily share with the Commission information relating to--

(A) a call made or a text message sent in violation of subsection (b); or

(B) a call or text message for which misleading or inaccurate caller identification information was caused to be transmitted in violation of subsection (e).

(2) Text message defined

In this subsection, the term “text message” has the meaning given such term in subsection (e)(8).

(j) Robocall blocking service

(1) In general

Not later than 1 year after December 30, 2019, the Commission shall take a final agency action to ensure the robocall blocking services provided on an opt-out or opt-in basis pursuant to the Declaratory Ruling of the Commission in the matter of Advanced Methods to Target and Eliminate Unlawful Robocalls (CG Docket No. 17-59; FCC 19-51; adopted on June 6, 2019)--

(A) are provided with transparency and effective redress options for both--

(i) consumers; and

(ii) callers; and²

(B) are provided with no additional line item charge to consumers and no additional charge to callers for resolving complaints related to erroneously blocked calls; and

(C) make all reasonable efforts to avoid blocking emergency public safety calls.

(2) Text message defined

In this subsection, the term “text message” has the meaning given such term in subsection (e)(8).

APPENDIX F
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:20-cv-01027-SVW-KS
[Filed November 15, 2021]

LUCINE TRIM, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

REWARD ZONE USA LLC; DOES 1-10
Inclusive,

Defendant.

**THIRD AMENDED COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF PURSUANT TO THE
TELEPHONE CONSUMER PROTECTION ACT, 47
U.S.C. § 227, ET SEQ.**

Introduction

1. LUCINE TRIM (“Trim”) (“Plaintiff”), brings this Third Amended Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of REWARD ZONE USA LLC (“Defendant”), in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47

U.S.C. § 227 *et seq.*, (“TCPA”) and related regulations, specifically the National Do-Not-Call provisions, thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

2. The TCPA was designed to prevent calls and messages like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them, and made specific findings that “[t]echnologies that might allow consumers to avoid receiving such calls and messages are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that

[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

Id. at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s purpose).

4. Congress also specifically found that “the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also, *Mims*, 132 S. Ct. at 744.

5. In a recent decision, the Supreme Court interpreted the term “automatic telephone dialing system” and held that “[t]o qualify as an ‘automatic telephone dialing system,’ a device must have the capacity either to store a telephone number using a random or sequential generator *or* to produce a telephone number using a random or sequential number generator.” *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163 (2021) (emphasis added).

6. In *Duguid*, the Supreme Court provided an example of such systems, stating: “For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time.” *Id.* at 1171-72 fn. 7.

7. Further, both *Duguid* and the legislative history of the TCPA are clear that the original focus on prerecorded voice technology prohibition was the fact that such communications involved agentless calls, not on the question of whether a literal voice was used during those agentless calls. See Hearing Before the Subcommittee on Communications of the Committee on

Commerce, Science and Transportation, United States Senate One Hundred Second Congress First Session July 24, 1992, Testimony of Robert Bulmash and Steve Hamm at pg 11; 7 FCC Rcd. 8752 (F.C.C. September 17, 1992).

8. The Sixth Circuit has also recognized this distinction: “Congress drew an explicit distinction between ‘automated telephone calls that deliver an artificial or prerecorded voice message’ on the one hand and ‘calls place by ‘live’ persons’ on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199 WV/KY/OH*, 708 F.3d 737,743 (6th Cir. 2013).

9. Similarly, the FTC has observed that “prerecorded calls are by their very nature one-sided conversations, and if there is no opportunity for consumers to ask questions, offers may not be sufficiently clear for consumers to make informed choices before pressing a button or saying yes to make a purchase.” 73 FR 51164-01, 51167 (Aug. 29, 2008).

Jurisdiction and Venue

10. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff, a resident of California who was in California at the time of the calls at issue, seeks relief on behalf of a Class, which will result in at least one class member belonging to a different state than that of Defendant, a Delaware limited liability company. Plaintiff also seeks \$1,500.00 in damages for each call in violation of the TCPA, which, when aggregated among a proposed class in the thousands, exceeds the \$5,000,000.00 threshold for federal court jurisdiction. Therefore, both diversity jurisdiction and the damages threshold under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

11. Venue is proper in the United States District Court for the Central District of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because Defendant is subject to personal jurisdiction in the County of Los Angeles, State of California.

Parties

12. Plaintiff is, and at all times mentioned herein, was a citizen and resident of the State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (39). Plaintiff was physically in California at the time she received the alleged text messages from Defendant.

13. Plaintiff is informed and believes, and thereon alleges, that Defendant is a limited liability company of the state of Delaware. Defendant, and all of its agents, are and at all times mentioned herein were “persons,” as defined by 47 U.S.C. § 153 (39). Plaintiff alleges that at all times relevant herein Defendant conducted business in the State of California and in the County of Los Angeles, and within this judicial district.

Factual Allegations

14. At all times relevant, Plaintiff was a citizen of Los Angeles County, and a citizen of the State of California. Plaintiff is, and at all times mentioned herein was a “person” as defined by 47 U.S.C. § 153 (39).

15. Defendant is, and at all times mentioned herein was, a “person,” as defined by 47 U.S.C. § 153 (39).

16. At all times relevant Defendant conducted business in the State of California and in the County of Los Angeles, within this judicial district.

17. On or about April 14, 2020, Plaintiff received a text message from Defendant on her cellular telephone number ending in -2347

18. During this time, Defendant began to use Plaintiff's cellular telephones for the purpose of sending Plaintiff spam advertisements and/or promotional offers, via text messages.

19. Plaintiff started receiving frequent text messages from Defendant that sought to solicit its "rewards" and other associated promotions.

20. Defendant did not have Plaintiff's prior express consent. On information and belief, Defendant obtained contact information to send messages to Plaintiff from a lead vendor named Deal Zingo. Plaintiff alleges that Deal Zingo was laundering consumer contact information from other sources and selling it to companies as if the consent had come from its website, when this was not accurate.

21. Plaintiff also alleges that even if that were not the case, the opt in language on Deal Ingo's website did not comply with the telemarketing regulations for written consent as interpreted by the FCC, and was therefore not prior express written consent.

22. Based on the content and format of these text messages, Plaintiff alleges that they were sent via Defendant's SMS Blasting Platform, i.e., an "automatic telephone dialing system," ("ATDS") as defined by 47 U.S.C. § 227 (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A).

23. Upon information and belief, the automated text messaging system used by Defendant to send the text

messages has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

24. The text message sent to Plaintiff's cellular telephone was not sent by a live agent and thus created a one-sided conversation in which Plaintiff could not receive a response to her questions and/or concerns. The text message also was sent in an automated fashion as a result of computerized campaigns that were pre-programmed in advance to send messages out to large groups of consumers all at once, either sequentially or via algorithmic dialing, i.e. in an automated fashion by a computer. By algorithmic dialing, Plaintiff means that the dialing platform is programmed in a manner which utilizes a random or sequential number generator in order to dial a stored list of numbers.

25. The texting platform uses an algorithm whereby a random or sequential number generator, similar to a randomization formula or sequential dialing formula, selects which number to dial from the stored list of numbers, and sequences those numbers in order to automatically dial the numbers and send our text messages en masse. Thus, a random or sequential number generator is used both to store the numbers, and to produce the stored numbers from the list, via the campaign, to the dialing platform itself.

26. Undersigned counsel have studied the code used to program other similarly-functioning autodialers in the past, with the assistance of software engineers fluent in Java, and have found that such autodialers, when used in automated mode, execute code that relies upon random or sequential number generation to both

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store and produce numbers to be dialed by the dialer. For instance, a common “parser” used in SMS blasters integrates the following opensource Apache code into an autodialing dialing platform:

```
730 if (!this.recordList.isEmpty()) {  
731 this.recordNumber++;  
732 final String comment = sb == null ?  
null : sb.toString();  
733  
result=newCSVRecord(this,this.recordList.  
toArray(Constants.E  
MPTY_STRING_ARRAY), comment,  
734 this.recordNumber, startCharPosition);  
735 }  
736 return result;  
737
```

27. These lines of code, and specifically the “++” in line 731, represent an operator token that generates sequential numbers as part of a loop. This loop is used to select which number from the CSV file, will be dialed, and produce that number to the dialer using a CSV parser. Such programs can dial thousands of consumers in mere seconds, without any human intervention whatsoever. The sequential number generator in the code above is executed in the process of mass predictive dialing. The program cannot function, and therefore cannot dial any phone numbers at all, without this sequential number generator.

28. Plaintiff alleges that Defendant used a dialing system with the similar capacity to autodial numbers as shown above. Functionally, that is simply how text blasting systems work. They rely on random or

sequential number generators to instruct the data set to produce telephone numbers to the dialer. Without this key component, a dialing campaign would require an agent to manually place the call, through organic decision making, or as was the case in *Duguid v. Facebook*, through some other organic one-to-one triggering event that instructs the dialer to place the call.

29. Plaintiff will not be able to demonstrate whether the code for Defendant's dialing system contains such random or sequential number generators without doing discovery and obtaining the code for the dialing platform. Plaintiff makes these allegations on information and belief based on the volume of calls he received, the fact that there was a pause at the beginning of the calls, and the fact that the calls were spoofed, which are all indicia that they were autodialed with a predictive dialer.

30. The problem with these known realities is that because Plaintiff does not and could not ever have access to Defendant's proprietary code, which is in its sole possession, Plaintiff cannot allege with any more specificity that the system's code contains such language. However, based on detailed discussions with experts and years of litigation and expertise surrounding such technology, Plaintiff, and his counsel, have a legitimate and sufficient good faith basis to make these allegations, and assert that if the system is a traditional text blasting platform as alleged, *then it will have some variation on the coding that is described herein*, which will undoubtedly include either random or sequential number generators that are being executed in conjunction with storing and dialing the telephone numbers, including the dialing of Plaintiff's phone number.

31. Additionally, Defendant spoofed the number from which it texted Plaintiff which is indicative of an automated system that automatically masks the number from which the text messages are placed.

32. The following is description, in plain English, of an automated dialer typically operates: A dialer operator accesses a database of consumer contact information, which is typically contained in a text delimited file, either in a CSV file, text file, Microsoft Excel, or Microsoft Access file. In essence, this is a spreadsheet, containing rows and columns of data, which includes telephone numbers. The operator will load this data set into the dialing platform. The dialing system will cut the data set into individual lines, unique to each telephone number with an assigned row using a parser. Parsers will separate the data, and then index the telephone numbers using either random or sequential number generators, but most commonly sequential number generators. The program will then store the telephone number using that number generator. The data is stored in temporary cache or RAM memory, to be accessed by the dialer platform thereafter. A random or sequential number generator is programmed to select and produce, automatically, without any organic triggering event by a human being, the telephone numbers, i.e. in accessing them from storage. Once the number generator corresponds to a matching number in the stored list, that telephone number will be “produced” from storage to the dialer, which then automatically dials that telephone number. Thus, predictive dialers have the capacity to use random or sequential number generators to both store and produce the telephone number to be automatically dialed by the dialing program, without human intervention.

33. To illustrate this using a real-world example that was provided to undersigned counsel by a software engineer who is fluent in Java and has reviewed dialer code, imagine a list of numbers as a lengthy sheet of lined notebook paper. A parser cuts this into strips, and stores it in a paper tray, which is attached to a scanner. Each strip of paper has a row number, and a telephone number. The scanner uses a program to generate numbers, either sequentially or randomly. That generator is hooked to the paper feed, which instructs the scanner to match the generated number, to the corresponding strip of paper in the tray, and then scan that telephone number from the stored list, through the scanner, and out the other side, at which time the scanner is dialing the telephone number on that strip of paper. Now imagine a scanner that accomplishes this with a tray containing thousands of pages of paper in the blink of an eye. Once the tray is empty, the dialing campaign is complete.

34. No human intervention whatsoever exists in this process other than pre-programming the parameters of the campaign, i.e. by inputting the numbers, and selecting the times/dates that the campaign will take place.

35. In Merriam Webster's Dictionary, "voice" is defined as "an instrument or medium of expression." It defines "artificial" as "humanly contrived...often on a natural model : MAN-MADE" and "lacking in natural or spontaneous quality."

36. The messages sent to Plaintiff by Defendant using the SMS blasting platform employed a text message as an instrument or medium of expression to deliver an automatic message drafted in advance of being

sent, i.e. that of an SMS message, to convey a telemarketing communication to Plaintiff. SMS blasting platforms are man-made humanly contrived programs which allow companies to blast out such messages via non-spontaneous methods, i.e. automated methods similar to that of an assembly line in a factory. Such SMS blasting devices are incapable of spontaneity, as they must be programmed by the operator to automatically send messages out, *en masse*, pursuant to preprogrammed parameters.

37. Accordingly, Defendant's messages utilized an "artificial voice" as prohibited by 47 U.S.C. § 227(b)(1)(A).

38. In Merriam Webster's Dictionary, "prerecorded" is defined as "recorded in advance." "Recorded" is defined as "to set down in writing." The text message sent to Plaintiff's cellular telephone via an SMS blasting platform was set down in writing in advance by Defendant, whose employees wrote out the standard automated messages that were to be sent to Plaintiff and other class members, and by way of preprogrammed SMS blasting, entered the prerecorded message into the SMS Blasting platform, and thereafter sent these messages pursuant to scheduled blasts that were programmed by Defendant. Thus, Defendant employed a text message as an instrument or medium of expression to deliver a prerecorded message drafted in advance of being sent.

39. Thus, Defendant's messages utilized a "prerecorded voice" as prohibited by 47 U.S.C. § 227(b)(1)(A).

40. The telephone number that Defendant, or their agent texted were assigned to a cellular telephone

service for which Plaintiff incur charges for incoming texts pursuant to 47 U.S.C. § 227 (b)(1).

41. These text messages constituted calls that were not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

42. Plaintiff was never a customer of Defendant and never provided her cellular telephone number to Defendant or its lead vendor for any reason whatsoever. Accordingly, Defendant and their agents never received Plaintiff's prior express consent to receive unsolicited text messages, pursuant to 47 U.S.C. § 227 (b)(1)(A).

43. Further, Plaintiff's cellular telephone number ending in -2347 had been on the National Do-Not-Call Registry well over thirty (30) days prior to Defendant's initial text message.

44. Defendant sent multiple text messages soliciting its business to Plaintiff on her cellular telephone ending in -2347 in or around April 2020.

45. Such text messages constitute solicitation calls pursuant to 47 C.F.R. § 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

46. Plaintiff received at least three text messages from Defendant within a 12-month period.

47. Upon information and belief, and based on Plaintiff's experience of being messages by Defendant after being on the National Do-Not-Call list for months prior to Defendant's initial calls, and at all relevant times, Defendant failed to establish and implement reasonable practices and procedures to effectively

prevent telephone solicitations in violation of the regulations prescribed under 47 U.S.C. § 227(c)(5).

48. These text messages by Defendant, or its agents, violated 47 U.S.C. § 227(b)(1) and 47 U.S.C. § 227(c).

Class Action Allegations

49. Plaintiff brings this action on behalf of herself and on behalf of and all others similarly situated, as a member of the two proposed Classes (together, the “Classes”).

50. Plaintiff represents, and is a member of, the ATDS Class (“ATDS Class”), defined as follows: all persons within the United States who received any unsolicited text messages sent using an ATDS or an artificial or prerecorded voice from Defendant, which text message was not made for emergency purposes or with the recipient’s prior express consent within the four years prior to the filing of the Complaint through the date of class certification.

51. Plaintiff represents, and is a member of, the DNC Class (“DNC Class”), defined as follows: all persons within the United States registered on the National Do-Not-Call Registry for at least 30 days, who had not granted Defendant prior express consent nor had a prior established business relationship, who received more than one text message sent by or on behalf of Defendant that promoted Defendant’s products or services, within any twelve-month period, within four years prior to the filing of the Complaint through the date of class certification.

52. Plaintiff also represents a Subclass of consumers who were sent text messages by Defendant and whose data was sold to Defendant by Deal Zingo.

53. Defendant and their employees or agents are excluded from the Classes. Plaintiff does not know the number of members in the Classes, but believes the Class members number in the hundreds of thousands, if not more. Thus, this matter should be certified as a Class action to assist in the expeditious litigation of this matter.

54. This suit seeks only damages and injunctive relief for recovery of economic injury on behalf of the Class, and it expressly is not intended to request any recovery for personal injury and claims related thereto. Plaintiff reserves the right to expand the Class definition to seek recovery on behalf of additional persons as warranted as facts are learned in further investigation and discovery.

55. The joinder of the Class members is impractical and the disposition of their claims in the Class action will provide substantial benefits both to the parties and to the court. The Class can be identified through Defendant's records or Defendant's agents' records.

56. Plaintiff and members of the ATDS Class were harmed by the acts of Defendant in at least the following ways: Defendant, either directly or through their agents, illegally contacted Plaintiff and the ATDS Class members via their cellular telephones by using marketing and text messages, thereby causing Plaintiff and the ATDS Class members to incur certain cellular telephone charges or reduce cellular telephone time for which Plaintiff and the ATDS Class members previously

paid, and invading the privacy of said Plaintiff and the ATDS Class members. Plaintiff and the ATDS Class members were damaged thereby.

57. There is a well-defined community of interest in the questions of law and fact involved affecting the ATDS Class members. The questions of law and fact common to the ATDS Class predominate over questions which may affect individual ATDS Class members, including the following:

- a) Whether, within the four years prior to the filing of this Complaint through the date of class certification, Defendant or their agents sent any text messages (other than a message made for emergency purposes or made with the prior express consent of the called party) to an ATDS Class member using any automatic dialing system or artificial or prerecorded voice to any telephone number assigned to a cellular phone service;
- b) Whether Plaintiff and the ATDS Class members were damaged thereby, and the extent of damages for such violation; and
- c) Whether Defendant and their agents should be enjoined from engaging in such conduct in the future.

58. As a person that received at least one solicitation text message without Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of the ATDS Class. Plaintiff will fairly and adequately represent and protect the interests of the ATDS Class in

that Plaintiff has no interests antagonistic to any member of the ATDS Class.

59. Plaintiff and members of the DNC Class were harmed by the acts of Defendant in at least the following ways: Defendant illegally contacted Plaintiff and the DNC Class members via their cellular telephones for solicitation purposes, thereby invading the privacy of Plaintiff and the DNC Class members whose telephone numbers were on the National Do-Not-Call Registry. Plaintiff and the DNC Class members were damaged thereby.

60. There is a well-defined community of interest in the questions of law and fact involved affecting the DNC Class members. The questions of law and fact common to the DNC Class predominate over questions which may affect individual DNC Class members, including the following:

- a. Whether, within four years prior to the filing of this complaint through the date of class certification, Defendant or its agents sent more than one solicitation text to the members of the DNC Class whose telephone numbers were on the National Do-Not-Call Registry for over thirty days and who had not granted prior express consent to Defendant and did not have an established business relationship with Defendant;
- b. Whether Defendant obtained prior express written consent to send solicitation texts to Plaintiff's or the DNC Class members' telephones;

- c. Whether Plaintiff and the DNC Class members were damaged thereby, and the extent of damages for such violation; and
- d. Whether Defendant and its agents should be enjoined from engaging in such conduct in the future.

61. Plaintiff and the members of the Classes have all suffered irreparable harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class action, the Classes will continue to face the potential for irreparable harm. In addition, these violations of law will be allowed to proceed without remedy and Defendant will likely continue such illegal conduct. Because of the size of the individual member's claims, few, if any, members of these Classes could afford to seek legal redress for the wrongs complained of herein.

62. Plaintiff has retained counsel experienced in handling class action claims and claims involving violations of the Telephone Consumer Protection Act.

63. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendant to comply with federal and California law. The interest of the Classes' members in individually controlling the prosecution of separate claims against Defendant are small because the maximum statutory damages in an individual action for violation of privacy are minimal. Management of these claims is likely to present significantly fewer difficulties than those presented in many class claims.

64. Defendant has acted on grounds generally applicable to the Classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Classes as a whole.

First Cause Of Action

Negligent Violations Of The Telephone Consumer Protection Act

47 U.S.C. § 227(b)

On Behalf of The ATDS Class

65. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

66. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227(b).

67. As a result of Defendant's negligent violations of 47 U.S.C. § 227(b), Plaintiff and the ATDS Class members are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

68. Plaintiff and the ATDS Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

Second Cause Of Action
Knowing and/or Willful Violations of the
Telephone Consumer Protection Act
47 U.S.C. § 227(b)

On Behalf of the ATDS Class

69. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

70. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227(b).

71. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and the ATDS Class members are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

72. Plaintiff and the ATDS Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

Third Cause Of Action

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**Negligent Violations Of The Telephone Consumer
Protection Act**

47 U.S.C. § 227(c)

On Behalf of The DNC Class

73. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

74. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227(c), and in particular 47 U.S.C. § 227(c)(5).

75. As a result of Defendant's negligent violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class members are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B).

76. Plaintiff and the DNC Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

Fourth Cause Of Action

**Knowing and/or Willful Violations Of The
Telephone Consumer Protection Act**

47 U.S.C. § 227(c)

On Behalf of The DNC Class

77. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

78. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227(c), and in particular 47 U.S.C. § 227(c)(5).

79. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class members are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B).

80. Plaintiff and the DNC Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

Prayer For Relief

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff, and members of the Classes, the following relief against Defendant:

First Cause of Action for Negligent Violation of the TCPA, 47 U.S.C. § 227(b)

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each ATDS Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.

- Any other relief the Court may deem just and proper.

**Second Cause of Action for Knowing and/or
Willful Violation of
the TCPA, 47 U.S.C. § 227(b)**

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each ATDS Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

**Third Cause of Action for Negligent Violation of
the TCPA, 47 U.S.C. § 227(c)**

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(c)(5), Plaintiff seeks for herself and each DNC Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5).
- Pursuant to 47 U.S.C. § 227(c)(5)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

**Fourth Cause of Action for Knowing and/or Willful
Violation of
the TCPA, 47 U.S.C. § 227(c)**

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(c)(5), Plaintiff seeks for herself and each DNC Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B).
- Pursuant to 47 U.S.C. § 227(c)(5)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

Trial By Jury

81. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.